File No. CI 12-01-77227

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:

THE ATTORNEY GENERAL OF MANITOBA

Plaintiff,

- and -

FRANKLIN BROWN,
ORVILLE SMOKE,
CHARLES CONRAD BLACKSMITH,
GARTH LEON BLACKSMITH,
WARREN PATRICK BLACKSMITH,
JAMES ANTHONY BLACKSMITH,
JAMES CHANCE STONECHILD,
and MURRAY A. STONECHILD,
operating as DAKOTA CHUNDEE SMOKE SHOP

Defendants.

SUPPLEMENTARY MOTION BRIEF OF THE ATTORNEY GENERAL OF MANITOBA (Interlocutory Injunction)

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SUPPLEMENTARY MOTION BRIEF

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I. AUTHORITIES

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2001 SCC 33, [2001] 1 S.C.R. 911

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28. *R. v. Williams*
(1994), 52 B.C.A.C. 296, 1994 CarswellBC 1731

29. *R. v. Pena (sub nom. R. v. Ignace)*
1998 CarswellBC 163 (B.C.C.A.), leave to appeal refused, 120 B.C.A.C. 62 (note) (S.C.C., May 14, 1998)

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39. *Sale of Marked Tobacco on Indian Reserves Regulation,* 63/2006

II. INTRODUCTION

1. The Attorney General files this Supplementary Brief to inform the Court in relation to two categories of matters not covered in the initial Motion Brief.

2. First, the Attorney General will outline the law as it relates to tobacco taxes and First Nations people and reserves.

3. Second, the Defendants are self-represented and have not filed a Brief. To assist the Court, the Attorney General will address some of the possible defences that it anticipates could be raised by some or all of the Defendants in opposition to the motion for an interlocutory injunction.

III. TOBACCO TAXES AND FIRST NATIONS RESERVES

4. As a commodity, tobacco is highly regulated in many aspects. Taxation is only one aspect of a broad array of specialized rules and restrictions that govern and regulate tobacco.

A) General Rules and Restrictions Related to Tobacco

5. The range of legislated rules and restrictions that apply to tobacco is varied and plentiful. The rules originate at both the federal and provincial levels. Often, the rules are supplemented by additional municipal by-laws or ordinances.

6. A few examples of the specialized rules that apply to tobacco and tobacco products are the following:

a) Age restrictions limit who may be furnished or supplied tobacco products (only persons 18 or over). In addition, there are rules that relate to the manner in which age is to be verified for those purposes.

> ***Tobacco Act*** **(Canada), ss. 8 and 9 [Tab 11]**
>
> **Tobacco (Access) Regulations (Canada) [Tab 11.c]**
>
> ***The Non-Smokers Health Protection Act*** **(Manitoba), s. 7(1) [Tab 3]**

b) Tobacco products cannot be labelled with the terms "light" or "mild".

> **Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms) (Canada) [Tab 11.b]**

c) There are prohibitions that preclude the use of certain specified additives in the manufacture of tobacco products.

> ***Tobacco Act*** **(Canada), s. 5.1 [Tab 11]**

d) Specified health warnings must be printed by manufacturers on tobacco labels and packages.

Tobacco Act **(Canada), ss. 15, 23 [Tab 11]**

Tobacco Products Labelling Regulations (Cigarettes and little Cigars) (Canada) [Tab 11.f]

Tobacco Products Information Regulations (Canada) [Tab 11.e]

e) Tobacco manufacturers must comply with detailed reporting requirements.

Tobacco Act **(Canada), s. 7 [Tab 11]**

Tobacco Reporting Regulations (Canada) [Tab 11.g]

f) Restrictions limit the manner that retailers may display tobacco products at the point of sale.

The Non-Smokers Health Protection Act **(Manitoba), s. 7.2 [Tab 3]**

g) There are general prohibitions regarding the promotion and advertising of tobacco products.

Tobacco Act **(Canada), ss. 18, 24, 25, and 31 [Tab 11]**

The Non-Smokers Health Protection Act **(Manitoba), s. 7.3 [Tab 3]**

h) There are package size minimums, so that cigarette packages can have no fewer than 20 cigarettes.

The Tobacco Tax Act **(Manitoba), s. 3.2(2) [Tab 1]**

i) There are restrictions about where tobacco products can be consumed by way of smoking.

The Non-Smokers Health Protection Act **(Manitoba), s. 2, 6 [Tab 3]**

Winnipeg By-law Nos. 62/2011 and 88/2003 [Tab 14]

j) There is a range of price-related measures that result in minimum prices that are to be paid by the end consumer for the product. Some of these measures are taxes, but there are other price-related measures that are not, in law, taxes.

***The Tobacco Tax Act* (Manitoba), s. 18(2) [Tab 1]**

7. *The Non-Smokers Health Protection Act* nevertheless recognizes, at sections 5.1 and 7(2), exemptions for Aboriginal spiritual or ceremonial purposes.

B) General Rules

8. In addition to the above rules that are specific to tobacco, tobacco transactions also remain governed by all the usual rules and principles that apply to purchases and sales of all other products and commodities. For example, tobacco sales in Manitoba are also subject to the retails sales tax under *The Retail Sales Tax Act* of Manitoba.

9. The federal *Indian Act* nevertheless precludes Manitoba from applying any tax to any purchase by First Nations people on a reserve.

***Indian Act* (Canada), s. 87(1)(b) [Tab 12]**

10. The tax exemption under the *Indian Act* accordingly precludes Manitoba's sales tax and tobacco tax from applying to on-reserve purchases made by First Nations people. Manitoba openly recognizes and respects this legal reality. As such, Manitoba does not tax First Nations people who buy tobacco on reserve for their personal use.

11. The Supreme Court of Canada has made it clear that the tax exemption under the *Indian Act* is limited in two respects. First, it is territorially limited to only those sales that take place on reserve. Second, it is limited to only those

purchases made by First Nations people (defined as "Indian" under the *Indian Act*.

> ***Union of New Brunswick Indians v. New Brunswick,* [1998] 1 S.C.R. 1161 [Tab 15]**

12. This means that section 87 does not exempt from tax the off-reserve purchases made by First Nations people. Similarly, it does not exempt from tax the on-reserve purchases made by non-First Nations people.

13. As such, the two Manitoba taxing statutes at issue here – both *The Retail Sales Tax Act* and *The Tobacco Tax Act* – apply fully to all off-reserve retail tobacco transactions (even to purchases made by First Nations people), and they also apply to all those on-reserve retail tobacco transactions made by non-First Nations people.

14. It should also be recognized that both of these Manitoba taxes are imposed only on the end purchaser. They are not imposed on the intermediaries who have administrative roles to play, such as wholesalers and retailers who are simply collectors at different stages of the process.

C) Manitoba Tobacco Tax Régime

15. Manitoba's tobacco tax régime is complex. This is due, in part, to the constitutional limitations over the provincial power of taxation. However, it is also due to the historic problems that have been encountered with contraband products.

16. Constitutionally, the Province has power to impose only "direct" taxes. To that end, s. 2(1) of *The Tobacco Tax Act* imposes the tobacco tax on the "purchaser".

A purchaser is defined at section 1 as the person who buys tobacco "for his own use" and not "for resale".

17. That means that under *The Tobacco Tax Act*, a retailer is never a taxpayer. While the retailer does have a role to play in the overall scheme, it is not the specific role of bearing the burden of paying the tax to the Government. That ultimate burden, quite properly for constitutional purposes, always lands on the ultimate end purchaser. In this case, Dakota Chundee Smoke Shop is operating as a retailer, and is not the end purchaser.

18. Under *The Tobacco Tax Act*, retailers (called "retail dealers" under the Act) and wholesalers (called "wholesale dealers" under the Act) have intermediate functions that do not include paying the actual taxation burden. These intermediaries are the conduits through which the tax is ultimately conveyed from the end purchaser to the Government.

19. The régime works through a multi-level pre-payment system, found at ss. 9, 10 and 11 of *The Tobacco Tax Act* and associated Regulations. First, the wholesaler pre-pays an equivalent to the tobacco tax to the Province. It gets reimbursed when it sells to the retailer. Second, the retailer also pre-pays an equivalent to the tax by reimbursing the wholesaler. And like the wholesaler, the retailer gets reimbursed when the final sale is made to the end purchaser who pays the tax. In the end, it is only the purchaser who pays the tax. (*The Tobacco Tax Act* also refunds for stolen or lost product, under section 13.1.)

20. This process of taxation already has been upheld by the Supreme Court of Canada as a valid method of structuring a direct taxation régime created by a Province.

***Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715. [Tab 38]**

21. To make this system work effectively, *The Tobacco Tax Act* also establishes a registration and licensing régime for wholesalers and retailers, and imposes some reporting and accounting requirements. Dakota Chundee Smoke Shop is not, however, registered or licensed and is operating entirely outside the scope of the régime.

22. All tobacco wholesalers and all tobacco retailers in the Province who want to trade in tobacco must have licences for these purposes, and must comply with reporting and accounting requirements. Section 4(1) permits only those people who hold subsisting tobacco retail licences to sell tobacco to purchasers (ie. the end consumer). The combination of sections 4(2) to (5) permit only those people who hold subsisting tobacco wholesale licences to sell to tobacco retail dealers who must be properly licensed (which Dakota Chundee Smoke Shop is not).

23. In addition, under section 4.2, only tobacco that is marked or stamped for Manitoba tobacco tax purposes may be sold in Manitoba. The stamping indicates that all appropriate taxes have been paid, and that the tobacco is legal to sell in Manitoba. Dakota Chundee Smoke Shop is not selling properly stamped tobacco.

24. Finally, the licensing system is complemented by a régime of collector appointments and collector agreements, at sections 9 to 13 of the Act.

25. The overall result, when properly observed, is an effective and efficient mechanism for collecting and remitting tobacco tax. Only the few wholesalers in the province (as opposed to the more numerous retailers and much more numerous purchasers) need to initially account and submit the taxes that ultimately are paid by the end purchaser.

26. There are several notable beneficial effects to this system. It ensures the Government collects tobacco tax revenue in an efficient manner. It limits

contraband possibilities. And it allows for an element of minimum pricing of tobacco products. Of course, all those benefits are undermined by an unregistered retailer selling contraband tobacco, as is being done by Dakota Chundee Smoke Shop.

D) On-reserve Exemptions

27. While Manitoba has designed a very efficient and effective tobacco tax régime in general, the system also needs to incorporate the recognition that on-reserve tobacco sales to First Nations people are not taxable. In fact, Section 1(5) of *TAMTA* states, very directly, that Manitoba's tax Acts must be interpreted so as not to derogate from the tax exemption provided at s. 87 of the *Indian Act*.

28. Out of this recognition has emerged a cooperative statutory régime, designed by Canada and built upon by Manitoba together with willing First Nations, which prevents provincial taxation from applying to purchases by First Nations people on reserve. The result is a specific federal statute – the *First Nations Goods and Services Tax Act* **[Tab 13]** – that empowers First Nations Bands to enact laws that impose Band Assessments where, in general, section 87 of the *Indian Act* otherwise precludes taxation by Government.

29. As such, to the extent that sales of tobacco take place on reserve, one of two supplementary régimes will operate – depending on which option is being followed on the particular reserve.

30. The régime preserves the obligation on the collector to remit the equivalent to tax to Manitoba to ensure that there is province-wide compliance. The province then distributes the money to the correct entity (as explained below, sometimes itself, sometimes a retailer or sometimes an Indian Band).

i) Band Assessments

31. Section 87 of the *Indian Act* prohibits a Province from taxing personal property bought by First Nations people on reserve. However, it does not prohibit a Band from assessing tax under its own authority to impose Band Assessments.

32. Section 95.1 of *TAMTA* authorizes Manitoba's Minister of Finance to enter into a "tax administration agreement" with a Band Council. Where this occurs, it allows the Province to administer taxes or assessments that are imposed by a Band under a Band By-law.

33. Where this scheme applies, the Province ends up collecting a Band Assessment on behalf of the Band, which the Province then pays out to the Band. The Province is permitted to take an administrative fee for its services, but it tends to be a nominal amount.

34. Under this régime, the Band chooses to tax its members under the authority of section 23 of the federal *First Nations Goods and Services Tax Act*, S.C. 2003, c. 15, s. 67 (*FNGSTA*) **[Tab 13]**. But for a Band to have the authority to pass a tax under section 23, it must be a Band listed in Schedule 2. At this time, there are 51 First Nations in Manitoba which have chosen to pass such a tax and are listed in Schedule 2 of *FNGSTA*, including Canupawapka Dakota First Nation.

35. Section 18 of *FNGSTA* provides that the obligation to pay tax under a band law applies despite section 87 of the *Indian Act*.

36. A band law enacted under section 23 does not have force unless there is an administration agreement in effect between the Band Council and the Provincial Government and the tax is collected in accordance with that agreement. Manitoba has such an agreement with Canupawakpa Dakota First Nation.

37. Retailers on reserve are required by the various Acts and the agreement to collect the Band's tax equal to that imposed under *The Tobacco Tax Act* for all retail sales it makes to a First Nations person from its business on reserve and to remit that money to the Province. The Province then returns the money (less the modest administration fee) to the Band.

38. In the end, for those retailers located on First Nations reserve lands, the result is that the purchaser of a tobacco product buys the product at the same overall price – whether the purchaser is a First Nations person or a non-First Nations person. The non-First Nations purchaser pays the Provincial tax that goes to the Province. And instead of paying a tax, the First Nations purchaser pays a Band Assessment that goes to the Band.

ii) Sales Limits

39. No Band is required to participate in the above-described Band Assessment process. For those Bands that choose to not participate in the Band Assessment régime, Manitoba has developed another method to ensure that First Nations people do not pay tax in relation to their on-reserve tobacco purchases.

40. There is a regulation under *The Tobacco Tax Act* that accomplishes this objective. The *Sale of Marked Tobacco on Indian Reserves Regulation*, 63/2006 **[Tab 39]** states in section 3(1) that the Minister of Finance must refund to a retailer the amounts paid on account of tax if the Minister is satisfied that the tobacco was purchased by a First Nations person on reserve from a retailer by way of a non-taxable purchase. There is a formula set out in the *Regulation* that allows an amount to be calculated without the need to record each sale.

41. Under this process, the retailer pays the wholesaler an amount equivalent to the tax and gets reimbursed by the Province for those sales made on reserve to First Nations people.

IV. POSSIBLE DEFENCES TO INTERLOCUTORY INJUNCTION

A) Application of provincial tobacco laws to Indians

42. It is well settled that provincial laws of general application apply to Indians and lands reserved for Indians provided that the pith and substance of the law is within a provincial head of power under s. 92 of the *Constitution Act, 1867*. In particular, the courts have consistently upheld the application of provincial sales tax and tobacco tax laws to Indians. If a status Indian chooses to sell tobacco products to Indians and non-Indians alike, that person is subject to all provisions of the provincial tobacco regime including the obligation to collect and remit taxes to the province.

> ***Union of New Brunswick Indians v. New Brunswick, [1998] 1 S.C.R. 1161*** **[Tab 15]**
>
> ***R. v. MacLaurin*** **(1999), 143 Man. R. (2d) 85 (Q.B.), aff'd 2001 MBCA 138 [Tab 16]**
>
> ***R. v. Fontaine,*** **1998 CarswellMan 599, [1998] 4 C.N.L.R. 194 (Prov. Ct.) [Tab 17]**
>
> ***Union of Nova Scotia Indians v. Nova Scotia (AG),*** **1998 CarswellNS 298 (N.S.C.A.) at paras. 26, 40-45, leave to appeal refused, [1999] 1 S.C.R. xiv - provincial tobacco tax laws apply to the purchase and sale of tobacco products by Indians, even where intended for resale to Indians on reserves. [Tab 18]**
>
> ***R. v. MacDonald*****, 2009 ONCJ 304, 2009 CarswellOnt 3713 at paras. 180-183, 190-195 [Tab 19]**
>
> ***Tseshaht Band v. British Columbia,*** **15 B.C.A.C. 1, 1992 CarswellBC 188 [Tab 20]**

43. In *MacDonald*, the accused was charged with possession of unmarked tobacco. The cigarettes were purchased on one reserve and transported to another reserve to be used for ceremonial purposes and to provide to other Indian persons. Relying in part on the Manitoba Court of Appeal decision in *MacLaurin*, Keast J. upheld the Ontario *Tobacco Tax Act*:

> The federal power over Indians does not create a constitutional "enclave" that excludes provincial laws. The general rule is provincial laws do apply to Indians, except in those circumstances where they single out Indians in such a manner that such conflicts with the core of the federal power over Indians. The *Tobacco Tax Act* does not single out Indians but applies to non-Indians alike. Native property interests are not exclusive to the federal power. Several Supreme Court decisions have enunciated provincial laws can impact Native property interests.
>
> ***R. v. MacDonald*, at para. 183 [Tab 19]**

44. First Nations who are prepared to do business with Indians and non-Indians alike must comply with the rules that apply to businesses of this nature. The law was not intended to provide a competitive advantage in the commercial marketplace over non-Indian businesses

> ***R. v. Sewell*, 2006 ONCJ 202 at para. 30 [Tab 21]**

45. *The Tobacco Tax Act* is a regulatory scheme designed to protect the integrity of the marking and tax collection system. It applies to all vendors, even on reserve, and does not conflict with s. 87 of the *Indian Act* or any other federal legislation. Furthermore, insofar as the taxation of tobacco products aims to discourage cigarette smoking and the associated injurious health effects, that objective is a valid part of the scheme and supports its validity.

> ***R. v. Fontaine* [Tab 17]**
>
> ***R. v. Pickering*, 1999 Carswell Man 92, 135 Man. R. (2d) 195 (Man. Q.B.) at paras. 32-33 [Tab 22]**

B) Sovereignty argument

46. The Defendants assert that they are not bound by provincial law because they did not relinquish their sovereignty through treaty. In essence, they argue that the Dakota people are a sovereign nation that is not subject to the rule of law in Canada. With respect, no court has countenanced such an argument.

47. Assuming for the sake of argument that the Defendants are members of a Band that possesses unextinguished aboriginal rights or title to land, the case law is abundantly clear this does not exempt Indians from otherwise valid federal or provincial laws. In *Sparrow*, a case dealing with aboriginal rights to fish for food, the Supreme Court of Canada remarked that while the constitutional recognition of aboriginal rights afforded by s. 35 of the *Constitution Act, 1982* requires the government to justify legislation that negatively effects such rights, it does not promise immunity from government regulation in a society that is increasingly more complex, interdependent and sophisticated. Dickson C.J. and La Forest J., for the Court, wrote:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. [emphasis added].

***R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103, 1110 [Tab 23]**

48. The above comments were made in relation to land to which no treaty applied and demonstrate conclusively that Crown title and legislative power exists independently of surrender agreements or treaties.

***R. v. Day Chief*, 2007 ABCA 22 (in Chambers) at paras. 8-9 [Tab 24]**

49. These sentiments were echoed more recently in *Mitchell v. M.N.R.* in which the Mohawks of Akwesasne argued they had an aboriginal or treaty right to bring goods into Canada from the U.S. without paying duty. The Supreme Court of Canada unanimously upheld the requirement to pay duty. The majority found that the appellant did not establish the aboriginal right claimed. In concurring reasons, Binnie J. also rejected the notion that aboriginal rights somehow shielded First Nations from the application of non-aboriginal laws. The objective

of s. 35 of the *Constitution Act, 1982*, which recognizes and affirms aboriginal rights, is reconciliation not mutual isolation. While an aboriginal person could be characterized as an Indian for purposes of language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. Aboriginal people are subject to the law just as any ordinary member of Canadian society:

> In a decision handed down soon after the coming into force of the *Constitution Act, 1982*, in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, a tax case, Dickson J. (as he then was) wrote at p. 36, "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities ... of other Canadian citizens". . . . In *Gladstone* (at para. 73) and again in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (at para. 165), Lamer C.J. repeats that "distinctive aboriginal societies exist within, and <u>are a part</u> of, a broader social, political and economic community, over which the Crown is sovereign". The constitutional objective is reconciliation not mutual isolation [underlining in original].
>
> ***Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at paras. 118, 133 [Tab 25]**

50. Courts across the country have rejected various arguments that aboriginal people are not subject to federal or provincial laws, whether or not they have signed a treaty.

> ***R. v. Campbell*, 2011 MBQB 173 [Tab 26]**
>
> ***R. v. Moody and Dysart*, 2004 MBQB 247 [Tab 27]**
>
> ***R. v. Williams* (1994), 52 B.C.A.C. 296, 1994 CarswellBC 1731 at para. 16 [Tab 28]**
>
> ***R. v. Pena (sub nom. R. v. Ignace)*, 1998 CarswellBC 163 (B.C.C.A.), leave to appeal refused, 120 B.C.A.C. 62 (note) (S.C.C., May 14, 1998) [Tab 29]**
>
> ***R. v. Day Chief* at paras. 7-14 [Tab 24]**
>
> ***Yellowhorn v. Alberta*, 2006 ABQB 307, reviewing the relevant cases at paras. 32-48 [Tab 30]**

51. In *Campbell*, Martin J. held that the criminal law applied to aboriginal people regardless of tribal laws. Among other cases, the court cited *R. v. Jones* (2000), 265 A.R. 96 (Alta. Q.B.) which dismissed an argument that a First Nation was exempt from federal and provincial income tax laws because he was a member of a sovereign nation recognized by the *Royal Proclamation of 1793* or because of ancestral treaty rights. The principle of sovereign integrity dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real and personal, within its territory. Thus, aboriginal people are subject to criminal and provincial laws.

***R. v. Campbell*, at paras. 18, 20, 24 [Tab 26]**

52. Justice Menzies rejected a similar argument in *Moody*. Even in the absence of a treaty, the criminal law applies to all First Nation peoples. To assert otherwise is inconsistent with Crown sovereignty:

> In my opinion the assertion by the Accused that they are immune from criminal prosecution due to their aboriginal status is inconsistent with the sovereignty of the federal and provincial governments. Their status is one found within and as a part of the broader community over which Canada is sovereign. The Accused are, for some intents and purposes, "Indians" within the meaning assigned by the Constitution. However, for the purposes of the criminal law they remain ordinary members of Canadian society. To grant the Accused immunity from criminal prosecution would be inconsistent with the sovereignty of the Dominion of Canada.

***R. v. Moody and Dysart*, at paras. 10, 14 [Tab 27]**

53. *Moody* and *Campbell* addressed the application of the criminal law to aboriginal people. However, the same reasoning has been applied in respect of provincial laws, regardless of whether the First Nation is a signatory to treaty. For example, in *Williams,* the accused challenged the court's jurisdiction over aboriginal people in respect of *Criminal Code* and provincial wildlife offences committed in a part of

the province that had not been surrendered or ceded by treaty. The British Columbia Court of Appeal held:

> There is no residual aboriginal sovereignty capable of displacing the general jurisdiction of the Provincial Court to try persons, whether aboriginal or non-aboriginal, for offences under the *Wildlife Act* and *Criminal Code* throughout British Columbia, whether or not the alleged offences took place "beyond the treaty frontier".
>
> ***R. v. Williams*, at para. 16 [Tab 28]**
>
> **See also: *R. v. Pena*. [Tab 29] Courts have jurisdiction over aboriginal people whether or not the territory is "unsurrendered ground".**
>
> ***R. v. Day Chief*, at paras. 7-14. [Tab 24] Provincial highway safety laws apply to First Nations, even where no treaty or surrender agreement exists.**

54. Therefore, the Attorney General submits that *The Tobacco Tax Act* is a valid provincial law of general application that applies to the Defendants, regardless of whether or not the Dakota people signed treaty surrendering their rights or title.

C) Aboriginal rights or title

55. To the extent the Defendants claim that they have an aboriginal right to sell contraband tobacco to anyone they choose, off-reserve, and without any obligation to collect and remit provincial taxes owed by third party purchasers, the Attorney General submits that such claim must be proved with sufficient evidence at trial to meet the *Van der Peet* test for aboriginal rights established by the Supreme Court of Canada.

> ***R. v. Pamajewon*, [1996] 2 S.C.R. 821 [Tab 31]**

56. We highlight two preliminary points. First, as retailers, the Defendants do not pay any taxes on the sale of tobacco. Under the *Act*, they are simply collectors of retail sales and tobacco taxes from the ultimate purchaser. Secondly, the Defendants are selling unmarked tobacco, off-reserve, in the commercial

mainstream, without a license, to Indian and non-Indians alike. If the aboriginal rights argument is accepted, it amounts to saying that the Province does not have the ability to impose retail sales tax or tobacco tax even on non-aboriginal purchasers of tobacco. That cannot be correct. An aboriginal right cannot possibly exempt third party purchasers (who may be non-Indians or Indians off-reserve) from paying the required taxes. This would undermine the entire regime.

> ***Tseshaht Band v. British Columbia*, at paras. 32, 40-45, 62 [Tab 20]**
>
> ***Union of Nova Scotia Indians v. Nova Scotia (Attorney General)*, at paras. 45, 53 [Tab 18]**

57. In fact, if the Defendants have a right to sell unmarked tobacco, free of any regulation, not only would this exempt aboriginal and non-aboriginal purchasers from paying the tobacco tax owed, it could potentially subject purchasers to charges for being in possession of unmarked tobacco, contrary to s. 3.1(2) of the *Act*.

58. The provincial scheme does not in any way prevent the use of tobacco for traditional or ceremonial purposes. However, an aboriginal right cannot exempt commercial retailers from complying with a regime designed to regulate the possession and sale of tobacco, discourage smoking and protect provincial revenues by ensuring that taxes are paid and collected from the ultimate purchaser of tobacco products. Prohibiting the possession of unmarked tobacco is a means of enforcing taxation on cigarette sales and stemming the illicit "black market" in tobacco. As Keast J. remarked:

> The elephant standing in the corner cannot be ignored. This province has a massive illegal trade in contraband cigarettes. They are illegally manufactured, distributed, sold and consumed; with the intent of by-passing the provincial regulation system. This is a system, as such relates to First Nations peoples, which has been upheld by the courts.
>
> ***R. v. MacDonald*, at paras. 194-195, 200-201 [Tab 19]**

***R v. Fontaine*, at para. 15 [Tab 17]**

See also: Affidavit of Jonathan Scott Connors, sworn March 26, 2012, Exh. H at para. 3 of the Information to Obtain a Search Warrant

59. For the purpose of this interlocutory injunction proceeding, it is unnecessary to rule on the merits of any asserted aboriginal right to sell tobacco free of provincial taxes or regulation. It suffices to say we are not aware of any court that has accepted such a claim based on treaty or aboriginal rights. To the contrary, courts have consistently held that a First Nation retailer who sells cigarettes to Indians and non-Indians alike in the commercial mainstream, is subject to all of the provisions of the tobacco tax legislation, including the obligation to collect and remit taxes from the purchasers to the province.

***R. v. Murdock*, 1996 CarswellNS 309 (NSCA) at paras. 179-187 [Tab 32]**

***R. v. Johnson*, 1996 CarswellNS 496 (NSCA), leave to appeal refused, 162 N.S.R. (2d) 80 (note) (S.C.C., June 26, 1997) [Tab 33]**

***Conway c. Quebec* (Sous-ministere du Revenue), 2009 QCCQ 9854 (Court of Quebec) [Tab34]**

***Union of Nova Scotia Indians v. Nova Scotia (Attorney General),* at paras. 26, 35 [Tab 18]**

***R. v. Johnson*, 1993 CarswellNS 294 (NSCA)[Tab 35]**

***R. v. David*, 2000 CarswellOnt 540 (Ont. S.C.J.) at para. 11 [Tab36]**

60. Thus, in *Murdock*, the accused claimed an aboriginal right to use, import and sell tobacco to non-aboriginal and aboriginal people. The expert evidence showed that tobacco was an essential part of the Mi'kmaq people's culture as it was traditionally used for ceremonial and social occasions. For a unanimous court, Hallett J.A. held that even if there was an aboriginal right to use tobacco, there was no evidence that the right included dealing, bartering or trading tobacco products between different Indian Bands in different parts of Canada, "[a]nd it clearly would not involve selling tobacco to non-natives".

***R. v. Murdock,* at paras. 179-187 [Tab 32]**

61. Similarly, in *David*, Rutherford J. found no evidence to support an aboriginal or treaty right to sell unmarked contraband cigarettes to non-aboriginal people:

> ...it would seem quite untenable in the circumstances of this case to torture some historical provision or practice into a justification for Mr. David being a domestic outlet and supply depot for high volume contraband that both evaded the legal revenue and flooded the open market at a cost base with which honest retailers could not compete. Mr. David advanced neither a claim nor evidence on which to base any assertion of a right recognized or affirmed under s. 35 of the *Constitution Act, 1982*.
>
> ***R. v. David*, at para. 11 [Tab 36]**

62. While each case necessarily turns on the evidence adduced, courts have not been receptive to aboriginal rights arguments advanced by retail vendors of tobacco products. If accepted, such claims would thwart the entire regulatory regime.

D) Conclusion

63. To summarize, there is no merit to the Defendants' assertion that they are entitled to ignore the requirements of Manitoba's tobacco legislation on the basis of their aboriginal identity or asserted aboriginal rights or title. With respect, the thrust of the Defendants' argument is that the rule of law is irrelevant. We can do no better than repeat the words of Williams P.C.J. in *R. v. Mason*, a case where the accused advanced a right to possess and sell tax-exempt tobacco products off-reserve, to Indians and non-Indians alike:

> In essence, and with great respect, it is about her unrelenting conduct of selling tax-exempt tobacco products to "non-natives", without collecting taxes, on an off reserve location where she apparently took the position that she had an absolute freedom to do so without any restrictions and regardless of the law. Or, as the question is posited: are we dealing with an individual whose persistent conduct infers a

> belief in the freedom to live without the acceptance or recognition of any established laws?
>
> ***R. v. Mason*, 2008 NSPC 3 at para. 44 (N.S. Prov. Ct.) [Tab 37]**

64. The Defendants, as off-reserve retailers selling tobacco, are bound by provincial legislation. Despite repeated attempts to enforce *The Tobacco Tax Act*, they have continued to flout provincial laws by possessing and selling unmarked tobacco, by failing to obtain the required tax authorizations and by failing to meet their obligation to collect and remit the taxes owed by purchasers. It is respectfully submitted that this court must enjoin such conduct to preserve respect for the rule of law.

All of which is respectfully submitted this 23rd day of May, 2012.

For the Attorney General of Manitoba:

Denis Guénette, Crown Counsel
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Civil Legal Services

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Constitutional Law Branch

CANADA

CONSOLIDATION

CODIFICATION

Tobacco Act

Loi sur le tabac

S.C. 1997, c. 13

L.C. 1997, ch. 13

Current to March 20, 2012

À jour au 20 mars 2012

Last amended on July 5, 2010

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 20, 2012. The last amendments came into force on July 5, 2010. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Les dernières modifications sont entrées en vigueur le 5 juillet 2010. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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S.C. 1997, c. 13

L.C. 1997, ch. 13

An Act to regulate the manufacture, sale, labelling and promotion of tobacco products, to make consequential amendments to another Act and to repeal certain Acts

Loi réglementant la fabrication, la vente, l'étiquetage et la promotion des produits du tabac, modifiant une autre loi en conséquence et abrogeant certaines lois

[*Assented to 25th April 1997*]

[*Sanctionnée le 25 avril 1997*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

Short title

1. This Act may be cited as the *Tobacco Act*.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur le tabac*.

INTERPRETATION

Definitions

2. The definitions in this section apply in this Act.

DÉFINITIONS

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

"accessory" « *accessoire* »

"accessory" means a product that may be used in the consumption of a tobacco product, including a pipe, cigarette holder, cigar clip, lighter and matches.

« accessoire » Produit qui peut être utilisé pour la consommation d'un produit du tabac, notamment une pipe, un fume-cigarettes, un coupe-cigare, des allumettes ou un briquet.

« accessoire » "*accessory*"

"additive" « *additif* »

"additive" means an ingredient other than tobacco leaves.

« additif » Ingrédient autre que les feuilles de tabac.

« additif » "*additive*"

"analyst" « *analyste* »

"analyst" means a person designated as an analyst under subsection 34(1).

« analyste » Personne désignée à titre d'analyste aux termes du paragraphe 34(1).

« analyste » "*analyst*"

"blunt wrap" « *feuille d'enveloppe* »

"blunt wrap" means a sheet, including one that is rolled, that is composed of natural or reconstituted tobacco and that is ready to be filled.

« détaillant » Personne qui exploite une entreprise consistant en tout ou en partie dans la vente de produits du tabac au consommateur.

« détaillant » "*retailer*"

"brand element" « *élément de marque* »

"brand element" includes a brand name, trademark, trade-name, distinguishing guise, logo, graphic arrangement, design or slogan that is reasonably associated with, or that evokes, a product, a service or a brand of product or service, but does not include a colour.

« élément de marque » Sont compris dans les éléments de marque un nom commercial, une marque de commerce, un logo, un signe distinctif, un dessin ou un slogan qu'il est raisonnablement possible d'associer à un produit, à un service ou à une marque d'un produit ou d'un service ou qui les évoque, à l'exception d'une couleur.

« élément de marque » "*brand element*"

"emission" « *émission* »

"emission" means a substance that is produced when a tobacco product is used.

"entity" « *entité* »
"entity" includes a corporation, firm, partnership, association, society, trust or other organization, whether incorporated or not.

"furnish" « *fournir* »
"furnish" means to sell, lend, assign, give or send, with or without consideration, or to barter or deposit with another person for the performance of a service.

"ingredient" « *ingrédient* »
"ingredient" means tobacco leaves and any substance used in the manufacture of a tobacco product or its components, including any substance used in the manufacture of that substance.

"inspector" « *inspecteur* »
"inspector" means a person designated as an inspector under subsection 34(1).

"little cigar" « *petit cigare* »
"little cigar" means a roll or tubular construction that

(*a*) is intended for smoking;

(*b*) contains a filler composed of natural or reconstituted tobacco;

(*c*) has a wrapper, or a binder and a wrapper, composed of natural or reconstituted tobacco; and

(*d*) has a cigarette filter or weighs no more than 1.4 g, excluding the weight of any mouthpiece or tip.

It includes any tobacco product that is prescribed to be a little cigar.

"manufacture" « *fabriquer* »
"manufacture", in respect of tobacco products, includes the packaging, labelling, distributing and importing of tobacco products for sale in Canada.

"manufacturer" « *fabricant* »
"manufacturer", in respect of tobacco products, includes any entity that is associated with a manufacturer, including an entity that controls or is controlled by the manufacturer or that is controlled by the same entity that controls the manufacturer.

"Minister" « *ministre* »
"Minister" means the Minister of Health.

"package" [Repealed, 2009, c. 27, s. 2]

"prescribed" *Version anglaise seulement*
"prescribed" means prescribed by regulation.

"retailer" « *détaillant* »
"retailer" means a person who is engaged in a business that includes the sale of a tobacco product to consumers.

"sell" « *vendre* »
"sell" includes offer for sale and expose for sale.

« emballage » [Abrogée, 2009, ch. 27, art. 2]

« émission » *"emission"*
« émission » Substance qui est produite quand un produit du tabac est utilisé.

« entité » *"entity"*
« entité » Personne morale, firme, société de personnes, fiducie, association ou autre organisation, dotée ou non de la personnalité morale.

« fabricant » *"manufacturer"*
« fabricant » Est assimilée au fabricant de produits du tabac toute entité qui a des liens avec lui, notamment qui le contrôle ou qui est contrôlée par lui ou qui est contrôlée par la même entité que celle qui le contrôle.

« fabriquer » *"manufacture"*
« fabriquer » Est assimilé à l'acte de fabriquer le produit du tabac le fait de le distribuer, de l'importer, de l'emballer ou de l'étiqueter pour le vendre au Canada.

« feuille d'enveloppe » *"blunt wrap"*
« feuille d'enveloppe » Feuille, y compris une feuille roulée, prête à être remplie et composée notamment de tabac naturel ou reconstitué.

« fournir » *"furnish"*
« fournir » Vendre, prêter, céder, donner ou expédier à un autre, à titre gratuit ou onéreux, ou échanger contre un produit ou un service.

« ingrédient » *"ingredient"*
« ingrédient » S'entend des feuilles de tabac et de toute substance utilisée dans la fabrication d'un produit du tabac ou de ses composants et vise notamment les substances utilisées dans la fabrication d'une telle substance.

« inspecteur » *"inspector"*
« inspecteur » Personne désignée à titre d'inspecteur aux termes du paragraphe 34(1).

« jeune » *"young person"*
« jeune » Personne âgée de moins de dix-huit ans.

« ministre » *"Minister"*
« ministre » Le ministre de la Santé.

« petit cigare » *"little cigar"*
« petit cigare » Rouleau ou article de forme tubulaire qui remplit les conditions suivantes :

a) il est destiné à être fumé;

b) il comporte une tripe composée notamment de tabac naturel ou reconstitué;

c) il comporte soit une sous-cape et une cape, soit une cape qui sont composées notamment de tabac naturel ou reconstitué;

d) il comporte un bout-filtre de cigarette ou pèse au plus 1,4 gramme, sans le poids des embouts.

La présente définition vise aussi les produits du tabac que les règlements désignent comme des petits cigares.

"tobacco product" « *produit du tabac* »

"tobacco product" means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the *Food and Drugs Act* applies.

« produit du tabac » "*tobacco product*"

« produit du tabac » Produit fabriqué à partir du tabac, y compris des feuilles et des extraits de celles-ci; y sont assimilés les tubes, papiers et filtres à cigarette. Sont toutefois exclus de la présente définition les aliments, drogues et instruments contenant de la nicotine régis par la *Loi sur les aliments et drogues*.

"young person" « *jeune* »

"young person" means a person under eighteen years of age.

« vendre » "*sell*"

« vendre » Est assimilé à l'acte de vendre le fait de mettre en vente ou d'exposer pour la vente.

1997, c. 13, s. 2; 2009, c. 27, s. 2.

1997, ch. 13, art. 2; 2009, ch. 27, art. 2.

GOVERNOR IN COUNCIL'S POWERS

POUVOIRS DU GOUVERNEUR EN CONSEIL

Regulations — little cigar

2.1 (1) The Governor in Council may make regulations prescribing any tobacco product to be a little cigar for the purpose of the definition "little cigar".

Règlements — petit cigare

2.1 (1) Le gouverneur en conseil peut, par règlement, désigner tout produit du tabac comme petit cigare pour l'application de la définition de ce terme.

Order in council — little cigar

(2) The Governor in Council may, by order, amend the definition "little cigar" by replacing the weight set out in that definition by a weight that is not less than 1.4 g.

Décret — petit cigare

(2) Le gouverneur en conseil peut, par décret, remplacer le poids qui figure à la définition de « petit cigare » par un poids égal ou supérieur à 1,4 gramme.

2009, c. 27, s. 3.

2009, ch. 27, art. 3.

HER MAJESTY

SA MAJESTÉ

Binding on Her Majesty

3. This Act is binding on Her Majesty in right of Canada or a province.

Obligation de Sa Majesté

3. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

PURPOSE

OBJET

Purpose of Act

4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

Santé publique

4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement :

(*a*) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

(*b*) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

b) de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter;

(*c*) to protect the health of young persons by restricting access to tobacco products; and

c) de protéger la santé des jeunes par la limitation de l'accès au tabac;

(*d*) to enhance public awareness of the health hazards of using tobacco products.

d) de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.

PART I

TOBACCO PRODUCTS

PARTIE I

PRODUITS DU TABAC

Product standards

5. No person shall manufacture a tobacco product that does not conform with the standards established by the regulations.

5. Il est interdit de fabriquer un produit du tabac qui n'est pas conforme aux normes établies par règlement.

Normes réglementaires

Prohibition — manufacture

5.1 (1) No person shall use an additive set out in column 1 of the schedule in the manufacture of a tobacco product set out in column 2.

5.1 (1) Il est interdit d'utiliser un additif visé à la colonne 1 de l'annexe dans la fabrication d'un produit du tabac visé à la colonne 2.

Fabrication interdite

Exception — trade-mark or marking

(2) Subsection (1) does not prohibit the use of a colouring agent to depict a trade-mark on a tobacco product or to display a marking required under this or any other Act of Parliament or of the legislature of a province or for any other prescribed purpose.

2009, c. 27, s. 4.

(2) Le paragraphe (1) n'a pas pour effet d'interdire l'utilisation d'un agent colorant pour représenter une marque de commerce sur un produit du tabac, pour faire figurer sur un tel produit une inscription exigée sous le régime de la présente loi ou d'une autre loi fédérale ou provinciale ou pour tout autre motif prévu par règlement.

2009, ch. 27, art. 4.

Exception — marque de commerce ou inscription

Prohibition — sale

5.2 (1) No person shall sell a tobacco product set out in column 2 of the schedule that contains an additive set out in column 1.

5.2 (1) Il est interdit de vendre un produit du tabac visé à la colonne 2 de l'annexe qui contient un additif visé à la colonne 1.

Vente interdite

Exception

(2) Subsection (1) does not prohibit the sale of a tobacco product by reason only that the product contains a colouring agent used for a purpose referred to in subsection 5.1(2).

2009, c. 27, s. 5.

(2) Le paragraphe (1) n'a pas pour effet d'interdire la vente d'un produit du tabac du seul fait qu'il contient un agent colorant pour l'un des motifs visés au paragraphe 5.1(2).

2009, ch. 27, art. 5.

Exception

Information required from manufacturer

6. (1) Every manufacturer shall submit to the Minister, in the prescribed manner and within the prescribed time, information that is required by the regulations about tobacco products, their emissions and any research and development related to tobacco products and their emissions, whether the tobacco products are for sale or not.

6. (1) Le fabricant est tenu de transmettre au ministre, dans les délais et selon les modalités réglementaires, les renseignements exigés par les règlements en ce qui touche les produits du tabac, en vente ou non, leurs émissions et la recherche et le développement liés à ces produits et à ces émissions.

Fabricant — renseignements

Requests for supplementary information

(2) The Minister may, subject to the regulations, request supplementary information relating to the information referred to in subsection (1), and every manufacturer shall submit the requested information.

1997, c. 13, s. 6; 2009, c. 27, s. 6.

(2) Le ministre peut, sous réserve des règlements, demander des renseignements supplémentaires portant sur les mêmes sujets. Le fabricant est tenu de les lui transmettre.

1997, ch. 13, art. 6; 2009, ch. 27, art. 6.

Demandes de renseignements supplémentaires

Regulations

7. The Governor in Council may make regulations

(*a*) establishing standards for tobacco products, including prescribing the amounts of substances that may be contained in the product or its emissions;

(*b*) respecting test methods, including methods to assess conformity with the standards;

7. Le gouverneur en conseil peut prendre des règlements :

a) établissant des normes applicables aux produits du tabac, notamment pour régir les quantités des substances que peuvent contenir les produits et leurs émissions;

b) concernant les méthodes d'essai, notamment en ce qui touche la conformité des produits du tabac aux normes;

Réglements

(*c*) prescribing information that manufacturers must submit to the Minister about tobacco products and their emissions, including sales data and information on market research, product composition, ingredients, health effects, hazardous properties and brand elements;

(*c.1*) prescribing information that manufacturers must submit to the Minister about research and development related to tobacco products and their emissions, including information on market research, product composition, ingredients, health effects, hazardous properties and brand elements;

(*c.2*) respecting requests for supplementary information under subsection 6(2);

(*c.3*) respecting the prohibition under section 6.1, including providing for the suspension of the manufacture or sale of a tobacco product;

(*d*) prescribing the means, including electronic means, by which the information referred to in paragraphs (*c*) to (*c.2*) may be submitted to the Minister;

(*d.1*) prescribing anything that by this Part is to be prescribed; and

(*e*) generally for carrying out the purposes of this Part.

1997, c. 13, s. 7; 2009, c. 27, s. 8.

c) prévoyant les renseignements que le fabricant doit transmettre au ministre relativement aux produits du tabac et à leurs émissions, notamment des données sur la vente et des renseignements sur les études de marché et sur la composition, les ingrédients, les effets sur la santé, les propriétés dangereuses et les éléments de marque de ces produits;

c.1) prévoyant les renseignements que le fabricant doit transmettre au ministre relativement à la recherche et au développement liés aux produits du tabac et à leurs émissions, notamment des renseignements sur les études de marché et sur la composition, les ingrédients, les effets sur la santé, les propriétés dangereuses et les éléments de marque de ces produits;

c.2) concernant les demandes de renseignements supplémentaires visées au paragraphe 6(2);

c.3) concernant l'interdiction prévue à l'article 6.1, notamment en ce qui concerne la suspension de la fabrication et de la vente du produit du tabac en cause;

d) prévoyant les modalités de transmission des renseignements visés aux alinéas *c*) à *c.2*), notamment sous forme électronique;

d.1) prévoyant toute autre mesure réglementaire prévue par la présente partie;

e) prévoyant toute autre mesure nécessaire à l'application de la présente partie.

1997, ch. 13, art. 7; 2009, ch. 27, art. 8.

Amendment of schedule

7.1 (1) The Governor in Council may, by order, amend the schedule by adding, amending or deleting

(*a*) the name or description of an additive or tobacco product; or

(*b*) a reference to all tobacco products, with or without exceptions.

Description

(2) An additive or tobacco product may be described by reference to a document produced by a body or person other than the Minister, either as the document exists on a particular date or as it is amended from time to time.

2009, c. 27, s. 9.

Modification de l'annexe

7.1 (1) Le gouverneur en conseil peut, par décret, modifier l'annexe par adjonction, modification ou suppression :

a) du nom ou de la description d'un additif ou d'un produit du tabac;

b) d'une mention générale visant tous les produits du tabac, avec ou sans exception.

Description

(2) L'additif ou le produit du tabac peut être décrit par renvoi à un document produit par un organisme ou une personne autre que le ministre, soit dans sa version à une date donnée, soit avec ses modifications successives.

2009, ch. 27, art. 9.

PART II

ACCESS

Furnishing tobacco products

8. (1) No person shall furnish a tobacco product to a young person in a public place or in a place to which the public reasonably has access.

Defence

(2) A person shall not be found to have contravened subsection (1) if it is established that the person attempted to verify that the person was at least eighteen years of age by asking for and being shown documentation prescribed for the purposes of verifying age, and believed on reasonable grounds that the documentation was authentic.

Signs

9. Every retailer shall post, at retail, in the prescribed place and manner, signs in the prescribed form and with the prescribed content, that inform the public that the sale or giving of a tobacco product to a young person is prohibited by law, or that contain a prescribed health message, unless that retailer is exempted by the regulations from the requirement to post the signs.

Minimum number of products in package

10. (1) No person shall import for sale in Canada, package, distribute or sell cigarettes, little cigars or blunt wraps except in a package that contains at least 20 cigarettes, little cigars or blunt wraps or, if a higher number is prescribed, at least the prescribed number.

Other tobacco products

(2) No person shall import for sale in Canada, package, distribute or sell a tobacco product — other than cigarettes, little cigars or blunt wraps — that is prescribed for the purposes of this subsection, except in a package that contains at least the prescribed portions, number or quantity of the tobacco product.

1997, c. 13, s. 10; 2009, c. 27, s. 10.

Self-service display

11. No person, unless exempted by the regulations, shall sell a tobacco product by means of a display that permits a person to handle the tobacco product before paying for it.

Dispensing device

12. No person shall furnish or permit the furnishing of a tobacco product by means of a device that dispenses tobacco products except where the device is in

(*a*) a place to which the public does not reasonably have access; or

PARTIE II

ACCÈS

Fourniture de tabac aux jeunes

8. (1) Il est interdit, dans des lieux publics ou dans des lieux où le public a normalement accès, de fournir des produits du tabac à un jeune.

Moyen de défense

(2) Une personne ne peut être reconnue coupable d'une infraction au paragraphe (1) s'il est établi qu'elle a tenté de vérifier si la personne avait au moins dix-huit ans en demandant et examinant une pièce d'identité conforme aux règlements et qu'elle avait des motifs raisonnables de croire que la pièce était authentique.

Affiche

9. Sous réserve des exceptions prévues par règlement, le détaillant doit placer dans son établissement les affiches réglementaires, aux endroits prévus par règlement, ou comportant un message réglementaire relatif à la santé et précisant l'interdiction de la fourniture de produits du tabac aux jeunes.

Nombre minimal de produits par emballage

10. (1) Il est interdit d'importer pour la vente au Canada, d'emballer, de distribuer ou de vendre des cigarettes, des petits cigares ou des feuilles d'enveloppe, sauf dans un emballage en contenant au moins vingt ou, si un nombre supérieur est prévu par règlement, au moins ce nombre.

Autres produits du tabac

(2) S'agissant d'un autre produit du tabac qui est visé par règlement d'application du présent paragraphe, il est interdit de l'importer pour le vendre au Canada, de l'emballer, de le distribuer ou de le vendre, sauf dans un emballage en contenant au moins les portions, le nombre ou la quantité réglementaires.

1997, ch. 13, art. 10; 2009, ch. 27, art. 10.

Libre-service

11. Il est interdit, sous réserve des exceptions prévues par règlement, de vendre des produits du tabac en les exposant de façon que les personnes puissent les prendre avant de les payer.

Appareils distributeurs

12. Il est interdit de fournir ou de laisser fournir des produits du tabac au moyen d'un appareil distributeur sauf si celui-ci :

a) se trouve dans un lieu où le public n'a pas normalement accès;

(*b*) a bar, tavern or beverage room and has a prescribed security mechanism.

b) se trouve dans un bar, une taverne ou un établissement semblable et est muni d'un mécanisme de sécurité réglementaire.

Deliver or mail

13. (1) No person shall, for consideration, cause a tobacco product to be delivered from one province to another or to be sent by mail unless the delivery or mailing is between manufacturers or retailers or the person is otherwise exempted by the regulations.

Livraison et envoi

13. (1) Il est interdit de faire livrer, à titre onéreux, un produit du tabac d'une province à l'autre ou de le faire envoyer, à titre onéreux, par la poste, sauf entre des fabricants et des détaillants et sous réserve de toute autre exception prévue par règlement.

Advertising an offer

(2) No person shall advertise an offer to deliver a tobacco product from one province to another or to mail a tobacco product.

Publication d'une offre

(2) Il est interdit d'annoncer une offre de livraison d'un produit du tabac d'une province à l'autre ou d'envoi d'un produit du tabac par la poste.

Regulations

14. The Governor in Council may make regulations

Règlements

14. Le gouverneur en conseil peut, par règlement :

(*a*) prescribing the documentation that may be used to verify the age of a person for the purposes of subsection 8(2);

a) préciser les documents qui peuvent servir à prouver l'âge d'une personne dans le cadre du paragraphe 8(2);

(*b*) exempting persons from the application of sections 9, 11 and 13;

b) préciser les personnes qui peuvent être exemptées de l'application des articles 9, 11 et 13;

(*c*) prescribing signs that are required by section 9 to be posted, including their form, size, content, number and placement;

c) prévoir la forme, la taille et le contenu des affiches prévues à l'article 9, leur nombre et les endroits où elles doivent être placées;

(*d*) prescribing tobacco products for the purposes of subsection 10(2);

d) préciser les produits du tabac auxquels s'applique le paragraphe 10(2);

(*e*) respecting exemptions from the application of section 12;

e) régir les exemptions de l'application de l'article 12;

(*f*) prescribing anything that by this Part is to be prescribed; and

f) prendre toute autre mesure d'ordre réglementaire prévue par la présente partie;

(*g*) generally for carrying out the purposes of this Part.

g) prendre, de façon générale, les mesures nécessaires à l'application de la présente partie.

PART III

LABELLING

PARTIE III

ÉTIQUETAGE

Information required on packages

15. (1) No manufacturer or retailer shall sell a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions, and about the health hazards and health effects arising from the use of the product or from its emissions.

Information — emballage

15. (1) Il est interdit au fabricant et au détaillant de vendre un produit du tabac à moins que ne figure sur l'emballage, en la forme et selon les modalités réglementaires, l'information — exigée par les règlements — sur le produit et ses émissions ainsi que sur les dangers pour la santé et les effets sur celle-ci liés à l'usage du produit et à ses émissions.

Information required on leaflet

(2) If required by the regulations, every manufacturer or retailer shall provide, in the prescribed form and manner, a leaflet that dis-

Information — prospectus

(2) Si les règlements l'exigent, le fabricant ou le détaillant est tenu de remettre, en la forme et selon les modalités réglementaires, un pros-

plays the information required by the regulations about a tobacco product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

Attribution

(3) The information referred to in subsections (1) and (2) may be attributed to a prescribed person or body if the attribution is made in the prescribed manner.

Existing obligations saved

16. This Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of a provincial legislature to warn consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions.

Regulations

17. The Governor in Council may make regulations

(*a*) respecting the information that must appear on packages and in leaflets about tobacco products and their emissions and the health hazards and health effects arising from the use of the products and from their emissions;

(*b*) prescribing anything that by this Part is to be prescribed; and

(*c*) generally for carrying out the purposes of this Part.

PART IV

PROMOTION

Definition of "promotion"

18. (1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

Application

(2) This Part does not apply to

(*a*) a literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that uses or depicts a tobacco product or tobacco product-related brand element, whatever the mode or form of its expression, if no consideration is given directly or indirectly for that

pectus comportant l'information exigée par les règlements sur le produit et ses émissions ainsi que sur les dangers pour la santé et les effets sur celle-ci liés à l'usage du produit et à ses émissions.

Attribution

(3) L'information visée aux paragraphes (1) et (2) peut être attribuée à un organe ou une personne désignés par règlement si l'attribution est faite selon les modalités réglementaires.

Maintien d'obligations existantes

16. La présente partie n'a pas pour effet de libérer le fabricant ou le détaillant de toute obligation — qu'il peut avoir, au titre de toute règle de droit, notamment aux termes d'une loi fédérale ou provinciale — d'avertir les consommateurs des dangers pour la santé et des effets sur celle-ci liés à l'usage du produit et à ses émissions.

Règlements

17. Le gouverneur en conseil peut, par règlement :

a) régir l'information sur les produits du tabac et leurs émissions, et sur les dangers pour la santé et les effets sur celle-ci liés à l'usage du produit et à ses émissions qui doit figurer sur l'emballage ou que doit comporter le prospectus;

b) prendre toute autre mesure d'ordre réglementaire prévue par la présente partie;

c) prendre, de façon générale, les mesures nécessaires à l'application de la présente partie.

PARTIE IV

PROMOTION

Définition de « promotion »

18. (1) Dans la présente partie, « promotion » s'entend de la présentation, par tout moyen, d'un produit ou d'un service — y compris la communication de renseignements sur son prix ou sa distribution — , directement ou indirectement, susceptible d'influencer et de créer des attitudes, croyances ou comportements au sujet de ce produit ou service.

Application

(2) La présente partie ne s'applique pas :

a) aux œuvres littéraires, dramatiques, musicales, cinématographiques, artistiques, scientifiques ou éducatives — quels qu'en soient le mode ou la forme d'expression — sur ou dans lesquelles figure un produit du tabac ou un élément de marque d'un produit du tabac, sauf si un fabricant ou un détaillant a donné

use or depiction in the work, production or performance;

(*b*) a report, commentary or opinion in respect of a tobacco product or a brand of tobacco product if no consideration is given by a manufacturer or retailer, directly or indirectly, for the reference to the tobacco product or brand in that report, commentary or opinion; or

(*c*) a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.

une contrepartie, directement ou indirectement, pour la représentation du produit ou de l'élément de marque dans ces œuvres;

b) aux comptes rendus, commentaires et opinions portant sur un produit du tabac ou une marque d'un produit du tabac et relativement à ce produit ou à cette marque, sauf si un fabricant ou un détaillant a donné une contrepartie, directement ou indirectement, pour la mention du produit ou de la marque;

c) aux promotions faites par un tabaculteur ou un fabricant auprès des tabaculteurs, des fabricants, des personnes qui distribuent des produits du tabac ou des détaillants, mais non directement ou indirectement auprès des consommateurs.

Prohibition

19. No person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or the regulations.

Interdiction

19. Il est interdit de faire la promotion d'un produit du tabac ou d'un élément de marque d'un produit du tabac, sauf dans la mesure où elle est autorisée par la présente loi ou ses règlements.

False promotion

20. No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

Promotion trompeuse

20. Il est interdit de faire la promotion d'un produit du tabac, y compris sur l'emballage de celui-ci, d'une manière fausse ou trompeuse ou susceptible de créer une fausse impression sur les caractéristiques, les effets sur la santé ou les dangers pour celle-ci du produit ou de ses émissions.

Testimonials or endorsements

21. (1) No person shall promote a tobacco product by means of a testimonial or an endorsement, however displayed or communicated.

Attestations et témoignages

21. (1) Il est interdit de faire la promotion d'un produit du tabac, y compris sur l'emballage de celui-ci, au moyen d'attestations ou de témoignages, quelle que soit la façon dont ils sont exposés ou communiqués.

Depiction of person

(2) For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.

Représentation

(2) Pour l'application du paragraphe (1), la représentation d'une personne, d'un personnage ou d'un animal, réel ou fictif, est considérée comme une attestation ou un témoignage.

Exception

(3) This section does not apply to a trademark that appeared on a tobacco product for sale in Canada on December 2, 1996.

Exception

(3) Le présent article ne s'applique pas aux marques de commerce qui figurent sur un produit du tabac en vente au Canada le 2 décembre 1996.

Advertising

22. (1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.

Publicité

22. (1) Il est interdit, sous réserve des autres dispositions du présent article, de faire la promotion d'un produit du tabac par des annonces qui représentent tout ou partie d'un produit du tabac, de l'emballage de celui-ci ou d'un élément de marque d'un produit du tabac, ou qui

Exception

(2) Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in

(*a*) a publication that is provided by mail and addressed to an adult who is identified by name; or

(*b*) [Repealed, 2009, c. 27, s. 11]

(*c*) signs in a place where young persons are not permitted by law.

Lifestyle advertising

(3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

Definitions

(4) The definitions in this subsection apply in this section.

"brand-preference advertising" « *publicité préférentielle* »

"brand-preference advertising" means advertising that promotes a tobacco product by means of its brand characteristics.

"information advertising" « *publicité informative* »

"information advertising" means advertising that provides factual information to the consumer about

(*a*) a product and its characteristics; or

(*b*) the availability or price of a product or brand of product.

"lifestyle advertising" « *publicité de style de vie* »

"lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

1997, c. 13, s. 22; 2009, c. 27, s. 11.

Packaging

23. No person shall package a tobacco product in a manner that is contrary to this Act or the regulations.

Prohibited additives — packaging

23.1 (1) No person shall package a tobacco product set out in column 2 of the schedule in a manner that suggests, including through illustrations, that it contains an additive set out in column 1.

Prohibition — sale

(2) No person shall sell a tobacco product set out in column 2 of the schedule that is packaged in a manner prohibited by subsection (1).

2009, c. 27, s. 12.

évoquent le produit du tabac ou un élément de marque d'un produit du tabac.

Exception

(2) Il est possible, sous réserve des règlements, de faire la publicité — publicité informative ou préférentielle — d'un produit du tabac :

a) dans les publications qui sont expédiées par le courrier et qui sont adressées à un adulte désigné par son nom;

b) [Abrogé, 2009, ch. 27, art. 11]

c) sur des affiches placées dans des endroits dont l'accès est interdit aux jeunes par la loi.

Publicité de style de vie

(3) Le paragraphe (2) ne s'applique pas à la publicité de style de vie ou à la publicité dont il existe des motifs raisonnables de croire qu'elle pourrait être attrayante pour les jeunes.

Définitions

(4) Les définitions qui suivent s'appliquent au présent article.

« publicité de style de vie » "*lifestyle advertising*"

« publicité de style de vie » Publicité qui associe un produit avec une façon de vivre, tels le prestige, les loisirs, l'enthousiasme, la vitalité, le risque ou l'audace ou qui évoque une émotion ou une image, positive ou négative, au sujet d'une telle façon de vivre.

« publicité informative » "*information advertising*"

« publicité informative » Publicité qui donne au consommateur des renseignements factuels et qui porte :

a) sur un produit ou ses caractéristiques;

b) sur la possibilité de se procurer un produit ou une marque d'un produit ou sur le prix du produit ou de la marque.

« publicité préférentielle » "*brand-preference advertising*"

« publicité préférentielle » Publicité qui fait la promotion d'un produit du tabac en se fondant sur les caractéristiques de sa marque.

1997, ch. 13, art. 22; 2009, ch. 27, art. 11.

Emballage

23. Il est interdit d'emballer un produit du tabac d'une manière non conforme à la présente loi et aux règlements.

Emballage — additifs interdits

23.1 (1) Il est interdit d'emballer un produit du tabac visé à la colonne 2 de l'annexe d'une manière qui donne à penser, notamment en raison d'illustrations, qu'il contient un additif visé à la colonne 1.

Vente interdite

(2) Il est interdit de vendre un produit du tabac visé à la colonne 2 de l'annexe s'il est ainsi emballé.

2009, ch. 27, art. 12.

Prohibition — sponsorship promotion

24. No person may display a tobacco product-related brand element or the name of a tobacco manufacturer in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility.

1997, c. 13, s. 24; 1998, c. 38, s. 1.

Interdiction — promotion de commandite

24. Il est interdit d'utiliser, directement ou indirectement, un élément de marque d'un produit du tabac ou le nom d'un fabricant sur le matériel relatif à la promotion d'une personne, d'une entité, d'une manifestation, d'une activité ou d'installations permanentes.

1997, ch. 13, art. 24; 1998, ch. 38, art. 1.

Prohibition — name of facility

25. No person may display a tobacco product-related brand element or the name of a tobacco manufacturer on a permanent facility, as part of the name of the facility or otherwise, if the tobacco product-related brand element or name is thereby associated with a sports or cultural event or activity.

1997, c. 13, s. 25; 1998, c. 38, s. 2.

Interdiction — élément ou nom figurant dans la dénomination

25. Il est interdit d'utiliser un élément de marque d'un produit du tabac ou le nom d'un fabricant sur des installations permanentes, notamment dans la dénomination de celles-ci, si l'élément ou le nom est de ce fait associé à une manifestation ou activité sportive ou culturelle.

1997, ch. 13, art. 25; 1998, ch. 38, art. 2.

Accessories

26. (1) Subject to the regulations, a manufacturer or retailer may sell an accessory that displays a tobacco product-related brand element.

Accessoires

26. (1) Sous réserve des règlements, le fabricant ou le détaillant peut vendre, à titre onéreux, un accessoire sur lequel figure un élément de marque d'un produit du tabac.

Promotion

(2) No person shall promote an accessory that displays a tobacco product-related brand element except in the prescribed manner and form and in a publication or place described in paragraphs 22(2)(*a*) and (*c*).

1997, c. 13, s. 26; 2009, c. 27, s. 13.

Promotion

(2) Il est interdit de faire la promotion d'accessoires sur lesquels figure un élément de marque d'un produit du tabac sauf selon les modalités réglementaires et dans les publications ou les endroits mentionnés aux alinéas 22(2)*a*) et *c*).

1997, ch. 13, art. 26; 2009, ch. 27, art. 13.

Non-tobacco product displaying tobacco brand element

27. No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or is used with a service, if the non-tobacco product or service

(*a*) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons; or

(*b*) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

Articles associés aux jeunes ou à un style de vie

27. Il est interdit de fournir ou de promouvoir un produit du tabac si l'un de ses éléments de marque figure sur des articles autres que des produits du tabac — à l'exception des accessoires — ou est utilisé pour des services et que ces articles ou ces services :

a) soit sont associés aux jeunes ou dont il existe des motifs raisonnables de croire qu'ils pourraient être attrayants pour les jeunes;

b) soit sont associés avec une façon de vivre, tels le prestige, les loisirs, l'enthousiasme, la vitalité, le risque ou l'audace.

Exception — tobacco product

28. (1) Subject to the regulations, a person may sell a tobacco product, or advertise a tobacco product in accordance with section 22, if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or used with a service, if the non-tobacco product or service does not fall within the criteria described in paragraphs 27(*a*) and (*b*).

Autres articles

28. (1) Sous réserve des règlements, il est possible de vendre un produit du tabac ou d'en faire la publicité conformément à l'article 22 dans les cas où l'un de ses éléments de marque figure sur des articles autres que des produits du tabac — à l'exception des accessoires — ou est utilisé pour des services qui ne sont pas visés par les alinéas 27*a*) ou *b*).

Exception — non-tobacco product

(2) Subject to the regulations, a person may promote a non-tobacco product, other than an

Promotion

(2) Sous réserve des règlements, il est possible de promouvoir des articles autres que des

accessory, that displays a tobacco product-related brand element, or a service that uses a tobacco product-related brand element, to which section 27 does not apply.

produits du tabac — à l'exception des accessoires — portant un élément de marque d'un produit du tabac ou des services utilisant un tel élément qui ne sont pas visés à l'article 27.

Sales promotions

29. No manufacturer or retailer shall

(*a*) offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, lottery or contest;

(*b*) furnish a tobacco product without monetary consideration or in consideration of the purchase of a product or service or the performance of a service; or

(*c*) furnish an accessory that bears a tobacco product-related brand element without monetary consideration or in consideration of the purchase of a product or service or the performance of a service.

29. Il est interdit au fabricant et au détaillant :

a) d'offrir ou de donner, directement ou indirectement, une contrepartie pour l'achat d'un produit du tabac, notamment un cadeau à l'acheteur ou à un tiers, une prime, un rabais ou le droit de participer à un tirage, à une loterie ou à un concours;

b) de fournir un produit du tabac à titre gratuit ou en contrepartie de l'achat d'un produit ou d'un service ou de la prestation d'un service;

c) de fournir un accessoire sur lequel figure un élément de marque d'un produit du tabac à titre gratuit ou en contrepartie de l'achat d'un produit ou d'un service ou de la prestation d'un service.

Promotion des ventes

Retail display of tobacco products

30. (1) Subject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element.

30. (1) Sous réserve des règlements, il est possible, dans un établissement de vente au détail, d'exposer des produits du tabac et des accessoires portant un élément de marque d'un produit du tabac.

Autorisation

Signs

(2) A retailer of tobacco products may post, in accordance with the regulations, signs at retail that indicate the availability of tobacco products and their price.

(2) Il est possible pour un détaillant, sous réserve des règlements, de signaler dans son établissement que des produits du tabac y sont vendus et d'indiquer leurs prix.

Affiches

Communication media

31. (1) No person shall, on behalf of another person, with or without consideration, publish, broadcast or otherwise disseminate any promotion that is prohibited by this Part.

31. (1) Il est interdit, à titre gratuit ou onéreux et pour le compte d'une autre personne, de diffuser, notamment par la presse ou la radiotélévision, toute promotion interdite par la présente partie.

Médias

Exception

(2) Subsection (1) does not apply to the distribution for sale of an imported publication or the retransmission of radio or television broadcasts that originate outside Canada.

(2) Le paragraphe (1) ne s'applique pas à la distribution en vue de la vente de publications importées au Canada ou à la retransmission d'émissions de radio ou de télévision de l'étranger.

Exception

Foreign media

(3) No person in Canada shall, by means of a publication that is published outside Canada, a broadcast that originates outside Canada or any communication other than a publication or broadcast that originates outside Canada, promote any product the promotion of which is regulated under this Part, or disseminate promotional material that contains a tobacco prod-

(3) Il est interdit à toute personne se trouvant au Canada de faire la promotion, dans une publication ou une émission provenant de l'étranger ou dans une communication, autre qu'une publication ou une émission, provenant de l'étranger, d'un produit à la promotion duquel s'applique la présente partie ou de diffuser du matériel relatif à une promotion contenant un élément de marque d'un produit du tabac

Usage des médias étrangers

uct-related brand element in a way that is contrary to this Part.

Report to Minister

32. Every manufacturer shall provide the Minister, in the prescribed manner and within the prescribed time, with the prescribed information about any promotion under this Part.

REGULATIONS

Regulations

33. The Governor in Council may make regulations

(*a*) respecting the promotion of tobacco products and tobacco product-related brand elements and the packaging of tobacco products, including the form, manner and conditions of the promotion and packaging, and the promotion of services and non-tobacco products for the purposes of section 28;

(*b*) respecting the advertisement of tobacco products for the purposes of subsection 22(2);

(*c*) and (*d*) [Repealed, 1998, c. 38, s. 3]

(*e*) respecting, for the purposes of subsection 26(1), the manner in which a tobacco product-related brand element may appear on an accessory;

(*f*) respecting the display of tobacco products and accessories at retail;

(*g*) respecting signs that a retailer may post under subsection 30(2), including the placement of the signs and their number, size and content;

(*h*) requiring manufacturers to disclose the particulars of their tobacco product-related brand elements and promotional activities;

(*i*) prescribing anything that by this Part is to be prescribed; and

(*j*) generally for carrying out the purposes of this Part.

1997, c. 13, s. 33; 1998, c. 38, s. 3.

d'une manière non conforme à la présente partie.

Renseignements

32. Le fabricant est tenu de transmettre au ministre les renseignements exigés par les règlements, dans les délais et selon les modalités réglementaires, sur les promotions visées par la présente partie.

RÈGLEMENTS

Règlements

33. Le gouverneur en conseil peut, par règlement :

a) régir l'emballage et la promotion des produits du tabac et l'utilisation des éléments de marque de ces produits, y compris les modalités et les conditions applicables à l'emballage et à la promotion, et la promotion des articles et services visés à l'article 28;

b) régir la publicité des produits du tabac pour l'application du paragraphe 22(2);

c) et *d*) [Abrogés, 1998, ch. 38, art. 3]

e) régir, pour l'application du paragraphe 26(1), la manière dont un élément de marque d'un produit du tabac peut figurer sur les accessoires;

f) régir l'exposition des produits du tabac et des accessoires dans les établissements de vente au détail;

g) régir, pour l'application du paragraphe 30(2), les affiches que le détaillant peut placer, y compris leur contenu, leur taille, leur nombre et les endroits où elles peuvent être placées;

h) exiger d'un fabricant qu'il fournisse les détails de ses éléments de marque et de ses activités de promotion;

i) prendre toute autre mesure d'ordre réglementaire prévue par la présente partie;

j) prendre, de façon générale, les mesures nécessaires à l'application de la présente partie.

1997, ch. 13, art. 33; 1998, ch. 38, art. 3.

PART V

ENFORCEMENT

INSPECTION

Designation of inspectors and analysts

34. (1) The Minister may designate any person or class of persons as an inspector or ana-

PARTIE V

CONTRÔLE D'APPLICATION

INSPECTION

Inspecteurs et analystes

34. (1) Pour le contrôle d'application de la présente loi, le ministre peut désigner des per-

lyst for the purposes of this Act and must provide every inspector and analyst with a certificate of designation, in the form determined by the Minister.

sonnes ou catégories de personnes pour remplir les fonctions d'inspecteur ou d'analyste; le cas échéant, il leur remet un certificat établi en la forme qu'il prévoit et attestant leur qualité.

Certificate must be produced

(2) An inspector entering a place under this Act must, on request, show the certificate to the person in charge of the place.

(2) L'inspecteur doit, sur demande, présenter son certificat au responsable des lieux visités en application de la présente loi.

Production du certificat

Places inspectors may enter

35. (1) For the purpose of ensuring compliance with this Act, an inspector may, subject to section 36, at any reasonable time, enter any place, other than a means of transportation, in which the inspector believes on reasonable grounds

(*a*) a tobacco product is manufactured, tested, stored, packaged, labelled or sold;

(*b*) there is anything used in the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product; or

(*c*) there is any information relating to the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product.

35. (1) En vue de faire observer la présente loi, l'inspecteur peut, à toute heure convenable et sous réserve de l'article 36, procéder à la visite de tout lieu — à l'exception d'un moyen de transport — où, à son avis :

a) sont fabriqués, soumis à des essais, entreposés, emballés, étiquetés ou vendus des produits du tabac;

b) se trouvent des choses utilisées dans le cadre de la fabrication, l'emballage, l'étiquetage, la promotion ou la vente de produits du tabac, ou dans le cadre d'essais;

c) se trouvent des renseignements relatifs à la fabrication, l'emballage, l'étiquetage, la promotion ou la vente de produits du tabac, ou aux essais.

L'avis de l'inspecteur doit être fondé sur des motifs raisonnables.

Visite

Powers of inspector

(2) In carrying out an inspection, an inspector may

(*a*) examine a tobacco product or thing referred to in paragraph (1)(*b*);

(*b*) require any person in the place to produce for inspection, in the manner and form requested by the inspector, the tobacco product or thing;

(*c*) open or require any person in the place to open any container or package found in the place that the inspector believes on reasonable grounds contains the tobacco product or thing;

(*d*) take or require any person in the place to produce a sample of the tobacco product or thing;

(*e*) conduct any test or analysis or take any measurements; or

(*f*) require any person found in the place to produce for inspection or copying any written or electronic information that is relevant

(2) Dans le cadre de sa visite, l'inspecteur peut :

a) examiner des produits du tabac et les choses mentionnées à l'alinéa (1)*b*);

b) exiger la présentation, pour examen, de tels produits ou choses, selon les modalités et les conditions qu'il précise;

c) ouvrir ou faire ouvrir tout contenant ou emballage où, à son avis, se trouvent de tels produits ou choses;

d) prélever ou faire prélever des échantillons de tels produits ou choses;

e) effectuer des essais, des analyses et des mesures;

f) exiger, aux fins d'examen ou de reproduction, la communication de tout renseignement — sur support électronique ou autre — utile à l'application de la présente loi.

L'avis de l'inspecteur doit être fondé sur des motifs raisonnables.

Pouvoirs de l'inspecteur

to the administration or enforcement of this Act.

Use of computers and copying equipment

(3) In carrying out an inspection, an inspector may

(*a*) use or cause to be used any computer system in the place to examine data contained in or available to the computer system that is relevant to the administration or enforcement of this Act;

(*b*) reproduce the data in the form of a printout or other intelligible output and take it for examination or copying; and

(*c*) use or cause to be used any copying equipment in the place to make copies of any data, record or document.

Usage d'ordinateurs et de photocopieuses

(3) Dans le cadre de sa visite, l'inspecteur peut :

a) utiliser ou faire utiliser tout système informatique se trouvant sur place pour prendre connaissance des données — utiles à l'application de la présente loi — qu'il contient ou auxquelles il donne accès;

b) obtenir ces données sous toute forme intelligible et les emporter aux fins d'examen ou de reproduction;

c) utiliser ou faire utiliser le matériel se trouvant sur place pour faire des copies de tous documents ou données.

Entry of dwelling-place

36. (1) An inspector may not enter a dwelling-place except with the consent of the occupant or under the authority of a warrant issued under subsection (2).

Mandat pour un local d'habitation

36. (1) L'inspecteur ne peut procéder à la visite d'un local d'habitation sans l'autorisation de l'occupant que s'il est muni du mandat prévu au paragraphe (2).

Authority to issue warrant

(2) On *ex parte* application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant authorizing the inspector named in the warrant to enter and inspect a dwelling-place, subject to any conditions specified in the warrant, if the justice is satisfied by information on oath

(*a*) that the dwelling-place is a place referred to in subsection 35(1);

(*b*) that entry to the dwelling-place is necessary for the administration or enforcement of this Act; and

(*c*) that the occupant does not consent to the entry, or that entry has been refused or there are reasonable grounds for believing that it will be refused.

Délivrance du mandat

(2) Sur demande *ex parte*, le juge de paix au sens de l'article 2 du *Code criminel* peut délivrer un mandat autorisant, sous réserve des conditions éventuellement fixées, l'inspecteur qui y est nommé à procéder à la visite d'un local d'habitation, s'il est convaincu, sur la foi d'une dénonciation faite sous serment, que sont réunis les éléments suivants :

a) les circonstances prévues au paragraphe 35(1) existent;

b) la visite est nécessaire pour l'application de la présente loi;

c) soit un refus a été opposé à la visite ou il y a des motifs raisonnables de croire que tel sera le cas, soit il n'est pas possible d'obtenir le consentement de l'occupant.

Use of force

(3) An inspector executing the warrant shall not use force unless the inspector is accompanied by a peace officer and the use of force is specifically authorized in the warrant.

Usage de la force

(3) L'inspecteur ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.

Certificate of analysis

37. An analyst who has analysed or examined a thing under this Act, or a sample of it, may issue a certificate or report setting out the results of the analysis or examination.

Analyse et examen

37. L'inspecteur peut soumettre à l'analyste, pour analyse ou examen, des choses ou des échantillons visés par la présente loi; celui-ci peut, après analyse ou examen, délivrer un certificat ou produire un rapport où sont donnés ses résultats.

Assistance to inspectors

38. (1) The owner of a place inspected by an inspector under this Act, the person in

Assistance à l'inspecteur

38. (1) Le propriétaire ou le responsable du lieu visité, ainsi que quiconque s'y trouve, est tenu de prêter à l'inspecteur toute l'assistance

charge of the place and every person found in the place shall

(*a*) provide all reasonable assistance to enable the inspector to carry out the inspector's duties under this Act; and

(*b*) furnish the inspector with the information that the inspector reasonably requires for that purpose.

possible et de lui donner les renseignements qu'il peut valablement exiger.

Obstruction

(2) No person shall obstruct or hinder, or knowingly make a false or misleading statement to, an inspector who is carrying out duties under this Act.

(2) Il est interdit d'entraver l'action de l'inspecteur ou de lui faire en connaissance de cause une déclaration fausse ou trompeuse.

Entrave et fausses déclarations

SEIZURE AND RESTORATION

SAISIE ET RESTITUTION

Seizure

39. (1) During an inspection under this Act, an inspector may seize any tobacco product or other thing by means of which or in relation to which the inspector believes on reasonable grounds that this Act has been contravened.

39. (1) Au cours de la visite, l'inspecteur peut saisir toute chose — notamment un produit du tabac — dont il a des motifs raisonnables de croire qu'elle a servi ou donné lieu à une infraction à la présente loi.

Saisie

Storage and removal

(2) The inspector may direct that any tobacco product or thing seized be kept or stored in the place where it was seized or that it be removed to another place.

(2) L'inspecteur peut exiger que la chose saisie soit entreposée sur les lieux; il peut également exiger qu'elle soit transférée dans un autre lieu.

Entreposage et transfert

Interference

(3) Unless authorized by an inspector, no person shall remove, alter or interfere in any way with any tobacco product or other thing seized.

(3) Il est interdit, sans autorisation de l'inspecteur, de déplacer la chose saisie, ou d'en modifier l'état de quelque manière que ce soit.

Interdiction

Application for restoration

40. (1) Any person from whom a tobacco product or thing was seized may, within sixty days after the date of seizure, apply to a provincial court judge within whose jurisdiction the seizure was made for an order of restoration, if the person sends a notice containing the prescribed information to the Minister within the prescribed time and in the prescribed manner.

40. (1) La personne dont la chose a été saisie peut, dans les soixante jours suivant la date de saisie et à la condition que la personne adresse au ministre, en la manière et dans le délai réglementaires, un préavis contenant les renseignements réglementaires, demander à un juge de la cour provinciale dans le ressort duquel la saisie a été faite de rendre une ordonnance de restitution.

Demande de restitution

Order of restoration

(2) The provincial court judge may order that the tobacco product or thing be restored immediately to the applicant if, on hearing the application, the judge is satisfied

(*a*) that the applicant is entitled to possession of the tobacco product or thing seized; and

(*b*) that the tobacco product or thing seized is not and will not be required as evidence in any proceedings in respect of an offence under this Act.

(2) Le juge de la cour provinciale ordonne la restitution immédiate si, après audition de la demande, il est convaincu :

a) d'une part, que le demandeur a droit à la possession de la chose saisie;

b) d'autre part, que celle-ci ne sert pas ou ne servira pas de preuve dans une procédure relative à une infraction à la présente loi.

Ordonnance de restitution immédiate

Order of later restoration

(3) Where, on hearing an application made under subsection (1), the provincial court judge is satisfied that the applicant is entitled to possession of the tobacco product or thing seized but is not satisfied with respect to the matters mentioned in paragraph (2)(*b*), the judge may order that the product or thing seized be restored to the applicant

(*a*) on the expiration of one hundred and eighty days after the date of the seizure if no proceedings in respect of an offence under this Act have been commenced before that time; or

(*b*) on the final conclusion of any such proceedings, in any other case.

Restitution différée

(3) Si le juge de la cour provinciale est convaincu du droit du demandeur à la possession de la chose saisie sans avoir la conviction visée à l'alinéa (2)*b*), il ordonne qu'elle soit restituée au demandeur :

a) dès l'expiration d'un délai de cent quatre-vingts jours à compter de la date de saisie, sauf introduction, dans ce délai, d'une poursuite visant une infraction à la présente loi;

b) dès que la poursuite est définitivement tranchée, dans les autres cas.

No restoration where forfeiture by consent

(4) The provincial court judge may not make an order under this section for restoration of a tobacco product or thing if it has been forfeited by consent under subsection 41(3).

Confiscation sur consentement

(4) Il ne peut être rendu d'ordonnance en vertu du présent article si la chose saisie a été confisquée en application du paragraphe 41(3).

Forfeiture

41. (1) Where no application has been made under subsection 40(1) for the restoration of a tobacco product or thing seized under this Act within sixty days after the date of the seizure, or an application has been made but on the hearing of the application no order of restoration is made, the product or thing is forfeited to Her Majesty and may be disposed of as the Minister directs.

Confiscation

41. (1) Si aucune demande de restitution n'est faite dans les soixante jours qui suivent la date de saisie, ou si la demande qui est faite n'est pas, après audition, suivie d'une ordonnance de restitution, la chose saisie est confisquée au profit de Sa Majesté; il en est disposé conformément aux instructions du ministre.

Forfeiture on conviction

(2) Where a person has been convicted of an offence under this Act, any tobacco product or thing seized under this Act by means of or in respect of which the offence was committed is forfeited to Her Majesty and may be disposed of as the Minister directs.

Confiscation — déclaration de culpabilité

(2) Sur déclaration de culpabilité de l'auteur de toute infraction à la présente loi, la chose saisie qui a servi ou donné lieu à l'infraction est confisquée au profit de Sa Majesté; il en est disposé conformément aux instructions du ministre.

Forfeiture with consent

(3) Where an inspector has seized a tobacco product or thing and the owner or the person in whose possession it was at the time of seizure consents in writing to its forfeiture, the product or thing is forfeited to Her Majesty and may be destroyed or disposed of as the Minister directs.

Confiscation sur consentement

(3) Le propriétaire ou le dernier possesseur de la chose saisie peut consentir par écrit à sa confiscation. Elle est dès lors confisquée au profit de Sa Majesté, et il en est disposé conformément aux instructions du ministre.

REGULATIONS

RÈGLEMENTS

Regulations

42. The Governor in Council may make regulations

(*a*) respecting the powers and duties of inspectors and analysts;

(*b*) respecting the taking of samples;

(*c*) prescribing anything that by this Part is to be prescribed; and

Règlements

42. Le gouverneur en conseil peut, par règlement :

a) régir les pouvoirs et fonctions des inspecteurs et des analystes;

b) régir le prélèvement d'échantillons;

c) prendre toute autre mesure d'ordre réglementaire prévue par la présente partie;

(*d*) generally for carrying out the purposes of this Part.

d) prendre, de façon générale, les mesures nécessaires à l'application de la présente partie.

PART V.1

LAYING OF PROPOSED REGULATIONS

PARTIE V.1

DÉPÔT DES PROJETS DE RÈGLEMENT

Laying of proposed regulations

42.1 (1) The Governor in Council may not make a regulation under section 7, 14, 17, 33 or 42 unless the Minister has first laid the proposed regulation before the House of Commons.

Dépôt des projets de règlement

42.1 (1) Le gouverneur en conseil ne peut prendre de règlement en vertu de l'article 7, 14, 17, 33 ou 42 à moins que le ministre n'ait fait déposer le projet de règlement devant la Chambre des communes.

Report by committee

(2) A proposed regulation that is laid before the House of Commons is deemed to be automatically referred to the appropriate committee of the House, as determined by the rules of the House, and the committee may conduct inquiries or public hearings with respect to the proposed regulation and report its findings to the House.

Rapport du comité

(2) Tout comité compétent, d'après le règlement de la Chambre des communes, est automatiquement saisi du projet de règlement et peut effectuer une enquête ou tenir des audiences publiques à cet égard et faire rapport de ses conclusions à la Chambre.

Making of regulations

(3) The Governor in Council may make a regulation under section 7, 14, 17, 33 or 42 only if

(*a*) the House of Commons has not concurred in any report from a committee respecting the proposed regulation within the thirty sitting days following the day on which the proposed regulation was laid before the House, in which case the regulation may only be made in the form laid; or

(*b*) the House of Commons has concurred in a report from a committee approving the proposed regulation or an amended version of it, in which case the Governor in Council may only make the regulation in the form concurred in.

Prise des règlements

(3) Le gouverneur en conseil peut prendre un règlement en vertu de l'article 7, 14, 33 ou 42 dans les cas suivants :

a) la Chambre des communes n'a donné son agrément à aucun rapport du comité au sujet du projet de règlement dans les trente jours de séance de la Chambre suivant le dépôt du projet de règlement; dans ce cas, le règlement pris doit être conforme au projet déposé;

b) la Chambre des communes a donné son agrément à un rapport du comité approuvant le projet de règlement avec ou sans modifications; dans ce cas, le gouverneur en conseil doit prendre un règlement conforme au projet agréé par la Chambre.

Definition of "sitting day"

(4) For the purpose of this section, "sitting day" means a day on which the House of Commons sits.

Définition de « jour de séance »

(4) Pour l'application du présent article, «jour de séance» s'entend d'un jour où la Chambre des communes siège.

PART VI

OFFENCES AND PUNISHMENT

PARTIE VI

INFRACTIONS ET PEINES

Packaging and promotion offences

43. Every person who contravenes section 5 or 19 is guilty of an offence and liable

(*a*) on summary conviction, to a fine not exceeding $100,000 or to imprisonment for a term not exceeding one year, or to both; or

(*b*) on conviction on indictment, to a fine not exceeding $300,000 or to imprisonment

Emballage et promotion

43. Quiconque contrevient aux articles 5 ou 19 commet une infraction et est passible, sur déclaration de culpabilité :

a) par procédure sommaire, d'une amende maximale de 100 000 $ et d'un emprisonnement maximal d'un an, ou de l'une de ces peines;

for a term not exceeding two years, or to both.

b) par mise en accusation, d'une amende maximale de 300 000 $ et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

Prohibited additives — manufacturer

43.1 Every manufacturer who contravenes subsection 5.1(1), 5.2(1) or 23.1(1) or (2) is guilty of an offence and liable on summary conviction to a fine not exceeding $300,000 or to imprisonment for a term not exceeding two years, or to both.

2009, c. 27, s. 14.

Additifs interdits — fabricants

43.1 Le fabricant qui contrevient aux paragraphes 5.1(1), 5.2(1) ou 23.1(1) ou (2) commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 300 000 $ et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

2009, ch. 27, art. 14.

Prohibited additives — retailer

43.2 Every retailer who contravenes subsection 5.2(1) or 23.1(2) is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000.

2009, c. 27, s. 14.

Additifs interdits — détaillants

43.2 Le détaillant qui contrevient aux paragraphes 5.2(1) ou 23.1(2) commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 50 000 $.

2009, ch. 27, art. 14.

Summary offence

44. Every person who contravenes subsection 6(1) or (2), 10(1) or (2), 26(1) or (2) or 31(1) or (3), section 32 or subsection 38(1) or (2) is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding six months, or to both.

1997, c. 13, s. 44; 2009, c. 27, s. 15.

Infractions — procédure sommaire

44. Quiconque contrevient aux paragraphes 6(1) ou (2), 10(1) ou (2), 26(1) ou (2) ou 31(1) ou (3), à l'article 32 ou aux paragraphes 38(1) ou (2) commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 50 000 $ et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

1997, ch. 13, art. 44; 2009, ch. 27, art. 15.

Sales to youth, promotions

45. Every person who contravenes section 8, 9, 11 or 12, or any retailer who contravenes section 29, is guilty of an offence and liable on summary conviction

(*a*) for a first offence, to a fine not exceeding $3,000; and

(*b*) for a subsequent offence, to a fine not exceeding $50,000.

Vente aux jeunes et promotion

45. Quiconque contrevient aux articles 8, 9, 11 ou 12 ou le détaillant qui contrevient à l'article 29 commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire :

a) pour une première infraction, d'une amende maximale de 3 000 $;

b) pour toute infraction subséquente, d'une amende maximale de 50 000 $.

Offence by retailer

46. (1) Every retailer who contravenes subsection 15(1) or (2) is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000.

Infractions — détaillants

46. (1) Le détaillant qui contrevient aux paragraphes 15(1) ou (2) commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 50 000 $.

Offence by manufacturer

(2) Every manufacturer who contravenes subsection 15(1) or (2) or section 29 is guilty of an offence and liable on summary conviction to a fine not exceeding $300,000 or to imprisonment for a term not exceeding two years, or to both.

Infractions — fabricants

(2) Le fabricant qui contrevient aux paragraphes 15(1) ou (2) ou à l'article 29 commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 300 000 $ et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

General offence

47. Every person who contravenes subsection 13(1) or (2), section 20, subsection 21(1) or 22(1) or section 23 or 27 is guilty of an offence and liable on summary conviction to a fine not exceeding $300,000 or to imprisonment for a term not exceeding two years, or to both.

Infractions

47. Quiconque contrevient aux paragraphes 13(1) ou (2), à l'article 20, aux paragraphes 21(1) ou 22(1) ou aux articles 23 ou 27 commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 300 000 $ et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

Where no other penalty

48. Every person who contravenes a provision of this Act or the regulations for which no other penalty is provided in this Act is guilty of an offence and liable on summary conviction to a fine not exceeding $25,000.

Infractions — autres dispositions

48. Quiconque contrevient à une disposition de la loi ou des règlements pour laquelle aucune peine n'est prévue commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 25 000 $.

Continuing offence

49. A person who commits or continues an offence under this Act on more than one day is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

Infraction distincte

49. Il est compté une infraction distincte pour chacun des jours au cours desquels se commet ou se continue l'infraction.

Offence by director or officer of corporation

50. Where a corporation commits an offence under this Act, any director or officer of the corporation who authorized or acquiesced in the offence is guilty of an offence and liable on conviction to the penalty provided for by this Act in respect of the offence committed by the corporation, whether or not the corporation has been prosecuted.

Administrateurs de la personne morale

50. En cas de perpétration par une personne morale d'une infraction à la présente loi, l'administrateur ou le dirigeant qui y a donné son autorisation ou son acquiescement est considéré comme coauteur de l'infraction et est passible, sur déclaration de culpabilité, de la peine prévue pour l'infraction en cause, que la personne morale ait été poursuivie ou non.

Limitation period

51. No prosecution for a summary conviction offence under this Act may be instituted after two years after the time when the subject-matter of the proceedings arose.

Prescription

51. Les poursuites visant une infraction punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par deux ans à compter de la perpétration de celle-ci.

Venue

52. A prosecution for an offence under this Act may be instituted, heard, tried and determined by a court in any jurisdiction in which the accused carries on business, regardless of where the subject-matter of the prosecution arose.

Tribunal compétent

52. Le tribunal dans le ressort duquel l'accusé exerce ses activités est compétent pour connaître de toute poursuite en matière d'infraction à la présente loi, indépendamment du lieu de perpétration.

Exception need not be pleaded

53. (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information or indictment for an offence under this Act or under section 463, 464 or 465 of the *Criminal Code* in respect of an offence under this Act.

Preuve d'exemption

53. (1) Dans les poursuites visant une infraction à la présente loi, ou engagées sous le régime des articles 463, 464 ou 465 du *Code criminel* et relatives à une telle infraction, il n'est pas nécessaire que soit énoncée ou niée, selon le cas, une exception, exemption, excuse ou réserve, prévue par le droit, dans la dénonciation ou l'acte d'accusation.

Proof of exemption

(2) In a prosecution for an offence referred to in subsection (1), the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused and the prosecutor is

Fardeau de la preuve

(2) Dans les poursuites visées au paragraphe (1), il incombe à l'accusé de prouver qu'une exception, exemption, excuse ou réserve, prévue par le droit, joue en sa faveur; quant au poursuivant, il n'est pas tenu, si ce n'est à titre

not required, except by way of rebuttal, to prove that it does not operate in favour of the accused, whether or not it is set out in the information or indictment.

de réfutation, de prouver que l'exception, l'exemption, l'excuse ou la réserve ne joue pas en faveur de l'accusé, qu'elle soit ou non énoncée dans la dénonciation ou l'acte d'accusation.

Offence by employee or agent

54. In a prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused and that the accused exercised all due diligence to prevent its commission.

Infraction commise par un employé ou un mandataire

54. Dans les poursuites visant une infraction à la présente loi, il suffit, pour la prouver, d'établir qu'elle a été commise par un employé ou un mandataire de l'accusé, que l'employé ou le mandataire ait été ou non identifié ou poursuivi. L'accusé peut se disculper en prouvant que la perpétration a eu lieu à son insu ou sans son consentement et qu'il a pris toutes les mesures nécessaires pour l'empêcher.

Certified copies and extracts

55. In a prosecution for an offence under this Act, a copy of any written or electronic information obtained during an inspection under this Act and certified by the inspector to be a true copy is admissible in evidence and is, in the absence of evidence to the contrary, proof of its contents.

Reproduction certifiée de documents

55. La reproduction de tout document — sur support électronique ou autre — obtenu dans le cadre d'une inspection, effectuée en vertu de la présente loi, qui est certifiée conforme par l'inspecteur est admissible en preuve dans les poursuites visant une infraction à la présente loi et, sauf preuve contraire, fait foi de son contenu.

Certificate or report of analyst as proof

56. (1) Subject to subsections (2) and (3), a certificate or report purporting to be signed by an analyst stating that the analyst has analysed anything to which this Act applies and stating the results of the analysis, is admissible in evidence in any prosecution for an offence under this Act without proof of the signature or official character of the person appearing to have signed the certificate or report.

Certificat ou rapport de l'analyste

56. (1) Sous réserve des paragraphes (2) et (3), le certificat ou le rapport censé signé par l'analyste, où il est déclaré que celui-ci a analysé une chose visée par la présente loi et où sont donnés ses résultats, est admissible en preuve dans les poursuites visant une infraction à la présente loi et fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Notice

(2) The certificate or report may not be received in evidence unless the party intending to produce it has, before the trial, given the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate or report.

Préavis

(2) Le certificat ou le rapport n'est admis en preuve que si la partie qui entend le produire donne à l'autre partie un préavis suffisant, accompagné d'une copie du certificat ou du rapport.

Attendance of analyst

(3) The party against whom the certificate or report is produced may, with leave of the court, require the attendance of the analyst for the purpose of cross-examination.

Présence de l'analyste

(3) La partie contre laquelle est produit le certificat ou le rapport peut, avec l'autorisation du tribunal, exiger la présence de l'analyste pour contre-interrogatoire.

Evidentiary presumptions

57. In a prosecution for a contravention of this Act,

(*a*) information on a package indicating that it contains a tobacco product is, in the absence of evidence to the contrary, proof that the package contains a tobacco product; and

Présomptions

57. Dans les poursuites visant une infraction à la présente loi :

a) la mention, sur l'emballage, selon laquelle celui-ci contient un produit du tabac fait foi, sauf preuve contraire, de ce fait;

b) le nom ou l'adresse, sur l'emballage, censés être le nom ou l'adresse de la personne

(*b*) a name or address on a package purporting to be the name or address of the person by whom the tobacco product was manufactured is, in the absence of evidence to the contrary, proof that it was manufactured by that person.

qui a fabriqué le produit du tabac fait foi, sauf preuve contraire, de l'identité du fabricant.

Additional fine

58. If an offender has been convicted of an offence under this Act and the court is satisfied that as a result of the commission of the offence the offender acquired any monetary benefits or that monetary benefits accrued to the offender, the court may order the offender to pay, despite the maximum amount of any fine that may otherwise be imposed under this Act, an additional fine in an amount equal to the court's estimation of the amount of those monetary benefits.

Amende supplémentaire

58. Le tribunal saisi d'une poursuite pour infraction à la présente loi peut, s'il constate que le contrevenant a tiré des avantages financiers de la perpétration de celle-ci, lui infliger, en sus du maximum prévu, une amende supplémentaire du montant qu'il juge égal à ces avantages.

Orders of court

59. When the court is sentencing an offender who has been convicted of an offence under this Act, in addition to any other punishment that may be imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:

(*a*) prohibiting the offender from doing any act or engaging in any activity that is likely to result in the continuation or repetition of the offence;

(*b*) prohibiting the offender from selling tobacco products for a period of not more than one year, in the case of a subsequent offence under section 8, 9, 11, 12 or 29;

(*c*) directing the offender to publish, in the manner directed by the court, the facts relating to the commission of the offence;

(*d*) directing the offender to post any bond or pay any amount of money into court that will ensure compliance with an order made pursuant to this section;

(*e*) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the act or omission that constituted the offence; and

(*f*) directing the offender to pay an amount for the purposes of conducting research into any matters relating to tobacco products that the court considers appropriate.

Ordonnance du tribunal

59. En sus de toute peine prévue par la présente loi et compte tenu de la nature de l'infraction et des circonstances de sa perpétration, le tribunal peut, lors du prononcé de la sentence, rendre une ordonnance imposant au contrevenant déclaré coupable tout ou partie des obligations suivantes :

a) s'abstenir de tout acte ou activité qui pourrait entraîner la continuation de l'infraction ou la récidive;

b) s'abstenir de vendre des produits du tabac, et ce pour une période maximale d'un an, en cas de récidive relativement à une infraction aux articles 8, 9, 11, 12 ou 29;

c) publier, en la forme qu'il précise, les faits liés à la déclaration de culpabilité;

d) donner tel cautionnement ou déposer telle somme d'argent en garantie de l'observation d'une ordonnance rendue en vertu du présent article;

e) indemniser, en tout ou en partie, le ministre des frais exposés pour la prise des mesures, par celui-ci ou en son nom, découlant des faits qui ont mené à la déclaration de culpabilité;

f) verser une somme d'argent destinée à permettre les recherches sur les produits du tabac qu'il estime indiquées.

PART VII
AGREEMENTS

Administrative agreements

60. (1) The Minister may enter into agreements with provinces or other bodies respecting the administration and enforcement of this Act, including the designation of provincial or other officials and bodies as inspectors under this Act and the appointment of federal officials as inspectors under provincial legislation in respect of tobacco.

Equivalency agreements

(2) The Minister may enter into equivalency agreements with a province where there are in force, under the laws of that province, provisions that are equivalent to the provisions of this Act.

Order

(3) The Governor in Council may, on the recommendation of the Minister, by order, declare that certain provisions of this Act or the regulations, other than those creating an absolute prohibition, do not apply within a province in which an equivalency agreement is in force.

Table in Parliament

(4) A copy of an equivalency agreement in respect of which an order is made under subsection (3) must be tabled in Parliament within fifteen days after the order is made.

PART VIII
CONSEQUENTIAL AMENDMENTS, REPEALS AND COMING INTO FORCE

Consequential Amendments

61. to 63. [Amendments]

Repeals

64. and 65. [Repeals]

Coming into Force

Subsections 24(2) and (3)

'66. (1) Subsections 24(2) and (3) come into force on October 1, 1998 or on any earlier day that the Governor in Council may fix by order.

' [Note: Subsections 24(2) and (3) in force October 1, 1998.]

Application delayed — sponsorship before April 25, 1997

(2) If a tobacco product-related brand element was displayed, at any time between January 25, 1996 and April 25, 1997, in promotional material that was used in the sponsorship of an event or activity that took place in

PARTIE VII
ACCORDS

Accords sur l'exécution de la loi

60. (1) Le ministre peut conclure des accords avec les provinces ou des organismes sur l'exécution et le contrôle d'application de la présente loi, y compris la désignation d'agents de la province ou de l'organisme à titre d'inspecteurs dans le cadre de la présente loi ou d'agents fédéraux à titre d'inspecteurs dans le cadre de la législation provinciale portant sur le tabac.

Accords d'équivalence

(2) Le ministre peut conclure des accords d'équivalence avec les provinces dont les lois contiennent des dispositions essentiellement comparables à celles de la présente loi.

Décrets

(3) Le gouverneur en conseil peut par décret, sur recommandation du ministre, déclarer que certaines dispositions de la présente loi ou de ses règlements, sauf celles qui créent une interdiction absolue, ne s'appliquent pas dans la province où un accord d'équivalence est en vigueur.

Dépôt devant le Parlement

(4) Une copie de l'accord d'équivalence doit être déposée devant le Parlement dans les quinze jours suivant sa prise.

PARTIE VIII
MODIFICATIONS CONNEXES, ABROGATIONS ET ENTRÉE EN VIGUEUR

Modifications connexes

61. à 63. [Modifications]

Abrogations

64. et 65. [Abrogations]

Entrée en vigueur

Paragraphes 24(2) et (3)

'66. (1) Les paragraphes 24(2) et (3) entrent en vigueur le 1er octobre 1998 ou à toute date antérieure fixée par décret.

' [Note: Paragraphes 24(2) et (3) en vigueur le 1er octobre 1998.]

Application reportée — promotion avant le 25 avril 1997

(2) Si un élément de marque d'un produit du tabac a été utilisé entre le 25 janvier 1996 et le 25 avril 1997 sur du matériel relatif à la promotion d'une manifestation ou activité qui a eu

Canada, subsections 24(2) and (3) do not apply until

(*a*) October 1, 2000 in relation to the display of a tobacco product-related brand element in promotional material that is used in the sponsorship of that event or activity or of a person or entity participating in that event or activity; and

(*b*) October 1, 2003 in relation to the display referred to in paragraph (*a*) on the site of the event or activity for the duration of the event or activity or for any other period that may be prescribed.

Promotional material

(3) Subsections 24(2) and (3) apply beginning on October 1, 2000 and ending on September 30, 2003 to prohibit the furnishing to the public, on the site of an event or activity to which paragraph (2)(*b*) applies, of promotional material that displays a tobacco product-related brand element otherwise than in conformity with subsection 24(2).

1997, c. 13, s. 66; 1998, c. 38, s. 4.

lieu au Canada, les paragraphes 24(2) et (3) ne s'appliquent qu'à compter :

a) du 1er octobre 2000 quant à l'utilisation d'un élément de marque d'un produit du tabac sur du matériel relatif à la promotion de la manifestation ou de l'activité, ou d'une personne ou entité y participant;

b) du 1er octobre 2003 quant à l'utilisation mentionnée à l'alinéa *a*) sur les lieux de la manifestation ou de l'activité, pour la durée de celle-ci ou pour toute autre période prévue par règlement.

Matériel de promotion

(3) Les paragraphes 24(2) et (3) s'appliquent du 1 octobre 2000 au 30 septembre 2003 pour interdire, sur les lieux d'une manifestation ou d'une activité à laquelle s'applique l'alinéa 2*b*), la fourniture au public de matériel de promotion sur lequel figure un élément de marque d'un produit du tabac, sauf en conformité avec le paragraphe 24(2).

1997, ch. 13, art. 66; 1998, ch. 38, art. 4.

SCHEDULE
(Sections 5.1, 5.2, 7.1 and 23.1)

PROHIBITED ADDITIVES

Item	Column 1 Additive	Column 2 Tobacco Product
1.	Additives that have flavouring properties or that enhance flavour, including – additives identified as flavouring agents by the Joint FAO/WHO Expert Committee on Food Additives in the Committee's evaluations, as published from time to time in the WHO Technical Report Series – additives identified as flavouring substances by the Flavor and Extract Manufacturers Association (FEMA) Expert Panel in its lists of GRAS (Generally Recognized as Safe) flavouring substances referred to as "GRAS 3" to "GRAS 24" and subsequent GRAS lists, as published from time to time, if any The following additives are excluded: – benzoic acid (CAS 65-85-0) and its salts – butylated hydroxytoluene (CAS 128-37-0) – carboxy methyl cellulose (CAS 9000-11-7) – citric acid (CAS 77-92-9) and its salts – ethanol (CAS 64-17-5) – ethoxylated sorbitan monolaurate (CAS 9005-64-5) – fumaric acid (CAS 110-17-8) – glycerol (CAS 56-81-5) – guar gum (CAS 9000-30-0) – menthol (CAS 89-78-1) – *l*-menthol (CAS 2216-51-5) – *l*-menthone (CAS 14073-97-3) – n-propyl acetate (CAS 109-60-4) – paraffin wax (CAS 8002-74-2) – propylene glycol (CAS 57-55-6) – rosin glycerol ester (CAS 8050-31-5) – sodium acetate anhydrous (CAS 127-09-3) – sodium alginate (CAS 9005-38-3) – sorbic acid (CAS 110-44-1) and its salts – triacetin (CAS 102-76-1) – tributyl acetylcitrate (CAS 77-90-7)	Cigarettes, little cigars and blunt wraps
2.	Amino acids	Cigarettes, little cigars and blunt wraps
3.	Caffeine	Cigarettes, little cigars and blunt wraps
4.	Colouring agents, excluding those used to whiten paper or the filter or to imitate a cork pattern on tipping paper	Cigarettes
4.1	Colouring agents, excluding those used to whiten plug wrap paper, to render tipping paper brown or bronze or to imitate a cork pattern on tipping paper	Little cigars

Item	Column 1 Additive	Column 2 Tobacco Product
4.2	Colouring agents	Blunt wraps
5.	Essential fatty acids	Cigarettes, little cigars and blunt wraps
6.	Fruits, vegetables or any product obtained from the processing of a fruit or vegetable, excluding activated charcoal and starch	Cigarettes, little cigars and blunt wraps
7.	Glucuronolactone	Cigarettes, little cigars and blunt wraps
8.	Probiotics	Cigarettes, little cigars and blunt wraps
9.	Spices, seasonings and herbs	Cigarettes, little cigars and blunt wraps
10.	Sugars and sweeteners, excluding starch	Cigarettes, little cigars and blunt wraps
11.	Taurine	Cigarettes, little cigars and blunt wraps
12.	Vitamins	Cigarettes, little cigars and blunt wraps
13.	Mineral nutrients, excluding those necessary to manufacture the tobacco product	Cigarettes, little cigars and blunt wraps

Note: In column 1, "FAO" means Food and Agriculture Organization of the United Nations; "WHO" means World Health Organization; "CAS" means Chemical Abstracts Service registry number.

2009, c. 27, s. 17.

ANNEXE
(articles 5.1, 5.2, 7.1 et 23.1)

ADDITIFS INTERDITS

Item	Colonne 1 Additif	Colonne 2 Produit du tabac
1.	Additif qui a des propriétés aromatisantes ou qui rehausse l'arôme, notamment : – tout additif qualifié d'aromatisant par le Comité mixte FAO/OMS d'experts des additifs alimentaires dans ses évaluations publiées dans la version à jour de la Série de rapports techniques de l'OMS – tout additif qualifié de substance aromatisante par le comité d'experts de l'association appelée Flavor and Extract Manufacturers Association (FEMA) dans ses listes, portant les numéros 3 à 24, de substances aromatisantes généralement reconnues inoffensives ou dans ses listes publiées subséquemment, s'il y en a Ne sont toutefois pas visés les additifs suivants : – acide benzoïque (CAS 65-85-0) et ses sels – hydroxytoluène butylé (CAS 128-37-0) – carboxyméthylcellulose (CAS 9000-11-7) – acide citrique (CAS 77-92-9) et ses sels – éthanol (CAS 64-17-5) – monolaurate de sorbitane éthoxylé (CAS 9005-64-5) – acide fumarique (CAS 110-17-8) – glycérol (CAS 56-81-5) – gomme de guar (CAS 9000-30-0) – menthol (CAS 89-78-1) – *l*-menthol (CAS 2216-51-5) – *l*-menthone (CAS 14073-97-3) – acétate de n-propyle (CAS 109-60-4) – cire de paraffine (CAS 8002-74-2) – propylène glycol (CAS 57-55-6) – ester glycérique de la colophane (CAS 8050-31-5) – acétate de sodium anhydre (CAS 127-09-3) – alginate de sodium (CAS 9005-38-3) – acide sorbique (CAS 110-44-1) et ses sels – triacétine (CAS 102-76-1) – acétylcitrate de tributyle (CAS 77-90-7)	Cigarettes, petits cigares et feuilles d'enveloppe
2.	Acides aminés	Cigarettes, petits cigares et feuilles d'enveloppe
3.	Caféine	Cigarettes, petits cigares et feuilles d'enveloppe
4.	Agents colorants, sauf ceux utilisés pour blanchir le papier ou le filtre ou pour donner au papier de manchette l'aspect du liège	Cigarettes

Item	Colonne 1 Additif	Colonne 2 Produit du tabac
4.1	Agents colorants, sauf ceux utilisés pour blanchir le papier de gainage, pour brunir ou bronzer le papier de manchette ou pour donner à ce dernier l'aspect du liège	Petits cigares
4.2	Agents colorants	Feuilles d'enveloppe
5.	Acides gras essentiels	Cigarettes, petits cigares et feuilles d'enveloppe
6.	Fruits, légumes et tout produit obtenu par leur transformation, sauf le charbon activé et l'amidon	Cigarettes, petits cigares et feuilles d'enveloppe
7.	Glucuronolactone	Cigarettes, petits cigares et feuilles d'enveloppe
8.	Probiotiques	Cigarettes, petits cigares et feuilles d'enveloppe
9.	Épices, aromates et herbes	Cigarettes, petits cigares et feuilles d'enveloppe
10.	Sucres et édulcorants, sauf l'amidon	Cigarettes, petits cigares et feuilles d'enveloppe
11.	Taurine	Cigarettes, petits cigares et feuilles d'enveloppe
12.	Vitamines	Cigarettes, petits cigares et feuilles d'enveloppe
13.	Minéraux nutritifs, sauf ceux qui sont nécessaires à la fabrication du produit du tabac	Cigarettes, petits cigares et feuilles d'enveloppe

Note: Dans la colonne 1, « FAO » renvoie à l'Organisation des Nations Unies pour l'alimentation et l'agriculture, « OMS » à l'Organisation mondiale de la Santé et « CAS » se rapporte au numéro du service des résumés analytiques de chimie (Chemical Abstracts Service).

2009, ch. 27, art. 17.

RELATED PROVISIONS

— 1998, c. 38, s. 2(2)

(2) Section 25 of the Act, as it read immediately before the coming into force of subsection (1), continues to apply until October 1, 2003 in relation to the display, on a permanent facility, of a tobacco product-related brand element that appeared on the facility on the day on which this Act comes into force.

DISPOSITIONS CONNEXES

— 1998, ch. 38, par. 2(2)

(2) L'article 25 de la même loi, dans sa version antérieure à l'entrée en vigueur du paragraphe (1), s'applique jusqu'au 1er octobre 2003 quant à l'utilisation d'un élément de marque d'un produit du tabac sur des installations permanentes, s'il y figurait à la date d'entrée en vigueur de la présente loi.

AMENDMENTS NOT IN FORCE

— 2009, c. 27, s. 7

7. The Act is amended by adding the following after section 6:

Prohibition

6.1 Subject to the regulations, no manufacturer shall manufacture or sell a tobacco product unless all of the information required under section 6 that relates to the product's composition and ingredients is submitted to the Minister.

— 2009, c. 27, s. 16

16. The Act is amended by adding the following after section 44:

Prohibited manufacture or sale

44.1 Every manufacturer who contravenes section 6.1 is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding six months, or to both.

MODIFICATIONS NON EN VIGUEUR

— 2009, ch. 27, art. 7

7. La même loi est modifiée par adjonction, après l'article 6, de ce qui suit :

Interdiction

6.1 Sous réserve des règlements, il est interdit au fabricant de fabriquer ou de vendre un produit du tabac à moins de transmettre au ministre les renseignements exigés sous le régime de l'article 6 qui portent sur la composition et les ingrédients de ce produit.

— 2009, ch. 27, art. 16

16. La même loi est modifiée par adjonction, après l'article 44, de ce qui suit :

Interdiction de fabriquer ou de vendre

44.1 Le fabricant qui contrevient à l'article 6.1 commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de 50 000 $ et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

CANADA

CONSOLIDATION

CODIFICATION

Cigarette Ignition Propensity Regulations

Règlement sur le potentiel incendiaire des cigarettes

SOR/2005-178

DORS/2005-178

Current to March 20, 2012

À jour au 20 mars 2012

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 20, 2012. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

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[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Registration
SOR/2005-178

TOBACCO ACT

Cigarette Ignition Propensity Regulations

P.C. 2005-1125 May 7, 2005

Whereas, pursuant to section 42.1 of the *Tobacco Act*[a], the Minister of Health laid a copy of the proposed *Cigarette Ignition Propensity Regulations*, in the annexed form, before the House of Commons on November 30, 2004 and the House of Commons did not concur in any report from a committee respecting the proposed Regulations within the following thirty sitting days;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to section 7 of the *Tobacco Act*[a], hereby makes the annexed *Cigarette Ignition Propensity Regulations*.

[a] S.C. 1997, c. 13

Enregistrement
DORS/2005-178 Le 7 juin 2005

LOI SUR LE TABAC

Règlement sur le potentiel incendiaire des cigarettes

C.P. 2005-1125 Le 7 juin 2005

Attendu que, conformément à l'article 42.1 de la *Loi sur le tabac*[a], le ministre de la Santé a fait déposer le projet de règlement intitulé *Règlement sur le potentiel incendiaire des cigarettes*, conforme au texte ci-après, devant la Chambre des communes le 30 novembre 2004 et que celle-ci n'a donné son agrément à aucun rapport de comité au sujet de ce projet dans les trente jours de séance suivants,

À ces causes, sur recommandation du ministre de la Santé et en vertu de l'article 7 de la *Loi sur le tabac*[a], Son Excellence la Gouverneure générale en conseil prend le *Règlement sur le potentiel incendiaire des cigarettes*, ci-après.

[a] L.C. 1997, ch. 13

CIGARETTE IGNITION PROPENSITY REGULATIONS

INTERPRETATION

Definitions

1. The following definitions apply in these Regulations.

"brand" « *marque* »

"brand" means all of the brand elements that as a whole are used by a manufacturer to identify to a consumer a tobacco product made by the manufacturer that is a cigarette. (*marque*)

"cigarette" « *cigarette* »

"cigarette" means any roll or tubular construction that contains tobacco, has a wrapper or cover made of paper and is consumed through the inhalation of the products of combustion. It does not include a bidi, cigar, kretek or tobacco stick. (*cigarette*)

APPLICATION

Application

2. Every provision of these Regulations that applies to a brand of cigarettes also applies to every size of that brand.

IGNITION PROPENSITY STANDARD

Standard

3. (1) Every manufacturer shall ensure that the cigarettes of every brand that it manufactures on or after October 1, 2005 burn their full length no more than 25% of the time when tested on 10 layers of filter paper using ASTM International method E2187 — 04, dated July 1, 2004 and entitled *Standard Test Method for Measuring the Ignition Strength of Cigarettes*.

Cigarettes of same brand

(2) Every manufacturer shall ensure that each test is conducted on cigarettes of the same brand.

RÈGLEMENT SUR LE POTENTIEL INCENDIAIRE DES CIGARETTES

DÉFINITIONS

Définitions

1. Les définitions qui suivent s'appliquent au présent règlement.

« cigarette » "*cigarette*"

« cigarette » S'entend de tout rouleau ou article de forme tubulaire qui contient du tabac, dont l'enveloppe est faite de papier et qui se consomme par inhalation des produits de combustion, à l'exclusion des cigares, des bâtonnets de tabac, des bidis ou des kreteks. (*cigarette*)

« marque » "*brand*"

« marque » Les éléments de marque qui, dans leur ensemble, sont utilisés par un fabricant pour identifier auprès du consommateur ceux de ses produits de tabac qui sont des cigarettes. (*brand*)

APPLICATION

Application

2. Les dispositions du présent règlement qui s'appliquent à la marque de cigarettes s'appliquent aussi à tout format de cette marque.

NORME SUR LE POTENTIEL INCENDIAIRE

Norme

3. (1) À compter du 1er octobre 2005, le fabricant doit s'assurer que les cigarettes de chacune des marques de cigarettes qu'il fabrique se consument entièrement dans au plus 25 % des cas lors d'essais effectués sur 10 couches de papier filtre selon la méthode E2187 — 04 de l'ASTM International intitulée *Standard Test Method for Measuring the Ignition Strength of Cigarettes*, dans sa version du 1er juillet 2004.

Cigarettes d'une même marque

(2) Le fabricant doit veiller à ce que chaque essai soit réalisé sur des cigarettes d'une seule marque à la fois.

COMING INTO FORCE

Coming into force

4. These Regulations come into force on the day on which they are registered.

ENTRÉE EN VIGUEUR

Entrée en vigueur

4. Le présent règlement entre en vigueur à la date de son enregistrement.

CANADA

CONSOLIDATION

CODIFICATION

Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)

Règlement sur la promotion des produits du tabac et des accessoires (termes interdits)

SOR/2011-178

DORS/2011-178

Current to March 20, 2012

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OFFICIAL STATUS OF CONSOLIDATIONS

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Inconsistencies in regulations

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NOTE

This consolidation is current to March 20, 2012. The last amendments came into force on January 22, 2012. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

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[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Les dernières modifications sont entrées en vigueur le 22 janvier 2012. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Registration
SOR/2011-178 September 22, 2011

TOBACCO ACT

Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)

P.C. 2011-926 September 22, 2011

Whereas, pursuant to section 42.1 of the *Tobacco Act*[a], the Minister of Health laid a copy of the proposed *Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)*, substantially in the annexed form, before the House of Commons on June 9, 2011 and the House of Commons concurred on June 22, 2011 in a report from the Standing Committee on Health approving the proposed Regulations;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to section 33[b] of the *Tobacco Act*[a], hereby makes the annexed *Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)*.

[a] S.C. 1997, c. 13
[b] S.C. 1998, c. 38, s. 3

Enregistrement
DORS/2011-178 Le 22 septembre 2011

LOI SUR LE TABAC

Règlement sur la promotion des produits du tabac et des accessoires (termes interdits)

C.P. 2011-926 Le 22 septembre 2011

Attendu que, conformément à l'article 42.1 de la *Loi sur le tabac*[a], la ministre de la Santé a fait déposer le projet de règlement intitulé *Règlement sur la promotion des produits du tabac et des accessoires (termes interdits)*, conforme en substance au texte ci-après, devant la Chambre des communes le 9 juin 2011 et que celle-ci, le 22 juin 2011, a donné son agrément à un rapport du Comité permanent de la santé approuvant le projet,

À ces causes, sur recommandation de la ministre de la Santé et en vertu de l'article 33[b] de la *Loi sur le tabac*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement sur la promotion des produits du tabac et des accessoires (termes interdits)*, ci-après.

[a] L.C. 1997, ch. 13
[b] L.C. 1998, ch. 38, art. 3

PROMOTION OF TOBACCO PRODUCTS AND ACCESSORIES REGULATIONS (PROHIBITED TERMS)

INTERPRETATION

Definition of "cigarette"

1. In these Regulations, "cigarette" includes any roll or tubular construction that contains tobacco and is intended for smoking, other than a bidi, cigar, kretek or tobacco stick.

APPLICATION

Scope of prohibitions

2. The prohibitions in these Regulations that apply with respect to the terms "light" and "mild" also apply with respect to

(*a*) any variations in the spelling of those terms as well as the spelling of other parts of speech and grammatical forms of those terms; and

(*b*) any modifiers of those terms, including "extra" and "ultra", as well as any abbreviation of those terms or modifiers.

PROMOTION

General

No promotion if terms on product

3. (1) A person must not promote a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters if the tobacco product displays the term "light" or "mild" or promote such a tobacco product by affixing to it the term "light" or "mild".

No promotion if terms on packaging

(2) A person must not promote a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters if the package of the tobacco product displays the term "light" or "mild".

No promotion if terms on accessories

(3) A person must not promote

RÈGLEMENT SUR LA PROMOTION DES PRODUITS DU TABAC ET DES ACCESSOIRES (TERMES INTERDITS)

DÉFINITION

Cigarette

1. Dans le présent règlement, est assimilé à une cigarette tout rouleau ou article de forme tubulaire contenant du tabac, destiné à être fumé et qui n'est pas un cigare, un bâtonnet de tabac, un bidi ou un kretek.

APPLICATION

Portée des interdictions

2. Les interdictions qui s'appliquent aux termes « léger » et « doux » dans le présent règlement s'appliquent également aux éléments suivants :

a) toute graphie de ces termes ainsi que les termes de même famille;

b) leurs déterminants — notamment « extra » et « ultra » — ainsi que tout signe abréviatif de ces termes ou déterminants.

PROMOTION

Disposition générale

Promotion restreinte — produit

3. (1) Nul ne peut faire la promotion de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes, si l'un ou l'autre des termes « léger » ou « doux » figure sur le produit du tabac en cause, ni en faire la promotion par l'apposition sur celui-ci de l'un ou l'autre terme.

Promotion restreinte — emballage du produit

(2) Nul ne peut faire la promotion de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes sur l'emballage desquels figure l'un ou l'autre des termes « léger » ou « doux ».

Promotion restreinte — accessoire

(3) Nul ne peut faire la promotion :

(*a*) an accessory that displays a brand element of a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters if that accessory displays the term "light" or "mild"; or

(*b*) a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters by affixing to an accessory a brand element of such a tobacco product if that accessory displays the term "light" or "mild".

a) d'accessoires sur lesquels figure l'un ou l'autre des termes « léger » ou « doux » et qui portent tout élément de marque de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes;

b) de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes par l'apposition de tout élément de marque sur un accessoire qui porte l'un ou l'autre de ces termes.

ADVERTISING

No advertising of product with terms

4. A person must not promote a bidi, cigarette, kretek, little cigar or tobacco stick, or cigarette tobacco, cigarette papers, tubes or filters by using the term "light" or "mild" in an advertisement of the tobacco product.

ANNONCES

Publicité restreinte — produit

4. Nul ne peut faire la promotion de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes s'il utilise l'un ou l'autre des termes « léger » ou « doux » dans la publicité du produit du tabac en cause.

PACKAGING

No packaging of products with terms

5. A person must not package a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters, or have the tobacco product packaged by a third party, in a package that displays the term "light" or "mild".

EMBALLAGE

Emballage restreint — produit

5. Nul ne peut emballer ou faire emballer des bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, du tabac à cigarettes, des tubes, papiers ou filtres à cigarettes dans un emballage sur lequel figure l'un ou l'autre des termes « léger » ou « doux ».

SALE

No sale of accessories with terms

6. A person must not sell an accessory that displays a brand element of a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters if that accessory displays the term "light" or "mild".

VENTE

Vente restreinte — accessoire

6. Nul ne peut vendre d'accessoires sur lesquels figure l'un ou l'autre des termes « léger » ou « doux » et qui portent tout élément de marque de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes.

DISPLAYING AT RETAIL

No retail display of products with terms

7. (1) A person must not display, at retail, a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters if the term "light" or "mild" is displayed on the tobacco product.

No retail display of accessories with terms

(2) A person must not display, at retail, an accessory that displays a brand element of a bidi, cigarette, kretek, little cigar or tobacco stick or cigarette tobacco, cigarette papers, tubes or filters if that accessory displays the term "light" or "mild".

COMING INTO FORCE

Registration

8. (1) Subject to subsection (2), these Regulations come into force on the day on which they are registered.

After registration — four months

(2) Sections 6 and 7 come into force on the day that is four months after the day on which these Regulations are registered.

EXPOSITION

Exposition restreinte — produit

7. (1) Nul ne peut exposer, dans un établissement de vente au détail, de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes si l'un ou l'autre des termes « léger » ou « doux » figure sur le produit du tabac en cause.

Exposition restreinte — accessoire

(2) Nul ne peut exposer, dans un établissement de vente au détail, d'accessoires sur lesquels figure l'un ou l'autre des termes « léger » ou « doux » et qui portent tout élément de marque de bidis, cigarettes, kreteks, bâtonnets de tabac, petits cigares, tabac à cigarettes, tubes, papiers ou filtres à cigarettes.

ENTRÉE EN VIGUEUR

Enregistrement

8. (1) Sous réserve du paragraphe (2), le présent règlement entre en vigueur à la date de son enregistrement.

Après enregistrement — 4 mois

(2) Les articles 6 et 7 entrent en vigueur quatre mois après la date de l'enregistrement du présent règlement.

CANADA

CONSOLIDATION

CODIFICATION

Tobacco (Access) Regulations

Règlement sur le tabac (accès)

SOR/99-93

DORS/99-93

Current to March 20, 2012

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...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

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CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

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[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Registration
SOR/99-93 February 11, 1999

TOBACCO ACT

Tobacco (Access) Regulations

P.C. 1999-197 February 11, 1999

Whereas, pursuant to section 42.1 of the *Tobacco Act*[a], the Minister of Health laid a copy of the proposed *Tobacco (Access) Regulations*, in the annexed form, before the House of Commons on June 3, 1998 and the House of Commons did not concur in any report from a committee respecting the proposed regulations within the following thirty sitting days;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to section 14 of the *Tobacco Act*[a], hereby makes the annexed *Tobacco (Access) Regulations*.

[a] S.C. 1997, c. 13

Enregistrement
DORS/99-93 Le 11 février 1999

LOI SUR LE TABAC

Règlement sur le tabac (accès)

C.P. 1999-197 Le 11 février 1999

Attendu que, conformément à l'article 42.1 de la *Loi sur le tabac*[a], le ministre de la Santé a fait déposer le projet de règlement intitulé *Règlement sur le tabac (accès)* conforme au texte ci-après, devant la Chambre des communes le 3 juin 1998 et que celle-ci n'a donné son agrément à aucun rapport de comité au sujet de ce projet dans les trente jours de séance suivants,

À ces causes, sur recommandation du ministre de la Santé et en vertu de l'article 14 de la *Loi sur le tabac*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement sur le tabac (accès)*, ci-après.

[a] L.C. 1997, ch. 13

TOBACCO (ACCESS) REGULATIONS

INTERPRETATION

1. In these Regulations, "Act" means the *Tobacco Act*.

PROOF OF AGE

2. Only the following documentation may be used to verify the age of a person for the purposes of subsection 8(2) of the Act:

(*a*) a driver's licence;

(*b*) a passport;

(*c*) a certificate of Canadian citizenship that contains the person's photograph;

(*d*) a Canadian permanent resident document;

(*e*) a Canadian Armed Forces identification card; or

(*f*) any other documentation that

(i) is issued by a federal or provincial authority or a foreign government, and

(ii) contains the person's photograph, date of birth and signature.

SELF-SERVICE

3. The following persons are exempt from the application of section 11 of the Act:

(*a*) a manufacturer or wholesaler who sells tobacco products to persons other than consumers at a location to which consumers do not have access; and

(*b*) a retailer who sells tobacco products at a duty free shop as defined in subsection 2(1) of the *Customs Act*.

SIGNS PROHIBITING SALES TO MINORS POSTED AT RETAIL

4. (1) Subject to subsection (2), every sign to be posted by a retailer at a retail establishment pursuant to section 9 of the Act must

RÈGLEMENT SUR LE TABAC (ACCÈS)

DÉFINITION

1. Dans le présent règlement, «Loi» s'entend de la *Loi sur le tabac*.

PREUVE D'ÂGE

2. Seuls les documents suivants peuvent servir à prouver l'âge d'une personne aux fins du paragraphe 8(2) de la Loi :

a) un permis de conduire;

b) un passeport;

c) un certificat de citoyenneté canadienne portant sa photographie;

d) un document de résident permanent canadien;

e) une carte d'identité des Forces armées canadiennes;

f) tout autre document :

(i) qui a été délivré par une autorité fédérale ou provinciale ou par un gouvernement étranger,

(ii) sur lequel apparaissent sa photographie, sa date de naissance et sa signature.

LIBRE-SERVICE

3. Les personnes suivantes sont exemptées de l'application de l'article 11 de la Loi :

a) le fabricant ou le grossiste qui vend des produits de tabac à des personnes autres que les consommateurs dans un endroit auquel ceux-ci n'ont pas accès;

b) le détaillant qui vend des produits de tabac dans une boutique hors taxes au sens du paragraphe 2(1) de la *Loi sur les douanes*.

AFFICHES INTERDISANT LA VENTE AUX MINEURS DANS LES ÉTABLISSEMENTS DE VENTE AU DÉTAIL

4. (1) Sous réserve du paragraphe (2), toute affiche que place le détaillant dans son établissement conformément à l'article 9 de la Loi doit :

(*a*) have a total surface area of not less than 600 cm² and minimum dimensions of 20 cm by 30 cm;

(*b*) display the following message:

"It is prohibited by federal law to provide tobacco products to persons under 18 years of age. Il est interdit par la loi fédérale de fournir des produits du tabac aux personnes âgées de moins de 18 ans.";

(*c*) display the message set out in paragraph (*b*) in such a manner that the message is

(i) legible,

(ii) centred on the sign,

(iii) in black Helvetica Bold type on a white background,

(iv) in type of such size that the message occupies not less than 30 per cent and not more than 40 per cent of the total surface area of the sign,

(v) displayed using upper-case lettering for the first letter of the message in each official language and lower-case lettering for the remainder of the message, and

(vi) surrounded by a red border along the edges of the sign that has a thickness of not less than 1 cm and not more than 1.5 cm; and

(*d*) be posted

(i) in such a manner that the sign is conspicuous and not obstructed from view, and

(ii) at every location in the retail establishment where tobacco products are furnished.

(2) A retailer is exempt from the application of section 9 of the Act if the retailer carries on business in a province in which provincial legislation

(*a*) prohibits the sale of tobacco products to persons under a specified age that is eighteen years of age or greater; and

(*b*) requires the posting of notices to that effect in retail establishments that sell tobacco products.

a) avoir une superficie totale d'au moins 600 cm² et des dimensions minimales de 20 cm sur 30 cm;

b) comporter le message suivant :

« Il est interdit par la loi fédérale de fournir des produits du tabac aux personnes âgées de moins de 18 ans. It is prohibited by federal law to provide tobacco products to persons under 18 years of age. »;

c) présenter le message prévu à l'alinéa *b*) de façon :

(i) qu'il soit lisible,

(ii) qu'il soit centré sur l'affiche,

(iii) qu'il apparaisse en caractères noirs gras Helvetica sur fond blanc,

(iv) qu'il soit en caractères d'une taille telle qu'il occupe au moins 30 pour cent et au plus 40 pour cent de la superficie totale de l'affiche,

(v) que la première lettre du texte dans chaque langue officielle soit une majuscule, les autres lettres étant des minuscules,

(vi) qu'il soit encadré d'une bordure rouge d'au moins 1 cm et d'au plus 1,5 cm d'épaisseur qui longe les côtés de l'affiche;

d) être placée :

(i) de façon à être bien en vue et non cachée,

(ii) dans chaque endroit de l'établissement où des produits du tabac sont fournis.

(2) Est exempté de l'application de l'article 9 de la Loi le détaillant qui exploite une entreprise dans une province où une loi provinciale :

a) interdit la vente de produits du tabac à des personnes n'ayant pas atteint l'âge qui y est précisé, non inférieur à 18 ans;

b) exige l'affichage d'avis à cet effet dans les établissements de détail qui vendent des produits du tabac.

REPEAL

5. The *Tobacco Sales to Young Persons Regulations*[1] are repealed.

COMING INTO FORCE

6. These Regulations come into force on the day on which they are registered.

ABROGATION

5. Le *Règlement sur la vente du tabac aux jeunes*[1] est abrogé.

ENTRÉE EN VIGUEUR

6. Le présent règlement entre en vigueur à la date de son enregistrement.

[1] SOR/94-163

[1] DORS/94-163

CANADA

CONSOLIDATION

CODIFICATION

Tobacco (Seizure and Restoration) Regulations

Règlement sur le tabac (saisie et restitution)

SOR/99-94

DORS/99-94

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 20, 2012. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Registration
SOR/99-94 February 11, 1999

TOBACCO ACT

Tobacco (Seizure and Restoration) Regulations

P.C. 1999-198 February 11, 1999

Whereas, pursuant to section 42.1 of the *Tobacco Act*[a], the Minister of Health laid a copy of the proposed *Tobacco (Seizure and Restoration) Regulations*, in the annexed form, before the House of Commons on June 3, 1998 and the House of Commons did not concur in any report from a committee respecting the proposed regulations within the following thirty sitting days;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to section 42 of the *Tobacco Act*[a], hereby makes the annexed *Tobacco (Seizure and Restoration) Regulations*.

[a] S.C. 1997, c. 13

Enregistrement
DORS/99-94 Le 11 février 1999

LOI SUR LE TABAC

Règlement sur le tabac (saisie et restitution)

C.P. 1999-198 Le 11 février 1999

Attendu que, conformément à l'article 42.1 de la *Loi sur le tabac*[a], le ministre de la Santé a fait déposer le projet de règlement intitulé *Règlement sur le tabac (saisie et restitution)*, conforme au texte ci-après, devant la Chambre des communes le 3 juin 1998 et que celle-ci n'a donné son agrément à aucun rapport de comité au sujet de ce projet dans les trente jours de séance suivants,

À ces causes, sur recommandation du ministre de la Santé et en vertu de l'article 42 de la *Loi sur le tabac*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement sur le tabac (saisie et restitution)*, ci-après.

[a] L.C. 1997, ch. 13

TOBACCO (SEIZURE AND RESTORATION) REGULATIONS

INTERPRETATION

1. In these Regulations, "Act" means the *Tobacco Act*.

SEIZURE

2. When an inspector seizes a tobacco product or other thing pursuant to subsection 39(1) of the Act, the inspector shall provide its owner or the person in charge of the place from which it was seized with a copy of these Regulations and of section 40 of the Act.

APPLICATION FOR RESTORATION

Service of Notice

3. A notice referred to in subsection 40(1) of the Act shall be served by registered mail on the Minister at Ottawa or on the regional manager of the Health Protection Branch, Department of Health, in the region in which the seizure occurred at least 15 clear days before the day on which the application for an order of restoration is to be made to the provincial court judge.

Contents of Notice

4. A notice referred to in subsection 40(1) of the Act must specify

(*a*) the provincial court judge to whom the application for an order of restoration is to be made;

(*b*) the time when and the place where the application is to be heard;

(*c*) the tobacco product or other thing seized in respect of which the application is to be made; and

(*d*) the evidence on which the applicant intends to rely to establish that the applicant is entitled to possession of the product or other thing seized in respect of which the application is to be made.

COMING INTO FORCE

5. These Regulations come into force on the day on which they are registered.

RÈGLEMENT SUR LE TABAC (SAISIE ET RESTITUTION)

DÉFINITION

1. Dans le présent règlement, «Loi» s'entend de la *Loi sur le tabac*.

SAISIE

2. L'inspecteur qui saisit toute chose — notamment un produit du tabac — conformément au paragraphe 39(1) de la Loi donne au propriétaire de la chose ou au responsable du lieu où la chose est saisie une copie du présent règlement ainsi qu'une copie de l'article 40 de la Loi.

DEMANDE DE RESTITUTION

Signification du préavis

3. Le préavis prévu au paragraphe 40(1) de la Loi est signifié par courrier recommandé au ministre à Ottawa, ou au gestionnaire régional de la Direction générale de la protection de la santé, ministère de la Santé, de la région où la saisie a eu lieu, au moins 15 jours francs avant la date de présentation de la demande d'ordonnance de restitution à un juge d'une cour provinciale.

Teneur du préavis

4. Le préavis prévu au paragraphe 40(1) de la Loi précise ce qui suit :

a) le nom du juge de la cour provinciale à qui la demande sera présentée;

b) les date, heure et lieu de l'audition de la demande;

c) la chose saisie qui fait l'objet de la demande;

d) les éléments de preuve sur lesquels le demandeur entend fonder son droit à la possession de la chose saisie.

ENTRÉE EN VIGUEUR

5. Le présent règlement entre en vigueur à la date de son enregistrement.

CANADA

CONSOLIDATION

CODIFICATION

Tobacco Products Information Regulations

Règlement sur l'information relative aux produits du tabac

SOR/2000-272

DORS/2000-272

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OFFICIAL STATUS OF CONSOLIDATIONS

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(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 20, 2012. The last amendments came into force on September 22, 2011. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Les dernières modifications sont entrées en vigueur le 22 septembre 2011. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Registration
SOR/2000-272 June 26, 2000

TOBACCO ACT

Tobacco Products Information Regulations

P.C. 2000-1039 June 21, 2000

Whereas, pursuant to section 42.1 of the *Tobacco Act*[a], the Minister of Health laid a copy of the proposed *Tobacco Products Information Regulations*, substantially in the annexed form, before the House of Commons on May 12, 2000 and the House of Commons concurred on June 8, 2000 in a report from the Standing Committee on Health approving the proposed Regulations;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to sections 17 and 33 of the *Tobacco Act*[a], hereby makes the annexed *Tobacco Products Information Regulations*.

[a] S.C. 1997, c. 13

Enregistrement
DORS/2000-272 Le 26 juin 2000

LOI SUR LE TABAC

Règlement sur l'information relative aux produits du tabac

C.P. 2000-1039 Le 21 juin 2000

Attendu que, conformément à l'article 42.1 de la *Loi sur le tabac*[a], le ministre de la Santé a fait déposer le projet de règlement intitulé *Règlement sur l'information relative aux produits du tabac*, conforme en substance au texte ci-après, devant la Chambre des communes le 12 mai 2000 et que celle-ci, le 8 juin 2000, a donné son agrément à un rapport du Comité permanent de la santé approuvant le projet,

À ces causes, sur recommandation du ministre de la Santé et en vertu des articles 17 et 33 de la *Loi sur le tabac*[a], Son Excellence la Gouverneure générale en conseil prend le *Règlement sur l'information relative aux produits du tabac*, ci-après.

[a] L.C. 1997, ch. 13

TOBACCO PRODUCTS INFORMATION REGULATIONS

INTERPRETATION

Definitions

1. The definitions in this section apply in these Regulations.

"Act" « *Loi* »

"Act" means the *Tobacco Act*.

"brand" « *marque* »

"brand" means all of the brand elements that as a whole are used by a manufacturer to identify to a consumer a tobacco product made by the manufacturer.

"carton" « *cartouche* »

"carton" means a package that contains two or more packages of a tobacco product, other than a tube, a filter or cigarette paper.

"cigar" « *cigare* »

"cigar" means a roll or tubular construction intended for smoking, other than a little cigar, that contains a filler composed of natural or reconstituted tobacco, and that has a wrapper, or a wrapper and a binder, composed of natural or reconstituted tobacco.

"cigarette" [Repealed, SOR/2011-179, s. 1]

"equivalent unit" [Repealed, SOR/2011-179, s. 1]

"health information" « *information de santé* »

"health information" means the information set out in Part 4 of the source document, but does not include the attribution of that information to its source as provided for in subsection 4(1).

"health warning" « *mise en garde* »

"health warning" means

(*a*) in respect of cigarette tobacco, kreteks, leaf tobacco and tobacco sticks, the warnings that are set out in Part 1 of the source document;

(*b*) in respect of pipe tobacco, other than pipe tobacco described in subsection 6(1), the warnings that are set out in Part 2 of the source document;

RÈGLEMENT SUR L'INFORMATION RELATIVE AUX PRODUITS DU TABAC

DÉFINITIONS

Définitions

1. Les définitions qui suivent s'appliquent au présent règlement.

« cartouche » "carton"

« cartouche » Emballage renfermant au moins deux paquets de produits du tabac autres que des tubes, papiers ou filtres à cigarette.

« cigare » "cigar"

« cigare » Rouleau ou article de forme tubulaire, autre qu'un petit cigare, destiné à être fumé, composé d'une tripe faite de tabac naturel ou reconstitué et soit d'une cape, soit d'une cape et d'une sous-cape, faites de tabac naturel ou reconstitué.

« cigarette » [Abrogée, DORS/2011-179, art. 1]

« constituant toxique » "toxic constituent"

« constituant toxique » Constituant toxique figurant à la colonne 1 de l'annexe 2.

« document source » "source document"

« document source » Le document du ministère de la Santé intitulé *Mises en garde et information de santé pour les produits du tabac*, dans sa version du 12 mai 2000, tel qu'il a été modifié le 30 mars 2007.

« émission toxique » [Abrogée, DORS/2011-179, art. 1]

« fabricant » "manufacturer"

« fabricant » Ne vise pas le particulier ou l'entité qui ne fait qu'emballer ou distribuer des produits du tabac pour le compte d'un fabricant.

« fumée principale » [Abrogée, DORS/2011-179, art. 1]

« information de santé » "health information"

« information de santé » L'information figurant à la partie 4 du document source, à l'exclusion de la mention de la source de cette information prévue au paragraphe 4(1).

« Loi » "Act"

« Loi » La *Loi sur le tabac*.

(*c*) in respect of pipe tobacco cigars described in section 6, the warnings that are set out in Part 3 of the source document; and

(*d*) in respect of bidis, chewing tobacco and snuff, the warnings that are set out in subsections 5(4) to (6).

This definition does not include the attribution of those warnings to their source as provided for in subsection 4(1).

"identical products" « *produits identiques* »

"identical products" means tobacco products that

(*a*) contain identical ingredients;

(*b*) are manufactured in an identical manner;

(*c*) have identical dimensions; and

(*d*) perform in an identical manner under the same testing conditions.

"kit" « *trousse* »

"kit" means a package that includes any of the following tobacco products together with another tobacco product, which products are intended to be assembled by a consumer for their use:

(*a*) [Repealed, SOR/2011-179, s. 1]

(*b*) cigarette tobacco;

(*c*) leaf tobacco;

(*d*) cigars;

(*e*) pipe tobacco;

(*f*) tobacco sticks;

(*g*) chewing tobacco;

(*h*) snuff;

(*i*) kreteks; or

(*j*) bidis.

"mainstream smoke" [Repealed, SOR/2011-179, s. 1]

« marque » "*brand*"

« marque » Les éléments de marque qui, dans leur ensemble, sont utilisés par un fabricant pour identifier auprès du consommateur l'un de ses produits du tabac.

« mise en garde » "*health warning*"

« mise en garde »

a) Dans le cas des bâtonnets de tabac, des kreteks, du tabac à cigarettes et du tabac en feuilles, tout message figurant à la partie 1 du document source;

b) dans le cas du tabac à pipe, autre que celui visé au paragraphe 6(1), tout message figurant à la partie 2 du document source;

c) dans le cas du tabac à pipe et des cigares visés à l'article 6, tout message figurant à la partie 3 du document source;

d) dans le cas des bidis, du tabac à mâcher et du tabac à priser, tout message figurant aux paragraphes 5(4) à (6).

La présente définition exclut la mention de la source de la mise en garde prévue au paragraphe 4(1).

« principale surface exposée » "*principal display surface*"

« principale surface exposée » S'agissant d'un paquet, d'une cartouche ou d'une trousse :

a) si au moins deux côtés ou surfaces d'égale superficie, à l'exclusion du dessus et du dessous, sont susceptibles d'être exposés ou visibles dans les conditions normales ou habituelles de vente ou d'utilisation, la superficie totale de chacun de deux de ces côtés ou surfaces, y compris les côtés du couvercle ou du dessus lorsque ces côtés font partie des côtés du paquet, de la cartouche ou de la trousse;

b) si les côtés sont de dimensions différentes, chacune des moitiés de la surface totale du plus grand côté;

"manufacturer" "manufacturer" does not include an individual or entity that only packages or only distributes tobacco products on behalf of a manufacturer.

"principal display surface" "principal display surface", means

(*a*) in the case of a package, carton or kit that has at least two equal sized sides or surfaces, other than the top and bottom, that may be displayed or visible under normal or customary conditions of sale or use, the area of each of two of those sides or surfaces, including the sides of any lid or cover if those sides are part of the sides of the package, carton or kit;

(*b*) in the case of a package, carton or kit that has sides of more than one size, the area of each half of the total area of its largest side;

(*c*) in the case of a package, carton or kit that has a lid or flap that is the part of the package, carton or kit displayed or visible under normal or customary conditions of sale or use, the area of each half of the total area of the top surface of the lid or flap; and

(*d*) in the case of a package, carton or kit that does not have a particular side or surface that is predominantly displayed or visible under normal or customary conditions of sale or use, any two portions that each occupy 40% of the total surface area of the package, carton or kit and that can be displayed or visible under normal or customary conditions of sale or use, excluding, where applicable, the top surface of any lid, but including the side of the lid if the side is a part of the side of the package, carton or kit.

c) si le couvercle ou le rabat est la partie exposée ou visible dans les conditions normales ou habituelles de vente ou d'utilisation, chacune des moitiés de la superficie totale de la surface supérieure du couvercle ou du rabat;

d) si aucun côté ou surface en particulier n'est exposé ou visible de façon prédominante dans les conditions normales ou habituelles de vente ou d'utilisation, chacune de deux portions quelconques occupant respectivement 40 % de la surface totale du paquet, de la cartouche ou de la trousse, à l'exclusion de la surface extérieure du couvercle, le cas échéant, mais y compris les côtés du couvercle lorsque ces côtés font partie des côtés du paquet, de la cartouche ou de la trousse, à la condition que ces 40 % puissent être exposés ou visibles dans les conditions normales ou habituelles de vente ou d'utilisation.

« produits identiques » *"identical products"*

« produits identiques » Produits du tabac qui, à la fois :

a) contiennent les mêmes ingrédients;

b) sont fabriqués de la même manière;

c) ont un format identique;

d) donnent des résultats identiques dans les mêmes conditions d'essai.

« tiroir » *"slide"*

« tiroir » La partie coulissante qui s'insère dans un paquet à coulisse.

« trousse » *"kit"*

« trousse » Emballage qui regroupe l'un des produits du tabac ci-après et un autre produit du tabac, lesquels sont destinés à être assemblés par le consommateur pour son utilisation :

a) [Abrogé, DORS/2011-179, art. 1]

b) tabac à cigarettes;

"slide" « *tiroir* »

"slide" means the sliding portion of a slide and shell package.

"source document" « *document source* »

"source document" means the document entitled *Health Warnings and Information for Tobacco Products*, published by the Department of Health, dated May 12, 2000, as amended on March 30, 2007.

"toxic constituent" « *constituant toxique* »

"toxic constituent" means a toxic constituent listed in column 1 of Schedule 2.

"toxic emission" [Repealed, SOR/2011-179, s. 1]

"type of package" « *type d'emballage* »

"type of package" includes each size of the following types of packages:

(*a*) in respect of bidis, kreteks and tobacco sticks,

(i) a slide and shell package,

(i.1) a slide and shell package with a lateral slide,

(ii) a flip-top package, and

(iii) a soft package;

(*b*) in respect of cigarette tobacco and pipe tobacco,

(i) a pouch,

(ii) a can, and

(iii) a tub;

(*c*) in respect of cigars,

(i) a tube,

(ii) a flip-top box,

(iii) a soft package, and

(iv) a bundle; and

(*d*) in respect of chewing tobacco and snuff, a plastic or metal container.

"unit" [Repealed, SOR/2011-179, s. 1]

SOR/2011-179, s. 1.

c) tabac en feuilles;

d) cigares;

e) tabac à pipe;

f) bâtonnets de tabac;

g) tabac à mâcher;

h) tabac à priser;

i) kreteks;

j) bidis.

« type d'emballage » "type of package"

« type d'emballage » S'entend notamment de chaque format des types d'emballage suivants :

a) dans le cas des bidis, bâtonnets de tabac et kreteks :

(i) un paquet à coulisse,

(i.1) un paquet à coulisse à tiroir latéral,

(ii) un paquet à abattant,

(iii) un paquet mou;

b) dans le cas du tabac à cigarettes et du tabac à pipe :

(i) une blague,

(ii) une boîte métallique,

(iii) un pot;

c) dans le cas des cigares :

(i) un tube,

(ii) une boîte à couvercle à charnière,

(iii) un paquet mou,

(iv) un fagot.

d) dans le cas du tabac à mâcher et du tabac à priser, un contenant de plastique ou de métal.

« unité » [Abrogée, DORS/2011-179, art. 1]

«unité équivalente» [Abrogée, DORS/2011-179, art. 1]

DORS/2011-179, art. 1.

APPLICATION

Retail sale

2. These Regulations apply to every package of tobacco products, other than cigarettes as defined in section 1 of the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)* and little cigars, that is intended for retail sale.

SOR/2011-179, s. 2.

CHAMP D'APPLICATION

Vente au détail

2. Le présent règlement s'applique à tous les emballages de produits du tabac, autres que les cigarettes, au sens de l'article 1 du *Règlement sur l'étiquetage des produits du tabac (cigarettes et petits cigares)*, et les petits cigares, destinés à la vente au détail.

DORS/2011-179, art. 2.

GENERAL

Must be legible

3. (1) Any written information that is required by these Regulations to be displayed shall be displayed

(*a*) in both official languages, in the same manner; and

(*b*) in a manner that ensures that the information is legible and prominently displayed.

DISPOSITIONS GÉNÉRALES

Lisibilité des renseignements écrits

3. (1) Les renseignements écrits à fournir en application du présent règlement sont, à la fois :

a) présentés dans les deux langues officielles, de la même façon;

b) lisibles et bien en évidence.

Health warnings and health information

(2) Health warnings and health information shall

(*a*) except for those set out in subsections 5(4) to (6), be obtained from the Minister and reproduced from electronic images obtained from the electronic files used by the Minister to generate the source document; and

(*b*) be adapted to meet the requirements of paragraph 5(2)(*b*).

Mises en garde et information de santé

(2) Les mises en garde et l'information de santé doivent, à la fois :

a) sauf celles prévues aux paragraphes 5(4) à (6), être obtenues du ministre et reproduites par imagerie électronique d'après l'infographie qui a été utilisée par le ministre pour produire le document source;

b) être adaptées pour se conformer aux exigences de l'alinéa 5(2)*b*).

Colour and clarity

(3) All health warnings and health information shall be reproduced

(*a*) in a colour that is as close as possible to the colour in which they are set out in the source document; and

Couleurs et clarté

(3) La reproduction de toute mise en garde ou de toute information de santé doit être effectuée :

a) d'une part, en des couleurs se rapprochant le plus possible de celles de cette mise en garde ou de cette information dans le document source;

(*b*) as clearly as possible taking into consideration the method of printing used by the manufacturer.

SOR/2011-179, s. 3(F).

b) d'autre part, avec le plus de clarté possible, compte tenu de la technique d'impression utilisée.

DORS/2011-179, art. 3(F).

Attribution

4. (1) If a manufacturer attributes health warnings or health information that in accordance with these Regulations must be displayed, the manufacturer shall do so by displaying only the phrase "Health Canada" under the English health warning or health information and the phrase "Santé Canada" under the French health warning or health information. The attribution, which is contained in the electronic files referred to in paragraph 3(2)(*a*), shall be displayed in the same colour as the text of the health warning or health information and in Universal type in a pitch that is not greater than the smallest pitch used in the attributed health warning or health information.

Mention de la source

4. (1) Le fabricant qui choisit de mentionner la source de tout renseignement — mise en garde ou information de santé — à fournir en application du présent règlement fait uniquement figurer sous le renseignement français la mention « Santé Canada » et sous le renseignement anglais la mention « Health Canada ». La mention, qui provient de l'infographie visée à l'alinéa 3(2)*a*), est imprimée de la même couleur que le renseignement et est en caractères Univers d'un pas ne dépassant pas le plus petit pas utilisé dans le renseignement.

Removal of attribution

(2) Every manufacturer that does not attribute a health warning or health information may remove the attribution contained in the electronic files referred to in paragraph 3(2)(*a*).

SOR/2011-179, s. 4.

Effacement de la mention

(2) Le fabricant qui choisit de ne pas mentionner la source de la mise en garde ou de l'information de santé peut effacer la mention provenant de l'infographie visée à l'alinéa 3(2)*a*).

DORS/2011-179, art. 4.

HEALTH WARNINGS

MISES EN GARDE

Obligation to display

5. (1) Subject to subsections (4) to (6), every manufacturer of bidis, chewing tobacco, cigarette tobacco, kreteks, leaf tobacco, pipe tobacco (other than pipe tobacco described in section 6), snuff or tobacco sticks shall display the applicable health warnings for the tobacco product on every package of the tobacco product that it manufactures, in accordance with this section.

Obligation de faire figurer

5. (1) Sous réserve des paragraphes (4) à (6), le fabricant de bâtonnets de tabac, bidis, kreteks, tabac à cigarettes, tabac à mâcher, tabac à pipe — sauf le tabac à pipe visé à l'article 6 —, tabac à priser ou tabac en feuilles, doit faire figurer, sur chaque emballage de ces produits du tabac qu'il fabrique, les mises en garde prévues pour ce produit du tabac, conformément au présent article.

Manner of display

(2) The health warnings must

Façon de faire figurer

(2) La mise en garde doit répondre aux conditions suivantes :

(*a*) be displayed in English on one principal display surface and in French on the other principal display surface;

(*b*) occupy at least 50% of the principal display surfaces and be positioned parallel to the top edge of the package, towards the top part of the package as much as possible while satisfying the requirements of paragraph (c), and in the same direction as the other information that is on the package;

(*c*) be displayed on a principal display surface in a manner that ensures that none of the words of the warning will be severed when the package is opened; and

(*d*) be selected, except in the case of bidis, chewing tobacco and snuff, from the formats that are set out in the source document for each health warning and based on the shape of the space as determined in accordance with paragraph (*b*).

a) elle figure en anglais sur l'une des principales surfaces exposées et en français sur l'autre;

b) elle occupe au moins 50 % de la principale surface exposée et est disposée parallèlement au bord supérieur du paquet et vers la partie supérieure de celui-ci, dans la mesure où le permet le respect de l'alinéa *c*), dans le même sens que les autres renseignements figurant sur la surface;

c) elle est disposée sur la principale surface exposée de façon à ce que l'imprimé d'aucun des mots qui en fait partie ne soit pas déchiré à l'ouverture de l'emballage;

d) sauf dans le cas des bidis, du tabac à mâcher et du tabac à priser, son format est choisi parmi les formats fournis dans le document source pour chaque mise en garde, selon la forme de l'espace délimité aux termes de l'alinéa *b*).

Pitch

(3) A health warning referred to in subsections (4) to (6) shall be displayed using black characters on a white background in Helvetica bold type in a pitch that results in it occupying not less than 60% and not more than 70% of the area in which it is displayed as determined in accordance with paragraph (2)(*b*).

Présentation

(3) Toute mise en garde prévue aux paragraphes (4) à (6) doit être imprimée en caractères gras Helvetica noirs, sur fond blanc, d'un pas tel qu'elle occupe au moins 60 % et au plus 70 % de l'espace déterminé à son égard conformément à l'alinéa (2)*b*).

Bidis

(4) Every manufacturer of bidis shall display one of the following bilingual health warnings on every package of bidis that they manufacture, in accordance with subsection (7):

(*a*) "USE OF THIS PRODUCT CAN CAUSE CANCER" and "L'USAGE DE CE PRODUIT PEUT CAUSER LE CANCER";

Bidis

(4) Le fabricant de bidis doit faire figurer sur chaque emballage, conformément au paragraphe (7), l'une des mises en garde bilingues suivantes :

a) « L'USAGE DE CE PRODUIT PEUT CAUSER LE CANCER » et « USE OF THIS PRODUCT CAN CAUSE CANCER »;

(*b*) "TOBACCO SMOKE HURTS CHILDREN" and "LA FUMÉE DE TABAC NUIT AUX ENFANTS";

(*c*) "TOBACCO SMOKE CAN CAUSE FATAL LUNG DISEASES" and "LA FUMÉE DE TABAC PEUT CAUSER DES MALADIES PULMONAIRES MORTELLES"; or

(*d*) "TOBACCO SMOKE CONTAINS HYDROGEN CYANIDE" and "LA FUMÉE DE TABAC CONTIENT DE L'ACIDE CYANHYDRIQUE".

b) « LA FUMÉE DE TABAC NUIT AUX ENFANTS » et « TOBACCO SMOKE HURTS CHILDREN »;

c) « LA FUMÉE DE TABAC PEUT CAUSER DES MALADIES PULMONAIRES MORTELLES » et « TOBACCO SMOKE CAN CAUSE FATAL LUNG DISEASES »;

d) « LA FUMÉE DE TABAC CONTIENT DE L'ACIDE CYANHYDRIQUE » et « TOBACCO SMOKE CONTAINS HYDROGEN CYANIDE ».

Chewing tobacco and oral snuff

(5) Every manufacturer of chewing tobacco or oral snuff shall display one of the following bilingual health warnings on every package of chewing tobacco or oral snuff that they manufacture, in accordance with subsection (7):

(*a*) "THIS PRODUCT IS HIGHLY ADDICTIVE" and "CE PRODUIT CRÉE UNE FORTE DÉPENDANCE";

(*b*) "THIS PRODUCT CAUSES MOUTH DISEASES" and "CE PRODUIT CAUSE DES MALADIES DE LA BOUCHE";

(*c*) "THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES" and "CE PRODUIT N'EST PAS UN SUBSTITUT SÉCURITAIRE À LA CIGARETTE"; or

(*d*) "USE OF THIS PRODUCT CAN CAUSE CANCER" and "L'USAGE DE CE PRODUIT PEUT CAUSER LE CANCER".

Tabac à mâcher ou tabac à priser oral

(5) Le fabricant de tabac à mâcher ou de tabac à priser oral doit faire figurer sur chaque emballage, conformément au paragraphe (7), l'une des mises en garde bilingues suivantes :

a) « CE PRODUIT CRÉE UNE FORTE DÉPENDANCE » et « THIS PRODUCT IS HIGHLY ADDICTIVE »;

b) « CE PRODUIT CAUSE DES MALADIES DE LA BOUCHE » et « THIS PRODUCT CAUSES MOUTH DISEASES »;

c) « CE PRODUIT N'EST PAS UN SUBSTITUT SÉCURITAIRE À LA CIGARETTE » et « THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES »;

d) « L'USAGE DE CE PRODUIT PEUT CAUSER LE CANCER » et « USE OF THIS PRODUCT CAN CAUSE CANCER ».

Nasal snuff

(6) Every manufacturer of nasal snuff shall display one of the following bilingual health warnings on every package of nasal snuff that they manufacture, in accordance with subsection (7):

Tabac à priser nasal

(6) Le fabricant de tabac à priser nasal doit faire figurer sur chaque emballage, conformément au paragraphe (7), l'une des mises en garde bilingues suivantes :

(*a*) "THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES" and "CE PRODUIT N'EST PAS UN SUBSTITUT SÉCURITAIRE À LA CIGARETTE";

(*b*) "THIS PRODUCT CONTAINS CANCER CAUSING AGENTS" and "CE PRODUIT CONTIENT DES AGENTS CANCÉRIGÈNES";

(*c*) "THIS PRODUCT MAY BE ADDICTIVE" and "CE PRODUIT PEUT CRÉER UNE DÉPENDANCE"; and

(*d*) "THIS PRODUCT MAY BE HARMFUL" and "CE PRODUIT PEUT ÊTRE NOCIF".

a) « CE PRODUIT N'EST PAS UN SUBSTITUT SÉCURITAIRE À LA CIGARETTE » et « THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES »;

b) « CE PRODUIT CONTIENT DES AGENTS CANCÉRIGÈNES » et « THIS PRODUCT CONTAINS CANCER CAUSING AGENTS »;

c) « CE PRODUIT PEUT CRÉER UNE DÉPENDANCE » et « THIS PRODUCT MAY BE ADDICTIVE »;

d) « CE PRODUIT PEUT ÊTRE NOCIF » et « THIS PRODUCT MAY BE HARMFUL ».

Equal display

(7) Every manufacturer shall, in respect of each type of package of each brand of tobacco product that the manufacturer packages in a year, display each health warning

(*a*) in the case of cigarette tobacco, kreteks, leaf tobacco and tobacco sticks, on between 3.25% and 9.25% of those tobacco products; and

(*b*) in the case of bidis, cigars, pipe tobacco, chewing tobacco and snuff, on between 22% and 28% of those tobacco products.

SOR/2011-179, s. 5.

Utilisation égale des mises en garde

(7) Le fabricant doit, à l'égard de chaque type d'emballage de chaque marque des produits du tabac qu'il emballe au cours d'une année, faire figurer chacune des mises en garde :

a) dans le cas des bâtonnets de tabac, des kreteks, du tabac à cigarettes et du tabac en feuilles, sur 3,25 % à 9,25 % de ces produits;

b) dans le cas du tabac à pipe, des cigares, des bidis, du tabac à mâcher et du tabac à priser, sur 22 % à 28 % de ces produits.

DORS/2011-179, art. 5.

Pipe tobacco and cigars

6. (1) Every manufacturer of pipe tobacco contained in a pouch or cigars contained in a box shall display, on only one side of the pouch or box, one of the bilingual health warnings set out in Part 3 of the source document such that the warning is not severed when the pouch or box is opened, as follows:

(*a*) if the side on which the warning is displayed is less than or equal to 149 cm², using a warning of at least

Tabac à pipe et cigares

6. (1) Le fabricant de tabac à pipe emballé dans une blague ou de cigares emballés dans une boîte doit faire figurer l'une des mises en garde bilingues prévues à la partie 3 du document source sur un seul côté de cette blague ou de cette boîte de sorte que la mise en garde ne soit pas déchirée à l'ouverture de la blague ou de la boîte et de façon qu'elle couvre :

a) si la surface du côté utilisé pour la mise en garde ne dépasse pas 149 cm²,

20 cm² with the width of the warning measuring not less than 4 cm; and

(*b*) if the side on which the warning is displayed is greater than 149 cm², using a warning placed on any side of the package other than the bottom, of at least 40 cm² with the width of the warning measuring not less than 4 cm.

au moins 20 cm² avec une largeur minimale de 4 cm;

b) si la surface du côté utilisé pour la mise en garde, excluant le dessous, dépasse 149 cm², au moins 40 cm² avec une largeur minimale de 4 cm.

Cigars in bundles

(2) Every manufacturer of cigars contained in a bundle shall display anywhere on the bundle, other than the top and bottom surfaces, one of the bilingual health warnings set out in Part 3 of the source document such that the warning is at least 40 cm² with the width of the warning measuring not less than 4 cm.

SOR/2011-179, s. 6.

Cigares en fagots

(2) Le fabricant de cigares emballés en fagots doit faire figurer, en un endroit quelconque du fagot, sauf le dessus et le dessous, l'une des mises en garde bilingues prévues à la partie 3 du document source de façon qu'elle couvre au moins 40 cm² avec une largeur minimale de 4 cm.

DORS/2011-179, art. 6.

HEALTH INFORMATION

INFORMATION DE SANTÉ

Display

7. (1) Every manufacturer of cigarette tobacco (other than cigarette tobacco contained in a pouch), kreteks, leaf tobacco or tobacco sticks shall display health information in the following manner:

(*a*) in the case of any package other than a slide and shell package or a tub

(i) anywhere on the package, other than the principal display surface or the bottom, in a manner that the English and French texts are side by side, centred, and together occupy between 60% and 70% of the side on which it is displayed; or

(ii) on a leaflet inserted in every package, in English on one side of the leaflet and in French on the other side, with the information centred and occupying between 60% to 70% of each side;

Affichage

7. (1) Le fabricant de bâtonnets de tabac, kreteks, tabac à cigarettes ou tabac en feuilles doit, sauf s'il s'agit de tabac à cigarettes emballé dans des blagues, faire figurer l'information de santé :

a) dans le cas de tout emballage, à l'exception d'un paquet à coulisse ou d'un pot :

(i) soit en un endroit quelconque de l'emballage, à l'exception de la principale surface exposée et du dessous, de façon que les versions française et anglaise soient côte à côte, qu'elles soient centrées et qu'ensemble elles occupent de 60 % à 70 % de la surface du côté utilisé,

(ii) soit sur un prospectus inséré dans chaque emballage, la version française figurant d'un côté et la version anglaise de l'autre, chacune étant centrée et occupant entre 60 % et 70 % de la surface du côté;

(*b*) in the case of a slide and shell package

(i) in the manner described in subparagraph (*a*)(ii), or

(ii) on the surface of the slide that is opposite to the side of the slide that is next to the tobacco product, in such a manner that the English and French texts are side-by-side and centered, and together occupy 60% to 70% of that surface; and

(*c*) in the case of a tub

(i) in the manner described in subparagraph (a)(ii),

(ii) on any exterior surface of the tub except the bottom,

(iii) on the interior surface of the lid, or

(iv) on the freshness seal.

b) dans le cas d'un paquet à coulisse :

(i) soit sur un prospectus, conformément au sous-alinéa *a*)(ii),

(ii) soit sur la surface du tiroir opposée à celle qui est en contact avec le produit du tabac, de façon que les versions anglaise et française soient côte à côte et qu'ensemble, elles soient centrées et occupent entre 60 % et 70 % de la surface;

c) dans le cas d'un pot :

(i) soit sur un prospectus, conformément au sous-alinéa *a*)(ii),

(ii) soit sur une surface extérieure, à l'exception du dessous,

(iii) soit sur la surface intérieure du couvercle,

(iv) soit sur le sceau de fraîcheur.

Leaflet

(2) The leaflet shall be approximately 50 mm by 88 mm and readily visible to a person who opens a package in which it has been inserted.

Prospectus

(2) Le prospectus doit être d'environ 50 mm sur 88 mm et être facilement visible à l'ouverture de l'emballage.

Equal display

(3) Every manufacturer shall, in respect of each type of package of each brand of tobacco product specified in subsection (1) that the manufacturer packages in a year, display each message on between 3.25% and 9.25% of those tobacco products.

SOR/2011-179, s. 7.

Utilisation égale des messages

(3) Le fabricant doit, à l'égard de chaque type d'emballage de chaque marque de produits du tabac visés au paragraphe (1) qu'il emballe au cours d'une année, faire figurer chaque message sur 3,25 % à 9,25 % de ces produits.

DORS/2011-179, art. 7.

TOXIC EMISSIONS AND TOXIC CONSTITUENTS

ÉMISSIONS TOXIQUES ET CONSTITUANTS TOXIQUES

Test methods

8. (1) Section 4 and subsections 12(4), (5) and (6) of the *Tobacco Reporting Regulations* apply to the testing of a tobacco product for the purpose of obtaining information that is to be displayed in accordance with section 10 of these Regulations.

Méthodes d'essai

8. (1) L'article 4 et les paragraphes 12(4), (5) et (6) du *Règlement sur les rapports relatifs au tabac* s'appliquent aux essais à effectuer pour obtenir l'information à faire paraître conformément à l'article 10 du présent règlement.

Exception

(2) A manufacturer is not required to perform the tests in respect of a particular brand of tobacco product if the manufacturer

(*a*) sells identical products under more than one brand, including the particular brand;

(*b*) performs the tests in respect of another of those brands of identical products (in this subsection referred to as the "reference brand");

(*c*) displays, in accordance with section 10, on the packages of the reference brand the information obtained from the tests described in paragraph (*b*); and

(*d*) displays, in accordance with section 10, the same information on the packages of all of the other brands of identical products, including the particular brand.

SOR/2011-179, s. 8.

Exception

(2) Le fabricant n'est pas tenu d'effectuer les essais à l'égard d'une marque spécifique d'un produit du tabac si, à la fois :

a) il vend des produits identiques sous plus d'une marque, dont la marque spécifique;

b) il effectue les essais à l'égard d'une autre de ces marques de produits identiques (appelée « marque de référence » au présent paragraphe);

c) il fait paraître, conformément à l'article 10, sur l'emballage de la marque de référence l'information qu'il a obtenue des essais visés à l'alinéa *b*);

d) il fait paraître, conformément à l'article 10, la même information sur l'emballage de toutes les autres marques de produits identiques, dont la marque spécifique.

DORS/2011-179, art. 8.

Toxic emissions

9. Every manufacturer of cigarette tobacco, kreteks, leaf tobacco and tobacco sticks shall display on every package, other than a carton, kit or wrapper, of those tobacco products the texts "Some of the toxic emissions: Tar, Nicotine, Carbon monoxide, Formaldehyde, Hydrogen cyanide, Benzene" and "Quelques-unes des émissions toxiques: goudron, nicotine, monoxyde de carbone, formaldéhyde, acide cyanhydrique, benzène" such that those texts are one under the other.

SOR/2011-179, s. 8.

Émissions toxiques

9. Le fabricant de bâtonnets de tabac, kreteks, tabac à cigarettes ou tabac en feuilles doit, sur chaque emballage de ces produits du tabac, sauf les cartouches, trousses et enveloppes, faire figurer les mentions « Quelques-unes des émissions toxiques : goudron, nicotine, monoxyde de carbone, formaldéhyde, acide cyanhydrique, benzène » et « Some of the toxic emissions : Tar, Nicotine, Carbon monoxide, Formaldehyde, Hydrogen cyanide, Benzene », une version sous l'autre.

DORS/2011-179, art. 8.

Toxic constituents

10. Every manufacturer of chewing tobacco or snuff shall display on every package, other than a carton, kit or wrapper, of chewing tobacco or snuff that they manufacture

Constituants toxiques

10. Le fabricant de tabac à mâcher ou de tabac à priser doit, sur chaque emballage de ce produit du tabac, sauf les cartouches, trousses et enveloppes :

a) indiquer, avec un pourcentage d'erreur d'au plus 5 %, la teneur moyenne

(*a*) with a variation of not more than 5%, the mean amount of toxic constituents contained in the chewing tobacco or snuff, expressed in milligrams, micrograms or nanograms per gram of chewing tobacco or snuff and determined in accordance with the official method set out for that toxic constituent in column 2 of Schedule 2; and

(*b*) the information referred to in paragraph (*a*), in the order set out in column 1 of Schedule 2, in such a manner that the English and French texts are one under the other, preceded by the words "Toxic constituents/gram:" and "Constituants toxiques/gramme :".

Placement, presentation and expression

11. The information to be displayed in accordance with sections 9 and 10 shall be displayed

(*a*) on any side of the package, other than a side displaying a health warning, or, in the case of a package of chewing tobacco or snuff, on its bottom, in a manner that it occupies no less than 50% of the entire side or bottom;

(*b*) in Helvetica bold type in black characters of 10 points on a white background, or, if it is impossible to display the information without occupying more than 70% of the surface on which it is to be displayed under paragraph (*a*), in a pitch that results in the information occupying not less than 60% of that area; and

(*c*) using the full name of the emission or constituent and not its chemical formula or any other abbreviated name.

SOR/2011-179, s. 9.

SLIDE AND SHELL PACKAGES

[SOR/2011-179, s. 10(F)]

de chaque constituant toxique dans le produit, exprimée en milligrammes, microgrammes ou nanogrammes par gramme de produit et déterminée selon la méthode officielle applicable figurant à la colonne 2 de l'annexe 2;

b) faire paraître l'information visée à l'alinéa *a*) en français et en anglais, une version sous l'autre, dans l'ordre des constituants toxiques à la colonne 1 de l'annexe 2, et la disposer à la suite de « Constituants toxiques/gramme : » et « Toxic constituents/gram : ».

Disposition, présentation et formulation

11. L'information exigée aux termes des articles 9 et 10 doit être, à la fois :

a) disposée de façon à occuper au moins 50 % de la surface d'un côté de l'emballage, autre qu'un côté sur lequel figure la mise en garde et, dans le cas de l'emballage de tabac à mâcher ou du tabac à priser, incluant le dessous;

b) imprimée en noir sur fond blanc, en caractères gras Helvetica de 10 points ou, dans le cas où plus de 70 % de la surface d'affichage visée à l'alinéa *a*) serait occupée par le texte du message, d'un pas qui permet qu'au moins 60 % de cette surface soit occupée par le texte de celui-ci;

c) formulée de façon à identifier chaque émission ou chaque constituant par son nom complet, plutôt que par la formule chimique ou par une abréviation.

DORS/2011-179, art. 9.

PAQUETS À COULISSE

[DORS/2011-179, art. 10(F)]

Texts to be displayed

12. (1) Every manufacturer of bidis, kreteks or tobacco sticks contained in slide and shell packages shall, in accordance with this section, display on the upper slide-flap the health information that is set out for that purpose in Part 4 of the source document.

Obligation de faire figurer

12. (1) Le fabricant de bidis, bâtonnets de tabac ou kreteks emballés dans des paquets à coulisse doit, conformément au présent article, faire figurer sur le rabat supérieur l'information de santé prévue à cette fin à la partie 4 du document source.

Manner of display

(2) The health information required under subsection (1) shall be displayed in a manner that the English and French texts are one under the other and together occupy at least 50% of the surface of the upper slide-flap.

Emplacement

(2) L'information de santé exigée au paragraphe (1) est disposée sur le rabat de façon que les versions française et anglaise soient l'une sous l'autre et qu'ensemble, elles occupent au moins 50 % de la surface du rabat supérieur.

Equal display

(3) Every manufacturer shall, in respect of each brand of tobacco product specified in subsection (1) that the manufacturer packages in a year, display each message on between 3.25% and 9.25% of those tobacco products.

Utilisation égale des messages

(3) Le fabricant doit, à l'égard de chaque marque de produits du tabac visés au paragraphe (1) qu'il emballe au cours d'une année, faire figurer chaque message sur 3,25 % à 9,25 % de ces produits.

Definition of "upper slide-flap"

(4) In this section, "upper slide-flap" means, in respect of a slide and shell package, the extremity of the slide that can be folded and is concealed by the shell when the package is closed and that is visible when the package is used in the customary manner to gain access to the product.

SOR/2011-179, s. 11.

Définition de « rabat supérieur »

(4) Dans le présent article, « rabat supérieur » s'entend, dans le cas d'un paquet à coulisse, de l'extrémité rabattable du tiroir qui est masquée par la coulisse lorsque le paquet est fermé et qui est visible lorsque l'emballage est utilisé de la manière habituelle pour avoir accès au produit.

DORS/2011-179, art. 11.

CARTONS AND KITS

CARTOUCHES ET TROUSSES

Display

13. (1) Every manufacturer of a tobacco product contained in a carton or kit shall, in addition to the information otherwise displayed on each package, display on the carton or kit

(*a*) on the principal display surface, a health warning in accordance with subsections 5(1), (2), (3) and (7);

(*b*) on the two next largest sides, a health warning from those mentioned in paragraph (*a*) so that it occupies at least

Renseignements

13. (1) Le fabricant d'un produit du tabac contenu dans une cartouche ou une trousse doit, en plus des renseignements à inscrire sur chaque emballage, faire figurer sur la cartouche ou la trousse les renseignements suivants :

a) sur la principale surface exposée, une mise en garde conforme aux paragraphes 5(1), (2), (3) et (7);

b) sur les deux plus grands parmi les autres côtés de la cartouche ou de la trousse, une mise en garde prévue à l'ali-

50% of the surface of each of those sides; and

(*c*) on the remaining sides, except in the case of transparent cartons and transparent kits, either

(i) a health warning from those mentioned in paragraph (*a*) so that it occupies at least 50% of the surface of those sides; or

(ii) the following, in such a manner that the English and French texts are one under the other and together occupy at least 50% of those sides, in Helvetica type and in a pitch that results in it occupying not less than 60% and not more than 70% of the surface to be occupied:

(A) in the case of chewing tobacco and snuff, the mean amount of the toxic constituents, determined in accordance with section 10, and

(B) in any other case except bidis, the texts "Some of the toxic emissions: Tar, Nicotine, Carbon monoxide, Formaldehyde, Hydrogen cyanide, Benzene" and "Quelques-unes des émissions toxiques: goudron, nicotine, monoxyde de carbone, formaldéhyde, acide cyanhydrique, benzène".

néa *a*), de façon qu'elle occupe au moins 50 % de la surface de chacun de ces côtés;

c) sauf dans le cas de cartouches ou trousses transparentes, sur les deux côtés restants de la cartouche ou de la trousse:

(i) soit une mise en garde prévue à l'alinéa *a*), de façon qu'elle occupe au moins 50 % de la surface de chacun de ces côtés,

(ii) soit les indications ci-après, de façon que les versions française et anglaise soient l'une sous l'autre, couvrent ensemble au moins 50 % de chacun de ces côtés et figurent en caractères Helvetica d'un pas tel qu'elles occupent entre 60 % et 70 % de la surface à occuper:

(A) dans le cas du tabac à mâcher et du tabac à priser, la teneur moyenne en constituants toxiques indiquée conformément à l'article 10,

(B) dans le cas de tout autre produit du tabac, sauf les bidis, les mentions « Quelques-unes des émissions toxiques: goudron, nicotine, monoxyde de carbone, formaldéhyde, acide cyanhydrique, benzène » et « Some of the toxic emissions: Tar, Nicotine, Carbon monoxide, Formaldehyde, Hydrogen cyanide, Benzene ».

Health information

(2) Every manufacturer of cigarettes contained in soft packages that are packaged in cartons or kits shall insert in each of those cartons a leaflet that displays health information in the manner specified in section 7.

SOR/2011-179, s. 12.

Information de santé

(2) Le fabricant de cigarettes en paquets mous emballés dans des cartouches ou des trousses doit insérer dans celles-ci un prospectus sur lequel figure l'information de santé conformément à l'article 7.

DORS/2011-179, art. 12.

COMING INTO FORCE

Coming into force

14. (1) These Regulations, except sections 8 to 11, come into force

(*a*) in respect of a brand of cigarettes that, for the year preceding the year in which these Regulations are registered, has total sales in Canada of that brand in that year of more than 2% of the total sales in Canada of cigarettes in that preceding year, on the day that is 180 days after the day on which these Regulations are registered; and

(*b*) in respect of any other tobacco product, one year after the day on which these Regulations are registered.

Toxic emissions and constituents

(2) Sections 8 to 11 come into force one year after the day on which these Regulations are registered.

ENTRÉE EN VIGUEUR

Entrée en vigueur

14. (1) Le présent règlement, à l'exception des articles 8 à 11, entre en vigueur :

a) dans le cas d'une marque de cigarettes dont les ventes totales au Canada pour l'année précédant celle de l'enregistrement du présent règlement représentent plus de 2 % des ventes totales de cigarettes au Canada pour l'année en question, 180 jours suivant la date de son enregistrement;

b) dans le cas de tout autre produit du tabac, à la première date anniversaire de son enregistrement.

Émissions et constituants toxiques

(2) Les articles 8 à 11 entrent en vigueur à la première date anniversaire de l'enregistrement du présent règlement.

SCHEDULE 1
[Repealed, SOR/2011-179, s. 13]

ANNEXE 1
[Abrogée, DORS/2011-179, art. 13]

SCHEDULE 2
(Sections 1 and 10)

OFFICIAL METHODS FOR THE COLLECTION OF DATA ON TOXIC CONSTITUENTS IN CHEWING TOBACCO AND SNUFF

Item	Column 1 Toxic Constituent	Column 2 Official Method
1.	Nitrosamines	Official Method T-309, *Determination of Nitrosamines in Whole Tobacco*, prepared by the Department of Health dated December 31, 1999
2.	Lead	Official Method T-306, *Determination of Ni, Pb, Cd, Cr, As, Se and Hg in Whole Tobacco*, prepared by the Department of Health dated December 31, 1999
3.	Nicotine	Official Method T-301, *Determination of Alkaloïds in Whole Tobacco*, prepared by the Department of Health dated December 31, 1999

ANNEXE 2
(articles 1 et 10)

MÉTHODES OFFICIELLES DE COLLECTE DE DONNÉES SUR LES CONSTITUANTS TOXIQUES DANS LE TABAC À MÂCHER ET LE TABAC À PRISER

Article	Colonne 1 Constituant toxique	Colonne 2 Méthode officielle
1.	Nitrosamines	Méthode officielle T-309 du ministère de la Santé, intitulée *Dosage des nitrosamines dans le tabac entier*, dans sa version du 31 décembre 1999
2.	Plomb	Méthode officielle T-306 du ministère de la Santé, intitulée *Dosage du nickel, du plomb, du cadmium, du chrome, de l'arsenic, du sélénium et du mercure dans le tabac entier*, dans sa version du 31 décembre 1999
3.	Nicotine	Méthode officielle T-301 du ministère de la Santé, intitulée *Dosage des alcaloïdes dans le tabac entier*, dans sa version du 31 décembre 1999

RELATED PROVISIONS

— SOR/2011-179, s. 14

14. (1) In this section, "former Regulations" means the *Tobacco Products Information Regulations* as they read immediately before the day on which these Regulations come into force.

(2) In this section, "former source document" means the document defined as "source document" in section 1 of the former Regulations.

(3) Despite these Regulations, if a package of a tobacco product, other than cigarettes or little cigars, or any accompanying leaflet displays information in accordance with the former Regulations, the former Regulations continue to apply to the package or the leaflet until the day that is 18 months after the day on which these Regulations come into force. However, if a package of a tobacco product displays one of the health information messages reproduced from the electronic images obtained from the electronic files used by the Minister to generate the former source document, the manufacturer may continue to display that message until the day that is three years after the day on which these Regulations come into force.

DISPOSITIONS CONNEXES

— DORS/2011-179, art. 14

14. (1) Dans le présent article, « règlement antérieur » s'entend du *Règlement sur l'information relative aux produits du tabac*, dans sa version antérieure à l'entrée en vigueur du présent règlement.

(2) Dans le présent article, « ancien document source » s'entend au sens de « document source » à l'article 1 du règlement antérieur.

(3) Malgré le présent règlement, si l'emballage d'un produit du tabac, autre que des petits cigares ou des cigarettes, ou le prospectus qui accompagne ce produit fait figurer l'information conformément au règlement antérieur, celui-ci continue de s'appliquer à cet emballage ou à ce prospectus durant les dix-huit mois qui suivent l'entrée en vigueur du présent règlement. Cependant, si l'emballage d'un produit du tabac affiche l'un des messages d'information de santé reproduit par imagerie électronique d'après l'infographie utilisée par le ministre pour produire l'ancien document source, le fabricant peut continuer d'afficher ce message durant les trois ans qui suivent l'entrée en vigueur du présent règlement.

CANADA

CONSOLIDATION

CODIFICATION

Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)

Règlement sur l'étiquetage des produits du tabac (cigarettes et petits cigares)

SOR/2011-177

DORS/2011-177

Current to March 20, 2012

À jour au 20 mars 2012

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 20, 2012. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Registration
SOR/2011-177 September 22, 2011

TOBACCO ACT

Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)

P.C. 2011-925 September 22, 2011

Whereas, pursuant to section 42.1 of the *Tobacco Act*[a], the Minister of Health laid a copy of the proposed *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, substantially in the annexed form, before the House of Commons on June 9, 2011 and the House of Commons concurred on June 22, 2011 in a report from the Standing Committee on Health approving the proposed Regulations;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to sections 17 and 33[b] of the *Tobacco Act*[a], hereby makes the annexed *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*.

[a] S.C. 1997, c.13
[b] S.C. 1998, c. 38, s. 3

Enregistrement
DORS/2011-177 Le 22 septembre 2011

LOI SUR LE TABAC

Règlement sur l'étiquetage des produits du tabac (cigarettes et petits cigares)

C.P. 2011-925 Le 22 septembre 2011

Attendu que, conformément à l'article 42.1 de la *Loi sur le tabac*[a], la ministre de la Santé a fait déposer le projet de règlement intitulé *Règlement sur l'étiquetage des produits du tabac (cigarettes et petits cigares)*, conforme en substance au texte ci-après, devant la Chambre des communes le 9 juin 2011 et que celle-ci, le 22 juin 2011, a donné son agrément à un rapport du Comité permanent de la santé approuvant le projet,

À ces causes, sur recommandation de la ministre de la Santé et en vertu des articles 17 et 33[b] de la *Loi sur le tabac*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement sur l'étiquetage des produits du tabac (cigarettes et petits cigares)*, ci-après.

[a] L.C. 1997, ch. 13
[b] L.C. 1998, ch. 38, art. 3

TOBACCO PRODUCTS LABELLING REGULATIONS (CIGARETTES AND LITTLE CIGARS)

RÈGLEMENT SUR L'ÉTIQUETAGE DES PRODUITS DU TABAC (CIGARETTES ET PETITS CIGARES)

INTERPRETATION

DÉFINITIONS

Definitions

1. The following definitions apply in these Regulations.

1. Les définitions qui suivent s'appliquent au présent règlement.

Définitions

"box"
« *boîte* »

"box" means a package that has rectangular sides and a lid.

« arête supérieure »

a) S'agissant de l'emballage cylindrique, l'arête qui est dans le plan horizontal et qui forme la limite supérieure du côté de l'emballage, lequel côté exclut le dessus de l'emballage mais inclut le côté du couvercle lorsque ce côté fait partie du côté de l'emballage;

b) s'agissant de l'emballage autre qu'un emballage cylindrique, l'arête qui est dans le plan horizontal et qui forme la limite supérieure de l'emballage lorsque celui-ci est utilisé de la manière habituelle pour accéder au produit du tabac;

c) s'agissant de la surface extérieure du tiroir, l'arête qui est dans le plan horizontal et qui forme la limite supérieure de cette surface lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac.

« arête supérieure »
"*top edge*"

"brand"
« *marque* »

"brand" means all of the brand elements that as a whole are used by a manufacturer to identify to a consumer a tobacco product made by the manufacturer.

"carton"
« *cartouche* »

"carton" means a package that contains two or more packages of a tobacco product.

« cartouche » Emballage renfermant au moins deux emballages de produits du tabac.

« cartouche »
"*carton*"

"cigarette"
« *cigarette* »

"cigarette" includes any roll or tubular construction that contains tobacco and is intended for smoking, other than a bidi, cigar, kretek, little cigar or tobacco stick.

« cigarette » Est assimilé à une cigarette tout rouleau ou article de forme tubulaire contenant du tabac, destiné à être fumé et qui n'est pas un bâtonnet de tabac, un bidi, un cigare, un kretek ou un petit cigare.

« cigarette »
"*cigarette*"

"component"
« *composante* »

"component" means, with respect to a labelling element,

(*a*) in the case of a health warning, the image, the title, the explanatory text or related information;

(*b*) in the case of a toxic emissions statement, the text;

(*c*) in the case of a health information message, the image or the text; and

(*d*) the attribution of a labelling element to its source as provided for in subsection 6(1) if the attribution appears in a display area or on a leaflet, even though the attribution is not a labelling element.

« composante » Relativement à l'élément d'étiquetage, s'entend :

« composante »
"*component*"

"display area"
« *zone d'application* »

"display area" means a side, or part of a side, of a package specified as a display area in accordance with sections 12, 17 and 22.

"exterior surface of the slide" « *surface extérieure du tiroir* »

"exterior surface of the slide" means, in respect of a slide and shell package, the exterior surface of the slide, other than the flaps of the slide, when the package is used in the customary manner to gain access to the tobacco product.

"health information message" « *message d'information sur la santé* »

"health information message" means the following messages, but does not include the attribution of those messages to their source as provided for in subsection 6(1):

(*a*) in respect of cigarettes, the messages set out in Part 3 of Division A of the source document; and

(*b*) in respect of little cigars, the messages set out in Part 3 of Division B of the source document.

"health warning" « *mise en garde* »

"health warning" means the following warnings, but does not include the attribution of those warnings to their source as provided for in subsection 6(1):

(*a*) in respect of cigarettes, the warnings set out in Part 1 of Division A of the source document; and

(*b*) in respect of little cigars, the warnings set out in Part 1 of Division B of the source document.

"labelling element" « *élément d'étiquetage* »

"labelling element" means a health warning, toxic emissions statement or health information message.

"manufacturer" « *fabricant* »

"manufacturer" does not include an individual or entity that only packages or only distributes tobacco products on behalf of a manufacturer.

"slide" « *tiroir* »

"slide" means the sliding portion of a slide and shell package.

"source document" « *document source* »

"source document" means the document entitled *Labelling Elements for Tobacco Products (Cigarettes and Little Cigars)*,

a) dans le cas d'une mise en garde, de l'illustration, du titre, du texte explicatif ou des renseignements accessoires;

b) dans le cas de l'énoncé sur les émissions toxiques, du texte;

c) dans le cas du message d'information sur la santé, de l'illustration ou du texte;

d) dans le cas où elle figure dans la zone d'application ou sur un prospectus, de la mention de source prévue au paragraphe 6(1), même si elle n'est pas un élément d'étiquetage.

« document source » "*source document*"

« document source » Le document du ministère de la Santé intitulé *Éléments d'étiquetage des produits du tabac (cigarettes et petits cigares)* dans sa version du 27 mai 2011.

« élément d'étiquetage » "*labelling element*"

« élément d'étiquetage » Toute mise en garde, tout énoncé sur les émissions toxiques ou tout message d'information sur la santé.

« énoncé sur les émissions toxiques » "*toxic emissions statement*"

« énoncé sur les émissions toxiques » Les énoncés ci-après, à l'exclusion de la mention de source prévue au paragraphe 6(1) :

a) dans le cas des cigarettes, ceux figurant à la partie 2 du titre A du document source;

b) dans le cas des petits cigares, ceux figurant à la partie 2 du titre B du document source.

« fabricant » "*manufacturer*"

« fabricant » Ne vise pas le particulier ni l'entité qui ne fait qu'emballer ou distribuer des produits du tabac pour le compte d'un fabricant.

« marque » "*brand*"

« marque » Les éléments de marque qui, dans leur ensemble, sont utilisés par un fabricant pour identifier auprès du consommateur les produits du tabac qu'il fabrique.

published by the Department of Health, dated May 27, 2011.

"tobacco product" « *produit du tabac* »

"tobacco product" means a cigarette or little cigar.

"top edge" « *arête supérieure* »

"top edge" means

(*a*) in respect of a cylindrical package, the edge that is in the horizontal plane and that forms the upper limit of the side of the package, which side excludes the top of the package but includes the side of the lid when the side forms part of the side of the package;

(*b*) in respect of a package other than a cylindrical package, the edge that is in the horizontal plane and that forms the upper limit of the package when the package is used in the customary manner to gain access to the tobacco product; and

(*c*) in respect of an exterior surface of a slide, the edge that is in the horizontal plane and that forms the upper limit of that surface when the package is used in the customary manner to gain access to the tobacco product.

"toxic emissions statement" « *énoncé sur les émissions toxiques* »

"toxic emissions statement" means the following statements, but does not include the attribution of those statements to their source as provided for in subsection 6(1):

(*a*) in respect of cigarettes, the statements set out in Part 2 of Division A of the source document; and

(*b*) in respect of little cigars, the statements set out in Part 2 of Division B of the source document.

"upper slide-flap" « *rabat supérieur* »

"upper slide-flap" means, in respect of a slide and shell package, the extremity of the slide that can be folded and is concealed by the shell when the package is

« message d'information sur la santé » "*health information message*"

« message d'information sur la santé » Les messages ci-après, à l'exclusion de la mention de source prévue au paragraphe 6(1) :

a) dans le cas des cigarettes, ceux figurant à la partie 3 du titre A du document source;

b) dans le cas des petits cigares, ceux figurant à la partie 3 du titre B du document source.

« mise en garde » "*health warning*"

« mise en garde » Les mises en garde ci-après, à l'exclusion de la mention de source prévue au paragraphe 6(1) :

a) dans le cas des cigarettes, celles figurant à la partie 1 du titre A du document source;

b) dans le cas des petits cigares, celles figurant à la partie 1 du titre B du document source.

« produit du tabac » "*tobacco product*"

« produit du tabac » Cigarette ou petit cigare.

« rabat supérieur » "*upper slide-flap*"

« rabat supérieur » S'agissant du paquet à coulisse, l'extrémité rabattable du tiroir qui est masquée par la coulisse lorsque l'emballage est fermé et qui est visible lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac.

« surface extérieure du tiroir » "*exterior surface of the slide*"

« surface extérieure du tiroir » S'agissant du paquet à coulisse, la surface de la partie extérieure du tiroir, à l'exclusion des rabats, lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac.

« tiroir » "*slide*"

« tiroir » La partie coulissante qui s'insère dans un paquet à coulisse.

« zone d'application » "*display area*"

« zone d'application » Côté ou partie du côté d'un emballage prévu à ce titre conformément aux articles 12, 17 et 22.

closed and that is visible when the package is used in the customary manner to gain access to the tobacco product.

APPLICATION

Retail sale

2. (1) These Regulations apply to packages of tobacco products that are intended for retail sale.

Overwraps

(2) These Regulations also apply to overwraps used as cartons that are intended for retail sale.

GENERAL PROVISIONS

Electronic files

3. A manufacturer must obtain from the Minister, in the form of electronic files, the labelling elements set out in the source document, including the attribution of the labelling elements to their source, and display them on packages or leaflets in accordance with these Regulations.

Printing

4. A labelling element and any attribution of its source that is displayed on a package or leaflet must be printed

(*a*) in colours that are as close as possible to the colours in which the labelling element and source attribution are set out in the source document; and

(*b*) with the greatest clarity possible taking into consideration the printing method used.

Legibility and official languages

5. Text contained in a labelling element must be legible and displayed in both official languages in the same manner.

Retention of attribution

6. (1) If a manufacturer chooses to display the attribution contained in the electronic files, they must display it in the same manner as it is presented in the

CHAMP D'APPLICATION

Vente au détail

2. (1) Le présent règlement s'applique aux emballages de produits du tabac destinés à la vente au détail.

Suremballages

(2) Il s'applique également aux suremballages qui sont utilisés en guise de cartouches destinées à la vente au détail.

DISPOSITIONS GÉNÉRALES

Dossiers électroniques

3. Il incombe au fabricant d'obtenir du ministre, sous la forme de dossiers électroniques, les éléments d'étiquetage figurant dans le document source, y compris les mentions de source, et de les faire figurer sur les emballages ou les prospectus conformément au présent règlement.

Impression

4. Les éléments d'étiquetage et les mentions de source qui figurent sur les emballages ou les prospectus doivent satisfaire aux conditions suivantes :

a) être imprimés en des couleurs se rapprochant le plus possible de celles de ces éléments et mentions dans le document source;

b) être imprimés avec le plus de clarté possible compte tenu de la technique d'impression utilisée.

Lisibilité et langues officielles

5. Le texte contenu dans les éléments d'étiquetage doit être lisible et figurer de la même façon dans les deux langues officielles.

Mention de source conservée

6. (1) Si le fabricant choisit de faire figurer la mention de source contenue dans un fichier électronique, il le fait de la même manière que dans le document

source document or in accordance with section 10.

Removal of attribution

(2) If a manufacturer chooses to remove the attribution contained in the electronic files, they must only remove the phrases "Health Canada" and "Santé Canada".

Visibility

7. A labelling element, or a component of a labelling element, must not be concealed or obscured, except partially

(*a*) by an excise stamp in accordance with subsection 11(2); or

(*b*) by a tear tape required under provincial legislation.

Integrity

8. (1) The customary method of opening the package must not damage the labelling element or make it illegible.

Severed package

(2) If the customary method of opening the package severs the labelling element,

(*a*) the integrity of the labelling element must be restored when the package is closed; and

(*b*) two lines of text within the labelling element may be separated, but no letter, numeral or other character may be severed.

Non-application

(3) Subsection (1) does not apply to a package that is ordinarily torn or discarded after opening.

Permanence

9. A labelling element that is displayed on a package or a leaflet must be irremovable.

Adaptation

10. If a labelling element does not fit the portion of the display area that it must occupy or does not fit the dimensions of a leaflet that are determined in accordance

source, ou selon les modalités prévues à l'article 10.

Mention de source retirée

(2) Si le fabricant choisit de retirer une mention de source contenue dans un fichier électronique, il ne peut retirer que les mentions « Santé Canada » et « Health Canada ».

Visibilité

7. Aucun élément d'étiquetage, ni aucune de ses composantes, ne peut être masqué ou voilé, sauf partiellement :

a) par un timbre d'accise conformément aux modalités prévues au paragraphe 11(2);

b) par une bandelette d'ouverture exigée par les lois et règlements provinciaux.

Intégrité

8. (1) L'ouverture de l'emballage de la manière habituelle ne doit pas endommager l'élément d'étiquetage ni le rendre illisible.

Emballage sectionné

(2) Si l'élément d'étiquetage est sectionné lorsque l'emballage est ouvert de la manière habituelle :

a) il doit retrouver son intégrité lorsque l'emballage est refermé;

b) deux lignes de texte qui en font partie peuvent être séparées, mais aucune lettre, aucun nombre ni autre caractère ne doit être sectionné.

Non-application

(3) Le paragraphe (1) ne s'applique pas aux emballages qui sont habituellement déchirés ou jetés lors de leur ouverture.

Permanence

9. L'élément d'étiquetage figurant sur l'emballage ou le prospectus doit être inamovible.

Modification

10. Si l'élément d'étiquetage n'est pas adapté à la partie de la zone d'application qu'il doit occuper — ou aux dimensions du prospectus déterminées conformément aux

with subsections 29(1) and (2), the labelling element must be adapted in accordance with the following requirements:

(*a*) its components must, to the extent possible, maintain the scale of the components in the source document;

(*b*) the positions of the components must, to the extent possible, be maintained relative to each other;

(*c*) the text may only be displaced to meet the requirements of section 8 or subsection 11(2); and

(*d*) the number of lines of text may only be adapted to avoid distortion of a component.

paragraphes 29(1) et (2) —, il est modifié en tenant compte des exigences suivantes :

a) dans la mesure du possible, ses composantes doivent rester à l'échelle relativement à celles du document source;

b) dans la mesure du possible, la position des composantes les unes par rapport aux autres doit être conservée;

c) le texte ne peut être déplacé que pour satisfaire aux exigences de l'article 8 ou du paragraphe 11(2);

d) le nombre de lignes ne peut être modifié que pour éviter la déformation d'une composante.

Stamp

11. (1) A labelling element must not be applied on an excise stamp that is required under the *Stamping and Marking of Tobacco Products Regulations*.

Estampille

11. (1) Aucun élément d'étiquetage ne peut être apposé sur un timbre d'accise exigé en application du *Règlement sur l'estampillage et le marquage des produits du tabac*.

Coverage

(2) A labelling element may be concealed only by an excise stamp but to the least extent possible and to a maximum surface area of 180 mm². In that case, the labelling element must be adapted in accordance with section 10 so that no component is concealed by the excise stamp.

Empiètement

(2) Seul un timbre d'accise peut masquer l'élément d'étiquetage mais le moins possible et sur au plus 180 mm². Le cas échéant, l'élément d'étiquetage est modifié conformément à l'article 10 de façon à ce qu'aucune de ses composantes ne soit masquée par le timbre d'accise.

HEALTH WARNINGS

MISES EN GARDE

Display areas

12. (1) Subject to subsection (2), health warnings must be displayed in respect of each type of package set out in column 1 of Schedule 1 on the display areas set out in column 2.

Zones d'application

12. (1) Sous réserve du paragraphe (2), les mises en garde doivent figurer sur chaque type d'emballage visé à la colonne 1 de l'annexe 1 dans les zones d'application prévues à la colonne 2.

Other packages

(2) In respect of a type of package that is not set out in Schedule 1, health warnings must be displayed on the following display areas:

Autres emballages

(2) S'agissant d'un type d'emballage qui n'est pas visé à l'annexe 1, les mises en garde doivent figurer dans les zones d'application suivantes :

(*a*) in the case of a package that has at least two equal-sized sides, other than the top and bottom of the package, two of those sides that are opposite sides of the package and one of which is visible when the package is used in the customary manner to gain access to the tobacco product, including the sides of any lid if those sides are part of the sides of the package; and

(*b*) in the case of any other package, the largest side that is visible when the package is used in the customary manner to gain access to the tobacco product.

a) dans le cas d'un emballage qui a au moins deux côtés d'égale superficie, à l'exclusion du dessus et du dessous de l'emballage, deux de ces côtés, pourvu qu'ils soient opposés l'un à l'autre et que l'un d'eux soit visible lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac, y compris les côtés du couvercle lorsqu'ils font partie des côtés de l'emballage;

b) dans le cas de tout autre emballage, le plus grand côté qui est visible lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac.

Portion of display area

13. (1) The portion of a display area of a package on which a health warning must be displayed is at least 75% of each display area referred to in section 12.

13. (1) La partie de la zone d'application dans laquelle la mise en garde doit figurer doit représenter au moins 75 % de chaque zone d'application visée à l'article 12.

Partie de la zone d'application

Determination of portion of display area

(2) The portion of a display area of a soft package is determined in accordance with subsection (3), the portion of a display area of a three-sided package is determined in accordance with subsection (4), the portion of a display area of a cylindrical package is determined in accordance with subsection (5) and the portion of a display area of all other types of packages is determined in accordance with subsections (6) and (7).

(2) La partie de la zone d'application des paquets mous est établie conformément au paragraphe (3), celle des emballages à trois côtés conformément au paragraphe (4), celle des emballages cylindriques conformément au paragraphe (5) et celle de tous les autres types d'emballage conformément aux paragraphes (6) et (7).

Définition de la partie de la zone d'application

Soft packages

(3) In the case of a soft package, the portion of the display area runs along a line that is parallel to and not more than 12 mm below the top edge of the package and extends from the left edge to the right edge of the display area.

(3) S'agissant des paquets mous, la partie de la zone d'application court le long d'une ligne parallèle à l'arête supérieure de l'emballage située à au plus 12 mm au-dessous de cette arête et s'étend de l'arête gauche à l'arête droite de la zone d'application.

Paquets mous

Three-sided packages

(4) In the case of a three-sided package, the portion of the display area runs along a line that is parallel to the top edge of the

(4) S'agissant des emballages à trois côtés, la partie de la zone d'application court le long d'une ligne parallèle à l'arête supé-

Emballages à trois côtés

package and not more than 12 mm below the tear line and extends from the left edge to the right edge of the display area.

rieure de l'emballage et à au plus 12 mm au dessous de la ligne de sectionnement et s'étend de l'arête gauche à l'arête droite de la zone d'application.

Cylindrical packages

(5) In the case of a cylindrical package, the portion of the display area runs along the line of separation between the lid and the side of the package, extends towards the bottom of the package and is bounded by the left and right limits of the display area.

(5) S'agissant des emballages cylindriques, la partie de la zone d'application court le long de la ligne de séparation du couvercle et du côté de l'emballage, s'étend vers le dessous de l'emballage et est encadrée par les démarcations gauche et droite de la zone d'application.

Emballages cylindriques

Vertical

(6) If, in relation to the top edge of a package, the height to width ratio of the display area is greater than or equal to 0.5, then the portion of the display area runs along that top edge and extends from the left edge to the right edge of the display area.

(6) Si, relativement à l'arête supérieure de l'emballage, le rapport hauteur-largeur de la zone d'application est supérieur ou égal à 0,5, la partie de la zone d'application court le long de cette arête et s'étend de l'arête gauche à l'arête droite de la zone d'application.

Vertical

Horizontal

(7) If, in relation to the top edge of a package, the height to width ratio of the display area is less than 0.5, then the portion of the display area runs along the left edge of the display area and extends from the bottom edge to the top edge of the package.

(7) Si, relativement à l'arête supérieure de l'emballage, le rapport hauteur-largeur de la zone d'application est inférieur à 0,5, la partie de la zone d'application court le long de l'arête gauche de la zone d'application et s'étend de l'arête inférieure à l'arête supérieure de l'emballage.

Horizontal

Space occupied and orientation of text

(8) A health warning must completely occupy the portion of the display area and must be oriented in such a manner that its text is readable from left to right when the package is used in the customary manner to gain access to the tobacco product.

(8) La mise en garde doit occuper la totalité de la partie de la zone d'application et être orientée de façon à ce que le texte se lise de gauche à droite lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac.

Espace occupé et orientation du texte

Package — two display areas

14. (1) If a package has two display areas, the English version of a health warning set out in Set 1 of Part 1 of the source document must be displayed on one display area and the French version must be displayed on the other.

14. (1) S'il y a deux zones d'application sur l'emballage, la version française de la mise en garde prévue au jeu 1 de la partie 1 du document source doit figurer dans une zone d'application et la version anglaise dans l'autre.

Emballage — deux zones d'application

Package — one display area

(2) If a package has one display area, a health warning in English and French set out in Set 2 of Part 1 of the source docu-

(2) S'il n'y a qu'une zone d'application sur l'emballage, une mise en garde en fran-

Emballage — une zone d'application

ment must be displayed on the display area.

Package — cartons

(3) In the case of a carton, the English version of a health warning set out in Set 1 of Part 1 of the source document must be displayed on one of the primary display areas set out in column 2 of item 10 of Schedule 1 and the French version must be displayed on the other. The English version of a different health warning set out in that Set 1 must be displayed on one of the two secondary display areas set out in the same column of the same item and the French version must be displayed on the other.

Proportional display

15. A manufacturer must, in respect of each type of package of each brand of tobacco product that they package in a year, display each health warning on between 3.25% and 9.25% of the packages of those products.

Formats

16. The format of a health warning set out in the source document that must be displayed on a package is the following:

(*a*) if the height to width ratio of the portion of the display area is less than 0.5, the "Elongated Landscape" format;

(*b*) if the height to width ratio of the portion of the display area is greater than or equal to 0.5 but less than or equal to 1.0, the "Landscape" format;

(*c*) if the height to width ratio of the portion of the display area is greater than 1.0 but less than or equal to 2, the "Portrait" format; and

(*d*) if the height to width ratio of the portion of the display area is greater than 2, the "Elongated Portrait" format.

çais et en anglais prévue au jeu 2 de la partie 1 du document source doit y figurer.

Emballage — cartouche

(3) S'agissant des cartouches, la version française de la mise en garde prévue au jeu 1 de la partie 1 du document source doit figurer dans une des zones d'application principales visées à la colonne 2 de l'annexe 1, en regard de l'article 10, et la version anglaise dans l'autre. La version française d'une mise en garde différente et prévue au jeu 1 doit figurer dans une des zones d'application secondaires visées à la même colonne en regard du même article et la version anglaise dans l'autre.

Répartition proportionnelle

15. Le fabricant doit, à l'égard de chaque type d'emballage de chaque marque des produits du tabac qu'il emballe au cours d'une année, faire figurer chacune des mises en garde sur 3,25 % à 9,25 % de ces produits.

Format

16. La mise en garde prévue dans le document source doit figurer sur l'emballage dans le format suivant :

a) si le rapport hauteur-largeur de la partie de la zone d'application est inférieur à 0,5, le format « paysage allongé »;

b) si le rapport hauteur-largeur de la partie de la zone d'application est égal ou supérieur à 0,5 mais inférieur ou égal à 1,0, le format « paysage »;

c) si le rapport hauteur-largeur de la partie de la zone d'application est supérieur à 1,0 mais inférieur ou égal à 2, le format « portrait »;

d) si le rapport hauteur-largeur de la partie de la zone d'application est supérieur à 2, le format « portrait allongé ».

TOXIC EMISSIONS STATEMENTS

Display areas

17. (1) Subject to subsection (2), a toxic emissions statement must be displayed in respect of each type of package set out in column 1 of Schedule 2 on the display areas set out in column 2.

Other packages

(2) In the case of a type of package that is not referred to in Schedule 2, a toxic emissions statement must be displayed on the display area that is the largest side of the package, other than the side or sides on which a health warning is displayed.

Space occupied — small display area

18. (1) If the display area on which the toxic emissions statement is required to be displayed is less than 10 cm², the statement must completely occupy the display area.

Space occupied — large display area

(2) In any other case except for cartons, if the display area on which the toxic emissions statement is required to be displayed is equal to or greater than 10 cm², the statement must occupy the greater of 60% of the display area and 10 cm².

Surface area

(3) Except in the case of cartons, the portion of the display area on which the toxic emissions statement is required to be displayed does not have to exceed a surface area of 30 cm².

Cartons

(4) In the case of a carton, the portion of the display area on which the toxic emissions statement must be displayed is at least 50% of the display area.

Soft packages

(5) In the case of a soft package, the portion of the display area runs along a line that is parallel to and not more than 12 mm below the top edge of the package and ex-

ÉNONCÉS SUR LES ÉMISSIONS TOXIQUES

Zones d'application

17. (1) Sous réserve du paragraphe (2), les énoncés sur les émissions toxiques doivent figurer sur chaque type d'emballage visé à la colonne 1 de l'annexe 2 dans les zones d'application prévues à la colonne 2.

Autres emballages

(2) S'agissant d'un type d'emballage qui n'est pas visé à l'annexe 2, les énoncés sur les émissions toxiques doivent figurer dans la zone d'application représentant le plus grand côté, autre que celui ou ceux où figure une mise en garde.

Espace occupé — petite zone d'application

18. (1) Si la zone d'application dans laquelle doit figurer l'énoncé sur les émissions toxiques est inférieure à 10 cm², l'énoncé doit occuper la totalité de cette zone.

Espace occupé — grande zone d'application

(2) Dans tous les autres cas, à l'exception des cartouches, si la zone d'application dans laquelle doit figurer l'énoncé sur les émissions toxiques est égale ou supérieure à 10 cm², l'énoncé doit occuper le plus grand espace entre 60 % de la zone d'application et 10 cm².

Superficie

(3) La partie de la zone d'application dans laquelle doit figurer l'énoncé sur les émissions toxiques n'a pas à dépasser une superficie de 30 cm², sauf dans le cas des cartouches.

Cartouches

(4) S'agissant des cartouches, la partie de la zone d'application dans laquelle l'énoncé sur les émissions toxiques doit figurer doit représenter au moins 50 % de cette zone.

Paquets mous

(5) S'agissant des paquets mous, la partie de la zone d'application court le long d'une ligne parallèle à l'arête supérieure de l'emballage située à au plus 12 mm au-des-

tends from the left edge to the right edge of the display area.

Cylindrical packages

(6) In the case of a cylindrical package, the portion of the display area runs along the line of separation between the lid and the side of the package, extends towards the bottom of the package and is bounded by the left and right limits of the display area.

Space occupied

(7) For the purposes of subsections (2) to (6), the toxic emissions statement must completely occupy the portion of the display area.

Bilingual toxic emissions statement

19. A toxic emissions statement must be displayed in English and French in the display area or the portion of the display area, as the case may be.

Proportional display

20. A manufacturer must, in respect of each type of package of each brand of tobacco product that they package in a year, display each toxic emissions statement on between 22% and 28% of those products.

Formats

21. The format of a toxic emissions statement set out in the source document that must be displayed on a package is the following:

(*a*) if the surface area of the display area or the portion of the display area, as the case may be, is less than or equal to 10 cm², the "Landscape" format; and

(*b*) if the surface area of the display area or the portion of the display area, as the case may be, is greater than 10 cm², the "Elongated Landscape" format.

sous de cette arête et s'étend de l'arête gauche à l'arête droite de la zone d'application.

Emballages cylindriques

(6) S'agissant des emballages cylindriques, la partie de la zone d'application court le long de la ligne de séparation du couvercle et du côté de l'emballage, s'étend vers le dessous de l'emballage et est encadrée par les démarcations gauche et droite de la zone d'application.

Espace occupé

(7) Pour l'application des paragraphes (2) à (6), l'énoncé sur les émissions toxiques doit occuper la totalité de la partie de la zone d'application.

Énoncé sur les émissions toxiques bilingue

19. Tout énoncé sur les émissions toxiques doit figurer en français et anglais dans la zone d'application ou la partie de la zone d'application, selon le cas.

Répartition proportionnelle

20. Le fabricant doit, à l'égard de chaque type d'emballage de chaque marque des produits du tabac qu'il emballe au cours d'une année, faire figurer chacun des énoncés sur les émissions toxiques sur 22 % à 28 % de ces produits.

Format

21. Les énoncés sur les émissions toxiques prévus dans le document source doivent figurer sur l'emballage dans le format suivant :

a) si la superficie de la zone d'application ou de la partie de la zone d'application, selon le cas, est inférieure ou égale à 10 cm², le format « paysage »;

b) si la superficie de la zone d'application ou de la partie de la zone d'application, selon le cas, est supérieure à 10 cm², le format « paysage allongé ».

HEALTH INFORMATION MESSAGES

Display areas

22. (1) Subject to subsections (3) and (4), in the case of a slide and shell package, other than a slide and shell package with a lateral slide, a health information message must be displayed on either the two display areas of the package which are the upper slide-flap and the exterior surface of the slide or on a leaflet inserted in the package.

Orientation of health information message

(2) When the package is used in the customary manner to gain access to the tobacco product, the health information message on the upper slide-flap and on the exterior surface of the slide must be oriented in the same direction as the health warning displayed on the package.

Exception — surface area

(3) If the surface area of the exterior surface of the slide is less than 55 cm², a health information message must be displayed on a leaflet inserted in the package.

Exception — height to width ratio

(4) If, in relation to the top edge of the exterior surface of the slide, the height to width ratio of the exterior surface of the slide is greater than one, a health information message must be displayed on a leaflet inserted in the package.

Leaflet

23. Subject to section 22, a health information message must be displayed on a leaflet inserted in the package except in the case of cylindrical packages, soft packages, two-sided packages, three-sided packages and cartons other than cartons containing soft packages. In the case of cartons containing soft packages the health information message must be displayed on a leaflet inserted in the carton.

MESSAGES D'INFORMATION SUR LA SANTÉ

Zones d'application

22. (1) Sous réserve des paragraphes (3) et (4), s'agissant d'un paquet à coulisse, autre que le paquet à coulisse à tiroir latéral, le message d'information sur la santé doit figurer soit sur les deux zones d'application que sont le rabat supérieur et la surface extérieure du tiroir, soit sur un prospectus inséré dans le paquet.

Orientation du message

(2) Lorsque le paquet est utilisé de la manière habituelle pour accéder au produit du tabac, le message d'information sur la santé figurant sur le rabat supérieur et sur la surface extérieure du tiroir doit être disposé dans le même sens que la mise en garde.

Exclusion — superficie

(3) Si la superficie de la surface extérieure du tiroir est inférieure à 55 cm², le message d'information sur la santé doit figurer sur un prospectus inséré dans le paquet.

Exclusion — rapport hauteur-largeur

(4) Si, relativement à l'arête supérieure de la surface extérieure du tiroir, le rapport hauteur-largeur de la surface extérieure du tiroir est supérieur à 1, le message d'information sur la santé doit figurer sur un prospectus inséré dans le paquet.

Prospectus

23. Sous réserve de l'article 22, le message d'information sur la santé doit figurer sur le prospectus inséré dans l'emballage, sauf dans le cas des emballages cylindriques, des paquets mous, des emballages à deux côtés, des emballages à trois côtés et des cartouches autres que les cartouches contenant des paquets mous. Dans ce dernier cas, le message d'information sur la santé doit figurer sur un prospectus inséré dans la cartouche.

Space occupied

24. A health information message must completely occupy the two display areas of a slide and shell package or the two sides of a leaflet.

Espace occupé

24. Le message d'information sur la santé doit occuper la totalité des deux zones d'application du paquet à coulisse ou la totalité des deux côtés du prospectus.

Health information message — slide and shell package

25. (1) The health information message required to be displayed on a slide and shell package must be one of those set out in section A of Part 3 of the source document.

Messages d'information sur la santé — paquet à coulisse

25. (1) Le message d'information sur la santé qui doit figurer sur le paquet à coulisse doit être l'un de ceux prévus à la division A de la partie 3 du document source.

Health information message — leaflet

(2) The health information message required to be displayed on a leaflet must be one of those set out in section B of Part 3 of the source document.

Messages d'information sur la santé — prospectus

(2) Le message d'information sur la santé qui doit figurer sur un prospectus doit être l'un de ceux prévus à la division B de la partie 3 du document source.

Proportional display

26. A manufacturer must, in respect of each type of package of each brand of tobacco product that they package in a year, display each health information message on between 9.5% and 15.5% of the packages or leaflets, as the case may be.

Répartition égale

26. Le fabricant doit, à l'égard de chaque type d'emballage de chaque marque des produits du tabac qu'il emballe au cours d'une année, faire figurer chaque message d'information sur la santé applicable sur 9,5 % à 15,5 % des emballages ou des prospectus, selon le cas.

Formats

27. The format of a health information message set out in the source document that must be displayed on a slide and shell package is the following:

(*a*) if the height to width ratio of the exterior surface of the slide is less than 0.5, the "Elongated Landscape" format;

(*b*) if the height to width ratio of the exterior surface of the slide is greater than or equal to 0.5 but less than 1.0, the "Landscape" format; and

(*c*) if the height to width ratio of the exterior surface of the slide is greater than or equal to 1.0, the "Portrait" format.

Format

27. Le message d'information sur la santé prévu dans le document source doit figurer sur le paquet à coulisse dans le format suivant :

a) si le rapport hauteur-largeur de la surface extérieure du tiroir est inférieur à 0,5, le format « paysage allongé »;

b) si le rapport hauteur-largeur de la surface extérieure du tiroir est supérieur ou égal à 0,5 mais inférieur à 1,0, le format « paysage »;

c) si le rapport hauteur-largeur de la surface extérieure du tiroir est supérieur ou égal à 1,0, le format « portrait ».

Bilingual health information messages — slide and shell package

28. A health information message must be displayed in English and French in the display areas of a slide and shell package.

Message d'information sur la santé bilingue — paquet à coulisse

28. Le message d'information sur la santé doit figurer en français et en anglais sur les zones d'application du paquet à coulisse.

Size of leaflet

29. (1) A leaflet on which a health information message is displayed must be the largest possible size that the dimensions of the package will allow without the leaflet being folded, and must be at least 65 mm high and 43 mm wide. If the dimensions of a package will not allow the insertion of a leaflet that is at least 65 mm high and 43 mm wide, the leaflet may be folded once lengthwise to allow it to be inserted in the package and, if necessary, folded a second time.

Surface area

(2) A leaflet does not have to exceed a surface area of 224 cm^2 as calculated on the basis of the height and width of one side of the leaflet.

Visibility and readability

(3) A leaflet must be readily visible when the package is used in the customary manner to gain access to the tobacco product, be easily removable and be placed in the package in a manner that makes the text of the message, or some portion of the text, readable without further manipulation.

Formats

30. The format of a health information message that must be displayed on a leaflet is the following:

(*a*) if the height to width ratio of the leaflet is less than or equal to 2, the "Portrait" format; and

(*b*) if the height to width ratio of the leaflet is greater than 2, the "Elongated Portrait" format.

Bilingual health information messages — leaflets

31. The English version of a health information message must be displayed on one side of the leaflet and the French version on the other.

Taille du prospectus

29. (1) La taille du prospectus sur lequel figure le message d'information sur la santé doit être la plus grande permise par les dimensions de l'emballage, sans que le prospectus soit plié, et doit être d'au moins 65 mm de hauteur et 43 mm de largeur. Si les dimensions de l'emballage ne permettent pas l'insertion d'un prospectus d'au moins 65 mm de hauteur et 43 mm de largeur, le prospectus peut être plié une fois dans le sens de la longueur pour permettre son insertion dans l'emballage et, au besoin, une deuxième fois.

Superficie

(2) Il n'est pas nécessaire que la superficie du prospectus, calculée à partir de la hauteur et de la largeur d'un côté du prospectus, dépasse 224 cm^2.

Visibilité et lisibilité

(3) Le prospectus doit être facilement visible lorsque l'emballage est utilisé de la manière habituelle pour accéder au produit du tabac, doit pouvoir être facilement retiré et doit être placé dans l'emballage de façon que le texte du message y figurant — ou une partie de celui-ci — puisse être lu sans autre manipulation.

Format

30. Le message d'information sur la santé doit figurer sur le prospectus dans le format suivant :

a) si le rapport hauteur-largeur du prospectus est inférieur ou égal à 2, le format « portrait »;

b) si le rapport hauteur-largeur du prospectus est supérieur à 2, le format « portrait allongé ».

Messages d'information sur la santé bilingues — prospectus

31. La version française du message d'information sur la santé doit figurer sur un côté du prospectus et la version anglaise sur l'autre.

TRANSITIONAL PROVISIONS

32. (1) In this section, "former Regulations" means the *Tobacco Products Information Regulations* as they read immediately before the day on which these Regulations come into force.

(2) Despite these Regulations, if a package of a tobacco product or any accompanying leaflet displays information in accordance with the former Regulations and the product is sold or distributed by a manufacturer, the former Regulations continue to apply to the package or the leaflet during the period of 180 days after the coming into force of these Regulations.

(3) Despite these Regulations, if a package of a tobacco product or any accompanying leaflet displays information in accordance with the former Regulations and the product is sold by a retailer, the former Regulations continue to apply to the package or the leaflet during the period of 270 days after the coming into force of these Regulations.

COMING INTO FORCE

33. These Regulations come into force on the day on which they are registered.

DISPOSITIONS TRANSITOIRES

32. (1) Dans le présent article, «règlement antérieur» s'entend du *Règlement sur l'information relative aux produits du tabac*, dans sa version antérieure à l'entrée en vigueur du présent règlement.

(2) Malgré le présent règlement, si l'information figure sur l'emballage d'un produit du tabac ou sur le prospectus qui accompagne le produit conformément au règlement antérieur et que le produit est vendu ou distribué par un fabricant, le règlement antérieur continue de s'appliquer à cet emballage ou à ce prospectus pendant la période de cent quatre-vingt jours suivant l'entrée en vigueur du présent règlement.

(3) Malgré le présent règlement, si l'information figure sur l'emballage d'un produit du tabac ou sur le prospectus qui accompagne le produit conformément au règlement antérieur et que le produit est vendu par un détaillant, le règlement antérieur continue de s'appliquer à cet emballage ou à ce prospectus pendant la période de deux cent soixante-dix jours suivant l'entrée en vigueur du présent règlement.

ENTRÉE EN VIGUEUR

33. Le présent règlement entre en vigueur à la date de son enregistrement.

SCHEDULE 1
(Section 12 and subsection 14(3))

DISPLAY AREAS FOR HEALTH WARNINGS

Item	Column 1 TYPE OF PACKAGE	Column 2 DISPLAY AREAS
1.	Slide and shell package	The two largest sides of the package
2.	Slide and shell package with a lateral slide	The two largest sides of the package
3.	Flip-top package	The two largest sides of the package
4.	Soft package	The two largest sides of the package
5.	Flip-top package with bevelled sides	The two largest sides of the package, including the two contiguous bevelled sides
6.	Two-sided package	One of the two sides of the package
7.	Three-sided package	The two largest sides excluding the bottom
8.	Box that is not a carton	If the two largest sides, excluding the top and bottom of the package, have a total surface area greater than the surface area of the top, the two largest sides If the two largest sides, excluding the top and bottom of the package, have a total surface area less than or equal to the surface area of the top, the top
9.	Cylindrical package	Excluding the top and bottom of the cylindrical package, any two areas each of which occupy 40% of the side and which extend from the top edge of the package to the bottom edge and which form rectangles when projected onto a flat plane
10.	Carton	The two largest sides of the package are the two primary display areas and the next two largest remaining sides are the two secondary display areas

ANNEXE 1
(article 12 et paragraphe 14(3))

ZONES D'APPLICATION POUR LES MISES EN GARDE

Article	Colonne 1 TYPES D'EMBALLAGE	Colonne 2 ZONES D'APPLICATION
1.	Paquet à coulisse	Les deux plus grands côtés de l'emballage.
2.	Paquet à coulisse à tiroir latéral	Les deux plus grands côtés de l'emballage.
3.	Paquet à abattant	Les deux plus grands côtés de l'emballage.
4.	Paquet mou	Les deux plus grands côtés de l'emballage.
5.	Paquet à abattant à côtés biseautés	Les deux plus grands côtés de l'emballage, incluant les deux côtés biseautés contigus.
6.	Emballage à deux côtés	Un des deux côtés de l'emballage.
7.	Emballage à trois côtés	Les deux plus grands côtés de l'emballage, à l'exception du dessous.
8.	Boîte qui n'est pas une cartouche	Si les deux plus grands côtés de l'emballage, à l'exception du dessus et du dessous de celui-ci, ont une surface totale supérieure à celle du dessus, les deux plus grands côtés. Si les deux plus grands côtés de l'emballage, à l'exception du dessus et du dessous de celui-ci, ont une surface totale plus petite ou égale à celle du dessus, le dessus.
9.	Emballage cylindrique	À l'exception du dessus et du dessous de l'emballage cylindrique, chacune des deux zones quelconques occupant respectivement 40 % du côté, s'étendant de l'arête supérieure de l'emballage à l'arête inférieure et qui formerait un rectangle si elle était projetée sur un plan plat.
10.	Cartouche	Les deux plus grands côtés de l'emballage sont les deux zones d'application principales et les deux autres plus grands côtés sont les deux zones d'application secondaires.

SCHEDULE 2
(Section 17)

DISPLAY AREA FOR TOXIC EMISSIONS STATEMENTS

Item	Column 1 TYPE OF PACKAGE	Column 2 DISPLAY AREA
1.	Slide and shell package	A side, other than that on which a health warning is displayed, excluding the top and bottom of the package
2.	Slide and shell package with a lateral slide	A side, other than that on which a health warning is displayed, excluding the top and bottom of the package
3.	Soft package	A side, other than that on which a health warning is displayed, excluding the top and bottom of the package
4.	Flip-top package	A side, other than that on which a health warning is displayed, excluding the top and bottom of the package and the portion of that side that is part of the flip-top
5.	Flip-top package with bevelled sides	A side, other than that on which a health warning is displayed, excluding the top and bottom of the package and the portion of that side that is part of the flip-top
6.	Two-sided package	The side on which no health warning is displayed
7.	Three-sided package	The side on which no health warning is displayed
8.	Box that is not a carton	If the health warnings are displayed on sides other than the top of the package, one of the largest remaining sides, excluding the bottom If the health warning is displayed on the top of the package, one of the largest remaining sides, excluding the bottom
9.	Cylindrical package	Excluding the top and bottom of the package and the display areas on which a health warning is displayed, any area that occupies at least 10% of the side and which extends from the top edge of the package to the bottom edge and which forms a rectangle when projected onto a flat plane
10.	Carton	The remaining sides, other than the sides on which the health warnings are displayed

ANNEXE 2
(article 17)

ZONES D'APPLICATION DES ÉNONCÉS SUR LES ÉMISSIONS TOXIQUES

Article	Colonne 1 TYPES D'EMBALLAGE	Colonne 2 ZONES D'APPLICATION
1.	Paquet à coulisse	Un des côtés autres que l'un de ceux où figure la mise en garde, à l'exception du dessus et du dessous de l'emballage.
2.	Paquet à coulisse à tiroir latéral	Un des côtés autres que l'un de ceux où figure la mise en garde, à l'exception du dessus et du dessous de l'emballage.
3.	Paquet mou	Un des côtés autres que l'un de ceux où figure la mise en garde, à l'exception du dessus et du dessous de l'emballage.
4.	Paquet à abattant	Un des côtés autres que l'un de ceux où figure la mise en garde, à l'exception du dessus et du dessous de l'emballage et de la partie de ce côté qui fait partie de l'abattant.
5.	Paquet à abattant à côtés biseautés	Un des côtés autres que l'un de ceux où figure la mise en garde, à l'exception du dessus et du dessous de l'emballage et de la partie de ce côté qui fait partie de l'abattant.
6.	Emballage à deux côtés	Le côté autre que celui où figure la mise en garde.
7.	Emballage à trois côtés	Le côté autre que ceux où figure la mise en garde.
8.	Boîte qui n'est pas une cartouche	Si la mise en garde figure sur des côtés autre que le dessus de l'emballage, alors un des plus grands côtés restants, à l'exception du dessous. Si la mise en garde figure sur le dessus de l'emballage, alors un des plus grands côtés restants, à l'exception du dessous.
9.	Emballage cylindrique	À l'exception du dessus et du dessous de l'emballage et des zones d'application où figure la mise en garde, une zone quelconque occupant au moins 10 % du côté, s'étendant de l'arête supérieure de l'emballage à l'arête inférieure et qui formerait un rectangle si elle était projetée sur un plan plat.
10.	Cartouche	Les côtés restants, autres que ceux où figurent les mises en garde.

CANADA

CONSOLIDATION

CODIFICATION

Tobacco Reporting Regulations

Règlement sur les rapports relatifs au tabac

SOR/2000-273

DORS/2000-273

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Copies of by-laws to be sent to Minister

(3) A copy of every by-law made under this section shall be sent by mail to the Minister by the chief or a member of the council of the band within four days after it is made.

Offence

(4) Every person who contravenes a by-law made under this section is guilty of an offence and liable on summary conviction

(*a*) in the case of a by-law made under paragraph (1)(*a*), to a fine of not more than one thousand dollars or to imprisonment for a term not exceeding six months or to both; and

(*b*) in the case of a by-law made under paragraph (1)(*b*) or (*c*), to a fine of not more than one hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., 1985, c. 32 (1st Supp.), s. 16.

Proof

86. A copy of a by-law made by the council of a band under this Act, if it is certified to be a true copy by the superintendent, is evidence that the by-law was duly made by the council and approved by the Minister, without proof of the signature or official character of the superintendent, and no such by-law is invalid by reason of any defect in form.

R.S., c. I-6, s. 86.

TAXATION

Property exempt from taxation

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Idem

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indi-

Copie des règlements administratifs au ministre

(3) Le chef ou un membre du conseil de la bande doit envoyer par courrier au ministre une copie de chaque règlement administratif prévu au présent article dans les quatre jours suivant sa prise.

Infraction

(4) Quiconque contrevient à un règlement administratif pris en vertu du présent article commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'un règlement pris en vertu de l'alinéa (1)*a*), une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

b) dans le cas d'un règlement pris en vertu des alinéas (1)*b*) ou *c*), une amende maximale de cent dollars et un emprisonnement maximal de trois mois, ou l'une de ces peines.

L.R. (1985), ch. 32 (1er suppl.), art. 16.

Preuve

86. La copie d'un règlement administratif pris par le conseil d'une bande en vertu de la présente loi, constitue, si elle est certifiée conforme par le surintendant, une preuve que le règlement administratif a été dûment pris par le conseil et approuvé par le ministre, sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du surintendant, et nul règlement administratif de cette nature n'est invalide en raison d'un vice de forme.

S.R., ch. I-6, art. 86.

TAXATION

Biens exempts de taxation

87. (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83 et de l'article 5 de la *Loi sur la gestion financière et statistique des premières nations*, les biens suivants sont exemptés de taxation :

a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;

b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

Idem

(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens.

Idem

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible

an in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150.

à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

L.R. (1985), ch. I-5, art. 87; 2005, ch. 9, art. 150.

LEGAL RIGHTS

DROITS LÉGAUX

General provincial laws applicable to Indians

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151.

Lois provinciales d'ordre général applicables aux Indiens

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière et statistique des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière et statistique des premières nations* ou sous leur régime.

L.R. (1985), ch. I-5, art. 88; 2005, ch. 9, art. 151.

Restriction on mortgage, seizure, etc., of property on reserve

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Inaliénabilité des biens situés sur une réserve

89. (1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ou une bande.

Exception

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Dérogation

(1.1) Par dérogation au paragraphe (1), les droits découlant d'un bail sur une terre désignée peuvent faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution.

Conditional sales

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agree-

Ventes conditionnelles

(2) Une personne, qui vend à une bande ou à un membre d'une bande un bien meuble en vertu d'une entente selon laquelle le droit de propriété ou le droit de possession demeure acquis en tout ou en partie au vendeur, peut exercer

ment notwithstanding that the chattel is situated on a reserve.

R.S., 1985, c. I-5, s. 89; R.S., 1985, c. 17 (4th Supp.), s. 12.

ses droits aux termes de l'entente, même si le bien meuble est situé sur une réserve.

L.R. (1985), ch. I-5, art. 89; L.R. (1985), ch. 17 (4e suppl.), art. 12.

Property deemed situated on reserve

90. (1) For the purposes of sections 87 and 89, personal property that was

(*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

90. (1) Pour l'application des articles 87 et 89, les biens meubles qui ont été :

a) soit achetés par Sa Majesté avec l'argent des Indiens ou des fonds votés par le Parlement à l'usage et au profit d'Indiens ou de bandes;

b) soit donnés aux Indiens ou à une bande en vertu d'un traité ou accord entre une bande et Sa Majesté,

sont toujours réputés situés sur une réserve.

Biens considérés comme situés sur une réserve

Restriction on transfer

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

(2) Toute opération visant à transférer la propriété d'un bien réputé, en vertu du présent article, situé sur une réserve, ou un droit sur un tel bien, est nulle à moins qu'elle n'ait lieu avec le consentement du ministre ou ne soit conclue entre des membres d'une bande ou entre une bande et l'un de ses membres.

Restriction sur le transfert

Destruction of property

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

R.S., c. I-6, s. 90.

(3) Quiconque conclut une opération déclarée nulle par le paragraphe (2) commet une infraction; commet aussi une infraction quiconque détruit, sans le consentement écrit du ministre, un bien meuble réputé, en vertu du présent article, situé sur une réserve.

S.R., ch. I-6, art. 90.

Destruction de biens

TRADING WITH INDIANS

COMMERCE AVEC LES INDIENS

Certain property on a reserve may not be acquired

91. (1) No person may, without the written consent of the Minister, acquire title to any of the following property situated on a reserve, namely,

(*a*) an Indian grave house;

(*b*) a carved grave pole;

(*c*) a totem pole;

(*d*) a carved house post; or

(*e*) a rock embellished with paintings or carvings.

91. (1) Nul ne peut, sans le consentement écrit du ministre, acquérir la propriété de l'un des biens suivants, situés sur une réserve :

a) une maison funéraire indienne;

b) un monument funéraire sculpté;

c) un poteau totémique;

d) un poteau sculpté de maison;

e) une roche ornée d'images gravées ou peintes.

Interdiction d'acquérir certains biens situés sur une réserve

Saving

(2) Subsection (1) does not apply to chattels referred to therein that are manufactured for sale by Indians.

(2) Le paragraphe (1) ne s'applique pas aux biens meubles y mentionnés qui sont fabriqués en vue de la vente par des Indiens.

Exception

Removal, destruction, etc.

(3) No person shall remove, take away, mutilate, disfigure, deface or destroy any chattel

(3) Nul ne peut enlever, emporter, mutiler, défigurer, détériorer ou détruire un bien meuble

Enlèvement, destruction, etc.

CANADA

CONSOLIDATION

CODIFICATION

First Nations Goods and Services Tax Act

Loi sur la taxe sur les produits et services des premières nations

S.C. 2003, c. 15, s. 67

L.C. 2003, ch. 15, art. 67

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to March 20, 2012. The last amendments came into force on March 2, 2012. Any amendments that were not in force as of March 20, 2012 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 20 mars 2012. Les dernières modifications sont entrées en vigueur le 2 mars 2012. Toutes modifications qui n'étaient pas en vigueur au 20 mars 2012 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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An Act respecting first nations goods and services tax

[*Assented to 19th June 2003*]

[Enacted by section 67 of chapter 15 of the Statutes of Canada, 2003, in force on assent June 19, 2003.]

SHORT TITLE

Short title

1. This Act may be cited as the *First Nations Goods and Services Tax Act*.

INTERPRETATION

Definitions

2. (1) The definitions in this subsection apply in this Act.

"administration agreement" « *accord d'application* »
"administration agreement", in Part 1, means an agreement referred to in subsection 5(2) and, in Part 2, means an agreement referred to in section 22.

"authorized body" « *organe autorisé* »
"authorized body", of a first nation, means the body of the first nation that has the authority to enter into an administration agreement.

"band" « *bande* »
"band" has the meaning assigned by subsection 2(1) of the *Indian Act*.

"governing body" « *corps dirigeant* »
"governing body" means the body of a first nation that is identified opposite the name of the first nation listed in Schedule 1.

"imported taxable supply" « *fourniture taxable importée* »
"imported taxable supply" has the meaning assigned by section 217 of the *Excise Tax Act*.

"input tax credit" « *crédit de taxe sur les intrants* »
"input tax credit" has the same meaning as in Part IX of the *Excise Tax Act*.

Loi concernant la taxe sur les produits et services des premières nations

[*Sanctionnée le 19 juin 2003*]

[Édictée par l'article 67 du chapitre 15 des Lois du Canada (2003), en vigueur à la sanction le 19 juin 2003.]

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur la taxe sur les produits et services des premières nations*.

DÉFINITIONS ET INTERPRÉTATION

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« accord d'application » "*administration agreement*"
« accord d'application » S'entend, à la partie 1, de l'accord visé au paragraphe 5(2) et, à la partie 2, de l'accord visé à l'article 22.

« bande » "*band*"
« bande » S'entend au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

« corps dirigeant » "*governing body*"
« corps dirigeant » Le corps d'une première nation dont le nom figure à l'annexe 1 en regard du nom de celle-ci.

« crédit de taxe sur les intrants » "*input tax credit*"
« crédit de taxe sur les intrants » S'entend au sens de la partie IX de la *Loi sur la taxe d'accise*.

« fourniture taxable importée » "*imported taxable supply*"
« fourniture taxable importée » S'entend au sens de l'article 217 de la *Loi sur la taxe d'accise*.

« ministre » "*Minister*"
« ministre » Le ministre des Finances.

« organe autorisé » "*authorized body*"
« organe autorisé » L'organe d'une première nation qui est autorisé à conclure un accord d'application.

"lands"
« *terres* »

"lands", of a first nation, means the lands that are described opposite the name of the first nation listed in Schedule 1.

"Minister"
« *ministre* »

"Minister" means the Minister of Finance.

"net tax"
« *taxe nette* »

"net tax" has the same meaning as in Part IX of the *Excise Tax Act*.

"Part IX of the *Excise Tax Act*"
« *partie IX de la Loi sur la taxe d'accise* »

"Part IX of the *Excise Tax Act*" includes Schedules V to X to that Act.

"reserve"
« *réserve* »

"reserve" has the meaning assigned by subsection 2(1) of the *Indian Act*.

Expressions defined in s. 123(1) of the *Excise Tax Act*

(2) Unless a contrary intention appears, words and expressions used in Part 1 have the meanings assigned by subsection 123(1) of the *Excise Tax Act*.

Mobile home or floating home

(3) A mobile home or floating home is deemed to be tangible personal property for the purposes of applying the provisions of Part 1 and any first nation law, as defined in subsection 11(1) or 12(1), in respect of the bringing of tangible personal property onto the lands of a first nation.

Application of deeming rules

(4) If a provision of Part IX of the *Excise Tax Act* deems certain circumstances or facts to exist, those circumstances or facts are deemed to exist for the purposes of determining the matters in respect of which a first nation may enact a first nation law, as defined in subsection 11(1) or 12(1).

2003, c. 15, s. 67 "2"; 2005, c. 19, s. 3.

« partie IX de la *Loi sur la taxe d'accise* » Comprend les annexes V à X de cette loi.

« partie IX de la *Loi sur la taxe d'accise* »
"*Part IX of the Excise Tax Act*"

« réserve » S'entend au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

« réserve »
"*reserve*"

« taxe nette » S'entend au sens de la partie IX de la *Loi sur la taxe d'accise*.

« taxe nette »
"*net tax*"

« terres » Les terres d'une première nation dont la description figure à l'annexe 1 en regard du nom de celle-ci.

« terres »
"*lands*"

(2) À moins d'indication contraire, les termes de la partie 1 s'entendent au sens du paragraphe 123(1) de la *Loi sur la taxe d'accise*.

Termes définis au par. 123(1) de la *Loi sur la taxe d'accise*

(3) Une maison mobile ou une maison flottante est réputée être un bien meuble corporel pour l'application des dispositions de la partie 1 et de tout texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), concernant le transfert de biens meubles corporels sur les terres d'une première nation.

Maison mobile ou maison flottante

(4) Les circonstances ou faits qui sont réputés exister aux termes d'une disposition de la partie IX de la *Loi sur la taxe d'accise* sont réputés exister lorsqu'il s'agit de déterminer les matières relativement auxquelles une première nation peut édicter un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1).

Application des présomptions

2003, ch. 15, art. 67 «2»; 2005, ch. 19, art. 3.

PART 1

FIRST NATIONS GOODS AND SERVICES TAX ACT

Application of other Acts of Parliament

Section 87 of *Indian Act* and similar provisions

3. (1) The obligation to pay tax or any other amount that is required to be paid under a first nation law, as defined in subsection 11(1) or 12(1), applies despite the application of the exemption under section 87 of the *Indian Act* and of any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section.

Section 89 of the *Indian Act*

(1.1) A first nation law, as defined in subsection 11(1) or 12(1), or an obligation to pay an amount that arises from the application of section 14, may be administered and enforced

PARTIE 1

TAXE SUR LES PRODUITS ET SERVICES DES PREMIÈRES NATIONS

Application d'autres lois fédérales

Article 87 de la *Loi sur les Indiens* et dispositions semblables

3. (1) L'obligation d'acquitter une taxe ou une autre somme à payer en vertu d'un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), l'emporte sur l'application de l'exemption prévue à l'article 87 de la *Loi sur les Indiens* et de toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption.

Article 89 de la *Loi sur les Indiens*

(1.1) Tout texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), ou toute obligation de payer une somme découlant de l'application de l'article 14 peut être mis en ap-

by Her Majesty in right of Canada or by an agent of the first nation despite section 89 of the *Indian Act*.

Subsection 4(1) applies despite any other Act of Parliament

(2) The governing body of a first nation listed in Schedule 1 may enact a law under subsection 4(1) that imposes a tax despite any other Act of Parliament that limits the authority of the first nation to enact a law that imposes a tax.

Binding on Her Majesty

(3) If a provision of Part IX of the *Excise Tax Act* is binding on Her Majesty in right of Canada or a province, that provision, to the extent that it applies for the purposes of a first nation law, as defined in subsection 11(1) or 12(1), and any provision of the first nation law that corresponds to that provision of that Part, are so binding for the purposes of that law.

2003, c. 15, s. 67 "3"; 2005, c. 19, s. 5.

FIRST NATION GOODS AND SERVICES TAX LAW

Authority to impose tax

4. (1) Subject to this section, the governing body of a first nation that is listed in Schedule 1 and that is a band or has the power to enact laws that has been recognized or granted under any other Act of Parliament or under an agreement that has been given effect by any other Act of Parliament may enact a law that imposes

(*a*) a tax in respect of a taxable supply made on the lands of the first nation;

(*b*) a tax in respect of the bringing of tangible personal property onto the lands of the first nation from a place in Canada; and

(*c*) a tax in respect of an imported taxable supply made on the lands of the first nation.

Supply made on lands

(2) For the purposes of subsection (1), a supply, other than an imported taxable supply, is made on the lands of a first nation only if at least one of the following conditions is met:

(*a*) if the lands of the first nation were a participating province, a provision of Part IX of the *Excise Tax Act* would deem the supply to be made in that participating province if

(i) the lands of every other first nation in respect of which a first nation law, as de-

application par Sa Majesté du chef du Canada ou par un mandataire de la première nation malgré l'article 89 de la *Loi sur les Indiens*.

Application prépondérante du par. 4(1)

(2) Le corps dirigeant d'une première nation dont le nom figure à l'annexe 1 peut édicter un texte législatif imposant une taxe en vertu du paragraphe 4(1) malgré toute autre loi fédérale qui limite le pouvoir de la première nation en cette matière.

Obligation de Sa Majesté

(3) Si une disposition de la partie IX de la *Loi sur la taxe d'accise* lie Sa Majesté du chef du Canada ou d'une province, cette disposition, dans la mesure où elle s'applique dans le cadre d'un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), ainsi que toute disposition de ce texte qui y correspond, lient Sa Majesté du chef du Canada ou d'une province pour l'application de ce texte.

2003, ch. 15, art. 67 « 3 »; 2005, ch. 19, art. 5.

TEXTE LÉGISLATIF CONCERNANT LA TAXE SUR LES PRODUITS ET SERVICES D'UNE PREMIÈRE NATION

Pouvoir d'imposition

4. (1) Sous réserve du présent article, le corps dirigeant d'une première nation dont le nom figure à l'annexe 1 et qui est soit une bande, soit une première nation dont le pouvoir d'édicter des textes législatifs a été reconnu ou conféré par une autre loi fédérale ou par un accord mis en vigueur par une autre loi fédérale, peut édicter un texte législatif imposant :

a) une taxe relative aux fournitures taxables effectuées sur les terres de la première nation;

b) une taxe relative au transfert de biens meubles corporels sur les terres de la première nation depuis un endroit au Canada;

c) une taxe relative aux fournitures taxables importées effectuées sur les terres de la première nation.

Fournitures sur des terres

(2) Pour l'application du paragraphe (1), une fourniture, sauf une fourniture taxable importée, est effectuée sur les terres d'une première nation seulement si au moins une des conditions suivantes est remplie :

a) à supposer que les terres de la première nation constituent une province participante, la fourniture serait réputée, aux termes d'une disposition de la partie IX de la *Loi sur la*

fined in subsection 11(1) or 12(1), is in force at the time the supply is made were each a separate participating province, and

(ii) the participating provinces listed in Schedule VIII to the *Excise Tax Act* were non-participating provinces; or

(*b*) tax under Part IX of the *Excise Tax Act* is not payable in respect of the supply and such tax would, without section 13, be payable but for the connection of the supply with those lands and the application of the exemption under section 87 of the *Indian Act* or of any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section.

taxe d'accise, être effectuée dans cette province si, à la fois :

(i) les terres de chacune des autres premières nations relativement auxquelles un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), est en vigueur au moment de la fourniture constituaient chacune une province participante distincte,

(ii) les provinces participantes dont le nom figure à l'annexe VIII de la *Loi sur la taxe d'accise* constituaient des provinces non participantes;

b) la taxe prévue à la partie IX de la *Loi sur la taxe d'accise* serait exigible relativement à la fourniture si ce n'était l'article 13, le lien entre la fourniture et ces terres et l'application de l'exemption prévue à l'article 87 de la *Loi sur les Indiens* ou de toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption.

Supply of specified motor vehicle on lands

(3) Despite subsection (2), for the purposes of paragraph (1)(*a*), a supply of a specified motor vehicle by way of lease, licence or similar arrangement under an agreement under which continuous possession or use of the vehicle is provided for a period of more than three months is made on the lands of a first nation only if

(*a*) in the case of a recipient who is an individual, the recipient ordinarily resides on those lands at the time the supply is made; and

(*b*) in the case of a recipient who is not an individual, the ordinary location of the vehicle, determined for the purposes of Schedule IX to the *Excise Tax Act* at the time the supply is made, is on those lands.

Fourniture d'un véhicule à moteur déterminé sur des terres

(3) Malgré le paragraphe (2), pour l'application de l'alinéa (1)*a*), la fourniture d'un véhicule à moteur déterminé, par bail, licence ou accord semblable faisant l'objet d'une convention qui prévoit une période de possession ou d'utilisation continues du véhicule de plus de trois mois, est effectuée sur les terres d'une première nation seulement si :

a) dans le cas d'un acquéreur qui est un particulier, il réside habituellement sur ces terres au moment de la fourniture;

b) dans le cas d'un acquéreur qui n'est pas un particulier, l'emplacement habituel du véhicule, déterminé pour l'application de l'annexe IX de la *Loi sur la taxe d'accise* au moment de la fourniture, se trouve sur ces terres.

Imported taxable supply made on lands

(4) For the purposes of paragraph (1)(c), an imported taxable supply is made on the lands of a first nation only if at least one of the following conditions is met:

(*a*) tax would be payable in respect of the imported taxable supply under subsection 218.1(1) of the *Excise Tax Act* if

(i) the lands of the first nation were the particular participating province referred to in that subsection,

Fourniture taxable importée sur des terres

(4) Pour l'application de l'alinéa (1)*c*), une fourniture taxable importée est effectuée sur les terres d'une première nation seulement si au moins une des conditions suivantes est remplie :

a) la taxe prévue au paragraphe 218.1(1) de la *Loi sur la taxe d'accise* serait exigible relativement à la fourniture si, à la fois :

(i) les terres de la première nation constituaient la province participante visée à ce paragraphe,

(ii) the lands of every other first nation in respect of which a first nation law, as defined in subsection 11(1) or 12(1), is in force at the time the supply is made were each a separate participating province,

(iii) the participating provinces listed in Schedule VIII to the *Excise Tax Act* were non-participating provinces, and

(iv) the recipient of the supply were not a selected listed financial institution; or

(*b*) tax under Part IX of the *Excise Tax Act* is not payable in respect of the imported taxable supply and such tax would, without section 13, be payable but for the connection of the supply with those lands and the application of the exemption under section 87 of the *Indian Act* or of any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section.

(ii) les terres de chacune des autres premières nations relativement auxquelles un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), est en vigueur au moment de la fourniture constituaient chacune une province participante distincte,

(iii) les provinces participantes dont le nom figure à l'annexe VIII de la *Loi sur la taxe d'accise* constituaient des provinces non participantes,

(iv) l'acquéreur de la fourniture n'était pas une institution financière désignée particulière;

b) la taxe prévue à la partie IX de la *Loi sur la taxe d'accise* serait exigible relativement à la fourniture si ce n'était l'article 13, le lien entre la fourniture et ces terres et l'application de l'exemption prévue à l'article 87 de la *Loi sur les Indiens* ou de toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption.

Bringing of property onto lands

(5) Subject to subsection (6), a tax in respect of the bringing of property onto the lands of a first nation by a person shall be imposed under a law of the first nation enacted under subsection (1) only if the property was last supplied to the person by way of sale at a time when an administration agreement was in effect in respect of that law and tax would have been payable under Part IX of the *Excise Tax Act* in respect of the supply otherwise than at the rate of zero but for the application of the exemption under section 87 of the *Indian Act* or of any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section.

(5) Sous réserve du paragraphe (6), la taxe relative au transfert d'un bien sur les terres d'une première nation n'est imposée sur le fondement d'un texte législatif de la première nation édicté en vertu du paragraphe (1) que dans le cas où le bien a été fourni, la dernière fois, par vente à l'auteur du transfert alors qu'un accord d'application était en vigueur relativement à ce texte et où une taxe aurait été exigible en vertu de la partie IX de la *Loi sur la taxe d'accise* relativement à la fourniture à un taux autre que nul n'eût été l'application de l'exemption prévue à l'article 87 de la *Loi sur les Indiens* ou de toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption.

Transfert d'un bien sur des terres

Exception

(6) For the purposes of paragraph (1)(b), a tax in respect of the bringing of property onto the lands of a first nation by a person shall not be imposed if

(*a*) tax became payable by the person in respect of the property under any first nation law, as defined in subsection 11(1) or 12(1), or section 212 of the *Excise Tax Act* before the property is brought onto the lands of the first nation; or

(6) Pour l'application de l'alinéa (1)*b*), la taxe relative au transfert d'un bien sur les terres d'une première nation n'est pas imposée dans le cas où :

a) avant le transfert, une taxe est devenue exigible de l'auteur du transfert relativement au bien en vertu d'un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), ou en vertu de l'article 212 de la *Loi sur la taxe d'accise*;

Exception

(*b*) tax would not be payable under subsection 220.05(1) of the *Excise Tax Act* in respect of the bringing of the property onto the lands of the first nation if

(i) the lands of the first nation were the particular participating province referred to in that subsection,

(ii) the lands of every other first nation in respect of which a first nation law, as defined in subsection 11(1) or 12(1), is in force at the time the property is brought onto the lands of the first nation were each a separate participating province,

(iii) the participating provinces listed in Schedule VIII to the *Excise Tax Act* were non-participating provinces, and

(iv) paragraphs 220.05(3)(*a*) and (*b*) of the *Excise Tax Act*, section 18 of Part I of Schedule X to that Act, the exemption under section 87 of the *Indian Act* and any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section did not apply in respect of the bringing of the property onto the lands of the first nation.

Carriers

(7) For the purposes of this Part, if a particular person brings property onto the lands of a first nation on behalf of another person, the other person, and not the particular person, is deemed to have brought the property onto those lands.

Amount of tax — bringing of property onto lands

(8) For the purposes of subsection (1), the amount of tax that may be imposed under the law of a first nation in respect of the bringing of property onto the lands of the first nation by a person is equal to the amount determined by the formula

$$A \times B$$

where

A is the rate of tax set out in subsection 165(1) of the *Excise Tax Act*, and

B is

(*a*) if the person last acquired the property by way of a sale under which the property was delivered to the person within thirty days before the day on which it is brought onto the lands of the first nation, the value of the consideration on which

b) la taxe prévue au paragraphe 220.05(1) de la *Loi sur la taxe d'accise* ne serait pas exigible relativement au transfert si, à la fois :

(i) les terres de la première nation constituaient la province participante visée à ce paragraphe,

(ii) les terres de chacune des autres premières nations relativement auxquelles un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), est en vigueur au moment du transfert constituaient chacune une province participante distincte,

(iii) les provinces participantes dont le nom figure à l'annexe VIII de la *Loi sur la taxe d'accise* constituaient des provinces non participantes,

(iv) les alinéas 220.05(3) *a*) et *b*) de la *Loi sur la taxe d'accise*, l'article 18 de la partie I de l'annexe X de cette loi, l'exemption prévue à l'article 87 de la *Loi sur les Indiens* et toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption ne s'appliquaient pas relativement au transfert.

Transporteurs

(7) Pour l'application de la présente partie, le bien qu'une personne donnée transfère sur les terres d'une première nation pour le compte d'une autre personne est réputé avoir été transféré par cette dernière et non par la personne donnée.

Montant de taxe — transfert d'un bien sur des terres

(8) Pour l'application du paragraphe (1), le montant de taxe qui peut être imposé en vertu du texte législatif d'une première nation relativement au transfert d'un bien sur les terres de celle-ci correspond au montant obtenu par la formule suivante :

$$A \times B$$

où :

A représente le taux de taxe établi au paragraphe 165(1) de la *Loi sur la taxe d'accise*;

B :

a) si le bien, que l'auteur du transfert a acquis la dernière fois par vente, a été livré à celui-ci dans les trente jours précédant le transfert, la valeur de la contrepartie sur laquelle la taxe prévue à la

tax under Part IX of the *Excise Tax Act* in respect of the sale would have been calculated but for the application of the exemption under section 87 of the *Indian Act* or of any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section, and

(*b*) in any other case, the lesser of

(i) the fair market value of the property at the time the property is brought onto the lands of the first nation, and

(ii) the value of the consideration referred to in paragraph (*a*).

partie IX de la *Loi sur la taxe d'accise* aurait été calculée relativement à la vente n'eût été l'application de l'exemption prévue à l'article 87 de la *Loi sur les Indiens* ou de toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption;

b) dans les autres cas, la moins élevée des sommes suivantes :

(i) la juste valeur marchande du bien au moment de son transfert,

(ii) la valeur de la contrepartie visée à l'alinéa *a*).

Reporting and payment of tax

(9) Tax that is imposed under a law of a first nation enacted under subsection (1) in respect of the bringing of property onto the lands of the first nation shall become payable by the person who brings it onto the lands at the time it is brought onto the lands and

(*a*) if the person is a registrant who acquired the property for consumption, use or supply primarily in the course of commercial activities of the person, the person shall, on or before the day on or before which the person's return in respect of net tax is required to be filed under the law of the first nation for the reporting period in which the tax became payable, pay the tax to the Receiver General and report the tax in that return; and

(*b*) in any other case, the person shall, on or before the last day of the month following the calendar month in which the tax became payable, pay the tax to the Receiver General and file with the Minister of National Revenue in the manner authorized by that Minister a return in respect of the tax in the form authorized by and containing information specified by that Minister.

Déclaration et paiement de la taxe

(9) La taxe qui est imposée par un texte législatif d'une première nation, édicté en vertu du paragraphe (1), relativement au transfert d'un bien sur les terres de la première nation devient exigible de l'auteur du transfert au moment du transfert. Au surplus, l'auteur du transfert est tenu :

a) s'il est un inscrit qui a acquis le bien pour le consommer, l'utiliser ou le fournir principalement dans le cadre de ses activités commerciales, de payer la taxe au receveur général au plus tard à la date où sa déclaration concernant la taxe nette est à produire en vertu du texte législatif pour la période de déclaration où la taxe est devenue exigible, et d'indiquer le montant de cette taxe dans cette déclaration;

b) sinon, de payer la taxe au receveur général et de présenter au ministre du Revenu national, en la forme et selon les modalités déterminées par celui-ci, une déclaration la concernant et contenant les renseignements requis, au plus tard le dernier jour du mois suivant le mois civil où la taxe est devenue exigible.

Amount of tax — supply made on lands

(10) For the purposes of paragraphs (1)(*a*) and (*c*), the amount of tax that may be imposed under the law of a first nation in respect of a supply is equal to the amount of tax that would be imposed under Part IX of the *Excise Tax Act* in respect of that supply if

(*a*) the *Excise Tax Act* applied and the law of the first nation, the exemption under section 87 of the *Indian Act* and any other exemption from taxation under any other Act

Montant de taxe — fourniture sur des terres

(10) Pour l'application des alinéas (1)*a*) et *c*), le montant de taxe qui peut être imposé en vertu du texte législatif d'une première nation relativement à une fourniture correspond à celui qui serait imposé en vertu de la partie IX de la *Loi sur la taxe d'accise* relativement à la fourniture si, à la fois :

a) la *Loi sur la taxe d'accise* s'appliquait relativement à la fourniture, mais non le texte législatif en question, ni l'exemption prévue

of Parliament that is similar to the exemption under that section did not apply in respect of that supply;

(*b*) the amount were determined without reference to subparagraph (v) of the description of A or subparagraph (vi) of the description of J in the definition "basic tax content" in subsection 123(1) of the *Excise Tax Act*; and

(*c*) no amount of tax under subsection 165(2), 212.1(2) or 218.1(1) or Division IV.1 of Part IX of the *Excise Tax Act* were included in determining that amount.

à l'article 87 de la *Loi sur les Indiens*, ni aucune autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption;

b) le montant était déterminé compte non tenu du sous-alinéa (v) de l'élément A de la première formule figurant à la définition de « teneur en taxe » au paragraphe 123(1) de la *Loi sur la taxe d'accise* ni du sous-alinéa (vi) de l'élément J de la quatrième formule figurant à cette définition;

c) la taxe prévue aux paragraphes 165(2), 212.1(2) ou 218.1(1) ou à la section IV.1 de la partie IX de la *Loi sur la taxe d'accise* n'entrait pas dans le calcul du montant.

Administration and enforcement

(11) A law enacted under subsection (1) by the governing body of a first nation shall be administered and enforced, and the tax imposed under that law shall be collected, in accordance with an administration agreement entered into under subsection 11(2) by the authorized body of the first nation.

2003, c. 15, s. 67 "4"; 2005, c. 19, s. 6.

Application

(11) Tout texte législatif édicté en vertu du paragraphe (1) par le corps dirigeant d'une première nation est appliqué, et la taxe imposée en vertu de ce texte est perçue, conformément à un accord d'application conclu aux termes du paragraphe 11(2) par l'organe autorisé de la première nation.

2003, ch. 15, art. 67 « 4 »; 2005, ch. 19, art. 6.

Tax attributable to a first nation

5. (1) An administration agreement in respect of a first nation law, as defined in subsection 11(1) or 12(1), of a particular first nation shall provide for payments by the Government of Canada to the particular first nation in respect of that law based on an estimate for each calendar year of the total (in this section referred to as "tax attributable to the first nation") of

(*a*) the amount by which

(i) the total of all amounts each of which is an amount of tax (other than tax payable by a listed financial institution) that, while that first nation law was in force, became payable in the year under a first nation law, as defined in subsection 11(1) or 12(1), or Part IX of the *Excise Tax Act* (other than subsections 165(2), 212.1(2) and 218.1(1) and Division IV.1) and that is attributable to property or a service that is for consumption or use on the lands of the particular first nation

exceeds

(ii) the total of all amounts each of which is included in the total determined under subparagraph (i) and

Taxe attribuable à une première nation

5. (1) L'accord d'application relatif à un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), d'une première nation donnée prévoit le versement, par le gouvernement du Canada à la première nation donnée, au titre de ce texte, de sommes fondées sur une estimation pour chaque année civile du total (appelé « taxe attribuable à la première nation » au présent article) des montants suivants :

a) l'excédent du total visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii) :

(i) le total des montants dont chacun représente le montant de taxe (sauf une taxe payable par une institution financière désignée) qui, pendant que le texte en question était en vigueur, est devenu exigible au cours de l'année en vertu d'un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), ou de la partie IX de la *Loi sur la taxe d'accise*, à l'exception des paragraphes 165(2), 212.1(2) et 218.1(1) et de la section IV.1, et qui est attribuable à un bien ou à un service destiné à être consommé ou utilisé sur les terres de la première nation donnée,

(A) is included in determining an input tax credit or in determining a deduction that may be claimed in determining the net tax of a person,

(B) can reasonably be regarded as an amount that a person is or was entitled to recover by way of a rebate or refund or otherwise under a first nation law, as defined in subsection 11(1) or 12(1), or under any Act of Parliament, or

(C) is an amount of tax in respect of a supply to a person who is, under any Act of Parliament or any other law, exempt from paying the tax, and

(*b*) the total of all amounts each of which is determined in respect of a listed financial institution by the formula

A × B

where

A is the excess that would be determined under paragraph (*a*) in respect of the financial institution if subparagraph (*a*)(i) were read without reference to the words "that is for consumption or use on the lands of the particular first nation" and that subparagraph included amounts of tax payable by the financial institution but did not include amounts of tax payable by any other person, and

B is the percentage that would be determined, for the purpose of the description of C in the formula in subsection 225.2(2) of the *Excise Tax Act*, as the financial institution's percentage for the particular first nation for the last taxation year of the financial institution ending in that calendar year (or, if the financial institution does not have a taxation year ending in that calendar year, for the period that would be that last taxation year if the taxation year of the financial institution that is partly included in that calendar year ended at the end of that calendar year) if the financial institution were a selected listed financial institution and the lands of the particular first nation were a participating province.

(ii) le total des montants dont chacun est inclus dans le total déterminé selon le sous-alinéa (i) et, selon le cas :

(A) est inclus dans le calcul soit d'un crédit de taxe sur les intrants, soit d'une déduction pouvant entrer dans le calcul de la taxe nette d'une personne,

(B) peut raisonnablement être considéré comme un montant qu'une personne peut ou pouvait recouvrer au moyen d'un remboursement, d'une remise ou autrement, en vertu d'un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), ou d'une loi fédérale,

(C) est un montant de taxe relatif à la fourniture effectuée au profit d'une personne qui est exonérée du paiement de la taxe en vertu d'une loi fédérale ou de tout autre texte législatif;

b) le total des montants dont chacun est déterminé relativement à une institution financière désignée et correspond au montant obtenu par la formule suivante :

A × B

où :

A représente l'excédent qui serait déterminé selon l'alinéa *a*) relativement à l'institution financière s'il n'était pas tenu compte du passage « destiné à être consommé ou utilisé sur les terres de la première nation donnée » au sous-alinéa *a*)(i) et si les montants visés à ce sous-alinéa comprenaient des montants de taxe exigibles de l'institution financière mais non d'une autre personne,

B le pourcentage qui représenterait, pour l'application de l'élément C de la formule figurant au paragraphe 225.2(2) de la *Loi sur la taxe d'accise*, le pourcentage applicable à l'institution financière quant à la première nation donnée pour la dernière année d'imposition de l'institution financière se terminant dans l'année civile en question (ou, en l'absence d'une telle année d'imposition, pour la période qui correspondrait à cette dernière année d'imposition si l'année d'imposition de l'institution financière qui est comprise en partie dans cette année civile s'était

Administration agreement

(2) The Minister, with the approval of the Governor in Council, may on behalf of the Government of Canada enter into an agreement in respect of a first nation law, as defined in subsection 11(1) or 12(1), of a first nation with the authorized body of the first nation and, among other things, the agreement shall provide

(*a*) the method for estimating, in accordance with the formulae, rules, conditions and data sources specified in the agreement, the tax attributable to the first nation;

(*b*) for the sharing, if any, between the first nation and the Government of Canada of the tax attributable to the first nation;

(*c*) for the retention by the Government of Canada, as its property, of

(i) the portion, if any, of the total tax imposed by the first nation under the first nation law that is not tax attributable to the first nation, and

(ii) the Government of Canada's share, if any, under paragraph (*b*) of the tax attributable to the first nation;

(*d*) for the payments, and for the eligibility for payments, by the Government of Canada to the first nation in respect of the tax attributable to the first nation out of the Consolidated Revenue Fund to which the first nation is entitled under the agreement, the time when and the manner in which such payments will be made, and the remittance by the first nation to the Government of Canada of any overpayments or advances by the Government of Canada or the right of the Government of Canada to set off any overpayments or advances against amounts payable by the Government of Canada to the first nation under the agreement;

(*e*) for the administration and enforcement of the first nation law by the Government of Canada and for the collection, by the Government of Canada, of amounts imposed under that law;

terminée à la fin de cette même année) si l'institution financière était une institution financière désignée particulière et si les terres de la première nation donnée constituaient une province participante.

Accord d'application

(2) Avec l'approbation du gouverneur en conseil, le ministre peut conclure, avec l'organe autorisé d'une première nation et pour le compte du gouvernement du Canada, un accord relatif à un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), de la première nation. Cet accord porte notamment sur les points suivants :

a) la méthode pour estimer, d'après les formules, règles, conditions et sources de données indiquées dans l'accord, la taxe attribuable à la première nation;

b) le partage éventuel, entre la première nation et le gouvernement du Canada, de la taxe attribuable à la première nation;

c) la conservation par le gouvernement du Canada, comme ses propres biens, des sommes suivantes :

(i) la partie éventuelle de la taxe totale imposée par la première nation en vertu du texte législatif autochtone qui n'est pas incluse dans la taxe attribuable à la première nation,

(ii) la part éventuelle, revenant au gouvernement du Canada en vertu de l'alinéa *b*), de la taxe attribuable à la première nation;

d) les versements effectués sur le Trésor par le gouvernement du Canada à la première nation — et auxquels celle-ci a droit aux termes de l'accord — relativement à la taxe attribuable à la première nation, les conditions d'admissibilité à ces versements, le calendrier et les modalités de paiement, et le versement par la première nation au gouvernement du Canada des paiements en trop ou des avances effectués par ce dernier ou le droit du gouvernement du Canada d'appliquer ces paiements en trop ou avances en réduction d'autres sommes à payer à la première nation aux termes de l'accord;

e) l'application du texte législatif autochtone par le gouvernement du Canada, et la perception, par ce dernier, des sommes imposées en vertu de ce texte;

(*f*) for the provision by the Government of Canada to the first nation of information acquired in the administration and enforcement of the first nation law or, subject to section 295 of the *Excise Tax Act*, Part IX of that Act and for the provision by the first nation to the Government of Canada of information acquired in the administration and enforcement of the first nation law;

(*g*) for the accounting for amounts collected in accordance with the agreement;

(*h*) for the payment by the Government of Canada and its agents and subservient bodies of amounts imposed under the first nation law or any other first nation law, as defined in subsection 11(1) or 12(1), and for the payment by the first nation and its agents and subservient bodies of amounts imposed under that law, any other first nation law, as defined in subsection 11(1) or 12(1), or Part IX of the *Excise Tax Act*;

(*i*) for the accounting for the payments referred to in paragraph (*h*);

(*j*) for the compliance by the Government of Canada and its agents and subservient bodies with the first nation law and any other first nation law, as defined in subsection 11(1) or 12(1), and for the compliance by the first nation and its agents and subservient bodies with that law, any other first nation law, as defined in subsection 11(1) or 12(1), and Part IX of the *Excise Tax Act*; and

(*k*) for other matters that relate to, and that are considered advisable for the purposes of implementing or administering, the first nation law.

f) la communication à la première nation par le gouvernement du Canada de renseignements obtenus lors de l'application du texte législatif autochtone ou, sous réserve de l'article 295 de la *Loi sur la taxe d'accise*, de la partie IX de cette loi, et la communication au gouvernement du Canada par la première nation de renseignements obtenus lors de l'application du texte législatif autochtone;

g) la façon de rendre compte des sommes perçues en conformité avec l'accord;

h) le paiement par le gouvernement du Canada et ses mandataires et entités subalternes de sommes imposées en vertu du texte législatif autochtone ou de tout autre texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), et le paiement par la première nation et ses mandataires et entités subalternes de sommes imposées en vertu du texte législatif autochtone, de tout autre texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), ou de la partie IX de la *Loi sur la taxe d'accise*;

i) la façon de rendre compte des paiements visés à l'alinéa *h*);

j) l'observation par le gouvernement du Canada et ses mandataires et entités subalternes du texte législatif autochtone et de tout autre texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), et l'observation par la première nation et ses mandataires et entités subalternes du texte législatif autochtone, de tout autre texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), et de la partie IX de la *Loi sur la taxe d'accise*;

k) d'autres questions concernant le texte législatif autochtone et dont l'inclusion est indiquée pour la mise en œuvre ou l'application de ce texte.

Amending agreements

(3) The Minister, with the approval of the Governor in Council, may on behalf of the Government of Canada enter into an agreement with the authorized body of a first nation amending or varying an administration agreement with the first nation or an agreement under this subsection.

Accords modificatifs

(3) Avec l'approbation du gouverneur en conseil, le ministre peut conclure, avec l'organe autorisé d'une première nation et pour le compte du gouvernement du Canada, un accord modifiant un accord d'application conclu avec la première nation ou un accord conclu aux termes du présent paragraphe.

Payments to first nation

(4) If the Minister, on behalf of the Government of Canada, has entered into an administration agreement with the authorized body of a

Versements à la première nation

(4) Le ministre, s'il a conclu, pour le compte du gouvernement du Canada, un accord d'application avec l'organe autorisé d'une première nation, peut verser à celle-ci sur le Trésor :

first nation, the Minister may pay to the first nation out of the Consolidated Revenue Fund

(*a*) amounts determined in accordance with the agreement as provided, and at such times as are specified, in the agreement; and

(*b*) in accordance with the agreement, advances in respect of the amounts referred to in paragraph (*a*).

a) des sommes déterminées en conformité avec l'accord, selon le calendrier convenu dans l'accord;

b) des avances sur les sommes visées à l'alinéa *a*), en conformité avec l'accord.

Payments to other persons

(5) Subject to subsection (6), if an administration agreement has been entered into in respect of a first nation law, as defined in subsection 11(1) or 12(1), payments may be made to a person out of the Consolidated Revenue Fund on account of any amount that is payable to the person under that law in accordance with the agreement.

(5) Sous réserve du paragraphe (6), si un accord d'application a été conclu relativement à un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), des sommes peuvent être versées à une personne sur le Trésor au titre d'un montant qui est payable à celle-ci aux termes de ce texte en conformité avec l'accord.

Versements à d'autres personnes

Recoverable advance out of Consolidated Revenue Fund

(6) If no amount is held on behalf of a first nation from which payment under subsection (5) may be made in accordance with an administration agreement, or the amount of the payment exceeds the amount so held, payment under subsection (5) may be made as a recoverable advance out of the Consolidated Revenue Fund if the repayment of the amount or excess by the first nation is provided for in the agreement.

(6) Si aucun montant sur lequel un versement peut être fait en application du paragraphe (5) en conformité avec un accord d'application n'est détenu pour le compte d'une première nation ou si le versement excède le montant ainsi détenu, un versement peut être fait en application du paragraphe (5) à titre d'avance recouvrable sur le Trésor, à condition que le remboursement du montant ou de l'excédent par la première nation soit prévu dans l'accord.

Avance recouvrable sur le Trésor

Statutory authority to make payments

6. Despite any other Act of Parliament, the payments made under an administration agreement under the authority of subsection 5(4), (5) or (6) may be made without any other or further appropriation or authority.

6. Malgré toute autre loi fédérale, les versements effectués aux termes d'un accord d'application sous le régime des paragraphes 5(4), (5) ou (6) peuvent être effectués sans autre affectation de crédits ou autorisation.

Autorisation d'effectuer des versements

Coming into force — law under subsection 4(1)

7. (1) A law enacted under subsection 4(1) may come into force only on or after the later of the day on which a copy of the law is received by the Minister and the day on which an administration agreement in respect of that law comes into effect.

7. (1) Le texte législatif édicté en vertu du paragraphe 4(1) entre en vigueur, au plus tôt, à la date de la réception par le ministre d'une copie du texte ou, si elle est postérieure, à la date de l'entrée en vigueur de l'accord d'application relatif à ce texte.

Entrée en vigueur — texte législatif édicté en vertu du par. 4(1)

Law deemed not in force

(2) A law enacted under subsection 4(1) is deemed to not be in force at a particular time unless an administration agreement in respect of that law is in effect at that time.

(2) Le texte législatif édicté en vertu du paragraphe 4(1) est réputé ne pas être en vigueur, à moins que l'accord d'application y afférent ne le soit.

Présomption

Not subject to *Statutory Instruments Act*

(3) A law enacted under subsection 4(1) is not subject to the *Statutory Instruments Act*.

(3) Le texte législatif édicté en vertu du paragraphe 4(1) n'est pas assujetti à la *Loi sur les textes réglementaires*.

Loi sur les textes réglementaires

Proof of law

8. A copy of a first nation law, as defined in subsection 11(1) or 12(1), enacted by the governing body of a first nation is, if it is certified to be a true copy, evidence that the law was duly enacted by the governing body and, in the

8. La copie d'un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), édicté par le corps dirigeant d'une première nation constitue, si elle est certifiée conforme, une preuve que le texte a été régulièrement édicé

Preuve

case of a law enacted under subsection 4(1), was received by the Minister, without proof of the signature or official character of the person certifying it to be a true copy if that person is

(*a*) in the case of a first nation law, as defined in subsection 11(1), the Minister or a person authorized by the Minister; and

(*b*) in the case of a first nation law, as defined in subsection 12(1), a person authorized by the governing body.

par le corps dirigeant et, dans le cas d'un texte législatif édicté en vertu du paragraphe 4(1), qu'il a été reçu par le ministre, sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle de la personne l'ayant certifiée conforme, cette personne étant :

a) dans le cas d'un texte législatif autochtone au sens du paragraphe 11(1), le ministre ou la personne qu'il autorise;

b) dans le cas d'un texte législatif autochtone au sens du paragraphe 12(1), la personne autorisée par le corps dirigeant.

Law of a band

9. (1) A law enacted under subsection 4(1) by the governing body of a band is valid only if the power of the governing body to enact the law is exercised in conformity with paragraph 2(3)(*b*) of the *Indian Act* and no such law is invalid by reason of any defect in form.

Texte législatif d'une bande

9. (1) Le texte législatif qui est édicté en vertu du paragraphe 4(1) par le corps dirigeant d'une bande n'est valide que si le pouvoir du corps dirigeant d'édicter ce texte est exercé en conformité avec l'alinéa 2(3)*b*) de la *Loi sur les Indiens*. Nul texte législatif de cette nature n'est invalide en raison d'un vice de forme.

Expenditures

(2) The power of the governing body of a band to expend moneys paid by the Government of Canada pursuant to an administration agreement in respect of a law enacted under subsection 4(1) by the governing body is validly exercised only if the power is exercised in conformity with paragraph 2(3)(*b*) of the *Indian Act*.

Dépenses

(2) Le pouvoir du corps dirigeant d'une bande de faire des dépenses sur les fonds versés par le gouvernement du Canada aux termes d'un accord d'application relatif à un texte législatif édicté en vertu du paragraphe 4(1) par le corps dirigeant n'est validement exercé qu'en conformité avec l'alinéa 2(3)*b*) de la *Loi sur les Indiens*.

Publication of law

(3) The governing body of a band shall, on demand, provide a copy of any law enacted under subsection 4(1) by that governing body and shall publish a copy of every such law in a newspaper that has general circulation in the place where the law applies and in the *First Nations Gazette*, but no such law shall be invalid by reason of a failure to publish it.

Publication

(3) Le corps dirigeant d'une bande est tenu de fournir, sur demande, une copie de tout texte législatif qu'il a édicté en vertu du paragraphe 4(1); il est aussi tenu de le publier dans un journal à grand tirage au lieu où le texte s'applique ainsi que dans la publication intitulée *First Nations Gazette*. Toutefois, le défaut de publication ne porte pas atteinte à la validité du texte législatif.

Indian moneys

(4) Moneys raised pursuant to a tax imposed under a law of a first nation enacted under subsection 4(1) are not Indian moneys within the meaning of subsection 2(1) of the *Indian Act*.

Argent des Indiens

(4) Les fonds prélevés par suite de l'imposition d'une taxe prévue par le texte législatif d'une première nation édicté en vertu du paragraphe 4(1) ne constituent pas de l'argent des Indiens au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

First nation — provisions of other Acts of Parliament

10. (1) Subject to subsection (2), if any other Act of Parliament or an agreement that has been given effect by any other Act of Parliament recognizes or grants a power of a first nation, other than a band, to enact a law and that Act or agreement contains provisions relating to such matters as the expenditure of moneys

Première nation — dispositions d'autres lois fédérales

10. (1) Sous réserve du paragraphe (2), si une autre loi fédérale ou un accord mis en vigueur par une autre loi fédérale reconnaît ou confère, à une première nation autre qu'une bande, le pouvoir d'édicter un texte législatif et que cette loi ou cet accord contienne des dispositions portant sur des questions telles les dé-

raised under a law of the first nation relating to taxation, the style, form or registration of such a law or the procedure for enacting, publishing and providing copies of such a law, the provisions of that Act or agreement apply, with such modifications as the circumstances require, for the purposes of a law of the first nation that is enacted under subsection 4(1).

Exception

(2) Subsection (1) does not apply to the extent that provisions relating to the matters referred to in that subsection are contained in a law of a first nation that is enacted under a power recognized or granted under any other Act of Parliament or under a power recognized or granted under an agreement that has been given effect by any other Act of Parliament.

Meaning of "first nation law"

11. (1) In this section, "first nation law" means a law enacted under subsection 4(1).

Administration agreement

(2) The authorized body of a first nation may enter into an administration agreement in respect of a first nation law enacted by the governing body of the first nation.

Rules where agreement

(3) If the authorized body of a first nation and the Minister have entered into an administration agreement in respect of a first nation law,

(*a*) every provision of Part IX of the *Excise Tax Act* (other than a provision that creates a criminal offence) applies, with any modifications that the circumstances require, for the purposes of the first nation law as if tax referred to in each of paragraphs 4(1)(*a*) and (*c*) imposed under the first nation law were imposed under subsection 165(1) and section 218 of the *Excise Tax Act* respectively and, subject to subsection 4(9), as if tax referred to in paragraph 4(1)(*b*) imposed under the first nation law were imposed under subsection 220.05(1) of the *Excise Tax Act* in respect of the bringing of property into a participating province, but the first nation law shall not thereby be construed as imposing a tax except as provided in section 4;

(*b*) the first nation law applies as if tax imposed under Part IX of the *Excise Tax Act* were imposed under the first nation law and as if the provisions of that Part (other than a provision that creates a criminal offence) re-

penses à faire sur les fonds prélevés sous le régime d'un texte législatif de la première nation en matière de taxation, la prise de ce texte ou le style, la forme, l'enregistrement, la communication ou la publication de celui-ci, ces dispositions s'appliquent, avec les adaptations nécessaires, dans le cadre d'un texte législatif de la première nation qui est édicté en vertu du paragraphe 4(1).

Exception

(2) Le paragraphe (1) ne s'applique pas dans la mesure où les dispositions portant sur les questions visées à ce paragraphe figurent dans un texte législatif d'une première nation édicté en vertu d'un pouvoir reconnu ou conféré par une autre loi fédérale ou par un accord mis en vigueur par une autre loi fédérale.

Définition de « texte législatif autochtone »

11. (1) Au présent article, « texte législatif autochtone » s'entend d'un texte législatif édicté en vertu du paragraphe 4(1).

Accord d'application

(2) L'organe autorisé d'une première nation peut conclure un accord d'application relatif à un texte législatif autochtone édicté par le corps dirigeant de la première nation.

Règles d'application

(3) Dans le cas où l'organe autorisé d'une première nation et le ministre ont conclu un accord d'application relatif à un texte législatif autochtone, les règles suivantes s'appliquent :

a) chaque disposition de la partie IX de la *Loi sur la taxe d'accise*, à l'exception de toute disposition créant une infraction criminelle, s'applique, avec les adaptations nécessaires, dans le cadre du texte législatif autochtone comme si la taxe visée à chacun des alinéas 4(1)*a*) et *c*) qui est imposée en vertu de ce texte était imposée en vertu du paragraphe 165(1) et de l'article 218 de cette loi respectivement et, sous réserve du paragraphe 4(9), comme si la taxe visée à l'alinéa 4(1)*b*) qui est imposée en vertu de ce texte était imposée en vertu du paragraphe 220.05(1) de cette loi relativement au transfert d'un bien dans une province participante; il n'en demeure pas moins que le texte législatif autochtone n'a pour effet d'imposer une taxe que dans la mesure prévue à l'article 4;

b) le texte législatif autochtone s'applique comme si la taxe imposée en vertu de la partie IX de la *Loi sur la taxe d'accise* était im-

lating to that tax were included in the first nation law, but the first nation law shall not thereby be construed as imposing a tax except as provided in section 4;

(*c*) Part IX of the *Excise Tax Act* applies, other than for the purposes of paragraph (*a*), as if tax imposed under the first nation law were imposed under that Part and as if the provisions of the first nation law relating to that tax were included in that Part, but that Part shall not thereby be construed as imposing a tax except as provided in that Part;

(*d*) all Acts of Parliament, other than this Act and Part IX of the *Excise Tax Act*, apply as if tax referred to in each of paragraphs 4(1)(*a*) and (*c*) imposed under the first nation law were imposed under subsection 165(1) and section 218 of the *Excise Tax Act* respectively and, subject to subsection 4(9), as if tax referred to in paragraph 4(1)(*b*) imposed under the first nation law were imposed under subsection 220.05(1) of the *Excise Tax Act* in respect of the bringing of property into a participating province; and

(*e*) for greater certainty,

(i) a person who does anything to satisfy a requirement of the first nation law that would satisfy a corresponding requirement of Part IX of the *Excise Tax Act* if the tax imposed under the first nation law were imposed under that Part is deemed to have satisfied the requirement of the first nation law,

(ii) a person who does anything to exercise an authority, right or privilege under the first nation law that would be a valid exercise of a corresponding authority, right or privilege under Part IX of the *Excise Tax Act* if the tax imposed under the first nation law were imposed under that Part is deemed to have validly exercised the authority, right or privilege under the first nation law,

(iii) a person who does anything to satisfy a requirement or exercise an authority, right or privilege under Part IX of the *Excise Tax Act* is deemed to have done that thing for the purposes of both that Part and the first nation law,

posée en vertu de ce texte et comme si les dispositions de cette partie concernant cette taxe, à l'exception de toute disposition créant une infraction criminelle, faisaient partie de ce texte; il n'en demeure pas moins que le texte législatif autochtone n'a pour effet d'imposer une taxe que dans la mesure prévue à l'article 4;

c) la partie IX de la *Loi sur la taxe d'accise* s'applique, sauf dans le cadre de l'alinéa *a*), comme si la taxe imposée en vertu du texte législatif autochtone était imposée en vertu de cette partie et comme si les dispositions de ce texte concernant cette taxe faisaient partie de cette partie; il n'en demeure pas moins que la partie IX de cette loi n'a pour effet d'imposer une taxe que dans la mesure qui y est prévue;

d) les lois fédérales, à l'exception de la présente loi et de la partie IX de la *Loi sur la taxe d'accise*, s'appliquent comme si la taxe visée à chacun des alinéas 4(1)*a*) et *c*) qui est imposée en vertu du texte législatif autochtone était imposée en vertu du paragraphe 165(1) et de l'article 218 de la *Loi sur la taxe d'accise* respectivement et, sous réserve du paragraphe 4(9), comme si la taxe visée à l'alinéa 4(1)*b*) qui est imposée en vertu de ce texte était imposée en vertu du paragraphe 220.05(1) de cette loi relativement au transfert d'un bien dans une province participante;

e) il est entendu que :

(i) tout acte accompli en vue de remplir une exigence du texte législatif autochtone qui remplirait une exigence correspondante de la partie IX de la *Loi sur la taxe d'accise*, si la taxe imposée en vertu de ce texte était imposée en vertu de cette partie, remplit l'exigence du texte,

(ii) tout acte accompli en vue d'exercer un pouvoir, un droit ou un privilège prévu par le texte législatif autochtone qui constituerait l'exercice valide d'un pouvoir, droit ou privilège correspondant prévu par la partie IX de la *Loi sur la taxe d'accise*, si la taxe imposée en vertu de ce texte était imposée en vertu de cette partie, constitue l'exercice valide du pouvoir, droit ou privilège prévu par le texte,

(iv) a person who does anything to satisfy a requirement or exercise an authority, right or privilege under the first nation law is deemed to have done that thing for the purposes of both that law and Part IX of the *Excise Tax Act*,

(v) a person who is a registrant for the purposes of Part IX of the *Excise Tax Act* is a registrant for the purposes of both that Part and the first nation law,

(vi) a person who is a registrant for the purposes of the first nation law is a registrant for the purposes of both that law and Part IX of the *Excise Tax Act*,

(vii) if a proceeding may be taken under any other Act of Parliament in respect of the tax imposed under Part IX of the *Excise Tax Act*, that proceeding may be taken in respect of the tax imposed under the first nation law, and

(viii) nothing in this Part shall be construed as conferring on a governing body the power to make an enactment in respect of criminal law.

2003, c. 15, s. 67 "11"; 2005, c. 19, s. 7.

(iii) tout acte accompli en vue de remplir une exigence ou d'exercer un pouvoir, un droit ou un privilège prévu par la partie IX de la *Loi sur la taxe d'accise* est accompli pour l'application à la fois de cette partie et du texte législatif autochtone,

(iv) tout acte accompli en vue de remplir une exigence ou d'exercer un pouvoir, un droit ou un privilège prévu par le texte législatif autochtone est accompli pour l'application à la fois de ce texte et de la partie IX de la *Loi sur la taxe d'accise*,

(v) quiconque est un inscrit pour l'application de la partie IX de la *Loi sur la taxe d'accise* l'est pour l'application à la fois de cette partie et du texte législatif autochtone,

(vi) quiconque est un inscrit pour l'application du texte législatif autochtone l'est pour l'application à la fois de ce texte et de la partie IX de la *Loi sur la taxe d'accise*,

(vii) toute procédure qui pourrait être engagée en application d'une autre loi fédérale relativement à la taxe imposée en vertu de la partie IX de la *Loi sur la taxe d'accise* peut être engagée relativement à la taxe imposée en vertu du texte législatif autochtone,

(viii) la présente partie n'a pas pour effet de conférer à un corps dirigeant le pouvoir d'édicter des textes législatifs en matière de droit criminel.

2003, ch. 15, art. 67 « 11 »; 2005, ch. 19, art. 7.

First Nation Law Enacted Under Separate Power

Meaning of "first nation law"

12. (1) In this section, "first nation law" means a law enacted by the governing body of a first nation listed in Schedule 1 under a power recognized or granted under any other Act of Parliament or an agreement that has been given effect by any other Act of Parliament, if that law and its application are consistent with subsections 4(1) to (10), paragraphs 11(3)(*a*) and (*b*) and subparagraphs 11(3)(*e*)(i) to (iii), (v) and (viii).

Rules where agreement

(2) If the authorized body of a first nation and the Minister have entered into an adminis-

Texte législatif autochtone édicté en vertu d'un pouvoir distinct

Définition de « texte législatif autochtone »

12. (1) Au présent article, « texte législatif autochtone » s'entend d'un texte législatif qui est édicté par le corps dirigeant d'une première nation dont le nom figure à l'annexe 1 en vertu d'un pouvoir reconnu ou conféré par une autre loi fédérale ou par un accord mis en vigueur par une autre loi fédérale. Ce texte et son application doivent toutefois être conformes aux paragraphes 4(1) à (10), aux alinéas 11(3)*a*) et *b*) et aux sous-alinéas 11(3)*e*)(i) à (iii), (v) et (viii).

Règles d'application

(2) Dans le cas où l'organe autorisé d'une première nation et le ministre ont conclu un ac-

tration agreement in respect of a first nation law,

(*a*) Part IX of the *Excise Tax Act* applies as if tax imposed under the first nation law were imposed under that Part and as if the provisions of the first nation law relating to that tax were included in that Part, but that Part shall not thereby be construed as imposing a tax except as provided in that Part;

(*b*) all Acts of Parliament, other than this Act and Part IX of the *Excise Tax Act*, apply as if tax referred to in each of paragraphs 4(1)(*a*) and (*c*) imposed under the first nation law were imposed under subsection 165(1) and section 218 of the *Excise Tax Act* respectively and, subject to subsection 4(9), as if tax referred to in paragraph 4(1)(*b*) imposed under the first nation law were imposed under subsection 220.05(1) of the *Excise Tax Act* in respect of the bringing of property into a participating province; and

(*c*) for greater certainty,

(i) a person who does anything to satisfy a requirement or exercise an authority, right or privilege under the first nation law is deemed to have done that thing for the purposes of both that law and Part IX of the *Excise Tax Act*,

(ii) a person who is a registrant for the purposes of the first nation law is a registrant for the purposes of both that law and Part IX of the *Excise Tax Act*, and

(iii) if a proceeding may be taken under any other Act of Parliament in respect of the tax imposed under Part IX of the *Excise Tax Act*, that proceeding may be taken in respect of the tax imposed under the first nation law.

Cessation of agreement

(3) If an administration agreement in respect of a first nation law ceases to have effect at any time, this Part applies after that time in respect of the first nation law as if the first nation law had been repealed at that time.

2003, c. 15, s. 67 "12"; 2005, c. 19, s. 8.

cord d'application relatif à un texte législatif autochtone, les règles suivantes s'appliquent :

a) la partie IX de la *Loi sur la taxe d'accise* s'applique comme si la taxe imposée en vertu du texte législatif autochtone était imposée en vertu de cette partie et comme si les dispositions de ce texte concernant cette taxe faisaient partie de cette partie; il n'en demeure pas moins que cette partie n'a pour effet d'imposer une taxe que dans la mesure qui y est prévue;

b) les lois fédérales, à l'exception de la présente loi et de la partie IX de la *Loi sur la taxe d'accise*, s'appliquent comme si la taxe visée à chacun des alinéas 4(1)*a*) et *c*) qui est imposée en vertu du texte législatif autochtone était imposée en vertu du paragraphe 165(1) et de l'article 218 de la *Loi sur la taxe d'accise* respectivement et, sous réserve du paragraphe 4(9), comme si la taxe visée à l'alinéa 4(1)*b*) qui est imposée en vertu de ce texte était imposée en vertu du paragraphe 220.05(1) de cette loi relativement au transfert d'un bien dans une province participante;

c) il est entendu que :

(i) tout acte accompli en vue de remplir une exigence ou d'exercer un pouvoir, un droit ou un privilège prévu par le texte législatif autochtone est accompli pour l'application à la fois de ce texte et de la partie IX de la *Loi sur la taxe d'accise*,

(ii) quiconque est un inscrit pour l'application du texte législatif autochtone l'est pour l'application à la fois de ce texte et de la partie IX de la *Loi sur la taxe d'accise*,

(iii) toute procédure qui pourrait être engagée en application d'une autre loi fédérale relativement à la taxe imposée en vertu de la partie IX de la *Loi sur la taxe d'accise* peut être engagée relativement à la taxe imposée en vertu du texte législatif autochtone.

Cessation de l'accord

(3) Dès qu'un accord d'application relatif à un texte législatif autochtone cesse d'avoir effet, la présente partie s'applique comme si ce texte avait été abrogé au même moment.

2003, ch. 15, art. 67 « 12 »; 2005, ch. 19, art. 8.

ADMINISTRATION AGREEMENT AND PART IX OF EXCISE TAX ACT

Tax not payable

13. If an administration agreement in respect of a first nation law, as defined in subsection 11(1) or 12(1), is in effect, no tax (other than tax imposed under subsection 165(2), 212.1(2) or 218.1(1) or Division IV.1 of Part IX of the *Excise Tax Act*) is payable or deemed to have been paid or collected under Part IX of the *Excise Tax Act* in respect of a supply to the extent that tax is payable or deemed to have been paid or collected, as the case may be, in respect of the supply under the first nation law.

ACCORD D'APPLICATION ET PARTIE IX DE LA LOI SUR LA TAXE D'ACCISE

Taxe non exigible

13. Si un accord d'application relatif à un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), est en vigueur, aucune taxe, à l'exception de celle imposée selon les paragraphes 165(2), 212.1(2) ou 218.1(1) ou la section IV.1 de la partie IX de la *Loi sur la taxe d'accise*, n'est exigible, ni n'est réputée avoir été payée ou perçue en vertu de cette partie relativement à une fourniture dans la mesure où cette taxe est exigible, ou est réputée avoir été payée ou perçue, selon le cas, relativement à la fourniture en vertu du texte législatif autochtone.

OFFENCES

Offences

14. When an administration agreement in respect of a first nation law, as defined in subsection 11(1) or 12(1), is in effect and a person commits an act or omission in respect of that law that would be an offence under a provision of Part IX of the *Excise Tax Act* or regulations made under that Part if the act or omission were committed in relation to that Part or those regulations,

(*a*) subject to paragraph (*b*), the person is guilty of an offence punishable on summary conviction;

(*b*) the Attorney General of Canada may elect to prosecute the person by indictment if an offence under that provision may be prosecuted by indictment; and

(*c*) the person is liable on conviction to the punishment provided for in that provision.

INFRACTIONS

Infractions

14. Lorsqu'un accord d'application relatif à un texte législatif autochtone, au sens des paragraphes 11(1) ou 12(1), est en vigueur et qu'une personne commet une action ou omission relative à ce texte qui constituerait une infraction prévue par une disposition de la partie IX de la *Loi sur la taxe d'accise* ou d'un règlement pris sous son régime si elle était commise relativement à cette partie ou à ce règlement :

a) sous réserve de l'alinéa *b*), la personne est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire;

b) le procureur général du Canada peut choisir de poursuivre la personne par voie de mise en accusation si une infraction prévue par cette disposition peut être poursuivie de cette manière;

c) sur déclaration de culpabilité, la personne est passible de la peine prévue par cette disposition.

GENERAL

Amendment of Schedule 1

15. The Governor in Council may, by order, amend Schedule 1 by adding, deleting or varying the name of any first nation or of the governing body of any first nation or the description of the lands of any first nation.

2003, c. 15, s. 67 "15"; 2005, c. 19, s. 9.

DISPOSITIONS GÉNÉRALES

Modification de l'annexe 1

15. Le gouverneur en conseil peut, par décret, modifier l'annexe 1 pour y ajouter, en retrancher ou y changer le nom d'une première nation, le nom du corps dirigeant d'une première nation ou la description des terres d'une première nation.

2003, ch. 15, art. 67 « 15 »; 2005, ch. 19, art. 9.

Information reports

16. (1) If an administration agreement entered into by the authorized body of a first nation is in effect, the Minister of National Rev-

Rapports d'information

16. (1) Si un accord d'application conclu par l'organe autorisé d'une première nation est en vigueur, le ministre du Revenu national

enue may, for the purposes of that agreement, require any person having a place of business, or maintaining assets of a business, on the lands of the first nation to make a report respecting supplies relating to that business made by the person or property or services acquired or imported for consumption, use or supply in connection with those lands and that business.

Form and manner of filing

(2) A report under subsection (1) shall be filed with the Minister of National Revenue in the manner and form authorized by that Minister and at the time and containing information specified by that Minister.

peut, pour l'application de cet accord, exiger de toute personne ayant un lieu d'affaires sur les terres de la première nation, ou y maintenant des éléments d'actif d'une entreprise, qu'elle produise un rapport concernant les fournitures liées au lieu d'affaires ou à l'entreprise qu'elle a effectuées ou les biens ou services acquis ou importés pour consommation, utilisation ou fourniture relativement à ces terres et à ce lieu d'affaires ou cette entreprise.

Production

(2) Le rapport contient les renseignements déterminés par le ministre du Revenu national et lui est présenté en la forme et selon les modalités qu'il autorise ainsi que dans le délai qu'il précise.

PART 2

FIRST NATIONS SALES TAX — SPECIFIED PROVINCES

Interpretation

Definitions

17. The following definitions apply in this Part and in Schedule 2.

"band law" « *texte législatif de bande* »

"band law" means a law enacted by a council of the band under section 23.

"council of the band" « *conseil de bande* »

"council of the band" has the same meaning as in subsection 2(1) of the *Indian Act*.

"direct" « *directe* »

"direct" has the same meaning, for the purpose of distinguishing between a direct and an indirect tax, as in class 2 of section 92 of the *Constitution Act, 1867*.

"parallel provincial law" « *loi provinciale parallèle* »

"parallel provincial law", in respect of a band law, means the enactment of the specified province listed in Schedule 2 opposite the name of the council of the band that enacted the band law, or those provisions of an enactment of that province, to which the band law is similar.

"parallel Quebec law" [Repealed, 2006, c. 4, s. 92]

"reserves in Quebec" [Repealed, 2006, c. 4, s. 92]

"sales tax" « *taxe de vente* »

"sales tax" means any tax of general application payable on a value, price or quantity basis by a person in respect of the sale, rental, supply, consumption or use of a property or service.

PARTIE 2

TAXE DE VENTE DES PREMIÈRES NATIONS — PROVINCES VISÉES

Définitions

Définitions

17. Les définitions qui suivent s'appliquent à la présente partie et à l'annexe 2.

« conseil de bande » *"council of the band"*

« conseil de bande » S'entend au sens de « conseil de la bande », au paragraphe 2(1) de la *Loi sur les Indiens*.

« directe » *"direct"*

« directe » Pour distinguer une taxe directe d'une taxe indirecte, a le même sens qu'à la catégorie 2 de l'article 92 de la *Loi constitutionnelle de 1867*.

« loi provinciale parallèle » *"parallel provincial law"*

« loi provinciale parallèle » En ce qui concerne un texte législatif de bande, le texte législatif de la province visée dont le nom figure à l'annexe 2 en regard du nom du conseil de bande ayant édicté le texte législatif de bande, ou toute disposition d'un texte législatif de cette province, auquel le texte législatif de bande est similaire.

« loi québécoise parallèle » [Abrogée, 2006, ch. 4, art. 92]

« province visée » *"specified province"*

« province visée » Province dont le nom figure à l'annexe 2.

« réserves au Québec » [Abrogée, 2006, ch. 4, art. 92]

« taxe de vente » *"sales tax"*

« taxe de vente » Toute taxe d'application générale payable par une personne selon le prix, la quantité ou la valeur, relativement à la consommation, à la fourniture, à la location, à l'utilisation ou à la vente d'un bien ou d'un service.

"specified province" *« province visée »*

"specified province" means a province that is listed in Schedule 2.

2005, c. 19, s. 10; 2006, c. 4, s. 92.

« texte législatif de bande » *"band law"*

« texte législatif de bande» Texte législatif édicté par un conseil de bande en vertu de l'article 23.

2005, ch. 19, art. 10; 2006, ch. 4, art. 92.

Application of Other Acts

Section 87 of the *Indian Act* and similar provisions

18. (1) The obligation to pay tax or any other amount that is required to be paid under a band law applies despite the application of the exemption under section 87 of the *Indian Act* and of any other exemption from taxation under any other Act of Parliament that is similar to the exemption under that section.

Section 89 of the *Indian Act*

(2) A band law may be administered and enforced by an agent of the band despite section 89 of the *Indian Act*.

2005, c. 19, s. 10.

Not subject to *Statutory Instruments Act*

19. A band law is not subject to the *Statutory Instruments Act*.

2005, c. 19, s. 10.

Application of section 23

20. A council of the band may enact a band law despite any other Act of Parliament that limits the authority of the council of the band to enact a law that imposes a tax.

2005, c. 19, s. 10.

Application of other Acts

21. If a law of a specified province provides that one or more laws of the specified province apply as if the tax imposed under a band law were imposed under a particular law of the specified province, all Acts of Parliament, other than this Act, apply as if the tax imposed under the band law were imposed under that particular law of the specified province.

2005, c. 19, s. 10; 2006, c. 4, s. 93.

Application d'autres lois

Article 87 de la *Loi sur les Indiens* et dispositions semblables

18. (1) L'obligation d'acquitter une taxe ou une autre somme à payer en vertu d'un texte législatif de bande l'emporte sur l'application de l'exemption prévue à l'article 87 de la *Loi sur les Indiens* et de toute autre exemption fiscale, prévue par une autre loi fédérale, qui est semblable à cette exemption.

Article 89 de la *Loi sur les Indiens*

(2) Tout texte législatif de bande peut être mis en application par un mandataire de la bande malgré l'article 89 de la *Loi sur les Indiens*.

2005, ch. 19, art. 10.

Loi sur les textes réglementaires

19. Le texte législatif de bande n'est pas assujetti à la *Loi sur les textes réglementaires*.

2005, ch. 19, art. 10.

Application prépondérante de l'art. 23

20. Le conseil de bande peut édicter un texte législatif de bande malgré toute autre loi fédérale qui limite son pouvoir d'édicter un texte législatif imposant une taxe.

2005, ch. 19, art. 10.

Application d'autres lois

21. Si une loi d'une province visée prévoit qu'une ou plusieurs lois de la province s'appliquent comme si la taxe imposée en vertu d'un texte législatif de bande était imposée en vertu d'une loi particulière de la province, les lois fédérales, à l'exception de la présente loi, s'appliquent comme si cette taxe était imposée en vertu de cette loi particulière.

2005, ch. 19, art. 10; 2006, ch. 4, art. 93.

Administration Agreement

Authority to enter into agreement

22. A council of the band may, on behalf of the band, enter into an administration agreement with the government of the specified province listed opposite the name of that council in Schedule 2 in respect of a band law enacted by that council.

2005, c. 19, s. 10; 2006, c. 4, s. 93.

Accord d'application

Pouvoir de conclure un accord

22. Le conseil de bande peut, au nom de la bande, conclure avec le gouvernement de la province visée dont le nom figure à l'annexe 2, en regard du nom du conseil, un accord d'application relatif au texte législatif de bande qu'il a édicté.

2005, ch. 19, art. 10; 2006, ch. 4, art. 93.

Delegation

Authority to impose a direct sales tax

23. (1) A council of the band that is listed in Schedule 2 may enact a law that imposes a direct sales tax, and any other amount that may be required to be paid in relation to the imposi-

Délégation

Pouvoir d'imposition

23. (1) Le conseil de bande dont le nom figure à l'annexe 2 peut édicter un texte législatif qui impose une taxe de vente directe, ainsi que toute autre somme dont le paiement peut être

tion of that direct sales tax, within its reserves that are situated in the specified province listed opposite the name of that council in that Schedule and that are listed in that Schedule opposite the name of the council.

exigé relativement à l'imposition de cette taxe, dans les limites des réserves de la bande — dont le nom ou la description figure à cette annexe en regard du nom du conseil — qui sont situées dans la province visée dont le nom figure à cette annexe en regard du nom du conseil.

Parallel provincial law

(2) A law may not be enacted under subsection (1) unless the law has only one parallel provincial law that is expressly identified in that law.

(2) Un texte législatif ne peut être édicté en vertu du paragraphe (1) que s'il se rattache à une seule loi provinciale parallèle qui y est nommée expressément.

Loi provinciale parallèle

Force of law

(3) A law enacted under subsection (1) does not have the force of law unless

(3) Le texte législatif édicté en vertu du paragraphe (1) n'a force de loi que si, à la fois :

Force de loi

(*a*) an administration agreement in respect of the law is in effect;

a) un accord d'application relativement au texte est en vigueur;

(*b*) that administration agreement is between the council of the band and the government of the specified province listed opposite the name of that council in Schedule 2;

b) cet accord a été conclu entre le conseil de bande et le gouvernement de la province visée dont le nom figure à l'annexe 2 en regard du nom du conseil;

(*c*) the law is administered and enforced, and the direct sales tax imposed under that law is collected, in accordance with that administration agreement;

c) le texte est appliqué, et la taxe de vente directe qu'il impose est perçue, conformément à cet accord;

(*d*) the name of the band, the name of the council of the band, the name, or description, of the reserves of the band within which the law applies and the name of the specified province in which the reserves are situated are listed opposite one another in Schedule 2; and

d) le nom de la bande, le nom du conseil de bande, le nom ou la description des réserves de la bande dans les limites desquelles le texte s'applique et le nom de la province visée où ces réserves sont situées figurent à l'annexe 2, les uns en regard des autres;

(*e*) its parallel provincial law is in force.

e) la loi provinciale parallèle à laquelle le texte se rattache est en vigueur.

Conformity with *Indian Act*

(4) A law enacted under subsection (1) is valid only if the power of the council of the band to enact the law is exercised in conformity with paragraph 2(3)(*b*) of the *Indian Act* and no such law is invalid by reason of any defect in form.

(4) Le texte législatif édicté en vertu du paragraphe (1) n'est valide que si le pouvoir du conseil de bande d'édicter ce texte est exercé en conformité avec l'alinéa 2(3)*b*) de la *Loi sur les Indiens*. Nul texte législatif de cette nature n'est invalide en raison d'un vice de forme.

Conformité à la *Loi sur les Indiens*

Criminal law exclusion

(5) Nothing in this Part shall be construed as conferring on a council of the band the power to make an enactment in respect of criminal law.

(5) La présente partie n'a pas pour effet de conférer au conseil de bande le pouvoir d'édicter des textes législatifs en matière de droit criminel.

Exclusion — droit criminel

2005, c. 19, s. 10; 2006, c. 4, s. 94.

2005, ch. 19, art. 10; 2006, ch. 4, art. 94.

Coming into force — law under section 23

24. Subject to subsection 23(3), a band law comes into force on the date specified in the administration agreement entered into under section 22 in respect of that law.

24. Sous réserve du paragraphe 23(3), le texte législatif de bande entre en vigueur à la date prévue dans l'accord d'application conclu en vertu de l'article 22 relativement à ce texte.

Entrée en vigueur du texte législatif

2005, c. 19, s. 10; 2006, c. 4, s. 95.

2005, ch. 19, art. 10; 2006, ch. 4, art. 95.

Proof of law

25. A copy of a band law is, if it is certified to be a true copy by the Minister or a person authorized by the Minister, evidence that the law was duly enacted by the council of the band without proof of the signature or official character of the Minister or the person authorized by the Minister.

2005, c. 19, s. 10.

Preuve

25. La copie d'un texte législatif de bande constitue, si elle est certifiée conforme par le ministre ou une personne qu'il autorise, une preuve que le texte a été régulièrement édicté par le conseil de bande sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du ministre ou de la personne.

2005, ch. 19, art. 10.

Publication of law

26. A council of the band shall on demand provide a copy of any band law enacted by that council and shall publish a copy of every such law in a newspaper that has general circulation in the place where the law applies and in the *First Nations Gazette*, but no such law shall be invalid by reason of a failure to publish it.

2005, c. 19, s. 10.

Publication

26. Le conseil de bande est tenu de fournir, sur demande, une copie de tout texte législatif de bande qu'il a édicté; il est aussi tenu de le publier dans un journal à grand tirage au lieu où le texte s'applique ainsi que dans la publication intitulée *First Nations Gazette*. Toutefois, le défaut de publication ne porte pas atteinte à la validité du texte législatif.

2005, ch. 19, art. 10.

Expenditures

27. The power of a council of the band to expend moneys received by the council under an administration agreement is validly exercised only if the power is exercised in conformity with paragraph 2(3)(*b*) of the *Indian Act*.

2005, c. 19, s. 10.

Dépenses

27. Le pouvoir du conseil de bande de faire des dépenses sur les fonds qui lui sont versés aux termes d'un accord d'application n'est validement exercé qu'en conformité avec l'alinéa 2(3)*b*) de la *Loi sur les Indiens*.

2005, ch. 19, art. 10.

Indian moneys

28. Moneys raised under a band law are not Indian moneys within the meaning of subsection 2(1) of the *Indian Act*.

2005, c. 19, s. 10.

Argent des Indiens

28. Les fonds prélevés en application d'un texte législatif de bande ne constituent pas de l'argent des Indiens au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

2005, ch. 19, art. 10.

General

Amendment of Schedule 2

29. The Governor in Council may, by order, amend Schedule 2 by adding, deleting or varying the name of a band, the name of a council of the band, the name, or description, of a band's reserves or the name of a specified province.

2005, c. 19, s. 10; 2006, c. 4, s. 96.

Disposition générale

Modification de l'annexe 2

29. Le gouverneur en conseil peut, par décret, modifier l'annexe 2 pour y ajouter, en retrancher ou y changer le nom d'une bande, le nom d'un conseil de bande, le nom ou la description des réserves d'une bande ou le nom d'une province visée.

2005, ch. 19, art. 10; 2006, ch. 4, art. 96.

SCHEDULE 1
(Subsections 2(1), 3(2), 4(1) and 12(1) and section 15)

LIST OF NAMES OF FIRST NATIONS AND GOVERNING BODIES AND DESCRIPTION OF LANDS

Column 1 First Nation	Column 2 Governing Body	Column 3 Lands
Adams Lake	Council of Adams Lake	Reserve of Adams Lake
Akisqnuk First Nation (also known as Columbia Lake Indian Band and ?Akisq'nuk First Nation)Akisq'nuk First Nation)	Council of the Akisqnuk First Nation	Reserves of Columbia Lake, other than the reserve designated as St. Mary's No. 1A.
Blueberry River First Nations	Council of the Blueberry River First Nations	Reserves of the Blueberry River First Nations
Bonaparte	Council of Bonaparte	Each reserve of Bonaparte that is not shared with another band
Buffalo Point First Nation	Council of Buffalo Point First Nation	Each reserve of the Buffalo Point First Nation that is not shared with another band
Burrard, also known as, the Tsleil-Waututh Nation	Council of Burrard	Reserve of Burrard
Carcross/Tagish First Nation	Assembly of the Carcross/Tagish First Nation	Settlement Land of the Carcross/Tagish First Nation under the Carcross/Tagish First Nation Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Champagne and Aishihik First Nations	First Nations Council of the Champagne and Aishihik First Nations	Settlement Land of the Champagne and Aishihik First Nations under the Champagne and Aishihik First Nations Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Cowessess	Council of Cowessess	Each reserve of Cowessess that is not shared with another band.
Cowichan	Council of Cowichan	Reserve of Cowichan
Duncan's First Nation	Council of the Duncan's First Nation	Reserves of the Duncan's First Nation
Enoch Cree Nation #440	Council of the Enoch Cree Nation #440	Reserve of the Enoch Cree Nation #440
First Nation of Nacho Nyak Dun	Assembly of the First Nation of Nacho Nyak Dun	Settlement Land of the First Nation of Nacho Nyak Dun under the First Nation of Nacho Nyak Dun Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Frog Lake	Council of Frog Lake	Each reserve of Frog Lake that is not shared with another band
Innue Essipit	Conseil de la Première Nation des Innus Essipit	Innue Essipit Reserve

Column 1 First Nation	Column 2 Governing Body	Column 3 Lands
Inuit, within the meaning assigned by the Agreement, as defined in the *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27	Nunatsiavut Government	Labrador Inuit Lands and Inuit Communities, within the meaning assigned by the Agreement, as defined in the *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27
Kahkewistahaw	Council of Kahkewistahaw	Each reserve of Kahkewistahaw that is not shared with another band
Kamloops	Council of Kamloops	Each reserve of Kamloops that is not shared with another band
Kluane First Nation	Council of the Kluane First Nation	Settlement Land of the Kluane First Nation under the Kluane First Nation Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Kwanlin Dun First Nation	Kwanlin Dun First Nation Council	Settlement Land of the Kwanlin Dun First Nation under the Kwanlin Dun First Nation Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Little Red River Cree Nation	Council of the Little Red River Cree Nation	Reserves of the Little Red River Cree Nation
Little Salmon/Carmacks First Nation	Assembly of the Little Salmon/Carmacks First Nation	Settlement Land of the Little Salmon/Carmacks First Nation under the Little Salmon/Carmacks First Nation Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Lower Kootenay	Council of Lower Kootenay	Reserves of Lower Kootenay, other than the reserve designated as St. Mary's No. 1A.
Matsqui	Council of Matsqui	Each reserve of Matsqui that is not shared with another band
Mosquito, Grizzly Bear's Head, Lean Man First Nation	Council of the Mosquito, Grizzly Bear's Head, Lean Man First Nation	Reserves of the Mosquito, Grizzly Bear's Head, Lean Man First Nation
Muskeg Lake	Council of Muskeg Lake	Reserve of Muskeg Lake
Nekaneet	Council of Nekaneet	Each reserve of Nekaneet that is not shared with another band.
Nisga'a Nation, within the meaning assigned by the Nisga'a Final Agreement, as defined in the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7	Nisga'a Lisims Government, within the meaning assigned by the Nisga'a Final Agreement, as defined in the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7	Nisga'a Lands, within the meaning assigned by the Nisga'a Final Agreement, as defined in the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7
Peter Ballantyne Cree Nation	Council of the Peter Ballantyne Cree Nation	Reserves of the Peter Ballantyne Cree Nation

Column 1 First Nation	Column 2 Governing Body	Column 3 Lands
Selkirk First Nation	Assembly of the Selkirk First Nation	Settlement Land of the Selkirk First Nation under the Selkirk First Nation Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Shuswap	Council of Shuswap	Reserve of Shuswap
Skeetchestn	Council of Skeetchestn	Each reserve of Skeetchestn that is not shared with another band
Skidegate	Council of Skidegate	Reserve of Skidegate
Sliammon	Council of Sliammon	Reserve of Sliammon
Songhees First Nation	Council of the Songhees First Nation	Reserves of the Songhees First Nation
St. Mary's	Council of St. Mary's	Reserves of St. Mary's, other than the reserve designated as St. Mary's No. 1A.
Ta'an Kwach'an Council	Board of Directors and Elders Council of the Ta'an Kwach'an Council	Settlement Land of the Ta'an Kwach'an Council under the Ta'an Kwach'an Council Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Teslin Tlingit Council	General Council of the Teslin Tlingit Council	Settlement Land of the Teslin Tlingit Council under the Teslin Tlingit Council Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Tla-o-qui-aht	Council of the Tla-o-qui-aht First Nations	Reserve of the Tla-o-qui-aht First Nations
Tlicho	Tlicho Government	Tlicho lands and Tlicho community within the meaning assigned by the Land Claims and Self-Government Agreement among the Tlicho, the Government of the Northwest Territories and the Government of Canada, signed on August 25, 2003 and approved, given effect and declared valid by the *Tlicho Land Claims and Self-Government Act*, as that Agreement is amended from time to time
Tobacco Plains	Council of Tobacco Plains	Reserves of Tobacco Plains, other than the reserve designated as St. Mary's No. 1A.
Tr'ondëk Hwëch'in	General Assembly of the Tr'ondëk Hwëch'in	Settlement Land of the Tr'ondëk Hwëch'in under the Tr'ondëk Hwëch'in Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34
Tsawout First Nation	Council of the Tsawout First Nation	Each reserve of the Tsawout First Nation that is not shared with another band
Tzeachten	Council of Tzeachten	Each reserve of Tzeachten that is not shared with another band
Vuntut Gwitchin First Nation	Tribal Council of the Vuntut Gwitchin First Nation	Settlement Land of the Vuntut Gwitchin First Nation under the Vuntut Gwitchin First Nation Final Agreement and the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34

Column 1 First Nation	Column 2 Governing Body	Column 3 Lands
Westbank First Nation	Council of the Westbank First Nation	Reserve of the Westbank First Nation
West Moberly First Nations	Council of the West Moberly First Nations	Reserve of the West Moberly First Nations
White Bear	Council of White Bear	Each reserve of White Bear that is not shared with another band
Whitecap Dakota First Nation	Council of the Whitecap Dakota First Nation	Reserve of the Whitecap Dakota First Nation

2003, c. 15, s. 67 "Sch."; SOR/2004-281; 2005, c. 19, s. 11; SOR/2005-363; SOR/2006-201, 294; SOR/2007-111; SOR/2007-185, ss. 1, 2; SOR/2008-103, 234, 235; SOR/2009-281; SOR/2010-178, 179; SOR/2011-36, 213, 214, 266; SOR/2012-31.

ANNEXE 1
(paragraphes 2(1), 3(2), 4(1) et 12(1) et article 15)

NOM DES PREMIÈRES NATIONS ET DES CORPS DIRIGEANTS ET DESCRIPTION DES TERRES

Colonne 1 Première nation	Colonne 2 Corps dirigeant	Colonne 3 Terres
Adams Lake	Council of Adams Lake	Réserve de Adams Lake
Première Nation Akisqnuk (aussi connue sous les noms de Columbia Lake Indian Band et de ?Akisq'-nuk First Nation)	Conseil de la Première Nation Akisq-nuk	Réserves de Columbia Lake, sauf la réserve désignée comme St. Mary's No. 1A.
Blueberry River First Nations	Council of Blueberry River First Nations	Réserves de Blueberry River First Nations
Bonaparte	Council of Bonaparte	Toute réserve de Bonaparte non partagée avec une autre bande
Buffalo Point First Nation	Council of Buffalo Point First Nation	Toute réserve de Buffalo Point First Nation non partagée avec une autre bande
Burrard, aussi connue sous le nom de Tsleil-Waututh Nation	Council of Burrard	Réserve de Burrard
Première nation de Carcross/ Tagish	Assembly of the Carcross/Tagish First Nation	Terres visées par le règlement, au sens de l'entente définitive de la Première nation de Carcross/ Tagish, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Premières nations de Champagne et de Aishihik	First Nations Council of the Champagne and Aishihik First Nations	Terres visées par le règlement, au sens de l'accord définitif des premières nations de Champagne et de Aishihik, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Cowessess	Council of Cowessess	Toute réserve de Cowessess non partagée avec une autre bande
Cowichan	Council of Cowichan	Réserve de Cowichan
Première Nation de Duncan	Conseil de la Première Nation de Duncan	Réserves de la Première Nation de Duncan
Enoch Cree Nation #440	Council of the Enoch Cree Nation #440	Réserve de l'Enoch Cree Nation #440
Frog Lake	Council of Frog Lake	Toute réserve de Frog Lake non partagée avec une autre bande
Première nation des Gwitchin Vuntut	Tribal Council of the Vuntut Gwitchin First Nation	Terres visées par le règlement, au sens de l'accord définitif de la première nation des Gwitchin Vuntut, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Innue Essipit	Conseil de la Première Nation des Innus Essipit	Réserve Innue Essipit

Colonne 1 Première nation	Colonne 2 Corps dirigeant	Colonne 3 Terres
Les Inuit, au sens de l'Accord, tel que défini dans la *Loi sur revendications territoriales des Inuit du Labrador*, L.C. 2005, ch. 27	Gouvernement nunatsiavut	Terres des Inuit du Labrador et communautés inuites, au sens de l'Accord, tel que ce terme est défini dans la *Loi sur l'Accord sur les revendications territoriales des Inuit du Labrador*, L.C. 2005, ch. 27
Kahkewistahaw	Council of Kahkewistahaw	Toute réserve de Kahkewistahaw non partagée avec une autre bande
Kamloops	Council of Kamloops	Toute réserve de Kamloops non partagée avec une autre bande
Première nation de Kluane	Council of the Kluane First Nation	Terres visées par le règlement, au sens de l'accord définitif de la première nation de Kluane, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Première nation des Kwanlin Dun	Conseil de la Première nation des Kwanlin Dun	Terres visées par le règlement, au sens de l'entente définitive de la Première nation des Kwanlin Dun, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Nation crie de Little Red River	Conseil de la Nation crie de Little Red River	Réserves de la Nation crie de Little Red River
Première nation de Little Salmon/Carmacks	Assembly of the Little Salmon/Carmacks First Nation	Terres visées par le règlement, au sens de l'accord définitif de la première nation de Little Salmon/Carmacks, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Lower Kootenay	Council of Lower Kootenay	Réserves de Lower Kootenay, sauf la réserve désignée comme St. Mary's No. 1A.
Matsqui	Council of Matsqui	Toute réserve de Matsqui non partagée avec une autre bande
Première Nation de Mosquito, Grizzly Bear's Head, Lean Man	Conseil de la Première Nation de Mosquito, Grizzly Bear's Head, Lean Man	Réserves de la Première Nation de Mosquito, Grizzly Bear's Head, Lean Man
Muskeg Lake	Council of Muskeg Lake	Réserve de Muskeg Lake
Première nation des Nacho Nyak Dun	Assembly of the First Nation of Nacho Nyak Dun	Terres visées par le règlement, au sens de l'accord définitif de la première nation des Nacho Nyak Dun, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Nekaneet	Conseil de Nekaneet	Toute réserve de Nekaneet non partagée avec une autre bande

Colonne 1 Première nation	Colonne 2 Corps dirigeant	Colonne 3 Terres
Nation Nisga'a, au sens de l'Accord définitif nisga'a tel que ce terme est défini dans la *Loi sur l'Accord définitif nisga'a*, L.C. 2000, ch. 7	Gouvernement Nisga'a Lisims, au sens de l'Accord définitif nisga'a tel que ce terme est défini dans la *Loi sur l'Accord définitif nisga'a*, L.C. 2000, ch. 7	Terres Nisga'a, au sens de l'Accord définitif nisga'a tel que ce terme est défini dans la *Loi sur l'Accord définitif nisga'a*, L.C. 2000, ch. 7
Nation crie Peter Ballantyne	Conseil de la Nation crie Peter Ballantyne	Réserves de la Nation crie Peter Ballantyne
Première nation de Selkirk	Assembly of the Selkirk First Nation	Terres visées par le règlement, au sens de l'accord définitif de la première nation de Selkirk, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Shuswap	Council of Shuswap	Réserve de Shuswap
Skeetchestn	Council of Skeetchestn	Toute réserve de Skeetchestn non partagée avec une autre bande
Skidegate	Council of Skidegate	Réserve de Skidegate
Sliammon	Council of Sliammon	Réserve de Sliammon
Songhees First Nation	Council of Songhees First Nation	Réserves de Songhees First Nation
St. Mary's	Council of St. Mary's	Réserves de St. Mary's, sauf la réserve désignée comme St.Â Mary's No. 1A.Mary's No. 1A.
Conseil des Ta'an Kwach'an	Board of Directors and Elders Council of the Ta'an Kwach'an Council	Terres visées par le règlement, au sens de l'accord définitif du conseil des Ta'an Kwach'an, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Tla-o-qui-aht	Tla-o-qui-aht	Réserve des Tla-o-qui-aht First Nations
Tlicho	Gouvernement tlicho	Terres tlichos et collectivité tlicho au sens de l'accord sur les revendications territoriales et l'autonomie gouvernementale conclu entre le peuple tlicho, le gouvernement des Territoires du Nord-Ouest et le gouvernement du Canada, signé le 25 août 2003 et approuvé, mis en vigueur et déclaré valide par la *Loi sur les revendications territoriales et l'autonomie gouvernementale du peuple tlicho*, ainsi que ses modifications éventuelles
Conseil des Tlingits de Teslin	General Council of the Teslin Tlingit Council	Terres visées par le règlement, au sens de l'accord définitif du conseil des Tlingits de Teslin, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Tobacco Plains	Council of Tobacco Plains	Réserves des Tobacco Plains, sauf la réserve désignée comme St. Mary's No. 1A.

Colonne 1 Première nation	Colonne 2 Corps dirigeant	Colonne 3 Terres
Tr'ondëk Hwëch'in	General Assembly of the Tr'ondëk Hwëch'in	Terres visées par le règlement, au sens de l'accord définitif des Tr'ondëk Hwëch'in, et appelées « terres désignées » dans la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34
Tsawout First Nation	Council of the Tsawout First Nation	Toute réserve de Tsawout First Nation non partagée avec une autre bande
Tzeachten	Council of Tzeachten	Toute réserve de Tzeachten non partagée avec une autre bande
Première Nation de Westbank	Conseil de la Première Nation de Westbank	Réserve de la Première Nation de Westbank
Premières nations de West Moberly	Council of the West Moberly First Nations	Réserve des premières nations de West Moberly
White Bear	Conseil de White Bear	Toute réserve de White Bear non partagée avec une autre bande
Whitecap Dakota First Nation	Council of the Whitecap Dakota First Nation	Réserve de Whitecap Dakota First Nation

2003, ch. 15, s. 67 «ann.»; DORS/2004-281; 2005, ch. 19, art. 11; DORS/2005-363; DORS/2006-201, 294; DORS/2007-111; DORS/2007-185, art. 1 et 2; DORS/2008-103, 234, 235; DORS/2009-281; DORS/2010-178, 179; DORS/2011-36, 213, 214, 266; DORS/2012-31.

SCHEDULE 2
(Sections 17, 22, 23 and 29)

LIST OF BANDS, COUNCILS, RESERVES AND SPECIFIED PROVINCES

Column 1 Band	Column 2 Council of the Band	Column 3 Reserves	Column 4 Specified Province
Barren Lands First Nation	Council of the Barren Lands First Nation	Reserve of the Barren Lands First Nation	Manitoba
Berens River First Nation	Council of the Berens River First Nation	Reserves of the Berens River First Nation	Manitoba
Birdtail Sioux First Nation	Council of the Birdtail Sioux First Nation	Each reserve of the Birdtail Sioux First Nation that is not shared with another band	Manitoba
Brokenhead Ojibway Nation	Council of the Brokenhead Ojibway Nation	Each reserve of the Brokenhead Ojibway Nation that is not shared with another band	Manitoba
Buffalo Point First Nation	Council of the Buffalo Point First Nation	Each reserve of the Buffalo Point First Nation that is not shared with another band	Manitoba
Canupawakpa Dakota First Nation	Council of the Canupawakpa Dakota First Nation	Reserve of the Canupawakpa Dakota First Nation	Manitoba
Chemawawin Cree Nation	Council of the Chemawawin Cree Nation	Reserves of the Chemawawin Cree Nation	Manitoba
Cowessess	Council of Cowessess	Each reserve of Cowessess that is not shared with another band	Saskatchewan
Cross Lake First Nation	Council of the Cross Lake First Nation	Reserves of the Cross Lake First Nation	Manitoba
Dakota Tipi	Council of the Dakota Tipi	Reserve of the Dakota Tipi	Manitoba
Fisher River First Nation	Council of the Fisher River First Nation	Reserves of the Fisher River First Nation	Manitoba
Fox Lake	Council of the Fox Lake	Reserves of the Fox Lake	Manitoba
Gamblers	Council of the Gamblers	Each reserve of the Gamblers that is not shared with another band	Manitoba
Garden Hill First Nation	Council of the Garden Hill First Nation	Reserves of the Garden Hill First Nation	Manitoba
God's Lake First Nation	Council of the God's Lake First Nation	Reserves of the God's Lake First Nation	Manitoba

ANNEXE 2
(articles 17, 22, 23 et 29)

NOM DES BANDES ET DES CONSEILS DE BANDE, NOM OU DESCRIPTION DES RÉSERVES ET NOM DES PROVINCES VISÉES

Colonne 1 Bande	Colonne 2 Conseil de bande	Colonne 3 Réserves	Colonne 4 Province visée
Première Nation de Barren Lands	Conseil de la Première Nation de Barren Lands	Réserve de la Première Nation de Barren Lands	Manitoba
Première Nation de Berens River	Conseil de la Première Nation de Berens River	Réserves de la Première Nation de Berens River	Manitoba
Nation ojibway de Brokenhead	Conseil de la Nation ojibway de Brokenhead	Toute réserve de la Nation ojibway de Brokenhead non partagée avec une autre bande	Manitoba
Première Nation de Buffalo Point	Conseil de la Première Nation de Buffalo Point	Toute réserve de la Première Nation de Buffalo Point non partagée avec une autre bande	Manitoba
Première Nation de Canupawakpa Dakota	Conseil de la Première Nation de Canupawakpa Dakota	Réserve de la Première Nation de Canupawakpa Dakota	Manitoba
Nation crie de Chemawawin	Conseil de la Nation crie de Chemawawin	Réserves de la Nation crie de Chemawawin	Manitoba
Cowessess	Conseil de Cowessess	Toute réserve de Cowessess non partagée avec une autre bande	Saskatchewan
Première Nation de Cross Lake	Conseil de la Première Nation de Cross Lake	Réserves de la Première Nation de Cross Lake	Manitoba
Dakota Tipi	Conseil de Dakota Tipi	Réserve de Dakota Tipi	Manitoba
Première Nation de Fisher River	Conseil de la Première Nation de Fisher River	Réserves de la Première Nation de Fisher River	Manitoba
Fox Lake	Conseil de Fox Lake	Réserves de Fox Lake	Manitoba
Gamblers	Conseil de Gamblers	Toute réserve de Gamblers non partagée avec une autre bande	Manitoba
Première Nation de Garden Hill	Conseil de la Première Nation de Garden Hill	Réserves de la Première Nation de Garden Hill	Manitoba
Première Nation de God's Lake	Conseil de la Première Nation de God's Lake	Réserves de la Première Nation de God's Lake	Manitoba
Première Nation de Grand Rapids	Conseil de la Première Nation de Grand Rapids	Réserve de la Première Nation de Grand Rapids	Manitoba

Column 1 Band	Column 2 Council of the Band	Column 3 Reserves	Column 4 Specified Province
Grand Rapids First Nation	Council of the Grand Rapids First Nation	Reserve of the Grand Rapids First Nation	Manitoba
Hollow Water First Nation	Council of the Hollow Water First Nation	Reserve of the Hollow Water First Nation	Manitoba
Innue Essipit	Conseil de la Première Nation des Innus Essipit	Innue Essipit Reserve	Quebec
Kahkewistahaw	Council of Kahkewistahaw	Each reserve of Kahkewistahaw that is not shared with another band	Saskatchewan
Keeseekoowenin	Council of the Keeseekoowenin	Reserves of the Keeseekoowenin	Manitoba
Lake Manitoba First Nation	Council of the Lake Manitoba First Nation	Reserve of the Lake Manitoba First Nation	Manitoba
Lake St. Martin	Council of the Lake St. Martin	Reserves of the Lake St. Martin	Manitoba
Little Black River First Nation	Council of the Little Black River First Nation	Reserve of the Little Black River First Nation	Manitoba
Little Grand Rapids First Nation	Council of the Little Grand Rapids First Nation	Reserve of the Little Grand Rapids First Nation	Manitoba
Little Saskatchewan First Nation	Council of the Little Saskatchewan First Nation	Reserves of the Little Saskatchewan First Nation	Manitoba
Long Plain First Nation	Council of the Long Plain First Nation	Reserve of the Long Plain First Nation	Manitoba
Manto Sipi Cree Nation	Council of the Manto Sipi Cree Nation	Reserves of the Manto Sipi Cree Nation	Manitoba
Mathias Colomb First Nation	Council of the Mathias Colomb First Nation	Reserves of the Mathias Colomb First Nation	Manitoba
Mosakahiken Cree Nation	Council of the Mosakahiken Cree Nation	Reserves of the Mosakahiken Cree Nation	Manitoba
Mosquito, Grizzly Bear's Head, Lean Man First Nation	Council of the Mosquito, Grizzly Bear's Head, Lean Man First Nation	Reserves of the Mosquito, Grizzly Bear's Head, Lean Man First Nation	Saskatchewan
Nisichawayasihk Cree Nation	Council of the Nisichawayasihk Cree Nation	Reserves of the Nisichawayasihk Cree Nation	Manitoba
Northlands Dene First Nation	Council of the Northlands Dene First Nation	Reserve of the Northlands Dene First Nation	Manitoba
O-Chi-Chak-Ko-Sipi First Nation	Council of the O-Chi-Chak-Ko-Sipi First Nation	Reserve of the O-Chi-Chak-Ko-Sipi First Nation	Manitoba

Colonne 1 Bande	Colonne 2 Conseil de bande	Colonne 3 Réserves	Colonne 4 Province visée
Première Nation de Hollow Water	Conseil de la Première Nation de Hollow Water	Réserve de la Première Nation de Hollow Water	Manitoba
Innue Essipit	Conseil de la Première Nation des Innus Essipit	Réserve Innue Essipit	Québec
Kahkewistahaw	Conseil de Kahkewistahaw	Toute réserve de Kahkewistahaw non partagée avec une autre bande	Saskatchewan
Keeseekoowenin	Conseil de Keeseekoowenin	Réserve de Keeseekoowenin	Manitoba
Première Nation de Lake Manitoba	Conseil de la Première Nation de Lake Manitoba	Réserve de la Première Nation de Lake Manitoba	Manitoba
Lake St. Martin	Conseil de Lake St. Martin	Réserves de Lake St. Martin	Manitoba
Première Nation de Little Black River	Conseil de la Première Nation de Little Black River	Réserve de la Première Nation de Little Black River	Manitoba
Première Nation de Little Grand Rapids	Conseil de la Première Nation de Little Grand Rapids	Réserve de la Première Nation de Little Grand Rapids	Manitoba
Première Nation de Little Saskatchewan	Conseil de la Première Nation de Little Saskatchewan	Réserves de la Première Nation de Little Saskatchewan	Manitoba
Première Nation de Long Plain	Conseil de la Première Nation de Long Plain	Réserve de la Première Nation de Long Plain	Manitoba
Nation crie de Manto Sipi	Conseil de la Nation crie de Manto Sipi	Réserves de la Nation crie de Manto Sipi	Manitoba
Première Nation Mathias Colomb	Conseil de la Première Nation Mathias Colomb	Réserves de la Première Nation Mathias Colomb	Manitoba
Nation crie de Mosakahiken	Conseil de la Nation crie de Mosakahiken	Réserves de la Nation crie de Mosakahiken	Manitoba
Première Nation de Mosquito, Grizzly Bear's Head, Lean Man	Conseil de la Première Nation de Mosquito, Grizzly Bear's Head, Lean Man	Réserves de la Première Nation de Mosquito, Grizzly Bear's Head, Lean Man	Saskatchewan
Nation crie de Nisichawayasihk	Conseil de la Nation crie de Nisichawayasihk	Réserves de la Nation crie de Nisichawayasihk	Manitoba
Première Nation dénée de Northlands	Conseil de la Première Nation dénée de Northlands	Réserve de la Première Nation dénée de Northlands	Manitoba
Première Nation d'O-Chi-Chak-Ko-Sipi	Conseil de la Première Nation d'O-Chi-Chak-Ko-Sipi	Réserve de la Première Nation d'O-Chi-Chak-Ko-Sipi	Manitoba
Première Nation de Pauingassi	Conseil de la Première Nation de Pauingassi	Réserve de la Première Nation de Pauingassi	Manitoba

Column 1 Band	Column 2 Council of the Band	Column 3 Reserves	Column 4 Specified Province
Pauingassi First Nation	Council of the Pauingassi First Nation	Reserve of the Pauingassi First Nation	Manitoba
Peter Ballantyne Cree Nation	Council of the Peter Ballantyne Cree Nation	Reserves of the Peter Ballantyne Cree Nation	Saskatchewan
Pinaymootang First Nation	Council of the Pinaymootang First Nation	Reserve of the Pinaymootang First Nation	Manitoba
Pine Creek	Council of Pine Creek	Each reserve of Pine Creek that is not shared with another band	Manitoba
Poplar River First Nation	Council of the Poplar River First Nation	Reserve of the Poplar River First Nation	Manitoba
Red Sucker Lake First Nation	Council of the Red Sucker Lake First Nation	Reserves of the Red Sucker Lake First Nation	Manitoba
Rolling River First Nation	Council of the Rolling River First Nation	Each reserve of the Rolling River First Nation that is not shared with another band	Manitoba
Roseau River Anishinabe First Nation	Council of the Roseau River Anishinabe First Nation	Reserves of the Roseau River Anishinabe First Nation	Manitoba
Sandy Bay First Nation	Council of the Sandy Bay First Nation	Reserve of the Sandy Bay First Nation	Manitoba
Sapotaweyak Cree Nation	Council of the Sapotaweyak Cree Nation	Each reserve of the Sapotaweyak Cree Nation that is not shared with another band	Manitoba
Sayisi Dene First Nation	Council of the Sayisi DeneFirst Nation	Reserve of the Sayisi Dene First Nation	Manitoba
Shamattawa First Nation	Council of the Shamattawa First Nation	Reserve of the Shamattawa First Nation	Manitoba
Sioux Valley Dakota Nation	Council of the Sioux Valley Dakota Nation	Each reserve of the Sioux Valley Dakota Nation that is not shared with another band	Manitoba
Skownan First Nation	Council of the Skownan First Nation	Reserve of the Skownan First Nation	Manitoba
St. Theresa Point First Nation	Council of the St. Theresa Point First Nation	Reserves of the St. Theresa Point First Nation	Manitoba
Swan Lake First Nation	Council of the Swan Lake First Nation	Reserves of the Swan Lake First Nation	Manitoba
Tataskweyak Cree Nation	Council of the Tataskweyak Cree Nation	Reserves of the Tataskweyak Cree Nation	Manitoba

Colonne 1 Bande	Colonne 2 Conseil de bande	Colonne 3 Réserves	Colonne 4 Province visée
Nation crie Peter Ballantyne	Conseil de la Nation crie Peter Ballantyne	Réserves de la Nation crie Peter Ballantyne	Saskatchewan
Première Nation Pinaymootang	Conseil de la Première Nation de Pinaymootang	Réserve de la Première Nation de Pinaymootang	Manitoba
Pine Creek	Conseil de Pine Creek	Toute réserve de Pine Creek non partagée avec une autre bande	Manitoba
Première Nation de Poplar River	Conseil de la Première Nation de Poplar River	Réserve de la Première Nation de Poplar River	Manitoba
Première Nation de Red Sucker Lake	Conseil de la Première Nation de Red Sucker Lake	Réserves de la Première Nation de Red Sucker Lake	Manitoba
Première Nation de Rolling River	Conseil de la Première Nation de Rolling River	Toute réserve de la Première Nation de Rolling River non partagée avec une autre bande	Manitoba
Première Nation anishinabe de Roseau River	Conseil de la Première Nation anishinabe de Roseau River	Réserves de la Première Nation anishinabe de Roseau River	Manitoba
Première Nation de Sandy Bay	Conseil de la Première Nation de Sandy Bay	Réserve de la Première Nation de Sandy Bay	Manitoba
Nation crie de Sapotaweyak	Conseil de la Nation crie de Sapotaweyak	Toute réserve de la Nation crie de Sapotaweyak non partagée avec une autre bande	Manitoba
Première Nation de Sayisi Dene	Conseil de la Première Nation de Sayisi Dene	Réserve de la Première Nation de Sayisi Dene	Manitoba
Première Nation de Shamattawa	Conseil de la Première Nation de Shamattawa	Réserve de la Première Nation de Shamattawa	Manitoba
Première Nation des Sioux de Birdtail	Conseil de la Première Nation des Sioux de Birdtail	Toute réserve de la Première Nation des Sioux de Birdtail non partagée avec une autre bande	Manitoba
Nation dakota de Sioux Valley	Conseil de la Nation dakota de Sioux Valley	Toute réserve de la Nation dakota de Sioux Valley non partagée avec une autre bande	Manitoba
Première Nation de Skownan	Conseil de la Première Nation de Skownan	Réserve de la Première Nation de Skownan	Manitoba
Première Nation de St. Theresa Point	Conseil de la Première Nation de St. Theresa Point	Réserves de la Première Nation de St. Theresa Point	Manitoba
Première Nation de Swan Lake	Conseil de la Première Nation de Swan Lake	Réserves de la Première Nation de Swan Lake	Manitoba

Column 1 Band	Column 2 Council of the Band	Column 3 Reserves	Column 4 Specified Province
Tootinaowazii-beeng Treaty Reserve	Council of the Tootinaowazii-beeng Treaty Reserve	Reserve of the Tootinaowazii-beeng Treaty Reserve	Manitoba
War Lake First Nation	Council of the War Lake First Nation	Reserves of the War Lake First Nation	Manitoba
Wasagamack First Nation	Council of the Wasagamack First Nation	Reserves of the Wasagamack First Nation	Manitoba
Waywayseecappo First Nation Treaty Four - 1874	Council of the Waywayseecappo First Nation Treaty Four - 1874	Each reserve of the Waywayseecappo First Nation Treaty Four - 1874 that is not shared with another band	Manitoba
White Bear	Council of White Bear	Each reserve of White Bear that is not shared with another band	Saskatchewan
Whitecap Dakota First Nation	Council of the Whitecap Dakota First Nation	Reserve of the Whitecap Dakota First Nation	Saskatchewan
Wuskwi Sipihk First Nation	Council of the Wuskwi Sipihk First Nation	Each reserve of the Wuskwi Sipihk First Nation that is not shared with another band	Manitoba
York Factory First Nation	Council of the York Factory First Nation	Reserve of the York Factory First Nation	Manitoba

2005, c. 19, s. 12; 2006, c. 4, s. 97; SOR/2007-185, ss. 3, 4; SOR/2009-282, 283; SOR/2010-180, 181; SOR/2012-25.

Colonne 1 Bande	Colonne 2 Conseil de bande	Colonne 3 Réserves	Colonne 4 Province visée
Nation crie de Tataskweyak	Conseil de la Nation crie de Tataskweyak	Réserves de la Nation crie de Tataskweyak	Manitoba
Tootinaowazii-beeng Treaty Reserve	Conseil de Tootinaowazii-beeng Treaty Reserve	Réserve de Tootinaowazii-beeng Treaty Reserve	Manitoba
Première Nation de War Lake	Conseil de la Première Nation de War Lake	Réserves de la Première Nation de War Lake	Manitoba
Première Nation de Wasagamack	Conseil de la Première Nation de Wasagamack	Réserves de la Première Nation de Wasagamack	Manitoba
Première Nation de Waywayseecappo Treaty Four - 1874	Conseil de la Première Nation de Waywayseecappo Treaty Four - 1874	Toute réserve de la Première Nation de Waywayseecappo Treaty Four - 1874 non partagée avec une autre bande	Manitoba
White Bear	Conseil de White Bear	Toute réserve de White Bear non partagée avec une autre bande	Saskatchewan
Whitecap Dakota First Nation	Council of the Whitecap Dakota First Nation	Réserve de Whitecap Dakota First Nation	Saskatchewan
Première Nation de Wuskwi Sipihk	Conseil de la Première Nation de Wuskwi Sipihk	Toute réserve de la Première Nation de Wuskwi Sipihk non partagée avec une autre bande	Manitoba
Première Nation de York Factory	Conseil de la Première Nation de York Factory	Réserve de la Première Nation de York Factory	Manitoba

2005, ch. 19, art. 12; 2006, ch. 4, art. 97; DORS/2007-185, art. 3 et 4; DORS/2009-282, 283; DORS/2010-180, 181; DORS/2012-25.

THE CITY OF WINNIPEG

BY-LAW NO. 62/2011

A By-law of THE CITY OF WINNIPEG to prohibit smoking in certain outdoor locations

WHEREAS section 134 of *The City of Winnipeg Charter* provides that Council may pass by-laws respecting health hazards and the health and well-being of people, and further provides that such by-laws may include provisions respecting the sale, use, consumption, possession or disposal of substances that may constitute a health hazard;

AND WHEREAS tobacco smoke is a known Class A carcinogen for which there is no safe level of exposure and scientific studies confirm that negative health consequences, including an increased risk of cardiovascular and respiratory disease, can result from even short exposures;

NOW THEREFORE THE CITY OF WINNIPEG, in Council assembled, enacts as follows:

Title

1 This By-law may be cited as the Outdoor Smoking By-law.

Definitions

2 In this By-law

"athletic field" means any outdoor space used for organized athletic or sporting activities that is:

(a) owned by the City of Winnipeg; or

(b) operated by the City of Winnipeg or a community centre;

and includes a soccer pitch, baseball or softball diamond, and football field;

"City of Winnipeg workplace" means any building, portion of a building or other location owned or leased by the City of Winnipeg and used as a place of work by one or more employees of the City of Winnipeg;

"community centre" means a member of the General Council of Winnipeg Community Centres;

"health care facility" means

(a) a hospital designated as such by the *Hospitals Designation Regulation*, Manitoba Regulation 47/93;

(b) an institution providing health care that is funded by the Winnipeg Regional Health Authority, including any Access Centre, Breast Health Centre, Winnipeg Birth Centre, Klinic, Mount Carmel Clinic and Pan Am Clinic; and

(c) a personal care home designated as such by the *Personal Care Homes Designation Regulation,* Manitoba Regulation 108/2000;

"hockey rink" means an outdoor ice surface designed for playing hockey or for recreational skating that is owned by the City of Winnipeg or is operated by the City of Winnipeg or a community centre;

"playground" means any outdoor space owned or operated by the City of Winnipeg that has been set aside for public use by young children, and includes places that contains swings, slides, see-saws, climbing apparatuses, or similar equipment;

"premises" means the parcel of land on which a health care facility is situated and includes any contiguous parcels owned or leased by the health care facility;

"smoking" has the same meaning as in *The Non-Smokers Health Protection Act, C.C.S.M. c. N-92*;

"youth event" means an organized athletic or sporting event in which individuals under the age of 18 are participating;

"WRHA workplace" means any building, portion of a building or other location owned or leased by the Winnipeg Regional Health Authority and used as a place of work by one or more employees of the Winnipeg Regional Health Authority.

Prohibition

3(1) No person shall smoke:

(a) subject to subsection 3(3), within 30 metres of the playing surface of an athletic field or a hockey rink during a youth event;

(b) on a playground;

(c) subject to subsection 3(3), within 30 metres of a swimming pool, wading pool, spray pad or spray park owned or operated by the City of Winnipeg;

(d) on the premises of a primary school, middle school or secondary school, whether a public school or a private school, as those terms are defined in *The Education Administration Act*, C.C.S.M. c. E-10;

(e) subject to subsection (2), on the premises of a health care facility;

(f) within 8 metres from an outdoor entrance providing direct access to a health care facility;

(g) within 8 metres from an outdoor entrance providing direct access to a City of Winnipeg workplace;

(h) within 8 metres from an outdoor entrance providing direct access to a WRHA workplace.

3(2) Clause (1)(e) does not apply to residents of a personal care home who smoke in an outdoor area that

(a) has been designated by the administration of a personal care home as a smoking area for residents of the personal care home and is clearly marked as such; and

(b) is at least 8 metres from any entranceway to a building, window that is capable of being opened, or air intake.

3(3) The prohibitions in clauses 3(1)(a) and 3(1)(c) do not apply to property that is not owned or operated by the City of Winnipeg or a community centre.

Penalties

4 A person who contravenes section 3 is guilty of an offence and is liable on summary conviction

(a) for a first offence, to a fine of not less than $100 and not more than $500;

(b) for a second offence, to a fine of not less than $200 and not more than $700; and

(c) for a third or subsequent offence, to a fine of not less than $300 and not more than $1000.

DONE AND PASSED, this 25th day of May, 2011.

_____
Mayor

_____
City Clerk

Approved as to content:

_____
Director of Community Services

Approved as to form:

_____
For Director of Legal Services/City Solicitor

REPEALED BY THE NEIGHBOURHOOD LIVEABILITY BY-LAW NO. 1/2008
JANUARY 23, 2008
(effective November 1, 2008)

THE CITY OF WINNIPEG

THE SMOKING REGULATION BY-LAW NO. 88/2003

A By-law of THE CITY OF WINNIPEG to ban smoking in public places.

WHEREAS after reviewing the representations and material submitted, Council has determined that tobacco smoke is a health hazard, is a nuisance to or detriment to persons, and that it is necessary to protect the safety, health and well-being of persons;

AND WHEREAS The City of Winnipeg Charter S.M. 2002, c. 39 authorizes Council to enact by-laws respecting, among other things, the protection, safety, health and well-being of people; health hazards; activities or things that in the opinion of Council are or may become a nuisance or detriment to persons or property; and people and activities in, on or near public places or places open to the public including private clubs;

AND WHEREAS The Non-Smokers Health Protection Act S.M. 1989-90, c. S125 authorizes a municipal council to pass a by-law limiting or banning smoking in any enclosed public place in the municipality;

NOW THEREFORE THE CITY OF WINNIPEG, in Council assembled enacts as follows:

Title

1. This By-law shall be known as **"The Smoking Regulation By-law"**.

Definitions

2. In this By-law

"ashtray" means a receptacle for tobacco ashes and for cigar and cigarette butts;

"enclosed public place" means any part of an enclosed place to which members of the public have access, including, without restricting the generality of the foregoing,

(a) any part of

(i) an office building,

(ii) a retail store or other commercial establishment, or the common areas of a residential building or shopping mall,

(b) a health care facility,

(c) a day care centre or nursery,

(d) an educational institution or facility,

(e) a restaurant, and

(f) an elevator, pedestrian walkway, pedestrian corridor or pedestrian tunnel or bus shelter;

"health care facility" means a place where a person may receive medical examination, treatment or care, and includes a hospital, hospice, clinic and medical practitioner's office;

"licensed premises" means licensed premises as defined in *The Liquor Control Act*";

"personal care home" means a personal care home as defined in *The Health Service Insurance Act* and regulations;

"private function" means a specific event for which an enclosed room or hall or a portion thereof has been reserved and at which attendance is limited to people who have been specifically invited, permitted or designated by the host, whether or not an admission fee is charged and regardless of the purpose for which the event is held, but excluding private residences;

"proprietor" means the owner of an enclosed public place, private club. tobacconist shop or the premises in which a private function is held and includes a person who carries on or manages the activities carried on in any of these places and includes the person present who is in charge at any particular time;

"restaurant" includes any part of a coffee shop, cafeteria, sandwich stand, food court or other eating establishment that is located in an enclosed public place and is open to members of the public, whether or not it is licensed premises or a portion of licensed premises;

"shopping mall" means a complex of commercial establishments designed for the sale of goods or services or both to members of the public;

"smoke" & "smoking" means

(a) smoking a cigarette, cigar, pipe or other device used for smoking tobacco; or

(b) carrying or having control of a lighted cigarette, cigar, pipe or other device used for smoking tobacco;

"smoking area" means an area marked and identifiable by a sign indicating that smoking is permitted in that area;

"tobacco product" means tobacco leaves and any product manufactured from tobacco that is intended to be used for smoking, inhaling or chewing and includes nasal and oral snuff, cigarette paper, tubes, pipes and filters;

"tobacconist shop" means any business that manufactures, sells or distributes tobacco products only;

Smoking Prohibited

3. Subject to Section 4 no person shall smoke in, and no proprietor shall permit any person to smoke in:

(a) any enclosed public place;

(b) any motor vehicle used for the public transportation of persons or property including buses, taxis and limousines;

(c) any area of a private club or private function to which a member or person invited has access;

Exceptions

4. A proprietor may allow smoking in

(a) an area of a health care facility, or personal care home designated by the board of the health care facility or personal care home and for use by residents or in patients of the facility or home only;

(b) guest rooms in hotels, motels and inns;

(c) any tobacconist shop;

provided that the area, room or tobacconist shop is physically separated and enclosed by a ceiling and floor to ceiling walls and doors from any adjacent or attached enclosed public place, private club; or private function.

Drifting Smoke

5. No person or proprietor shall permit smoke to drift or be recirculated into an enclosed public place, private club, or private function.

Signs

6. (a) In every enclosed public place, motor vehicle, private club, or private function to which this By-law applies, a proprietor shall clearly and conspicuously post and keep in place at all times a sufficient number of signs as prescribed by Section 7, which signs shall be clearly visible.

(b) The signs referred to in this By-law shall be posted in such number of places as, having regard to size of the printed text or symbol thereon and the place of posting, will give every person in the place or area to which the sign relates, a clear and unobstructed view of at least two of the signs.

(c) No person shall remove, alter, conceal, deface or destroy any sign posted pursuant to this By-law.

7. The requirements of section 6 shall be met by either:

(a) posting a sign that

(i) carries the text "no smoking" in capital or lower case letters or a combination thereof, either alone or in conjunction with other words which do not detract from the purpose of the sign of indicating a place or area in which smoking is prohibited;

(ii) consists of at least two (2) contrasting colours which make the text of the sign clearly legible in whatever lighting is used in the place or area in which the sign is posted or if the text is to be applied directly to a surface or to be mounted on a clear panel, set the text out in a colour which contrasts with the background so that the text is clearly legible in whatever lighting is used in the place or area; and

(iii) sets the text out in letters of such a style and size and be posted in such places as will make them clearly legible to persons within the place or area in which the smoking is prohibited, but in any case the text shall not be less than 28 millimetres in height; or

(b) (i) posting a sign consisting of the following graphic symbol that shall be used to indicate "no smoking" areas:

on a white background with the circle and interdictory stroke in red and the diameter of the circle in the symbol shall be of such size as will make it clearly discernible by persons within the place or area to which the symbol relates but in any case not less than 100 millimetres in size.

(ii) Notwithstanding that the symbol in clause (a) illustrates a cigarette, it shall also refer to and represent a lighted cigar or pipe.

Ashtrays

8. A proprietor shall ensure that no ashtrays or similar receptacles are placed or allowed to remain in any area in which smoking is prohibited pursuant to this By-law.

Enforcement

9. The Director of Community Services and his/her delegates may conduct inspections and take steps to administer and enforce this By-law or remedy a contravention of this By-law in accordance with *The City of Winnipeg Charter* and, for those purposes, have the powers of a "designated employee" under *The City of Winnipeg Charter*.

Penalties

10. A person or proprietor who contravenes a provision of this By-law is guilty of an offence and is liable on summary conviction to the following penalties:

(a) For a first offence, to a fine of not less than One Hundred ($100.00) Dollars in the case of an individual and Five Hundred ($500.00) Dollars in the case of a corporation or partnership;

(b) For a second offence, to a fine of not less than Two Hundred ($200.00) Dollars in the case of an individual and Seven Hundred ($700.00) Dollars in the case of a corporation or partnership;

(c) For a third offence or subsequent offence, to a fine of not less than Three Hundred ($300.00) Dollars in the case of an individual and One Thousand ($1,000.00) Dollars in the case of a corporation or partnership.

Severability

11. A decision of a Court that one or more of the provisions of this By-law are invalid in whole or in part does not affect the validity, effectiveness or enforceability of the other provisions or parts of the provisions of this By-law.

Repeal

12. By-law No. 7870/2001 is repealed.

Effective Date

13. This by-law comes into force on July 1, 2003.

DONE AND PASSED in Council assembled, this 30th day of April, A.D., 2003.

Union of New Brunswick Indians *v.* New Brunswick (Minister of Finance), [1998] 1 S.C.R. 1161

The Minister of Finance for the Province of New Brunswick and the Provincial Sales Tax Commissioner for the Province of New Brunswick *Appellants*

v.

Union of New Brunswick Indians and Paul David Leonard Tomah, suing on his own behalf and on behalf of all New Brunswick Indian Bands and their members *Respondents*

and

The Attorney General of Canada,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Alberta,
the Grand Council of the Crees (Eeyou Estchee),
the Cree Regional Authority,
Matthew Coon Come, Violet Pachanos and Bill Namagoose *Interveners*

Indexed as: Union of New Brunswick Indians *v.* New Brunswick (Minister of Finance)

File No.: 25427.

1998: March 25; 1998: June 18.

Present: Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci, Major and Binnie JJ.

on appeal from the court of appeal for new brunswick

Indians -- Taxation -- Reserves -- Indian Act exempting goods on-reserve from taxation -- Whether goods purchased off-reserve for use on-reserve subject to provincial sales tax -- Indian Act, R.S.C., 1985, c. I-5, s. 87 -- Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10, ss. 1 "consumer", "purchaser", "retail sale", 4, 5, 8, 16.

New Brunswick's *Social Services and Education Tax Act* levies a tax on items sold for consumption at the time of the sale. In 1993, a provision giving status Indians an exemption from paying provincial sales tax on goods purchased off-reserve for on-reserve use was repealed so that only goods and services purchased on reserve lands or delivered there by the vendor were sales tax exempt. The respondents brought a test case involving items for personal use and consumption which had been purchased by Indians off the reserve for use on the reserve. The trial judge concluded that s. 87 of the *Indian Act*, which exempts goods on reserves from taxation, applies only to property actually situated on a reserve. A majority of the Court of Appeal reversed this decision. At issue here is whether New Brunswick Indians were required to pay provincial sales tax on goods purchased off the reserve for consumption on the reserve. The constitutional question queried whether, if as a matter of statutory interpretation s. 87 of the *Indian Act* prohibits taxation of tangible personal property purchased off-reserve, New Brunswick's *Social Services and Education Tax Act* was rendered inoperative to the extent of the inconsistency with s. 87.

Held (Gonthier and Binnie JJ. dissenting): The appeal should be allowed. New Brunswick's *Social Services and Education Tax Act* is not inconsistent with s. 87 of the *Indian Act* because that section does not prohibit taxation in respect of tangible personal property purchased off-reserve even if destined for use on-reserve.

Per Lamer C.J. and Cory, McLachlin, Iacobucci and Major JJ.: Section 87 of the *Indian Act* applies only to property physically located on a reserve at the time of taxation or property whose paramount location is on a reserve at the time of taxation. This comports with the purpose of s. 87, which is to protect the property of Indians on reserves and prevent that property from being eroded. In determining the applicability of s. 87, one must consider whether the property is located or has its paramount location on a reserve at the time and place that the tax would otherwise attach. In the context of retail sales taxes, this can be called the "point of sale" test.

Provincial sales taxes when imposed on retail sales are sales taxes and not taxes on consumption, notwithstanding references to "consumer" and "consumption". This sort of language is used to define the taxpayer and so avoid the charge of indirect taxation. It has been repeatedly held to impose a sales tax, not a consumption tax. Sections 1, 4 and 5 of the *Social Services and Education Tax Act*, when read together, impose a direct retail sales tax that fixes on the transaction of sale and is calculated on the fair value of the goods. In the case of a retail sale, the act of purchase, not the act of consumption, triggers liability for the sales tax. For the purposes of these sections, it is largely irrelevant how, why, where, when, and by whom they are consumed once they have been purchased at a retail sale within the province. If there is a sale but no consumption, the sales tax is still payable. If the sales tax were a true consumption tax, each use of taxable goods by the ultimate consumer would attract tax liability.

The "paramount location" test, which has been used to protect Indian property normally situated on the reserve from being taxed or seized while off-reserve, should not be applied to sales taxes on tangible goods. Sales taxes attach at the moment of sale and the property at this point cannot have its paramount location elsewhere than the point of sale because no pattern of use and safekeeping has been established. The

location of property after the sale and the imposition of sales tax is irrelevant. Goods purchased off-reserve therefore attract tax, while goods purchased on-reserve are exempt, regardless of where the purchaser may intend to use them. To make taxation dependent on the place of anticipated use would render the administration of the tax uncertain and unworkable. Where the location of the property at the time of taxation is readily apparent, the "paramount location" test need not be applied.

To apply s. 87 to sales tax levied off-reserve on goods purchased by Indians for use on the reserve would take the purpose of s. 87 far beyond preventing the erosion of on-reserve Indian property which this Court articulated to be the purpose of s. 87. Such an extension flies in the face of the wording of s. 87(1)(*b*), which confines the protection from taxation to property situated on a reserve. The history of s. 87 also belies the conclusion that Parliament intended it to provide general tax protection for property intended for on-reserve use. Finally, providing a tax exemption to Indians for property purchased off-reserve will not necessarily benefit Indians uniformly. Adopting the "paramount location" test would have adverse consequences for Indians who live off the reserve because they would presumably have to pay tax on goods purchased on-reserve for use off the reserve.

The "point of sale" test is beneficial to on-reserve Indians in many parts of Canada. First, it provides an incentive for Indians to establish their own retail outlets on reserves and gives a competitive edge to reserve businesses, thereby increasing economic activity and employment. Second, the "point of sale" approach to the tax exemption permits reserves to impose their own taxes on reserve sales, thus creating a tax base for aboriginal governments. These considerations belie the conclusion that s. 87, by its object and purpose, must be read as intending to exempt Indians from all sales taxes, whether on or off a reserve, on property used on reserves.

Per Gonthier and Binnie JJ. (dissenting): The expression "situated on a reserve" bears the same interpretation in s. 87(1) of the *Indian Act* as it does elsewhere in that statute and should not be extended in an artificial or conceptual way to cover personal property that is not physically situated on a reserve at the critical time. Indian people cannot be expected to live reasonably on the reserve without making purchases. If the goods are not available locally, then purchases will have to be made off-reserve to enable the Indians to enjoy a reasonable standard of life on the reserve. Exemption of such goods from taxation in these circumstances is consistent with the purpose of s. 87(1).

New Brunswick, having levied a tax explicitly "in respect of consumption" to finesse any constitutional challenge to its constitutional validity based on the tax being construed as an indirect tax beyond provincial competence, should not be relieved of the consequences of that design feature when the statute is subjected to scrutiny under s. 87 of the *Indian Act*. If in fact the New Brunswick tax had been charged in respect of the transaction of purchase and sale, then the tax (subject to any constitutional infirmities) would be an exigible as neither the purchaser nor the goods were situated on a reserve at the time of the transaction. However, s. 4 of the *Social Services and Education Tax Act* imposes the tax in "respect of consumption", and the critical time is therefore the time of consumption, not the time when the goods were purchased. At the time of consumption, the goods are "primarily located" on the reserve. While the legislation identifies a retail sale as a condition precedent to taxation where goods are purchased in the province, such a condition precedent cannot reasonably be characterized as the subject matter of the tax.

In any event, given that some of the key provisions of the Act are ambiguous in their meaning and effect and since any ambiguities should be resolved in favour of the

Indian taxpayers, s. 87 applies. The assurance, expressed in earlier cases, that s. 87 is designed to give status Indian people a meaningful tax choice in the location of their personal property should not be defeated.

The "pattern of use and safekeeping" which controls the tax treatment under s. 87(1) is not necessarily the *situs* of the personal property at the moment of acquisition. Even if some importance is to be attached to *situs* at that moment, the issue here is not unidimensional, and the circumstances of acquisition should be placed in the larger "pattern" or context of the realities of life on a New Brunswick reserve. The "paramount location" approach reflects a purposive approach to s. 87(1)(*b*), and confirms the appropriateness of a tax exemption in this case.

The purpose of s. 87 was not to allow merchants on reserves to compete on a tax-free basis with off-reserve merchants for business in the broader community. In terms of financing Indian self-government, the present wording of s. 87 is not immutable. The s. 87 exemption is the creature of an ordinary federal statute and can be expanded or redefined as Parliament sees fit. Thus neither of these objectives offers a valid policy justification for interpreting the tax as exigible here.

Cases Cited

By McLachlin J.

Considered: *Williams v. Canada*, [1992] 1 S.C.R. 877; *Simpsons-Sears Ltd. v. Provincial Secretary (N.B.)*, [1978] 2 S.C.R. 869; **distinguished:** *Leighton v. British Columbia* (1989), 57 D.L.R. (4th) 657; *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45; **referred to:** *Nowegijick v. The Queen*,

[1983] 1 S.C.R. 29; *Francis v. The Queen*, [1956] S.C.R. 618; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Leonard v. R. in Right of British Columbia* (1984), 52 B.C.L.R. 389; *R. v. Lewis*, [1996] 1 S.C.R. 921; *Brown v. The Queen in right of British Columbia* (1979), 107 D.L.R. (3d) 705; *Danes v. The Queen in right of British Columbia* (1985), 18 D.L.R. (4th) 253; *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934; *Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] A.C. 550; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Miawpukek Indian Band v. Newfoundland (Minister of Finance)* (1995), 130 Nfld. & P.E.I.R. 164; *Brooks (J.E.) and Associates Ltd. v. Kingsclear Indian Band* (1991), 118 N.B.R. (2d) 290.

By Binnie J. (dissenting)

Williams v. Canada, [1992] 1 S.C.R. 877; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Francis v. The Queen*, [1956] S.C.R. 618; *Simpsons-Sears Ltd. v. Provincial Secretary (N.B.)*, [1978] 2 S.C.R. 869; *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934; *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Miawpukek Indian Band v. Newfoundland (Minister of Finance)* (1995), 130 Nfld. & P.E.I.R. 164.

Statutes and Regulations Cited

Budget Implementation Act, 1997, S.C. 1997, c. 26.

Constitution Act, 1867, s. 92(2).

Indian Act, R.S.C., 1985, c. I-5, ss. 87, 88, 89(1) [rep. & sub. c. 17 (4th Supp.), s. 12], (2).

Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10, ss. 1 "consumer", "purchaser" [rep. & sub. S.N.B. 1983, c. 86, s. 1(*b*)], "retail sale" [*idem*, s. 1(*c*)],

4 [*idem*, s. 2; am. 1985, c. 68, s. 2(*a*)], 5(1) [rep. & sub. 1979, c. 67, s. 2; am. 1983, c. 86, s. 3; am. 1993, c. 66, s. 1(*a*)], (2) [ad. 1993, c. 66, s. 1(*b*)], 8(1) [rep. & sub. 1979, c. 67, s. 3(*a*); am. 1983, c. 85, s. 1], 16 [rep. & sub. 1979, c. 67, s. 6].

Authors Cited

Bartlett, Richard H. *Indians and Taxation in Canada*, 3rd ed. Saskatoon: Native Law Centre, University of Saskatchewan, 1992.

Hogg, Peter W. and Mary Ellen Turpel. "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 *Can. Bar Rev.* 187.

Maritimes Tax Reporter (loose-leaf). Don Mills, Ont.: CCH Canadian Ltd., 1993.

Reiter, Robert Alan. *Tax Manual for Canadian Indians.* Edmonton: First Nations Resource Council, 1990.

APPEAL from a judgment of the New Brunswick Court of Appeal (1996), 178 N.B.R. (2d) 1, 454 A.P.R. 1, 135 D.L.R. (4th) 193, [1997] 1 C.N.L.R. 213, [1996] N.B.J. No. 258 (QL), allowing an appeal from a judgment of Savoie J. (1994), 148 N.B.R. (2d) 351, 378 A.P.R. 351, 115 D.L.R. (4th) 292, 2 G.T.C. 7178, [1995] 1 C.N.L.R. 210, [1994] N.B.J. No. 212 (QL). Appeal allowed, Gonthier and Binnie JJ. dissenting.

Bruce Judah, *Q.C.*, for the appellants.

P. John Landry and *Lewis F. Harvey*, for the respondents.

John R. Power, *Q.C.*, and *Sandra Phillips*, for the intervener the Attorney General of Canada.

Kenneth J. Tyler and *Stewart J. Pierce*, for the intervener the Attorney General of Manitoba.

Patrick G. Foy, Q.C., and *Hunter W. Gordon*, for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

John Hurley, for the interveners the Grand Council of the Crees (Eeyou Estchee), the Cree Regional Authority, Matthew Coon Come, Violet Pachanos and Bill Namagoose.

The judgment of Lamer C.J. and Cory, McLachlin, Iacobucci and Major JJ. was delivered by

MCLACHLIN J. --

I. Introduction

1 This case requires the Court to rule whether Indians living in New Brunswick were required to pay provincial sales tax on goods purchased off the reserve for consumption on the reserve.

2 Prior to April 1, 1993, Indians in New Brunswick were generally exempt from paying provincial sales tax under the *Social Services and Education Tax Act*, R.S.N.B. 1973, c. S-10. The exemption was repealed in 1993 and the New Brunswick Sales Tax Commissioner issued sales tax notices that status Indians were only exempt

from sales tax on goods and services purchased on or delivered by the vendor to reserve lands. The respondent Indians bring a test case challenging this. They argue that s. 87 of the *Indian Act*, R.S.C., 1985, c. I-5, which exempts Indians from taxation on "property . . . situated on a reserve", prohibits taxation on off-reserve sales where the property is intended to be used on a reserve.

II. Judgments Below

3 At trial ((1994), 148 N.B.R. (2d) 351), Savoie J. concluded that s. 87 applies only to property actually situated on a reserve. The sales tax is charged and collected at the point of sale. At this point, the property is not on a reserve. It follows that the tax is not prohibited by s. 87 of the *Indian Act*.

4 The majority of the New Brunswick Court of Appeal ((1996), 178 N.B.R. (2d) 1), *per* Bastarache J.A. (as he then was) rejected Savoie J.'s conclusion that s. 87 applies only to property located on a reserve. It held that s. 87 confers on Indians the right to use or consume personal property on the reserve without taxation. Since most property consumed or used on-reserve in New Brunswick is purchased off-reserve, the right would be meaningless without the right to purchase goods off-reserve tax-free. Therefore, s. 87 must extend to purchases off the reserve. Hoyt C.J. (Turnbull J.A. concurring) dissented, holding that the only purpose of s. 87 was to protect Indians from being dispossessed of their on-reserve personal property by taxation.

III. Statutory Provisions

5 *Indian Act*, R.S.C., 1985, c. I-5

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to s. 83, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

. . .

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

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

. . .

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10

1 . . .

"consumer" means a person who

(*a*) utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense, or

(*b*) utilizes or intends to utilize within the Province goods on behalf of or as the agent for a principal, who desired or desires to so utilize such goods for consumption by the principal or by any other person at the expense of the principal;

. . .

"purchaser" means a consumer who acquires goods at a retail sale within the Province and includes also

. . .

(*b*) a person who purchases services;

"retail sale" means a sale to a consumer for the purpose of consumption and not for resale and includes a sale of services to a purchaser;

. . .

4 Every consumer of goods consumed within the Province and every purchaser of services purchased within the Province shall pay to the Minister for the raising of revenue for Provincial purposes a tax in respect of the consumption of such goods or purchase of such services, computed at the rate of eleven per cent of the fair value of such goods or services. . .

.

5(1) In the case of a retail sale within the Province, the tax shall be payable by the purchaser at the time of purchase on the fair value of the goods or services.

5(2) Notwithstanding subsection (1), in the case of a retail sale within the Province of goods that are used or consumed within the Province and are used or consumed frequently or substantially outside the Province, the purchaser shall report the matter to the Commissioner in accordance with the regulations and shall pay the tax on such goods at such time and in such manner as the Commissioner requires.

. . .

8(1) Every person who consumes within the Province goods acquired by him for resale, or who consumes within the Province goods manufactured, processed, produced or purchased by him within or without the Province, shall for the purposes of this Act, be deemed to have purchased the goods at a retail sale in the Province on the day that he begins to consume the goods within the Province.

IV. Analysis

6 This appeal requires us to decide whether s. 87 of the *Indian Act* applies to tax levied under the former New Brunswick *Social Services and Education Tax Act*. The provisions of both statutes must be interpreted and analyzed to determine whether the s. 87(1)(*b*) exemption applies to the sales tax on the property in question: see *Williams*

v. Canada, [1992] 1 S.C.R. 877. In the event of ambiguity, the interpretation that most favours the Indians is to be preferred: see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

A. *The Application of Section 87 of the Indian Act*

7 Section 87(1) of the *Indian Act* exempts certain property of Indians from taxation. This includes "the personal property of an Indian or a band situated on a reserve": see s. 87(1)(*b*). Section 87(2) describes the types, or modalities, of taxation on the exempted property that are prohibited: taxation "in respect of the ownership, occupation, possession or use of" the property mentioned in s. 87(1).

8 The purpose of the s. 87 exemption was to "preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize". It "was not to confer a general economic benefit upon the Indians": see *Williams*, *supra*, at p. 885.

9 In the past, s. 87(1)(*b*) has been confined to property physically situated on a reserve or property whose "paramount location" is on a reserve.

10 In *Francis v. The Queen*, [1956] S.C.R. 618, the Court, *per* Kellock J., stated at p. 631:

> It is quite plain from this section that the actual situation of the personal property on a reserve is contemplated by s. 86 [now s. 87] and that any argument suggesting a notional situation is not within the intendment of that section.

11 In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 132, La Forest J. approved and quoted the comments of Macfarlane J.A. in *Leonard v. R. in Right of British Columbia* (1984), 52 B.C.L.R. 389 (C.A.), at p. 395:

> It is a reasonable interpretation of the section to say that a tax exemption on the *personal* property of an Indian will be confined to the place where the holder of such property is expected to have it, namely on the lands which an Indian occupies as an Indian, the reserve. [Emphasis in original.]

In response to the argument that Parliament intended the privileges of ss. 87 and 89 to protect all property, regardless of where that property is situated, La Forest J. continued at p. 144:

> . . . such an interpretation takes one beyond the liberal and the generous and subverts the very character of the commitments that the Crown has historically undertaken *vis-à-vis* the protection of native property.

12 Again, in *Williams, supra,* the Court, *per* Gonthier J. confirmed the approach in *Mitchell* in determining whether the *situs* of unemployment insurance benefits was on or off the reserve for the purposes of taxation. As the benefits, intangible personal property, were effectively on the reserve at the time of taxation, they were exempt from taxation pursuant to s. 87.

13 In *R. v. Lewis*, [1996] 1 S.C.R. 921, at p. 959, this Court, *per* Iacobucci J., held that the phrase "on the reserve" in s. 81(1)(*o*) of the *Indian Act* should be given its ordinary and common sense meaning, namely "within the reserve", "inside the reserve", or "located upon or within the boundaries of the reserve". The Court had earlier stated at p. 955 that the phrase should be given the same construction wherever it is used throughout the *Indian Act*. The phrase "situated on a reserve" should be interpreted in

the same way. The addition of the word "situated" does not significantly alter the meaning of the phrase in the circumstances of this case: see also *Brown v. The Queen in right of British Columbia* (1979), 107 D.L.R. (3d) 705 (B.C.C.A.), at p. 713, and *Danes v. The Queen in right of British Columbia* (1985), 18 D.L.R. (4th) 253 (B.C.C.A.), at p. 257.

14 The only qualification the case law admits to the rule that s. 87 catches only property physically located on a reserve is the rule that where property which was on a reserve moves off the reserve temporarily, the court will ask whether its "paramount location" is on the reserve. If it is, s. 87 will apply to prevent taxes being levied on property while it is off the reserve: see *Leighton v. British Columbia* (1989), 57 D.L.R. (4th) 657 (B.C.C.A.).

15 These authorities suggest that s. 87 applies only to property physically located on a reserve at the time of taxation or property whose paramount location is on a reserve at the time of taxation. This comports with the purpose of s. 87 to protect the property of Indians on reserves and prevent that property from being eroded: see *Williams, supra.* In determining the applicability of s. 87, one must consider whether the property is located or has its paramount location on a reserve at the time and place that the tax would otherwise attach. In the context of retail sales taxes, this can be called the "point of sale" test.

16 The remaining question, therefore, is whether the sales tax here at issue is levied on property while it is situated, or has its paramount location on a reserve. The property described in the stated case consists of items for personal use and consumption like clothing and toiletries, purchased by Indians off the reserve for use on the reserve. The *Social Services and Education Tax Act* levies the tax on these items at the time of

the off-reserve sale. At the point of sale, the property is not, and has never been located on a reserve. This, without more, suggests that the tax is not levied on goods situated on a reserve or whose paramount location is on a reserve. This would accord with the general view expressed by Richard H. Bartlett, *Indians and Taxation in Canada* (3rd ed. 1992), at p. 92:

> The reasoning employed by the Supreme Court of Canada [in *Francis*] appears applicable to the imposition of sales tax at the point of sale off a reserve. In the vast majority of sales transactions involving Indian purchases in Canada the sales take place off the reserve, and according to *Francis* are not subject to the exemption conferred by section 87.

17 This, however, does not conclude the matter. The respondents raise a number of arguments in support of their position that s. 87 applies to the tax at issue in this case: (1) that the tax is not a sales tax but a consumption tax collected at the time of purchase but levied in respect of the on-reserve consumption of personal property by Indians; (2) that property purchased for use on-reserve has its paramount location on a reserve; and (3) that s. 87 must be applied to off-reserve purchases by Indians in New Brunswick in order to fulfill its purpose. I will address each of these arguments in turn.

B. *The Consumption Tax Argument*

18 The respondents argue that the sales tax is a consumption tax collected out of convenience at the time of purchase but levied in respect of the consumption or use of property which occurs on the reserve.

19 To this, we must look at the language used by the Legislature, the history and purpose of the *Social Services and Education Tax Act* and the case law. As stated earlier, if ambiguity exists, it must be resolved in favour of the Indians. In this case, this

process leads to but one conclusion: when imposed on a retail sale, the tax is a sales tax, not a tax on consumption.

20 The tax at issue is one in a long series of taxing statutes adopted to tax sales in New Brunswick. It conforms generally to a pattern of sales taxes found all across Canada. The pattern combines provisions imposing tax on "sale[s]" with wording suggesting that the tax is paid by "consumer[s]" of the goods taxed. Despite their references to "consumer[s]" and "consumption", these taxes have long and uniformly been held by the courts to be, in essence, sales taxes, not consumption taxes. Indeed, this Court has ruled that the predecessor of the very statute here at issue, using a similar combination of provisions regarding sale and consumption, was a sales tax and not a tax on consumption: see *Simpsons-Sears Ltd. v. Provincial Secretary (N.B.)*, [1978] 2 S.C.R. 869, *per* Ritchie J.

21 The peculiar wording of modern Canadian sales tax statutes stems from the constitutional prohibition on indirect taxation by the provinces. The provinces are limited to direct taxes -- taxes whose incidence falls primarily on the person who pays them. They cannot impose taxes which may be passed on to another person: see *Constitution Act, 1867*, s. 92(2).

22 A tax imposed on sales *simpliciter* runs afoul of this rule, since the purchaser may resell the goods to another and pass the tax along in the resale price. Early sales taxes were struck down on this basis: see *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934 (P.C.). In response to *Canadian Pacific*, British Columbia passed a true consumption tax, which was upheld in *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45 (P.C.). However, as consumption taxes proved difficult to compute and collect, the provinces eventually

came up with a new scheme -- a sales tax which avoided the problem of indirect taxation by identifying the person liable to pay the tax as the consumer, or ultimate user of the property: see Laskin C.J. in *Simpsons-Sears*, *supra*, at p. 872. This sort of tax was upheld as direct in *Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] A.C. 550 (P.C.).

23 The new tax raised a fundamental question -- the very question before us on this appeal. What was the new tax? Was it a tax on consumption? Or was it a sales tax? The Privy Council in *Atlantic Smoke Shops*, *per* Viscount Simon, upheld the tax on the basis that sales taxes could be direct (at p. 564). Implicit in this reasoning is acceptance that the tax was a sales tax.

24 The next case to consider the problem was *Simpsons-Sears*, *supra*, involving the New Brunswick statute at issue on this appeal. At that time, the statute also combined the language of sales tax with the language of consumer and consumption. Section 4, the charging section, imposed a tax on the consumer: "Every consumer of goods consumed in the Province shall pay to the Minister for the raising of a revenue for Provincial purposes, a tax in respect of the consumption of such goods. . . ." Section 5 went on to provide that the tax was payable at the time of purchase. Like the present statute, the act also defined "consumption" and "consumer" and made provisions for variation of the tax where, for example, goods were purchased for consumption outside the province. In describing the nature of the tax imposed by the act, Ritchie J., for the majority, stated, at p. 888: "I have referred to the last cited sections . . . to show that the original concept of a sales tax payable by the consumer purchaser is maintained in the present statute. . . ." To the argument that the tax was a tax on consumption, Ritchie J. pointed out, at p. 887, that "the 'consumption' . . . referred to is to be construed as meaning *a consumption after sale*. . . ." (emphasis in original) and found that "[f]or these purposes 'a sale' is an essential component of the taxable consumption. . . ." In

short, the tax was held to retain its character as a sales tax, despite its references to consumption. It followed that the use or "consumption" of catalogues without a sale was not taxable.

25 This Court's most recent pronouncement on the character of a tax on sales for consumers came in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161. At issue was the validity of a provincial tax imposed under the *Gasoline Tax Act*, s. 25 (quoted at p. 1175), on "any person who, within the Province, . . . purchased or received delivery of gasoline for his own use or consumption. . . ." In response to the argument that the tax was a consumption tax, La Forest J. stated, at p. 1187, that "[t]he Act clearly does not impose a consumption tax. The references in the definition to consumption or use merely define the taxpayer, i.e., a purchaser who buys gasoline for his own use."

26 These cases have settled the law: provincial sales taxes, when they are levied on retail sales, are just that — sales taxes — notwithstanding their references to "consumer[s]" and "consumption" to avoid the charge of indirect taxation. In *Miawpukek Indian Band v. Newfoundland (Minister of Finance)* (1995), 130 Nfld. & P.E.I.R. 164 (Nfld. S.C.T.D.), at p. 170, Roberts J. stated, in dealing with a similar provision in Newfoundland's *Retail Sales Tax Act,* R.S.N. 1990, c. R-15:

> That the tax provided for by the said s. 3 is "in respect of the consumption or use of that property", in my opinion, changes nothing. These words are intended to identify the tax as a direct tax on the consumer, not one to be passed on, and thus within the jurisdiction of the province to impose. The important point for the purpose of the present analysis is that the tax is levied "at the time of sale".

See also the *Maritimes Tax Reporter* (1993 (loose-leaf)), at ¶ 60-004:

> In New Brunswick sales tax is imposed on the purchase of goods and services at fair value within the province.
>
> Sales tax is designed to be one of single incidence upon the ultimate consumer or user of taxable property in New Brunswick.

27 The language of the statutory provisions at issue does not negate this view. It is the same sort of language that has been repeatedly held to impose a sales tax, not a consumption tax. Section 4 imposes a tax on "[e]very consumer of goods consumed within the Province" a tax "in respect of" consumption. "Consumer" is defined by the *Social Services and Education Tax Act* as a person who "utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense. . . ." Section 5, on the other hand, imposes a tax on sale, providing that "[i]n the case of a retail sale within the Province, the tax shall be payable by the purchaser at the time of purchase on the fair value of the goods or services." Section 1 defines "retail sale", in part, as "a sale to a consumer for the purposes of consumption. . . ." "Sale", in turn, is defined as including "exchange, barter . . . and any other contract whereby for a consideration a person delivers goods or services to another". Finally, "purchaser" is defined as "a consumer who acquires goods at a retail sale within the Province. . . ."

28 These sections, apart from minor changes in wording, mirror the sections found in the statute's predecessor, which this Court ruled in *Simpsons-Sears* did not impose a tax on consumption. To borrow the language of La Forest J. in *Air Canada,* the references to "consumption" merely define the taxpayer for the purpose of ensuring that the person taxed cannot pass the tax on to another, thereby making the tax indirect and unconstitutional.

29 Section 4 does not operate in isolation. Rather, it operates in tandem with s. 5 and is given meaning by the definitions in s. 1. When read together in light of the definitions, it is evident that these sections impose a direct retail sales tax that fixes on the transaction of sale and is calculated on the fair value of the goods. In the case of a retail sale, the act of purchase, not the act of consumption, triggers liability for the sales tax. For the purposes of these sections of the *Social Services and Education Tax Act*, it is largely irrelevant how, why, where, when, and by whom they are consumed once they have been purchased at a retail sale within the province. If there is a sale but no consumption, the sales tax is still payable. If the sales tax were a true consumption tax, each use of taxable goods by the ultimate consumer would attract tax liability.

30 Certain provisions in the *Social Services and Education Tax Act* impose a tax on consumption. For example, s. 8(1) stipulates that "[e]very person who consumes within the Province goods acquired . . . for resale, or . . . goods manufactured, processed, produced or purchased by him . . . [is] deemed to have purchased the goods at a retail sale" and, as such, is liable to pay the tax. Under s. 8(1), the use or consumption of the goods triggers tax liability. However, the fact that the Act taxes consumption in certain specific circumstances does not determine the overall scheme of the Act or influence the nature of the tax imposed by ss. 4 and 5. Indeed, it is implicit in s. 8(1) that the consumption of goods in such circumstances would, absent express statutory provision to the contrary, not attract the sales tax. In the present case, the Court is concerned with the tax levied on goods purchased at a retail sale. In these circumstances, ss. 4 and 5 impose tax liability on the transaction of sale. Section 8(1) and any others that impose a tax on consumption are not at issue.

31 The sales tax here may be contrasted with the pure consumption tax at issue in *Kingcome Navigation, supra*. It may also be contrasted with the consumption or "use"

tax provisions at issue in *Leighton*, *supra*, where the provincial government sought to tax the off-reserve use of goods that had been purchased tax-free on the reserve. The *Social Service Tax Act*, R.S.B.C. 1979, c. 388, was amended to impose a tax on "tangible personal property . . . purchased by an Indian or a band" that is otherwise exempt under s. 87 of the *Indian Act*, when "that tangible personal property is, while owned by that Indian or band, used at a place where the exemption would not have applied. . . ." (pp. 659-60). The use of the property attracted the tax rather than the purchase of the property for use or consumption. The British Columbia Court of Appeal, *per* Lambert J.A., struck down the tax on the ground that it taxed property that had its paramount location on the reserve.

32 I conclude that the law is clear: statutory provisions like the ones here at issue impose a sales tax, not a consumption tax. The law has long been settled and there is no ambiguity. In the present case, the tax is imposed at the time of sale on property off the reserve.

C. *The "Paramount Location" Argument*

33 The respondents submit that tangible personal property which is intended to be consumed primarily on the reserve is "situated on a reserve" for the purposes of s. 87. In doing so, they seek to extend the "paramount location" doctrine to property which has never been on a reserve.

34 As discussed earlier, the "paramount location" test has been used to protect Indian property normally situated on the reserve from being taxed or seized while off-reserve. In *Leighton*, *supra*, the B.C. Court of Appeal, *per* Lambert J.A., held that neither a motor vehicle nor its Indian owner could be taxed with respect to the use of a

vehicle off the reserve if the paramount location of the property remained on the reserve. Similarly, the New Brunswick Court of Appeal, *per* Stratton C.J., in *Brooks (J.E.) and Associates Ltd. v. Kingsclear Indian Band* (1991), 118 N.B.R. (2d) 290, held that a school bus which had been used for years to transport children from the reserve to an off-reserve school could not be seized by creditors while off-reserve pursuant to s. 89(1) of the *Indian Act* because its paramount location was on the reserve.

35 The concept of "paramount location" finds no application to sales taxes on tangible goods. Sales taxes attach at the moment of sale. At this point, the property has but one location — the place of sale. It cannot have its paramount location elsewhere because no pattern of use and safekeeping elsewhere is established. The location of property after the sale and the imposition of tax is irrelevant. This means that goods purchased off-reserve attract tax, while goods purchased on-reserve are exempt, regardless of where the purchaser may intend to use them. To make taxation dependent on place of anticipated use of the article purchased would render the administration of the tax uncertain and unworkable. As Macfarlane J.A. put it in *Danes*, *supra*, at p. 259:

> An exemption must apply at the moment of purchase. To do so it must be certain. It must not depend upon the consideration of factors such as the extent to which the property may be used on or off the reserve.

36 In these circumstances, where the location of the property at the time of taxation is readily apparent, there is simply no need to apply the "paramount location" test and I conclude that it does not assist the respondents.

D. *The "Purpose of Section 87" Argument*

37 The respondents argue that s. 87 is intended to protect Indians from taxation in respect of their use of property on-reserve. Where Indians are obliged to purchase most of their goods off-reserve, as most are in New Brunswick, this protection is eroded. Therefore, they submit that s. 87 should be read as applying to sales tax levied off-reserve on goods purchased by Indians for use on the reserve. This was the view of the majority of the New Brunswick Court of Appeal.

38 The first difficulty with this argument is that it takes the purpose of s. 87 far beyond that articulated by this Court in *Williams* — to prevent Indian property on Indian reserves from being eroded by taxation or claimed by creditors. No support has been offered for the proposed extension, except that this would economically benefit Indians. But that, this Court has stated, is not the purpose of s. 87: see *Mitchell* and *Williams*. La Forest J. in *Mitchell* (at p. 133) specifically cautioned against attributing an expansive scope to the s. 87 exemption:

> . . . one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusion and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements. [Emphasis added.]

39 The second difficulty with this argument is that it flies in the face of the wording of s. 87(1)(*b*), which confines the protection from taxation to property situated on a reserve. The respondents attempt to overcome this difficulty by relying on s. 87(2) which provides that "[n]o Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property." But this section does not extend the ambit of s. 87(1)(*a*) and (*b*). Section 87(1) states what

property is protected from taxation. Section 87(2) states that tax cannot be levied in respect of the ownership, occupation, possession or use of this property. It does not enlarge the class of property subject to the exemption, but merely states the types of tax that are prohibited on a particular type of property. It does not change the rule that for property to be exempt from taxation under s. 87, it must be situated on a reserve. Courts have consistently held that s. 87(1)(*b*) is confined to property physically situated on a reserve or whose paramount location is on a reserve: see *Francis*, *Mitchell*, *Williams*, *Lewis* and *Leighton*, *supra*.

40 A third difficulty with this argument is that the history of s. 87 belies the conclusion that Parliament intended it to provide general tax protection for off-reserve property. The tax exemption began in 1850 as a prohibition against taxes on Indians residing on Indian lands. It was amended in 1876 to prevent taxes on Indian property unless it was held outside the reserve. It now prohibits taxation in respect of Indian property that is situated on the reserve: see Bartlett, *supra*. Over the years Parliament has explicitly limited and narrowed the scope of what is now s. 87 to protect from taxation only property that is situated on the reserve.

41 A fourth difficulty with this argument is that it rests on the assumption that providing a tax exemption to Indians for property purchased off-reserve will benefit Indians uniformly. The argument is that Parliament must have intended the tax to apply to off-reserve purchases because this is required to protect and enhance the position of Indians. Yet it is far from clear that Indians across Canada would benefit from such an interpretation.

42 Confining s. 87 to property situated on a reserve and excluding off-reserve sales taxes will have varying effects. It is said that in New Brunswick the effects are

negative. There are very few retail establishments on New Brunswick reserves where 65-75 percent of status Indians live. Delivery of goods to reserves may partially offset the problem; the trial judge, Savoie J., found that delivery of goods and services to Indians resident on reserves in New Brunswick was available from many of the retail establishments close to reserves. However, delivery may involve additional charges equivalent to a sales tax and, in any event, will not be available in many situations. The reality is that, at present, New Brunswick Indians are unable to live on their reserves without paying a certain amount of provincial sales tax.

43 At the same time, adopting the "paramount location" test would have adverse consequences for Indians who live off the reserve. They would presumably have to pay tax on purchases made on and off the reserve because the "paramount location" of the goods would be off-reserve. Indians who lived, and thus consumed their property, off the reserve would always be subject to taxation, while those living on the reserve would be effectively immune. In contrast, the "point of sale" test allows Indians living off-reserve to purchase goods tax-free on reserves regardless of where the goods are ultimately used.

44 In addition, the "point of sale" test is beneficial to on-reserve Indians in many parts of Canada. First, it provides an incentive for Indians to establish their own retail outlets on reserves and gives a competitive edge to reserve businesses, thereby increasing economic activity and employment. Although the exemption may not yet have been a catalyst in New Brunswick, where until recently off-reserve sales were exempt from tax, it has fostered aboriginal economic development elsewhere. For example, the intervener, the Attorney General of Manitoba, asserted that almost all Manitoba reserves contain some retail businesses. The fact that the exemption is closely tied to the reserve enhances reserve-linked benefits, promotes privatization of reservation

economies and encourages an entrepreneurial spirit: see Robert A. Reiter, in *Tax Manual for Canadian Indians* (1990), at p. 1.1.

45 Second, the "point of sale" approach to the tax exemption permits reserves to impose their own taxes on reserve sales, thus creating a tax base for aboriginal governments: see Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 *Can. Bar Rev.* 187, at pp. 207 *et seq*. For example, in the *Budget Implementation Act, 1997*, S.C. 1997, c. 26, Parliament granted the Cowichan tribes the authority to impose a direct tax on the on-reserve purchase of tobacco by status Indians. This legislation enabled the Cowichan Tribes to fill the tax void created by s. 87 and raise revenue for the community. If s. 87 is interpreted to provide an exemption for all off-reserve purchases of tobacco destined for use on the reserve, the purpose of this amendment would be frustrated.

46 These considerations belie the conclusion that s. 87, by its object and purpose, must be read as intending to exempt Indians from all sales taxes, whether on or off a reserve, on property used on reserves. I conclude that the argument that s. 87 must, in keeping with its objects, be read expansively to apply to off-reserve sales cannot succeed.

V. Conclusion

47 I would allow the appeal and set aside the order of the New Brunswick Court of Appeal. I make no comment regarding the validity of the new Harmonized Sales Tax that replaced the tax here at issue.

48 The following constitutional question was stated:

Question: If as a matter of statutory interpretation, the *Social Services and Education Tax Act*, R.S.N.B. 1973, c. S-10, imposes a tax in respect of tangible personal property purchased at a location off reserve which is destined for use entirely or primarily by an Indian or an Indian band on a reserve, and further, if as a matter of statutory interpretation, s. 87 of the *Indian Act* prohibits such taxation, is the *Social Services and Education Tax Act* rendered inoperative to the extent of its inconsistency with s. 87 of the *Indian Act*?

Answer: Section 87 of the *Indian Act* does not prohibit taxation in respect of tangible personal property purchased at a location off reserve which is destined for use entirely or primarily by an Indian or an Indian band on a reserve. As such, the *Social Services and Education Tax Act* is not inconsistent with s. 87 of the *Indian Act* and is not rendered inoperative.

The reasons of Gonthier and Binnie JJ. were delivered by

49 BINNIE J. (dissenting) -- This appeal is about the right of Indian people on New Brunswick reserves to purchase clothing and other goods for their personal consumption without paying tax to the provincial government. Given the realities of reserve life in that province, and in particular the lack of on-reserve shopping facilities, restricting the tax exemption to shopping on reserves in New Brunswick means for all practical purposes that no exemption is available.

50 The legal issue, in more technical terms, is the proper construction of the New Brunswick *Social Services and Education Tax Act*, R.S.N.B. 1973, c. S-10, and whether its reach is defeated in these circumstances by the tax exemption provided by s. 87(1)(*b*) of the *Indian Act*, R.S.C., 1985, c. I-5. A majority of this Court has concluded that the exemption is not available where the point of acquisition of the personal property is off the reserve irrespective of where the personal property is used

or consumed. The result is that New Brunswick can collect its 11 percent tax. I disagree.

51 The facts are outlined in the reasons for judgment of my colleague Justice McLachlin and I will add to them only insofar as may be necessary to explain these reasons.

Relevant Statutory Provisions

52 *Social Services and Education Tax Act*, R.S.N.B. 1973, c. S-10

> **1** . . .
>
> "consumer" means a person who
>
> (*a*) utilizes or intends to utilize within the Province goods for his own consumption, or for the consumption of any other person at his expense, or
>
> (*b*) utilizes or intends to utilize within the Province goods on behalf of or as the agent for a principal, who desired or desires to so utilize such goods for consumption by the principal or by any other person at the expense of the principal;
>
> . . .
>
> "purchaser" means a consumer who acquires goods at a retail sale within the Province and includes also
>
> (*a*) a promotional distributor to the extent that the full fair value of any goods provided by way of promotional distribution exceeds any payment specifically made therefor by the person to whom such goods are provided, and
>
> (*b*) a person who purchases services;
>
> . . .
>
> **4** Every consumer of goods consumed within the Province and every purchaser of services purchased within the Province shall pay to the Minister for the raising of revenue for Provincial purposes a tax in respect

of the consumption of such goods or purchase of such services. . . . [Emphasis added.]

5(1) In the case of a retail sale within the Province, the tax shall be payable by the purchaser at the time of purchase on the fair value of the goods or services.

. . .

8(1) Every person who consumes within the Province goods acquired by him for resale, or who consumes within the Province goods manufactured, processed, produced or purchased by him within or without the Province, shall for the purposes of this Act, be deemed to have purchased the goods at a retail sale in the Province on the day that he begins to consume the goods within the Province.

. . .

16 Every vendor shall be an agent of the Minister for the purpose of collecting the tax imposed by section 4 and payable under section 5, and as such shall collect the tax.

Indian Act, R.S.C., 1985, c. I-5

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

. . .

(*b*) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Analysis

53 In *Williams v. Canada*, [1992] 1 S.C.R. 877, the Court discussed the appropriate approach to consideration of a claim for a tax exemption under s. 87 of the *Indian Act*, *per* Gonthier J. at p. 885. First, any analysis must keep in mind the limited

and specific purpose of s. 87. Second, the nature of the property or benefits sought to be exempted from taxation is to be looked at. Third, the manner in which the incidence of the particular provincial tax (here the New Brunswick *Social Services and Education Tax Act*) falls upon the personal property sought to be taxed is to be considered. That having been done, the Court compares the text of the taxing statute with s. 87(1)(*b*) of the *Indian Act* to determine if the exemption applies. In the vital exercise of construing both the *Indian Act* and the New Brunswick *Social Services and Education Tax Act*, the interpretive principles expressed by Dickson J. (as he then was) in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, must be observed, namely:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

This "liberal interpretative method" was affirmed in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, *per* La Forest J., at p. 143, although he pointed out that these principles did not imply

> . . . automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation.

It is convenient in this case, as in *Williams*, to examine separately each step of the analysis of the tax exemption claimed by the Indian people.

Purpose of Section 87 of the Indian Act

54 In *Williams*, Gonthier J., for the Court, outlined the "Nature and Purpose of the [s. 87] Exemption from Taxation" as follows, at p. 885:

> The question of the purpose of ss. 87, 89 and 90 has been thoroughly addressed by La Forest J. in the case of *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. La Forest J. expressed the view that the purpose of these sections was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize. The corollary of this conclusion was that the purpose of the sections was not to confer a general economic benefit upon the Indians. . . . [Emphasis added.]

55 Gonthier J.'s focus on the "use" of personal property stems from the language of s. 87 which exempts from taxation "the personal property of an Indian or a band situated on a reserve" and, importantly, taxation "in respect of the . . . use of any [such] property. . .", which personal property is not to be "otherwise subject to taxation" (emphasis added).

56 I agree with McLachlin J. that the expression "situated on a reserve" bears the same interpretation in s. 87(1) of the *Indian Act* as it does elsewhere in that statute and should not be extended in an artificial or conceptual way to cover personal property that is not physically situated on a reserve at the critical time. (The task, of course, is to determine the "critical time" in the context of a particular case.) In this I differ from the majority of the New Brunswick Court of Appeal. This Court held in *Francis v. The Queen*, [1956] S.C.R. 618, *per* Kellock J. at p. 631, that the words "situated on a reserve" were to be taken literally and did not include "notional situation" on a reserve. Parliament has not seen fit to enlarge the exemption in the 42 years since that decision. In *Francis*, the critical time was the moment of importation of the Indian's personal property into Canada. The question in this case is whether the critical time is the time of acquisition, as the province contends, or the time of use or consumption, as the Indian

respondents contend. If the New Brunswick *Social Services and Education Tax Act* charges the tax on the use or consumption of the personal property of Indian people, and if at the time of use or consumption the personal property is primarily situated on a reserve, then in my opinion the respondents are entitled to the benefit of the exemption.

Nature of the Property in Question

57 The goods at issue in this case are tangible goods which we are told by the parties include ordinary household and related goods such as taxable groceries, personal toiletries, cleaning supplies, building materials, sports and recreational equipment, furniture, household appliances, motor vehicles, clothing and footwear. Indian people cannot be expected to live reasonably on the reserve without purchasing some or all of these goods, and if the goods are not available locally, then purchases will have to be made off-reserve to enable the Indians to enjoy a reasonable standard of life on the reserve. New Brunswick recognized the justice of this position during the decades when the province itself exempted the Indians from payment of the tax.

58 New Brunswick will still exempt from the tax goods delivered by the vendor at the vendor's expense to the reserve. To the vagaries of on-reserve shopping facilities are therefore added the idiosyncrasies of off-reserve delivery services. The parties agreed that the tax would be levied (if the provincial Attorney General prevails in this appeal) in the following instances of everyday purchases by a status Indian resident on a reserve:

(a) purchase of an article of children's clothing in July, 1993 for a price of approximately $150 from Metropolitan Store in Woodstock, New

Brunswick where the purchaser, a resident of the Woodstock reserve, was advised that vendor delivery to the reserve was not available;

(b) purchase of an article of clothing in December, 1993 for a purchase price of approximately $150 from Eaton's department store in Moncton where the purchaser, a resident of the Woodstock reserve, was advised that vendor delivery to a reserve was not available but that delivery through a common carrier could be made with the charge for such delivery to be borne by the purchaser;

(c) purchase of light bulbs, toothpaste and sundry toiletry items in January, 1994 for less than $50 from Shoppers Drug Mart in Fredericton in which the purchaser, a resident of the Kingsclear reserve, was advised that delivery to the reserve was not available;

(d) purchase of cleaning supplies, laundry detergent, paper towels, dish washing liquid and similar household cleaning items in February, 1994 for less than $25 from the Byway Store in Fredericton where the purchaser, a resident of the Kingsclear reserve, was advised that no delivery to the reserve was available; and

(e) purchase of sundry toiletry items, magazines and taxable groceries, in November, 1993, for less than $20, from a convenience store in Newcastle where the purchaser, a resident of the Eel Ground Reserve, was advised that vendor delivery to the reserve was not available.

59 These illustrations underscore the extent to which the province seeks to benefit from its 11 percent impost on on-reserve living expenses under the Social Services and Education Tax which, ironically, does not benefit Indian people on the reserve, who receive such education and services (if at all) from the federal government.

60 There are at least 9,500 status Indians resident in the Province of New Brunswick, approximately 65 to 75 percent of whom are resident on reserves. The parties agreed that there are very few retail establishments located on reserves in the province. For this reason, most personal property purchased by on-reserve status Indians and New Brunswick bands must be purchased from retail establishments located off reserve. If the Social Services and Education Tax applies to off-reserve acquisitions, as argued by the provincial Attorney General, the result would be that New Brunswick Indians would suffer a greater tax vulnerability than Indians settled elsewhere in the country on larger reserves with better on-reserve shopping facilities. I say all of this by way of background to the narrow legal issue, which is whether the wording of s. 87(1)(*b*) is apt to prevent the application of the New Brunswick tax statute in the factual circumstances already mentioned.

Design of the New Brunswick Social Services and Education Tax Act

61 The key to this case is the precise wording of the charging section of the New Brunswick *Social Services and Education Tax Act*, which imposes the tax on the consumer "in respect of the consumption" (emphasis added) of the goods in question:

> **IMPOSITION OF TAX**
>
> **4** Every consumer of goods consumed within the Province and every purchaser of services purchased within the Province shall pay to the

> Minister for the raising of revenue for Provincial purposes a tax in respect of the consumption of such goods. . . . [Emphasis added.]

The Act specifically defines "consumer" as a person who "utilizes or intends to utilize within the Province goods" (emphasis added). This echoes the reference to the "use" of personal property in s. 87 of the *Indian Act* which, it will be recalled, provides that "[n]o Indian or band is subject to taxation in respect of the . . . use of any property [situated on a reserve] or is otherwise subject to taxation in respect of any such property" (emphasis added).

62 The appellant argues that despite such clear and specific language the New Brunswick tax is a transaction tax targeting the transaction of purchase and sale rather than a tax in respect of consumption. An appraisal of that position requires consideration of s. 8 which provides that goods acquired outside New Brunswick are taxed if consumed within the province despite the absence of any retail sale within the territorial jurisdiction of New Brunswick:

> **8**(1) Every person who consumes within the Province goods acquired by him for resale, or who consumes within the Province goods manufactured, processed, produced or purchased by him within or without the Province, shall for the purposes of this Act, be deemed to have purchased the goods at a retail sale in the Province on the day that he begins to consume the goods within the Province. [Emphasis added.]

63 Accordingly, the New Brunswick *Social Services and Education Tax Act* is a tax imposed "in respect of" consumption subject to the condition precedent of either a sale within the province (s. 5) or a deemed sale within the province (s. 8(1)). I take this characterization from the decision of this Court in *Simpsons-Sears Ltd. v. Provincial Secretary (N.B.)*, [1978] 2 S.C.R. 869. The particular issue in that case had nothing to do with Indians and nothing to do with s. 87 of the *Indian Act*, but it did require an

interpretation of a predecessor of the New Brunswick *Social Services and Education Tax Act*. In that case, the particular issue was whether Simpsons-Sears had to pay the tax in its capacity as distributor of free catalogues in the province. Laskin C.J. observed, at p. 872:

> . . . I agree with my brother Ritchie's primary conclusion that the language of the New Brunswick *Social Services and Education Tax Act* cannot be construed to convert a distributor into a taxable consumer of the catalogues which that distributor mails or delivers free to persons in New Brunswick. This is enough to dispose of the appeal which I would allow as proposed by my brother Ritchie. [Emphasis added.]

The primary conclusion of Ritchie J. was that while the tax was imposed "in respect of" consumption, imposition of the tax under s. 4 required there to be a sale prior to consumption, and that Simpsons-Sears was not party to any such sale. In other words, a retail sale had been imposed by the legislature as a condition precedent to taxable consumption with respect to goods acquired within the province, *per* Ritchie J., at p. 888:

> . . . in amending s. 4 so as to place the burden of the tax on the consumer, the Legislature of New Brunswick nevertheless retained "a sale" or "purchase" as a precondition of taxable consumption at least with respect to goods purchased at retail in New Brunswick.
>
> In the present case there is no sale of catalogues within or without the Province either at retail or otherwise. The appellant is the producer, not the purchaser of the catalogues and potential customers receive them free of charge. [Emphasis added.]

64 In the circumstances, I cannot agree with McLachlin J. that the *Simpsons-Sears* case characterized the Social Services and Education Tax as a transaction tax rather than a consumption tax. Ritchie J., for the majority, seems to me plainly to state in the paragraph reproduced above that the s. 4 tax is in respect of consumption albeit he notes that a precondition to its imposition is a transaction of purchase and sale. The

precondition to the imposition of a tax cannot plausibly be characterized as its subject matter. This view is reinforced by the fact, already mentioned, that New Brunswick imposes the tax under s. 8 where goods are consumed in the province where no retail sale has taken place in the province. My colleague McLachlin J. is obliged to argue in para. 30 of her reasons that the *Social Services and Education Tax Act* creates two different taxes, a s. 8 tax in respect of consumption and a s. 4 tax in respect of a transaction of purchase and sale. In my view, there is nothing to suggest that the Legislature intended the *Social Services and Education Tax Act* to create two different taxes. The difference between s. 4 and s. 8 is not that one creates a transaction tax and the other creates a consumption tax. There is a single tax in respect of consumption. The difference is that where goods are retailed in the province s. 5 qualifies s. 4 by imposing the "precondition" of a retail sale (as Ritchie J. termed it) but s. 5 cannot qualify s. 8 because by definition s. 8 only applies where no retail sale occurs within the territorial jurisdiction of the province. The interpretation accepted by McLachlin J. derives no support from *Simpsons-Sears*, where Ritchie J. said, at p. 887:

> The "tax" referred to in both these sections is obviously "the tax" imposed by s. 4 which is the charging section and when that section is read in light of s. 5(1) the "consumption" therein referred to is to be construed as meaning a *consumption after sale* if the goods are to be purchased at retail within the Province. [Italics in original; underlining added.]

65 My colleague, McLachlin J., states in para. 27 that s. 5 "imposes a tax on sale" but if this is intended to suggest that s. 5 is a charging section, I respectfully disagree. As stated in *Simpsons-Sears*, the tax is imposed by s. 4. There is no reference in s. 4 to a sale of any description. While provincial taxes of this type are popularly known as retail sales taxes, the generic name is an oversimplification. Each taxation statute has to be considered in light of its particular terms. In the case of the New

Brunswick statute, the sale referred to in s. 5 does no more than trigger payment and collection of a tax explicitly charged by s. 4 "in respect of" consumption.

66 As to the argument of McLachlin J. in para. 29 that "[i]f the sales tax were a true consumption tax, each use of taxable goods by the ultimate consumer would attract tax liability", nothing in the Act suggests repetitive impositions of the tax in respect of use or consumption of the same goods, i.e., a consumer who buys a pair of pants is not expected to pay tax every time he or she puts the pants on. One-time imposition is entirely consistent with characterizing this tax as a consumption tax. Moreover, as Ritchie J. pointed out in *Simpsons-Sears*, at p. 889:

> Incidental use such as that which the appellant [Simpsons-Sears] makes of its catalogue is not, in my opinion, "consumption" within the meaning of this section or of s. 4 of the statute.

67 The interpretation of the New Brunswick Act by this Court in *Simpsons-Sears* is therefore fully consistent with the granting of the s. 87 exemption to the respondents. The manner in which "the incidence of taxation falls upon the benefits to be taxed", to quote again from this Court's unanimous judgment in *Williams*, *supra*, at p. 885, is fixed by s. 4, the charging section, and is not altered by later sections in the taxing statute that deal with the legislative infrastructure for the payment and collection of the tax thus imposed.

68 I add parenthetically that the concerns raised by the province about the uncertainties of application and collection of a tax in respect of consumption seem already to be present in the case of out-of-province acquisitions which are consumed within the province which, as stated, the province has historically taxed under s. 8.

The Constitutional History

69 The respondents' interpretation is also consistent with the constitutional history related by McLachlin J. at para. 21 *et seq*. The "consumer" orientation of modern provincial sales taxes stems from the constitutional prohibition on indirect taxation by the provinces. In the early years of this century the provinces faced the dilemma that a tax imposed on a transaction of purchase and sale would not pass constitutional muster because goods purchased can usually be resold for consumption by others. The tax in that event is passed along as part of the purchase price, and thus constitutes a constitutionally impermissible indirect tax. In *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934 (P.C.), the Judicial Committee struck down a provincial tax imposed on purchasers of fuel oil because, as stated, purchasers were not necessarily consumers and could always resell to other purchasers. One solution hit upon by the provinces (and it is evident here in the design of the New Brunswick *Social Services and Education Tax Act*) is to aim the tax explicitly at the consumer who, by definition, is at the end of the line and cannot pass along the goods (and the tax) to anyone else. As pointed out by McLachlin J., however, consumption taxes proved difficult to compute and collect. The provincial strategy was to devise methods of computation and collection without sacrificing the constitutional validity assured to them by imposing a tax "in respect of consumption". The provinces found that they could have their constitutional cake and eat it too by imposing the tax in respect of consumption but making the tax payable at the time of sale, and designating the vendor as a provincial government agent for collection of the tax. This legislative device was upheld as valid in *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45 (P.C.), where the distinction between a transaction tax and a consumption tax was relied upon to uphold the constitutional validity of the

provincial tax as a consumption tax. In that case and as quoted from p. 49, the charging section of the taxing statute read:

> 2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon. [Emphasis added.]

With respect to this wording, Lord Thankerton stated, at p. 59:

> . . . it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and some one else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot effect [*sic*] the nature of the tax. [Emphasis added.]

70 In my opinion, New Brunswick, having levied a tax "in respect of consumption" to finesse any constitutional challenge to its validity, should not be relieved of the consequences of that characterization when the statute is subjected to scrutiny under s. 87 of the *Indian Act*. This reading of *Kingcome Navigation*, *supra*, seems to be confirmed by La Forest J. in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, where he notes at p. 1174:

> A virtually identical provision in the British Columbia *Fuel-oil Tax Act*, R.S.B.C. 1924, c. 251, had been struck down by the Privy Council in *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934, on the ground that since the initial purchaser could always resell the commodity and thereby pass on the tax, it was not a direct tax within the meaning of s. 92(2) of the *Constitution Act, 1867*. Oddly enough, though the *Fuel-oil Tax Act* was shortly afterwards amended so as to impose the tax directly on the consumer, an approach later held by the Privy

> Council to conform to the constitutional requirements of s. 92(2) (see *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45), no such step was taken in respect of the Act impugned in the present case until 1976. [Emphasis added.]

71 At paragraph 25 of her reasons, McLachlin J. draws comfort from *Air Canada* for her characterization of the New Brunswick tax as a transaction tax. In that case, it will be remembered, the charging section of the statute (*Gasoline Tax Act*), quoted in *Air Canada* at p. 1175, provided:

> **25.** . . .
>
> (2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15¢ a gallon on all gasoline purchased by him. . . . [Emphasis added.]

The taxpayer is thus functionally identified as a purchaser rather than as a consumer, and it was held by La Forest J. that references in the statute to "use" and "consumption" of gasoline were words of description rather than words of imposition. See La Forest J., at p. 1187:

> The airlines argued that the tax was a tax on the consumption of gasoline. Since most of that consumption, so far as the airlines were concerned, was in the airspace, which falls outside the province (see *R. in right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303), the tax was imposed outside the province. I cannot agree with this contention. The Act clearly does not impose a consumption tax. The references in the definition to consumption or use merely define the taxpayer, i.e., a purchaser who buys gasoline for his own use. Since the tax is imposed in the province in respect of the purchase of gasoline, it does not matter where the gasoline is consumed, whether it is in the airspace or in another province. [Emphasis added.]

72 As has been noted, the charging section at issue in *Air Canada* was very different from the charging section in this case, and the fact in *Air Canada* a tax on "the

purchaser" was held not to be a consumption tax is, with respect, not determinative here. For our purposes, the question is whether the references in the New Brunswick *Social Services and Education Tax Act* to "consumer" and "consumption" are merely descriptive of the purchaser (as in *Air Canada*) or identify the subject matter of the tax (as in *Kingcome Navigation*). If indeed the New Brunswick tax is charged in respect of the transaction of purchase and sale, then (subject to any constitutional infirmities) it would have to be concluded that as neither the purchaser nor the goods were situated on a reserve at the time of the transaction, the tax is exigible. On the other hand, if the particular design of the New Brunswick statute does indeed impose the tax in respect of consumption (as s. 4 says) and consumption occurs primarily on an Indian reserve, as it does according to the agreed facts, there should be no tax payable.

73 The other case cited in support of the characterization of the tax by McLachlin J. is the Newfoundland trial level judgment in *Miawpukek Indian Band v. Newfoundland (Minister of Finance)* (1995), 130 Nfld. & P.E.I.R. 164. The short passage reproduced by my colleague constitutes the entirety of the learned trial judge's discussion of the point, which is simply stated as a conclusion unsupported by any analysis, and is therefore, in my respectful view, of little assistance to this Court.

Application of the Nowegijick Principle

74 As stated, the charging section (s. 4) of the Act says that it is a tax "in respect of the consumption" and I see nothing else in the Act to contradict that characterization. However, if I am wrong in that analysis, the very least that can be said is that the differences of opinion here and in the courts below about the interplay of the concepts of purchase and consumption in this statute show that reasonable people differ in their interpretation of the New Brunswick Act. In a word, some of the key provisions

are ambiguous in their meaning and effect. In these circumstances, the applicable rule is that any ambiguities in the New Brunswick statute should be resolved in favour of the Indian taxpayers (*Nowegijick*). Unless the Court is now prepared to resile from the fundamental *Nowegijick* rule resolving statutory ambiguities in favour of the Indian taxpayer, then it seems to me s. 87 of the *Indian Act* applies and the appeal must be dismissed.

Giving Indian People a Meaningful Choice

75 In *Williams, supra*, Gonthier J. (for the Court at p. 887) outlined "the choice" confronting Indian people in respect of their personal property:

> Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.

76 In the present case, we are dealing with personal property which, it is agreed, the Indians have chosen to locate and consume on the reserve. New Brunswick seeks to deny Indian people the tax benefit of that choice, not because the Indians have decided to "integrate more fully into the larger commercial world", but because the absence of appropriate retail stores on the reserve compels the Indians to shop off the reserve. The result of the majority decision to allow the appeal in this case is to defeat the assurance in *Williams*, *supra*, and in *Mitchell*, *supra*, that s. 87 is designed to give status Indian people a meaningful tax choice in the location of their personal property.

Subsequent Removal of Property from the Reserve

77 In the foregoing discussion, reference has been made to personal property "primarily located" on a reserve. The concept of "primary location" is intended to avoid the administrative inconvenience of shifting tax treatment every time the personal property in question crosses the boundary of the reserve. In *Mitchell*, *supra*, La Forest J. referred at pp. 132-33, with approval, to the concept of primary or paramount location:

> In another recent decision, *Leighton v. B.C. (Gov't)*, [1989] 3 C.N.L.R. 136, the British Columbia Court of Appeal again had occasion to consider the significance of the phrase "situated on a reserve" in s. 87(*b*) of the *Indian Act*. In what I take to be a sound approach, Lambert J.A. held that when considering whether tangible personal property owned by Indians can benefit from the exemption from taxation provided for in s. 87, it will be appropriate to examine the pattern of use and safekeeping of the property in order to determine if the paramount location of the property is indeed situated on the reserve. I have no doubt that it will normally be appropriate to take a fair and liberal approach to the problem whether the paramount location of tangible property or a chose-in-action is situated on the reserve: see *Metlakatla Ferry Service Ltd. v. B.C. (Gov't)* (1987), 12 B.C.L.R. (2d) 308 (C.A.).

78 It seems to me inconsistent with this "sound approach" for the Court in the present case to conclude that the one and only thread in the "pattern of use and safekeeping" which controls the tax treatment is the *situs* of the personal property at the moment of acquisition, irrespective of the fact that the "paramount location" of the use and consumption of the personal property is "situated on a reserve" in the literal and physical sense of the words in s. 87(1)(*b*) of the *Indian Act*. Even if some importance is to be attached to *situs* at the moment of acquisition, the issue here is not unidimensional, and acquisition should be placed in the larger context of the realities of life on a New Brunswick reserve. The "paramount location" approach endorsed by this Court in *Mitchell*, reflects a purposive approach to s. 87(1)(*b*). For this reason, as well, the provincial Attorney General's argument should be rejected.

Additional Policy Considerations

79 My colleague, McLachlin J., at the conclusion of her discussion of the purpose of s. 87 (paras. 41 to 45), reviews a number of policy arguments designed to show the mixed benefits and burdens for status Indian people across the country if the respondents' contentions are accepted. She points out, correctly, that taxes imposed by Indian bands themselves on retail sales on reserves may become an important source of income, and that there are real advantages for off-reserve Indians in being able to make on-reserve purchases free of tax if a "point of sale" exemption is allowed. On this theory, the goods would then be consumed tax free off the reserve. In my view, however, it is not the purpose of s. 87 to allow merchants on reserves to compete on a tax-free basis with off-reserve merchants for business in the broader community. Moreover, in terms of financing Indian self-government, the present wording of s. 87 is not immutable. The s. 87 exemption is the creature of an ordinary federal statute and can be expanded or redefined as Parliament sees fit. The successful financing of Indian government does not turn on the present wording of s. 87, or on the outcome of this appeal.

Disposition

80 I would dismiss the appeal with costs.

Appeal allowed, GONTHIER *and* BINNIE JJ. *dissenting*.

Solicitor for the appellants: The Attorney General for New Brunswick, Fredericton.

Solicitors for the respondents: Davis & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitors for the interveners the Grand Council of the Crees (Eeyou Estchee), the Cree Regional Authority, Matthew Coon Come, Violet Pachanos and Bill Namagoose: Byers, Casgrain, Montreal.

1999 CarswellMan 592, [2000] 3 W.W.R. 606, 143 Man. R. (2d) 85, [2000] 2 C.N.L.R. 216, 2 C.N.L.R. 216

R. v. MacLaurin

Her Majesty The Queen, Appellant and William Francis MacLaurin, Respondent

Manitoba Court of Queen's Bench

Keyser J.

Judgment: December 23, 1999
Docket: Winnipeg Centre CR 99-01-20572

Proceedings: reversing [1999] 3 C.N.L.R. 274 (Man. Prov. Ct.)

Counsel: *Kenneth J. Tyler*, for Crown.

Ronald Schmalcel, for Respondent/Accused.

Subject: Public; Constitutional; Provincial Tax

Taxation --- Provincial and territorial taxes — Manitoba — Tobacco tax.

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Native law --- Taxation — Miscellaneous issues

Taxpayer was Status Indian residing and working on reserve in Ontario — Taxpayer was stopped while driving through Manitoba — Taxpayer was found in possession of cigarettes which had not been purchased through licensed dealer or collector and cigarettes were seized — Taxpayer was charged with possessing cigarettes and tobacco in excess of prescribed limit — Taxpayer was acquitted — Crown appealed — Appeal was allowed — Provincial laws were applicable to Indians as long as they did not touch upon "indianness" of Indian — Tobacco Tax Act did not affect taxpayer's "indianness" — Sections 9(3.1) and 9(3.4) of Tobacco Tax Act were not taxing provisions as they only restricted possession of tobacco — Report or payment required was not taxation — Goods in question were not on reserve — Tobacco Tax Act was consistent with s. 87 of Indian Act — Tobacco Tax Act was not in operational conflict with Indian Act — Taxpayer was not collector and products were not obtained from dealer or collector licensed in Manitoba — Taxpayer did not make report or payment as required by Tobacco Tax Act — Taxpayer was convicted — Indian Act, R.S.C. 1985, c. I-5, ss. 87, 88, 89 — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, ss. 9(3.1), 9(3.4).

Taxation --- Provincial taxation — Tobacco tax

Taxpayer was Status Indian residing and working on reserve in Ontario — Taxpayer was stopped while driving through Manitoba — Taxpayer was found in possession of cigarettes which had not been purchased through licensed dealer or collector and cigarettes were seized — Taxpayer was charged with possessing cigarettes and tobacco in excess of prescribed limit — Taxpayer was acquitted — Crown appealed — Appeal was allowed — Provincial laws were applicable to Indians as long as they did not touch upon "indianness" of Indian — Tobacco Tax Act did not affect taxpayer's "indianness" — Sections 9(3.1) and 9(3.4) of Tobacco Tax Act were not taxing provisions as they only restricted possession of tobacco — Report or payment required was not taxation — Goods in question were not on reserve — Tobacco Tax Act was consistent with s. 87 of Indian Act — Tobacco Tax Act was not in operational conflict with Indian Act — Taxpayer was not collector and products were not obtained from dealer or collector licensed in Manitoba — Taxpayer did not make report or payment as required by Tobacco Tax Act — Taxpayer was convicted — Indian Act, R.S.C. 1985, c. I-5, ss. 87, 88, 89 — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, ss. 9(3.1), 9(3.4).

Cases considered by *Keyser J.*:

Kingsclear Indian Band v. J.E. Brooks & Associates Ltd. (1991), 2 P.P.S.A.C. (2d) 151, [1992] 2 C.N.L.R. 46, (sub nom. *Brooks (J.E.) & Associates Ltd. v. Kingsclear Indian Band)* 118 N.B.R. (2d) 290, (sub nom. *Brooks (J.E.) & Associates Ltd. v. Kingsclear Indian Band)* 296 A.P.R. 290 (N.B. C.A.) — considered

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138 (S.C.C.) — referred to

R. v. Pickering, [1996] 6 W.W.R. 291, 4 G.T.C. 6155 (Man. Prov. Ct.) — considered

R. v. Pickering, 169 D.L.R. (4th) 749, 132 C.C.C. (3d) 306, 135 Man. R. (2d) 195, [1999] 9 W.W.R. 120 (Man. Q.B.) — referred to

R. v. Tenale, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 33, (sub nom. *R. v. Dick)* 62 N.R. 1, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129 (S.C.C.) — considered

Tseshaht Indian Band v. British Columbia, (sub nom. *Tseshaht Band v. British Columbia)* 69 B.C.L.R. (2d) 1, 15 B.C.A.C. 1, 27 W.A.C. 1, (sub nom. *Tseshaht Band v. British Columbia)* [1992] 4 C.N.L.R. 171, 94 D.L.R. (4th) 97, 5 T.C.T. 4248 (B.C. C.A.) — considered

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1998), 165 D.L.R. (4th) 126, 170 N.S.R. (2d) 36, 515 A.P.R. 36, [1999] 1 C.N.L.R. 277 (N.S. C.A.) — referred to

Statutes considered:

Indian Act, R.S.C. 1985, c. I-5

Generally — considered

s. 87 — considered

s. 87(1) — considered

s. 87(2) — considered

s. 88 — considered

s. 89 — referred to

Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80

Generally — considered

s. 1 "collector" — considered

s. 9(1) — referred to

s. 9(2) — referred to

s. 9(3) — referred to

s. 9(3.1) [en. 1988-89, c. 19, s. 60(1)] — considered

s. 9(3.4) [en. 1989-90, c. 15, s. 78(4)] — considered

s. 26(2) — pursuant to

APPEAL by Crown from acquittal reported at [1999] 3 C.N.L.R. 274 (Man. Prov. Ct.).

***Keyser J.*:**

1 The respondent William Francis MacLaurin ("the respondent") was acquitted by His Honour Judge Kopstein on March 5, 1999, of two charges under the *Tobacco Tax Act*, R.S.M. 1988, c. T80, that he:

> 1. on or about the 11th day of May, 1994, in the Rural Municipality of Westbourne, in the Province of Manitoba, being a person who has not been appointed a collector under s. 9(1) of the ***Tobacco Tax Act***, unlawfully failed to comply with s. 9(3.1) of the ***Act*** by being in possession of 50,800 cigarettes and 11,450 grams of tobacco, more or less, which he did not acquire from a dealer or collector licensed in Manitoba without having made the report or payment required under ss. 9(2) or 9(3) of the ***Act***, contrary to subsection 26(2) of the ***Act***, and
>
> 2. on the 11th day of May, 1994, in the Rural Municipality of Westbourne, in the Province of Manitoba, unlawfully did contravene s. 9(3.4) of the ***Tobacco Tax Act*** by possessing 5,4000 cigarettes, more or less, that were marked "tobacco product," marked for tax purposes of the Province of Ontario, and did thereby commit an offence contrary to s. 26(2) of the ***Act***.

The appellant Her Majesty the Queen ("the appellant") appeals from these acquittals.

2 The respondent was stopped near Gladstone, in Manitoba, in May of 1994 and found in possession of the amounts of tobacco as outlined in the charges above. The learned trial judge, after hearing evidence, accepted the respondent's testimony that he was transporting the tobacco and cigarettes in question from a reserve in Ontario to a reserve in Saskatchewan for sale to one Josie Worm. He determined that ss. 9(3.1) and 9(3.4) of the

Tobacco Tax Act were constitutionally inapplicable to the respondent as being inconsistent with s. 87 of the *Indian Act*, R.S.C. 1985, c. I-5. In his reasons for decision, the learned trial judge determined that the legislative authority of Parliament over the property and civil rights of Indians is exclusive and that, therefore, no restrictions could be imposed upon the civil or property rights of Indians unless these restrictions were authorized by the *Indian Act*..

3 It is clear that only Parliament can legislate about Indians, but it does not necessarily follow that provincial laws cannot properly affect the civil and property rights of Indians. This is expressly dealt with by s. 88 of the *Indian Act*, which reads:

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

The learned trial judge determined that s. 88 could not be used to allow a provincial law of general application to dispossess an Indian of his or her property rights. Counsel for the appellant submits that the case of *R. v. Tenale*, [1985] 2 S.C.R. 309 (S.C.C.) has removed any uncertainty as to the applicability of provincial laws to Indians. In that case, Mr. Justice Beetz, for a unanimous court, described two categories of provincial laws:

> (i) those that would apply to Indians on their own without the assistance of s. 88 of the *Indian Act*, and
>
> (ii) those that would apply by virtue of that section, which, in fact, incorporated provincial laws of general application and gave them the force of federal law.

He stated at pp. 326-327:

> I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians.
>
> Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88 in 1951 - then numbered s. 87 (1951 (Can.), c. 29) - and quite apart from s. 88....
>
> I have come to the view that it is the laws of the second category that s. 88 refers....

Therefore, if a provincial law does not touch upon the Indianness of an Indian, then the provincial law will be applicable. In this case, there was no evidence before the court as to the *Tobacco Tax Act* affecting the respondent's Indianness, and thus, *prima facie*, the provincial legislation would be applicable to Indians unless directly inconsistent with the *Indian Act*.

4 Are the provisions of the *Tobacco Tax Act* in question inconsistent with s. 87 of the *Indian Act*? Although

the learned trial judge appears to have found such an inconsistency, it is unclear on what that is based. Section 87 reads as follows:

> (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

5 Counsel for the appellant argues that there is no conflict between the provisions of the *Tobacco Tax Act* in question and s. 87 of the *Indian Act* for two reasons:

> (i) the report or payment required is not taxation; and
>
> (ii) the goods in question were not on a reserve.

6 Counsel for the respondent takes the position that the impugned sections are in fact taxing provisions and points out in support of this that there is no room to claim an exemption on the forms required to be completed.

7 The learned trial judge agreed with the argument of counsel for the respondent and found the provisions to be taxing provisions. He used the existence of the penalty provisions found in the *Act* to support his conclusion, since the court is mandated to penalize an individual found guilty of a breach in the amount of three times any tax evaded. Counsel for the appellant maintains that tying a penalty provision to an amount of tax alleged to be evaded is of no assistance in determining whether the sections are taxing provisions. In fact, if the breach is for having failed to make a report, but no payment of tax is required, then the penalty required of three times the tax evaded would be of no consequence. In any event, the finding of the learned trial judge is completely opposite his finding in the earlier case of *R. v. Pickering*, [1996] 6 W.W.R. 291 (Man. Prov. Ct.), where he stated at p. 312:

> ...Subsections (3.1) and (3.4) are remedial provisions in that they are designed to prevent a loss of revenue to which the ***Act*** entitles the Province upon the possession of tobacco in Manitoba. Subsections (3.1) and (3.4) of s. 9 are not substantive provisions within the ***Act***. They do not create a law authorizing the imposition of a tax. (emphasis added)

This finding was upheld by Kennedy J. in the Manitoba Court of Queen's Bench ([1999] 9 W.W.R. 120 (Man. Q.B.)).

8 Since there is no evidence before the court on the question of whether or not the *Tobacco Tax Act* affects the Indianness of the respondent, the respondent would have to demonstrate an operational conflict between the section of the *Indian Act* and the impugned provincial law, that is to say, there must be evidence to indicate that compliance with one law leads to the breach of the other (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R.

161 (S.C.C.)).

9 Sections 9(3.1) and 9(3.4) restrict possession of tobacco products, in my view, and do not impose a tax. Failure to comply with the provincial law leads to the possibility of prosecution for that failure and not taxation. There is no question that the respondent is not a "collector" as defined in the *Act* and that the product was not acquired from a dealer or collector licensed in Manitoba. There is also no question that the respondent did not either make a report or any payment required pursuant to the *Act*. Counsel for the respondent urges the court to read disjunctively the requirement to either make a report or payment. In my view, this makes no sense. The only reasonable interpretation is that the *Act* obligates an individual in possession of tobacco products to report, if such is required, or to pay, if such is required. In my view, if you need not pay taxes, it does not follow that you also need not report. The respondent could have complied with the reporting provisions of s. 9(3.1) and still claimed an exemption pursuant to s. 87 of the *Indian Act* (see *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)* (1998), [1999] 1 C.N.L.R. 277 (N.S. C.A.)).

10 The goods not subject to taxation, in any event, must be goods located on a reserve or whose paramount location is on a reserve. There is no question that when the goods were located they were not physically located on a reserve. In addition, the learned trial judge found, at p. 283 of his decision, that:

> To attempt to force the facts of the present case into either one of the two categories:
>
> (i) paramount location, or
>
> (ii) location determined by point of sale,
>
> would be to stretch both of them beyond their legitimate limits.

Counsel for the respondent concedes that the success of his case depends on a finding of paramount location, but argues that the learned trial judge did not properly apply the test for that. He refers to the case of *Kingsclear Indian Band v. J.E. Brooks & Associates Ltd.* (1991), [1992] 2 C.N.L.R. 46 (N.B. C.A.). In that case, a bus used to transport children off reserve to school and back to the reserve at the end of the day was seized while off reserve by a creditor with a judgment against the band. In the majority reasons written by Stratton C.J.N.B., he quashed the seizure, stating at p. 53 that:

> ...the evidence as to the pattern of use of the school bus together with the discernible nexus between the bus and the Kingsclear Reserve in the provision of education to Indian children residing on the reserve, in my opinion establishes that the "permanent location" of the school bus was on the Kingsclear Reserve.

Counsel for the appellant counters that *Kingsclear* can be distinguished from the case at bar because in that case a pattern of usage had been established that led to an evidentiary basis for a finding of paramount location on a reserve. Such an evidentiary basis is lacking in this case.

11 In addition, in *Union of Nova Scotia Indians* (N.S.C.A., *supra*) at p. 284, Jones J.A. quotes, with approval, the decision of the British Columbia Court of Appeal in *Tseshaht Indian Band v. British Columbia* (1992), 94 D.L.R. (4th) 97 (B.C. C.A.), which found that, "Section 87 does not exempt Indians from prepaying the tax to wholesalers on purchases made off the reserve as contended by the intervenor". In other words, the fact that the defendant may have had to prepay tax before asserting his right to an exemption does not mean that the law is inoperative as breaching s. 87 of the *Indian Act*.

12 The argument of whether the sections of the *Tobacco Tax Act* in question are inconsistent with s. 89 of the *Indian Act* was raised by counsel for the respondent at trial, but was not the subject of the learned trial judge's findings. As well, counsel for the respondent did not strenuously argue this on appeal. I simply note in passing that the "property" mentioned in s. 89 which is protected from seizure must, as with s. 87, be property situated on a reserve. I need go no further because of the findings on this area with respect to the s. 87 argument.

13 In conclusion, there not being any conflict between the operations of the impugned sections of the *Tobacco Tax Act* and any potential exemption under the *Indian Act*, it is my view that the acquittals entered by the learned trial judge were in error. They will be set aside and convictions entered with respect to both counts.

Appeal allowed.

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1999 CarswellMan 592, [2000] 3 W.W.R. 606, 143 Man. R. (2d) 85, [2000] 2 C.N.L.R. 216, 2 C.N.L.R. 216

R. v. MacLaurin

Her Majesty The Queen, Appellant and William Francis MacLaurin, Respondent

Manitoba Court of Queen's Bench

Keyser J.

Judgment: December 23, 1999
Docket: Winnipeg Centre CR 99-01-20572

Proceedings: reversing [1999] 3 C.N.L.R. 274 (Man. Prov. Ct.)

Counsel: *Kenneth J. Tyler*, for Crown.

Ronald Schmalcel, for Respondent/Accused.

Subject: Public; Constitutional; Provincial Tax

Taxation --- Provincial and territorial taxes — Manitoba — Tobacco tax.

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Native law --- Taxation — Miscellaneous issues

Taxpayer was Status Indian residing and working on reserve in Ontario — Taxpayer was stopped while driving through Manitoba — Taxpayer was found in possession of cigarettes which had not been purchased through licensed dealer or collector and cigarettes were seized — Taxpayer was charged with possessing cigarettes and tobacco in excess of prescribed limit — Taxpayer was acquitted — Crown appealed — Appeal was allowed — Provincial laws were applicable to Indians as long as they did not touch upon "indianness" of Indian — Tobacco Tax Act did not affect taxpayer's "indianness" — Sections 9(3.1) and 9(3.4) of Tobacco Tax Act were not taxing provisions as they only restricted possession of tobacco — Report or payment required was not taxation — Goods in question were not on reserve — Tobacco Tax Act was consistent with s. 87 of Indian Act — Tobacco Tax Act was not in operational conflict with Indian Act — Taxpayer was not collector and products were not obtained from dealer or collector licensed in Manitoba — Taxpayer did not make report or payment as required by Tobacco Tax Act — Taxpayer was convicted — Indian Act, R.S.C. 1985, c. I-5, ss. 87, 88, 89 — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, ss. 9(3.1), 9(3.4).

Taxation --- Provincial taxation — Tobacco tax

Taxpayer was Status Indian residing and working on reserve in Ontario — Taxpayer was stopped while driving through Manitoba — Taxpayer was found in possession of cigarettes which had not been purchased through licensed dealer or collector and cigarettes were seized — Taxpayer was charged with possessing cigarettes and tobacco in excess of prescribed limit — Taxpayer was acquitted — Crown appealed — Appeal was allowed — Provincial laws were applicable to Indians as long as they did not touch upon "indianness" of Indian — Tobacco Tax Act did not affect taxpayer's "indianness" — Sections 9(3.1) and 9(3.4) of Tobacco Tax Act were not taxing provisions as they only restricted possession of tobacco — Report or payment required was not taxation — Goods in question were not on reserve — Tobacco Tax Act was consistent with s. 87 of Indian Act — Tobacco Tax Act was not in operational conflict with Indian Act — Taxpayer was not collector and products were not obtained from dealer or collector licensed in Manitoba — Taxpayer did not make report or payment as required by Tobacco Tax Act — Taxpayer was convicted — Indian Act, R.S.C. 1985, c. I-5, ss. 87, 88, 89 — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, ss. 9(3.1), 9(3.4).

Cases considered by *Keyser J.*:

Kingsclear Indian Band v. J.E. Brooks & Associates Ltd. (1991), 2 P.P.S.A.C. (2d) 151, [1992] 2 C.N.L.R. 46, (sub nom. *Brooks (J.E.) & Associates Ltd. v. Kingsclear Indian Band)* 118 N.B.R. (2d) 290, (sub nom. *Brooks (J.E.) & Associates Ltd. v. Kingsclear Indian Band)* 296 A.P.R. 290 (N.B. C.A.) — considered

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138 (S.C.C.) — referred to

R. v. Pickering, [1996] 6 W.W.R. 291, 4 G.T.C. 6155 (Man. Prov. Ct.) — considered

R. v. Pickering, 169 D.L.R. (4th) 749, 132 C.C.C. (3d) 306, 135 Man. R. (2d) 195, [1999] 9 W.W.R. 120 (Man. Q.B.) — referred to

R. v. Tenale, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 33, (sub nom. *R. v. Dick)* 62 N.R. 1, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129 (S.C.C.) — considered

Tseshaht Indian Band v. British Columbia, (sub nom. *Tseshaht Band v. British Columbia)* 69 B.C.L.R. (2d) 1, 15 B.C.A.C. 1, 27 W.A.C. 1, (sub nom. *Tseshaht Band v. British Columbia)* [1992] 4 C.N.L.R. 171, 94 D.L.R. (4th) 97, 5 T.C.T. 4248 (B.C. C.A.) — considered

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1998), 165 D.L.R. (4th) 126, 170 N.S.R. (2d) 36, 515 A.P.R. 36, [1999] 1 C.N.L.R. 277 (N.S. C.A.) — referred to

Statutes considered:

Indian Act, R.S.C. 1985, c. I-5

Generally — considered

s. 87 — considered

s. 87(1) — considered

1998 CarswellMan 599, [**1998**] 4 C.N.L.R. 194, 4 C.N.L.R. 194

R. v. Fontaine

In the Matter of: The Tobacco Tax Act, C.C.S.M. c. T80, section 3.1(2)

In the Matter of: The Indian Act, R.S.C. 1985, c. I-5, ss. 87 and 89

Her Majesty The Queen, Informant and Marjory Fontaine, Accused

Manitoba Provincial Court

Guy Prov. J.

Judgment: April 4, 1998

Counsel: *Mr. K. Tyler*, for the Crown.

Mr. R. Schmalcel, for the Accused.

Subject: Constitutional; Public; Tax — Miscellaneous

Taxation --- Other federal taxes — Tobacco tax — Seizure and forfeiture.

Taxation --- Federal taxation — Tobacco — Seizure and forfeiture

Accused was native Indian — Accused sold tobacco products to non-natives — Accused claimed that Tobacco Tax Act was inconsistent with Indian Act — Constitutional challenge was dismissed — Section 3.1(2) of Tobacco Tax Act did not provide for payment of tax but was one component of legislative scheme that protected integrity of marking system and enforcement of tax collection system — Tax was on consumer — Section 3.1(2) of Tobacco Tax Act was not obligation to pay tax and thus was not inconsistent with Indian Act — Indian Act protected against seizure with respect to civil process but not seizure pursuant to criminal or regulatory offence — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, s. 3.1(2) — Indian Act, R.S.C. 1985, c. I-5, s. 87, 89.

Native law --- Taxation — Miscellaneous issues

Accused was native Indian — Accused sold tobacco products to non-natives — Accused claimed that Tobacco Tax Act was inconsistent with Indian Act — Constitutional challenge was dismissed — Section 3.1(2) of Tobacco Tax Act did not provide for payment of tax but was one component of legislative scheme that protected integrity of marking system and enforcement of tax collection system — Tax was on consumer — Section 3.1(2) of Tobacco Tax Act was not obligation to pay tax and thus was not inconsistent with Indian Act — Indian Act

protected against seizure with respect to civil process but not seizure pursuant to criminal or regulatory offence — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, s. 3.1(2) — Indian Act, R.S.C. 1985, c. I-5, s. 87, 89.

Cases considered by *Guy Prov. J.*:

Mitchell v. Sandy Bay Indian Band, (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46 (S.C.C.) — distinguished

R. v. Johnson (1996), 156 N.S.R. (2d) 71, 461 A.P.R. 71, [1997] 3 C.N.L.R. 206 (N.S. C.A.) — considered

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1988), 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, 227 A.P.R. 121, [1989] 1 T.S.T. 3055, 2 T.C.T. 4244, [1989] 2 C.N.L.R. 168 (N.S. T.D.) — considered

Statutes considered:

Constitutional Questions Act, S.M. 1986-87, c. 31; C.C.S.M., c. C180

s. 7 — pursuant to

Indian Act, R.S.C. 1985, c. I-5

s. 87 — considered

s. 89 — considered

Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80

Generally — considered

s. 3.1(2) [en. 1995, c. 5, s. 5] — considered

CONSTITUTIONAL CHALLENGE by accused.

***Guy Prov. J.*:**

I. Issue

1 By Notice of Constitutional Question dated August 20, 1997, the accused provided notice pursuant to section 7 of *The Constitutional Questions Act* that she would seek a Declaration that:

> Subsection 3.1(2) of the *Tobacco Tax Act* (Manitoba), R.S.M. 1988, c. T80 (the "*Tobacco Tax Act*" is inconsistent with sections 87 and 89 of the *Indian Act* (Canada), R.S.C. 1985, c. 1-5, (the "*Indian Act*) and has no force or effect in respect of tobacco on a reserve by a person who is an 'Indian' within the meaning of the *Indian Act*.

II. Facts

2 The facts of the case are comprised of Exhibit 1, Agreed Statement of Facts filed September 4, 1997, Exhibit 2, Amended Agreed Statement of Facts filed February 23, 1998 and the testimony of the accused Marjory Fontaine.

3 The principal purpose of the *viva voce* evidence was to provide to the Court evidence of to whom the tobacco products were being sold by the accused. Although the accused intended to sell to Natives, she realized non-Natives were also obtaining cigarettes.

> Q. And to whom were you selling cigarettes at the time?
>
> A. Except of two - maybe two per cent mostly to Natives. (Transcript of Proceedings at p. 2)
>
> Q. ...but I would like to confirm your testimony that at least some of your sales in the period relevant to this charge were to non-Indians to your knowledge?
>
> A. A few, yes. (Transcript of Proceedings at p. 6, line 12)
>
> A. I was aware that some non-status people were sending friends to buy cigarettes, yes. (Transcript of Proceedings at p. 6, line 23)

III. Argument - Section 87

4 Counsel for the accused offers two cases in support of his argument that subsection 3.1(2) of the "*Tobacco Tax Act*" is inconsistent with section 87 of the *Indian Act*.

> The first of these is the case of *R. v. Johnson* (1996), [1997] 3 C.N.L.R. 206 (N.S. C.A.). Counsel argues that unlike the facts in the *Johnson* case, the accused in this case did not enter the "commercial mainstream" and therefore did not become a retail vendor for the purpose of the provision of the *Tobacco Tax Act*. Further, counsel argues that there is no system in place in Manitoba to acquire tax-free cigarettes and thus section 87 should provide the exemption.
>
> The second case counsel relies on with respect to the section 87 exemption is that of the *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)* (1988), 54 D.L.R. (4th) 639 (N.S. T.D.). It is clear from this case that a tax had to be paid (or an amount equal to the tax) initially and then a refund claimed. The Court held that the legislation requiring the payment of this tax impinged on the exemption conferred by section 87 of the *Indian Act* and the federal legislation must therefore prevail.

5 The Crown argues that two general principles must be kept in mind when interpreting such legislation. The first is that as a matter of general principle, section 3.1(2) of the *Tobacco Tax Act* is a law of general application and as such applies to Indian Reserves.

6 Secondly, there must be a conflict or inconsistency between the provincial law of general application regarding section 3.1(2) and the federal law applicable in section 87 or section 89 of the *Indian Act*. The Crown argues that if it is possible to obey one law without violating the other, then there is no conflict nor inconsist- ency.

7 Although the first general principle appears to be settled in law, the second area of whether a "conflict" exists in the case before the Court is the issue to be decided and has been the subject matter of much conflicting

opinion.

8 With respect to the case law relied upon by the defence with respect to section 87, the Crown agrees with the conclusion reached in the *Union of Nova Scotia Indians* case because on the facts there was an inconsistency between the provincial legislation and section 87 as the Indians were required to pay the tax - a clear conflict with the exemption of section 87 of the *Indian Act*. The Crown argues that is not the facts in the present case.

9 With respect to the *Johnson* case, the Crown disputes the defence's interpretation. The Crown argues and cites case law to the effect that section 3.1(2) is a general application designed for the effective collection of the tax and applies to retail vendors on a Reserve. The Crown argues that section 3.1(2) prohibits possession and is not designed to collect tax but to ensure the integrity of the marking system and the enforcement of the tax collection system. Therefore, there is no inconsistency with section 87 of the *Indian Act*. The tax to be imposed is on the consumer or purchaser.

IV. Argument - Section 89

10 With respect to the section 89 argument, the defence relies on *Mitchell v. Sandy Bay Indian Band*, [1990] 3 C.N.L.R. 46 (S.C.C.). The defence argues reliance should be placed on this case to find that section 3.1(2) of the *Tobacco Tax Act* is inconsistent with section 89 of the *Indian Act* which exempts the property of Indians from seizure.

11 The Crown argues that section 3.1(2) has no seizure or forfeiture provision and argues that the proper interpretation of section 89 is to provide protection of seizure from civil process not seizures pursuant to criminal or regulatory offence investigations for the protection of evidence.

V. Conclusion

12 With respect to the constitutional challenge involving section 89, I am of the view that the *Mitchell* case is distinguishable on the facts. That case being confined to civil remedies such as the item in question, attachment of money as part of a commercial agreement. In my view, that is consistent with the interpretation of section 89 of the *Indian Act* in protecting items from seizure through the civil process. That is clearly distinguishable from the facts of the present case and the constitutional challenge based on section 89 of the *Indian Act* is dismissed.

13 The remaining issue of the constitutional challenge to section 3.1(2) upon the claim of inconsistency with section 87 of the *Indian Act* is less clear.

14 First of all, surely it cannot be the law that the collection of tax by the retail vendor need not take place if only 2% of the consumers are non-Native. Surely, the point is that the obligation of Indians on the reserve to comply with the provisions of the *Tobacco Tax Act* unless exempted by the provision of section 87.

15 I agree that section 3.1(2) is not a provision for the payment of tax but just one component of a legislative scheme that protects the integrity of a marking system and the enforcement of the tax collection system. This provision standing by itself does not conflict with section 87 of the *Indian Act* - it is not an obligation to pay any tax. It is a provision of general application designed for the effective collection of the tax (by delineating the packaging of the cigarettes in the possession of the vendor) and applies to all retail vendors on a reserve. The tax is on the consumer or purchaser, be they only 2% of the consumers or more. This provision allows for the con-

trol and method of determining the taxes payable and does not conflict with the exemption of section 87 of the *Indian Act*.

16 Therefore, the constitutional challenge founded on section 87 of the *Indian Act* is dismissed.

17 As a result of these findings, the essential ingredients of the offence have been established beyond a reasonable doubt and a conviction on the charge is entered.

Constitutional challenge dismissed.

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1998 CarswellNS 298, 165 D.L.R. (4th) 126, 170 N.S.R. (2d) 36, 515 A.P.R. 36, [1999] 1 C.N.L.R. 277, [1998] N.S.J. No. 301, [1998] N.S.J. No. 477, 1 C.N.L.R. 277

1998 CarswellNS 298, 165 D.L.R. (4th) 126, 170 N.S.R. (2d) 36, 515 A.P.R. 36, [1999] 1 C.N.L.R. 277, [**1998**] N.S.J. No. 301, [**1998**] N.S.J. No. 477, 1 C.N.L.R. 277

Union of Nova Scotia Indians v. Nova Scotia (Attorney General)

Union of Nova Scotia Indians, a body corporate under the Societies Act, R.S.N.S. 1989, c.435, on behalf of all registered Indians in Nova Scotia, and Paul Kenneth Francis on his own behalf and on behalf of all registered Indians in Nova Scotia, Appellants and Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia, Respondent

Nova Scotia Court of Appeal

Roscoe, Jones, Bateman JJ.A.

Heard: May 26, 1998
Judgment: July 21, 1998
Docket: C.A. 144562

Proceedings: affirming (November 27, 1997), Doc. S.H. 138597/97 (N.S.S.C. [In Chambers])

Counsel: *Bruce H. Wildsmith, Q.C.*, for the Appellants.

William M. Wilson, Q.C., for the Respondent.

Subject: Public; Constitutional; Corporate and Commercial; Provincial Tax

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Taxation --- Provincial and territorial taxes — Nova Scotia — Tobacco tax.

Native law --- Constitutional issues — Taxation — Miscellaneous issues

Plaintiff Indian unsuccessfully applied for declaration that Indians had right to purchase, store and sell tobacco products on reserves without payment of tax — Plaintiff appealed — Province established quota system which permitted sale of certain amount of tax free tobacco to Indians on reserves — Wholesaler and retailer of tobacco were subject to tax requirements even though purchase by consumer was exempt from tax — Tax relief was available to Indian consumer, not wholesaler or retailer — As wholesaler, plaintiff was required to collect tax from retailer to whom he sold tobacco — There was no way for plaintiff to ensure that retailer would sell tobacco just to Indians — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, s. 91 — Indian Act, R.S.C. 1985, c. I-5, s. 87 — Revenue Act, S.N.S. 1995-96, c. 17 — Tobacco Tax Act,

R.S.N.S. 1989, c. 470.

Native law --- Taxation — Miscellaneous issues

Plaintiff Indian unsuccessfully applied for declaration that Indians had right to purchase, store and sell tobacco products on reserves without payment of tax — Plaintiff appealed — Province established quota system which permitted sale of certain amount of tax free tobacco to Indians on reserves — Wholesaler and retailer of tobacco were subject to tax requirements even though purchase by consumer was exempt from tax — Tax relief was available to Indian consumer, not wholesaler or retailer — As wholesaler, plaintiff was required to collect tax from retailer to whom he sold tobacco — There was no way for plaintiff to ensure that retailer would sell tobacco just to Indians — Indian Act, R.S.C. 1985, c. I-5, s. 87 — Revenue Act, S.N.S. 1995-96, c. 17 — Tobacco Tax Act, R.S.N.S. 1989, c. 470.

The plaintiff Indian resided on a reserve and was a wholesaler of tobacco products. He unsuccessfully applied for a declaration that Indians had a right to purchase, store and sell tobacco products on reserves without collecting tax. The plaintiff appealed.

Held: The appeal was dismissed.

Per Bateman J.A. (Roscoe J.A. concurring): The province established a quota system which permitted the sale of a certain amount of tax free tobacco to Indians living on reserves. The wholesaler and retailer of the tobacco products were subject to tax requirements even though the Indian consumers were exempt from tax obligations. Tax relief was only available to the Indian purchaser, not the Indian wholesaler or retailer. There was no way for the plaintiff to ensure that the retailer to whom he sold the tobacco products would sell just to Indians. The plaintiff was required to collect tax from the retailer.

Per Jones J.A. (concurring): Indians do not have the right to purchase and transport tobacco products from reserve to reserve, for the purpose of resale, exempt from restrictions imposed by provincial laws.

Cases considered by *Jones J.A.*:

Francis v. R., [1956] S.C.R. 618, 56 D.T.C. 1077, 3 D.L.R. (2d) 641 (S.C.C.) — referred to

Mitchell v. Sandy Bay Indian Band, (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46 (S.C.C.) — referred to

R. v. Johnson (1993), 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129, (sub nom. *Johnson v. R.)* 1 G.T.C. 6150 (N.S. C.A.) — considered

R. v. Johnson (1996), 156 N.S.R. (2d) 71, 461 A.P.R. 71, [1997] 3 C.N.L.R. 206 (N.S. C.A.) — considered

R. v. Murdock (1996), 38 C.R.R. (2d) 15, 154 N.S.R. (2d) 1, 452 A.P.R. 1, [1997] 2 C.N.L.R. 103 (N.S. C.A.) — considered

Tseshaht Indian Band v. British Columbia, (sub nom. *Tseshaht Band v. British Columbia)* 69 B.C.L.R. (2d) 1, 15 B.C.A.C. 1, 27 W.A.C. 1, (sub nom. *Tseshaht Band v. British Columbia)* [1992] 4 C.N.L.R. 171, 94 D.L.R. (4th) 97, 5 T.C.T. 4248 (B.C. C.A.) — considered

Union of New Brunswick Indians v. New Brunswick (Minister of Finance) (1996), 135 D.L.R. (4th) 193, 178 N.B.R. (2d) 1, 454 A.P.R. 1, [1997] 1 C.N.L.R. 213, 4 G.T.C. 6178 (N.B. C.A.) — considered

Union of New Brunswick Indians v. New Brunswick (Minister of Finance) (1998), 227 N.R. 92, 161 D.L.R. (4th) 193 (S.C.C.) — considered

Cases considered by *Bateman J.A.*:

Hill v. Ontario (Minister of Revenue) (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537, [1986] 1 C.N.L.R. 22 (Ont. H.C.) — referred to

Mitchell v. Sandy Bay Indian Band, (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46 (S.C.C.) — referred to

R. c. Adams, 110 C.C.C. (3d) 97, 202 N.R. 89, 138 D.L.R. (4th) 657, [1996] 3 S.C.R. 101, [1996] 4 C.N.L.R. 1 (S.C.C.) — considered

R. c. Côté , 110 C.C.C. (3d) 122, 202 N.R. 161, 138 D.L.R. (4th) 385, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26 (S.C.C.) — considered

R. v. Johnson (1993), 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129, (sub nom. *Johnson v. R.)* 1 G.T.C. 6150 (N.S. C.A.) — considered

R. v. Murdock (1996), 38 C.R.R. (2d) 15, 154 N.S.R. (2d) 1, 452 A.P.R. 1, [1997] 2 C.N.L.R. 103 (N.S. C.A.) — considered

R. v. Nikal, [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal)* 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178 (S.C.C.) — considered

Union of New Brunswick Indians v. New Brunswick (Minister of Finance) (1998), 227 N.R. 92, 161 D.L.R. (4th) 193 (S.C.C.) — considered

Williams v. R., 92 D.T.C. 6320, 41 C.C.E.L. 1, (sub nom. *Williams v. Canada)* 90 D.L.R. (4th) 129, (sub nom. *Williams v. Minister of National Revenue)* 136 N.R. 161, (sub nom. *Williams v. Minister of National Revenue)* 53 F.T.R. 104 (note), (sub nom. *Williams v. Canada)* [1992] 1 C.T.C. 225, (sub nom. *Williams v. Canada)* [1992] 3 C.N.L.R. 181, [1992] 1 S.C.R. 877 (S.C.C.) — considered

Statutes considered by *Jones J.A.*:

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 92 ¶ 2 — referred to

Indian Act, R.S.C. 1985, c. I-5

s. 87 — considered

s. 87(1)(b) — considered

s. 88 — considered

Revenue Act, S.N.S. 1995-96, c. 17

Generally — considered

s. 34(1) — considered

s. 35 — considered

s. 37 — considered

s. 38 — considered

s. 39 — considered

s. 40 — considered

Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10

Generally — referred to

Tobacco Tax Act, R.S.N.S. 1989, c. 470

Generally — considered

s. 25(2) — considered

Statutes considered by*Bateman J.A.* :

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11

s. 35(1) — referred to

Fisheries Act, R.S.C. 1985, c. F-14

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — considered

s. 87 — considered

s. 87(1) — considered

s. 87(2) — considered

s. 88 — considered

Revenue Act, S.N.S. 1995-96, c. 17

Generally — considered

s. 39(2) — considered

Tobacco Tax Act, R.S.N.S. 1989, c. 470

Generally — considered

s. 6 — considered

s. 14(1) — considered

s. 14(1)(a) — considered

s. 25(2) — considered

Regulations considered by *Jones J.A.*:

Revenue Act, S.N.S. 1995-96, c. 17

Revenue Act Regulations, N.S. Reg. 63/96

Generally

s. 76(1)(d) "designated retail vendor"

s. 76(13)(a)

Regulations considered by *Bateman J.A.*:

Fisheries Act, R.S.C. 1985, c. F-14

British Columbia Fishery (General) Regulaions, SOR/84-248

Generally

s. 4(1)

Quebec Fishery Regulations, 1990, SOR/90-214

s. 4(1)

Revenue Act, S.N.S. 1995-96, c. 17

Revenue Act Regulations, N.S. Reg. 63/96

Generally

APPLICATION by plaintiff for declaration that Indians had right to sell tobacco products on reserves without

payment of tax.

The Court:

1 Appeal dismissed, per reasons for judgment of Bateman, J.A.; Roscoe, J.A., concuring; Jones, J.A. concurring by separate reasons.

***Jones J.A.*:**

2 This is an appeal from the dismissal of an application in the Supreme Court for a declaration that Indians have the right to purchase and sell tobacco and tobacco products on Indian reserves to Indians without complying with the provisions of the Nova Scotia *Revenue Act*, S.N.S. 1995-96, c. 17 and *Regulations*.

3 The appellant Paul Francis is a registered Mi'Kmaq Indian and a member of the Eskasoni Band. He resides on the Eskasoni Indian Reserve in Cape Breton. The application was based on affidavit evidence filed by the parties to the application. Mr. Francis wishes to purchase tobacco products from Indians on a reserve at Pointe-Bleue, Quebec. He intends to transport the products to reserves in Nova Scotia and resell them to other registered Indians acting as retailers. The products would be marked "For sale only to registered Indians on reserves in Canada".

4 Initially Mr. Francis applied to the Provincial Tax Commission for a permit to act as a wholesale vendor under the *Revenue Act*. He proposed to restrict his sales to registered Indian retailers operating on reserves in Nova Scotia. The *Revenue Act* provides for the issuance of licenses for the wholesale and retail sale of tobacco products which may, under certain conditions, permit the sale of tobacco products to Indians on reserves in Nova Scotia.

5 The *Act* and *Regulations* apply to the purchase and sale of all tobacco products in Nova Scotia. The Province, as a matter of policy, has established a quota system for the amount of tax free tobacco products that may be sold to Indians on reserves in Nova Scotia. The quota for each reserve is sold through licensed wholesalers and retailers approved by resolution of the Band Council for each reserve. The appellants dispute whether the quota system was devised with the consent of the Indians. There is no real dispute that it exists and how it operates. The parties agree that it is essentially the same as the quota system in British Columbia. As the appellant Francis failed to comply with the provisions of the *Act* and the quota system, his application for a wholesaler's permit was rejected.

6 The appellant Francis filed the present application in the Supreme Court. He applied for an order in the following form:

> WHEREAS Paul Kenneth Francis is a registered Indian who intends to purchase tobacco products from other registered Indians on Indian reserves in Canada,
>
> AND WHEREAS the tobacco products in question are manufactured, possessed and offered for sale on reserve in Canada in compliance with the *Excise Tax Act* (*Canada*), as it may be amended from time-to-time,
>
> AND WHEREAS the tobacco products will be marked in large, readable print "For sale only to registered Indians on reserves in Canada",
>
> **IT IS DECLARED** that, in these circumstances, Paul Kenneth Francis and all other registered Indians in

Nova Scotia, and their servants, employees, and agents, have the right, as wholesale and/or retail vendors, to:

1. purchase the tobacco products on an Indian reserve anywhere in Canada,

2. transport those tobacco products to an Indian reserve or reserves in Nova Scotia, from reserve-to-reserve within Nova Scotia, and from a reserve in Nova Scotia to a reserve elsewhere in Canada, and

3. store, possess, offer for sale, and sell on an Indian reserve in Nova Scotia those tobacco products to other registered Indians,

all without being registered or designated as a wholesale or retail vendor, or paying or collecting provincial tax, or otherwise complying with the provisions of the *Revenue Act* (*Nova Scotia*) and the *Revenue Act Regulations* and any other regulations under that *Act*, as they may be amended from time-to-time, or any administrative directions or quotas imposed by the Province of Nova Scotia,

PROVIDED that:

a) an Indian tobacco wholesale or retail vendor who offers for sale or sells to non-Indians any tobacco products to which this declaration applies is subject to the provisions of the *Revenue Act* (*Nova Scotia*) and the *Revenue Act Regulations*.

7 The application was heard by Mr. Justice Tidman. Mr. Justice Tidman dismissed the application. He held that all of the issues raised on this application were dealt with by the Court of Appeal in *R. v. Murdock* (1996), 154 N.S.R. (2d) 1 (N.S. C.A.) and that he was bound by that decision.

8 The appellant has appealed from that decision. The notice of appeal contains nine grounds of appeal. The appellants' factum states the issues as follows:

1. This case raises one central question: Can a Province, for the purpose of collecting tax from non-exempt consumers, lawfully impair the federally-mandated status, capacity and right of Indians to be free of taxation in respect of their personal property situated on Indian reserves, by setting limits, terms and conditions under which tax-free trade may take place between Indians on their reserves?

2. Under the *Revenue Act*, S.N.S. 1995-96, c. 17, as amended by S.N.S. 1976, c. 6, ss. 37, 38, and 39, and the *Revenue Act Regulations*, N.S. Reg. 63/96, O.I.C. 96-230, ss. 77-79, extensive controls are placed on the importation, sale and possession of tobacco in Nova Scotia. That legislation creates an exclusive system of wholesale and retail vendors, and a series of prohibitions against acquiring and selling tobacco outside that system. Anyone possessing tobacco in Nova Scotia must acquire it in conformity with the *Act*, and a retail vendor must obtain its tobacco from a wholesale vendor holding a provincial permit. With respect to tax-free tobacco for Indians on Indian reserves, the Province **by administrative direction** authorizes a limited quantity (or, quota) of such tobacco to be sold by licensed wholesalers to designated retailers on each reserve, and requires the Indian wholesale and retail vendors of such quota tobacco to enter into agreements specifying additional terms and conditions [all of which is referred to herein collectively as the "Indian tobacco quota system"]. Thus, the effect of what was said to Mr. Francis is that, unless he opted in and complied with the existing policy-based, administrative Indian tobacco quota system, he could not be a wholesale vendor in Nova Scotia and would not be able to whole-

sale tax-free tobacco to other Indians acting as retailers in Nova Scotia. Is that legally correct?

3. To properly analyse this situation, several subordinate issues must be considered:

1. Is the Province's Indian tobacco quota system, by limiting and controlling intra-Indian trade (meaning trade between Indians on Indian reserves) in a lawful product constitutionally invalid, since it impairs the status and capacities of Indians and regulates Indians *qua* Indians, contrary to s. 91(24) of the *Constitution Act*, 1867?

2. Does the Province's Indian tobacco quota system conflict with s. 87 of the *Indian Act*, in that it

(i) prohibits unlicensed intra-Indian, on-reserve trade,

(ii) limits quantities of tax-free tobacco and imposes other restrictions;

(iii) does not provide for a license directed to purely intra-Indian, on-reserve trade, and

(iv) requires licensees to post a bond and enter into a contractual agreement specifying further terms with which the licensee must abide.

3. If the Province may operate an Indian tobacco quota system as in this case, must the Province's Indian tobacco quota system be authorized by legislation?

4. In addition, to these three issues, a fourth issue is the evidentiary ruling. Was the "without prejudice" Tripartite MOU properly admitted into evidence?

9 Counsel for the appellants conceded that the issues are contained in the proposed order as set forth above, which he filed with the application.

10 With respect to the admission of the evidence relating to the Tripartite Memorandum of Understanding it appears to have no significant relation to the issues raised on the appeal except that the affidavit refers to the operation of the quota system which in my view is relevant to the grounds raised on the application.

11 The respondent raised the issue as to whether this is an appropriate case in which to grant declaratory relief because there is no factual foundation on which to answer the issues raised. While there is considerable merit in that argument, I do not think it is necessary to deal with it as I agree with the conclusions reached by the trial judge.

12 The main thrust of the appellants' argument is that the *Revenue Act* and *Regulations* do not apply to the purchase and sale of tobacco products by Indians for resale to Indians on Indian reserves. Counsel submitted that s. 87 of the *Indian Act* protects the property of Indians on reserves from taxation and accordingly Indians can trade in tobacco products from reserve to reserve and sell those products on reserves to Indians for their own consumption and use without complying with the *Revenue Act*. Counsel distinguished the case of *R. v. Johnson* (1993), 120 N.S.R. (2d) 414 (N.S. C.A.) and the subsequent cases on the basis that Johnson was engaged in the commercial sale of tobacco to non-Indians. Counsel also argued that the provisions of the *Revenue Act* and *Regulations* were unconstitutional as they conflict with the rights of Indians under s. 87 of the *Indian Act* as they impair those rights. This refers particularly to the tobacco quota system. The following is from the appellants' brief:

In sum, the vital distinction between the case at bar and all other s. 87 cases, including those from this Honourable Court, is the absence of non-Indian retailers and consumers.

13 The appellants also contend that the quota system is not authorized by the *Act* and *Regulations*.

14 The respondent contends that the *Revenue Act* and *Regulations* are valid Provincial legislation under s. 92 ¶ 2 of the *Constitution Act*. The respondent in particular maintains that the substantive issues involved in this appeal have been addressed by this Court in *R. v. Johnson* and *R. v. Murdock*.

15 Sections 87 and 88 of the *Indian Act* provide as follows:

87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to s. 83, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs 1(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, c. 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, c. E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian. R.S., c. 1-6, s. 87; 1980-81-82-83, c. 47, s. 25.

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

(Emphasis added)

16 Section 34(1) of the *Revenue Act* provides that every consumer of tobacco products shall pay a tax at the rates prescribed by that Section.

17 Sections 35, 37, 38, 39 and 40 provide as follows:

35 Every person who

(a) brings tobacco into the Province:

(b) receives delivery in the Province of tobacco acquired by that person for value

(i) for that person's own consumption in the Province, or for the consumption in the Province of

other persons at that person's expense, or

(ii) on behalf of, or as agent for, a principal who desires to acquire the tobacco for consumption in the Province by such principal or other persons at the principal's expense,

shall immediately

(c) report the matter in writing to the Commissioner;

(d) supply to the Commissioner the invoice and all other pertinent information as required by the Commissioner in respect of the consumption of the tobacco; and

(e) pay to Her Majesty the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province.

37 No person shall sell or agree to sell tobacco to a consumer at a retail sale, by any means, including vending machines, unless the person has been granted, upon application in the manner required by the Commissioner, a retail vendor's permit and such permit is in force at the time of the sale.

38 The Commissioner may issue a wholesale vendor's permit upon application to the Commissioner by a person in the manner and form required by the Commissioner.

39(1) No person shall be in the possession of tobacco

(a) on which tax has not been paid;

(b) not bearing a prescribed mark; or

(c) not purchased from a retail vendor who holds a valid retail vendor's permit, where the person in possession is a consumer.

(2) No retail vendor shall be in possession of tobacco other than tobacco purchased by the retail vendor from a wholesale vendor who, at the time of purchase, held a wholesale vendor's permit that was issued pursuant to this Part and that, at the time of purchase, was in force.

(3) No person shall distribute, sell, barter or offer for sale or as a gift tobacco except as permitted by this Part of the regulations.

40 No person shall transport tobacco unless, at the time the tobacco is being transported, that person is in possession of a bill of lading, waybill or other document showing the origin and destination of the tobacco.

18 Sections 76(1)(d) and 76(13)(a) of the *Regulations* provide:

76(1) In this Section,

. . . . .

(d) "designated retail vendor" means a retail vendor designated by the Commissioner who sells tobacco in the Province to a consumer at a retail sale on a reserve, as defined in the Indian Act, being Chapter

1-5 of the Revised Statutes of Canada, 1985;

76(13) The Commissioner may, provided the application is not a person described in clauses (8)(a) or (b), issue a permit to purchase and sell unmarked tobacco to an applicant if the applicant requires unmarked tobacco

(a) for sale in the Province to designated retail vendors situated on a reserve, as defined in the Indian Act, being Chapter 1-5 of the Revised Statutes of Canada, 1985;

19 The *Revenue Act* is a revised consolidation of several statutes including the former *Tobacco Tax Act*, R.S.N.S. 1989, c. 470. The above provisions are identical to those referred to in *R. v. Murdock, infra.*

20 In *R. v. Johnson* (1993), 120 N.S.R. (2d) 414 (N.S. C.A.) there were three main issues on the appeal. Issue 2 was whether s. 87 of the *Indian Act* exempted the appellant from the application of s. 25(2) of the *Tobacco Tax Act* (now s. 39(2) of the *Revenue Act*). In the *Johnson (S.G.)* case, I reviewed the authorities relating to the importation and taxation of property on reserves under s. 87 of the *Indian Act*. This Court followed the decision of the British Columbia Court of Appeal in *Tseshaht Indian Band v. British Columbia* (1992), 15 B.C.A.C. 1, 27 W.A.C. 1, 94 D.L.R. (4th) 97 (B.C. C.A.). I concluded by stating:

Section 87 of the **Indian Act** exempts the personal property of an Indian on a reserve from taxation. The exemption extends to ownership, occupation, possession or use of personal property on a reserve. The cases make it clear that the exemption applies to personal property on a reserve and the sale of personal property to an Indian on a reserve. The **Tobacco Tax Act** can only apply to Indians on reserves to the extent that it does not conflict with the provisions of the **Indian Act** or any treaty. The general provisions of the **Tobacco Tax Act** which do not conflict with s. 87 apply to reserves and Indians. I agree with the reasoning in the **Tseshaht Indian Band** case and of Krever, J., in **Re Hill**. Section 87 does not exempt Indians from prepaying the tax to wholesalers on purchases made off the reserve as contended by the intervenor. While s. 25(1)(a) of the **Act** may not apply to the possession of tobacco on a reserve, s. 25(2) is a provision of general application designed for the effective collection of the tax and applies to retail vendors on reserves. It follows therefore that the conviction on the second count is valid.

21 In *R. v. Murdock* (1996), 154 N.S.R. (2d) 1, 452 A.P.R. 1 (N.S. C.A.) Hallett, J.A., in delivering the judgment of this Court, stated at p. 12:

Ground 1 of that Notice of Appeal states:

1 **THAT** the learned trial judge erred in finding that the **Tobacco Tax Act**, R.S.N.S. 1989, c. 470 and **Regulations** made pursuant thereto, O.I.C. 90-38, N.S., was constitutional and validly enacted provincial legislation applicable to Indians and property of Indians on reserves and in particular the learned trial judge erred in finding:

(a) That the **Tobacco Tax Act** and the **Regulations** made under the Act are intra vires the legislature of the Province of Nova Scotia on the grounds that the **Act** and **Regulations** are not in pith and substance and in legal and practical effect legislation in relation to Federal Indian matters falling with the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(24) of the **Constitution Act**, 1867.

(b) That the **Tobacco Tax Act** and the **Regulations** do not impose limitations on tobacco and do not affect a significant element of traditional Indian ways, and that the **Act** is inapplicable to Indians as it is a law of general application pursuant to s. 88 of the **Indian Act**, R.S.C. 1985, c. 1-5.

(c) That the Mi'Kmaq are unrestricted in their ability to gather wild tobacco or grow their own tobacco for spiritual, ceremonial, and cultural practices.

(d) That the **Tobacco Tax Act** with its **Regulations** and any administrative directives issued pursuant to it, nor any sections of it, is a provincial law that does not single out Indians for specific treatment and cannot be classified as a law in relation to Indians, thereby not usurping federal jurisdiction, and has full force and effect over Indians with status under the **Indian Act**.

(e) That there are in existence agreements between Mi'Kmaq Band Councils in Nova Scotia and the Government of Nova Scotia restricting the quantity of tax exempt tobacco available on Indian reserves, when no evidence was adduced in the trial that any such agreement had ever been reached and the finding was contrary to Crown submissions to the court.

Counsel for the intervenor, in his factum, states under the heading "Points in Issue":

The charge alleges as essential ingredients two facts that are said to be germane on the basis that the **Tobacco Tax Act** (Nova Scotia) applies in the circumstances of this case to the Indian appellants. Johnson and Murdock (collectively, the 'appellants') are said to be required to: 1) hold wholesale vendor's permits; and 2) pay tobacco tax as and when they bring tobacco into Nova Scotia. The first requirement is allegedly imposed by s. 14(1)(a) and the second by s. 6(c) of the **Tobacco Tax Act** (Nova Scotia).

The Intervenor submits that these two requirements do not apply in the circumstances because the tobacco in question was sold from one registered Indian to another and transported from one Indian reserve to another for resale on-reserve there. While the Intervenor submits that three constitutional bases support this proposition, it does not in light of Justice Bateman's decision on the Intervenor's Motion for Leave to Intervene propose to argue in its Factum the issues of indirect taxation and extraprovincial trade. Therefore, the sole basis argued herein is the tax exemption created by s. 87 of the **Indian Act** (Canada). The issue may be stated as follows:

Are ss. 6(c) and/or 14(1)(a) of the **Tobacco Tax Act**, R.S.N.S. 1989, c. 470, which on their face require that registered Indians who for resale bring tobacco into Nova Scotia from outside the Province hold a wholesale vendor's permit [s. 14(1)(a)] and pay tobacco tax in respect of such tobacco as and when brought into Nova Scotia [s. 6(c)], constitutionally inapplicable in respect of the appellants as being inconsistent with s. 87 of the **Indian Act**, R.S.C. 1985, c. 1-5 when regard is had to all or some of the following facts:

a) the tobacco is Indian property bought by a registered Indian on an Indian reserve outside Nova Scotia from another registered Indian,

b) the tobacco is Indian property brought or intended to be brought to an Indian reserve in Nova Scotia, and/or

c) the tobacco is Indian property sold or intended to be sold on an Indian reserve by a re-

gistered Indian?

22 With reference to the first two issues he referred to the decision in *R. v. Johnson (supra)* and stated at p. 42:

> In my opinion the following issues expressly or impliedly were resolved by this court by the decision in (1993) ***R. v. Johnson***: (i) Section 25(2) of the **Tobacco Tax Act** is valid provincial legislation; (ii) s. 87(1)(b) of the **Indian Act** does not exempt an Indian retail vendor from prepaying the tax to wholesalers on purchases of tobacco made off reserve as required by s. 25(2) of the Act; (iii) s. 25(2) is a provision of general application designed for the effective collection of tax and applies to "retail vendors on reserves"; (iv) that the **Tobacco Tax Act** imposes a direct tax; (v) that the quota system in force in this Province is a means by which the Province as a matter of policy delivers the tax exemption Indian consumers claim that they are entitled to pursuant to the obligations created under s. 87 of the **Indian Act**; (vi) by adopting the reasoning of the courts in ***Hill v. Ontario*** and in the ***Tseshaht Indian Band v. British Columbia*** this court rejected the reasoning in ***Bomberry and Hill v. Ontario*** that the quota system was ultra vires the Ontario government as it was not authorized by the Ontario **Act**; (vii) despite the fact that there is nothing in the British Columbia or Nova Scotia **Tobacco Tax Act** that expressly authorize the creation of a quota system by regulation, the creation of such a system is a valid exercise of the power to make **Regulations** conferred on the Governor-in-Council by s. 44 of the **Act**; and (viii) there is nothing in s. 4 of the **1752 Treaty** which exempts Indians from complying with the general provisions of the **Tobacco Tax Act** regarding the collection and payment of tobacco tax ((1993) ***R. v. Johnson*** at para. 35).
>
> Do ss. 6 and 14(1)(a) of the **Tobacco Tax Act** offend the s. 87(1)(b) tax exempt status of Indians with respect to property on a reserve?

A "vendor" is defined in the **Tobacco Tax Act** as:

> 'vendor' means a retail vendor or a wholesale vendor

A "wholesale vendor" means:

> 2 (m) 'wholesale vendor' means a person who sells tobacco in the Province for the purpose of resale and who purchases not less than ninety per cent of the person's tobacco products for resale from Canadian tobacco manufacturers.

A "retail vendor" means:

> 2 (h) 'retail vendor' means a person who sells tobacco in the Province to a consumer at a retail sale;

Section 6 of the **Tobacco Tax Act** provides that every person who brings tobacco into the Province or who received delivery in the Province of tobacco acquired by that person for value for that person's own consumption shall immediately report the matter in writing to the Commissioner, supply the Commissioner with invoices and other pertinent information respecting the consumption of the tobacco and pay to the Province the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale.

Section 14(1)(a) provides that no person shall import or bring tobacco into the Province unless that person

holds a wholesale vendor's permit that is issued pursuant to the **Act**.

Sections 6 and 14(1)(a) are clearly designed to create a system whereby tobacco cannot be brought into the Province without the person paying the sales tax levied as if it were a purchase at a retail sale (s. 6) or the person bringing the tobacco into the Province is a person that holds a wholesale vendor's permit (s. 14). The **Tobacco Tax Act** was amended subsequent to the decision of Burchell, J., in ***Union of Nova Scotia Indians et al. v. Nova Scotia (Attorney General) (supra)*** The amended scheme was found by Justice Jones to have the effect of bringing the Nova Scotia tobacco tax collection system in line with similar legislation in Ontario and British Columbia.

With respect to the validity of the **Tobacco Tax Act** and the quota system in place in Nova Scotia, Jones, J.A., in (1993) ***R. v. Johnson*** (supra) at paragraph 32 (previously quoted) approved the reasoning of the British Columbia Court of Appeal in **Tseshaht** (supra).

23 He continued at p. 44:

The Parliament of Canada has exercised its legislative power to enact laws with respect to Indians and Indian bands by the enactment of the **Indian Act**. By s. 88 of that **Act** Parliament has stated that provincial laws of general application apply to Indians except to the extent that these laws are: (i) inconsistent with the **Indian Act** or (ii) make provision for any matter for which provision is made by or under the **Indian Act**.

In my opinion, this court, having decided that s. 25(2) of the **Tobacco Tax Act** is valid provincial legislation for the effective collection of tobacco tax and applies to Indian retail vendors on reserve, it follows that ss. 6 and 14(1)(a) of the **Act** are similarly valid as these sections are simply part of the necessary tax collection regime established by the **Tobacco Tax Act**. Sections 6 and 14(1)(a) are provisions of general application like s. 25(2) designed for the effective collection of tax and apply to retail vendors on reserves. Sections 6 and 14(1)(a) of the **Tobacco Tax Act**, like s. 25(2) of the Act, enable the Province to exercise control over the importation of tobacco into the Province as the necessary incidence of an effective collection system.

I do not agree with the argument made by counsel for the intervenor that the burdens imposed on Indians by the **Tobacco Tax Act** respecting quotas, etc. are significant in that they restrict the source from which cigarettes may be obtained and the quantity that may be obtained tax free. Counsel asserts that the **Act** and **Regulations** "restrict competition for Indian retailers and for Indian consumers" and, therefore, interfere with the freedom of Indian retailers to obtain and offer for a sale on reserve tax free personal property and as a result erode the benefit conferred on Indians by s. 87 of the **Indian Act**. He argues that accordingly the burdens are inconsistent with the s. 87 rights of the Indians and inapplicable to the appellants. This argument is based on a decision of the New York Court of Appeal in ***Milhelm Attea & Brothers Inc. v. Department of Taxation and Finance of New York*** (1993), 599 N.Y. Supp.2d 510 (N.Y.C.A.).

In my opinion the quota system in Nova Scotia does not impose restrictions on a retail vendor of tobacco products beyond those necessary to ensure as a matter of policy that the volume of tax exempt products on a reserve do not exceed the reasonable requirements of the Indians on reserves. In my opinion the **Regulations** which allow for the designation of a retail vendor to deal with quota tobacco on a reserve is simply part of the necessary administrative machinery to effectively control and collect tax on tobacco products in the Province of Nova Scotia. Under the present collection regime there is no erosion of the Indian consumers' alleged right to purchase tax free tobacco. The Indian consumers on the reserve have the benefit of

the quota system which, by implication, was found by Jones, J.A., in (1993), ***R. v. Johnson***, accommodates the Indians' claim to have tobacco situate on a reserve exempt from taxation.

24 He went on to consider the most recent decision of the New Brunswick Court of Appeal in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)* (1996), 178 N.B.R. (2d) 1, 454 A.P.R. 1 (N.B. C.A.). In that case the majority held that the *Social Services* and *Education Tax Act* of New Brunswick does not apply to the acquisition of chattels destined for use or for consumption on a reserve by an Indian by virtue of the exemption provided in s. 87(1)(b) of the *Indian Act*. This Court expressly adopted the reasoning of the minority decision of Chief Justice Hoyt.

25 The Supreme Court of Canada on appeal in that case, *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)* (unreported File No: 25427, dated 1998: June 18) [Reported (1998), 227 N.R. 92 (S.C.C.)] has held that s. 87 of the *Indian Act* does not apply to exempt Indians from paying sales tax on off reserve purchases. That ruling is not inconsistent with the decisions in this Court in the *Johnson* cases. See also *R. v. Johnson* (1996), 156 N.S.R. (2d) 71 (N.S. C.A.).

26 I have referred to the decisions in *R. v. Johnson* and *R. v. Murdock* at length to show that essentially the same issues were raised in those cases which are being put forward in this case with some slight variations. In the *Johnson* cases, the appellants were importing tobacco products from reserves outside the Province for sale to Indians and non-Indians on reserves. The appellants in those cases argued that the provisions of the *Tobacco Tax Act* did not apply to Indians and lands reserved for Indians and that s. 87 of the *Indian Act* exempted sales to Indians on reserves. As pointed out in *R. v. Johnson* and *R. v. Murdock* the situation was out of control. The current provisions were enacted to control the illicit sale of tobacco products in the Province and to protect the revenue. The Court held that the provisions were constitutionally valid as being of general application and did not offend s. 87 of the *Indian Act*. They applied to all with respect to the importation and sale of tobacco products. It is immaterial that the product is imported from a reserve outside the province by Indians for sale solely to Indians on reserves in Nova Scotia. Those cases did not turn solely on the fact that sales were also being made to non-Indians. No authorities have been cited for the proposition that Indians are free to trade between reserves exempt from restrictions imposed by provincial laws of general application. With respect, the decisions of the Supreme Court of Canada in *Francis v. R.*, [1956] S.C.R. 618 (S.C.C.) and *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) do not support the claim that Indians have the right to purchase and transport tobacco products from reserve to reserve for the purpose of resale.

27 With respect, I see no error on the part of the trial judge and I would dismiss the appeal without costs.

***Bateman J.A.* (Concurring by separate reasons); Roscoe J.A. (concurring):**

28 I agree with the result reached by my colleague Jones, J.A. I share his concerns regarding the propriety of declaratory relief in these circumstances. I agree, as well, that the appeal of the trial judge's evidentiary ruling should be dismissed. I wish to more specifically address some points raised by the appellant.

29 The relevant facts are set out in the reasons of Jones. J.A. Summarizing, the appellant, Paul Kenneth Francis, a registered Mi'Kmaq, sought a declaration in the Supreme Court to the effect that all registered Indians in Nova Scotia have the right as wholesale vendors and/or retail vendors to purchase tobacco products on an Indian reserve anywhere in Canada, transport those products to an Indian reserve in Nova Scotia and sell those products to other registered Indians, without being registered or designated as a wholesale vendor or retailer or paying or collecting provincial sales tax or otherwise complying with the provisions of the *Revenue Act*, S.N.S.

1995-96, c. [17], as amended.

30 The *Revenue Act* and *Regulations* require that anyone who brings tobacco into the Province, or holds out tobacco for resale, possess a wholesale vendor's permit. Wholesalers may not sell tobacco to anyone but a retail vendor holding a certificate issued under the *Act*. Retail vendors may only possess tobacco purchased from a wholesale vendor holding the required permit. Only a person holding a retail vendor's permit may sell tobacco to a consumer. A "consumer" is, in general terms, the end user of the tobacco. Under the *Regulations*, the wholesaler is deemed to be an agent of the Minister and, as such, is responsible for collecting the tax on the tobacco product and remitting it to the Province. This tax burden is passed along by the wholesaler to the retail vendor and, in turn, to the consumer.

31 The *Revenue Act* revised and consolidated several Acts including the former *Tobacco Tax Act*, R.S.N.S. 1989 c.470. Under the predecessor *Tobacco Tax Act* the Province established a quota system which permitted the sale of a certain amount of tax-free tobacco products to Indians on reserves in Nova Scotia. This quota system is intended to satisfy the provisions of the *Indian Act*, R.S.C. 1985, c. 1- 5 which provides in relevant part:

> **87** (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely.
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and (b) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property.
>
> . . . . .
>
> **88.** Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.
>
> (Emphasis added)

32 Pursuant to the quota system, a specified amount of tax-free tobacco may be sold by wholesalers to designated Indian retailers who may sell to Indian consumers, free from the requirement that the wholesaler collect the tax. A wholesaler may only receive a share of this quota (tax-free) tobacco for sale to a retailer on a reserve if that wholesaler obtains a Band Council Resolution designating him/her to be a wholesaler for that reserve and specifying the portion of the quota allotment which he/she may sell to the retailer.

33 This quota system is discussed in greater detail in two decisions of this Court which are particularly relevant here: *R. v. Johnson* (1993), 120 N.S.R. (2d) 414 (N.S. C.A.) [referred to hereafter as *Johnson, supra*] and *R. v. Murdock* (1996), 154 N.S.R. (2d) 1 (N.S. C.A.) [referred to hereafter *Murdock, supra*].

34 It is Mr. Francis' position that *s.87* of the *Indian Act* entitles him to purchase tobacco products on the Indian reserve at Pointe-Bleue, Quebec, transport those products to a reserve in Nova Scotia and resell the product

as a wholesaler to Indian retailers, free from the constraints of the *Revenue Act*. Pursuant to the *Revenue Act* he must acquire a wholesale vendor's permit, and, as a wholesaler, pay the equivalent of the tax on the product which he may then collect from the retailer to whom he sells the tobacco. Mr. Francis argues that because the product will ultimately be sold to Indian consumers on a reserve, the tax burden cannot be passed along. In the result, he submits, he is effectively required to pay tax on his personal property (the tobacco product) situate on a reserve, contrary to *s.87* of the *Indian Act*. In the context of this argument, the appellant frames several issues which are set out in the reasons of Jones, J.A.

35 The respondent says that this Court in *Johnson*, *supra* and *Murdock*, *supra* has settled the issues raised by the appellant. In *Johnson*, the Indian retail vendor was convicted of possession of tobacco not purchased from a wholesale vendor holding a wholesale vendor's permit, contrary to *s.25(2)* of the *Tobacco Tax Act*. He paid no taxes on the tobacco product. He unsuccessfully appealed his conviction. In *Murdock*, both Murdock and Johnson were status Indians living on reserves in Ontario and Nova Scotia, respectively. Murdock sold and delivered tobacco products to Johnson who sold them out of his retail stores on the Nova Scotia reserve. Neither of them held a wholesale nor a retail vendor permit. Tax was not paid on the tobacco. Both failed on appeal to reverse their convictions for conspiracy to defraud the Nova Scotia government of revenue payable under the *Tobacco Tax Act*. Hallett, J.A., writing for the Court in *Murdock*, said at p.42:

> In my opinion the following issues expressly or impliedly were resolved by this Court by the decision in (1993) *R v. Johnson*:
>
> (i) *Section 25(2)* of the *Tobacco Tax Act* is valid provincial legislation;
>
> (ii) *s. 87(1)(b)* of the *Indian Act* does not exempt an Indian retail vendor from prepaying the tax to wholesalers on purchases of tobacco made off reserve as required by *s. 25(2)* of the *Act*;
>
> (iii) *s. 25(2)* is a provision of general application designed for the effective collection of tax and applies to "retail vendors on reserves";
>
> (iv) that the *Tobacco Tax Act* imposes a direct tax;
>
> (v) that the quota system in force in this Province is a means by which the Province as a matter of policy delivers the tax exemption Indian consumers claim that they are entitled to pursuant to the obligations created under *s. 87* of the *Indian Act*,
>
> (vi) by adopting the reasoning of the courts in *Hill v. Ontario* and in the *Tseshaht Indian Band v. British Columbia* this court rejected the reasoning in *Bomberry and Hill v. Ontario* that the quota system was ultra vires the Ontario government as it was not authorized by the Ontario Act,
>
> (vii) despite the fact that there is nothing in the British Columbia or Nova Scotia *Tobacco Tax Act* that expressly authorizes the creation of a quota system by regulation, the creation of such a system is a valid exercise of the power to make *Regulations* conferred on the Governor-in-Council by *s. 44* of the *Act*, and
>
> (viii) there is nothing in *s. 4* of the *1752 Treaty* which exempts Indians from complying with the general provisions of the *Tobacco Tax Act* regarding the collection and payment of tobacco tax ((1993) *R. v. Johnson* at para. 35).

36 *Section 25(2)* of the *Tobacco Tax Act*, referred to by Hallett, J.A. is now *s.39(2)* of the *Revenue Act* and

> 39 (2) No retail vendor shall be in possession of tobacco other than tobacco purchased by the retail vendor from a wholesale vendor who, at the time of the purchase, held a wholesale vendor's permit that was issued pursuant to this Part and that, at the time of the purchase, was in force.

37 While not conceding the correctness of this Court's prior rulings on the above issues, the appellant agrees that there is no factual distinction between this case and those previously decided on issues (i), (iii), (iv), (vi), (vii) and (viii) identified by Hallett, J.A. in *Murdock*.

38 In relation to issue (ii), the appellant maintains that this finding is not binding in that we are here dealing with "on reserve" purchases of tobacco products, not "off reserve" purchases. With respect to issue (v), he submits that Hallett, J.A., in reaching this conclusion, relied upon the law as stated in *R. v. Nikal* (1996), 105 C.C.C. (3d) 481 (S.C.C.), which law has since been refined and developed.

39 In expressing approval of the quota system, Hallett, J.A., in *Murdock*, at p. 44, made further specific findings:

> (i) ss. 6 and *14(1)(a)* of the *Tobacco Tax Act* are valid as a part of the necessary tax collection regime established by the *Tobacco Tax Act* which enables the Province to exercise control over the importation of tobacco into the Province as the necessary incidence of an effective collection system.
>
> (ii) the burdens imposed on Indians by the *Tobacco Tax Act* respecting quotas insofar as they restrict the source from which tobacco products may be obtained and the amount of available tax free product and restrict competition for Indian retailers and consumers are not significant.
>
> (iii) the quota system in Nova Scotia does not impose restrictions on a retail vendor of tobacco products beyond those necessary to ensure as a matter of policy that the volume of tax exempt products on a reserve do not exceed the reasonable requirements of the Indians on reserves. The regulations which allow for the designation of a retail vendor to deal with quota tobacco on a reserve is simply part of the necessary administrative machinery to effectively control and collect tax on tobacco
>
> (iv) Under the present collection regime there is no erosion of the Indian consumers' alleged right to purchase tax free tobacco.

40 *Sections 6* and *14(1)* of the *Tobacco Tax Act* referred to above are now incorporated into the scheme of the *Revenue Act*. Their effect is to require that: (i) persons who bring tobacco into the Province for personal consumption (or for the consumption of others at the importer's expense) pay tax on the tobacco and, (ii) no one shall import into the Province tobacco for resale unless that person holds a wholesale vendor's permit.

41 The appellant submits that the *Act* and *Regulations* restrict competition for Indian retailers and for Indian consumers and, therefore, interfere with the freedom of Indian retailers to obtain and offer for sale on a reserve tax free personal property thereby eroding the benefit conferred on Indians by *s. 87* of the *Indian Act*. This same argument was presented to Hallett, J.A. in *Murdock* and rejected by him. I agree with his finding in that regard. In my view the appellant, in making this submission, attributes too broad a purpose to *s.87*. In *Williams v. R.*,

[1992] 1 S.C.R. 877 (S.C.C.), Gonthier, J., writing for the Court, confirmed the comments of LaForest, J. in *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.), to the effect that the purpose of *s.87* of the *Act* "was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax and creditors to seize" (at p.885, *Williams*). This view was recently confirmed by the majority of the Supreme Court of Canada in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)* (1998), 227 N.R. 92 (S.C.C.).

42 The appellant further submits that this case is materially different from the previously decided cases in that it deals only with "Indian to Indian" sales on a reserve. In both *Johnson*, *supra* and *Murdock*, *supra*, Mr. Johnson was selling tobacco to natives and non-natives at his retail outlets.

43 In support of his position that the fact that the tobacco products here are purchased on a reserve, for resale on a reserve, is an important distinction, the appellant points to the *obiter* comment of Hallett, J.A. in *Murdock*, *supra* at p.46:

> ... It may be that, if the consumer is an Indian on the reserve and the sale takes place on the reserve, the Indian purchase is exempt, by reason of s. *87(1)(b)* of the *Indian Act*, from payment of the tobacco tax levied under Nova Scotia's *Tobacco Tax Act* even if purchased from a retailer who has not been designated by the Commissioner to sell on a reserve... I hasten to add that this *obiter* comment does not mean that an Indian retail vendor of tobacco products on a reserve can ignore the provisions of the *Tobacco Tax Act* and *Regulations.*
>
> (Emphasis added)

44 In *Hill v. Ontario (Minister of Revenue)* (1985), 18 D.L.R. (4th) 537 (Ont. H.C.), Krever, J., as he then was, made a similar comment (at p.546). In both cases there was evidence that the tobacco was sold not just to natives but to non-natives as well.

45 In my view the above observation of Hallett, J.A. does not alter the fact that the wholesaler and retailer are subject to the requirements of the *Revenue Act*, even though the "purchase" by the consumer may be exempt of tax. Justice Hallett, in his comment, is speaking about the tax relief that may be available to the Indian consumer and is not addressing the obligation of the wholesaler and retailer to comply with the *Act*. Indeed, he specifically qualifies his remark by stating that an Indian retail vendor on a reserve cannot ignore the provisions of the *Act*. Additionally, his comment is clearly *obiter* and made without a factual context. The case before us suffers from that same defect. Notwithstanding the stated intentions of the appellant to sell the tobacco only to Indian retailers who will sell only to Indian consumers, he cannot know whether the retail vendor will ultimately sell the tobacco product to a native or a non-native. Retail vendors on reserves are not restricted with respect to whom they sell their products. The tax exemption to the consumer is only available if the final purchasers are Indians on a reserve. On the proven facts before us we are concerned only with a wholesaler who intends to sell tobacco products to a retailer for resale. The liability for tax, if any, will not be known until the products are resold. In response to a similar argument concerning Indian retailers Hallett, J.A. wrote in *Murdock* at p 59:

> The Indian consumer purchasing tobacco on a reserve is tax exempt under *s. 87(1)(b)* of the *Indian Act*. If the purchase is made from an Indian retailer that has not been designated to handle quota tobacco products the burden of the tax is left on the Indian retailer. Counsel for the appellant Murdock argues that a collection

> scheme which demands that tax be paid regardless of the fact that it cannot be legally passed on as a tax to the person intended to bear it, is, when so applied, indirect taxation. Counsel for the appellant submits that the *Tobacco Tax Act* should be read down so as not to apply to Indian retailers selling tobacco products on a reserve. Counsel submits that the approach of the Supreme Court of Canada in *Manitoba v. Air Canada and Canada (Attorney General) et al.*, [1980] 2 S.C.R. 303, 32 N.R. 244, 4 Man.R. (2d) 278 in which the court read down a provincial tax *Act* so as to exempt aircraft flying over the province from the tax should be applied to the interpretation of the *Tobacco Tax Act* of this Province with respect to the payment of tax on tobacco products on the reserve. This court is being asked to find that the legislation should be held inapplicable to an Indian retailer acquiring and possessing on a reserve tobacco for sale to "tax exempt Indian consumers."
>
> In my opinion, an Indian retail vendor acquiring and possessing on a reserve tobacco for sale to tax exempt Indian consumers might warrant a reading down of the *Tobacco Tax Act* but that is not the factual situation that arises on this appeal. The evidence shows Mr. Johnson sells to nonnatives.
>
> Although the regime created by the *Tobacco Tax Act* applies to both Indians and non Indians in that it required Johnson when he imported tobacco into the Province to comply with the requirement of the *Act* and pay the tax which he could not recoup from an Indian who purchases tobacco from him on the reserve, it does not mean that the tax has changed in nature from a direct tax to an indirect tax. It simply means that due to the exemption from tax granted Indians with respect to their personal property situate on the reserve, the Indian retail tobacco vendor who is not designated by the Commissioner and therefore cannot obtain quota tobacco, cannot recover the prepaid tax. That is not a reason to declare the *Act* invalid or inoperative with respect to Johnson (or other Indian retailers who sell to nonnatives) or to read down the *Act* so as to exempt Johnson from payment of the tax on imports of tobacco into the Province. This question could only be considered if it was unequivocally proven that the tobacco would be sold only to Indians on the reserve. To do otherwise would frustrate the objective of the *Act* of providing an effective method of tobacco tax collection merely for the purpose of allowing Johnson to disregard the law which has been developed and enacted to recognize the claim of Indian consumers (by the adoption of the quota system) to tax exempt purchases of tobacco pursuant to their right created under *s. 87(1)(b)* of the *Indian Act*. Johnson is not a consumer of the tobacco products; he sells in his stores to anyone and, therefore, with respect to such sales does not have the benefit of the *s. 87(1)(b)* exemption. I would dismiss this ground of appeal.
>
> (Emphasis added)

46 While it was established in *Murdock*, *supra*, that Johnson was selling tobacco to non-natives, the comments of Hallett, J.A. are equally applicable here. It has not been "unequivocally proven" that the tobacco imported by the appellant would be sold only to Indian consumers on a reserve.

47 If the appellant wishes to deal in tax free tobacco he must comply with the quota system which, as Hallett, J.A. found in *Murdock*, is not an onerous requirement. In *Murdock* the transactions under scrutiny involved wholesale sales by Indian wholesalers to Indian retailers. Here, the appellant proposes to be a wholesale reseller to Indian retailers. He is subject to the *Act*. The quota system was developed specifically to ensure that Indians on a reserve who are free from taxation have access to a sufficient amount of tax-free tobacco. It has been found to adequately and validly achieve that purpose.

48 The appellants further submit that the quota system infringes the rights of all Indians to be free, not just

from tax on personal property, but free from "tax-related burdens" including any restriction on importation, transportation, possession and sale. The appellant says that "a scheme of taxation is a system of restrictions and controls imposed to make the system of tax collection work, as well as the actual payment of tax". To give effect to the intent of *s.87*, he submits, Indians must be free from the mechanism of taxation, not just the tax itself. With respect, I disagree. The intent of *s.87* is not so far-reaching as is evident from the comments in *Mitchell*, *supra*, where LaForest, J. wrote at p. 133:

> ...one must guard against ascribing an overly broad purpose to ss.87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusion and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.

49 Hallett, J.A., in *Murdock*, determined that the quota scheme imposed only "an insignificant encroachment on the right of an Indian on a reserve to acquire tax exempt tobacco from an Indian retailer of choice" (at p.44). In response to the submission of the appellants that the quota system, insofar as it requires submission to the government licensing mechanism, constitutes a prima facie infringement of *s.87*, he quoted with approval the following passage from *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.) (at p. 1057 per Cory, J.):

> ...It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group is **[sic]** necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a Charter or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. *Section 1 of the Canadian Charter of Rights* and Freedoms is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at p. 524, are persuasive and convincing.

50 In *Nikal* the appellant, a Wet'suwet'en Indian of the Moricetown Band, took the position that the *Fisheries Act*, R.S.C., 1985, c. F-14 and *Regulations* did not apply to him because the licencing scheme infringed his aboriginal rights as provided in *s. 35(1)* of the *Constitution Act, 1982*. The Court held that the mere requirement of a licence under *s.4(1)* of the *British Columbia Fishery (General) Regulations* did not infringe the appellant's constitutional rights. The Court found, however that the conditions attached to the licence may infringe the aboriginal rights. In making the latter determination, the critical issue was whether the particular conditions contradicted the right, which depended upon the nature of the right.

51 I reject the appellant's argument that Hallett, J.A.'s conclusions in *Murdock* should now be revisited in the face of the decisions in *R. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.) and *R. c. Côté* , [1996] 3 S.C.R. 139 (S.C.C.). According to the submission of the appellant, these cases have refined the reasoning in *Nikal*. Hallett, J.A.'s reliance upon the passage in *Nikal* was simply to support his view that in a complex modern society, individual and collective rights must be balanced, which necessitate, in some instances, coordination by the government of the interaction of those rights. This is unchanged by *Adams* and *Côté* . Independent of *Nikal*, he determined that the quota system was a valid means by which to deliver the tax exemption to the Indians.

52 The issue in *Adams* concerned the validity of the *Quebec Fishery Regulations*. It was held that *Regulation 4(1)* did infringe the aboriginal right to fish for food because the appellant's exercise of this right was left to the discretion of the Minister. The Court held that a government cannot adopt "an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". (The decision in *R. c. Côté* is to the same effect.) Such an administrative regime will prima facie infringe an aboriginal right. I do not agree with the appellant, however, that the tobacco quota system is akin to an unstructured discretionary regime or that it offends *s.87*. The appellant here can obtain a wholesaler's license pursuant to the system set up under the *Revenue Act*, as can any applicant. The requirement that he obtain a Band Council Resolution to sell unmarked tobacco is not an uncertain one. The appellant's argument in this regard is faulty in that it is premised upon the erroneous view that a right to sell tobacco to Indian retailers free of regulation is necessarily incident to the *s.87* right to possess tax exempt personal property on a reservation.

53 The appellant says that the decision in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance), supra*, supports his position on this appeal. This case concerned the point of sale tax levied by the government of New Brunswick on items sold for consumption. The respondent Union brought a test case maintaining that the tax is not payable by Indians who buy items off reservation for use on the reservation. The trial judge determined that *s.87* of the *Indian Act*, which exempts goods on reserves from taxation, applies only to property actually situated on the reservation at time of sale. A majority of the Court of Appeal reversed this decision. On further appeal a majority of the Supreme Court of Canada restored the decision of the trial judge. The appellant submits that because Mr. Francis will purchase the tobacco product on an Indian reserve in Quebec, he will be beyond the reach of the *Revenue Act* and the product will be purchased tax free. The product, he submits, will then be moved "off reserve temporarily" for transport to a Nova Scotia reserve. Because its paramount location remains on the reserve, the product is free of tax. This argument misses the point that the *Revenue Act* does not impose a tax on wholesalers and retailers, it simply requires them to collect, as agents of the government, any tax that will be payable by the consumer. The quota system, that has been previously approved by this Court, provides the tax relief required by *s.87* of the *Indian Act*. The point of sale issues raised in *Union of New Brunswick Indians v. New Brunswick*, are not helpful to the appellant here.

Disposition:

54 In summary, the submissions of the appellants do no persuade me that the declaration should be granted. I would dismiss the appeal.

Appeal dismissed.

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R. v. MacDonald

Her Majesty the Queen and Andrew Martin MacDonald

Ontario Court of Justice

J.D. Keast J.

Heard: December 8-11, 2008
Judgment: June 23, 2009
Docket: 070144, 080018

Counsel: Joseph M. Chapman for Federal Crown

Hazel Jones for Provincial Crown, Ministry of Revenue / Finance

Sean Hanley for Provincial Crown, Ministry of Attorney General - Constitutional Branch

John R. Saftic for Defendant

Subject: Criminal; Constitutional; Public; Provincial Tax; Evidence

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Authorized by law

Accused was stopped for speeding — Police officer observed box with markings indicative of contraband cigarettes — Officers searched vehicle and found 10,000 unmarked cigarettes, 310 grams of marijuana, knife, more than $5,000 cash, cell phones, pagers and scales — Accused was charged with possession of marijuana for purpose of trafficking, possession of weapon for purpose dangerous to public peace, and possession of more than 200 unmarked cigarettes contrary to s. 29(2) of Tobacco Tax Act of Ontario — Accused convicted of drug and Tobacco Tax Act charges — Crown did not pursue weapons possession charge, so it was dismissed — Accused, his wife, and passenger in vehicle were not credible witnesses, and their evidence on material features of defence did not raise reasonable doubt — Officers were both credible, but officer conducting Highway Traffic Act investigation was only peripherally aware of other officer's actions pursuing Tobacco Tax Act investigation — Officer sought authorization for search under s. 24(1) of Tobacco Tax Act prior to opening vehicle's door, after seeing cigarettes box through passenger's window — Search of vehicle and seizure of items was lawfully authorized by delegate of Minister of Revenue — Conversation between officer and delegate conveyed sufficient information to support reasonable and probable grounds of infraction under Tobacco Tax Act — Markings on box,

unique to contraband cigarettes, and accused's statement that box contained cigarettes provided reasonable and probable grounds for search — Accused did not establish breach of s. 8 of Canadian Charter of Rights and Freedoms.

Criminal law --- Charter of Rights and Freedoms — Arrest or detention [s. 10] — Right to counsel [s. 10(b)] — Detention

Accused was stopped for speeding — Police officer observed box with markings indicative of contraband cigarettes — Officers searched vehicle and found 10,000 unmarked cigarettes, 310 grams of marijuana, knife, more than $5,000 cash, cell phones, pagers and scales — Accused was charged with possession of marijuana for purpose of trafficking, possession of weapon for purpose dangerous to public peace, and possession of more than 200 unmarked cigarettes contrary to s. 29(2) of Tobacco Tax Act of Ontario — Accused convicted of drug and Tobacco Tax Act charges — Crown did not pursue weapons possession charge, so it was dismissed — Accused, his wife, and passenger in vehicle were not credible witnesses, and their evidence on material features of defence did not raise reasonable doubt — Search of vehicle and seizure of items was lawfully authorized by delegate of Minister of Revenue — Markings on box, unique to contraband cigarettes, provided reasonable basis to inquire as to contents of box — When officer received answer to question, he decided to seek authorization for search — While officer sought authorization, accused was detained under both Highway Traffic Act and Tobacco Tax Act — Officer's failure to advise accused of detention under Tobacco Tax Act breached accused's rights under s. 10(b) of Charter — Breach had no consequence, since no evidence was collected because of it but rather through reasonable search.

Criminal law --- Narcotic and drug control — Offences — Possession for purpose of trafficking — Controlled Drugs and Substances Act — Miscellaneous

Accused was stopped for speeding — Police officer observed box with markings indicative of contraband cigarettes — Officers searched vehicle and found 10,000 unmarked cigarettes, 310 grams of marijuana, knife, more than $5,000 cash, cell phones, pagers and scales — Accused was charged with possession of marijuana for purpose of trafficking, possession of weapon for purpose dangerous to public peace, and possession of more than 200 unmarked cigarettes contrary to s. 29(2) of Tobacco Tax Act of Ontario — Accused convicted of drug and Tobacco Tax Act charges — Crown did not pursue weapons possession charge, so it was dismissed — Accused, his wife, and passenger in vehicle were not credible witnesses, and their evidence on material features of defence did not raise reasonable doubt — Officers were both credible witnesses — Accused's right to counsel under s. 10(b) of Canadian Charter of Rights and Freedoms was breached by officer's failure to advise that detention occurred under Tobacco Tax Act as well as Highway Traffic Act — Breach had no consequence, since evidence was not obtained by breach but by lawfully authorized search of vehicle and seizure of items — Crown established constituent elements of offence beyond reasonable doubt — Large quantity of marijuana found with scales, coupled with other items such as calculator, debt list, cash and multiple cell phones and pages, all clearly and unequivocally pointed to trafficking purposes — Lack of breakdown of marijuana into smaller packages was not sufficient in circumstances to raise reasonable doubt.

Aboriginal law --- Quasi-criminal offences — Tobacco offences

Accused was stopped for speeding — Police officer observed box with markings indicative of contraband cigarettes — Officers searched vehicle and found 10,000 unmarked cigarettes, 310 grams of marijuana, knife, more than $5,000 cash, cell phones, pagers and scales — Accused was charged with possession of marijuana for pur-

pose of trafficking, possession of weapon for purpose dangerous to public peace, and possession of more than 200 unmarked cigarettes contrary to s. 29(2) of Tobacco Tax Act of Ontario — Accused convicted of drug and Tobacco Tax Act charges — Crown did not pursue weapons possession charge, so it was dismissed — Accused, his wife, and passenger in vehicle were not credible witnesses, and their evidence on material features of defence did not raise reasonable doubt — Search of vehicle and seizure of items was lawfully authorized — Tobacco Tax Act applied to Natives — Accused did not establish cigarettes' permanent location on particular reserve through evidence of pattern of use, as required to support argument that cigarettes being transported from one reserve to another were exempt under s. 87 of Indian Act — Prohibition against possession of unmarked cigarettes without permit did not conflict with s. 87 of Indian Act as permit requirement did not impose tax or prevent any person entitled to possess tax-exempt tobacco from such possession — No reason existed why cigarettes marked with peach band, free from provincial tax, could not be used for ceremonial purposes on reserve — No substantive defence was put forth on strict liability offence under Tobacco Tax Act — Crown demonstrated proof of constituent elements beyond reasonable doubt.

Tax --- Provincial taxation — Ontario — Tobacco tax

Accused was stopped for speeding — Police officer observed box with markings indicative of contraband cigarettes — Officers searched vehicle and found 10,000 unmarked cigarettes, 310 grams of marijuana, knife, more than $5,000 cash, cell phones, pagers and scales — Accused was charged with possession of marijuana for purpose of trafficking, possession of weapon for purpose dangerous to public peace, and possession of more than 200 unmarked cigarettes contrary to s. 29(2) of Tobacco Tax Act of Ontario — Accused convicted of drug and Tobacco Tax Act charges — Crown did not pursue weapons possession charge, so it was dismissed — Accused, his wife, and passenger in vehicle were not credible witnesses, and their evidence on material features of defence did not raise reasonable doubt — Officers were both credible witnesses — Accused's right to counsel under s. 10(b) of Canadian Charter of Rights and Freedoms was breached by officer's failure to advise that detention occurred under Tobacco Tax Act as well as Highway Traffic Act — Breach had no consequence, since evidence was not obtained by breach but by lawfully authorized search of vehicle and seizure of items — Accused did not establish that cigarettes being transported from one reserve to another fell within exemption in s. 87 of Indian Act as property situated on reserve — Prohibition against possession of unmarked cigarettes without permit did not conflict with s. 87 of Indian Act — No substantive defence was put forth on strict liability offence under Tobacco Tax Act — Crown demonstrated proof of constituent elements beyond reasonable doubt.

Cases considered by *J.D. Keast J.*:

Bomberry v. Ontario (Minister of Revenue) (1989), 63 D.L.R. (4th) 526, 70 O.R. (2d) 662, 34 O.A.C. 17, 2 T.C.T. 4234, 1989 CarswellOnt 2289, [1989] 3 C.N.L.R. 27 (Ont. Div. Ct.) — considered

Bomberry v. Ontario (Minister of Revenue) (1993), [1994] 2 C.N.L.R. vi (note), 1993 CarswellOnt 4478, 107 D.L.R. (4th) 448 (Ont. C.A.) — referred to

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

Kingsclear Indian Band v. J.E. Brooks & Associates Ltd. (1991), 2 P.P.S.A.C. (2d) 151, [1992] 2 C.N.L.R. 46, (sub nom. *Brooks (J.E.) & Associates Ltd. v. Kingsclear Indian Band)* 118 N.B.R. (2d) 290, (sub nom.

Brooks (J.E.) & Associates Ltd. v. Kingsclear Indian Band) 296 A.P.R. 290, 1991 CarswellNB 68 (N.B. C.A.) — distinguished

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture) (2002), [2002] 2 C.N.L.R. 143, (sub nom. *Kitkatla Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture))* 286 N.R. 131, 1 B.C.L.R. (4th) 1, 210 D.L.R. (4th) 577, [2002] 6 W.W.R. 1, 2002 CarswellBC 617, 2002 CarswellBC 618, 2002 SCC 31, 165 B.C.A.C. 1, 270 W.A.C. 1, [2002] 2 S.C.R. 146 (S.C.C.) — referred to

Mitchell v. Sandy Bay Indian Band (1990), 1990 CarswellMan 380, (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46, 1990 CarswellMan 209 (S.C.C.) — considered

R. v. Collins (1987), [1987] 3 W.W.R. 699, [1987] 1 S.C.R. 265, (sub nom. *Collins v. R.)* 38 D.L.R. (4th) 508, 74 N.R. 276, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, 28 C.R.R. 122, 1987 CarswellBC 94, 1987 CarswellBC 699 (S.C.C.) — followed

R. v. Evans (1991), 4 C.R. (4th) 144, [1991] 1 S.C.R. 869, 63 C.C.C. (3d) 289, 124 N.R. 278, 3 C.R.R. (2d) 315, 1991 CarswellBC 918, 1991 CarswellBC 417 (S.C.C.) — referred to

R. v. Kruger (1977), [1978] 1 S.C.R. 104, 34 C.C.C. (2d) 377, 1977 CarswellBC 368, 1977 CarswellBC 491, 9 C.N.L.C. 624, [1977] 4 W.W.R. 300, 15 N.R. 495, 75 D.L.R. (3d) 434 (S.C.C.) — referred to

R. v. MacLaurin (1999), 1999 CarswellMan 131, [1999] 3 C.N.L.R. 274 (Man. Prov. Ct.) — considered

R. v. MacLaurin (1999), 1999 CarswellMan 592, [2000] 3 W.W.R. 606, 143 Man. R. (2d) 85, [2000] 2 C.N.L.R. 216 (Man. Q.B.) — considered

R. v. MacLaurin (2001), 2001 MBCA 138, 2001 CarswellMan 449, [2003] 5 W.W.R. 621, 160 Man. R. (2d) 27, 262 W.A.C. 27 (Man. C.A.) — considered

R. v. Mann (2004), 21 C.R. (6th) 1, 241 D.L.R. (4th) 214, 185 C.C.C. (3d) 308, 122 C.R.R. (2d) 189, 324 N.R. 215, [2004] 3 S.C.R. 59, 2004 SCC 52, 2004 CarswellMan 303, 2004 CarswellMan 304, [2004] 11 W.W.R. 601, 187 Man. R. (2d) 1, 330 W.A.C. 1 (S.C.C.) — followed

R. v. Mellenthin (1992), 16 C.R. (4th) 273, 76 C.C.C. (3d) 481, 144 N.R. 50, 40 M.V.R. (2d) 204, 5 Alta. L.R. (3d) 232, [1993] 1 W.W.R. 193, 135 A.R. 1, 33 W.A.C. 1, 12 C.R.R. (2d) 65, [1992] 3 S.C.R. 615, 1992 CarswellAlta 149, 1992 CarswellAlta 474 (S.C.C.) — distinguished

R. v. Murdock (1996), 38 C.R.R. (2d) 15, 154 N.S.R. (2d) 1, 452 A.P.R. 1, [1997] 2 C.N.L.R. 103, 1996 CarswellNS 309 (N.S. C.A.) — referred to

R. v. Nikal (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal)* 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — considered

R. v. Sewell (2006), 2006 ONCJ 202, 2006 CarswellOnt 3363, 2006 G.T.C. 1237 (Eng.), [2006] G.S.T.C.

72, [2006] 4 C.N.L.R. 241 (Ont. C.J.) — referred to

R. v. Tenale (1985), 1985 CarswellBC 399, 1985 CarswellBC 814, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 33, (sub nom. *R. v. Dick)* 62 N.R. 1, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129 (S.C.C.) — referred to

R. v. Therens (1985), 38 Alta. L.R. (2d) 99, 1985 CarswellSask 851, 1985 CarswellSask 368, [1985] 1 S.C.R. 613, 13 C.R.R. 193, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 59 N.R. 122, 40 Sask. R. 122, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153 (S.C.C.) — referred to

R. v. Yang (1998), 109 O.A.C. 162, 52 C.R.R. (2d) 1, (sub nom. *Yang v. R.)* 38 O.R. (3d) 417, 125 C.C.C. (3d) 328, 1998 CarswellOnt 2147 (Ont. C.A.) — followed

Tseshaht Indian Band v. British Columbia (1992), (sub nom. *Tseshaht Band v. British Columbia)* 69 B.C.L.R. (2d) 1, 15 B.C.A.C. 1, 27 W.A.C. 1, (sub nom. *Tseshaht Band v. British Columbia)* [1992] 4 C.N.L.R. 171, 94 D.L.R. (4th) 97, 1992 CarswellBC 188, 5 T.C.T. 4248 (B.C. C.A.) — referred to

Union of New Brunswick Indians v. New Brunswick (Minister of Finance) (1998), 1998 CarswellNB 179, 1998 CarswellNB 180, [1998] 3 C.N.L.R. 295, 227 N.R. 92, 200 N.B.R. (2d) 201, 512 A.P.R. 201, [1998] 1 S.C.R. 1161, (sub nom. *Minister of Finance (New Brunswick) v. Union of New Brunswick Indians)* 98 G.T.C. 6247, 161 D.L.R. (4th) 193 (S.C.C.) — considered

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1998), 170 N.S.R. (2d) 36, 515 A.P.R. 36, 1998 CarswellNS 298, [1999] 1 C.N.L.R. 277, 165 D.L.R. (4th) 126 (N.S. C.A.) — referred to

Vincent c. Québec (Juge de la Cour du Québec) (1996), (sub nom. *Québec (Sous-ministre du Revenu) c. Vincent)* [1996] R.J.Q. 239, (sub nom. *Québec (Sous-ministre du Revenu) c. Vincent)* [1996] R.D.F.Q. 15, (sub nom. *Deputy Minister of Revenue for Québec v. Vincent)* 4 G.T.C. 6050, 1996 CarswellQue 89 (Que. C.A.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 8 — considered

s. 9 — considered

s. 10 — considered

s. 10(a) — referred to

s. 10(b) — considered

s. 24(2) — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 24 — considered

Controlled Drugs and Substances Act, S.C. 1996, c. 19

s. 5(2) — pursuant to

Sched. II — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 88 — pursuant to

Highway Traffic Act, R.S.O. 1990, c. H.8

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 87 — considered

s. 88 — considered

s. 89 — referred to

s. 89(1) — considered

Ministry of Revenue Act, R.S.O. 1990, c. M.33

Generally — referred to

s. 7 — referred to

s. 7(1) — considered

Provincial Offences Act, R.S.O. 1990, c. P.33

Generally — referred to

Pt. III — referred to

Tobacco Tax Act, R.S.O. 1990, c. T.10

Generally — referred to

s. 24 — referred to

s. 24(1) — considered

s. 24(1)(a) — considered

s. 24(1)(a)-24(1)(d) — referred to

s. 24(1)(b) — considered

s. 29 — considered

s. 29(1) — considered

s. 29(2) — pursuant to

Regulations considered:

Tobacco Tax Act, R.S.O. 1990, c. T.10

Sales of Unmarked Cigarettes on Indian Reserves, O. Reg. 649/93

Generally — referred to

TRIAL of accused on charges of possession of marijuana for purpose of trafficking, possession of weapon for purpose dangerous to public peace, and possession of more than 200 unmarked cigarettes contrary to *Tobacco Tax Act*.

***J.D. Keast J.*:**

1: Introduction

1 On July 7, 2007, the accused, Andew Martin MacDonald, was operating his van along Trans-Canada Highway No. 17, some 45 kilometres west of Sudbury, Ontario.

2 Police radar clocked the vehicle for speeding. During a routine stop pursuant to the *Highway Traffic Act*, R.S.O. 1990, c.H.8, police observed a suspicious brown cardboard box. This led to a search of the vehicle. The search yielded ten thousand (10,000) unmarked cigarettes, 310 grams of cannabis marijuana, a knife, in excess of five thousand dollars ($5,000.00) cash, cell phones, pagers and scales.

3 Mr. MacDonald was charged with possessing a substance included in schedule 2 of the *Controlled Drug and Substances Act*, S.C. 1996, c.19, specifically under three kilograms of cannabis marijuana, for the purpose of trafficking, contrary to section 5(2) of the *Act*. He was further charged with having in his possession a weapon, specifically a knife, for a purpose dangerous to the public peace, contrary to section 88 of the *Criminal Code of Canada*. Also, Mr. MacDonald is charged under section 29(2) of the *Tobacco Tax Act*, R.S.O. 1990, c.T.10 (as amended), having in his possession more than 200 unmarked cigarettes, specifically 10,000 unmarked cigarettes. The section states:

> 29.(1) No person shall, unless permitted under this Act or the regulations to do so,
>
> (a) have in the person's possession more than 200 unmarked cigarettes; or

(b) have in the person's possession, purchase or receive any number of unmarked cigarettes for the purposes of sale. 2004, c. 7, s. 31 (1).

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to,

(a) a fine of not less than $500 and not more than $10,000; and

(b) an additional fine of not less than three times the amount of tax that would be payable under section 2 had the cigarettes been sold to a consumer liable to pay tax under this Act. 2004, c. 7, s. 31 (2).

4 This relatively straightforward fact situation gives rise to an array of legal issues. In addition to the substantive elements of the offences, the validity of the search is questioned, the validity of the search authorization section of the *Tobacco Tax Act* is challenged; together with a right to counsel breach under section 10(b) of the *Canadian Charter of Rights and Freedoms* and the constitutional validity of the *Tobacco Tax Act* as it relates to First Nation people.

2: Evidence

2:1 Crown Evidence

Officer Joel McCallion

5 He was conducting radar patrol on Trans-Canada Highway 17, was uniformed and was operating an Ontario Provincial Police cruiser. He was accompanied by Sergeant Kevin Webb. He observed Mr. MacDonald's vehicle travelling at a high rate of speed which he confirmed by using the radar unit. The clocking was 121 kilometres per hour in a 90 kilometre zone.

6 A traffic stop was initiated under the *Highway Traffic Act*. The officer approached the driver's side of the 1999 Dodge Caravan. The driver rolled down his window. The officer requested the usual motor vehicle documentation. The driver identified himself as Andrew Martin MacDonald but indicated he did not have his photo Ontario license. He handed the officer an Ontario birth certificate and the vehicle registration. The registration indicated an address in Wikwemikong, Ontario, on Manitoulin Island, a Native Reserve.

7 Back in the cruiser a telephone call was initiated to the Wikwemikong Tribal Police Service in an attempt to confirm the identity of Mr. MacDonald. A description of Mr. MacDonald was provided and the officer was satisfied as to identity. The officer commenced writing three *Provincial Offences Act* tickets.

8 The vehicle was stopped at 12:30 a.m.; pulled over onto the shoulder of the roadway in the vicinity of a small recreational park. Though it was dark, there was an overhead light which provided some illumination to the area. Mr. MacDonald activated the interior lights of the vehicle to show him drum sticks for ceremonial use to support his contention of heading to a pow-wow. He observed Sergeant Webb at the window on the passenger's side dealing with the passenger, a Joshua Beaucage, and making some observations of the interior of the vehicle.

9 The officer was focused primarily on *Highway Traffic Act* matters but did become aware Sergeant Webb became engaged in an investigation under the *Tobacco Tax Act*. While he was writing up his tickets, Sergeant Webb was on the phone to someone pertaining to a *Tobacco Tax Act* search authorization.

10 At 1:08 a.m. (38 minutes after the stop) the two officers approached the vehicle and requested the occupants exit the vehicle so a search could be conducted pursuant to the *Tobacco Tax Act*. They were co-operative and exited the vehicle.

11 The search commenced at 1:08 a.m. and at 1:09 a.m. Sergeant Webb was observed to have seized a large quantity of cannabis marijuana, later ascertained as 310 grams. Mr. MacDonald was placed under arrest for possession of the cannabis marijuana, given the standard caution and the right to counsel. This was approximately 1:10 a.m. Mr. MacDonald and his passenger were then placed in the back of the police cruiser. The passenger was also charged but such was ultimately withdrawn.

12 A second police cruiser with two police officers attended the scene and assisted in dealing with the MacDonald vehicle and various items contained within the vehicle.

13 The search by Sergeant Webb continued and various items allegedly associated with the trafficking of cannabis marijuana were located. At that point, Mr. MacDonald was now charged with possession of cannabis marijuana for the purpose of trafficking. He was once again given the caution and right to counsel.

14 At 1:40 a.m., one hour and ten minutes after the initial traffic stop, the police cruiser left the scene along with Mr. MacDonald and his passenger and drove to the OPP detachment, arriving at 1:45 a.m. Mr. MacDonald was lodged in a cell at 1:46 a.m. At 1:52 a.m. a phone call was placed to the Legal Aid duty counsel via the 1-800 number. At 2:35 a.m. a duty counsel lawyer contacted the police detachment and spoke to Mr. MacDonald. The phone call lasted twelve minutes.

Sergeant Kevin Webb

15 He went to the passenger side of the vehicle at the same time Constable McCallion went to the driver's side. He went to the vehicle for officer safety reasons. It was late at night and there were two occupants in the vehicle. He was making observations of the vehicle and the occupants. He observed the back seats of the van were down which left a large open area. The vehicle was disorganized and in disarray. He observed a brown cardboard box, in open view, approximately twenty inches by fourteen inches by ten inches. *Significant* to him, he observed capital letters indicating "SM" in the top left corner of the box and "FF" in the top right corner of the box. (All underlining in this decision is my emphasis).

16 The officer had recently completed a course pertaining to *Tobacco Tax Act* investigations. The lettering on the box was of significance. Such lettering is associated with contraband cigarettes. To Sergeant Webb this was a strong indicator the closed box contained contraband cigarettes.

17 The officer went from the passenger side to the driver's side for the purpose of speaking to the driver. He asked Mr. MacDonald what was in the brown box which he had just observed. Mr. MacDonald replied he did not know. He asked the question again and the response was cigarettes were contained in the box. They were for Mr. MacDonald's mother-in-law and for a pow-wow he was intending to attend.

18 He went back to the police cruiser. Given his recently learned knowledge of *Tobacco Tax Act* investigations, he proceeded to follow the established protocol to request permission to conduct a search. He called an on-call senior investigator in the Greater Toronto area, in order to provide his reasonable and probable grounds as to an infraction under the *Tobacco Tax Act*.

19 The discussion commenced twenty-five minutes after the stop and lasted twelve or thirteen minutes.

20 He told the investigator of his observations of the cardboard box and of the markings on the box which he felt were associated with contraband cigarettes. He told the investigator about the utterance from Mr. MacDonald as to the box containing cigarettes. The investigator authorized him to conduct a search for evidence of contraband cigarettes or any paperwork associated with those cigarettes.

21 Officer McCallion and Sergeant Webb left the police cruiser at approximately 1:08 a.m., 38 minutes after the stop, and Mr. MacDonald and his passenger were requested to exit the vehicle so a search could be conducted. This officer conducted the search. He firstly went to the brown box and opened it and observed several bundles of cigarettes contained in plastic bags. The total was ten thousand cigarettes.

22 He then looked under the driver seat and pulled out a plastic bag with 310 grams of cannabis marijuana. He continued the search and located several items which he believed were associated with the marijuana. There was a separate package with 3 grams of marijuana, there was a money clip which contained $360 in cash, of various denominations in both Canadian and American currency. In the console area, between the two front seats, there was a pocket calculator, an address book, two cell phones, two pagers, a green saber knife with a four inch blade, cigarette papers and individual pieces of paper with handwriting. The address book contained what appeared to be a debt list.

23 Underneath the passenger seat there was seized a fanny pack which contained $4,812.75. Some of the money was lose, but most of the money was packaged in various bundles. These bills were in Canadian currency with denomination of $5 bills, $10, $20, $50 and $100. Scales were also found contained in the large plastic bag containing the cannabis marijuana.

24 He entered the vehicle by the sliding door on the driver's side. He did not open the sliding door until after receiving the authorization from the investigator pursuant to the *Tobacco Tax Act*.

25 Mr. MacDonald was not arrested in relation to the *Tobacco Tax Act* charge. This was a *Provincial Offences Act* matter and he was issued a summons. The right to counsel was not given in relation to the *Tobacco Tax Act* charge. Mr. MacDonald's awareness of the *Tobacco Tax Act* matter occurred when he and his passenger were requested to exit the vehicle so a search could be conducted pursuant to the *Tobacco Tax Act*.

Jack Anthopoulos

26 He has been employed with the Ministry of Revenue since January 1998 and is assigned to the Special Investigations Branch, with specific responsibilities in relation to *Tobacco Tax Act* matters. At the time of trial, he was the acting senior manager of Tobacco Operations, but at the time of this particular incident he was a senior investigator.

27 In his position as a senior investigator, he has the delegated authority under the *Ministry of Revenue Act*, section 7, to perform the duties and exercise the powers imposed by the Ministry as it relates to the *Tobacco Tax Act*, in particular, section 24. He has the power to authorize various directions pursuant to the legislation. He was the person on duty at the Ministry of Revenue on July 7, 2007. He spoke to Sergeant Webb at 12:57 a.m.

28 Sergeant Webb told him he stopped a Dodge Caravan vehicle with a certain license plate number and such vehicle was driven by an Andrew MacDonald. The officer observed a cardboard box with cigarettes inside the

vehicle in his plain view. The driver did not have any paperwork relating to any permits for the cigarettes. He was advised of the utterance that cigarettes were in the box; they were purchased from the Whitefish Reserve and were being delivered to his mother.

29 Based on the information received from Sergeant Webb, he made a determination there was reasonable and probable grounds to believe there was a contravention of the *Tobacco Tax Act* and Sergeant Webb was authorized to detain the vehicle, search it and seize any tobacco products or any paperwork relating to the purchase, sale and transportation of cigarettes. There was also an authorization to issue any *Provincial Offences* notices and to issue a Part III summons under the *Provincial Offences Act* in relation to unmarked cigarettes wherein the offence was under section 29(2) of the *Tobacco Tax Act*.

30 The power to authorize includes a police officer, though such person does not work directly for the Ministry of Revenue. He is considered to be a public servant of the province of Ontario.

31 Cigarettes sold in the province of Ontario must have certain markings pursuant to the directions of the *Tobacco Tax Act* and regulations. These markings signify the tax classification of certain categories of cigarettes. A standard cigarette package has a yellow tear band around the package. This indicates the provincial tobacco tax has been paid and federal excise tax has been paid.

32 There is another category of cigarettes with a peach coloured paper strip around the package. These specifically refer to cigarettes sold on Native reserves and intended exclusively for consumption by Natives. The significance of the peach colour is such is not subject to the provincial tobacco tax, but is subject to the federal excise tax.

33 All cigarettes sold in Ontario must have either a yellow or peach marker. Cigarettes that do not have those markers are almost certainly contraband cigarettes wherein no provincial tax has been paid.

34 There are authorizations and permits to allow the shipping of the peach marked cigarettes to Native reserves and between Native reserves.

35 He examined the seized cigarettes in this cardboard box. The bags of cigarettes are not marked properly under the regulations of the *Tobacco Tax Act*. The lack of markings would signify the appropriate tax has not been paid on these cigarettes.

36 There were other witnesses for the Crown but their evidence will not be reviewed separately

2:2 Defence Evidence

Andrew Martin MacDonald

37 He is of Native ancestry and was born in New Brunswick. He was raised by Caucasian parents who adopted him at a young age. Many of the original records were lost and accordingly he was unable to register and be designated as a status Indian under the *Indian Act*, R.S.C. 1985 as amended.

38 He was convicted on September 12, 2002 of possession of cannabis marijuana and received a fine of $1,500.00. He was further convicted on May 17, 2006 for possession for the purpose of trafficking in relation to cannabis marijuana and received a three month jail sentence.

39 He has been in a common-law relationship for several years and they have a young child.

40 He belongs to a pow-wow drum group. This group plays at ceremonies and pow-wows on Indian reserves on many weekends throughout the year.

41 On July 6, 2007, which was the day before the incident, he was at his residence in Wikwemikong, Ontario, on Manitoulin Island. He left late in the afternoon with the plan to drive to North Bay, Ontario to pick up Joshua Beaucage, who is part of the pow-wow drum group and drive to a pow-wow ceremony.

42 He picked up Mr. Beaucage in North Bay, Ontario and proceeded back to Wikwemikong and stopped in Sturgeon Falls, Ontario to visit Mr. Beaucage's grandmother, Dot Beaucage, who owned a money business called "Cash Stop" wherein she made loans and payday loans. He has known Mrs. Beaucage for several years but had not done business with her.

43 He was registered in a summer educational program for the summer of 2007 and required funds to enrol in the program. Thus, he borrowed $5,000.00 from Mrs. Beaucage and executed a document allegedly evidencing this arrangement. The course cost $2,700.00 but he required funds for other matters. He says this money received from Mrs. Beaucage on July 6 explains the cash in his vehicle located by the police officer pursuant to the search.

44 He left Sturgeon Falls, Ontario after receiving the cash and was headed back to Wikwemikong, Ontario. He stopped off at a Native reserve in Whitefish, Ontario and purchased the ten thousand cigarettes at Bob's Smoke Shop, a Native business for the sum of $700.00. These cigarettes were intended for his mother-in-law and also to be distributed at the pow-wow. The organizers of the pow-wow would reimburse him the $700.00. The purchase money for the cigarettes came from the cash loaned to him by Mrs. Beaucage.

45 He left Whitefish, Ontario to continue his trip back to Wikwemikong and it was during this part of the journey he was stopped by police.

46 When the office approached he rolled down his window. He observed the other officer go to the passenger side and was engaged in conversation with Mr. Beaucage.

47 All the windows in the back part of his van are tinted black and one cannot see into the vehicle from the outside.

48 Officer Webb proceeded from the passenger side to the driver's side and, without receiving any permission, opened the sliding door and "snooped around".

49 The officers told him they were going to attempt to verify his identification. In a few minutes they came back to his van. They wanted to know about the roof rack stored in the back part of the van. He opened the vehicle door and then the roof rack, which was empty. The officers went back to the cruiser.

50 The officers came back to the van again and this time focused on the cardboard box stored in the back part of the van. At the outset of the stop, he was asked about the contents of the box and he responded, he did not know what was in the box. On being further questioned, he indicated there were cigarettes in the box, intended for his mother-in-law and the pow-wow. The officers went back again to the police cruiser with the intention of making some calls.

51 The officers once again came to the van and requested he and Mr. Beaucage exit the vehicle so a search could be conducted. Shortly after this, he was arrested and given his rights.

52 In going through the alleged debt list, he explained he was owed money for cigarettes because of a delivery to a pow-wow and he owed two other individuals money because of personal loans.

53 He was not aware of the drugs or scales being in the vehicle. The two cell phones and pagers were not operational. One cell phone and pager were his and one cell phone and one pager belonged to someone else.

Naomi Pitawanakwat

54 She and Mr. MacDonald have been in a common-law relationship for six years. They have a four and a half year old child.

55 As to the bag of marijuana found in Mr. MacDonald's van, she indicates it belonged to her. In the few days before July 7, 2007, she drove in Mr. MacDonald's van by herself from Wikwemikong to Sudbury, Ontario to purchase the marijuana. She was a heavy user at the time, but not at the time of trial, and the marijuana was for her personal use.

56 She paid $900.00 for the marijuana. She knew the dealer through a bar in Sudbury and went to his house to conduct the transaction. She did not know his name.

57 The dealer did not measure the marijuana in her presence. She did not measure the marijuana in his presence. The dealer had several scales lying around his house and gave her a set of the scales to measure the marijuana after she left.

58 She hid the marijuana under the driver's seat of the van. Normally, she keeps her marijuana in her house. However, her father was doing renovations to her house and she was fearful he might find the marijuana. He is strongly against drug use and has lectured her in the past.

59 From the Tuesday (the day of the purchase of the marijuana) to the Friday (the day Mr. MacDonald left to go to North Bay to pick up Mr. Beaucage), she did not tell Mr. MacDonald about the marijuana under the driver's seat. She was not aware he was leaving on the Friday. She attempted to call him on his cell phone but there was no answer.

60 She did not tell any authority she was claiming ownership of the marijuana, but she did pen a letter dated March 14, 2008 (eight months after the alleged offence date) addressed "To whom it may concern", which was sent to counsel for Mr. MacDonald. To her knowledge, the letter was not forwarded to any authority.

Joshua Beaucage

61 He is a close friend of Mr. MacDonald. He is eighteen years of age. Historically, Mr. MacDonald would take care of him and supervise him for periods of time.

62 His grandmother, Dot Beaucage, owns a loan business and smoke shop in Sturgeon Falls, Ontario.

63 On July 6, 2007, Mr. MacDonald picked him up in North Bay, Ontario and they drove to his grandmother's house in Sturgeon Falls, Ontario. His grandmother and Mr. MacDonald conducted a loan transaction. He was

outside the residence in the vehicle and was not present during the transaction and did not observe any money. He claims his grandmother gave Mr. MacDonald some paper supporting the transaction. They then drove to Whitefish, Ontario where Mr. MacDonald purchased the cardboard box full of cigarettes. It was intended for the pow-wow ceremony they would be attending the next day.

64 At the scene of the traffic stop early in the morning on July 7, 2007, he was sitting in the passenger seat of the MacDonald van when two police officers approached the vehicle. One went to the driver's side and one went to his side. The officer he spoke with inquired as to his identity. He provided documentation to the officer.

65 The officer left the passenger side and walked to the driver's side and shone his flashlight inside the vehicle, then opened up the sliding door of the vehicle, looked around with his light and then closed the door.

66 The officer opened up the door again and asked what was in the black roof rack, which was stored in the back of the van. Mr. MacDonald opened up the roof rack and it was empty. The officer left the vehicle and went back to the cruiser and then came back to the vehicle and inquired about the contents of the brown box.

67 Mr. MacDonald told the police there were cigarettes in the box, for ceremonial use and for his mother- in-law.

68 He was on probation at the time. He was charged but the charges were withdrawn.

3: Credibility

69 To analyze the various factual and legal issues requires an assessment of the credibility and reliability of the witnesses. Factual disputes require resolution before considering legal principles.

Andrew Martin MacDonald

70 Mr. MacDonald was not a credible witness. More to the point, he was untruthful and deceitful in relation to material matters. His defence had a flavour of contrivance. In turn, he was evasive, rambling, confusing, contradictory and flippant.

71 The core of his defence is the cannabis marijuana was not his; it belonged to his wife. One would expect the essence of the defence to be presented in the examination in chief. It was not. The only reference to the issue of ownership in the examination in chief is the following exchange.

> Question: "Now, Mr. MacDonald, so you were informed that there were drugs found in your vehicle?"
>
> Answer: "Yes, sir".
>
> Question: "Did you have any knowledge of those drugs in your vehicle?"
>
> Answer: "No, not in the vehicle".
>
> Question: "Did you have any knowledge of any drugs?"
>
> Answer: "I had knowledge of those - of drugs. Not in that vehicle, no..."
>
> Question: "A large package of drugs were found under your seat. Were you aware of those drugs being

in your vehicle?"

Answer: "No, not in my vehicle".

72 He tantalizes by saying he did not have knowledge of the drugs in his vehicle, but he did have general knowledge of those particular drugs and does not provide any further detail.

73 After leaving the court dangling on such a material matter in his examination in chief, Mr. Chapman, the federal drug prosecutor, pursues this point. There is the following exchange:

Question: "I believe you had indicated in your examination in chief with Mr. Saftic, sir, that you said you had knowledge of the drugs but you did not have knowledge that they were in your vehicle."

Answer: "Yes, sir".

Question: "So you knew that bag of marijuana existed, did you not?"

Answer: "Yes, I knew it existed".

Question: "And how did you know it existed?"

Answer: "I don't smoke - I don't smoke marijuana so - but I know people that do and that's how I knew it existed...."

Question: "And you don't have an explanation as to how it got there, do you?"

Answer: "No".

Question: "You're trying to tell us again here today that you had no knowledge of 310 grams of marijuana in your vehicle".

Answer: "No sir."

Question: "You're sticking with that story".

Answer: "Yes".

Question: "And you're sticking with the story that you didn't - you don't have any idea how it got in your vehicle?"

Answer: "No."

Question: "No idea whatsoever".

Answer: "No".

Question: "Who did it belong to? Do you know who it belonged to?"

Answer: "I could speculate but I don't want to...."

Question: "I don't want you to speculate. But you know it is marijuana and it's in your vehicle."

Answer: "Yes sir".

74 In cross-examination, he had his second opportunity to deal with the ownership issue and does not do so. He does make it clear he has general knowledge of these particular drugs but does not explain who owns the drugs, where they came from and how they came to be under the driver's seat in his vehicle.

75 Finally, in re-examination, he gets to the core of his defence. His wife owned the drugs and she put them in his vehicle.

Question: "Were you aware that any drugs were in the vehicle when you were stopped by the police?"

Answer: "No".

Question: "Now, after the fact, after the drugs were found in your vehicle, were you made aware of an explanation of how the drugs got there?" "Did anyone tell you after the fact how the drugs ended up in your vehicle?"

Answer: "Yes."

Question: "Were you told how they got into the vehicle?"

Answer: "Yes."

Question: "And when did you become aware of how the drugs got into the vehicle?"

Answer: "When I be - when I went home."

Question: "So, when you said no you didn't when Mr. Chapman asked you the question, do you have an explanation how they got there, your answer was, no. Now, can you explain- I know there's the drugs before and the drugs after they were found. When did you become aware and how did you become aware of how the drugs were put in the vehicle?"

Answer: "I became aware - I was upset when I was released from the police station that those were in the vehicle and I questioned a few people that I knew that - that used - used marijuana, and I didn't want to vindicate [? - incriminate] anyone in my - in my examination, [examination in chief] so that's why I really didn't want to say where they came from."

Question: "Now, what were you told about the drugs after the fact?"

Answer: "That they were put under my seat."

Question: "And who told you this?"

Answer: "The mother of my child."

Question: "Pardon me?"

Answer: "My wife".

Question: "And what did she say to you?"

Answer: "She was sorry that she put them there, and she - her father's a very anti-drug person."

Question: "Now, when Mr. Chapman was asking - I want to go to - when Mr. Chapman was asking you the question, did you understand when he said, do you have an explanation how it got there, did you understand what he meant by that?"

Answer: "If I understood how they got there?"

Question: "Yes".

Answer: "I know how they got there, but I just - I just - I'm having trouble - I don't want to vindicate [? Incriminate] anybody else in - in - in that substance."

76 He says he did not tell Mr. Chapman in cross-examination, his wife put the drugs in his vehicle, because he did not want to incriminate her, but he knew his wife was going to be the next witness and would be incriminating herself! A re-examination is hardly the time to put forth the centrepiece of your defence. Mr. Chapman requested the right to recross examine and such was granted.

Question: "Your evidence now is something completely different. You're telling us that it was your wife, and you've known it was your wife ever since you were released from the police station the following morning. So would you agree with me that you weren't entirely honest when you answered the question that I asked you?"

Answer: "I don't want to ..."

Question: "I'd like you to answer the question."

Answer: "I'll give it to you. Because there's a reason for that though. I don't want to ....."

Question: "Okay, let's start with the first part. Would you agree with me that you weren't entirely honest when I asked you that question just a few minutes ago?"

Answer: "Forthcoming, maybe."

Question: "While you knew it was your wife, you knew that's what you were going to say, and you chose not to say that to me, correct?"

Answer: "I wanted this - I didn't want to have to say it if she was going to get into any -in any big legal trouble. I would just take it myself if that was the case."

Question: "And you'd agree with me that that's very similar to this situation that seems to have occurred when Sergeant Webb asked you what was in the box, isn't it?"

Answer: "No."

Question: "What's the difference? I suggest to you, sir, that there isn't any difference in that in both cases when pressed, you lie and then ultimately you will say something else. Isn't that true?"

Answer: "That's your analysis".

77 He had great difficulty in admitting the obvious - he was lying under oath.

78 Having been deceitful about his core defence, and not accepting the obvious, this casts a dark shadow over the balance of his evidence.

79 Another point of obvious deception was his initial response to Sergeant Webb's inquiry as to the contents of the cardboard box. He replied he did not know but when further questioned he indicated the cigarettes were for his mother-in-law and the pow-wow. He had great difficulty in cross-examination in accepting the obvious notion his initial response was not the truth.

80 Mr. MacDonald states the $5000 in cash found in the vehicle, primarily under the passenger seat, came from loan proceeds from Dot Beaucage, a few hours before the traffic stop. To support this, he produced two documents. One was the loan document itself executed by dot Beaucage and himself; and a receipt acknowledging the transfer of the money.

81 When were those documents received?

82 In the ordinary course of business, they would be received at the same time the money was provided to him. His evidence was he drove directly from Sturgeon Falls, Ontario to the place he was stopped for the driving infraction, with only a short diversion to pick up the cigarettes at the Whitefish Reserve. Therefore, the loan document and receipt should have been in the vehicle or on his person. The vehicle was searched and a strip search was conducted, yet no documents were found. This led to the inevitable questioning as to when and where the documents came from. There is the following exchange on cross-examination:

Question: "And you'd agree with me that the receipt, which was exhibit 25 I believe it was."

Answer: "Mh'mm". Question: "...that wasn't in the fanny pack".

Answer: "I don't know. I don't believe so".

Question: "And it wasn't in the car?"

Answer: "I don't believe so. No."

Question: "So how does the receipt - you're coming back from Dot's cash stop.... So when did you get the receipt".

Answer: "Because she has a copy of the receipt. I was going to the pow-wow, and God knows who was going in and out of that vehicle when we were at the pow-wow."

Question: "She didn't - she just gave you the cash and you didn't receive any paperwork at the time."

Answer: "No. No, I signed the paper and she gave me the cash, and I was just happy to get the cash."

83 Then in re-examination he states:

Question: "Cash Stop in Sturgeon Falls, when Mr. Chapman was asking questions, you said - you said

that you weren't provided a receipt at that time?"

Answer: "Yes".

Question: "So when did you get the receipt? Did you have to go back and get the receipt?"

Answer: "I - ya, I talked to her. I told her what happened and I said they're not gonna -[believe me] even though - I need a receipt for that - for that loan."

Question: "Then she provided that to you?"

Answer: "Yes, right away. It was just a photocopy".

84 At first he does not know if the receipt is with the fanny pack of money and then he conveys uncertainty by saying he does not believe so. And then he implies someone at the pow-wow (later on that day) took the receipt because people were in and out of his vehicle. Finally, he concedes he received no paperwork at the time of the transaction - the paper was allegedly obtained from Dot Beaucage sometime later. Since he clearly ultimately said that, why was there so much fencing and ambiguity to get to that point?

85 He was questioned on the breakdown of the $5000 that it was unusual for a loan amount to be in a number of bundles of various denominations. He says he does not recall how the money was rolled up and then concedes it was he that arranged the money in the manner it was found!

86 The bundling of the money as described by Sergeant Webb is indicative of a trafficking scheme as to how sums of money are arranged. His answers on this point are unsatisfactory.

87 Joshua Beaucage said he did not see any cash. He was seated in the passenger seat when Mr. MacDonald came out of Dot Beaucage's house with the money. The money was found by the police under Joshua Beaucage's seat. How could Mr. Beaucage possibly miss the money being placed there - unless, of course, it was placed there at another time and date altogether, which had nothing to do with the supposed Beaucage loan.

88 I also found his answers unsatisfactory as to the reasons for the total loan amount of $5000. He said the tuition for the summer educational course was the primary reason for the loan. However, the tuition was $2700, leaving a further $2300 unaccounted for. He was vague as to the expenditure of those monies, except the sum spent on the cigarettes.

89 The providing of the loan documentation after the fact is suspicious. He had to explain why there was over $5000 cash in his vehicle. The bundles of money would be an unusual arrangement for someone provided with loan proceeds. The explanation for the bundling of the money was deficient. Mr. MacDonald may have had a loan with Dot Beaucage for his summer school tuition, but it did not occur on July 7, 2007 and had nothing to do with the money found in his vehicle. This strikes me as part of the contrivance.

90 Mr. MacDonald's responses to questions about the cell phones and pagers is also indicative of his resistant attitude on key points. When initially questioned on the four cell phones and pagers, instead of dealing directly with the point, he throws back at the cross-examiner:

But were they operational? Did you ever check that they worked, if they were operating?

He avoided the point the questioner was attempting to make and deflected the thrust of the cross-examination by asking a question as opposed to answering the questions asked. On being asked why he needed a pager, he did not answer the question and insisted they were not active. He goes on to say one pager and one cell phone were not his but could not name the owner of these two items. Pressed as to who owned the other pager he responded:

> "Probably somebody. I have no clue who owned the other one..."

He was guessing and attempting to deflect the focus from himself.

91 The Crown questioned on the custom of drug dealers frequently changing their cell phones and pagers. There is the following exchange:

> Question: "Would you agree with me drug dealers often change cell phones?"
>
> Answer: "Politicians, often change cell phones too."

Again, instead of dealing with the issue raised in the question, he deflects the questioner.

92 Though he says the two cell phones were not operational, the evidence of his wife suggests at least one of the cell phones was operational. On discovering he left town on Friday, July 6, 2007, she says she attempted to reach him on his cell phone to advise of the marijuana she placed under the driver's seat in his van, but there was no answer. The fact she attempted to reach him on the cell implies she thought the cell phone was operational.

93 On the surface, Mr. MacDonald's explanation of the debt list might make sense in other circumstances. However, his overall credibility is so challenged, I do not accept his explanation as to the list of debts.

94 Mr. MacDonald has a criminal record for possession of marijuana and possession of marijuana for the purpose of trafficking. He was incarcerated for three months in 2006. He must know another conviction of possession for the purpose carries with it the probability of incarceration. His record is not determinative of the issue of his credibility but it cannot be ignored in a defence of this nature.

95 I do not accept Mr. MacDonald's evidence on the material features of his defence. Further, his evidence does not raise a reasonable doubt.

Naomi Pitawanakwat

96 She was not a credible witness. Her evidence cannot be considered in isolation from the evidence of her husband. Her evidence smacks of contrivance. She has a strong vested interest in the outcome of the case. She has already seen her husband go to jail once for a conviction of possession for the purpose of trafficking. She does not want to see it again. Having rejected her evidence, I find it does not raise a reasonable doubt.

97 The first problem with her evidence is the timing of disclosing the marijuana was hers and she placed it in her husband's vehicle. This evidence, in these circumstances, raises a high index of suspicion. If there is validity to her position, why did she not go to the police within a few days after July 7, 2007? She does not answer this. For this kind of defence to have some semblance of credibility, one would expect the disclosure to be put forth as soon as possible after the offence date. However, if she came forward shortly after the laying of the charges, she had to have known there would be further police investigation and perhaps she would be placed in jeopardy

by being charged.

98 Instead of going to the police, she sends a letter to Mr. MacDonald's counsel claiming ownership and responsibility for the marijuana. The letter is sent eight months after the charge against her husband. The letter was not forwarded to the police, which, if it occurred, may have led to further investigation. The substantially delayed disclosure has a major impact on her believability.

99 Her next problem is the validity of the explanation as to why she hid the marijuana under the driver's seat. Her answer was contradictory. She states:

> Well, I don't really have an answer to that. They were doing renovations on our home and my father is anti-drug. He doesn't appreciate drug use so I kept it there [in the vehicle] to prevent him from finding it in the house.

100 She starts out by saying she does not have an answer and then indeed does give an answer. The answer she now gives does not stand up to scrutiny.

101 This was not a large bag of marijuana. It was easily stored under the driver's seat. There are many nooks and crannies in a house wherein the marijuana could have easily been concealed. Her father may be upset with her drug use, but she does not say her father is going to conduct a detailed inspection of her house in an attempt to find drugs. He is performing renovations. His focus is on the renovations. What wrath would she rather incur? The risk of her father finding marijuana in the house or the risk police finding marijuana in the family vehicle? Logic suggests the marijuana is far more protected in the house than the vehicle. Anything can go wrong with a vehicle and the marijuana easily discovered - which is precisely what happened. Basic common sense suggests there is much less privacy and protection in a vehicle compared to a house.

102 Why did she not tell her husband sooner about the marijuana being placed in the family vehicle? She purchased the marijuana on Tuesday, July 3, 2007. When she discovered he left town late Friday afternoon (July 6, 2007), when she arrived home from work, she urgently attempts to reach him by cell phone to tell him of the marijuana in the vehicle. What is so urgent about telling him on the Friday? Would not the same urgency be there on the Tuesday, Wednesday or Thursday?

103 Another problem with her evidence is her claim she did not know he was going out-of-town for the July 6 to 8, 2007 weekend. Mr. MacDonald's evidence was he had established a pattern of leaving town on most weekends to attend pow-wows where he performed. She surely must have known about this pattern. It had already been planned he was going to attend the pow-wow on Saturday July 7, 2007. She should not have been surprised when she came home from work and discovered he was gone. He has done this on weekends frequently in the past. On the other hand, it is difficult to believe Mr. MacDonald would leave town for the weekend and not tell his wife, unless, of course, they took it as automatic he left town most weekends. All the more reason to tell him about the marijuana before he left town on Friday, July 6, 2007.

104 Her explanation as to the mechanics of the purchase of the marijuana and the possession of the scales is damaging to her credibility. She claims she purchased the marijuana for $900. The seller was trying to get rid of it.

105 James Vardon, of the Ontario Provincial Police, an expert on the street value of marijuana, gave evidence the alleged purchase price was significantly below the street value of this marijuana. He suggested it was prob-

ably below the seller's costs. Mr. Vardon gave evidence on the various factors affecting value in a careful and measured fashion. He was prepared to be conservative in considering those factors which would reduce the value. Taking all that into account, I am of the view no rational seller would sell this quantity of marijuana for $900. This alleged transaction strikes me as part of the contrivance.

106 What particularly colours her explanation as to the purchase, revolves around the scales allegedly given to her by the seller (which were located along with the bag of marijuana by the police). She claims the seller told her if she did not trust his weighing of the marijuana, she could take a set of scales home with her, implying she could get back to him if she is not satisfied with the weight. This explanation is preposterous. Why would she not have the seller weigh the product at the time of the purchase? She does not explain this. She had no prior dealings with the seller. She claims not to know his name. Aside from the practical problem of locating and communicating with the seller if she is dissatisfied as to the weight, what rational seller is going to take her word she was short-changed on the weight! I do not believe her story on the scales. I do not accept her evidence in relation to the material features of the defence. Her evidence does not raise a reasonable doubt.

Joshua Beaucage

107 Mr. Beaucage was not a credible or reliable witness. His significant challenge was the impact of the passage of time on the accuracy of his evidence. He was not aware he was going to be a witness in the proceeding until a few days before the day of his evidence. That was the first time he had to draw his mind back in time to attempt recollection of events - from seventeen months earlier.

108 The human memory does not operate like a video camcorder, playing back accurately what happened at an event. As a result, parties and witnesses involved in litigation follow a process to preserve evidence at an early opportunity when memory recollection is at its highest. Police officers and other witnesses make notes and prepare statements which lock them into early memory retention in an effort to enhance accuracy. Accused persons are likewise engaged at an early time. They retain counsel who obtain disclosure and review it with their clients, who in turn provide early feedback to establish the defence, at a time when memory is not eroded by the passage of time. It appears Mr. Beaucage did not have this opportunity and did not reflect on events until a day or two before his evidence.

109 Mr. Beaucage claims he saw the document evidencing the loan after Mr. MacDonald left the house and entered the van. Mr. Beaucage was already sitting in the passenger's seat. If this observation is correct, it would be important evidence suggesting a legitimate explanation for the $5000 cash.

110 There are a number of deficits with this evidence. Firstly, if he saw Mr. MacDonald enter the van with the contract document, then the document would be on Mr. MacDonald's person at the time of the traffic stop and search, or would be located in the vehicle. The document did not surface during the search of the vehicle or per- son.

111 Secondly, Mr. MacDonald in his evidence, *did not say he had the loan contract at the time of the loan transaction.* If such was the case, he certainly would have said so. He went to Dot Beaucage's at some point *after* July 7, 2007 to obtain documentation because he did not think he would be believed. This is a material discrepancy between the evidence of Mr. Beaucage and Mr. MacDonald.

112 Thirdly, his evidence of observing the contract, but not observing the cash is inconsistent. If Mr. Beaucage is correct, then Mr. MacDonald would have entered the vehicle with both the cash and the loan contract. It is il-

logical in the context he would see the loan contract but not see the cash - especially when Mr. MacDonald says he placed the cash under the very seat in which Mr. Beaucage was seated.

113 Fourthly, he did not convey a sense of certainty in observing the loan contract. Some of his answers appeared hesitant. He is sure at one point and then at another point, he is "pretty sure". He then *assumes* there was a loan contract because this is the way his grandmother does business. He says this is a lot of money and she does not make loans without getting contracts signed at the time of the loan. It struck me he was relying more on his assumption of the contract being present, based on his knowledge of his grandmother's business practices, as opposed to any *actual* observation of the loan contract.

114 There is a further material discrepancy between his evidence and the evidence of Mr. MacDonald, when Mr. MacDonald initially responded he did not know the contents of the cardboard box. Mr. Beaucage says he is absolutely certain as to what Mr. MacDonald told the police and then he says he is crystal clear as to what he told the police. Mr. Beaucage does not accept Mr. MacDonald told the police initially he did not know the contents of the cardboard box. How can this witness be unshakeable in his view of a material point, when officers McCallion and Webb and Mr. MacDonald himself disagree?

115 When he and Mr. MacDonald attended at Bob's Smoke Shop in Whitefish to purchase the cigarettes, Mr. MacDonald indicated he used money from the $5000 loan to purchase the cigarettes. At Bob's Smoke Shop, Mr. Beaucage did not get out of the vehicle. For Mr. MacDonald to obtain the $700, he would have had to go under the very seat in which Mr. Beaucage was sitting. Yet, Mr. Beaucage for the second time, says he did not observe any cash. I do not accept the evidence of this witness in relation to the material features of the defence. It does not raise a reasonable doubt.

Officers Joel McCallion and Kevin Webb

116 Of the Crown witnesses, the most contentious in terms of credibility and reliability were the investigating police officers at the scene. There is conflict within their evidence and conflict with defence evidence. These conflicts must be sorted out as such relates to certain facts.

117 There are two central factual questions. Firstly, how did Sergeant Webb come to view the interior of the van, and in particular, the cardboard box which contained the cigarettes? Secondly, when did Sergeant Webb open the sliding door on the driver's side of the vehicle? Was it before he sought the authorization under section 24(1) of the *Tobacco Tax Act* or was it after the authorization was provided?

118 Overall, both officers were credible witnesses. They were measured and careful in their choice of language and expressing thoughts, observations and opinions. In particular, Sergeant Webb had a high degree of clarity to his evidence. He was careful not to speculate or to make assumptions when he could have done so.

119 The defence position is Sergeant Webb could not have viewed the cardboard box unless he opened up the sliding door on the driver's side. The windows were tinted black and one cannot see into the interior of the vehicle without opening up the door. The significance of the time of opening the sliding door relates to whether there was an unreasonable search conducted.

120 There is no evidence to contradict Mr. MacDonald when he says the windows were fully tinted and you could not see inside. Neither Officer McCallion or Sergeant Webb had sufficient recollection of the tinting of the windows. They would not speculate. However, it should be noted, OPP Officer Phillips, who played a minor

role in this matter, gave evidence he had no difficulty seeing into the back part of the van from the outside, suggesting the tint was not strong enough to obliterate observation of the interior of the vehicle.

121 I find as a fact Sergeant Webb observed the cardboard box with its tell-tale signs through the rolled down window on the passenger side of the van when he was having a conversation with Mr. Beaucage. The cardboard box was in plain view.

122 Officer McCallion indicates Mr. MacDonald turned on the interior lights of the vehicle to show the officer his drum sticks intended for use at a pow-wow. That evidence has not been disputed by either Mr. MacDonald or Mr. Beaucage.

123 There is specific evidence the driver's window was rolled down. There is no specific evidence the passenger window was rolled down. However, it had to be. A conversation took place between Sergeant Webb and Mr. Beaucage. Further, Mr. Beaucage showed identification papers to Sergeant Webb. This could not have been done without rolling down the window. This allowed Sergeant Webb to view the interior of the van. There was sufficient illumination because Mr. MacDonald activated the interior light.

124 Mr. Beaucage did say Sergeant Webb used his flashlight, not specifically on the passenger side of the vehicle, but when he went over to the driver's side of the vehicle he shone the flashlight inside the vehicle, before any opening of the door. I conclude, the only reason he would go from the passenger side to the driver's side was when he observed something of interest. It was probable he had his flashlight activated when he was on the passenger side of the vehicle. He points out the cardboard box in question was on the opposite side of the vehicle to the passenger's side. He should have been able to see through the passenger window part of the back section of the vehicle. His view would be across the vehicle to the side of the driver and toward the back. In order to get a closer look at the item of interest, he goes to the driver's side and shines the flashlight through the downed driver's window into the back section of the vehicle. Mr. Beaucage does not dispute that part.

125 There was another source of illumination. The stop on the shoulder was adjacent to a small park which had an activated overhead light. No one suggested this light was not sufficient to illuminate the inside of the vehicle. I cannot tell the strength of that illumination, but the outside light, coupled with the activation of the interior light and the use of a flashlight were all sufficient to allow Sergeant Webb to observe the cardboard box which was in plain view.

126 Whether or not the windows on the back half of both sides of the van were completely tinted or partially tinted is irrelevant. Sergeant Webb did not make his observations into the interior through those windows.

127 As to how Sergeant Webb made the initial observation of the interior of the vehicle, there is no dispute by either Mr. MacDonald or Mr. Beaucage. I accept the evidence of Officer McCallion and Sergeant Webb as to how Sergeant Webb observed the interior of the van.

128 As to the timing of the opening of the sliding door on the driver's side, Mr. MacDonald states Sergeant Webb proceeded from the passenger side of the vehicle to the driver's side of the vehicle, and without receiving permission, opened up the sliding door of the vehicle and "snooped around". Mr. Beaucage's evidence on this point is materially different than Mr. MacDonald's in one important aspect. Mr. Beaucage says when Sergeant Webb was initially at the driver's side he shone the flashlight into the vehicle and *then* opened up the sliding door.

129 I have found both MacDonald and Beaucage not to be credible witnesses. However, as between the two of them, in this conflicting evidence, Beaucage's comment makes more sense in relation to the context. When Sergeant Webb came to the driver's side, the driver's window was already rolled down. It would be logical he would flash his light into the interior of the van from that vantage point.

130 Neither Mr. MacDonald or Mr. Beaucage have said Sergeant Webb would not have been able to view the cardboard box in the back part of the van through the opened windows on the passenger and driver's side.

131 The evidence is clear Sergeant Webb was able to conduct observations of the cardboard box from looking into the illuminated interior from both the passenger and driver's side of the van. If that is the case, why would he open the sliding door on the driver's side? He had no need to do so. He already had what he needed. The opening of the driver's side sliding door at the time indicated by MacDonald and Beaucage is incongruent with the context. It was superfluous to pursue the matter by intruding into the vehicle. After making his observation through the two front windows, the logical follow-up was not to open up the sliding door but to simply ask the question as to what was in the box. This is exactly what he did.

132 Before asking the question, Sergeant Webb had a strong indicator as to the contents of the box. He could not be certain because the box was closed. Hence the question.

133 Once the question was answered which confirmed the strong indicator of cigarettes in the box, there again was no need to open up the sliding door. Sergeant Webb now had sufficient information in his mind to pursue the protocol to seek authorization to search the vehicle under section 24(1) of the *Tobacco Tax Act*.

134 Mr. MacDonald and Mr. Beaucage indicate Sergeant Webb opened the driver side sliding door on three occasions, two of them coming before the section 24(1) *Tobacco Tax Act* authorization. In the first time he opened up the door and inquired as to the contents of the roof top carrier box which was also in the back pat of the van. Then, the police officers go back to the cruiser and then come back to the van and make inquiries about the cardboard box and Sergeant Webb again opens up the sliding door to look at the cardboard box.

135 It is illogical Sergeant Webb would twice be opening up the sliding door to separately inquire about the roof carrier and cardboard box. If the door was opened at all, logically, inquiries would have been made about the roof top carrier and cardboard box at the same time. For these reasons, and my reasons in relation to the general credibility of Mr. MacDonald and Mr. Beaucage, I do not accept their evidence the sliding door was opened up before the authorization. I am satisfied the sliding door was not opened until after the appropriate authorization under section 24(1).

136 The observation of MacDonald and Beaucage as to the initial opening of the sliding door does have some support in the evidence of Officer McCallion. Officer McCallion's evidence on this point was contradictory and inconsistent, but he did say at one point the sliding door was opened before the section 24(1) authorization.

137 That one answer - indicating an early opening up of the door - must be assessed together with all of his answers on this point. Considering the totality of his answers, he does not know when the sliding door was opened. Why the contradiction? There are two reasons. Firstly, Officer McCallion had no notes as to when the sliding door was opened. He was operating purely in an attempt at independent recollection. The purpose of notes is to lock in memory at an early date. It was obvious he was struggling with the attempt to recall.

138 Secondly, the memory retention of Officer McCallion, as well as Sergeant Webb, is impacted by their fo-

cus. The focus was different for each officer. Officer McCallion's primary focus was the *Highway Traffic Act* investigation. The time spent with the driver at the window appeared to take longer than usual because of the lack of proper documentation. Though he had some awareness of what Sergeant Webb was doing, he was not giving the actions of Sergeant Webb his undivided attention. With his primary focus on the *Highway Traffic Act* investigation and only having a secondary awareness of the actions and movements of Sergeant Webb, it is not surprising he is struggling with memory retention as it relates to when the sliding door was opened.

139 The same thinking applies to the clarity of the evidence on this issue by Sergeant Webb. The *Tobacco Tax Act* investigation was the primary focus of Sergeant Webb though he was still somewhat aware of the movements of Officer McCallion in dealing with the *Highway Traffic Act* investigation. He had no difficulty dealing with the many questions put to him as to when the sliding door was opened. He was clear it was opened after he received the section 24(1) authorization. For the reasons given herein, I accept the evidence of Sergeant Webb as to when the sliding door was opened. The evidence of Mr. MacDonald, Mr. Beaucage and Officer McCallion does not raise a reasonable doubt on this point.

140 Having dealt with important factual matters, I am now in a position to examine the section 8, 9 and 10(b) *Charter* issues.

4: Sections 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms

141 The defence position is there was an unreasonable search of the vehicle. There are different components to this. Questioning Mr. MacDonald as to the contents of the box was part of the search process and was unreasonable and illegal. Even if the sliding door was opened after the section 24(1) authorization, the search is still unreasonable. Sergeant Webb did not have reasonable and probable grounds. Sergeant Webb was not properly authorized under section 24(1) of the *Tobacco Tax Act*. The scheme under section 24(1) is too broad and is invalid and cannot be utilized to support a search. There is no authority in law to specifically delegate the search power to Sergeant Webb. Mr. MacDonald was arbitrarily detained under the *Tobacco Tax Act*, as much as he was arbitrarily detained under the *Highway Traffic Act*.

142 Section 8 and 9 of the *Charter* state:

> (8) Everyone has the right to be secure against unreasonable search or seizure.
>
> (9) Everyone has the right not be to arbitrarily detained or imprisoned.

143 Section 24(1) of the *Tobacco Tax Act* states:

> 24.(1) For any purpose relating to the administration and enforcement of this Act and the regulations, any person authorized for the purpose by the Minister who has reasonable and probable grounds to believe that the vehicle, trailer attached to a vehicle, vessel, railway equipment on rails or aircraft contains evidence of any contravention of this Act,
>
> (a) may, without warrant, stop and detain any vehicle, including any trailer attached to the vehicle, any vessel, railway equipment on rails or aircraft;
>
> (b) may examine the contents thereof including any cargo, manifests, records, accounts, vouchers, papers or things that may afford evidence as to the contravention of this Act or the regulations;

(c) subject to subsections (2), (2.2) and (2.4), may seize and take away any of the manifests, records, accounts, vouchers, papers or things and retain them until they are produced in any court proceedings; and

(d) may use any investigative technique, procedure or test that is, in the person's opinion, necessary to determine whether cigarettes found during a detention are marked or stamped in accordance with this Act and the regulations. R.S.O. 1990, c. T.10, s. 24 (1); 1991, c. 48, s. 4; 2004, c. 31, Sched. 36, s. 9 (1).

144 Section 7(1) of the *Ministry of Revenue Act* R.S.O. 1990, c.M.33 states:

7.(1) Any power or duty conferred or imposed on the Minister under this or any other Act may be delegated by the Minister to the deputy minister or to a public servant employed under Part III of the *Public Service of Ontario Act, 2006* who works in or provides services to the Ministry and, when purporting to exercise a delegated power or duty, the delegate shall be presumed conclusively to act in accordance with the delegation. 2007, c. 7, Sched. 25, s. 1.

145 Section 24 of the *Tobacco Tax Act* authorizes a warrantless search. For such a search to be reasonable, the Crown must show:

(a) the search is authorized by law,

(b) the law authorizing the search is reasonable; and

(c) the search was carried out in a reasonable manner.

See *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.) and *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.).

Authority for Sergeant Webb's Search

146 The defence alleges Jack Anthopoulos improperly sub-delegated the powers given to him under the *Ministry of Revenue Act*, to Sergeant Webb. Thus, the search of Mr. MacDonald's vehicle and seizure of various items was not lawfully authorized.

147 In analyzing this, the starting point is section 7(1) of the *Ministry of Revenue Act*, which provides the Minister of Revenue may delegate the Minister's statutory powers and/or "duties to the Deputy Minister or to a public servant... who works in or provides services to the Ministry". The Minister made a Delegation Order dated June 13th, 2007 that provides, in part, the Minister's power under section 24(1) of the *Tobacco Tax Act* (to authorize a search and seizure) is delegated to specified persons in the Special Investigations Branch, including senior investigators.

148 The power to conduct the search comes from section 24(1) of the *Tobacco Tax Act*, which provides that *"any person* authorized for the purpose by the Minister [or delegate] who has reasonable and probable grounds to believe" that a vehicle, trailer, etc. contains evidence of a contravention of the *Act*, may exercise various investigatory search powers set out in paragraphs (a) through (d) of that section. This provision directly empowered Sergeant Webb ("any person") to conduct the search and seizure once he had the two prerequisites required by the section:

(i) authorization from the Minister (or in this case, his delegate Mr. Anthopoulos); and

(ii) reasonable and probable grounds to believe he would discover evidence of a contravention of the *Act*.

149 Mr. Anthopoulos, acting as the Minister's delegate, authorized Sergeant Webb to search Mr. MacDonald's vehicle, as he was empowered to by virtue of section 24(1) of the *Tobacco Tax Act* and section 7(1) of the *Ministry of Revenue Act*. Once so authorized, and with reasonable and probable grounds, Sergeant Webb exercised the investigatory powers provided directly to him ("any person") under paragraphs 24(1)(a) through (d) of the *Tobacco Tax Act*.

Does Section 24(1) Authorize a Reasonable Search?

150 This issue was dealt with by the Court of Appeal in *R. v. Yang* (1998), 38 O.R. (3d) 417 (Ont. C.A.) at paras. 8 - 9. In upholding section 24 of the *Tobacco Tax Act* the court stated:

> ...Section 24(1) of the *Tobacco Tax Act* requires that there be "reasonable and probable grounds" for a warrantless search of a vehicle. The provision is a direct response to this court's decision in *Johnson v. Ontario (Minister of Revenue)*,j (1990), 75 O.R. (2d) 558. in *Johnson*, this court struck down the predecessor to s. 24(1) of the Act. Near the end of her judgment, Arbour J.A. offered explicit advice about how a valid search provision could be drafted. She said, at p. 574:
>
> > A requirement of reasonable and probable grounds to believe that a commercial vehicle contains evidence of a contravention of the *Tobacco Tax Act* will, in my opinion, reduce the scope of the search sufficiently to recognize the privacy interest at stake. While not unduly impairing the enforcement of the Act, such a requirement would also satisfy the s. 8 *Charter* standard required for regulatory type searches.

The Ontario legislature complied with this advice when it enacted s. 24(1) of the current Act. The "reasonable and probable grounds" standard is the anchor of this new search provision.

151 The defence submits *R. v. Yang* found section 24 of the *Tobacco Tax Act* to be constitutional only as it pertained to commercial vehicles. The court's reasons expressly address the fact that the predecessor search provision in the Act applied to commercial vehicles only, while the new section applies to all vehicles.

> The first distinction is, in our view, not a compelling one. It is true that the previous Act applied only to commercial vehicles whereas the current Act applies to all vehicles. It is also true that the court in Johnson attached a very low privacy interest to commercial vehicles and a somewhat higher interest to private vehicles. Arbour J. A. said at p. 567:
>
> > In terms of the location in which a reasonable expectation of privacy may be claimed, commercial vehicles, as they are defined, would not rank as high as a private home or even as office space or private motor vehicles. Vehicles generally have been recognized as not carrying the same privacy expectations as a home or private office. Commercial vehicles would generally carry an even lower expectation of privacy, given that they are more heavily regulated than private vehicles.
>
> We do not think that this passage places private vehicles on a particularly high pedestal. Moreover, when it is recalled that the vehicle in question in this case was being used to carry a clearly commercial product - 3/4 of a million cigarettes - it stretches credulity to link the vehicle and the product to any serious privacy

concern. Finally, we observe that counsel for the respondent conceded that the inclusion of all vehicles in the new Act did not render it unconstitutional.

For these reasons, our firm conclusion is that s. 24(1) of the Tobacco Tax Act does not violate s. 8 of the Charter.

I am satisfied Section 24(1) authorizes a reasonable search.

Was the Search Carried Out in a Reasonable Manner?

152 The defence argues the search was not carried out in a reasonable manner. The search should have been restricted to the cardboard box containing tobacco, but it went beyond this, and included the glove box and other compartments and sections of the vehicle and went beyond the requirements of what is necessary to enforce the *Tobacco Tax Act*.

153 In *R. v. Yang* the court upheld a search and seizure that included items other than tobacco, such as price lists, customer lists, an invoice and order forms. Section 24(1) has a broad scope giving considerable latitude to go well beyond the cardboard box. In the course of this search, the discovery of the cannabis marijuana provided reasonable grounds to continue searching the vehicle for other items.

Reasonable and Probable Grounds

154 It was submitted the information in the possession of Sergeant Webb did not constitute reasonable and probable grounds, to support a search. The strength or weakness of that information directly impacts on the validity of the actions of Mr. Anthopoulos, including the authorization to Sergeant Webb.

155 There are differences in the notes of Sergeant Webb and Mr. Anthopoulos, with Sergeant Webb having less information in his notes. The difference in the notes is not material, because the only source of information for Mr. Anthopoulos is the conversation with Sergeant Webb. For example, Sergeant Webb had no recollection of discussing permits with Mr. MacDonald, but Mr. Anthopoulos has such in his notes, that there were no permits. I am satisfied the evidence of Mr. Anthopoulos properly captured the information provided by Sergeant Webb.

156 I am satisfied Sergeant Webb and Mr. Anthopoulos conducted due diligence as to the reasonable and probable grounds. Their conversation lasted twelve to thirteen minutes. There is the following information to support the reasonable and probable grounds:

i) observing a box in the vehicle in plain view;

ii) the box contained lettering associated with the contraband cigarette trade;

iii) an utterance by Mr. MacDonald there were cigarettes in the box;

iv) the cigarettes were obtained from the Whitefish Reserve and were intended for the mother-in-law of Mr. MacDonald;

v) the occasion for observing the vehicle was a traffic stop;

vi) a description of the vehicle and license plates;

vii) the identity of the driver and his residence in Wikwemikong, Ontario; and

viii) there were no permits for the cigarettes.

157 This information is sufficient, on the subjective and objective standard, to support reasonable and probable grounds of an infraction under the *Tobacco Tax Act*.

158 The two most crucial pieces of information is the cardboard box with the unique lettering and the utterance of Mr. MacDonald there were cigarettes in the box. *The lettering on the box was unique to the contraband cigarette trade.* The inference to be drawn from the lettering is clear - the box contains contraband cigarettes. However, boxes such as this could be used to store contents other than its original contents. Hence, the simple and basic question "What's in the box?" Based on these two pieces of information alone, there would be sufficient basis for reasonable and probable grounds.

159 The defence argues Sergeant Webb should have asked more questions and should have taken into consideration this was a private vehicle as opposed to a commercial vehicle and Mr. MacDonald was Native and may have certain rights as a result of this.

160 It is no incumbent on an officer in Sergeant Webb's circumstances to conduct an extensive scope of information. Each situation will turn on its own circumstances. It is not for Sergeant Webb to assess the ultimate merits of a charge, for example, whether there is more privacy in a private vehicle compared to a commercial vehicle, or whether Mr. MacDonald's Native status provides him with rights that non-Natives would not possess. It is only required he address the subjective and objective reasonable and probable grounds standard.

Does the Question as to the Contents of the Box Constitute an Unreasonable Search

161 The defence submits the utterance by Mr. MacDonald as to the contents of the box, was an unreasonable search occurring when he was arbitrarily detained. On that basis, the verbal statement should be excluded, as well as the cigarettes and cannabis marijuana.

162 To support this position, the defence relies on a decision of the Supreme Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615 (S.C.C.). It is suggested the scenario in *Mellenthin* is materially the same as this case.

163 In *Mellenthin*, there was a check stop set up as part of a program to check vehicles. The accused vehicle was randomly pulled aside. One of the officers shone a flashlight in the interior. The flashlight inspection revealed an open gym bag on the front seat. The officer asked what was inside the bag and was told food and shown a paper bag with a plastic sandwich bag in it. The officer saw a reflection of something in the paper bag. He then asked the accused what was in the bag and he pulled out a baggy containing empty glass viles. At this point, the officer conducted a full search.

164 The Court found the search was unreasonable. The questions pertaining to the gym bag were improper.

"At the moment the questions were asked, the *officer had not even the slightest suspicion* that drugs or alcohol were in the vehicle or in the possession of the appellant....Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search."

The Court found there was a breach of section 8 and 9 of the *Charter* and excluded the evidence.

165 At the time the question was asked, Mr. MacDonald was not arbitrarily detained under the *Tobacco Tax Act*. Though Sergeant Webb embarked upon an investigation once he saw the box, the investigation under the *Tobacco Tax Act* had not yet led to a detention. At the time the question was asked, there was a valid detention under the *Highway Traffic Act*.

166 A *Highway Traffic Act* stop cannot justify general investigations or unreasonable searches. The police officer in *Mellenthin* "had not even the *slightest* suspicion that drugs or alcohol were in the vehicle..." The police officer gambled and hoped he would find some thing.

167 The *Mellenthin* scenario is materially different than this case. Sergeant Webb was not gambling or guessing. He was not operating on a hunch. The markings on the box were unique to the storage of contraband cigarettes. He had a reasonable basis to ask the question as to the contents of the box. This was an appropriate investigatory question in the circumstances.

168 I am satisfied the question was not a breach of sections 8 and 9 of the *Charter*. I am further satisfied the actions of Sergeant Webb and Mr. Anthopoulos have not violated sections 8 and 9 of the *Charter*. Mr. MacDonald has not discharged his burden of establishing a *Charter* breach under sections 8 and 9.

5: Right to Counsel

169 Section 10 states:

> Everyone has the right on arrest or detention
>
> a) To be informed promptly of the reasons therefore;
>
> b) To retain and instruct counsel without delay and to be informed of that right.

170 The right to counsel is triggered by arrest or detention. There was no arrest; Mr. MacDonald was issued a summons. Was there a detention under the *Tobacco Tax Act*? There is a detention if there is a restraint of liberty wherein the person may reasonably require the assistance of counsel.

See *R. v. Therens*, [1985] 1 S.C.R. 613 (S.C.C.); *R. v. Evans*, [1991] 1 S.C.R. 869 (S.C.C.).

171 At the point in time Sergeant Webb received the utterance as to cigarettes in the box, he made a decision to seek authorization to conduct a search of the vehicle, under section 24(1) of the *Tobacco Tax Act*. In essence, he concluded he had reasonable and probable grounds and now was statutorily mandated to review those grounds with an authorized individual under the legislation. *At the point in time he walked back to the cruiser with the intent of pursuing the section 24(1) protocol, Mr. MacDonald was detained.*

172 The structure of section 24(1) creates an interlude in time. The intent of a search is suspended until clearance is received from a third party. In this case, Sergeant Webb went back to the cruiser and made a call to locate the authorizing individual. After several minutes he was able to engage with Mr. Anthopoulos. The phone call took twelve to thirteen minutes. The time from intention to seek authorization to completion of the phone call was approximately thirty-five minutes. Mr. MacDonald was detained during this time, not only under the *Highway Traffic Act*, but also under the *Tobacco Tax Act*.

173 Before he went back to the cruiser to make his call, he should have advised Mr. MacDonald he was being detained under the *Tobacco Tax Act* and what he was about to do with the Minister's delegate. Mr. MacDonald and the vehicle must remain while this process was completed.

174 I am satisfied that there was a valid traffic stop from 12:35 a.m. to 1:08 a.m. It was much longer than usual because of delay caused by the time to verify identity and the number of tickets to be prepared. The valid detention under the *Highway Traffic Act* cannot justify a collateral detention under other legislation.

175 Sometimes considering a hypothetical stimulates analysis. What if this were a R.I.D.E. program to check sobriety of a motorist? This type of valid arbitrary detention is usually conducted quickly. It takes only 30 to 60 seconds to determine whether the driver has been drinking or if there is an odour of an alcoholic beverage in the vehicle. Usually in this kind of stop, there is a quick visual inspection of the interior of the vehicle. What if Sergeant Webb observed this box in plain view with its significant markings, at a R.I.D.E. stop? He would have quickly determined Mr. MacDonald had no signs of alcohol. The detention to ascertain drinking and driving would have been over quickly. He would no longer have the basis to detain Mr. MacDonald in a R.I.D.E. check. In order to pursue a search under section 24(1) of the *Tobacco Tax Act*, there must be a detention, because the driver cannot leave during the period of time the section 24(1) protocol is pursued. It is illogical that a longer than normal traffic stop means there is no collateral detention. The issue of detention cannot be determined by luck; a short traffic stop such as in a R.I.D.E. program or a lengthier traffic stop such as in this case.

176 The philosophy behind section 10(a) and (b) is a person is placed in *jeopardy*. When such happens, the person should know about it and be advised of the right to counsel. In this case, jeopardy occurred when Sergeant Webb felt he had reasonable and probable grounds and was going to seek authorization for a search.

177 Accordingly, I conclude there has been a *Charter* breach in relation to Mr. MacDonald's section 10(b) rights.

178 However, in these particular circumstances, there is no consequence to the *Charter* breach. No conscriptive evidence has been collected because of the breach. The cigarettes, the drugs and all related paraphernalia are not conscriptive evidence occasioned by the section 10(b) breach. Those items of evidence occurred pursuant to a reasonable search, wherein there has been no violation of sections 8 and 9 of the *Charter*. Thus, there is no evidence to consider the application of section 24(2) of the *Charter*.

179 Would a detention in order to seek a section 24(1) authorization constitute a reasonable limit under section 1 of the *Charter*? There are instances within traffic law wherein section 1 of the *Charter* has been applied as a reasonable limit on rights. Would the same reasoning apply to the *Tobacco Tax Act*? I do not know. The issue was not raised.

6: Constitutional Issues

6:1 Federal and Provincial Powers

180 Mr. MacDonald submits the *Tobacco Tax Act* and the regulations under the Act are *ultra vires* a provincial legislature because the exclusive jurisdiction to regulate Native matters falls within the exclusive legislative jurisdiction of the Parliament of Canada under section 91(24) of the *Constitution Act*, 1867 and exercised by it under section 87 of the *Indian Act*, R.S.C. 1985, c. 1-5.

181 He relies on a Manitoba provincial court decision, *R. v. MacLaurin*, [1999] M.J. No. 97, [1999] 3 C.N.L.R. 274 (Man. Prov. Ct.). The *Tobacco Tax Act* prohibition on possession of unmarked tobacco is constitutionally inapplicable to Natives, because of the operation of section 91(24) of the *Constitution Act*, 1867.

182 However, the Manitoba Court of Queen's Bench granted the Crown's appeal in that case, holding that provincial tobacco possession charges applied to Indians and non-Indians alike. See *R. v. MacLaurin*, [1999] M.J. No. 574, [2000] 3 W.W.R. 606 (Man. Q.B.). The Manitoba Court of Appeal affirmed the Court of Queen's Bench decision, noting that they were in "substantial agreement with the reasons for the decision." (Man. C.A.).

183 The federal power over Indians does not create a constitutional "enclave" that excludes provincial laws. The general rule is provincial laws do apply to Indians, except in those circumstances where they single out Indians in such a manner that such conflicts with the core of the federal power over Indians. The *Tobacco Tax Act* does not single out Indians but applies to non-Indians alike. Native property interests are not exclusive to the federal power. Several Supreme Court decisions have enunciated provincial laws can impact Native property interests.

See *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paragraphs 47, 50, 60-61;

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), [2002] 2 S.C.R. 146 (S.C.C.) at paragraphs 69, 70;

R. v. Tenale, [1985] 2 S.C.R. 309 (S.C.C.), at 326;

R. v. Kruger (1977), [1978] 1 S.C.R. 104 (S.C.C.).

6:2 Is There a Conflict Between the Tobacco Tax Act and Section 87 of the Indian Act?

184 Section, 87, 88 and 89 of the *Indian Act* states:

> 87.(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
>
> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151.

Restriction on mortgage, seizure, etc., of property on reserve

89.(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

185 Mr. MacDonald argues the cigarettes are property situated on a reserve and such is exempt from tax in respect of the use of that property. Section 87 of the *Indian Act* overrides any taxing provision contained in the *Tobacco Tax Act*. For the purposes of determining whether the property is situated on a reserve, the pattern and use of the property must be examined to establish its paramount location. If the location is on a reserve, then the property is not subject to taxation. Mr. MacDonald should be allowed to transport his personal property from one reserve to another. There is a valid purpose for this property. It was intended for ceremonial purposes at a pow-wow and also to be provided to other natives.

186 Mr. MacDonald primarily relies on *Kingsclear Indian Band v. J.E. Brooks & Associates Ltd.* (1991), [1992] 2 C.N.L.R. 46 (N.B. C.A.) at 53. This is a case wherein a school bus, which was property of a reserve, was seized, on account of liens when the bus moved off the reserve to non-Indian land. The Band contended the paramount location of the bus was on the reserve. Though it moves off the reserve at times, it is legally "situated" on a reserve, and thus is exempt from seizure.

187 The court found the school bus was "situated" on a reserve even though it was off the reserve at the time of the seizure. Thus, it was not subject to seizure.

188 It is argued the cigarettes were situated on one reserve and were being transported to another reserve and cannot be seized and cannot be taxed.

189 In *Kingsclear*, the court held section 89 of the *Indian Act*, which precludes seizure of property located on an Indian reserve, applied to the bus because "its paramount location" was on the reserve. The court reached this conclusion because the evidence established a pattern of use over several years that established a nexus between the bus and the Kingsclear Reserve in providing education to Indian children residing on the reserve.

190 Mr. MacDonald also relies on the overturned decision of the Manitoba Provincial Court in *R. v. MacLaurin* . In overturning *R. v. MacLaurin*, the Manitoba Court of Queen's Bench distinguished *Kingsclear* on the grounds that cigarettes are not fixed assets with a permanent location. In this case, Mr. MacDonald has adduced no evidence of any pattern of use of the cigarettes over time to establish their permanent location on a particular reserve, analogous to the use of the school bus in *Kingsclear*. The evidence in this case and *MacLurin* was the cigarettes were simply being transported from one location to another for distribution and consumption. Accordingly, *Kingsclear* is not applicable because this fact scenario is distinguishable.

191 This interpretation of *Kingsclear* is consistent with the Supreme Court of Canada's jurisprudence stating section 87 of the *Indian Act* provides an exemption from taxation of an Indian's or Band's property *on a reserve* but does not provide such an exemption for products *going to* a reserve:

> One must guard against ascribing an overly broad purpose to sections 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess wherever

situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusion and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.

See *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) at 133;

Union of New Brunswick Indians v. New Brunswick (Minister of Finance), [1998] 1 S.C.R. 1161 (S.C.C.) at paragraph 38.

192 The prohibition against possession of untaxed tobacco in section 29 of the *Tobacco Tax Act*, does not conflict with section 87 of the *Indian Act*. To render a provincial law constitutionally inoperative under the paramouncy doctrine, there must be an operational conflict between the laws; mere overlap is not sufficient. The federal and provincial laws must conflict in either that:

(i) there is an impossibility of dual compliance, where one says "yes" while the other says "no" or

(ii) the operation of the provincial law would frustrate the purpose of the federal law. *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paragraphs 71-75.

193 Further, and from another perspective, section 29 of the *Tobacco Tax Act* does not conflict with the tax exemption in section 87 of the *Indian Act*, because section 29 does not impose a tax at all, but prohibits possession of more than 200 unmarked cigarettes without obtaining a permit. The requirement to obtain a permit under the *Tobacco Tax Act* does not conflict with the operation or purpose of the *Indian Act* tax exemption. Requiring a person who has a right to possess unmarked cigarettes based on the *Indian Act*, to apply for a permit, tailor's the application of the provincial law to meet the *Indian Act*'s requirements. It provides a mechanism for persons entitled to an exemption to legally possess unmarked (and therefore untaxed) tobacco, while prohibiting persons who are not entitled to the *Indian Act* tax exemption from possessing unmarked (untaxed) tobacco.

R. v. MacLaurin, [1999] M.J. No. 574, [2000] 3 W.W.R. 606 (Man. Q.B.), aff'd (Man. C.A.);

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1998), [1999] 1 C.N.L.R. 277 (N.S. C.A.) at paragraphs 25, and 46-50;

R. v. Sewell, [2006] 4 C.N.L.R. 241 (Ont. C.J.) at paragraph 32.

194 The Supreme Court has held, in the context of aboriginal rights, that the requirement of a license to participate in an activity that constituted an aboriginal right was not unreasonable and did not itself amount to an infringement of the right. The requirement of a permit to demonstrate entitlement to possess untaxed cigarettes similarly does not in itself conflict with the tax exemption for Indian and Band property on a reserve in section 87 of the *Indian Act*. The court states in *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), at 1057:

> The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended....
>
> The simple requirement of a license is not in itself unreasonable; rather, it is necessary for the exercise for the right itself. Accordingly the first question, is licensing unreasonable, must be answered in the negative.

195 The prohibition against possession of unmarked cigarettes without a permit is one means of enforcing taxation in respect of cigarette sales off reserve or to non-Indians. Another mechanism is the regulation that allocates quantities of tax exempt tobacco that retailers may purchase for sale to Indians on reserves. The present allocation regulation was adopted after the Division Court held, in *Bomberry v. Ontario (Minister of Revenue)*, that the previous regulation was not authorized by statute and stated, in *obiter dicta* that it was *ultra vires* and conflicted with section 87 of the *Indian Act*. Courts of Appeal in British Columbia, Quebec and Nova Scotia have since held that the provinces are constitutionally entitled to limit the volume of 'tax exempt' cigarettes sold under section 87 of the *Indian Act* to some realistic estimate of legitimate demand for those products.

Bomberry v. Ontario (Minister of Revenue) (1989), 70 O.R. (2d) 662 (Ont. Div. Ct.), appeal dismissed as moot (1993), 107 D.L.R. (4th) 448 (Ont. C.A.);

Vincent c. Québec (Juge de la Cour du Québec), [1996] J.Q. No. 129 (Que. C.A.) at paragraphs 45-48;

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1998), [1999] 1 C.N.L.R. 277 (N.S. C.A.) at paragraphs 25, and 46-50;

R. v. Murdock (1996), [1997] 2 C.N.L.R. 103 (N.S. C.A.), at 145-146;

Tseshaht Indian Band v. British Columbia (1992), 94 D.L.R. (4th) 97 (B.C. C.A.), at 113; Ontario Regulation 649/93.

196 The case law supports a division of powers analysis that promotes co-operation between the federal and provincial governments through overlapping fields of constitutional jurisdiction:

> "The task of maintaining the balance of powers in practise falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this court has called 'co-operative federalism'." See *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paragraph 24.

197 Mr. MacDonald is not a status Indian under the *Indian Act* and thus he cannot benefit from the *Indian Act* tax exemption. I have no doubt he is culturally, psychologically and by blood, a native. He is proud of his native heritage, and he should be. If he were a status Indian under the *Indian Act*, the decision on the constitutional issue would be the same.

198 Section 87 of the *Indian Act* does not establish a defence in a charge under section 29 of the *Tobacco Tax Act* for possession of unmarked tobacco without a permit. The prohibition against possession of unmarked tobacco without a permit does not conflict with section 87 of the *Indian Act* as the permit requirement does not impose a tax or prevent any person who would be entitled to possess tax exempt tobacco under section 87 of the *Indian Act*.

199 The province of Ontario already has in place a sophisticated system for the manufacturing, distribution and consumption of cigarettes, specifically focused on First Nation peoples. Hence, the peach band on cigarettes distributed and sold on reserves. *These cigarettes are free of provincial tax*. This is significant because taxes comprise a substantial portion of the price of cigarettes.

200 Mr. MacDonald said cigarettes are culturally sanctioned and required for First Nation ceremonial purposes on reserves. However, within the current provincial scheme, there is no reason why peach band cigarettes cannot be used for these ceremonial purposes. The very existence of peach band cigarettes demonstrates a recognition

of First Nation principles and laws which limit taxation.

201 The elephant standing in the corner cannot be ignored. This province has a massive illegal trade in contraband cigarettes. They are illegally manufactured, distributed, sold and consumed; with the intent of by-passing the provincial regulation system. This is a system, as such relates to First Nation peoples, which has been upheld by the courts.

202 These were contraband cigarettes in Mr. MacDonald's vehicle. He is attempting to legitimate these contraband cigarettes and essentially by-pass the provincial regulatory system.

203 Mr. MacDonald's constitutional challenge is dismissed.

7 Conclusion

204 The Crown did not pursue the possession of a weapon for a purpose dangerous to the public peace. This charge is dismissed.

205 Having rejected the evidence of Mr. MacDonald and his witnesses, and finding their evidence does not raise a reasonable doubt; I still must be satisfied that the evidence I do accept is sufficient to establish guilt beyond a reasonable doubt.

206 As to the drug offence, I am satisfied the Crown has established the constituent elements beyond a reasonable doubt.

207 The large quantity of cannabis marijuana found with the scales in close physical proximity to the cannabis marijuana, coupled with all the other items, such as a calculator, debt list, a large amount of cash in different denominations and multiple cell phones and pagers; all clearly and unequivocally point to a trafficking purpose. The lack of a breakdown of the cannabis marijuana into smaller packages, is not sufficient in these circumstances, to raise a reasonable doubt.

208 There was no substantive defence put forth on the *Tobacco Tax Act* charge. This is a strict liability offence. I am satisfied the Crown has demonstrated proof of the constituent elements beyond a reasonable doubt.

209 On the drug and *Tobacco Tax Act* charges there will be findings of guilt and convictions registered.

Accused convicted.

END OF DOCUMENT

1992 CarswellBC 188, 69 B.C.L.R. (2d) 1, 94 D.L.R. (4th) 97, 15 B.C.A.C. 1, 27 W.A.C. 1, 5 T.C.T. 4248, [1992] 4 C.N.L.R. 171

1992 CarswellBC 188, 69 B.C.L.R. (2d) 1, 94 D.L.R. (4th) 97, 15 B.C.A.C. 1, 27 W.A.C. 1, 5 T.C.T. 4248, [1992] 4 C.N.L.R. 171

Tseshaht Band v. British Columbia

THE **TSESHAHT**, an Indian **Band**; ROBERT THOMAS, suing on his own behalf and on behalf of all the members of the **Tseshaht**

British Columbia Court of **Appeal**

Lambert, Cumming and Goldie JJ.A.

Heard: February 28, **1992**
Judgment: June 25, **1992**
Docket: Doc. Victoria V01495

Counsel: Paul J. Pearlman and Hunter W. Gordon, for appellant.

Jack Woodward and E. Jane Woodward, for respondents.

Subject: Public; Provincial Tax

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Taxation --- Provincial and territorial taxes — British Columbia — Fuel tax.

Taxation --- Provincial and territorial taxes — British Columbia — Tobacco tax.

Native law --- Taxation — Sales tax.

Refund and quota systems not ultra vires province.

Refund and quota systems not ultra vires province.

Refund and quota systems not ultra vires province.

Refund and quota systems not ultra vires province.

The petitioning Indian band operated a store on its reserve which sold tobacco products and gasoline to native Indians and non-natives. Purchases by the latter were taxable under the *Tobacco Tax Act* and the *Motor Fuel Tax*

Act ; those by Indians were not, by virtue of s. 87 of the *Indian Act* . Two systems were in place for purchases by Indians. First, since tobacco wholesalers were required by provincial policy to sell tobacco at a price which included the tax, the band was required to apply for tax refunds in respect of sales to Indians. The second system involved a quota under which a certain proportion of the store's total purchases was tax-free. The second system did not apply to tobacco purchases at the store but did apply to gasoline purchases. The gasoline quota was based on the percentage of recent tax-free gasoline purchases made at the store. The provincial Crown was flexible as to the gasoline quota allotted but, if it was exceeded, the petitioner was required to apply for a tax refund on tax-free sales. The petitioner sought declarations that these arrangements were ultra vires the province and that it had the right to purchase tobacco and gasoline on the reserve tax-free. The petition was granted and the Crown appealed.

Held:

Appeal allowed.

Under s. 87 of the *Indian Act* , the personal property of an Indian or a band on a reserve is exempt from taxation, and no Indian or band is subject to taxation in respect of the ownership, occupation, possession, or use of such property. The scheme of the *Motor Fuel Tax Act* and the *Tobacco Tax Act* is that the tax is payable by "purchasers" and "consumers" respectively when the product is purchased for personal use. The arrangements in place, whereby amounts equal to the tax to be collected by the retailer were remitted from purchaser to vendor in the distribution chain, were designed for ease of administration and accounting, but payment of such an amount was not itself payment of a "tax." Accordingly, the band could not avail itself of the s. 87 exemption. As for the quota systems, the province required no specific legislative authority to implement them, as they were merely a method used to relieve retailers of the requirement to remit amounts equivalent to tax when it was predictable that the ultimate consumers would not pay tax. The systems imposed no restrictions on Indian retailers beyond those necessary to ensure that the volume of "tax-exempt" purchases bore a realistic relation to the tax-exempt sales.

Per LAMBERT J.A. (dissenting): The *Tobacco Tax Act* and the *Motor Fuel Tax Act* must be construed as imposing a tax at the time of the retail sale. At that time, and not before, that very tax is required to be remitted to the province. There is no statutory provision authorizing a collection of an amount equivalent to the tax before the tax is actually levied. The evidence indicated that in practice each purchaser in the distribution chain paid an amount equal to the tax to its vendor and then recouped that amount from its own purchasers. This system had in effect been made mandatory by the province, without legislative authority, and in fact it was contrary to the express provisions of the statutes. The real question was whether the payments made by the petitioner, of amounts equal to the tax at the time of purchases of gasoline and tobacco products, constituted a tax imposed on the band. Because payment of those amounts was not imposed by legislation or enforceable by law, the amounts were not taxes, but by the same token the petitioner was not obliged to pay.

Cases considered:

Considered by majority:

Army & Navy Department Store Ltd. v. British Columbia (Commissioner Social Services Tax) (1964), 53 W.W.R. 285, 54 D.L.R. (2d) 245 (B.C.C.A.) — *distinguished*

Atlantic Smoke Shops Ltd. v. Conlon, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 2 All E.R. 393, [1943]

4 D.L.R. 81 (P.C.) — *considered*

Bomberry v. Ontario (Minister of Revenue), [1989] 3 C.N.L.R. 27, 34 O.A.C. 17, 2 T.C.T. 4234, 63 D.L.R. (4th) 526, 70 O.R. (2d) 662 (Div. Ct.) — *distinguished*

Cairns Construction Ltd. v. Saskatchewan, [1960] S.C.R. 619, 35 W.W.R. 241, 24 D.L.R. (2d) 1 — *distinguished*

Cevaxs Corp. v. British Columbia (1988), 31 B.C.L.R. (2d) 80, 2 T.C.T. 4012, 1 T.S.T. 3014 (S.C.) [reversed (1989), 42 B.C.L.R. (2d) 129, 1 T.S.T. 3151, 3 T.C.T. 5089 (C.A.)] — *referred to*

Chehalis Indian Band v. British Columbia (1988), 31 B.C.L.R. (2d) 333, 53 D.L.R. (4th) 761, [1989] 1 T.S.T. 3008, 2 T.C.T. 4017, [1989] 1 C.N.L.R. 62 (C.A.) — *applied*

Danes v. British Columbia, 61 B.C.L.R. 257, [1985] 2 C.N.L.R. 18, 18 D.L.R. (4th) 253 (C.A.) — *distinguished*

Hill v. Ontario (Minister of Revenue) (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537, [1986] 1 C.N.L.R. 22 (H.C.) — *considered*

Leighton v. British Columbia, 35 B.C.L.R. (2d) 216, [1989] 4 W.W.R. 654, 57 D.L.R. (4th) 657, [1989] 3 C.N.L.R. 136, [1989] 1 T.S.T. 3065, 2 T.C.T. 4282 (C.A.) — *distinguished*

Metlakatla Ferry Service Ltd. v. British Columbia, 12 B.C.L.R. (2d) 308, 37 D.L.R. (4th) 322, [1987] 2 C.N.L.R. 95 (C.A.) — *distinguished*

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, 110 N.R. 241, 67 Man. R. (2d) 81 — *considered*

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1988), 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, 227 A.P.R. 121, [1989] 1 T.S.T. 3055, 2 T.C.T. 4244, [1989] 2 C.N.L.R. 168 (T.D.) — *distin- guished*

Williams v. R., 92 D.T.C. 6320, (sub nom. *Williams v. Canada)* [1992] 1 C.T.C. 225, 90 D.L.R. (4th) 129 (S.C.C.) — *referred to*

Considered in dissent:

Atlantic Smoke Shops Ltd. v. Conlon, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 2 All E.R. 393, [1943] 4 D.L.R. 81 (P.C.) — *considered*

Bomberry v. Ontario (Minister of Revenue), [1989] 3 C.N.L.R. 27, 34 O.A.C. 17, 2 T.C.T. 4234, 63 D.L.R. (4th) 526, 70 O.R. (2d) 662 (Div. Ct.) — *considered*

British Columbia (Attorney General) v. Kingcome Navigation Co. (1933), [1934] A.C. 45, [1933] 3 W.W.R. 353, [1934] 1 D.L.R. 31 (P.C.) — *referred to*

Canada (Attorney General) v. British Columbia (Registrar of Titles of Vancouver Land Registration District), 48 B.C.R. 544, [1934] 3 W.W.R. 165, [1934] 4 D.L.R. 764 (C.A.) — *referred to*

Chehalis Indian Band v. British Columbia (1988), 31 B.C.L.R. (2d) 333, 53 D.L.R. (4th) 761, [1989] 1 T.S.T. 3008, 2 T.C.T. 4017, [1989] 1 C.N.L.R. 62 (C.A.) — *considered*

Hill v. Ontario (Minister of Revenue) (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537, [1986] 1 C.N.L.R. 22 (H.C.) — *referred to*

Lawson v. Interior Tree Fruit & Vegetable Committee, [1931] S.C.R. 357, [1931] 2 D.L.R. 193 — *referred to*

Johnson v. Nova Scotia (Attorney General), 96 N.S.R. (2d) 140, 253 A.P.R. 140, 3 T.C.T. 5148, [1990] 2 C.N.L.R. 62 (C.A.) [leave to appeal to S.C.C. refused (1990), [1991] 1 C.N.L.R. vi, 100 N.S.R. (2d) 180n] — *considered*

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1988), 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, 227 A.P.R. 121, [1989] 1 T.S.T. 3055, 2 T.C.T. 4244, [1989] 2 C.N.L.R. 168 (T.D.) — *referred to*

Statutes considered:

Constitution Act, 1867

s. 92(2)*referred to*

Constitutional Question Act, R.S.B.C. 1979, c. 63 — *referred to*

Gasoline Tax Act, R.S.B.C. 1979, c. 152 — *referred to*

Health Services Tax Act, R.S.N.S. 1967, c. 126 — *referred to*

Indian Act, R.S.C. 1985, c. I-5

s. 87*considered*

s. 88*referred to*

Motor Fuel Tax Act, S.B.C. 1985, c. 76

s. 1 "collector"*considered*

s. 1 "purchaser"*considered*

s. 1 "retail dealer"*considered*

s. 1 "vendor"*considered*

s. 1 "wholesale dealer"*considered*

s. 4(a) [re-en. 1987, c. 13, s. 3]*considered*

s. 4(c) [re-en. 1987, c. 13, s. 3]*considered*

s. 5*referred to*

s. 6*referred to*

s. 7*referred to*

s. 8*referred to*

s. 9*referred to*

s. 22(1)*considered*

s. 22(2)*considered*

s. 24(1)*considered*

s. 25*considered*

s. 26(1)*considered*

s. 26(1.1)*referred to*

s. 26(2)*referred to*

s. 27*considered*

s. 28(1)*referred to*

s. 42(1)*referred to*

s. 53*referred to*

s. 60(1)(c)*referred to*

Social Service Tax Act, R.S.B.C. 1979, c. 388

s. 2(4.2) [en. 1987, c. 17, s. 2(g)]*referred to*

s. 2.1(3.1) [en. 1987, c. 17, s. 3(c)] — referred to.

Tobacco Tax Act, R.S.B.C. 1979, c. 404

s. 1 "consumer"*considered*

s. 1 "dealer"*considered*

s. 1 "retail dealer"*considered*

s. 1 "wholesale dealer"*considered*

s. 2(1) [am. 1981, c. 5, s. 55; 1983, c. 11, s. 1; 1985, c. 33, s. 1; 1988, c. 28, s. 1]*considered*

s. 2(1.2) [en. 1981, c. 5, s. 55; am. 1983, c. 11, s. 3; 1985, c. 33, s. 2; 1988, c. 28, s. 2; 1991, c. 9, s. 11]*considered*

s. 2(5)*considered*

s. 2(6)*considered*

s. 4(1)(a) [re-en. 1982, c. 29 s. 1]*considered*

s. 4(2)*considered*

s. 5.1(1)*referred to*

s. 5.1(3)*referred to*

s. 8.1*referred to*

s. 14*considered*

s. 15*considered*

s. 31(1)(b)*referred to*

Tobacco Tax Act, S.N.B. 1940, c. 44 — *referred to*

Rules considered:

British Columbia Supreme Court Rules, 1990

R. 33

Regulations considered:

Health Services Tax Act, R.S.N.S. 1967, c. 126 — Health Services Tax Act Regulations

s. 3(2)

Motor Fuel Tax Act, S.B.C. 1985, c. 76 — Motor Fuel Tax Act Regulation, B.C. Reg. 414/85

s. 2(1) [am. B.C. Regs. 27/86, s. 1; 186/89, s. (a)]

Tobacco Tax Act, R.S.B.C. 1979, c. 404 — Tobacco Tax Act Regulations, B.C. Reg. 83/71

s. 5

s. 6(1)

Appeal by Crown from judgment of Harvey J. 57 B.C.L.R. (2d) 168, 82 D.L.R. (4th) 706, [1992] 2 C.N.L.R. 164 , granting declaration that Indian band having right to make on-reserve purchases of tobacco and gasoline

without paying tax and for declarations that quota system on gasoline purchases and refund system on tobacco purchases by Indians ultra vires province.

***Cumming J.A. (Goldie J.A.* concurring):**

1 This is an appeal by Her Majesty the Queen in right of the province of British Columbia (the "province") from the judgment of the Honourable Mr. Justice Harvey, pronounced June 27, 1991 declaring that:

> (1) The Tseshaht Band has the right to purchase tobacco products on the Reserve without paying tax or an amount equivalent to the tax pursuant to the *Tobacco Tax Act* , R.S.B.C. 1979, c. 404.
>
> (2) The Tseshaht Band has the right to purchase gasoline on the Reserve without paying tax pursuant to the *Motor Fuel Tax Act* , S.B.C. 1985, c. 76.
>
> (3) The provincial taxation scheme which imposes a quota on tax free gasoline purchases by the Tseshaht Band is ultra vires the Province.
>
> (4) The provincial taxation scheme which requires the payment of tax or an amount equivalent to tax followed by applications for refunds on purchases of tobacco products by the Tseshaht Band is ultra vires the Province.

2 This judgment is now reported at (1991), 57 B.C.L.R. (2d) 168, 82 D.L.R. (4th) 706, [1992] 2 C.N.L.R. 164 .

3 The Tseshaht Band is a "band" within the meaning of the *Indian Act* , R.S.C. 1985, c. I-5, and operates a business known as the "Tseshaht Market" on the Tsah-Ah-Eh Reserve I.R. 1 near Port Alberni, British Columbia.

4 The Tseshaht Market is adjacent to the main highway from Port Alberni to Ucluelet and serves both Indian and non-Indian members of the community, as well as transient tourist traffic. It is the only retailer of tobacco products and motor fuels situate on the reserve.

5 There are approximately 450 members of the band who reside on the reserve. The Tseshaht Market does business with approximately 6,000 status Indians to whom it sells tobacco and gasoline products tax free. The actual volume of sales of the tobacco and gasoline products made to status Indians is variable.

Sales of Motor Fuels

6 In conformance with the provincial policy then in effect respecting the retail sale of motor fuels to status Indians on Indian reserves, the Tseshaht Band and the province entered into an agreement executed by the band on December 6, 1985, whereby the band was authorized to purchase for resale a percentage of its total purchases of motor fuel each month from its supplier without payment to the supplier of an amount equal to the motor fuel tax on that fuel. The fuel was sold by the band at retail sales through the band's station on the reserve. Initially, the percentage of motor fuel which the band was authorized to purchase each month without payment of an amount equal to the tax was 25 per cent. On May 26, 1986 the province acceded to the band's request to increase the tax exemption quota to 60 per cent because the retail sales of tax exempt motor fuel to Indians were averaging 60 per cent of total retail sales through the station.

7 It was at all times material to these proceedings the policy of the province, and understood by the band, that the percentage of motor fuels which the band might purchase from its supplier without paying an amount equal to the tax would be adjusted to reflect the changes in the volume of sales as between Indian and non-Indian purchasers. The band has not requested any increase in that percentage since 1986. Indeed, the 60/40 division still reflects, at least on an annual basis, the volume of sales of petroleum products between Indian and non-Indian purchasers at the Tseshaht Market. Within any given period of time, the amount of gasoline sold on the reserve by the Tseshaht Market to non-Indians may be greater or lesser than 40 per cent of its total gasoline supply. Simi larly, the amount of gasoline sold to tax exempt persons may be greater or less than 60 per cent of its total supply.

8 The Tseshaht Market did not collect tax on sales of gasoline to status Indians even if its supply of tax exempt gasoline had been exhausted. Such sales had to be made from the gasoline purchased from its wholesalers at a rate which included an amount equal to tax required under the *Motor Fuel Tax Act* .

9 The Tseshaht Market applied to the province for a refund of the amount equal to tax required under the *Motor Fuel Tax Act* when its sales of non-taxable gasoline exceeded 60 per cent of its total supply.

10 At the time the petition was heard by the learned chambers judge, the "quota system" with respect to motor fuels, as described in consumer taxation branch bulletin 058, operated under agreements between the province and 21 Indian bands throughout the province, including the Tseshaht Band.

Sales of Tobacco Products

11 With respect to tobacco products the province had, at the time the petition was heard, entered into agreements with 95 Indian bands located throughout the province, (but not including the Tseshaht Band) implementing the quota system established by policy of the province. That policy is described in consumer taxation branch bulletin 085.

12 Generally, under the terms of each agreement, one or more retailers were authorized by the province to purchase a specific quantity of tobacco products from its wholesaler at a price which does not include an amount equivalent to the tax on tobacco. The quantity of tobacco products which could be purchased without payment of an amount equivalent to tobacco tax was established by the Consumer Taxation Branch in consultation with the band. Usually it was calculated as ten cigarettes per day for every Indian man, woman and child permanently resident on the band's reserve. After the band and the Consumer Taxation Branch had concluded an agreement in writing, the branch notified the wholesaler who supplied the retailer on the reserve, who then was permitted to sell up to an agreed amount of tobacco products each month to that retailer on the reserve without being required to account to the branch for the tax due on those products.

13 The quantity under the quota may be varied to meet the circumstances of the particular retailer. For example, in one case, where a band store served more than one reserve, the quantity under the quota was increased. In another case, where an additional retailer indicated a desire to operate on a reserve, that retailer was also give a quota.

14 Under provincial policy, where a band has entered into an agreement with the province in respect of tobacco products, the retailer is not required to account to the province for tobacco tax on products purchased under the agreement.

15 In the case of each of the 95 bands with which the province had an agreement the quota of tobacco products allocated to the retailer(s) on the reserve was not less than the amount of tobacco products which were actually resold to status Indians.

16 In May 1988 the Tseshaht Band proposed to the province that the Tseshaht Market be permitted to obtain from its wholesaler unlimited quantities of cigarettes at prices that did not include amounts equal to the tax that would be payable by the ultimate consumer on a taxable retail sale. The province rejected this proposal. The band then notified the province that it would pay its wholesaler a price that included amounts equal to the tax and thereafter claim a refund of those amounts paid on cigarettes sold to Indians. The province subsequently accepted the band's proposal as to the method of providing sufficient evidence to the province to support the band's claims to those refunds.

17 When the Tseshaht Market purchased its supplies of tobacco products from tobacco wholesalers, all such purchases were made at a price which included an amount equal to the tax. The wholesaler is not permitted to sell without including this component.

18 In order to recover the "amount equal to tax" which the Tseshaht Market paid to its tobacco wholesalers, but which was not collected from tax exempt purchasers, the band had to apply for a refund from the province. The "carrying costs" incurred by the band if it had entered into a tobacco quota agreement rather than a refund system would have been less because, under the quota system, the band would not have been required to prepay an amount equivalent to the tax to its wholesalers with respect to those products which it purchased for resale to status Indians.

Issues on Appeal

19 1. Is the collection of an "amount equal to tax" itself a tax, the collection of which from the respondent is contrary to s. 87 of the *Indian Act* ?

20 2. Are the "quota" system applied by the province to the Tseshaht Band with respect to gasoline products, and the "refund" system applied by the province to the band with respect to tobacco products, authorized by the *Motor Fuel Tax Act* or by the *Tobacco Tax Act* or by any other statute?

21 3. Even if the "quota" system and the "refund" system are authorized by statute (which the respondents dispute) are they an unlawful interference with the rights of the respondents under s. 87 of the *Indian Act* ?

22 Counsel for the appellant submitted that the learned chambers judge erred in holding that s. 87 of the *Indian Act* afforded the band, in respect of tobacco and motor fuel products purchased by it for resale, an exemption from payment of an amount equivalent to the tax to be paid by the ultimate non-Indian consumers or purchasers of such products.

23 Section 87 of the *Indian Act* [R.S.C. 1970, c. I-6, now R.S.C. 1985, c. I-5] provides:

> 87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province ... the following property is exempt from taxation, namely:
>
> (*b*) the personal property of an Indian or band situated on a reserve;
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of

any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

24 In granting the relief sought by the petitioners the learned trial judge said, at p. 175 [B.C.L.R.]:

... the exemption in s. 87 applies not only to the property itself but also to Indians and Indian bands. Dickson J. (as he then was) in *Nowegijick* , supra, states at p. 202:

> Section 87 provides that 'the personal property of an Indian [or band] on a reserve' is exempt from taxation; but it also provides that 'no Indian [or band] is [sic] subject to taxation in respect of any such property'. The earlier words certainly exempt certain property from taxation; but the latter words also exempt certain persons from taxation in respect of such property.

Not only is personal property exempt from taxation when purchased by an Indian or Indian band on the reserve, the Indian or Indian band is also exempt from paying tax with respect to the "ownership, occupation, possession or use" of such property. Here, the only difference between an individual purchasing tobacco products or gasoline for his or her personal consumption and the band purchasing such products for resale is the *use* to which the products are put. Section 87 provides a specific exemption for Indians or Indian bands with respect to the use of personal property, and therefore the mode of using the products in issue cannot be the basis for the tax. The fact that the goods are to be resold cannot legitimize the imposition of a tax on an Indian band entitled to the exemption of s. 87 of the *Indian Act* .

And at p. 178:

The Tseshaht Band is exempt by virtue of s. 87 in the same manner as an individual Indian from paying tax on personal property purchased on the reserve. The use to which the personal property is put once purchased should have no bearing on whether a tax can be imposed.

25 In order to ascertain whether the respondent band, qua retailer, is entitled to avail itself of any exemption from taxation afforded by s. 87 of the *Indian Act* , it is first necessary to determine whether the *Tobacco Tax Act* , R.S.B.C. 1979, c. 404, or the *Motor Fuel Tax Act* , S.B.C. 1985, c. 76, imposes a tax at all on any retailer, Indian or non-Indian.

26 It will be appropriate, at this stage, to set out the pertinent provisions of the provincial taxing legislation.

Tobacco Tax Act:

27

Interpretation

1. In this Act

"consumer" means a person who,

(*a*) in the Province, acquires tobacco ...

for his own use or consumption, or for the use or consumption by others at his expense, or on behalf of, or as the agent for, a principal who desires to acquire the tobacco for use or consumption by him or other per-

sons at his expense;

"dealer" means a person who, in the Province, sells or offers to sell tobacco or keeps tobacco for sale, either at wholesale or at retail;

"retail dealer" means a person who sells or offers for sale, in the Province, tobacco to a consumer;

"retail sale" means a sale of tobacco to a consumer;

"wholesale dealer" means a person who sells or offers for sale, in the Province, tobacco for the purpose of resale.

Tax on consumer

2. (1) Every consumer shall, at the time of making a purchase of tobacco, pay to Her Majesty in right of the Province a tax ...

(1.2) Every consumer shall, at the time of making a purchase of tobacco in the form of cigarettes, pay to Her Majesty in right of the Province a tax, for every cigarette purchased by him, at a rate determined by the following formula ...

(5) The tax imposed by this Act shall be collected by the retail dealer at the time of the sale and shall be remitted to the minister at the time and in the manner prescribed by the regulations.

(6) Every dealer shall be deemed to be an agent for the minister and as such shall levy and collect the tax imposed by this Act on the purchaser.

4. (1) A person who is a retail or wholesale dealer or both a retail and wholesale dealer shall not sell or offer for sale tobacco in the Province unless

(*a*) he is registered as a retail dealer, wholesale dealer, or both a retail and wholesale dealer, as the case may be;

(2) No dealer shall sell or offer for sale tobacco to a consumer unless the dealer holds a retail dealer's per- mit.

14. The consumer is and remains liable for the tax imposed under this Act until the tax has been paid to a dealer, and, in the event of the failure on the part of a dealer to collect the tax, he shall immediately notify the director, and the consumer may be sued for the amount of the tax in any court of competent jurisdiction; but action against the consumer under this section does not affect the liability of the dealer under this Act for failure to collect the tax.

15. Every person who collects any tax under this Act shall be deemed to hold it in trust for Her Majesty in right of the Province and for the payment over of it in the manner and at the time provided under this Act or the regulations; and the amount, until paid, forms a lien and charge on the entire assets of that person, or his estate in the hands of any trustee, having priority over all other claims of any person.

Tobacco Tax Act Regulations (B.C. Reg. 83/71), s. 5:

28

5. Every dealer who is not a collector shall collect the tax imposed by the Act and shall pay over the tax to a collector on demand.

Motor Fuel Tax Act:

29

Interpretation

1. In this Act

"collector" means a person who has been appointed under section 22(1) or 24(2) ...

"purchaser" means a person who, within the Province, buys or receives delivery of fuel

(*a*) for his own use or for use by other persons at his expense, or

(*b*) on behalf of or as an agent for a principal for use by the principal or by other persons at the expense of the principal;

"retail dealer" means a person who, within the Province, sells fuel to a purchaser;

"vendor" means a person who, within the Province, sells fuel for the first time after its manufacture in, or its importation into, the Province;

"wholesale dealer" means a person who, within the Province, buys fuel for resale to a person other than a purchaser.

Tax on gasoline ...

4. A person who

(*a*) is a purchaser of gasoline ...

shall, at the time of purchase ... pay to the government

(*c*) where he purchases or uses gasoline, a tax ... on each litre of gasoline purchased or used by him ...

Appointment of vendors as collectors

22. (1) The director may

(*a*) on application, appoint a vendor to be a collector under this Act, and

(*b*) for and on behalf of the government, enter into an agreement with a collector setting out the duties to be performed by the collector and any matters the director considers necessary or advisable.

(2) A vendor shall not sell fuel within the Province unless he is appointed a collector under this section.

Exemption of collector and appointment

24. (1) The director may, in writing, exempt a collector from the requirement to collect tax from a person who buys fuel for resale.

Deputy collectors

25. A wholesale dealer is deemed to have been appointed a deputy collector by a collector from whom the wholesale dealer purchases fuel.

Duties of retail dealers, collectors and deputy collectors

26. (1) A retail dealer shall collect a tax imposed by this Act at the time of making the sale to a purchaser, and shall, on demand of a collector or deputy collector remit the tax to him.

Remittance of tax

27. A collector shall remit to the minister all taxes collected by him under this Act at the prescribed time and in the prescribed manner.

30 Mr. Pearlman, for the appellant, concedes that the products in question, cigarettes and gasoline, are personal property and that they are situate on the Indian reserve. He contended, however, that because the *Tobacco Tax Act* requires the consumer of tobacco products to pay tax on those products, and the *Motor Fuel Tax Act* requires the ultimate purchaser of motor fuel to pay tax, the Tseshaht Band, as proprietor of the Tseshaht Market and retailer of tobacco products and motor fuel, is not subject to "taxation" within the meaning of s. 87 of the *Indian Act* under either provincial statute. It is the Indian consumer of tobacco products and the Indian purchaser of motor fuel who purchases those products for his own use from a retail outlet (in this case the Tseshaht Market) situated on a reserve, who is entitled to the exemption afforded by s. 87 of the *Indian Act* .

Discussion

31 The *Tobacco Tax Act* imposes a tax on the "consumer" of tobacco products: s. 2(1.2). "Consumer" is defined in s. 1 to be a person who purchases for his own consumption or use. Since the Tseshaht Band does not purchase for its own consumption or use, it is not a "consumer" under the Act, and is not required under that Act to pay tax.

32 The *Tobacco Tax Act* (ss. 2 and 15) and the regulations (s. 5) require a retail dealer (such as the Tseshaht Band) to remit tax to "collectors" on demand. All wholesale dealers in tobacco products are designated as "collectors." For reasons of efficiency and administrative convenience for the wholesale dealer, the retail dealer and the province, each wholesale dealer requires each of its customers who is a retail dealer to pay, at the time the retail dealer pays the wholesale dealer for the tobacco, an amount equal to the tax that will be collected on the retail sale.

33 The scheme of the *Motor Fuel Tax Act* is similar. That Act imposes a tax on the "purchaser" of motor fuel (ss. 4-9). The definition of "purchaser," somewhat like the definition of "consumer" under the *Tobacco Tax Act* , refers to a person who purchases for his own use (s. 1). As with the *Tobacco Tax Act* , retail dealers of motor fuel are required to remit to their wholesale dealer amounts equal to the tax payable by the ultimate purchasers of that fuel. As with the tobacco tax scheme, each retail dealer includes the amount equivalent to the tax

in the price it pays to its wholesale dealer for the fuel it purchases.

34 These prepayment schemes appear, although it is not necessary to decide the question as it was neither pleaded nor argued otherwise, to be authorized by the provisions of the *Motor Fuel Tax Act* and the *Tobacco Tax Act* .

35 Under s. 22(1) of the *Motor Fuel Tax Act* the director is authorized to appoint a "vendor" to be a "collector" under the Act and to enter into an agreement with the collector setting out the duties to be performed by the collector. Section 22(2) prohibits the sale of fuel by a vendor unless he is appointed a collector and s. 53 makes doing so an offence. By s. 25 a wholesale dealer is deemed to have been appointed a deputy collector by the collector from whom the wholesale dealer purchases fuel. Section 26(2) requires a deputy collector to remit any tax collected by him from a retail dealer to a collector on demand. By s. 42(1) the director is empowered to require a collector to deposit with him a bond to secure payment of the amount of tax which may become due. Section 60(1)(*c*) empowers the Lieutenant Governor in Council to make regulations prescribing the method of payment and remittance of tax on fuel and any other conditions or requirements affecting the payment and remittance of tax.

36 In the *Motor Fuel Tax Regulations* , B.C. Reg. 414/85, the duties of collectors are set out:

> 2. (1) A collector ... shall
>
> (*a*) on or before the 15th day of each month in respect of the previous month, deliver to the director a return in a form specified by the director, and
>
> (*b*) remit with the return referred to in paragraph (*a*) the amount of tax computed on the return.

37 Under s. 2(6) of the *Tobacco Tax Act* every dealer is deemed to be an agent for the minister and as such is required to levy and collect the tax imposed by the Act on the purchaser. Section 4 prohibits the sale of tobacco either at retail or wholesale by anyone unless he is registered as a retail dealer or wholesale dealer and holds a valid permit issued by the director. Under s. 5.1(1) a wholesale dealer is required in respect of tobacco delivered to him to pay as security to the director, within the time required by him, an amount equal to the tax that would be collectable if tobacco were sold to a consumer.

38 By s. 31(1)(*b*) the Lieutenant Governor in Council is empowered to make regulations prescribing the method of collection and remittance of the tax and any other conditions and requirements affecting the collection and remittance.

39 By s. 6(1) of the *Tobacco Tax Act Regulation* , B.C. Reg. 83/71:

> 6. (1) Every collector shall
>
> (*a*) on or before the 20th day of each month in respect of the previous month, deliver to the director such return as he requires, and
>
> (*b*) remit with the return required by paragraph (*a*) the amount of the tax as computed in the return.

40 The legislative scheme is strikingly similar to that under consideration in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 2 All E.R. 393, [1943] 4 D.L.R. 81 (P.C.) , which held

that taxes of the sort imposed by the *Motor Fuel Tax Act* and the *Tobacco Tax Act* are direct taxes.

41 In *Chehalis Indian Band v. British Columbia* (1988), 31 B.C.L.R. (2d) 333, 53 D.L.R. (4th) 761, [1989] 1 T.S.T. 3008, 2 T.C.T. 4017, [1989] 1 C.N.L.R. 62 , this court held that the tax imposed by the *Gasoline Tax Act* , R.S.B.C. 1979, c. 152, a predecessor statute to the *Motor Fuel Tax Act* (and not different in any material way), was a direct tax imposed upon the consumer. The court described the tax collection scheme in these terms at pp. 337-38 [B.C.L.R.]:

> The collection scheme employed in this case was designed for ease of administration and accounting. A retailer's inventory of gasoline is turned over relatively fast and the amount of tax that will be collected on the gasoline when sold to a retail purchaser is known. Thus, each seller in the chain, from manufacturer to wholesale dealer, collects an amount equal to the tax at the time it makes its sale. The commercial effect is that the selling price of the gasoline, at each stage of the chain, is a price which includes an amount equal to the tax, *although the legal liability for the tax does not arise under the statute until the retail sale is made* .

42 In *Chehalis* , as in the case at bar, the Indian band was operating as a retail dealer on a reserve. The court, after describing at pp. 339-40 the collection scheme under the *Gasoline Tax Act* and *Motor Fuel Tax Act* , continued at p. 340:

> We are not persuaded that the collection scheme in this case involves the levy of a tax upon the retail dealer. The parties knew that the tax was to be paid by the "purchaser". The band did not object to tax being collected from it, as a retail dealer, but protested the imposition of tax on its members whom, it alleged, were exempt from taxation. The scheme was a practical method of collecting a known amount, equal to the tax which must be paid by the ultimate purchaser, and remitted by the band, as a retail dealer, to the minister. There is no suggestion that the minister received more tax than what was paid by those who purchased gas from the Chehalis Gas Bar.
>
> *We conclude that the band did not pay tax but remitted an amount equal to what it collected, and cannot now take the position that the band made an overpayment of tax in error* . Thus the band is not entitled to relief under the refund provisions in the legislation. [Emphasis added]

43 In *Chehalis* , this court drew a clear distinction between the liability of the ultimate consumer of gasoline products to pay tax under the *Gasoline Tax Act* , and the obligation of a retailer (whether Indian or non-Indian) to remit an amount equal to the tax to the wholesaler as part of the tax collection scheme. At p. 340, the court quoted from an Ontario Supreme Court decision which aptly described the "scheme":

> In *423092 Ont. Ltd. v. Minister of National Revenue* ... Mr. Justice Barr referred to the [tobacco] tax collected under such a scheme as "a direct tax which is collected indirectly".

Simply stated, the retailer, when it remits an amount equal to the tax, is not itself paying tax.

44 To the same effect is the decision in *Hill v. Ontario (Minister of Revenue)* (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537, [1986] 1 C.N.L.R. 22 (H.C.) (leave to appeal to the Ontario Court of Appeal refused). That case concerned an assessment made under the Ontario *Tobacco Tax Act* against an Indian wholesaler of tobacco products who sold tobacco to retailers on a reserve. The assessment was for the sum of $2,721,207.65 and related to the sale by the Indian wholesaler of 413,186 cartons of cigarettes for resale without a wholesale dealer's permit. Krever J. found that the Indian wholesaler was not entitled to any exemption under s. 87 of the *Indian*

Act , as the wholesaler claimed and accordingly upheld the assessment. The Ontario scheme was no different in its essential terms to the scheme in British Columbia for the collection of tobacco and motor fuel tax. The court stated at pp. 544-45 [D.L.R.]:

> ... the assessment in question in this application is not an assessment of the tax for which, under the Act, the applicant is liable but rather the tax for which the consumer would have been liable if the consumers had purchased the cigarettes.
>
> It would be difficult, if not impossible, to devise a practical method of imposing a tax on the consumer in respect of the sales of articles sold in massive quantities without resorting to the use of agents for the purposes of collection. That this sort of enforcement machinery does not have the effect of taxing these persons who are part of the collection process but who are not consumers seems to me to follow from the reasoning of the Judicial Committee of the Privy Council in *Atlantic Smoke Shops Ltd. v. Conlon et al.*, [1943] 4 D.L.R. 81 ...
>
> *The tax reflected in the notice of assessment dated October 24, 1984, is not a tax on the applicant* . It does not tax the property of the applicant situated on a reserve. Nor does it purport to tax the applicant in respect of the ownership, possession or use of any of his personal property situated on a reserve. *It follows, then, that s. 87 of the Indian Act is, in the circumstances of this case, of no assistance to him* . [emphasis added]

45 It therefore follows that since tax is not levied against the retailer, the retailer cannot avail itself of the exemption from taxation under s. 87 of the *Indian Act* .

Section 87 of the Indian Act

46 The provisions of s. 87 of the *Indian Act* are not intended to arm Indians with any competitive advantage or special privileges in the marketplace, but rather are intended to prevent interference with Indian property on a reserve.

47 In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, 110 N.R. 241, 67 Man. R. (2d) 81 , La Forest J. said, at p. 132 [W.W.R.] (in a passage quoted with approval by Gonthier J. for the court, in *Williams v. R.* (April 16, 1992) (S.C.C.), at p. 9 [now reported 92 D.T.C. 6320, *(*sub nom. *Williams v. Canada)* [1992] 1 C.T.C. 225, 90 D.L.R. (4th) 129]):

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act* , the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.
>
> It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens.

And at p. 134:

> ... one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements.

48 This approach reflects what is specifically provided for in s. 88 of the *Indian Act* :

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

49 Mr. Woodward agreed that, in all other respects, such as the requirements of the legislation relating to matters of administration, audit and enforcement, the band stands on precisely the same footing as other non-Indian retailers of tobacco and motor fuel products.

50 Mr. Woodward contended, however, that the true nature of a payment made by a band to a "collector" under the *Tobacco Tax Act* or the *Motor Fuel Tax Act* is a tax on the band and cannot be disguised by describing it as an "amount equal to the tax that would be payable on the retail sale." He submitted that where the taxpayer is required to pay an "amount equivalent to tax" and claim a refund, the equivalent amount is considered a tax and referred to *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)* (1988), 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, 227 A.P.R. 121, [1989] 1 T.S.T. 3055, 2 T.C.T. 4244, [1989] 2 C.N.L.R. 168 (T.D.) .

51 In the *Nova Scotia* case the court held ultra vires provisions of the Nova Scotia *Health Services Tax Act* [R.S.N.S. 1967, c. 126] that required persons, including Indians, purchasing tobacco exempt from tax, to pay an amount equal to the tax that would be payable if the tobacco were not exempt. The ultimate purchaser, the Indian, could then apply to the commissioner for a rebate. Burchell J. rejected the Crown's contention that these provisions were merely a collection mechanism designed to prevent abuses. He held that the province, by levying this sum from the consumer, imposed a tax on Indian consumers contrary to s. 87 of the *Indian Act* . Mr. Woodward relied on the following passage from the judgment of Burchell J., at p. 174 [C.N.L.R.]:

> It is my opinion, in other words, that the true nature of a payment made under s. 10A cannot be disguised by describing it (as in s. 10A(a) of the *Health Services Tax Act*) as "an amount equal to the tax that would be payable if the tobacco were not exempt."

52 In my view the *Nova Scotia* case is distinguishable. The amount levied against the Indian consumers was exactly equal to the amount of tax levied upon non-Indian consumers. Consequently, it was in substance a tax, and could really only be characterized as a payment of tax. This is to be contrasted with the regime in place on the Tseshaht Reserve, where the Indian consumer of tobacco products is not required to pay the tobacco tax, or an amount equal to the tax, when he purchases from the Tseshaht Market. The Tseshaht Market does not pay tax on the tobacco products which it purchases from the wholesaler. Rather, it simply pays an amount equal to the tax to the wholesaler, as does any other retailer in the province. Subsequently, after the tobacco products are sold, the Market applies for a refund, not of the tax, but rather of that part of the sum of moneys equivalent to

the tax which it has paid to the wholesaler in respect of tobacco products ultimately purchased by Indians on the reserve.

53 Burchell J. was very much alive to this distinction for he stated, immediately before the passage I have quoted:

> It is one thing to say that tobacco wholesalers and retailers (who are paid a commission) are merely collectors under such a scheme but, when the appropriate amount is levied against the consumer (the ultimate taxpayer if the tax is to qualify as a direct tax at all), then the payment cannot be anything but a payment of the tax itself. It is a transparent fiction to pretend that consumers are merely collecting from themselves or that they are only funding and facilitating a convenient mode of supervising exemption claims.

And, immediately after, he continued:

> The fair construction of s. 10A, I think, is that, notwithstanding any exemption, Indians must pay the tax that would otherwise be collectable on tobacco and thereafter submit to the nuisance and uncertainty of a rebate system under regulations that, to date, have been inconsistently and arbitrarily applied, albeit with what appears to have been a predominantly lenient intent.
>
> It follows that in my opinion s. 10A impinges upon the absolute exemption conferred upon the property of Indians by s. 87 of the *Indian Act* and that, because of the subject matter, the federal legislation must pre- vail.

54 The fact that the band has been "accepted" by the province as a "person" for the purposes of claiming refunds on sales of tax exempt tobacco products and is entitled to apply for and receive refunds of tax paid when tax exempt sales exceed the gasoline quota allotted to the Tseshaht Market does not advance the respondent's position. This is merely an administrative arrangement designed to overcome the legal hurdle created by the decision in *Chehalis Indian Band v. British Columbia* , supra.

55 More importantly, the submission that "where the taxpayer is required to pay an 'amount equivalent to tax' and claim a refund the equivalent amount is a tax" begs the question, for it is based upon the premise that the band is itself a taxpayer. Taxes are either direct or indirect: see *Cevaxs Corp. v. British Columbia* (1988), 31 B.C.L.R. (2d) 80, 2 T.C.T. 4012, 1 T.S.T. 3014 (S.C.) , at p. 84 [B.C.L.R.]. If Mr. Woodward's proposition is correct the amount that a wholesaler is required to pay to the vendor, equivalent to the tax ultimately payable by the consumer or purchaser, when acquiring tobacco or motor fuel products for sale to the retail trade would be a tax in his hands and would, because it will in the ordinary course be passed on, be an indirect tax. But it is conceded here that the taxes in question are direct taxes, falling upon and payable by the ultimate consumer or purchaser.

56 Mr. Woodward further submitted that, as was held by the learned trial judge, the use to which the personal property is put once purchased by the band, i.e., resale to retail consumers or purchasers, is irrelevant to the issue here. He relied on *Metlakatla Ferry Service Ltd. v. British Columbia*, 12 B.C.L.R. (2d) 308, 37 D.L.R. (4th) 322, [1987] 2 C.N.L.R. 95 (C.A.) ; *Danes v. British Columbia*, 61 B.C.L.R. 257, [1985] 2 C.N.L.R. 18, 18 D.L.R. (4th) 253 (C.A.) , and *Leighton v. British Columbia*, 35 B.C.L.R. (2d) 216, [1989] 4 W.W.R. 654, 57 D.L.R. (4th) 657, [1989] 3 C.N.L.R. 136, [1989] 1 T.S.T. 3065, 2 T.C.T. 4282 (C.A.) .

57 In the *Metlakatla* case the appellant, Metlakatla Ferry Service Ltd., was a British Columbia company

whose shareholders were all members of the Metlakatla Band of Indians, most of whom resided on the Metlakatla Reserve where the offices of the band were located. The reserve was situate on a remote peninsula inaccessible by road. The company owned a passenger vessel which it leased to the band for a term of years with the rental payable monthly. The band used the vessel to transport its members between the reserve and the mainland. The vessel was at all times operated in coastal waters and was never physically on the reserve or in reserve waters. The company paid no social service tax when it purchased the vessel. Under the scheme of the *Social Service Tax Act* , R.S.B.C. 1979, c. 388, persons acquiring tangible personal property for the purpose only of leasing it to others were exempt from tax. Instead, the tax was imposed on the lease payments. However, the company paid no tax on the lease payments, contending that it was exempted by s. 87 of the *Indian Act* . In allowing the company's appeal from a judgment dismissing its appeal against the penalty which the commissioner under the *Social Service Tax Act* had imposed in an amount equal to the tax that should have been collected from the band on the lease payments, McLachlin J.A. (as she then was) said at pp. 324-25 [D.L.R.]:

> The first question which arises under s. 87 is whether the property in respect of which the tax is levied, was, at the time the tax was to be levied, "the personal property of an Indian or band". If the answer to that question is affirmative, then the court must go on to consider the second question, namely, whether the property was situate on a reserve at the relevant time ... If the answer to that question is also affirmative, s. 87 applies and the Indian or band is exempt from taxation in respect of the property ...
>
> In my opinion, the band's lease may be considered "property" under s. 87 of the *Indian Act* . Section 2.1 of the *Social Service Tax Act* , imposes the tax not upon the tangible personal property (the vessel), but on the "lease price of the leased property". In other words, the individual is taxed on the lease payments or the lease debt. Having established that the tax is on the lease price, the next step is to proceed to s. 87 of the *Indian Act* to determine whether it is "in respect of" property owned by the band and situate on a reserve. For this purpose, it must be noted that there may be a distinction between what the tax is "on" and what it is "in respect of" under s. 87: *Danes v. The Queen in right of B.C.* (1985), 18 D.L.R. (4th) 253, 61 B.C.L.R. 257 (C.A.) . Strictly speaking, the tax is "on" the lease price, although the heading for s. 2.1 indicates that the tax is a "Tax on Leases". At the same time, for the purposes of s. 87 of the *Indian Act* , the tax may be considered to be "in respect of" the lease. The lease and the debt owing under it are intangible personal property capable of falling under s. 87, which refers simply to "personal property", whether tangible or intangible. The *situs* of the band's lease interest is the residence of the debtor-lessee or the band, namely, the reserve: *Com'r of Stamps v. Hope*, [1891] A.C. 476 at p. 481 (J.C.P.C.); *Nowegijick v. The Queen, supra* , at p. 198 D.L.R., p. 34 S.C.R. Thus "property" in s. 87, applied to the facts of this case, may be taken as referring to the band's interest in the lease.

And at p. 327:

> ... I conclude that the lease held by the band on the "Sisayda Lady" should be considered "property" for the purposes of s. 87 of the *Indian Act* . Returning to the two questions posed earlier, it is clear that the lease interest in question is the property of the band and that its *situs* is the reserve. It follows that s. 87 is applicable and that the lease payments are exempt from taxation.

58 In the *Danes* and *Watts* cases both plaintiffs were registered Indians who lived on reserves and who purchased motor vehicles located on their reserves at the time of purchase. The plaintiffs were required to pay tax under the *Social Service Tax Act* when they had their respective vehicles licensed and insured for use in the province both on and off their reserves. At the trial of a special case, the trial judge held that the social service

tax was payable on the purchases and the plaintiffs appealed. The appeal was allowed. The effect of the decision is accurately set forth in the headnote to the report [61 B.C.L.R. at p. 257]:

> Section 87 of the Indian Act provides that no Indian is subject to taxation in respect of the ownership, possession or use of the personal property of an Indian situated on a reserve. The social service tax imposed in these instances was with respect to the "personal property of an Indian" given that the tax could only be levied at the time of purchase by the plaintiffs. The vehicles were "situated on a reserve" at the time of purchase as it is the actual location of the property at the time the exemption is to apply which is determinative, not other factors such as the intention of the purchaser to use the property off the reserve. The purchasers were therefore exempt from social service tax pursuant to the Indian Act.

59 Following these two decisions the provincial legislature, in 1987, enacted ss. 2(4.2) and 2.1(3.1) of the *Social Service Tax Act* purporting to impose a sales tax on otherwise exempt tangible personal property purchased or leased by an Indian or Indian band and used at a place where the exemption did not apply. Two Indian bands brought an action to challenge the constitutionality of the new subsections. The parties agreed on a special case under R. 33 confined to the constitutional question. The trial judge held the provisions to be constitutional and effective and the plaintiff bands appealed. The appeal was allowed. The effect of the decision is fairly summarized in the headnote as follows [35 B.C.L.R. (2d) at pp. 216-17]:

> The impugned provisions singled out Indians to pay a special tax that was not payable by anyone else. The fact that non-Indians pay an equivalent tax, from which Indians are exempt, did not alter the characterization of the legislation which was in pith and substance a law coming within the class of subject, "Indians", enumerated in s. 91(24) of the Constitution Act, 1867, and therefore outside the powers of the provincial legislature.
>
> Moreover, there was a conflict between the impugned provisions and s. 87 of the Indian Act. The word "situated" in s. 87 does not refer only to the permanent location of property; neither personal property nor its Indian owner can be taxed with respect to the use of property off the reserve if the "paramount" location of the property remains on the reserve. The provisions in their present form could not be "read down" so as to avoid a conflict with the federal provision.

60 In my view, all three cases relied upon by Mr. Woodward are distinguishable. In the case at bar, the personal property in question, the tobacco products and motor fuel, was not used or consumed by the band in the sense that the tangible personal property that was held to be subject to taxation in *Cairns Construction Ltd. v. Saskatchewan*, [1960] S.C.R. 619, 35 W.W.R. 241, 24 D.L.R. (2d) 1 (component or prefabricated parts purchased for use or incorporation in the construction of houses to be offered for sale), and *Army & Navy Department Store Ltd. v. British Columbia (Commissioner Social Service Tax)* (1964), 53 W.W.R. 285, 54 D.L.R. (2d) 245 (B.C.C.A.) (labels showing the prices and sizes of goods to be sold purchased to be affixed by string, pin or gum to the goods before putting them on display), was used or consumed by the taxpayers in those two cases.

61 On the contrary, rather than being used or consumed by the band they retained their identity and were resold at retail to the consumers of tobacco or the purchasers of motor fuel who acquired them, if they were non-Indians, subject to the payment on the applicable tax or, if they were Indian, tax exempt. As Lambert J.A. pointed in the course of the argument before us, the only people who are taxed are the ultimate consumers or purchasers. This is constitutionally valid direct taxation. There cannot be two taxes, and so the payment of an amount equivalent to the tax which must ultimately be paid cannot itself be a tax.

62 The payment by the retailer of an amount equivalent to the tax is simply part of the collection scheme held to be valid by this court in *Chehalis* ; it is not the payment of a tax and so s. 87 of the *Indian Act* can have no application.

63 Mr. Woodward further submitted here, as he did in the court below, that the administration of the *Motor Fuel Tax Act* in the form of a quota cannot be upheld because there is nothing in the *Motor Fuel Tax Act* that authorizes its imposition. In acceding to this submission the learned trial judge relied on *Bomberry v. Ontario (Minister of Revenue)*, [1989] 3 C.N.L.R. 27, 34 O.A.C. 17, 2 T.C.T. 4234, 63 D.L.R. (4th) 526, 70 O.R. (2d) 662 (Div. Ct) , and said, at p. 182 [D.L.R.]:

> The *Motor Fuel Tax Act* and its regulations do not provide authority for the quota system imposed by the province upon the Tseshaht Market. Further, there is no provision in the *Motor Fuel Tax Act* or its regulations which could support a quota system as necessarily incidental to the powers under that statute and as such the province has no authority to institute such a scheme.

64 Mr. Pearlman submitted that the province requires no specific legislative authority to implement a quota system. The authority for the exemption of Indian consumers and purchasers of tobacco or motor fuel products from the payment of tax is s. 87 of the *Indian Act* . The quota systems are simply the means by which the province, as a matter of policy, delivers those exemptions in conformance with its constitutional obligation under s. 87 of the *Indian Act* .

65 In essence, all that the quota system does is unburden the retailers (both Indian and non-Indian) from the requirement to remit an amount equal to tax in circumstances where it is predicted and predictable that no tax will be payable by the ultimate consumers. In the absence of the quota system the carrying burden on the amount which the band would otherwise have to pay when purchasing these products from a wholesaler, an amount equivalent to the total tax assessable, and which, it would later seek to recover, in respect of sales to Indian customers, would be that much greater.

66 Unlike the *Bomberry* case, supra, where the Ontario court found that the quota system imposed significant restrictions on the capacity of Indian retail merchants to engage in business, the quota system in British Columbia imposes no restrictions beyond those necessary to ensure that the volume of "tax exempt" products bears some realistic relationship to the legitimate demand for those products.

67 In the circumstances I am unable to accept the respondents' submission that the quota system requires more in the way of specific legislative authority.

68 In my view, it is constitutionally valid and intra vires the provincial legislature. Even if I am wrong in this regard I am further of the view, although this point was not argued before us, that there is specific legislative authority for the quota system at least with respect to motor fuel.

69 Section 24(1) of the *Motor Fuel Tax Act* provides:

> 24. (1) The director may, in writing, exempt a collector from the requirement to collect tax from a person who buys fuel for resale.

70 Surely, if a total exemption can be granted, a partial exemption can also be granted.

71 The provincial policy set out the Consumer Tax Branch Bulletin 058 (A.B. pp. 34-35) provides as fol-

lows:

Retailers Located on Reserve or Designated Land

Purchases of tax-Exempt Fuels: Operators of retail outlets located on reserve or designated land who wish to make exempt sales to Registered Indians or Indian Bands are required to contact the Consumer Taxation Branch. Based on market conditions and the size of the Indian population served by the retail outlet, an estimate of the percentage of fuels which will be sold tax-exempt will be established. Where possible, a Consumer Taxation Branch representative will contact the retailer in person to assist in this process and to view the premises.

When this estimate has been established, the wholesale fuel supplier for that retailer will receive written authority from the Consumer Taxation Branch to deliver the appropriate percentage of tax-exempt fuels on orders placed by that retailer. Fuel suppliers will be required to report the quantity and type of tax-exempt fuels delivered to a specific retailer operating on reserve or designated land.

The established estimate of tax-exempt fuels will remain in effect for a three month period. At the end of each quarterly period, the Consumer Taxation Branch will review the percentage of tax-exempt sales authorized for that retailer. If the initial estimate for the quarter was incorrect, adjustments will be made, effective the first day of October, January, April, and July of each year. The Consumer Taxation Branch will advise the supplier of the revised amount of tax-exempt fuels that should be delivered to the retail operator.

72 This is the quota system and, it appears to me, it is precisely what s. 24(1) authorizes.

73 For these reasons I would allow the appeal and dismiss the respondents' petition.

Lambert J.A. **(dissenting):**

74 The Tseshaht Band applied in the Supreme Court of British Columbia, by petition, for these four declara- tions:

1. A Declaration that the Tseshaht, also known as the Sheshaht Indian Band, has the right to buy tobacco products on reserve without paying tobacco tax pursuant to the *Tobacco Tax Act* .

2. A Declaration that the Tseshaht, also known as the Sheshaht Indian Band, has the right to buy gasoline on reserve without paying tax pursuant to the *Motor Fuel Tax Act* .

3. A Declaration that a provincial taxation system which imposes a quota on tax-free gasoline purchases by the Tseshaht, also known as the Sheshaht Indian Band, or on status Indians, is ultra vires.

4. A Declaration that a provincial taxation system, which requires payment of tax or amounts equivalent to tax followed by applications for refunds, on tobacco or gasoline purchases by the Tseshaht, also known as the Sheshaht Indian Band, is ultra vires.

75 The petition was heard by Mr. Justice Harvey, who granted it and made four declarations in these terms [p. 182 B.C.L.R.]:

1. The Tseshaht Band has the right to purchase tobacco products on the reserve without paying tax, or an amount equivalent to the tax, pursuant to the *Tobacco Tax Act* ;

2. The Tseshaht Band has the right to purchase gasoline on the reserve without paying tax pursuant to the *Motor Fuel Tax Act* ;

3. The provincial taxation scheme which imposes a quota on tax-free gasoline purchases by the Tseshaht Band is ultra vires the province;

4. The provincial taxation scheme which requires a payment of tax or amounts equivalent to tax followed by applications for refunds on tobacco purchases by the Tseshaht Band is ultra vires the province.

76 This appeal is brought by the Crown from that decision. Mr. Justice Harvey's reasons are reported at (1991), 57 B.C.L.R. (2d) 168, 82 D.L.R. (4th) 706, [1992] 2 C.N.L.R. 164 .

77 The issue in the appeal is whether the Tseshaht Band, which operates the Tseshaht Market, a retail store and gasoline service station on the Tsah-ah-eh Reserve near Port Alberni, can be lawfully required to pay an amount as tax or in respect of tax when it purchases gasoline or tobacco products for resale to its customers, some of whom are status Indians, and some of whom are not.

78 I propose to start with a separate consideration of the two taxing statutes, namely, the *Tobacco Tax Act* [R.S.B.C. 1979, c. 404] and the *Motor Fuel Tax Act* [S.B.C. 1985, c. 76]. In each case I will discuss first the structure of the legislation, then the way the collection provisions in the legislative scheme are generally administered, and finally the way the collection provisions are applied to Indians and specifically to the Tseshaht Market. After that I will describe the trial judgment and the issues. I will then deal with the real question in the appeal and with the authorities. That will take me to my conclusions and orders.

I Tobacco Tax

(a) The Structure of the Tobacco Tax Act

79 The *Tobacco Tax Act* is framed in accordance with the structure of the New Brunswick Act of 1940 [S.N.B. 1940, c. 44] which was upheld by the Judicial Committee of the Privy Council in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 3 W.W.R. 113, [1943] 2 All E.R. 393, [1943] 4 D.L.R. 81 . The tax is imposed on the ultimate purchaser who buys tobacco for his or her own consumption. The tax is collected by the retail dealer as an addition to the purchase price at the time of the sale to the ultimate purchaser. The retail dealer is then required to remit the very tax that has actually been collected to the Crown. The Judicial Committee of the Privy Council decided that such a tax was within the legislative competence of New Brunswick under head 92(2) of the *Constitution Act, 1867* , as being "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."

80 In British Columbia, the key provisions of the *Tobacco Tax Act* , for present purposes are these:

1 ...

"collector" means a dealer who is appointed by the minister to act as his agent to collect the tax imposed by this Act;

"retail dealer" means a person who sells or offers for sale, in the Province, tobacco to a consumer;

"wholesale dealer" means a person who sells or offers for sale, in the Province, tobacco for the purpose of resale.

2. (1) Every consumer shall, at the time of making a purchase of tobacco, pay to Her Majesty in right of the Province a tax at the rate of [then follow the various rates].

(1.2) Every consumer shall, at the time of making a purchase of tobacco in the form of cigarettes, pay to Her Majesty in right of the Province a tax, for every cigarette purchased by him, at a rate determined by the following formula [then follows the formula for calculating the rates].

(5) *The tax imposed by this Act shall be collected by the retail dealer at the time of the sale and shall be remitted to the minister at the time and in the manner prescribed by the regulations* .

(6) Every dealer shall be deemed to be an agent for the minister and as such shall levy and collect the tax imposed by this Act on the purchaser.

5.1 (1) A wholesale dealer shall, in respect of tobacco delivered to him in the Province, pay, as security to the director, within the time required by the director, an amount equal to the tax that would be collectable if that tobacco were sold to a consumer in the Province.

(3) The director shall refund to the wholesale dealer security paid under subsection (1) on being satisfied that the tobacco in respect of which security was paid was not sold or will not be sold to a consumer.

15. Every person who collects any tax under this Act shall be deemed to hold it in trust for Her Majesty in right of the Province and for the payment over of it in the manner and at the time provided under this Act or the regulations; and the amount, until paid, forms a lien and charge on the entire assets of that person, or his estate in the hands of any trustee, having priority over all other claims of any person. (my emphasis)

81 It will readily be seen that the tax is collected by the retail dealer at the time of the sale. *After that* it must be remitted to the minister, either directly, if the retail dealer is a collector, or through a collector, if the retail dealer is not itself a collector. It is the very tax that is collected that must be remitted. Section 2(5) cannot be construed in any other way; and any regulation requiring payment of the tax before it is collected would not be in accordance with s. 2(5).

82 Section 5.1 contemplates that a wholesale dealer who takes delivery of tobacco in the province must pay, as security, an amount equal to the tax that would ultimately be payable by the consumer if the tobacco were sold to a consumer in the province. There is no similar provision requiring retail dealers to post security or indeed to provide any other form of prepayment.

(b) The Actual Collection Practices under the Tobacco Tax Act

83 The collection practices are not in accordance with the system set out in the Act. In his affidavit E.J. Turner, the executive director of the Consumer Taxation Branch, said this:

5. The *Tobacco Tax Act* imposes a tax on consumers of tobacco products who acquire those products for their own consumption or use, or for the consumption or use of others at their expense. The retail vendors of

such products are required to collect the tax at the time of sale, and pay it over to designated "collectors". Those "collectors" are wholesalers of tobacco products. The collectors/wholesalers must remit the collected tax to the Province.

6. For reasons of administrative convenience, wholesalers/collectors sell tobacco products to retailers at a price that includes an amount equal to the tax that would be paid by the ultimate consumer at a taxable sale. This system is advocated by the Province, and indeed, applies in all the Provinces.

84 The system may be advocated by the province. It may apply in all provinces. But it is contrary to s. 2(5) of the Act, which requires the very tax that is collected to be remitted to the minister.

85 In fact, the system is more than advocated by the province. It seems in some way to be compelled by the province. Mr. Turner was cross-examined on his affidavit. He was asked these questions and gave these an- swers:

Q. So, except pursuant to such an agreement it's your evidence that Provincial policy does not allow a Band such as the Tseshaht Band in this case to purchase cigarettes free of tax from the wholesaler?

A. The system we — that's outlined in the bulletin is — is our way of insuring the Bands do purchase the cigarettes exempt of tax. It's an administrative procedure that's set up to ensure that the Bands can purchase cigarettes exempt of tax.

Q. And if a Council refuses to enter into such an agreement *they will not be allowed to purchase cigarettes free of tax* ?

A. *That's correct at this time, yeah* .

Q. Now, in Exhibit C to your Affidavit you will find a letter that I wrote to you. And in the second full paragraph, the last sentence reads as follows and I quote: "Apart from the quota system, the Band has no choice but to operate this way, because *the wholesalers consider themselves bound under Provincial law to impose an amount equal to taxes on all sales to the Tseshaht Market* ." Do you agree with the statement made in that sentence?

A. *Yes, I agree with that, um-hum* . (my emphasis)

86 The Tseshaht Band, which is a retail dealer, is not allowed to purchase tobacco free of tax except by signing a quota agreement, to which I will shortly come. And the wholesalers, on their sales to retail dealers, consider themselves bound under provincial law to impose an amount equal to tax on all sales to all retail dealers, including sales to the Tseshaht Market.

87 One supposes that, in accordance with universal practice, Mr. Turner's affidavit, which speaks of the province "advocating" prepayment, was prepared by the province's lawyer, whereas Mr. Turner in his answers, which speak in terms of compulsion, expresses his own view of the system of taxation and collection as it is actually administered.

88 The factual material in this appeal is somewhat scant. But the only collection system which is consistent with the evidence is a system whereby the wholesale dealer pays to the Crown an amount in respect of tax, and equal to what would be the tax on the ultimate consumer, at about the time the wholesale dealer brings the to-

bacco into the province. That payment is called "security" in s. 5.1 but it is not treated as security. It is retained by the Crown and is, it seems, generally the only payment that is made to the Crown at all. The wholesale dealer then demands that the retail dealer pay to the wholesale dealer an amount in respect of the tax, and equal to the amount which will be the tax on the ultimate consumer, within whatever time the wholesaler allows the retail dealer for payment (7 days on the evidence in this case). The wholesale dealer then recoups itself for the amount it has laid out as security under s. 5.1 of the Act but does not pay anything more to the Crown. The retail dealer in turn has paid the full amount of the tax, or the full amount equal to the tax, to the wholesale dealer before it has collected the tax from the ultimate purchaser, unless the entire inventory purchased by the retail dealer were to be sold by the retail dealer to the ultimate consumers before payment was demanded for that inventory by the wholesale dealer, a most unlikely surmise. The retail dealer then collects the tax, or an am ount in respect of the tax, on each sale of tobacco products. But, contrary to the Act, it does not remit the tax to the minister or to a collector for the minister as required by s. 2(5). Nor does it treat the amounts that it collects as tax as being held in trust, as required by s. 15. Instead, the retail dealer keeps the amounts that it collects as tax and uses them to reimburse itself for the amounts that it has already paid to the wholesale dealer in respect of tax.

89 In general, the only funds that seem to be paid to the province are the funds paid by the first legal entity which brings the tobacco into the province for resale. That entity reimburses itself from the next entity in the chain of sales and so on down to the retail dealer which recoups itself from the ultimate purchaser.

90 In short, as I understand the process, the initial payment, however it is categorized, cascades down the chain so that each member of the chain is reimbursed by the one below until, in the end, the ultimate consumer has no one from whom reimbursement can be sought and must bear the final burden of the tax.

(c) The Tobacco Tax Act Collection Practices on Sales to Indians and to the Tseshaht Market

91 The province recognizes that status Indians, when purchasing tobacco products on a reserve, are exempt from the tax under the *Tobacco Tax Act* . The exemption is set out in s. 87 of the *Indian Act* [R.S.C. 1985, c. I-5]. So the province has tried to set up a special system for Indian purchases which will meet the dual goals of tax exemption for status Indians and tax collection from all other purchasers.

92 Ninety-five bands in the province have made agreements with the province to be governed by the province's system. The system contemplates that there will be a quota of tax-free cigarettes which will be purchased by retail dealers on reserves from wholesalers, without any addition of an amount in respect of the tax that would ultimately be paid by consumers who are not status Indians. The quota consists of ten cigarettes each day for each man, woman and child on the reserve. The wholesaler charges an amount in respect of tax, equal to the amount of the tax, on all tobacco products sold to the retailer on the reserve in excess of the amount of the quota.

93 As a matter of principle, the Tseshaht Band refused to join the quota system for tobacco products. Instead, an agreement was reached between the band and the province under which, when the band paid the full am ount in respect of the tax, and equal to the tax, at the time it purchased tobacco products from its wholesaler, but did not charge the tax when it sold tobacco products to status Indians, it could itself claim a refund from the Crown of the amount it had paid in respect of tax but which it had not recouped from a taxable sale to a con- sumer.

94 In this appeal, the band's position is that s. 87 of the *Indian Act* exempts it from paying tax on personal property on the reserve and that it is entitled to purchase all the tobacco products it wants from its wholesaler

without paying any amount in respect of the tax and equal to the tax. The band's complaint about the quota system, as I understand it, is not a complaint about those cigarettes that would be sold to it without any addition with respect to tax, but rather a complaint about those cigarettes that it would buy under the quota system but which are still subject to an additional charge to it in respect of tax.

95 The band wants to buy whatever tobacco products it wishes, without limitation, free from tax, and from any amount in respect of tax, and it says s. 87 of the *Indian Act* entitles it to do so. The band would, however, collect the tax on sales to taxable customers and remit the tax so collected to the province, just as it is required to do by the Act itself.

II Motor Fuel Tax

(a) The Structure of the Motor Fuel Tax Act

96 The *Motor Fuel Tax Act* is framed in accordance with the decisions of the Judicial Committee of the Privy Council in *British Columbia (Attorney General) v. Kingcome Navigation Co.* (1933), [1934] A.C. 45, [1933] 3 W.W.R. 353, [1934] 1 D.L.R. 31 , and *Atlantic Smoke Shops Ltd. v. Conlon* , supra. I will set out the relevant provisions of the *Motor Fuel Tax Act* :

> **Interpretation**
>
> 1. In this Act
>
> "collector" means a person who has been appointed under section 22(1) or 24(2) ...
>
> "purchaser" means a person who, within the Province, buys or receives delivery of fuel
>
> (*a*) for his own use or for use by other persons at his expense, or
>
> (*b*) on behalf of or as an agent for a principal for use by the principal or by other persons at the expense of the principal;
>
> "retail dealer" means a person who, within the Province, sells fuel to a purchaser;
>
> "vendor" means a person who, within the Province, sells fuel for the first time after its manufacture in, or its importation into, the Province;
>
> "wholesale dealer" means a person who, within the Province, buys fuel for resale to a person other than a purchaser.
>
> 4. A person who
>
> (*a*) is a purchaser of gasoline ...
>
> shall, at the time of purchase ... pay to the government
>
> (*c*) where he purchases or uses gasoline, a tax ... on each litre of gasoline purchased or used by him ...
>
> 22. (1) The director may

(*a*) on application, appoint a vendor to be a collector under this Act, and

(*b*) for and on behalf of the government, enter into an agreement with a collector setting out the duties to be performed by the collector and any matters the director considers necessary or advisable.

(2) A vendor shall not sell fuel within the Province unless he is appointed a collector under this section.

24. (1) The director may, in writing, exempt a collector from the requirement to collect tax from a person who buys fuel for resale.

25. A wholesale dealer is deemed to have been appointed a deputy collector by a collector from whom the wholesale dealer purchases fuel.

26. (1) *A retail dealer shall collect a tax imposed by this Act at the time of making the sale to a purchaser, and shall, on demand of a collector or deputy collector remit the tax to him .*

(1.1) Where a retail dealer does not remit the tax to a collector or deputy collector, the dealer shall remit it to the minister at the prescribed time and in the prescribed manner.

(2) A deputy collector shall remit any tax collected by him from a retail dealer to a collector on demand.

27. *A collector shall remit to the minister all taxes collected by him under this Act at the prescribed time and in the prescribed manner .*

28. (1) The minister may provide an allowance to collectors for their services in collecting and remitting the tax to the minister as prescribed by the regulations. (my emphasis)

97 The tax is imposed on the ultimate consumer of motor fuel. It is collected by the retail dealer, usually at a gas station, at the time of the sale to the ultimate consumer. The tax so collected is required to be remitted to a collector or deputy collector. But there is no provision for remitting an amount on account of the tax, or in respect of the tax, before the tax is actually collected. Indeed, s. 26(1) is to the contrary. If the tax is paid to a deputy collector then the deputy collector must pay it over to a collector. The taxes collected by the collector must be remitted to the minister at the prescribed time and in the prescribed manner. But a regulatory requirement that an amount be paid in respect of tax before the tax is collected would not be a legislative provision authorized by s. 27 because it would be contrary to both s. 26(1) and s. 27 itself.

(b) The Actual Collection Practices under the Motor Fuel Tax Act

98 Again it seems that what actually happens is that, by agreement or otherwise, but without any statutory requirement other than the authorization to the director under s. 22(1)(*b*) to enter into an agreement with the vendor, the vendors in the province, that is, those importers and refiners who first sell the product in the province, collect from the wholesale dealers or retailers to whom they make their sales an amount in respect of the tax and equal to the tax. No agreement between a vendor and the director was in evidence in this case. Such an agreement may require a vendor to pay an amount equal to the tax to the director in respect of the vendor's sales to a dealer. It may require the vendor not to make a sale to a dealer unless the dealer pays to the vendor an amount in respect of tax and equal to the tax. But such an agreement cannot, in itself, impose an obligation on the retail dealer to make a payment in respect of tax, in an amount equal to the tax, at the time the retail dealer makes its purchase.

99 Nonetheless, contrary to s. 26(1) of the Act, which contemplates that tax will not be demanded by a collector until the tax is collected at the time the retail dealer makes a sale to a consumer, an amount in respect of the tax and equal to the tax is in fact demanded by the wholesaler from the retail dealer, apparently as a condition of sale, at the time of the sale to the retail dealer. What is more, and again contrary to the Act, the retail dealer does not remit the actual tax collected to a collector after it has been collected, as required by s. 26(1), but instead the retail dealer retains the tax money and uses it to reimburse itself for the amount in respect of tax that it has paid in advance to a wholesale dealer.

100 Again, it seems that the only way that the administrative scheme would be in accordance with the actual legislation would be if the retail sales out of a bulk purchase of gasoline by the retail dealer were all made, and the tax collected from the ultimate consumer, by the time the retail dealer was required to pay to the wholesaler the full price for the bulk purchase.

(c) The Motor Fuel Tax Act Collection Practices on Sales to Indians and to the Tseshaht Market

101 There is a quota system for the purpose of gasoline purchases by the Tseshaht Band. The band purchases 60 per cent of its total gasoline purchases free from any additional amount in respect of tax. The remaining 40 per cent is sold to the band on the basis that an amount equal to the gasoline tax that would be payable by the ultimate consumer, if the ultimate consumer were not a status Indian, will be added on to the price and be payable by the band at the time it pays for the gasoline.

102 The fact that Mr. Turner, the executive director of the Consumer Taxation Branch, regards the payment of an amount in respect of tax on the 40 per cent of the band's purchases as being a legal requirement which the band is not entitled to avoid is clear from this question and answer in the cross-examination of Mr. Turner on his affidavit:

> Q. Okay. But, at the present time for this particular Band when the Husky truck comes along the Band is not entitled to purchase its entire delivery free of tax; it's only entitled to purchase 60 per cent of the delivery free of tax?
>
> A. That's correct.

103 The figure of 60 per cent roughly approximates the percentage of the band's gasoline sales that are made to status Indians. The percentage is lower in the summer when there are a lot of tourists driving out to the West Coast of Vancouver Island and passing through the reserve. The percentage is higher in the winter. The band, of course, must collect tax on all sales of gasoline to persons other than status Indians. If it sells more than 40 per cent of its purchases to persons other than status Indians, then it remits the tax to the minister that is in excess of the amount that it has already paid in respect of tax to its wholesale dealer. If it sells less than 40 per cent of its purchases to persons other than status Indians then it applies for a refund to the minister and a refund is made.

104 Again, the band's position is that s. 87 of the *Indian Act* exempts it from payment of an amount in respect of tax on the 40 per cent of the gasoline which it purchases with an amount in respect of tax added on. The band says that it is entitled to buy as much gasoline as it wishes entirely free from tax, or from an amount in respect of tax, and it says s. 87 of the *Indian Act* entitles it to do so.

III The Trial Judgment

105 Mr. Justice Harvey applied s. 87 of the *Indian Act* , which reads in this way:

> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
>
> (*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (*b*) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Mr. Justice Harvey decided that the Tseshaht Market acquired its inventory of tobacco products and gasoline by purchases made on the reserve, and that the purchased inventory was used by the market in its retail business conducted entirely on the reserve. He then considered the refund system and the quota system. He decided that the refund system was unsupportable because it required the payment of tax, and then granted a refund, in circumstances where the Tseshaht Market was exempt from tax. He decided that the quota system was unsupportable for the same reason, and also for the additional reason that there was no statutory authority for such a sys- tem.

106 It is implicit in Mr. Justice Harvey's reasons that he regarded the requirement that the Tseshaht Market pay an amount in respect of tax and equal to the tax as being contrary to s. 87 of the *Indian Act* which exempts Indian bands from taxation.

IV The Issues

107 In its factum, the province, as appellant, stated the errors in the trial judgment in these terms:

> The Learned Chambers Judge erred in holding that s. 87 of the *Indian Act* , R.S.C. 1985, c. I-5, afforded the Respondent Indian Band, in respect of tobacco and motor fuel products purchased by it for resale, an exemption from payment of an amount equivalent to the tax to be paid by the ultimate non-Indian consumers of such products.

108 The Tseshaht Band, as respondent, set out in its factum two principal issues:

> 1. Is the collection of an "amount equal to tax" itself a tax, the collection of which from the Respondent is contrary to s. 87 of the *Indian Act* ?
>
> 2. Alternatively, is the collection of an "amount equal to tax" itself a tax, and if so, is such a tax an indirect tax, contrary to the limitation on the taxing powers of the Province under the *Constitution Act, (1867)* ?

The second of those two issues was not pursued. No notice was given under the *Constitutional Question Act* [R.S.B.C. 1979, c. 63]. At the outset of the hearing the second issue was abandoned.

109 So the principal issue in this appeal was whether the amounts required to be paid by the Tseshaht Band to its wholesalers on its purchases of tobacco products and gasoline as inventory were payments of "tax" within the meaning of s. 87 of the *Indian Act* . There were subordinate issues about whether the quota system and the

refund system were authorized by statute.

110 Of course the issues between the parties are defined by the pleadings. In this case the terms of the declarations applied for in the petition established the scope of the points in issue at trial and, together with the trial judgment, the scope of the points in issue in this appeal. The arguments made on what I have described as the principal issue have raised and have required an answer to what I will call the real question in this appeal, namely, whether the Tseshaht Band is required by law to pay to its wholesalers of tobacco products and gasoline an amount in respect of tax and equal to the tax. That real question is an intrinsic and inseparable part of the principal issue as presented in the factums. It must be answered in the course of answering the principal issue and the issues as raised by the petitioners and by the declarations made by the trial judge. It might have been desirable to ask for additional oral or written submissions on the text of the statutes but the members of the division hearing this appeal have not reached agreement on doing so. But, in my opinion, we can not avoid answering the real question. The reason is that the public statutes of the province can not be misinterpreted on a point squarely raised by the pleadings, merely because the parties do not dwell on the point in argument. The real question is not like the constitutional question which was expressly abandoned. The real question is raised by the issues presented by the parties and must be answered.

111 So I now propose to move on to the real question.

V The Real Question

112 Counsel for the Tseshaht Band, by abandoning his constitutional issue, must be taken to have conceded, for the purposes of this appeal, that the taxes imposed by the *Tobacco Tax Act* and by the *Motor Fuel Tax Act* are, in their ordinary applications, direct taxes. So the two taxation schemes, for the purposes of this appeal, must be regarded as imposing a tax only on the ultimate consumer who bears the burden of the tax and cannot pass it on.

113 But the argument on behalf of the Tseshaht Band is that on its sales to status Indians, the Tseshaht Band, as a retailer, bears the burden of the tax itself on all sales above the tax-free quota of gasoline and on all sales of tobacco products. So, it is argued, the taxes, in their application to the band, may well remain direct taxes but, nonetheless, it is the band that is being taxed and it is the band that is bearing the ultimate burden, whether a refund is available or not.

114 So the argument on behalf of the band raises a question about what are the characteristics of a tax. The question is whether the payments that the band is required to make in respect of tax and equal to the tax at the time it purchases gasoline and at the time it purchases tobacco products constitute a tax imposed on the band. That question requires consideration of what makes a payment that a person is required to make a tax. It is a sufficient answer for the purposes of this case to say that to be a tax a levy must have these three characteristics: first, the levy must be imposed by or by the express authority of a legislature; second, the levy must be enforceable by law; and third, the levy must be imposed for a public purpose: see *Lawson v. Interior Tree Fruit & Vegetable Committee*, [1931] S.C.R. 357, [1931] 2 D.L.R. 193 , per Duff J. at pp. 362-63 [S.C.R.], followed and applied by Macdonald J.A. of this court in *Canada (Attorney General) v. British Columbia (Registrar of Titles of Vancouver Land Registration District)*, 48 B.C.R. 544, [1934] 3 W.W.R. 165, [1934] 4 D.L.R. 764 , at pp. 557-58 [B.C.R.].

115 The amounts that the Tseshaht Market is required to pay to its wholesalers by administrative practice in respect of the taxes and equal to the taxes are neither imposed by the legislature nor enforceable by law. It fol-

lows, in my opinion, that the amounts are not taxes. Accordingly, it is unnecessary for me to consider whether, if the payments were required by law, they would bear the characteristics of a tax, or whether such a tax would be direct or indirect. The answers would no doubt depend on the language and structure of the legislation.

116 It is therefore not the exemption from taxation under s. 87 of the *Indian Act* which frees the Tseshaht Market from any obligation to pay the amounts to its wholesalers. Rather, it is the very fact that there is no legislative authority under the two taxing statutes, which requires, compels, or enforces the payments of those amounts. The compulsion comes, not from the legislature, but from an administrative scheme for collection which is not only entirely devoid of legislative support but which is contrary to the express provisions of s. 2(5) of the *Tobacco Tax Act* and s. 26(1) of the *Motor Fuel Tax Act* , which require retailers to collect the tax from the ultimate consumers and to remit the very tax collected to the province, either directly or through collectors. By contrast, the administrative scheme which is in issue here contemplates that the retailer will retain the tax that is collected and use it to reimburse itself for the amount it has paid to its wholesaler in respect of the tax and equal to the tax.

117 There is a reason, of course, why the administrative collection scheme is not set out in the legislation. In my opinion, if such a scheme were set out in the legislation, the legislative scheme would almost certainly become a scheme for the imposition of an unconstitutional, indirect tax. Under the administrative scheme, the first and principal payment to the Crown is a payment by the initial manufacturer or importer. That payment, if compelled by law, would bear all the indicia of being a tax. The manufacturer or importer reimburses itself from the wholesaler, which reimburses itself from the retailer, which reimburses itself from the customer. The initial payment at the top of the chain to the Crown, followed by a cascading process of reimbursement, is the very essence of an indirect tax.

118 I consider that the conclusions I have reached are supported by the authorities in Nova Scotia and Ontario and not contrary to the leading authority in British Columbia, when properly understood. I will now turn to those authorities.

VI The Authorities

Bomberry v. Ontario (Minister of Revenue)

119 This is a unanimous and unattributed decision of Osler, Reid and Campbell JJ. for the Ontario High Court of Justice, Divisional Court. It is reported at [1989] 3 C.N.L.R. 27, 34 O.A.C. 17, 2 T.C.T. 4234, 63 D.L.R. (4th) 526, 70 O.R. (2d) 662 .

120 The applicants, Mr. Bomberry and Mr. Hill, were both status Indians. They owned and operated the Chiefswood Gas Bar and Dick's Smoke Shop, both situated on the Six Nations of the Grand River Indian Reserve. They both sold cigarettes at retail, sometimes to status Indians and sometimes to people who were not status Indians. Mr. Bomberry was required to pay to his wholesaler an amount in respect of tax and equal to the tax on all cigarette purchases. Mr. Hill was allowed to purchase a quota of cigarettes tax free, but on the remainder of his purchases he had to pay an amount in respect of tax and equal to the tax.

121 The Divisional Court decided, first, that the tax scheme imposed a direct tax. The court felt constrained by authority to reach that conclusion, though in my opinion, the authorities to which the court referred are not compelling.

122 The Divisional Court decided, second, that there was no statutory authority for the administrative scheme which prevented the two Indian retailers from purchasing all the tobacco products they wished without any payment to their wholesalers of an amount in respect of tax and equal to the tax. In the course of its decision on this point, the Divisional Court said this, at pp. 539-40 [D.L.R.]:

> *It is trite that the Minister, the Ministry, and the Director must have legal authority before they may impose any restrictions upon the business conducted by wholesalers or retailers, including Indian retailers on the reserve. Unless the restrictions are authorized by law, they must be struck down ...*
>
> The power to restrict the right of any retail merchant to buy his product from whomever he pleases, the power to insist that he buy from no wholesaler other than the one designated for the time being by the government, the power to decide what is a reasonable amount of tobacco for Indians to smoke, *the power to prevent wholesalers from selling to Indian retailers tax-exempt products to which they would otherwise be freely entitled unless they do so in accordance with a quota* , the power to set an over-all quota for a reserve and to enforce quotas set for individual retailers, *are all significant infringements of the rights of Indian retailers engaged in the business of supplying retail tobacco products to Indian people on the Six Nations Reserve* .
>
> It would take express language to confer such powers on the Minister or the Director, just as it would take express language to impose a food-rationing scheme or an agricultural marketing scheme.
>
> There is, however, not a single word in the Act or regulations that expressly authorizes any quota system, let alone the Indian tobacco quota. (my emphasis)

I would add that it would take similar express language to authorize a requirement of payment in this case by the Tseshaht Market to its wholesalers of an amount in respect of tax and equal to the tax. Not only is there no such express language, there is express language to the contrary in s. 2(5) of the *Tobacco Tax Act* and s. 26(1) of the *Motor Fuel Tax Act* .

123 The third point decided by the Divisional Court was that the quota system represented a constitutionally unauthorized excursion into jurisdiction over Indians, reserved to Parliament and expressed in s. 87 of the *Indian Act* . No such constitutional point was argued in the present case.

Johnson v. Nova Scotia (Attorney General)

124 This is a decision of the Nova Scotia Supreme Court, Appeal Division, sitting in a division comprised of Jones, MacKeigan and Chipman JJ.A. The majority reasons were written by Mr. Justice Jones. Mr. Justice MacKeigan wrote a short concurring set of reasons. Mr. Justice Chipman dissented, but on an issue of fact, not law. The decision is reported at 96 N.S.R. (2d) 140, 253 A.P.R. 140, 3 T.C.T. 5148, [1990] 2 C.N.L.R. 62 .

125 The four plaintiffs were all status Indians who operated gift shops or convenience stores on Indian reserves. They all sold tobacco products, at retail, in their shops or stores. Mr. Justice Jones and Mr. Justice MacKeigan decided that the *Health Services Tax Act* [R.S.N.S. 1967, c. 126] did not authorize the collection of tax or an amount in respect of tax at the wholesale level. The device employed in Nova Scotia to justify the cascading tax collection system was Reg. 3(2) which provided that regulations relating to a vendor would apply to a wholesale vendor. That regulation was said by the majority to be a patent attempt to extend the application of the Act without legislative authority. The relevant passage is in these words, at p. 70 [C.N.L.R.]:

> *There are no provisions in the Act authorizing the wholesaler to collect the tax from the retailer* . Section 3(2) of the Regulations extends all of the provisions of the *Health Services Tax Act* relating to a vendor to a wholesale vendor. The power to make regulations under s. 40(2) of the Act relates to the collection and remittance of the tax. Under the Act the tax payable is on a retail sale. By definition vendor does not include a wholesaler. The Act does not not include a power to make regulations empowering the wholesaler to collect the tax. Regulation 3(2) is a patent attempt to extend the application of the Act without legislative authority. (my emphasis)

126 Having reached that conclusion, the majority decided that it was unnecessary to deal with the two constitutional issues, namely, whether the collection of tax or an amount in respect of tax by wholesalers amounted to an unconstitutional indirect tax, and whether the provisions of the Act and regulations, as they related to Indians, were ultra vires or in conflict with s. 87 of the *Indian Act* .

Chehalis Indian Band v. British Columbia

127 This is a decision of this court, sitting in a division comprised of Mr. Justice Macfarlane, Mr. Justice Wallace and Mr. Justice Locke. The unanimous but unattributed reasons are reported at (1988), 31 B.C.L.R. (2d) 333, 53 D.L.R. (4th) 761, [1989] 1 T.S.T. 3008, 2 T.C.T. 4017, [1989] 1 C.N.L.R. 62 .

128 The Chehalis Band operated a gas station on a reserve. Ninety-five per cent of its customers were status Indians. It purchased its gasoline for resale from Imperial Oil Limited and paid an amount in respect of tax and equal to the tax on the full amount of its gasoline purchases. It did so because Imperial Oil Limited said that if the payments were not made Imperial Oil Limited would discontinue deliveries. In order to reimburse itself the band collected an amount in respect of the tax and equal to the tax on its sales of gasoline to status Indians on the reserve. The province came to realize that the imposition of the tax on status Indians with respect to purchases on the reserve was unlawful. The band applied for a refund of an amount that was equal to both the taxes paid by band members and the amount paid by the band in respect of those taxes between 1980 and 1985. The Crown refused the refund. The band sued for the refund. Mr. Justice Finch, at trial, decided that the band was not a person entitled to a refund and dismissed the action. The band appealed. This court affirmed that the band was not a person entitled to apply for a refund and dismissed the appeal in reasons "for the court." In the course of those reasons the court dealt with what is called, at p. 335 [B.C.L.R.], "the subsidiary question of whether the procedure adopted for the collection of a direct tax converts the tax into an indirect tax and hence is ultra vires the legislature." The court decided, for the reasons set out at pp. 339-40, that it did not.

129 The court expressed its overall conclusion in this way [p. 340]:

> We conclude that the band did not pay tax, but remitted an amount equal to what it collected, and cannot now take the position that the band made an overpayment of tax in error. Thus the band is not entitled to relief under the refund provisions in the legislation.

But in the course of its reasons on the subsidiary point the court said this [pp. 339-40]:

> *The Crown concedes that there is no statutory authority for the collection of tax until the retail sale is made* , but says that the commercial practice of collecting an amount equal to the tax at the time the wholesaler delivers fuel to the retailer does not alter the character of the tax from a direct tax to an indirect tax ...
>
> *The band did not object to tax being collected from it* , as a retail dealer, but protested the imposition of tax

on its members whom, it alleged, were exempt from taxation. (my emphasis)

130 In my opinion, having regard to the concession by the Crown that the collection procedures have no statutory authority, and the concession by the band that it did not object to tax being collected from it as a retail dealer, the conclusion that the collection procedures did not result in the imposition of an indirect tax can not be regarded as part of the ratio decidendi of the *Chehalis* case. The ratio decidendi is simply that the band was not a person entitled to apply for a refund because it had always been fully reimbursed by the ultimate purchasers, who, if they were status Indians, were the only people entitled to a refund. Of course, as I have said, the subsidiary question in the *Chehalis* case was abandoned by the band in this case.

131 The only other observation I would like to make about the *Chehalis* case is that the provisions of the *Tobacco Tax Act* and the *Motor Fuel Tax Act* which are expressly contrary to the administrative collection scheme requiring retailers to pay to wholesalers an amount in respect of tax and equal to the tax, at the time of the retailer's purchase, namely, ss. 5(2) and 26(1) respectively, were not referred to the court in the factums of either the appellant or the respondent in the *Chehalis* case. I have assured myself on this point by examining the factums. And those provisions were not mentioned in the reasons of the court.

Summary of the Authorities

132 Neither *Bomberry* in Ontario nor *Johnson* in Nova Scotia was dealing with precisely the same point, on precisely the same legislation, as this case. But in my opinion, both cases support the view that I have taken and they are inconsistent with any contrary view.

133 *Chehalis* is a decision of this court. To the extent that it may be thought to express a different view than the view that I have expressed about the validity of the collection system, administratively imposed, which requires retailers of tobacco products and gasoline to pay to their wholesalers an amount in respect of tax and equal to the tax, that different view is, first, obiter dicta, since the issue in the *Chehalis* case related to entitlement to a refund; second, per incuriam, since the provisions of the two statutes expressly contrary to the collection system were not referred to the court; and third, contrary to the law in Ontario, as expressed in *Bomberry* , and in Nova Scotia, as expressed in *Johnson* .

134 We were also referred to *Hill v. Ontario (Minister of Revenue)* (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537, [1986] 1 C.N.L.R. 22 (H.C.) , and *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)* (1988), 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, 227 A.P.R. 121, [1989] 1 T.S.T. 3055, 2 T.C.T. 4244, [1989] 2 C.N.L.R. 168 (T.D.) . Those decisions relate to the same general subject as this appeal but their circumstances are so different that I have not found them helpful.

VII Conclusions

135 I have said that I have been unable to find any statutory authority for a requirement that the band, or any other retail dealer, should pay an amount in respect of the tax and equal to the tax under either Act to its wholesale dealers before it has itself collected the tax. I have indicated the affidavit evidence in this case in which Mr. Turner says that the making of such a payment is "advocated" by the province. And I have referred to the *Chehalis* case and to the concession by the Crown in that case that the very same collection practice of prepayment by retailers as is in issue in this case is without statutory authority. Nothing that would affect that concession has been added to the *Motor Fuel Tax Act* since 1985 when the *Chehalis* case was argued.

136 In its factum in this case the Crown described the two tax collection schemes in this way:

> 22. The *Tobacco Tax Act* (ss. 2 and 15) and the Regulations (s. 5) require a retail dealer (such as the Tseshaht Band) to remit tax to "collectors" on demand. All wholesale dealers of tobacco products are designated as "collectors". *For reasons of efficiency and administrative convenience for the wholesale dealer, the retail dealer and the Province* , each wholesale dealer *requires* each of its customers who is a retail dealer to pay at the time the retail dealer pays the wholesale dealer for the tobacco, an amount equal to the tax that will be collected on the retail sale.
>
> 23. The scheme of the *Motor Fuel Tax Act* is similar. That Act imposes tax on the "purchaser" of motor fuel (ss. 4-9). The definition of "purchaser", like the definition of "consumer" under the *Tobacco Tax Act* , refers to a person who purchases for his own consumption or use (s. 1). As with the *Tobacco Tax Act, retail dealers of motor fuel are required to remit to their wholesale dealer amounts equal to the tax payable by the ultimate purchasers of that fuel* . As with the tobacco tax scheme, each retail dealer includes these amounts equivalent to tax in the amount it pays to its wholesale dealer for the fuel it purchases. (my emphasis)

No reference was made in the Crown's factum to any statutory authority for requiring retail dealers to pay to their wholesalers amounts in respect of the taxes and equal to the taxes at the same time as they pay for their bulk purchases of their stock-in-trade of gasoline and tobacco products.

137 I conclude that the "requirement" that retail dealers pay amounts in respect of taxes, equal to the taxes, when they pay for their stock-in-trade of gasoline and tobacco products is entirely without legislative or regulatory foundation.

138 Having reached that conclusion there is no continuing relevance to any question about whether the quota system or the refund system has a proper legislative or regulatory foundation. If the prepayment system were properly authorized then there might well be said to be authorization in such provisions as s. 24(1) of the *Motor Fuel Tax Act* and s. 8.1 of the *Tobacco Tax Act* for the partial amelioration of the prepayment system by the quota system under the *Motor Fuel Tax Act* and the refund system under the *Tobacco Tax Act* . But since, in my opinion, the prepayment system for retail dealers is itself entirely without proper legislative or regulatory foundation, the fact that, if it did have such a foundation, the prepayment system could be validly ameliorated by the quota system and the refund system is legally inconsequential.

139 The whole taxation scheme, to the extent that it requires, by administrative action, payments by the Tseshaht Market to wholesalers of gasoline and tobacco products, is ultra vires the province. So both the quota system and the refund system are, for that reason, ultra vires the province.

VIII Orders

140 In substance, I would dismiss the appeal. But I would vary, somewhat, the order made at trial. Instead of the first two declarations made by Mr. Justice Harvey, I would make these two declarations:

141 1. There is no legislative or regulatory requirement preventing the Tseshaht Band from purchasing tobacco products on the reserve without paying tax, or an amount in respect of tax and equal to the tax, under the *Tobacco Tax Act* .

142 2. There is no legislative or regulatory requirement preventing the Tseshaht Band from purchasing gas-

oline on the reserve without paying tax, or an amount in respect of tax and equal to the tax, under the *Motor Fuel Tax Act* .

143 I consider that those two declarations come respectively within the terms of the first two declarations requested in the petition, as I set them out at the beginning of these reasons.

144 I would affirm the third and fourth declarations, as applied for in the petition, and as made by Mr. Justice Harvey, in these terms:

145 3. The provincial taxation scheme which imposes a quota on tax free gasoline purchases by the Tseshaht Band is ultra vires the province;

146 4. The provincial taxation scheme which requires a payment of tax or amounts equivalent to tax followed by applications for refunds, on tobacco purchases by the Tseshaht Band is ultra vires the province.

Appeal allowed.

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2006 CarswellOnt 3363, **2006 ONCJ 202**, [**2006**] G.S.T.C. 72, **2006** G.T.C. 1237 (Eng.), [**2006**] 4 C.N.L.R. 241

R. v. Sewell

Her Majesty the Queen and Albert Sewell

Ontario Court of Justice

Keast J.

Heard: November 16, 2005
Judgment: June 5, 2006
Docket: Sault Ste. Marie 04-0907

Counsel: Martin J. Pawelek, for Crown

Joseph Corbiere, for accused

Subject: Public; Constitutional; Goods and Services Tax (GST)

Taxation --- Goods and services tax — Administration and enforcement — Offences — Other offences

Accused charged with failure to comply with demand to provide GST information — Accused, First Nations person and status Indian residing on reserve, carried on business as gasoline and convenience-products retailer — Accused's business was located on reserve land — Accused sold products to GST-exempt status Indians and to persons not having tax-exempt status — Accused collected GST from persons not having tax-exempt status and remitted that GST to Minister for National Revenue, but declined to provide supporting documents when requested by Minister for GST audit purposes — Minister obtained order requiring accused to provide documents, accused refused to comply with order and present charge ensued — Accused convicted — Pursuant to Indian Act s. 89(1), "personal property [belonging to status Indians] . . . situated on a reserve is exempt from . . . seizure" — Jurisprudence indicated that clear intent of Parliament in drafting of s. 89(1) was to prevent civil debtor-creditor attachment and related execution remedies from having effect over First Nations-owned property on reserve land — Assuming that supporting documents constituted "property" of accused for purpose of argument, extension of civil execution law to criminal proceedings as between Crown and particular First Nations persons was clearly unjustified and outside of intent of Parliament — As accused could not then assert Indian Act defence to Minister's demand for provision of supporting documents as "exempt from . . . seizure", accused's admitted non-compliance with order was unlawful and accused was properly convicted — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 165(1), 289, 326(1).

Taxation --- Goods and services tax — Non-taxable purchasers — Status Indians

Accused charged with failure to comply with demand to provide GST information — Accused, First Nations person and status Indian residing on reserve, carried on business as gasoline and convenience-products retailer — Accused's business was located on reserve land — Accused sold products to GST-exempt status Indians and to persons not having tax-exempt status — Accused collected GST from persons not having tax-exempt status and remitted that GST to Minister for National Revenue, but declined to provide supporting documents when requested by Minister for GST audit purposes — Minister obtained order requiring accused to provide documents, accused refused to comply with order and present charge ensued — Accused convicted — Pursuant to Indian Act s. 89(1), "personal property [belonging to status Indians] . . . situated on a reserve is exempt from . . . seizure" — Jurisprudence indicated that clear intent of Parliament in drafting of s. 89(1) was to prevent civil debtor-creditor attachment and related execution remedies from having effect over First Nations-owned property on reserve land — Assuming that supporting documents constituted "property" of accused for purpose of argument, extension of civil execution law to criminal proceedings as between Crown and particular First Nations persons was clearly unjustified and outside of intent of Parliament — As accused could not then assert Indian Act defence to Minister's demand for provision of supporting documents as "exempt from . . . seizure", accused's admitted non-compliance with order was unlawful and accused was properly convicted — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 165(1), 289, 326(1).

Aboriginal law --- Constitutional issues — Taxation — Miscellaneous issues

GST information as "personal property situated on reserve" — Accused charged with failure to comply with demand to provide GST information — Accused, First Nations person and status Indian residing on reserve, carried on business as gasoline and convenience-products retailer — Accused's business was located on reserve land — Accused sold products to GST-exempt status Indians and to persons not having tax-exempt status — Accused collected GST from persons not having tax-exempt status and remitted that GST to Minister for National Revenue, but declined to provide supporting documents when requested by Minister for GST audit purposes — Minister obtained order requiring accused to provide documents, accused refused to comply with order and present charge ensued — Accused convicted — Pursuant to Indian Act s. 89(1), "personal property [belonging to status Indians] . . . situated on a reserve is exempt from . . . seizure" — Jurisprudence indicated that clear intent of Parliament in drafting of s. 89(1) was to prevent civil debtor-creditor attachment and related execution remedies from having effect over First Nations-owned property on reserve land — Assuming that supporting documents constituted "property" of accused for purpose of argument, extension of civil execution law to criminal proceedings as between Crown and particular First Nations persons was clearly unjustified and outside of intent of Parliament — As accused could not then assert Indian Act defence to Minister's demand for provision of supporting documents as "exempt from . . . seizure", accused's admitted non-compliance with order was unlawful and accused was properly convicted.

Cases considered by *Keast J.*:

Douglas v. R. (1984), [1984] 3 C.N.L.R. 65, 10 C.R.R. 197, 1984 CarswellBC 897 (B.C. Co. Ct.) — considered

Laforme v. Minister of National Revenue (1991), (sub nom. *Laforme v. R.)* 91 D.T.C. 5372, (sub nom. *Laforme v. Canada)* [1991] 2 C.T.C. 28, 48 F.T.R. 92, 1991 CarswellNat 479 (Fed. T.D.) — referred to

Mitchell v. Sandy Bay Indian Band (1990), (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97,

[1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46, 1990 CarswellMan 209, 1990 CarswellMan 380 (S.C.C.) — followed

Nowegijick v. R. (1983), *(*sub nom. *Nowegijick v. Canada)* [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123, 1983 CarswellNat 520 (S.C.C.) — followed

R. v. Point (1957), 22 W.W.R. 527, 57 D.T.C. 1200, 119 C.C.C. 117, 1957 CarswellBC 92 (B.C. C.A.) — considered

Tseshaht Indian Band v. British Columbia (1992), *(*sub nom. *Tseshaht Band v. British Columbia)* 69 B.C.L.R. (2d) 1, 15 B.C.A.C. 1, 27 W.A.C. 1, *(*sub nom. *Tseshaht Band v. British Columbia)* [1992] 4 C.N.L.R. 171, 94 D.L.R. (4th) 97, 1992 CarswellBC 188, 5 T.C.T. 4248 (B.C. C.A.) — considered

Statutes considered:

Excise Tax Act, R.S.C. 1985, c. E.15

Pt. IX [en. 1990, c. 45, 12(1)] — referred to

s. 289(1)(b) [en. 1990, c. 45, 12(1)] — referred to

s. 326(1) [en. 1990, c. 45, 12(1)] — referred to

Fisheries Act, R.S.C. 1970, c. F-14

s. 58 — considered

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 87 — considered

s. 87(1)(b) — considered

s. 88 — considered

s. 89 — considered

s. 90 — considered

TRIAL of accused on charge of failing to provide Minister of National Revenue with GST audit information following demand.

Keast J.:

1 Albert Sewell, a status Indian, is charged pursuant to section 326(1) of the *Excise Tax Act*, R.S.C. 1985, c. E15, that he *unlawfully* did fail to comply with a notice made upon him pursuant to paragraph 289(1)(b) and did not provide to the Minister of National Revenue information and documents for a specified time period (any em-

phasis is mine).

2 No *viva voce* evidence was presented. The Crown and defence agreed to the facts. The issue is the legal interpretation of those facts.

3 Mr. Sewell owns and operates a gas bar and convenience store on the Batchewana First Nation Reserve, close to the city limits of Sault Ste. Marie, Ontario. He sells gasoline and confectionary products to Indians and non-Indians. Approximately nine percent of the sales are to non-Indians.

4 The *Excise Tax Act* is the taxing authority for the Goods and Services Tax (referred to as the GST), taxation in relation to the manufacturing of jewellery, taxation of alcohol products and the transportation levy on fuel.

5 As part of the business process Mr. Sewell files on a monthly basis a GST return and remits collected GST to the Minister of National Revenue in relation to those purchases by non-Indians. (Indians are exempt from the GST.) Only the GST return form is filed and not the underlying documentation.

6 Under the *Excise Tax Act* there is authority to review the underlying business documentation of a retailer who submits a GST return, in order to ascertain the accuracy of the amount of remitted tax. In essence there is the authority to conduct an audit of the information contained in the GST return.

7 For purposes related to the administration and enforcement of the *Excise Tax Act*, a notice was served on Mr. Sewell to provide the underlying documents. Mr. Sewell has refused to provide the documents. Without the documents there can be no verification of the information contained in the GST return. Thus, Mr. Sewell was charged with failing to comply with the notice requesting the underlying documents. There is no dispute as to the constituent elements of the offence. The focus is on whether he unlawfully failed to comply.

8 Mr. Sewell argues he is lawfully entitled not to comply with the demand for documents by operation of the *Indian Act*, R.S.C. 1985, c. I-5, specifically section 89. To put section 89 into perspective I will set out sections 87, 88 and 90. They are as follows:

Taxation

87. (1) Property exempt from taxation — Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.

(2) Idem — No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

(3) Idem — No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable un-

der the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

Legal Rights

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

89. (1) Restriction on mortgage, seizure, etc., of property on reserve — Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Exception — Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

(2) Conditional sales — A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

90. (1) Property deemed situated on reserve — For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

(2) Restriction on transfer — Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

(3) Destruction of property — Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

9 The defence contends the sought after documents are the *personal property* of Mr. Sewell and the process of seeking such documentation constitutes a *seizure* under section 89. Therefore Mr. Sewell is relieved from compliance with the notice to produce documents, because the *Excise Tax Act* is inconsistent with section 89 of the *Indian Act*. There is no dispute Mr. Sewell has an obligation to collect and remit the GST of non-Indians.

10 The Crown's position is the *Excise Tax Act* provides authority to demand documents for inspection and

such is an *administrative* process only which allows for the effective enforcement of the *Excise Tax Act*. There is no substantive encroachment on the *personal property* of any Indian. This process by itself does not create a tax. It provides information to verify the contents of the GST return, and if the documents suggest otherwise, then tax may be requested as such relates only to the purchases of non-Indians. The Crown argues the documents underlying the GST return are not *personal property* and the process of obtaining the documents do not constitute a *seizure* as contemplated by section 89 of the *Indian Act*.

11 To put these issues into context there must be an understanding of the history of the *Indian Act* itself and the philosophy behind sections 87 to 90. The settlement by Europeans of what is now Canada caused considerable dislocation and disruption of the Indian population, which had occupied the lands relatively peaceably for hundreds of years. Indians were the victims of many injustices.

12 Indians eventually gave up much of their home lands to the British Crown on the basis that the Crown would protect them in the possession and use of lands and property retained by them.

13 Pre confederation, there were several treaties, proclamations, statutes and other government documents that protected the lands and personal property of Indians. These protections continued post confederation, wherein provisions were contained in the *Indian Act*, first enacted in 1876. Since then there has been several legislative changes to the *Indian Act*, that continued the protection of Indians on their lands and properties.

14 The protective themes contained in sections 87 to 90, as well as other sections, of the current *Indian Act*, can be traced back as far as the Royal Proclamation of 1673, enacted by King George of England.

15 Some of this history is referred to in the Supreme Court of Canada decision in *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) as follows:

> ¶ 85 As is clear from the comments of the Chief Justice in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 383, these legislative restraints on the [page130] alienability of Indian lands are but the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763. The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use; see the comments of Professor Slattery in his article "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 753. The sections of the Indian Act relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserve lands. This Court, in its recent decision of *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, alluded to this point when it noted, at p. 677, that the feature of inalienability was adopted as a protective measure for the Indian population lest it be persuaded into improvident transactions.
>
> ¶ 80 Section 87, we saw, confers a tax exemption on Indians with respect to their interest in reserve lands or surrendered lands, and their personal property situated on reserves. It is instructive to note that such exemptions from taxation predate Confederation. Professor Bartlett in his monograph Indians and Taxation in Canada (2nd ed. 1987), traces the origins of statutory tax exemptions for natives to an Act of the Province of Canada passed in 1850. Section 4 of this statute, entitled An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, S.C.

1850, c. 74.

¶ 81 As Professor Bartlett notes, this exemption from taxation remained unchanged until the passage of Canada's first Indian Act, 1876, S.C. 1876, c. 18. [page128] ... which effected a comprehensive consolidation of laws respecting Indians.

¶ 82 Section 89 weaves another strand into the protection afforded property of natives by shielding the real and personal property of an Indian or a band situated on a reserve from ordinary civil process. [The predecessor to the current section 89 can be traced back as far as 1876.]

¶ 83 Section 90 first appeared in its present form in the Indian Act, S.C. 1951, c. 29. Professor Bartlett in his monograph, op. cit, at p. 46, points out that this section has as its historical antecedents provisions in early Indian legislation which exempted [page129] from seizure "presents" and "annuities" given to Indians.

¶ 87 In summary, the historical record makes it clear that ss. 87 and 89 of the Indian Act, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.

¶ 88 It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

¶ 92 I draw attention to these decisions by way of emphasizing once again that one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements. The Alberta Court of Appeal in *Bank of Nova Scotia v. Blood*, [1990] 1 C.N.L.R. 16, captures the essence of the matter when it states, at p. 18, in reference to s. 87, that: "In its terms the section is intended to prevent interference with Indian property on a reserve."

16 The philosophy of the protection of Indians was the basis for a very liberal interpretation of treaties and statutes relating to Indians. In *Nowegijick v. R.* (1983), 83 D.T.C. 5041 (S.C.C.), Dickson, C. J. stated:

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which

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

17 In *Mitchell* Dickson, C.J. indicated:

> The Nowegijick principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. The above-quoted statement is clearly concerned with interpreting a statute or treaty with respect to the persons who are its subjects — Indians — not with interpreting a statute in favour of Indians simply because it is the State that is the other interested party. It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying Nowegijick is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation. (para. 15)

18 This liberal construction of the *Indian Act*, specifically section 87, as such refers to the concept of *personal property* as to whether wages are personal property, can be seen in *Nowegijick*. The taxpayer was a registered Indian and lived on a reserve and performed work off the reserve as a logger for a company which had its head office on the reserve, and which paid the Indian by cheque at the head office. The Minister of National Revenue assessed the Indian's wages as taxable income and he contested the assessment on the basis the income constituted personal property within the meaning of section 87. The Supreme Court found that wages in this context was personal property and was exempt from taxation. Dickson J. stated:

> The prime task of the Court in this case is to construe the words 'no Indian... is subject to taxation in respect of any such [personal] property'. Is taxable income personal property? The Supreme Court of Illinois in the case of *Bachrach v. Nelson* (1932), 182 N.E. 909considered whether 'income' is 'property' and responded:
>
> > The overwhelming weight of judicial authority holds that it is. The cases of Eliasberg Bros. *Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300, Tax Commissioner v. Putnam, 227 Mass. 522, 116 N.E. 904, L.R.A. 1917F, 806, *Stratton's Independence v. Howbert*, 231, U.S. 399, 34 S. Ct. 136, 58 L. Ed. 285, *Doyle v. Mitchell Bros.* Co., 247 U.S. 179, 38 S. Ct. 467, 62 L. Ed. 1054, Board of Revenue v. Montgomery Gaslight Co., 64 Ala. 269, *Greene v. Knox*, 175 N.Y. 432, 67, N.E. 910, *Hibbard v. State*, 65 Ohio St. 574, 64 N.E. 109, 58 L.R.A. 654, *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196, and *State v. Pinder*, 7 Boyce (30 Del.) 416, 108 A. 43, define what is personal property and in substance hold that money or any other thing of value acquired as gain or profit from capital or labor is property, and that, in the aggregate, these acquisitions constitute income, and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property. (at p. 914).
>
> > We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section. A person exempt from taxation in respect of any of his personal property would have difficulty in understanding why he should pay tax in respect of his wages. And I do not think it is a sufficient answer to say that the conceptualization of the Income Tax Act renders it so.

19 In addition to the rationale in *Nowegijick*, a review of several cases is instructive in the application of these principles.

20 In *Mitchell*, Manitoba Hydro invalidly imposed a tax upon the Peguis Indians in respect of the sale of electricity on a reserve. A settlement was reached of the Indians' claim for the return of the taxes paid and the issue was whether the settlement fund could be the subject matter of a garnishee. The court concluded the settlement fund constituted personal property under section 89 and 90 of the *Indian Act* and therefore could not be seized by way of garnishee.

21 In interpreting relevant sections of legislative acts the courts have drawn a distinction between procedural, administrative or process requirements and the impact on substantive rights. In *R. v. Point* (1957), 57 D.T.C. 1200 (B.C. C.A.) the Minister of National Revenue demanded that a status Indian file an income tax return in the prescribed form. When he failed to do so a charge was laid. He contended that as an Indian, because he was not required to pay tax in general, he was not required to file a return. The court found he was obligated to file a return.

22 Because of the operation of section 87 of the *Indian Act* many forms of income will not be subject to tax. There may still be circumstances in which tax will be paid by a status Indian. It is implied in this case that in order to determine whether tax is applicable or exempted under section 87, that certain information is required that is expected to be contained in the prescribed return. Once having such information the Minister is then in a position to determine whether section 87 applies to a specific type of income. The court distinguishes between the section 87 right not to pay tax in certain circumstances and the procedural obligation to file the appropriate documents so the issue of tax exemption can be properly addressed. Also see *Laforme v. Minister of National Revenue* (1991), 91 D.T.C. 5372 (Fed. T.D.).

23 The distinction between the procedural and administrative and the substantive concept was considered in *Tseshaht Indian Band v. British Columbia* (1992), 94 D.L.R. (4th) 97 (B.C. C.A.). The Indian band operated a business on its reserve which sold tobacco products and gasoline. These products were sold tax free to Indians. The taxes on tobacco products and gasoline were collected from non-Indian customers. The collection system implemented by the province required retailers, such as the band in this case, to pay to the wholesale dealers from whom they purchased their products an amount equivalent to the tax that would ultimately be paid by the non-native purchasers. The band took the position that this system of paying an amount equivalent to the tax on non-native purchases, to the wholesaler, constituted a tax and was contrary to section 87 of the *Indian Act* on the basis that tobacco and gasoline products were personal property of the Indian band and thus exempt from taxation. The court found the band did not purchase these products from the wholesaler for its own use or consumption. The imposed tax is on the ultimate consumer or purchaser. The band is a retailer and not a purchaser. The payment by the retailer band of an amount equivalent to the tax, to the wholesaler from which it purchases its gasoline and tobacco products is part of a collection scheme and is not the payment of a tax. Section 87 of the *Indian Act* has no application. The band is not using or consuming the gasoline and tobacco products. Those products retained their identity and were resold at retail to the ultimate consumers, and if those consumers were non-Indians, the applicable tax was collected.

24 The court viewed the collection and payment of an equivalent to the ultimate taxes owed, as an enforcement, administrative and accounting structure. The payment of the equivalent tax was not a substantive tax.

25 In *Douglas v. R.*, [1984] 3 C.N.L.R. 65 (B.C. Co. Ct.), an Indian was found guilty of resisting and ob-

structing a peace officer when he attempted to prevent the seizure on an Indian reserve of a truck allegedly used in connection with the illegal sale of fish. The seizure purported to be under section 58 of the *Fisheries Act*, R.S.C. 1970 c. F-14. The accused argued that section 58 of the *Fisheries Act* was inconsistent with section 89 of the *Indian Act*, and he was entitled to resist the peace officer because the seizure of the truck was illegal.

26 The court found the whole tenor of section 89 applied only to civil proceedings. To interpret section 89 otherwise would give to it an unnatural meaning as well as to frustrate the law enforcement agencies of Canada in the application of the general laws of Canada relating to the seizures of chattels. Section 89 cannot be utilized as a bar to the seizure of property for a legally justifiable purpose under a criminal or quasi-criminal enactment. Thus, the defence of the accused that he was acting lawfully in attempting to prevent the seizure of the vehicle was not accepted.

27 In the facts of the case at bar, the underlying documents that led to the information contained in the GST return, would technically constitute personal property.

28 An examination of the case law suggests that courts carefully consider the substantive or intrinsic value in any such property. The nature and quality of the circumstances in each situation is scrutinized.

29 The supporting documents sought, have little if any substantive or intrinsic value. They are simply paper materials generated in the course of operating the business. This type of personal property is not the type of property historically contemplated by the section 89 protection against interference, encroachment or erosion. The substantive or intrinsic value is in the business itself as a whole and the profitability it generates. That profitability is directly affected by the revenue base — which partly relates to sales to non-Indians. In other words, revenue generated from non-Indians increases the substantive or intrinsic value of the business and its profitabil- ity.

30 Mr. Sewell holds himself out as a retailer prepared to do business with non-Indians. He is prepared to remit the collected GST, but does not want to provide the documents to verify the accuracy of the collected tax. Non-Indian businesses similar to that of Mr. Sewell have to comply with various government reporting schemes. Such is part of the operating expenses of any business. To allow Mr. Sewell not to incur operating expenses in relation to the GST return would give him a competitive advantage over similar businesses owned by non-Indians. It was not the intention of section 89 to provide a competitive advantage in the commercial marketplace in relation to non-Indian businesses. If Mr. Sewell chooses to do business with non-Indians, then he must comply with the rules that apply to businesses of this nature. The historical context of section 89 is a *shield* against interference on the use and rights in property. There is no historical basis to support the use of section 89 as a *sword* to obtain a commercial competitive advantage. Mr. Sewell cannot expect to deal with property in the commercial mainstream on different terms than his fellow citizens.

31 The historical basis and philosophy of section 89 is rooted in the vulnerability of the Indian population, involving many injustices, improvident transactions and the dispossession of their entitlements. An expectation to produce supporting documents to verify remitted tax, hardly qualifies as the type of conduct that would trigger a section 89 protection.

32 The authority under the *Excise Tax Act* to demand supporting documents to verify a GST return is an administrative, procedural and accounting mechanism in order to monitor and enforce this tax legislation. It does not interfere with the substantive interest in the personal property of Mr. Sewell.

33 The charge against Mr. Sewell is criminal in nature. Section 89 contemplates a protection primarily in a civil proceeding context. To allow section 89 to be a defence to a criminal charge would frustrate the legitimate law enforcement of taxation statutes.

34 Even allowing for a liberal interpretation of section 89, does not automatically lead to accepting the Indian perspective in statutory interpretation. There is no ambiguity in the statutory interpretation in these circumstances. The Indian interpretation is contrary to the common sense plain meaning of section 89 and inconsistent with the historical context that led to the section 89 protection. As directed by the Supreme Court of Canada, I must guard against an overly broad purpose being ascribed to section 89.

35 Accordingly, I am satisfied that the notice served on Mr. Sewell demanding documents, does not constitute a *seizure* under section 89. Mr. Sewell was not acting lawfully in refusing to comply with the notice. All elements of the offence have been established beyond a reasonable doubt. There is a finding of guilt and a conviction registered.

Accused convicted.

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1999 CarswellMan 92, 169 D.L.R. (4th) 749, 132 C.C.C. (3d) 306, 135 Man. R. (2d) 195, [**1999**] 9 W.W.R. 120, [**1999**] 9 W.W.R. 120

R. v. Pickering

Orville T. Pickering, Lily Lapka, James Robertson, Raymond Royer, Monte Calvin Shoemaker, Alan Tucker, Hamish MacSteeofain, Richard Kosmick, Brent Petrowski, Leslie Atkin, Saul Colin, Lynn Franks, Jeffrey Morgan, Larry Parks, Joao Traveres, James Weiss, Thomas Peterson and Larry Wood, Appellants and Her Majesty The Queen, Respondent

Manitoba Court of Queen's Bench

Kennedy J.

Judgment: February 17, 1999
Docket: CR 96-01-17449

Counsel: *K.J. Tyler*, for the Crown.

R. Schmalcel, for the appellants.

Subject: Criminal; Constitutional

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Ancillary and necessarily incidental legislation (double aspect, pith and substance) — Taxing statutes

Accused were convicted of being in possession of prohibited quantities of marked tobacco product in violation of ss. 26(2) and 9(3.4) of Manitoba's Tobacco Tax Act — Provisions of Act prevent anyone from transporting excessive amounts of tobacco into Manitoba without paying appropriate provincial tax — Accused appealed conviction on ground that limits on tobacco possession in s. 9(3.4) were ultra vires provincial legislation, as trade and commerce and mobility rights were within federal jurisdiction — Pith and substance of legislation was to ensure that all tobacco products were subjected to provincial taxation under provisions of Act — Impunged section could not be severed and was sufficiently integrated within Act so as to justify connection with legislation — Act does not offend constitutional division of powers and is not ultra vires — Appeal dismissed — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, ss. 9(3.4), 26(2).

Constitutional law --- Distribution of legislative powers — Areas of legislation — Taxation — Provincial taxes — General

Accused were convicted of being in possession of prohibited quantities of marked tobacco product in violation

of ss. 26(2) and 9(3.4) of Manitoba's Tobacco Tax Act — Provisions of Act prevent anyone from transporting excessive amounts of tobacco into Manitoba without paying appropriate provincial tax — Accused appealed conviction on ground that limits on tobacco possession in s. 9(3.4) were ultra vires provincial legislation, as trade and commerce and mobility rights were within federal jurisdiction — Measures set out in Act had legitimate objective of requiring provincial tax to be paid on tobacco products — Any intrusion on federal jurisdiction was minimal and secondary to legitimate objective of provincial Act — Act does not offend constitutional division of powers and is not ultra vires — Appeal dismissed — Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80, ss. 9(3.4), 26(2).

Cases considered by *Kennedy J.*:

Canadian Pacific Air Lines Ltd. v. British Columbia, [1989] 4 W.W.R. 137, (sub nom. *Canadian Pacific Airlines Ltd. v. British Columbia)* 96 N.R. 1, (sub nom. *Canadian Pacific Airlines Ltd. v. British Columbia)* [1989] 1 S.C.R. 1133, (sub nom. *Canadian Pacific Airlines Ltd. v. British Columbia)* 59 D.L.R. (4th) 218, (sub nom. *Canadian Pacific Airlines Ltd. v. British Columbia)* 2 T.C.T. 4170, (sub nom. *Canadian Pacific Airlines Ltd. v. British Columbia)* [1989] 1 T.S.T. 2153, (sub nom. *Canadian Pacific Air Lines Ltd. v. British Columbia)* 36 B.C.L.R. (2d) 185 (S.C.C.) — referred to

City National Leasing Ltd. v. General Motors of Canada Ltd., 93 N.R. 326, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, 32 O.A.C. 332, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 68 O.R. (2d) 512 (note) (S.C.C.) — con- sidered

Gold Seal Ltd. v. Dominion Express Co., 62 S.C.R. 424, [1921] 3 W.W.R. 710, 62 D.L.R. 62 (S.C.C.) — referred to

Little v. British Columbia (Attorney General), [1922] 2 W.W.R. 359, 31 B.C.R. 84, 37 C.C.C. 189, 65 D.L.R. 297 (B.C. C.A.) — referred to

Murphy v. Canadian Pacific Railway, 15 D.L.R. (2d) 145, [1958] S.C.R. 626, 77 C.R.T.C. 322 (S.C.C.) — referred to

R. v. Belliveau (1985), 18 C.C.C. (3d) 554, 61 N.B.R. (2d) 223, 158 A.P.R. 223, 15 C.R.R. 88 (N.B. Q.B.) — considered

R. v. Doer (February 1, 1999), Doc. Winnipeg Centre CR 97-01-19071 (Man. Q.B.) — considered

Voigts v. Saskatchewan Government Insurance, [1993] 6 W.W.R. 329, 102 D.L.R. (4th) 593, 108 Sask. R. 313, 1 G.T.C. 6205 (Sask. Q.B.) — referred to

Statutes considered:

Canada Temperance Act, S.C. 1921, c. 20

Generally — referred to

Combines Investigation Act, R.S.C. 1970, c. C-23

Generally — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91(2) — considered

s. 121 — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

Retail Sales Act, R.S.M. 1987, c. R130; C.C.S.M., c. R130

Generally — referred to

Statute Law Amendment (Taxation) Act, 1989, S.M. 1989-90, c. 15

Generally — referred to

s. 78(4) — referred to

s. 80 — referred to

Statute Law Amendment (Taxation) Act, 1994, S.M. 1994, c. 23

Generally — referred to

s. 44(5) — referred to

s. 42 — referred to

Tobacco Tax Act, R.S.M. 1988, c. T80; C.C.S.M., c. T80

Generally — referred to

s. 1 "extraprovincial marked product" [en. 1994, c. 23, s. 42] — referred to

s. 2(1) — referred to

s. 9(3.2) "marked product" [en. 1989-90, c. 15, s. 78(4); am. 1992, c. 52, s. 78] — referred to

s. 9(3.4) [en. 1989-90, c. 15, s. 78(4); rep. & sub. 1994, c. 23, s. 44(5)] — considered

s. 9(3.5) [en. 1989-90, c. 15, s. 78(4)] — considered

s. 26(2) [rep. & sub. 1989-90, c. 15, s. 80; am. 1994, c. 23, s. 47(2)] — referred to

APPEAL by accused from conviction for violation of tobacco tax legislation.

***Kennedy J.*:**

1 The appellants, with the exception of James Robertson, appeal their summary conviction for violation of

ss. 9(3.4) and 26(2) of *The Tobacco Tax Act* R.S.M. 1988 c. T80, as amended by the *Statute Law Amendment (Taxation) Act* (1989-90) S.M. 1989-90, c. 15, s. 78(4) and 80, and by the *Statute Law Amendment* (*Taxation*) *Act* (1994) S.M. 1994 c. 23, s. 44(5) and 47(2), i.e. being in possession of prohibited quantities of extraprovincial marked tobacco products.

2 The appellant, James Robertson, was charged pursuant to ss. 9(3.4) and 26(2) of *The Tobacco Tax Act R.S.M. 1988 c. T80* as amended by *The Statute Law Amendment Act* (*Taxation*) *Act S.M. 1989-90, c. 15, ss. 78(4) and 80*, i.e. being in possession of prohibited quantities of marked tobacco product. The amendments to the *Act* which introduced changes affecting the appellants were enacted under the *Statute Law Amendment* (*Taxation*) *Act* (1989-90) S.M. 1989-90 c. 15 s. 78(4) as follows:

> 9 (3.2) In subsection (3.3), (3.4), and (3.5), "marked product" means tobacco or tobacco product that, for the tax purposes of a jurisdiction other than Manitoba, is endorsed or marked, whether on the tobacco or tobacco product or on the packaging or wrapping in which the tobacco or tobacco product or on the packing or wrapping in which the tobacco or tobacco product is contained, to permit sale of the tobacco or tobacco product in the other jurisdiction or for export out of Canada.
>
> 9 (3.4) Subject to subsection (3.5), no person shall possess
>
> (a) more than 200 cigarettes that are marked products; or
>
> (b) more than 50 cigars or 900 grams of tobacco product for export out of Canada.
>
> These amendments introduced the notion of "marked product".

3 The following provisions enacted under the *Statute Law Amendment* (*Taxation*) *Act* S.M. 1994, c. 23, s. 42 was further amended to include:

> "**extraprovincial marked product**" means tobacco or tobacco product that, for the tax purposes of a jurisdiction other than Manitoba, is endorsed or marked, whether on the tobacco or tobacco product or on the packaging or wrapping which the tobacco or tobacco product is contained, to permit sale of the tobacco or tobacco product in other jurisdiction;

which then replaced the term "marked product" with "extraprovincial marked product" in the prohibition section as follows:

> 9(3.4) Subject to subsection (3.5), no person shall possess more than
>
> (2) 200 cigarettes that are extraprovincial marked product; or
>
> (3) 400 grams of tobacco or tobacco products, other than cigarettes or cigars, that are extraprovincial marked product.

Subsection 9(3.4) is the provision of the *Act* impugned by the appellants.

4 The circumstances of each accused are the same except for the quantity of cigarettes "extraprovincially marked". The quantities ranged from possession of 2,000 cigarettes to 39,400 cigarettes. In each instance the

numbers of cigarettes were well beyond the limit allowed to be possessed and were not intended for the accused's own use. None of the accused claimed to be passing through Manitoba or that the cigarettes were destined for other provinces. The cigarettes were in Manitoba for resale in this province, at a price considerably less than cigarettes sold at licenced outlets in Manitoba. None of the accused paid the provincial tax under *The Tobacco Tax Act*.

5 All of the appellants have agreed to the particulars of the offence, but challenge the validity of *The Tobacco Tax Act* (*Manitoba*) under which they have been charged on the following grounds:

> (1) Subsection 9(3.4) of *The Tobacco Tax Act* (*Manitoba*) was ultra vires the Province of Manitoba as being contrary to section 121 of the *Constitution Act, 1867* and was void and of no force or effect;
>
> (2) Subsection 9(3.4) of *The Tobacco Tax Act* (*Manitoba*) was ultra vires the Province of Manitoba as being in pith and substance in relation to the regulation of trade and commerce, a matter within the exclusive legislative authority of the Parliament of Canada pursuant to subsection 91(2) of the *Constitution Act, 1867*, and was void and of no force or effect.

6 The price of cigarettes is made up of a relatively minor production cost, with by far the largest component of the cost being the provincial tax. The attraction to "possessing extraprovincially marked" cigarettes, in this case acquired from Ontario, was a result of the dramatic reduction of tobacco taxes both in Ontario and Quebec. The reduction in cost was occasioned by the high cost of preventing the smuggling of cigarettes from the United States into those provinces and their resale on the "black market". The reduction of the provincial tax in both Ontario and Quebec was aimed at eliminating the profit incentive on the resale of smuggled cigarettes.

7 The result of the tax reduction dramatically reduced the cost of cigarettes in Ontario and made it attractive to purchase "Ontario marked" cigarettes and re-sell them in Manitoba, while cigarette taxes charged by licenced vendors in Manitoba, were maintained at a higher level. In the simplest of terms the accused were profiting, by not paying provincial taxes.

8 Subsection 9(3.4) was made subject to 9(3.5) which had the effect of allowing persons in the legitimate business of selling tobacco in other provinces to be in possession of quantities exceeding the prohibited amount in Manitoba for the purpose of transporting to legitimate markets. One draws from this section that there was not an absolute prohibition to possession in Manitoba of "marked cigarettes". Passage through Manitoba was permitted where the payment of the appropriate provincial taxes was made. Section 9(3.5) reads:

> Where a person is authorized to collect tobacco taxes for jurisdiction, other than Manitoba, that requires the marking of tobacco or tobacco products for tax purposes, the person may possess extraprovincial marked product for the purpose of selling the extraprovincial marked product in the other jurisdiction.

To end the profit taking and the government's loss of tax revenue, the Province of Manitoba decided to prohibit the possession of quantities of extraprovincially marked cigarettes in Manitoba, over and above a small quantity for personal use. Provincial budgetary dependence on this source of taxation was and is, substantial.

9 It is the method chosen under the existing *The Tobacco Tax Act* legislation that is the subject of the appeal. The main objective of the impugned legislation is abundantly clear — the legislation was designed to prevent the practise by persons other than licenced dealers who pay the required tax from possessing extraprovin-

cially marked cigarettes and tobacco products, thereby avoiding the provincial tax. The possession of "extraprovincial marked product" cigarettes, over a small quantity (one carton) was made an offence carrying deterring penalties.

10 The 1994 legislation is challenged on the basis that it conflicts with the exclusive jurisdiction of the federal government under its constitutional power over trade and commerce pursuant to s. 91(2) of the *Constitution Act*. The legislation is also challenged on the basis that it conflicts with s. 121 of *the Constitution Act*, which permits the free movement of certain goods across provincial borders. The applicable sections of the *Constitution Act 1867* are as follows:

> **VI. Distribution of Legislative Powers**
>
> ***Powers of the Parliament***
>
> *Legislative Authority of Parliament of Canada*
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> . . . . .
>
> 2. The Regulation of Trade and Commerce.
>
> . . . . .
>
> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

11 The regulation of trade is within the exclusive authority of the federal government. With growing complications in the movement of goods between provinces subtleties in provincial legislation have arisen which have the appearance of conflicting with federal authority. Courts have had to appreciate these complexities and determine the real purpose of the provincial legislation. The options available to the courts if the legislation encroaches into the federal sphere are to strike the offending Act, sever the offending sections, or determine the extent to which the intrusion, is ultra vires. The legal exercise is to determine whether the impugned provisions go to the essence of the *Act* or are incidental to the valid and principal objectives of the legislation. As referred to above, the appellants do not take issue with the purpose of *The Manitoba Tax Act* which includes the follow- ing:

> **Imposition of tax**
>
> 2 (1) Every purchaser shall pay to Her Majesty in right of Manitoba, for the public use of the government, a

tax at a rate of...

12 The facts of this case are that neither the purchasers of extraprovincially marked cigarettes nor the appellants would remit the provincial tax on cigarettes, to this province, were it not for the prohibition against the possession of large quantities of cigarettes or tobacco products. The appellants would retain as profit the amount the market would bear in relation to the market price, which legitimate licenced vendors of cigarettes would charge inclusive of provincial taxes. This scenario is tantamount to evading legitimate provincial taxes.

13 The Supreme Court addressed the relationship between provincial legislation and federal legislation in the decision of *City National Leasing Ltd. v. General Motors of Canada Ltd.* (1989), 58 D.L.R. (4th) 255 (S.C.C.). Chief Justice Dickson set out the steps to be followed respecting the conflict between the Federally legislated *Combines Investigation Act* and Provincial civil rights legislation. In dealing with that issue he stated:

> **1) Does s. 31.1 encroach on provincial powers?**
>
> The first step, therefore in assessing the validity of s. 31.1 of the Combines Investigation Act is to determine whether the impugned provision can be seen as encroaching on provincial powers, and if so, to what extent.
>
> **2) The validity of the regulatory scheme**
>
> Having discerned the presence of a regulatory scheme in the *Combines Investigation Act* it is necessary to consider the validity of the scheme under the general trade and commerce power.
>
> **3) The validity of s. 31.1 of the Combines Investigation Act**
>
> Having found that the *Combines Investigation Act* contains a regulatory scheme, valid under s. 91(2) of the Constitution, the only issue remaining to be addressed is the constitutional validity of 31.1. As I have already mentioned mere inclusion in a valid legislative scheme does not ipso facto confer constitutional validity upon a particular provision. The provision must be sufficiently related to the scheme for it to be constitutionally justified.

In the appellant's factum he sets out the steps as:

> (1) The court must determine whether the impugned provisions (subsections 9(3.4) and 26(2) of *The Tobacco Tax Act*) can be viewed as having intruded on federal powers, and if so to what extent;
>
> (2) The court must establish whether the act (*The Tobacco Tax Act*), or a severable part of it, was valid; and
>
> (3) If the answer to (2) is affirmative, the court must then determine whether the impugned provisions (subsections 9(3.4) and 26(2) are sufficiently integrated with the scheme (*The Tobacco Tax Act* as a whole) that they can be constitutionally justified by reason of their connection with valid legislation. This final step will require consideration of how well the provision was integrated into the scheme of the legislation and how important it was to the efficacy of the legislation.

14 The *General Motors* decision at first considered the general nature of the legislation and provided further reasoning as to the true nature of the legislation. Chief Justice Dickson, at p. 274 reviews the issue as follows:

In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate. I reiterate what I said on this general theme (although in a slightly different context) in *OPSEU v. A.-G. Ont.* (1987), 41 D.L.R. (4th) 1 at p. 11, [1987] 2 S.C.R. 2, 59 O.R. (2d) 671*n*:

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that the doctrines like interjurisdictional and Crown immunity and concepts like 'watertight compartments' qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.

The above comments also emphasize that the question in this appeal of how far federal legislation may validly impinge on provincial powers is one part of the general notion of the "pith and substance" of legislation; i.e., the doctrine that a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa). On p. 334 of his book *Constitutional Law of Canada*, Professor Hogg explains this in the following way:

> The pith and substance doctrine enables a law that is classified as 'in relation to' a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body.

I emphasize that these comments should not be seen as altering the balance of constitutional powers. Both provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government's sphere of power. I quote from Professor Hogg again, where at p. 336 he states: "I think it is plain both on principle and on authority that the provincial enumerated powers have exactly the same capacity as the federal enumerated powers to 'affect' matters allocated to the other level of government.

As indicated earlier, the appellants agree with the primary objective of the legislation and that is the direct taxation of tobacco and tobacco products.

Pith and Substance Doctrine

15 The "pith and substance" doctrine when applied to *The Tobacco Tax Act* permits the direct taxation of tobacco products. The impugned provisions of the legislation purport to ensure that all tobacco products are subjected to the provincial taxation provisions under *The Tobacco Tax Act*. The legislation cannot be seen as interfering with transportation of tobacco products generally inasmuch as it provides for the valid transportation of tobacco through Manitoba. Subsection 9(3.5) of *The Tobacco Tax Act* permits persons to transfer cigarettes or tobacco products through Manitoba without restrictions as to quantities, if they were authorized by the laws of those other jurisdictions to trade in tobacco products. (Trial transcript-Evidence of Bruce W. McLeod, Vol. 4, p. 59 lines 10-19):

> Q And what, if any, restrictions does the Government of Manitoba place upon Imperial Tobacco's ability to bring its products into the province for distribution to Alberta and Saskatchewan?

A There are no restrictions that I am aware of.

Q And what, if any, restrictions does the Government of Manitoba place upon Imperial Tobacco's ability to transport its tobacco products through the province of Manitoba to other provinces or territories?

A Once again, I'm not aware of any restrictions.

16 Likewise, the *Act* also permits a possession of limited quantities for personal use, hence the section challenged by the appellants do not serve as to prevent possession of all tobacco products, but merely quantities of tobacco that otherwise had not been subjected to the provincial tax.

17 In examining whether the challenged sections are integrated into the legislation as a whole, it is clear that the section is an essential component of the *The Tobacco Tax Act* of Manitoba. Were the sections not contained, it would have the effect of completely undermining, if not destroying the effect of *The Tobacco Tax Act*. One might easily conjecture that if the possession of extraprovincially marked tobacco were not prohibited the loss of the province's ability to direct taxation of tobacco products would be completely lost. The entitlement of a provincial government to ensure the integrity of its legitimate legislation is a component of the legislation and a necessary ingredient to permit it to carry out its constitutional powers. Applying the tests set forth by Chief Justice Dickson in the *General Motors* decision the impugned provisions could not be severed and are sufficiently integrated within *The Tobacco Tax Act* so as to justify their connection with the legislation.

Section 121 of the Constitution Act, 1867

18 The purchase of goods, in any one of the categories mentioned under s.121, in one province and bringing them into another is constitutionally guaranteed to be admitted free. The Fathers of Confederation contemplated such mobility of goods as a fundamental component of the economic fabric of our country. It was consistent with the notion that goods produced more efficiently or less expensively in one area of the country should not be precluded from sale in any market in Canada, for the benefit of both the producer and the consumer.

19 At the same time as this judgment was under deliberation by this court, my colleague, Steel, J., was considering similar constitutional issues respecting the *Excise Tax Act*. I endorse, without the need of repeating them here, the basic principles of constitutional interpretation as are found in paras. 98 and 99 of her decision in *R. v. Doer* delivered (February 1, 1999) [Doc. Winnipeg Centre CR 97-01-19071 (Man. Q.B.)]. I furthermore adopt her arguments pertaining to the requirement to look at the pith and substance of the provision for the principal purpose of the legislation as she mentions in para. 11 and seq. of her decision.

20 In considering whether or not the legislation is severable, one need only consider that if it were held to be invalid it would have the effect of completely destroying or emasculating the legitimate purposes of the legislation itself, which is to directly tax the sale of tobacco products.

21 Against the backdrop of unrestricted movement of goods between provinces, the economy has developed such that each province depended in different ways upon its entitlement to impose varying forms of legitimate direct taxation. The more obvious example came about with the imposition by some provinces of a provincial value added tax or sales tax. Without any regulations governing such taxes as it affected other areas of the country, provinces with lower or no provincial sales taxes would be the obvious market from which to acquire goods less expensively than from the home markets. The effect would be to detrimentally affect the economy of higher taxed provinces and the services they provide dependant on those revenues.

22 The Manitoba sales tax legislation (see *The Retail Sales Act* R.S.M. 1987, c. R130) was framed, requiring purchasers of tangible personal property in lower taxed provinces who transport it to a higher taxed area without paying the sales tax, to remit the local sales tax on a self-assessed basis. It is obvious that a system of requiring provincial sales tax to be paid in the province where the purchaser resides but has purchased goods in another province, is not without enforcement problems. Such a scheme requires consumers from higher taxed areas to pay taxes on goods purchased in lower taxed provinces, thus making the purchase less attractive. An obvious example arises where a person from one province brings to another province a large ticket item such as a motor vehicle. The Motor Vehicle Branch, before permitting registration of the vehicle, requires payment of the provincial tax. Such legislation impinges on the passage of goods from one part of the country to another, but its purpose and objective is to protect the integrity of the legitimate taxing regime within the provinces.

23 Such measures, which have the legitimate objective of requiring a provincial tax to be paid, was held to be intra vires because it was aimed at collecting a provincial tax, notwithstanding the indirect or secondary effect on interprovincial trade and commerce between the provinces.

24 The courts have, on several occasions, dealt with instances where the legislation appears to have interfered with the transmission of goods between provinces. In those cases, various provinces impose a tax on goods moved from one province to another and the legislation was held to be valid since the object and purposes of the imposition of the tax was to prevent the evasion of taxes imposed in the province, and not as barriers to interprovincial trade. (See *Canadian Pacific Air Lines Ltd. v. British Columbia* (1989), 59 D.L.R. (4th) 218 (S.C.C.); *Voigts v. Saskatchewan Government Insurance* (1993), 108 Sask. R. 313 (Sask. Q.B.); *Little v. British Columbia (Attorney General)*, [1922] 2 W.W.R. 359 (B.C. C.A.).)

25 The appellants agree that if the legislation under *The Tobacco Tax Act* were framed so as to allow for the self-assessment of the goods, and the payment of tax in Manitoba, there would be no argument. The impugned legislation in this case is not drafted with that provision in mind but it serves the same legitimate objective.

26 The Crown, on the other hand, agrees that the prohibition against possession of cigarettes in Manitoba which are extraprovincially marked, intrudes minimally into federal jurisdiction, but argues the intrusion is minimal and secondary to the legitimate objective of the provincial legislation as it is in other cases, and therefore does not offend the constitutional authority of the federal government. I agree with this position. To maintain the intent of s.121 of the *Constitution Act* the true purpose of any impugned legislation must be examined with its intent in mind. What is objectionable under the Constitution is the impeding of goods at the border through the imposition of a custom or excise tax, which has the effect of taxing the importation of goods from one province to another.

27 The aim of the impugned section of *The Tobacco Tax Act*, is to prohibit possession of tobacco products which have not been subjected to Manitoba tax. There is nothing in the provincial legislation which purports to impose a custom or excise tax. The purpose is to restrict possession of goods on which legitimate provincial tax has not been paid. In *Gold Seal Ltd. v. Dominion Express Co.* (1921), 62 S.C.R. 424 (S.C.C.), Mr. Justice Duff in considering the effect of the *Canada Temperance Act* on the free flow of goods stated at page 466:

> I am unable to accept the contention founded upon section 121 of the BNA Act; the phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the union. Mr. Justice Anglin expressed it thusly:

> Neither is the legislation under consideration in my opinion obnoxious to s. 121 of the BNA Act. The purpose of that section is to ensure that articles of growth, produce or manufacture of any province shall not be subjected to any custom duty when carried into any other province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

28 The application of s.121 of the *Constitution Act* has been referred in terms of impeding trade or setting tariffs based upon provincial boundaries. (See *Murphy v. Canadian Pacific Railway*, [1958] S.C.R. 626 (S.C.C.) at p. 638.)

29 It might be argued that prohibiting the possession of certain goods restrict the transportation across borders to some extent. However, when the legislation's objective is to prevent or eliminate evasion of legitimate taxes as its primary purpose, which *The Tobacco Tax Act of Manitoba* has, the true purpose of the taxing statute serves to place the matter outside the parameters of s. 121. In the decision of *R. v. Belliveau* (1985), 18 C.C.C. (3d) 554 (N.B. Q.B.), an accused was also charged with breach of that province's *Tobacco Tax Act*. The section there also prohibited the possession of tobacco in a quantity exceeding an amount prescribed by regulation unless that individual has a wholesale or retail vendor's licence. The legislation in New Brunswick was struck down in the Provincial Court but on appeal Mr. Justice Stevenson of the New Brunswick Queen's Bench rejected the conclusion and stated the following:

> I take a different view. When a tax is imposed on the consumption of a commodity there are always those who will attempt to evade the tax and profit by the evasion. Bootleg or black-market operations are an inevitable feature of such evasion. In my view, the enactment of provisions creating an offence of possession of goods, aimed at illegal trafficking of those goods for the purpose of evading tax, is a legitimate way to put teeth in the taxing statute. It is not beyond the power of the Legislature to do so. The late and great Justice Oliver Wendell Holmes Jr. said, in *Compania General de Tabacos de Filipinos v. Collector of Internal Revenue* (1904) [sic-actually 1927] 275 U.S. 87 at p. 100, "Taxes are what we pay for civilized society". Taxing statutes require strong enforcement provisions to enable society to deal with those who want to reap the benefit of society without paying for them.

I therefore conclude that the Manitoba legislation does not offend s. 121 of the *Constitution Act*.

Additional Objections Raised by the Appellant

30 The appellant argues that the setting up of means of enforcement in conjunction with other provinces, all of which appears to be supported by references to Handsard and other political documentation, is aimed at suggesting that the real issue is interference with trade and commerce between provinces.

31 As with any legislation where direct taxation is involved the provinces must be able to enforce the taxation provisions. In this case enforcing the provisions against possessing extraprovincially marked tobacco, must involve cooperation between provinces. This is but a further necessary and incidental aspect of preserving the integrity and the enforcement of valid legislation. I see no reason why a province could not enlist the help of other provinces to ensure the effectiveness of its legislation.

32 The respondent in this case argues that in addition to the primary objective of the *Act*, there is also another functional component to the scheme, and that is the reduction of smoking related illnesses. I suppose in this respect, if health related matters were the pre-immanent concern, smoking could be banned altogether, but given its tolerance in society, taxation of the product serves both to control its use as the evidence adduced at the trial

suggests. The evidence adduced clearly demonstrates on an unrefuted basis the reduction in loss of life among men and women is significantly increased, or put another way, substantially injurious to the health of the public when cigarette smoking is made more accessible through the reduction of taxes.

33 Inasmuch as taxation of tobacco addresses the discouragement, through the imposition of taxes on certain potential smokers, this objective is a valid part of the *Act's* scheme and supports its validity.

34 The appeal is dismissed on both grounds.

Appeal dismissed.

END OF DOCUMENT

Ronald Edward Sparrow *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The National Indian Brotherhood / Assembly of First Nations, the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., the Fisheries Council of British Columbia, the United Fishermen and Allied Workers' Union, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: R. *v.* SPARROW

File No.: 20311.

1988: November 3; 1990: May 31.

Present: Dickson C.J. and McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Fishing rights — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 — Constitution Act, 1982, ss. 35(1), 52(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

* McIntyre J. took no part in the judgment.

Ronald Edward Sparrow *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

La Fraternité des Indiens du Canada / Assemblée des premières nations, la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters' Association, la Gulf Trollers' Association, la Pacific Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., le Fisheries Council of British Columbia, le Syndicat des pêcheurs et travailleurs assimilés, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: R. *c.* SPARROW

N° du greffe: 20311.

1988: 3 novembre; 1990: 31 mai.

Présents: Le juge en chef Dickson et les juges McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Droits ancestraux — Droits de pêche — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982? — Loi constitutionnelle de 1982, art. 35(1), 52(1) — Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34 — Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4, 12, 27(1), (4).

* Le juge McIntyre n'a pas pris part au jugement.

Indians — Aboriginal rights — Fishing rights — Interpretation — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of Constitution Act, 1982.

Appellant was charged in 1984 under the *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Appellant was convicted. The trial judge found that an aboriginal right could not be claimed unless it was supported by a special treaty and that s. 35(1) of the *Constitution Act, 1982* accordingly had no application. An appeal to County Court was dismissed for similar reasons. The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Its decision was appealed and cross-appealed. The constitutional question before this Court queried whether the net length restriction contained in the Band's fishing licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Held: The appeal and cross-appeal should be dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Section 35(1) applies to rights in existence when the *Constitution Act, 1982* came into effect; it does not revive extinguished rights. An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.

The Crown failed to discharge its burden of proving extinguishment. An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*. Nothing in the *Fisheries Act* or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian

Indiens — Droits ancestraux — Droits de pêche — Interprétation — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982?

En 1984, l'appelant a été accusé, en vertu de la *Loi sur les pêcheries*, d'avoir pêché avec un filet dérivant plus long que celui autorisé par le permis de pêche de subsistance de la bande indienne à laquelle il appartenait. Il a reconnu les faits à l'origine de l'infraction, mais il a soutenu en défense qu'il exerçait un droit ancestral existant de pêcher et que la restriction imposée dans le permis de la bande quant à la longueur du filet était invalide pour cause d'incompatibilité avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

L'appelant a été déclaré coupable. Le juge de première instance a conclu qu'on ne pouvait revendiquer un droit ancestral à moins que celui-ci ne soit étayé par un traité particulier, et que le par. 35(1) de la *Loi constitutionnelle de 1982* ne s'appliquait donc pas. Un appel devant la Cour de comté a été rejeté pour des motifs semblables. La Cour d'appel a statué que les conclusions de fait du juge de première instance étaient insuffisantes pour justifier un acquittement. Son arrêt fait l'objet d'un pourvoi et d'un pourvoi incident. La question constitutionnelle soumise à la Cour est de savoir si la restriction imposée dans le permis de pêche de la bande quant à la longueur des filets est incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

Arrêt: Le pourvoi et le pourvoi incident sont rejetés. La question constitutionnelle doit être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Le paragraphe 35(1) s'applique aux droits qui existaient au moment de l'entrée en vigueur de la *Loi constitutionnelle de 1982*; il ne vient pas rétablir des droits éteints. Un droit ancestral existant ne saurait être interprété de façon à englober la manière précise dont il était réglementé avant 1982. L'expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps.

Le ministère public ne s'est pas acquitté de son fardeau de prouver l'extinction du droit. Un droit ancestral n'est pas éteint du seul fait que son exercice fasse l'objet d'une réglementation très minutieuse en vertu de la *Loi sur les pêcheries*. Ni la *Loi sur les pêcheries* ni ses règlements d'application détaillés ne font état d'une

aboriginal right to fish. These fishing permits were simply a manner of controlling the fisheries, not of defining underlying rights. Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).

Section 35(1) of the *Constitution Act, 1982*, at the least, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples constitutional protection against provincial legislative power. Its significance, however, extends beyond these fundamental effects. The approach to its interpretation is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.

Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights. The provision is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms*. Any law or regulation affecting aboriginal rights, however, will not automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

intention claire et expresse de mettre fin au droit ancestral des Indiens de pêcher. Ces permis de pêche constituaient simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents. La politique historique de Sa Majesté ne permet pas d'éteindre le droit ancestral existant en l'absence d'intention claire en ce sens ni ne permet en soi de délimiter ce droit. La nature de règlements gouvernementaux ne saurait être déterminante quant au contenu et à la portée d'un droit ancestral existant. La politique gouvernementale peut toutefois réglementer l'exercice de ce droit, mais cette réglementation doit être conforme au par. 35(1).

Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* procure, tout au moins, un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises et accorde aux autochtones une protection constitutionnelle contre la compétence législative provinciale. Son importance va toutefois au-delà de ces effets fondamentaux. La méthode à adopter pour l'interpréter est dérivée des principes généraux d'interprétation constitutionnelle, des principes relatifs aux droits ancestraux et des objets sous-jacents à la disposition constitutionnelle elle-même.

Il y a lieu d'interpréter le par. 35(1) en fonction de l'objet qu'il vise. Une interprétation généreuse et libérale s'impose étant donné que cette disposition vise à confirmer les droits ancestraux. La disposition n'est pas assujettie à l'article premier de la *Charte canadienne des droits et libertés*. Cependant, toute loi ou tout règlement portant atteinte aux droits ancestraux des autochtones ne sera pas automatiquement inopérant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Un texte législatif qui touche l'exercice de droits ancestraux sera valide s'il satisfait au critère applicable pour justifier une atteinte à un droit reconnu et confirmé au sens du par. 35(1).

Le paragraphe 35(1) n'autorise pas explicitement les tribunaux à apprécier la légitimité d'une mesure législative gouvernementale qui restreint des droits ancestraux. L'expression «reconnaissance et confirmation» comporte cependant la responsabilité qu'a le gouvernement d'agir en qualité de fiduciaire à l'égard des peuples autochtones et implique ainsi une certaine restriction à l'exercice du pouvoir souverain. Les pouvoirs législatifs fédéraux subsistent, y compris le droit de légiférer relativement aux Indiens en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*, mais ces pouvoirs doivent être rapprochés du par. 35(1). Le pouvoir fédéral doit être concilié avec l'obligation fédérale et la meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux.

The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The inquiry begins with a reference to the characteristics or incidents of the right at stake. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the "*sui generis*" nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Here, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. The issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

Le critère de la justification exige qu'un objectif législatif soit réalisé d'une manière qui préserve l'honneur de Sa Majesté et qui soit conforme aux rapports contemporains uniques, fondés sur l'histoire et les politiques, qui existent actuellement entre la Couronne et les peuples autochtones du Canada. La mesure dans laquelle une loi ou un règlement a un effet sur un droit ancestral existant doit être examinée soigneusement de manière à assurer la reconnaissance et la confirmation de ce droit. Le paragraphe 35(1) ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans la société contemporaine, mais il représente un engagement important de la part de la Couronne. En effet, le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. L'analyse commence par un examen des caractéristiques ou des attributs du droit en question. Les droits de pêche ne sont pas des droits de propriété au sens traditionnel. Il s'agit de droits qui appartiennent à un groupe et qui sont en harmonie avec la culture et le mode de vie de ce groupe. Les tribunaux doivent prendre soin d'éviter d'appliquer les concepts traditionnels de propriété propres à la common law en tentant de saisir la nature «*sui generis*» des droits ancestraux. S'il est impossible de donner une définition simple des droits de pêche, il est crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause.

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. La restriction est-elle déraisonnable? Le règlement est-il indûment rigoureux? Le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue.

En l'espèce, le règlement serait jugé constituer une atteinte à première vue si on concluait qu'il impose une restriction néfaste à l'exercice par les autochtones de leur droit de pêcher à des fins de subsistance. La question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par le droit de pêche.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. The "public interest" justification is so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. The justification of conservation and resource management, however, is uncontroversial.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified. There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource.

Guidelines are necessary to resolve the allocational problems that arise regarding the fisheries. Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority and guarantees that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has

Si on conclut à l'existence d'une atteinte à première vue, l'analyse porte ensuite sur la question de la justification. Ce critère comporte deux étapes. En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministère à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause. La justification fondée sur «l'intérêt public» est si vague qu'elle ne fournit aucune ligne directrice utile et si large qu'elle est inutilisable comme critère applicable pour déterminer si une restriction imposée à des droits constitutionnels est justifiée. La justification de la conservation et de la gestion des ressources ne soulève cependant aucune controverse.

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification: l'honneur de Sa Majesté lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable. Il doit y avoir un lien entre la question de la justification et l'établissement de priorités dans le domaine de la pêche. La reconnaissance et la confirmation des droits ancestraux, prévues dans la Constitution, peuvent donner lieu à des conflits avec les intérêts d'autrui étant donné la nature limitée de la ressource.

On a besoin de lignes directrices qui permettront de résoudre les problèmes de répartition de ressources qui surgissent dans le domaine des pêcheries. Dans l'établissement des priorités suite à la mise en œuvre de mesures de conservation valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance.

La norme de justification à respecter est susceptible d'imposer un lourd fardeau à Sa Majesté. Toutefois, la politique gouvernementale relativement à la pêche en Colombie-Britannique commande déjà, et ce, indépendamment du par. 35(1), que, dans l'attribution du droit de prendre du poisson, le droit des Indiens de pêcher à des fins d'alimentation ait la priorité sur les intérêts d'autres groupes d'usagers. Le paragraphe 35(1) exige que Sa Majesté assure que Ses règlements respectent cette attribution de priorité et garantit que les plans de conservation et de gestion réservent aux peuples autochtones un traitement qui assure que leurs droits sont pris au sérieux.

Il y a, dans l'analyse de la justification, d'autres questions à aborder selon les circonstances de l'enquête. Il s'agit notamment des questions de savoir si, en tentant

been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

Cases Cited

Applied: *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **considered**: *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), aff'g (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.); **distinguished**: *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); **referred to**: *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), aff'd [1973] S.C.R. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] S.C.R. 81; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Kruger v. The Queen*, [1978] 1 S.C.R. 104.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12(1), (2), 27(1), (4).
British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10, art. 13.
Canadian Charter of Rights and Freedoms, ss. 1, 33.
Constitution Act, 1867, ss. 91(12), (24), 109.
Constitution Act, 1930.
Constitution Act, 1982, ss. 35(1), 52(1).
Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).
Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45.

d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. Cette énumération n'est pas exhaustive.

Jurisprudence

Arrêts appliqués: *Jack c. La Reine*, [1980] 1 R.C.S. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **arrêts examinés**: *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (C.A. Ont.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (C.A. Sask.), conf. (1983), 7 C.C.C. (3d) 443 (B.R. Sask.); **distinction d'avec l'arrêt**: *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (C.S.C.); **arrêts mentionnés**: *Calder v. Attorney-General of British Columbia* (1970), 74 W.W.R. 481 (C.A.C.-B.), conf. [1973] R.C.S. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (B.R. Alb.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (B.R.N.-B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (C.P.); *Baker Lake (Hamlet) c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518 (D.P.I.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] R.C.S. 81; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (S.C.É.-U.); *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (C.S.C.-B.); *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Kruger c. La Reine*, [1978] 1 R.C.S. 104.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 33.
Conditions de l'adhésion de la Colombie-Britannique, L.R.C. (1985), app. II, nº 10, art. 13.
Loi constitutionnelle de 1867, art. 91(12), (24), 109.
Loi constitutionnelle de 1930.
Loi constitutionnelle de 1982, art. 35(1), 52(1).
Loi de l'extension des frontières de Québec, 1912, S.C. 1912, ch. 45.
Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34, 61(1).
Proclamation royale de 1763, L.R.C. (1985), app. II, nº 1.

Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.
Wildlife Act, S.B.C. 1966, c. 55.

Authors Cited

Canada. Department of Indian Affairs and Northern Development. *In All Fairness: A Native Claims Policy—Comprehensive Claims*. Ottawa: 1981.
Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy*. Ottawa: 1969.
Clement, W. H. P. *The Law of the Canadian Constitution*, 3rd ed. Toronto: Carswells, 1916.
Little Bear, Leroy. "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.
Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95.
McNeil, Kent. "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court L.R.* 255.
Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.
Sanders, Douglas. "Pre-existing Rights: The Aboriginal Peoples of Canada," in Gérald A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswells, 1989.
Schwartz, Bryan. *First Principles, Second Thoughts: Aboriginal People, Constitutional Reform and Canadian Statecraft*. Montreal: Institute for Research on Public Policy, 1986.
Slattery, Brian. "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361.
Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, allowing an appeal from a judgment of Lamperson Co. Ct. J., [1986] B.C.W.L.D. 599, dismissing an appeal from conviction by Goulet Prov. Ct. J. Appeal and cross-appeal dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4, 12(1), (2), 27(1), (4).
Wildlife Act, S.B.C. 1966, ch. 55.

Doctrine citée

Canada. Ministère des Affaires indiennes et du Nord canadien. *En toute justice: Une politique des revendications des autochtones: revendications globales*. Ottawa: 1981.
Canada. Ministère des Affaires indiennes et du Nord canadien. *La politique indienne du gouvernement du Canada*. Ottawa: 1969.
Clement, W. H. P. *The Law of the Canadian Constitution*, 3rd ed. Toronto: Carswells, 1916.
Little Bear, Leroy. «A Concept of Native Title,» [1982] 5 *Can. Legal Aid Bul.* 99.
Lyon, Noel. «An Essay on Constitutional Interpretation» (1988), 26 *Osgoode Hall L.J.* 95.
McNeil, Kent. «The Constitutional Rights of the Aboriginal People of Canada» (1982), 4 *Supreme Court L.R.* 218.
Pentney, William. «The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207.
Sanders, Douglas. «Pre-existing Rights: The Aboriginal Peoples of Canada», in Gérald A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswells, 1989.
Schwartz, Bryan. *First Principles, Second Thoughts: Aboriginal People, Constitutional Reform and Canadian Statecraft*. Montréal: Institut de recherches politiques, 1986.
Slattery, Brian. «The Hidden Constitution: Aboriginal Rights in Canada» (1984), 32 *Am. J. of Comp. Law* 361.
Slattery, Brian. «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, qui a accueilli l'appel interjeté contre un jugement du juge Lamperson de la Cour de comté, [1986] B.C.W.L.D. 599, qui avait rejeté l'appel d'une déclaration de culpabilité prononcée par le juge Goulet de la Cour provinciale. Pourvoi et pourvoi incident rejetés. La question constitutionnelle doit être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Marvin R. V. Storrow, Q.C., Lewis F. Harvey and *Joanne Lysyk*, for the appellant.

Thomas R. Braidwood, Q.C., and *James E. Dorsey*, for the respondent.

Harry A. Slade, Arthur Pape and *Louise Mandell*, for the intervener the National Indian Brotherhood / Assembly of First Nations.

Christopher Harvey, for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild and the Deep Sea Trawlers' Association of B.C.

J. Keith Lowes, for the intervener the Fisheries Council of British Columbia.

Ian Donald, Q.C., for the intervener the United Fishermen and Allied Workers' Union.

J. T. S. McCabe, Q.C., and *Michel Hélie*, for the intervener the Attorney General for Ontario.

René Morin and *Robert Décary, Q.C.*, for the intervener the Attorney General of Quebec.

E. Robert A. Edwards, Q.C., and *Howard R. Eddy*, for the intervener the Attorney General of British Columbia.

Kenneth J. Tyler and *Robert G. Richards*, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey, for the intervener the Attorney General for Alberta.

S. Ronald Stevenson, for the intervener the Attorney General of Newfoundland.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND LA FOREST J.—This appeal requires this Court to explore for the first time the scope of s. 35(1) of the *Constitution Act,*

Marvin R. V. Storrow, c.r., Lewis F. Harvey et *Joanne Lysyk*, pour l'appelant.

Thomas R. Braidwood, c.r., et *James E. Dorsey*, pour l'intimée.

Harry A. Slade, Arthur Pape et *Louise Mandell*, pour l'intervenante la Fraternité des Indiens du Canada / Assemblée des premières nations.

Christopher Harvey, pour les intervenants la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters' Association, la Gulf Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild et la Deep Sea Trawlers' Association of B.C.

J. Keith Lowes, pour l'intervenant le Fisheries Council of British Columbia.

Ian Donald, c.r., pour l'intervenant le Syndicat des pêcheurs et travailleurs assimilés.

J. T. S. McCabe, c.r., et *Michel Hélie*, pour l'intervenant le procureur général de l'Ontario.

René Morin et *Robert Décary, c.r.*, pour l'intervenant le procureur général du Québec.

E. Robert A. Edwards, c.r., et *Howard R. Eddy*, pour l'intervenant le procureur général de la Colombie-Britannique.

Kenneth J. Tyler et *Robert G. Richards*, pour l'intervenant le procureur général de la Saskatchewan.

Robert J. Normey, pour l'intervenant le procureur général de l'Alberta.

S. Ronald Stevenson, pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF ET LE JUGE LA FOREST—Le présent pourvoi nous oblige à examiner pour la première fois la portée du par. 35(1) de la *Loi*

1982, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and provides as follows:

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

The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984 in Canoe Passage which is part of the area subject to the Band's licence. The licence, which had been issued for a one-year period beginning March 31, 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s. 35(1) of the *Constitution Act, 1982* and therefore invalid.

The Courts Below

Goulet Prov. Ct. J., who heard the case, first referred to the very similar pre-*Charter* case of *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.),

constitutionnelle de 1982 et à indiquer la force qu'il peut avoir en tant que promesse faite aux peuples autochtones du Canada. Le paragraphe 35(1), qui se trouve à la partie II de cette loi sous la rubrique «Droits des peuples autochtones du Canada», porte:

35. (1) Les droits existants—ancestraux ou issus de traités—des peuples autochtones du Canada sont reconnus et confirmés.

Le contexte de ce pourvoi est une allégation de violation des conditions du permis de pêche de subsistance des Musqueams, lesquelles conditions sont fixées par la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14, et par ses règlements d'application. La question est de savoir si le pouvoir du Parlement de réglementer la pêche est maintenant restreint par le par. 35(1) de la *Loi constitutionnelle de 1982* et, plus précisément, de savoir si la restriction imposée dans le permis quant à la longueur du filet est incompatible avec cette disposition.

Les faits

L'appelant, un membre de la bande indienne des Musqueams, a été accusé en vertu du par. 61(1) de la *Loi sur les pêcheries* d'avoir pêché avec un filet dérivant plus long que celui autorisé par le permis de pêche de subsistance de la bande indienne. L'infraction remonte au 25 mai 1984 alors que l'appelant pêchait dans le passage Canoe qui fait partie de la zone visée par le permis de la bande. Le permis, délivré pour une période d'un an à compter du 31 mars 1984, établissait un certain nombre de restrictions dont celle qui prévoyait que les filets dérivants ne devaient pas avoir plus de 25 brasses de longueur. L'appelant a été trouvé en possession d'un filet qui avait 45 brasses de longueur. Il a toujours reconnu les faits à l'origine de l'infraction, mais il a soutenu en défense qu'il exerçait un droit ancestral existant de pêcher et que la restriction imposée dans le permis de la bande quant à la longueur du filet était incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982* et, par conséquent, invalide.

Les décisions des tribunaux d'instance inférieure

Le juge Goulet qui a entendu l'affaire en Cour provinciale a d'abord mentionné une affaire très semblable survenue avant l'adoption de la *Charte*,

in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

We now turn to the impact of s. 35(1) of the *Constitution Act, 1982* on the regulatory power of Parliament and on the outcome of this appeal specifically.

quant à la longueur des filets est liée, du moins en partie, à l'usage commercial qui est probablement fait du poisson pris en vertu du permis de pêche de subsistance des Musqueams indiquent une possibilité de conflit entre la pêche par des autochtones et la pêche commerciale concurrentielle relativement à un poisson d'une grande valeur économique comme le saumon. Nous reconnaissons l'existence de ce conflit ainsi que la probabilité qu'il s'aggrave à mesure que les quantités de poisson diminuent, que la demande augmente et que les tensions montent.

Depuis plus de cent ans, les règlements gouvernementaux régissant l'exercice du droit des Musqueams de pêcher décrit plus haut ne reconnaissent que le droit de pêcher à des fins de subsistance. Cela peut expliquer la position actuelle. Cependant, non seulement la politique historique de Sa Majesté ne permet pas d'éteindre le droit ancestral existant en l'absence d'intention claire en ce sens, mais elle ne permet pas non plus en soi de délimiter ce droit. La nature de règlements gouvernementaux ne saurait être déterminante quant au contenu et à la portée d'un droit ancestral existant. La politique gouvernementale peut toutefois réglementer l'exercice de ce droit, mais cette réglementation doit être conforme au par. 35(1).

Devant les tribunaux d'instance inférieure, la présente affaire n'a pas été débattue en fonction de l'existence d'un droit ancestral de pêcher à des fins commerciales ou de subsistance. Les débats ont plutôt porté, et portent encore, sur la validité d'une restriction quant à la longueur des filets qui touche le permis de pêche de subsistance de l'appelant. Nous adoptons donc, pour les fins du présent pourvoi, la caractérisation de ce droit donnée par la Cour d'appel et limitons nos motifs au sens de la reconnaissance et de la confirmation constitutionnelles du droit ancestral existant de pêcher à des fins de subsistance et à des fins sociales et rituelles.

«Reconnus et confirmés»

Nous passons maintenant à l'effet du par. 35(1) de la *Loi constitutionnelle de 1982* sur le pouvoir réglementaire du Parlement et, en particulier, sur l'issue du présent pourvoi.

Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood / Assembly of First Nations, is that the right to regulate is part of the right to use the resource in the Band's discretion. Section 35(1) is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms* nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of the *Constitution Act, 1982* and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures might qualify" (emphasis added)—where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the *Charter*.

In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

L'avocat de l'appelant soutient que l'effet du par. 35(1) est de nier le pouvoir du Parlement de réglementer restrictivement les droits de pêche des autochtones en vertu du par. 91(24) («les Indiens et les terres réservées aux Indiens») et du par. 91(12) («les pêcheries des côtes de la mer et de l'intérieur»). L'essence de cet argument, appuyé par l'intervenante, la Fraternité des Indiens du Canada / Assemblée des premières nations, est que le droit de réglementer fait partie du droit de la bande d'utiliser la ressource comme bon lui semble. Le paragraphe 35(1) n'est pas assujetti à l'article premier de la *Charte canadienne des droits et libertés*, ni à la dérogation législative prévue à l'art. 33. L'appelant fait valoir que si le pouvoir de réglementation continue de s'appliquer, les limites de son étendue sont établies par le terme «incompatibles» contenu au par. 52(1) de la *Loi constitutionnelle de 1982* et les fins protectrices et réparatrices du par. 35(1). Cela signifie qu'un titre aborigène comporte le droit de pêcher au moyen de toute méthode non dangereuse choisie par les pêcheurs autochtones. Tout pouvoir de réglementation que le gouvernement continuerait à exercer devrait être exceptionnel et strictement limité à une réglementation nettement compatible avec les fins protectrices et réparatrices du par. 35(1). L'avocat de l'appelant a donc supposé que [TRADUCTION] «dans certains cas, des mesures de conservation nécessaires et raisonnables pourraient être adoptées» (nous soulignons) si, par exemple, de telles mesures étaient nécessaires pour éviter qu'on porte sérieusement atteinte aux droits ancestraux des générations actuelles et futures, si les objectifs de conservation ne pouvaient être atteints que par une restriction de ce droit et non de la pêche pratiquée par d'autres pêcheurs, et si le groupe autochtone visé refusait de mettre en œuvre les mesures de conservation nécessaires. Par analogie avec l'article premier de la *Charte*, il incomberait au gouvernement de justifier l'adoption de règlements restrictifs.

Afin de répondre à ces arguments et de trouver le cadre d'interprétation approprié pour le par. 35(1), nous commençons par examiner l'historique de ce paragraphe.

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); *Calder*, *supra*, *per* Judson J., at p. 328, Hall J., at pp. 383 and 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the 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 these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to

Il convient de rappeler que bien que la politique britannique envers la population autochtone fût fondée sur le respect de leur droit d'occuper leurs terres ancestrales, comme en faisait foi la Proclamation royale de 1763, dès le départ, on n'a jamais douté que la souveraineté et la compétence législative, et même le titre sous-jacent, à l'égard de ces terres revenaient à Sa Majesté; voir l'arrêt *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (C.S.É.-U.); voir également la Proclamation royale elle-même (L.R.C. (1985), app. II, nº 1, pp. 4 à 6); *Calder*, précité, le juge Judson, à la p. 328, le juge Hall aux pp. 383 et 402. Et il n'y a pas de doute qu'au fil des ans les droits des Indiens ont souvent été reconnus par suite d'une violation (voir, par exemple l'arrêt *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654). Comme le juge MacDonald l'a affirmé dans la décision *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (C.S.C.-B.), à la p. 37: [TRADUCTION] «Ce n'est pas avec beaucoup de fierté que nous pouvons rappeler le traitement réservé aux autochtones de notre pays».

Pendant plusieurs années les droits des Indiens à leurs terres ancestrales—certainement à titre de droits reconnus en common law—ont été à toutes fins pratiques ignorés. Les arrêts de principe qui ont défini les droits des Indiens au début du siècle portaient sur des revendications étayées par la Proclamation royale ou d'autres documents juridiques et, même dans ces cas, les tribunaux étaient essentiellement intéressés à établir la compétence législative ou les droits des entreprises commerciales. Au cours des cinquante années qui ont suivi la publication de l'ouvrage de Clement, *The Law of the Canadian Constitution* (3e éd. 1916), on constate une absence quasi totale d'analyse des droits territoriaux des Indiens, et ce, même dans les ouvrages de doctrine. À la fin des années soixante, le gouvernement fédéral n'accordait même pas de valeur juridique aux revendications des autochtones. Ainsi, même si elle procédait d'une intention louable, *La politique indienne du gouvernement du Canada* (1969), contenait (à la p. 12) l'affirmation que «les droits aborigènes [. . .] sont tellement généraux qu'il n'est pas réaliste de les considérer comme des droits précis, susceptibles d'être réglés excepté par un ensemble de politiques et de mesu-

the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal Government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis added.) See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

res qui mettront fin aux injustices dont les Indiens ont souffert comme membres de la société canadienne». Au cours de la même période générale, Hydro Québec a entrepris le développement de la Baie James sans d'abord tenir compte des droits des Indiens qui y vivaient, et ce, même si ces droits bénéficiaient d'une protection constitutionnelle expresse; voir la *Loi de l'extension des frontières de Québec, 1912*, S.C. 1912, ch. 45. Il aura fallu un bon nombre de décisions judiciaires et notamment l'arrêt *Calder* de notre Cour (1973) pour que le gouvernement reconsidère sa position.

Compte tenu de sa nouvelle évaluation des revendications des Indiens à la suite de l'arrêt *Calder*, le gouvernement fédéral publie, le 8 août 1973, «une déclaration de principe» concernant les terres indiennes. Par cette déclaration, le gouvernement veut montrer qu'il «reconnaît et accepte sa responsabilité permanente, aux termes de l'Acte de l'Amérique du Nord britannique, en ce qui a trait aux Indiens et aux territoires réservés à leur intention», qu'il considère «comme le résultat d'une évolution historique remontant à la Proclamation royale de 1763, laquelle demeure comme une déclaration fondamentale des intérêts fonciers des Indiens du pays, quelles que soient les différences intervenues quant à son interprétation légale». (Nous soulignons.) Voir la *Déclaration par l'honorable Jean Chrétien, ministre des Affaires indiennes et du Nord canadien, au sujet des revendications des Indiens et Inuit*, en date du 8 août 1973. Les remarques au sujet de ces terres se voulaient «une attestation de [. . .] responsabilité.» Mais, pour la première fois, le gouvernement y exprime sa volonté de négocier concernant les revendications d'un titre aborigène de propriété, particulièrement en Colombie-Britannique, dans le Nouveau-Québec et les Territoires, et ce, indépendamment de tout document officiel. «Le gouvernement», dit-on, «est maintenant prêt à négocier avec les représentants mandatés par ces groupes, en partant du principe que, dans les cas où leurs droits traditionnels aux terres revendiquées peuvent être établis, les autochtones recevront, en retour de ces intérêts, une indemnité ou un avantage convenus.»

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; see also *In All Fairness: A Native Claims Policy — Comprehensive Claims* (1981), pp. 11-12; Slattery, "Understanding Aboriginal Rights" op. cit., at p. 730. As recently as *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the federal government argued in this Court that any federal obligation was of a political character.

Il ressort clairement du texte que l'attitude adoptée à l'égard des revendications des autochtones dans la déclaration de 1973 exprimait une politique plutôt qu'une prise de position sur le plan juridique; voir également *En toute justice: Une politique des revendications des autochtones: revendications globales* (1981), pp. 11 et 12; Slattery, «Understanding Aboriginal Rights», *op. cit.*, à la p. 730. Aussi récemment que dans l'affaire *Guerin c. La Reine*, [1984] 2 R.C.S. 335, le gouvernement fédéral a soutenu devant notre Cour que toute obligation fédérale était de nature politique.

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 the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, *supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., especially at p. 730).

Il est donc clair que le par. 35(1) de la *Loi constitutionnelle de 1982* représente l'aboutissement d'une bataille longue et difficile à la fois dans l'arène politique et devant les tribunaux pour la reconnaissance de droits ancestraux. La forte représentation des associations autochtones et d'autres groupes soucieux du bien-être des peuples autochtones du Canada a rendu possible l'adoption du par. 35(1) et il est important de souligner que cette disposition s'applique aux Indiens, aux Inuit et aux Métis. Le paragraphe 35(1) procure, tout au moins, un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises. Il accorde également aux autochtones une protection constitutionnelle contre la compétence législative provinciale. Nous sommes évidemment conscients que cela découlerait de toute façon de l'arrêt *Guerin*, précité, mais pour bien comprendre la situation, il est essentiel de se rappeler que l'arrêt *Guerin* a été rendu après l'entrée en vigueur de la *Loi constitutionnelle de 1982*. En outre, en plus de son effet sur les droits ancestraux, le par. 35(1) a clarifié d'autres points concernant l'application des droits issus de traités (voir Sanders, «Pre-existing Rights: The Aboriginal Peoples of Canada,» dans Beaudoin et Ratushny (éd.), *The Canadian Charter of Rights and Freedoms*, 2e éd., particulièrement à la p. 730).

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:

À notre avis, l'importance du par. 35(1) va au-delà de ces effets fondamentaux. Dans «An Essay on Constitutional Interpretation» (1988), 26 *Osgoode Hall L.J.* 95, à la p. 100, le professeur Lyon dit ceci au sujet du par. 35(1):

. . . 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.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court said the following about the perspective to be adopted when interpreting a constitution, at p. 745:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 322:

[TRADUCTION] . . . le contexte de l'année 1982 nous fournit assurément une indication suffisante qu'il ne s'agit pas d'une simple codification de la jurisprudence portant sur les droits ancestraux qui existait en 1982. L'article 35 exige un règlement équitable en faveur des peuples autochtones. Il écarte les anciennes règles du jeu en vertu desquelles Sa Majesté établissait des cours de justice auxquelles elle refusait le pouvoir de mettre en doute Ses revendications souveraines.

La méthode qu'il convient d'adopter pour interpréter le par. 35(1) est dérivée des principes généraux d'interprétation constitutionnelle, des principes relatifs aux droits ancestraux et des objets sous-jacents à la disposition constitutionnelle elle-même. Nous allons ici ébaucher le cadre d'une interprétation de l'expression «reconnus et confirmés» qui, selon nous, accorde au caractère constitutionnel de ces mots l'importance qui lui revient.

Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, notre Cour affirme ceci au sujet de l'optique dans laquelle il faut aborder l'interprétation d'une constitution, à la p. 745:

> La Constitution d'un pays est l'expression de la volonté du peuple d'être gouverné conformément à certains principes considérés comme fondamentaux et à certaines prescriptions qui restreignent les pouvoirs du corps législatif et du gouvernement. Elle est, comme le déclare l'art. 52 de la *Loi constitutionnelle de 1982*, la «loi suprême» de notre pays, qui ne peut être modifiée par le processus législatif normal et qui ne tolère aucune loi incompatible avec elle. Il appartient au pouvoir judiciaire d'interpréter et d'appliquer les lois du Canada et de chacune des provinces et il est donc de notre devoir d'assurer que la loi constitutionnelle a préséance.

La nature même du par. 35(1) laisse supposer qu'il y a lieu de l'interpréter en fonction de l'objet qu'il vise. Si on considère les objectifs de la confirmation des droits ancestraux, il est évident qu'une interprétation généreuse et libérale du texte de cette disposition constitutionnelle s'impose. Devant l'argument voulant que l'art. 35 n'ait aucun effet sur les droits ancestraux ou issus de traités et qu'il ne soit qu'un préambule aux parties de la *Loi constitutionnelle de 1982* qui portent sur les droits des autochtones, la Cour d'appel en l'espèce dit ceci, à la p. 322:

This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future .... To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29 ....

In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, the following principle that should govern the interpretation of Indian treaties and statutes was set out:

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

In *R. v. Agawa*, *supra*, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

The second principle was enunciated by the late Associate Chief Justice MacKinnon in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:

> "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."

This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legisla-

[TRADUCTION] Cet argument ne donne aucun sens à l'art. 35. En le retenant, on se trouverait à nier la déclaration non équivoque de cet article que les droits existants sont reconnus et confirmés et à n'en faire qu'une simple promesse de reconnaître et de confirmer ces droits à une époque future [...] Une telle interprétation du par. 35(1) ferait abstraction à la fois de ses termes et du principe selon lequel la Constitution doit recevoir une interprétation libérale et réparatrice. Nous ne pouvons accepter que ce principe s'applique avec moins de force aux droits ancestraux qu'à ceux garantis par la Charte, compte tenu particulièrement de l'histoire et de la méthode d'interprétation des traités et des lois concernant les Indiens commandée par des arrêts comme *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29 ...

Dans l'arrêt *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la p. 36, on énonce le principe qui doit régir l'interprétation des traités et des lois concernant les Indiens:

... les traités et les lois visant les Indiens doivent recevoir une interprétation libérale et [...] toute ambiguïté doit profiter aux Indiens.

Dans l'arrêt *R. v. Agawa*, précité, le juge Blair affirme que ce principe devrait s'appliquer à l'interprétation du par. 35(1). Aux pages 215 et 216, il ajoute comme tout aussi applicable le principe suivant:

[TRADUCTION] Le second principe a été énoncé par feu le juge en chef adjoint MacKinnon dans l'arrêt **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360. Soulignant l'importance de l'histoire et des traditions indiennes ainsi que ce qu'on croyait être l'effet du traité au moment de sa signature, il a en outre fait une mise en garde contre la détermination des droits des Indiens «dans l'abstrait». L'interprétation de traités avec les Indiens met en cause l'honneur de la Couronne et, par conséquent, l'équité envers les Indiens est un facteur dominant. Il dit, à la p. 367:

> «Les principes applicables à l'interprétation de traités visant les Indiens ont fait l'objet de nombreuses discussions au fil des ans. Lorsqu'il s'agit d'interpréter les conditions d'un traité, tout à fait indépendamment des autres considérations déjà évoquées, il y va toujours de l'honneur de la Couronne et aucune apparence de «manœuvres malhonnêtes» ne doit être tolérée.»

Ce point de vue se reflète dans de récentes décisions judiciaires insistant sur la responsabilité qu'a le gouvernement de protéger les droits des Indiens, laquelle responsabilité résulte des rapports fiduciaires spéciaux

tion: see **Guerin v. The Queen**, [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.

In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick*, *Taylor and Williams* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content (Lyon, op. cit.; Pentney, op. cit.; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35—'What's in the Box?' and 'What Kind of Box?'", Chapter XXIV, in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*; Slattery, op. cit.; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361).

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our

créés par l'histoire, par des traités et par des textes législatifs: voir **Guerin c. La Reine**, [1984] 2 R.C.S. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.

Dans l'affaire *Guerin*, précitée, la bande indienne Musqueam avait cédé des terres réservées à Sa Majesté pour que celle-ci les loue à un club de golf. Les conditions du bail consenti par Sa Majesté étaient beaucoup moins favorables que celles approuvées par la bande à l'assemblée de la cession. Notre Cour a statué que Sa Majesté a envers les Indiens une obligation de fiduciaire en ce qui concerne leurs terres. La nature *sui generis* du titre indien de même que les pouvoirs et la responsabilité historiques de Sa Majesté constituent la source de cette obligation de fiduciaire. À notre avis, l'arrêt *Guerin*, conjugué avec l'arrêt *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, justifie un principe directeur général d'interprétation du par. 35(1), savoir, le gouvernement a la responsabilité d'agir en qualité de fiduciaire à l'égard des peuples autochtones. Les rapports entre le gouvernement et les autochtones sont de nature fiduciaire plutôt que contradictoire et la reconnaissance et la confirmation contemporaines des droits ancestraux doivent être définies en fonction de ces rapports historiques.

Nous partageons l'avis de la Cour d'appel de la Colombie-Britannique en l'espèce et de la Cour d'appel de l'Ontario que, dans l'interprétation du par. 35(1), on doit se laisser guider par les principes exposés ci-dessus qui découlent des arrêts *Nowegijick*, *Taylor and Williams* et *Guerin*. Comme les auteurs l'ont souligné, le par. 35(1) constitue un engagement solennel qui doit avoir un sens utile (Lyon, *op. cit.*; Pentney, *op. cit.*; Schwartz, «Unstarted Business: Two Approaches to Defining s. 35—«What's in the Box?» and «What Kind of Box?»», chapitre XXIV, dans *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*; Slattery, *op. cit.*, et Slattery, «The Hidden Constitution: Aboriginal Rights in Canada» (1984), 32 *Am. J. of Comp. Law* 361).

Pour répondre à l'argument de l'appelant que les droits visés au par. 35(1) bénéficient d'une protection plus sûre que ceux garantis par la *Charte*, il est vrai que le par. 35(1) n'est pas assujetti à

opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

We refer to Professor Slattery's "Understanding Aboriginal Rights", op. cit., with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these

l'article premier de la *Charte*. Cela ne veut pas dire, selon nous, que toute loi ou tout règlement portant atteinte aux droits ancestraux des autochtones sera automatiquement inopérant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Un texte législatif qui touche l'exercice de droits ancestraux sera néanmoins valide s'il satisfait au critère applicable pour justifier une atteinte à un droit reconnu et confirmé au sens du par. 35(1).

Le paragraphe en question ne contient aucune disposition explicite autorisant notre Cour ou n'importe quel autre tribunal à apprécier la légitimité d'une mesure législative gouvernementale qui restreint des droits ancestraux. Nous estimons pourtant que l'expression «reconnaissance et confirmation» comporte les rapports de fiduciaire déjà mentionnés et implique ainsi une certaine restriction à l'exercice du pouvoir souverain. Les droits qui sont reconnus et confirmés ne sont pas absolus. Les pouvoirs législatifs fédéraux subsistent, y compris évidemment le droit de légiférer relativement aux Indiens en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Toutefois, ces pouvoirs doivent maintenant être rapprochés du par. 35(1). En d'autres termes, le pouvoir fédéral doit être concilié avec l'obligation fédérale et la meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux. Une telle vérification est conforme au principe d'interprétation libérale énoncé dans l'arrêt *Nowegijick*, précité, et avec l'idée que la Couronne doit être tenue au respect d'une norme élevée — celle d'agir honorablement—dans ses rapports avec les peuples autochtones du Canada, comme le laisse entendre l'arrêt *Guerin c. La Reine*, précité.

Nous nous référons à «Understanding Aboriginal Rights», *op. cit.*, du professeur Slattery pour ce qui est d'envisager un processus de justification au par. 35(1). Le professeur Slattery souligne, à la p. 782, qu'un processus de justification s'impose à titre de compromis entre une caractérisation «composite» des droits ancestraux qui ferait entrer dans la définition de ceux-ci les règlements antérieurs et une caractérisation qui garantirait les droits ancestraux sous leur forme initiale sans aucune restriction apportée par des règlements ultérieurs. Nous

two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regula-

sommes d'accord avec lui pour dire que ces deux positions extrêmes doivent être rejetées au profit d'un système de justification.

Il semble se dégager du par. 35(1) que, si la réglementation des droits ancestraux n'est pas exclue, une telle réglementation doit être adoptée conformément à un objectif régulier. Notre histoire démontre, trop bien malheureusement, que les peuples autochtones du Canada ont raison de s'inquiéter au sujet d'objectifs gouvernementaux qui, bien que neutres en apparence, menacent en réalité l'existence de certains de leurs droits et intérêts. En accordant aux droits ancestraux le statut et la priorité propres aux droits constitutionnels, le Parlement et les provinces ont sanctionné les contestations d'objectifs de principe socio-économiques énoncés dans des textes législatifs, dans la mesure où ceux-ci portent atteinte à des droits ancestraux. Ce régime constitutionnel comporte implicitement une obligation de la part du législateur de satisfaire au critère de la justification. La façon de réaliser un objectif législatif doit préserver l'honneur de Sa Majesté et doit être conforme aux rapports contemporains uniques, fondés sur l'histoire et les politiques, qui existent entre la Couronne et les peuples autochtones du Canada. La mesure dans laquelle une loi ou un règlement a un effet sur un droit ancestral existant doit être examinée soigneusement de manière à assurer la reconnaissance et la confirmation de ce droit.

La reconnaissance constitutionnelle exprimée dans la disposition en cause permet donc, dans une certaine mesure, de contrôler la conduite du gouvernement et de limiter fortement le pouvoir du législateur. Bien qu'elle ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans une société qui, au XX^{e} siècle, devient de plus en plus complexe et interdépendante et où il est nécessaire de protéger et de gérer les ressources épuisables, cette reconnaissance représente un engagement important de la part de la Couronne. Le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

Dans les présents motifs, nous entendons exposer l'analyse appropriée aux fins du par. 35(1)

tion made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

Taking the above framework as guidance, we propose to set out the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the *Constitution Act, 1982*, renders the authority of *R. v. Derriksan*, *supra*, inapplicable. In that case, Laskin C.J., for this Court, found that there was nothing to prevent the *Fisheries Act* and the Regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the *Derriksan* line of cases established that, before April 17, 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguishment. The new constitutional status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations

dans le contexte d'un règlement pris en vertu de la *Loi sur les pêcheries*. Nous tenons à souligner relativement au par. 35(1) l'importance du contexte et d'un examen cas par cas. Étant donné la généralité du texte de la disposition constitutionnelle en cause et compte tenu surtout des complexités que présentent l'histoire, la société et les droits des autochtones, les limites d'une norme justificative doivent être fixées dans le contexte factuel particulier de chaque cas.

Le paragraphe 35(1) et la réglementation des pêcheries

Nous servant du cadre que nous venons de décrire, nous nous proposons d'énoncer le critère applicable pour déterminer s'il y a atteinte à première vue à un droit ancestral existant, d'une part, et pour justifier cette atteinte, d'autre part. En ce qui a trait à la question de la réglementation des pêcheries, l'existence du par. 35(1) de la *Loi constitutionnelle de 1982* fait en sorte que l'arrêt *R. v. Derriksan*, précité, ne s'applique pas. Dans cette affaire, le juge en chef Laskin a statué, au nom de notre Cour, que rien n'empêchait la *Loi sur les pêcheries* et ses règlements d'application d'assujettir aux contrôles y prévus le droit ancestral, qu'on revendiquait, de pêcher dans une zone déterminée. Comme le fait remarquer la Cour d'appel en l'espèce, il ressort du courant de jurisprudence établi par l'arrêt *Derriksan* qu'avant le 17 avril 1982, le droit de pêche ancestral était soumis à une réglementation par voie législative et était susceptible d'extinction. Or, le nouveau statut constitutionnel de ce droit consacré au par. 35(1) laisse entendre qu'on doit procéder différemment en décidant si la réglementation des pêcheries pourrait être incompatible avec la protection constitutionnelle.

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. Dans l'affirmative, elle constitue une violation à première vue du par. 35(1). Le Parlement n'est pas censé agir d'une manière contraire aux droits et aux intérêts des autochtones et, en réalité, il peut être empêché de le faire par la seconde étape de l'analyse fondée sur le par. 35(1) . L'analyse portant sur l'atteinte commence par un examen des caractéristiques ou des attributs du droit en question. Nos observa-

regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.)

tions précédentes concernant la portée du droit de pêche ancestral sont pertinentes à ce propos. Les droits de pêche ne sont pas des droits de propriété au sens traditionnel. Il s'agit de droits qui appartiennent à un groupe et qui sont en harmonie avec la culture et le mode de vie de ce groupe. Les tribunaux doivent donc prendre soin d'éviter d'appliquer les concepts traditionnels de propriété propres à la common law en tentant de saisir ce qu'on appelle, dans les motifs de jugement de l'affaire *Guerin*, précitée, à la p. 382, la nature «*sui generis*» des droits ancestraux. (Voir aussi Little Bear, «A Concept of Native Title,» [1982] 5 *Can. Legal Aid Bul.* 99.)

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

S'il est impossible de donner une définition simple des droits de pêche, il est possible et même crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause. Il serait artificiel, par exemple, de tenter d'établir une distinction nette entre le droit de pêche et la manière précise dont ce droit est exercé.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. Premièrement, la restriction est-elle déraisonnable? Deuxièmement, le règlement est-il indûment rigoureux? Troisièmement, le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue. En ce qui concerne les faits du présent pourvoi, le règlement serait jugé constituer une atteinte à première vue si on concluait qu'il impose une restriction néfaste à l'exercice par les Musqueams de leur droit de pêcher à des fins de subsistance. Nous tenons à souligner ici que la question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables des Musqueams. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par

the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial. In *Kruger v. The Queen*, [1978] 1 S.C.R. 104, the applicability of the B.C. *Wildlife Act*, S.B.C. 1966, c. 55, to the appellant members

le droit de pêche. Si, par exemple, les Musqueams se voyaient astreints à des pertes injustifiables de temps et d'argent par poisson pris ou si la restriction quant à la longueur des filets faisait en sorte qu'il serait difficile aux Musqueams de prendre du poisson, cela suffirait pour satisfaire aux exigences du premier volet de l'analyse fondée sur le par. 35(1).

Si on conclut à l'existence d'une atteinte à première vue, l'analyse porte ensuite sur la question de la justification. C'est là le critère qui touche la question de savoir ce qui constitue une réglementation légitime d'un droit ancestral garanti par la Constitution. L'analyse de la justification se déroulerait comme suit. En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministère à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause. L'objectif de préserver, par la conservation et la gestion d'une ressource naturelle par exemple, des droits visés au par. 35(1) serait régulier. Seraient également réguliers des objectifs visant apparemment à empêcher l'exercice de droits visés au par. 35(1) lorsque cet exercice nuirait à l'ensemble de la population ou aux peuples autochtones eux-mêmes, ou d'autres objectifs jugés impérieux et réels.

La Cour d'appel en l'espèce a décidé, à la p. 331, qu'une réglementation pourrait être valide si elle était raisonnablement justifiée comme [TRADUCTION] «nécessaire pour la gestion et la conservation judicieuses des ressources ou dans l'intérêt public». (Nous soulignons.) Nous considérons que la justification fondée sur «l'intérêt public» est si vague qu'elle ne fournit aucune ligne directrice utile et si générale qu'elle est inutilisable comme critère applicable pour déterminer si une restriction imposée à des droits constitutionnels est justifiée.

Par contre, la justification de la conservation et de la gestion des ressources ne constitue sûrement pas un sujet de controverse. Dans l'affaire *Kruger c. La Reine*, [1978] 1 R.C.S. 104, notre Cour s'est penchée sur la question de l'applicabilité de la

of the Penticton Indian Band was considered by this Court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.

While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between

Wildlife Act de la Colombie-Britannique, S.B.C. 1966, ch. 55, aux appelants membres de la bande indienne Penticton. En analysant cette loi, on affirme au sujet de l'objectif de conservation (à la p. 112):

> Les lois sur la conservation de la faune ont pour but la protection du gibier. On peut soutenir que sans mesure de protection, l'anéantissement de la faune rendrait théorique la question du droit des Indiens ou d'autres personnes de chasser pour se nourrir. Il faut présumer que le texte législatif en cause est valide. En l'espèce, cela signifie qu'en l'absence d'une preuve à l'effet contraire, il faut aussi présumer que les mesures adoptées par la Législature de la Colombie-Britannique ont pour but la protection efficace de la faune de la province, pour ses habitants, et ne visent pas à opposer les intérêts des écologistes à ceux des Indiens en favorisant les revendications des premiers.

Bien que la «présomption» de validité soit maintenant désuète étant donné le statut constitutionnel des droits ancestraux en cause, il est évident que l'importance des objectifs de conservation est reconnue depuis longtemps en matière de législation et d'action gouvernementales. De plus, la conservation et la gestion de nos ressources sont compatibles avec les croyances et les pratiques des autochtones et, en fait, avec la mise en valeur des droits de ces derniers.

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification. Ici, nous nous référons au principe directeur d'interprétation qui découle des arrêts *Taylor and Williams* et *Guerin*, précités. C'est-à-dire, l'honneur de Sa Majesté est en jeu lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable.

Le problème qui se pose en évaluant la mesure législative en fonction de son objectif et de la responsabilité de la Couronne, est que les efforts de conservation dans une industrie de la pêche moderne fortement exploitée se heurtent inévitablement à la répartition et à la gestion efficaces d'une ressource à la fois peu abondante et très prisée. La nature de la protection constitutionnelle

the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J., as he then was, in *Jack v. The Queen*, *supra*, for such guidelines.

In *Jack*, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the *British Columbia Terms of Union* imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this Court, we point out that this case concerns a different constitutional promise that asks this Court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal rights. We therefore repeat the following passage from *Jack*, at p. 313:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

qu'offre le par. 35(1) dans ce contexte commande l'existence d'un lien entre la question de la justification et l'établissement de priorités dans le domaine de la pêche. La reconnaissance et la confirmation des droits ancestraux, prévues dans la Constitution, peuvent donner lieu à des conflits avec les intérêts d'autrui étant donné la nature limitée de la ressource. De toute évidence, on a besoin de lignes directrices qui permettront de résoudre les problèmes de répartition des ressources qui surgissent dans le domaine des pêcheries. Pour de telles lignes directrices, nous renvoyons aux motifs du juge Dickson (maintenant Juge en chef) dans l'affaire *Jack c. La Reine*, précité.

Dans l'affaire *Jack*, les appelants, accusés d'avoir pêché le saumon pendant une période et en un endroit prohibés, ont invoqué comme moyen de défense la prétendue absence de compétence constitutionnelle du Parlement pour légiférer de manière à priver les Indiens du droit de pêcher pour se nourrir. Ils ont fait valoir que l'art. 13 des *Conditions de l'adhésion de la Colombie-Britannique* imposait une limite constitutionnelle au pouvoir réglementaire fédéral. Tout en reconnaissant que la conclusion qu'une telle limite avait été imposée n'a pas été adoptée par la majorité dans notre Cour, nous soulignons qu'il s'agit en l'espèce d'une promesse constitutionnelle différente, par suite de laquelle notre Cour est appelée à donner un sens utile aux notions de reconnaissance et de confirmation. C'est là une tâche dont l'accomplissement nécessite des lignes directrices tout aussi utiles qui tiennent compte de la priorité constitutionnelle accordée aux droits ancestraux. En conséquence, nous reprenons le passage suivant de l'arrêt *Jack*, à la p. 313:

> La protection des ressources constitue une considération législative valide. Les appelants l'admettent. Ce qui les préoccupe c'est plutôt la répartition des ressources après la détermination et l'application des mesures de protection raisonnables et nécessaires. Ils ne réclament pas le droit de pêcher jusqu'au dernier saumon. Ils préconisent plutôt, me semble-t-il, l'ordre de priorité suivant: (i) la protection de la ressource; (ii) la pêche par les Indiens; (iii) la pêche commerciale par les non-Indiens; ou (iv) la pêche sportive par les non-Indiens; les Indiens ne devraient pas subir en premier lieu le fardeau des mesures de protection.

I agree with the general tenor of this argument .... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

The decision of the Nova Scotia Court of Appeal in *R. v. Denny* (1990), 55 C.C.C. (3d) 322, addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the

J'accepte cet argument dans ses grandes lignes [...] En ce qui concerne la pêche du saumon, les pêcheurs indiens doivent avoir priorité, sous réserve des difficultés pratiques relatives aux eaux internationales et aux déplacements du poisson. Mais toute restriction à la pêche par les Indiens établie conformément à un objectif valide de protection des ressources l'emporte sur la protection de la pêche par les Indiens prévue à l'art. 13, au même titre que ces mesures de protection l'emportent sur les autres genres de pêche.

La nature constitutionnelle du droit des Musqueams de pêcher à des fins de subsistance fait en sorte que, dans l'établissement des priorités suite à la mise en œuvre de mesures de conservation valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance. Si l'objectif visé se rapportait à la conservation des ressources, le plan de conservation serait examiné en vue de déterminer les priorités. Bien que la répartition détaillée de ressources maritimes soit une tâche devant être confiée aux experts dans le domaine, on doit satisfaire d'abord aux besoins alimentaires des Indiens en procédant à cette répartition. L'importance d'accorder la priorité absolue au droit ancestral de pêcher pour se nourrir peut s'expliquer ainsi. Si, au cours d'une année donnée, il s'avérait nécessaire pour les besoins de la conservation de réduire le nombre de prises de poisson et que ce nombre soit égal à celui requis par les Indiens pour leur alimentation, alors il résulterait de la nature constitutionnelle de leur droit de pêche que c'est aux Indiens que reviendrait la totalité des poissons pouvant être pris suite aux mesures de conservation. Si, d'une manière plus réaliste, il restait encore du poisson après que les besoins alimentaires des Indiens eurent été satisfaits, ce seraient alors les pêcheurs sportifs et les pêcheurs commerciaux qui feraient les frais de ces mesures de conservation.

Dans l'arrêt *R. v. Denny* (1990), 55 C.C.C. (3d) 322, la Cour d'appel de la Nouvelle-Écosse se penche sur la constitutionnalité du droit des Indiens Micmacs de la Nouvelle-Écosse de pêcher dans les eaux du ruisseau Indian et de la rivière Afton et elle le fait d'une manière conforme à notre compréhension de la nature constitutionnelle des droits ancestraux et du lien entre la répartition et la justification qui est requis pour que le gouverne-

rights. Clarke C.J.N.S., for a unanimous court, found that the Nova Scotia *Fishery Regulations* enacted pursuant to the federal *Fisheries Act* were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the *Constitution Act, 1982*, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at p. 339:

> I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account . . .
>
> To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at pp. 340-41:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a

ment puisse réglementer l'exercice de ces droits. Le juge en chef Clarke a décidé, au nom d'une cour unanime, que les *Fishery Regulations* de la Nouvelle-Écosse pris en vertu de la *Loi sur les pêcheries* fédérale étaient incompatibles en partie avec les droits constitutionnels des Micmacs appelants. Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* conférait aux appelants le droit d'obtenir la priorité absolue sur tout surplus de poisson pouvant exister après la prise en considération des besoins en matière de conservation. Quant à la question de la priorité du droit des Indiens de pêcher pour se nourrir, le juge en chef Clarke fait remarquer que le gouvernement fédéral reconnaît officiellement cette priorité. Il ajoute, à la p. 339:

> [TRADUCTION] Je conclus sans hésitation que l'existence du droit des Indiens, sous réserve des exigences de la conservation, de pêcher à des fins de subsistance dans les eaux du ruisseau Indian, adjacentes à la réserve Eskasoni, et dans les eaux de la rivière Afton, doit être reconnue aussi bien dans les faits que sur les plans de la législation et des politiques . . .
>
> Il ne convient simplement pas que le gouvernement fédéral accorde à des groupes d'usagers tels que les pêcheurs sportifs (les pêcheurs à la ligne) une priorité en matière de pêche qui l'emporte sur les besoins alimentaires légitimes des appelants et de leurs familles. Cela est inconciliable avec le fait que les appelants jouissent depuis bien des années d'un droit ancestral de pêcher à des fins de subsistance. Les appelants, pour reprendre la formule de leur avocat, ont «droit à une part de la ressource disponible». Ce droit constitutionnel ne cède le pas qu'aux mesures de conservation pouvant être prévues dans des lois fédérales.

Le juge en chef Clarke a conclu en outre que le par. 35(1) énonçait la reconnaissance constitutionnelle de la priorité des autochtones en matière de pêche et que le règlement, du fait qu'il ne garantissait pas cette priorité, violait cette disposition constitutionnelle. Il dit, aux pp. 340 et 341:

> [TRADUCTION] Quoiqu'il importe au plus haut degré de comprendre que les droits conférés aux appelants par le par. 35(1) ne sont pas absolus, le règlement contesté pèche par l'omission de reconnaître que ce paragraphe accorde aux appelants la priorité dans la répartition de tout surplus de poisson ainsi que l'accès en priorité à ce surplus après qu'ont été pris en considération les besoins en matière de conservation. Appliqué aux présents appels, le paragraphe 35(1) accorde aux appelants le

surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

In light of this approach, the argument that the cases of *R. v. Hare and Debassige*, *supra*, and *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In *Hare and Debassige*, which addressed the issue of whether the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, applied to members of an Indian Band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with respect to taking fish, Thorson J.A. emphasized the need for priority to be given to measures directed to the management and conservation of fish stocks with the following observation (at p. 17):

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the *Constitution Act, 1982*, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.

> The prohibitions found in ss. 12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly, it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

In *Eninew*, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regu-

droit de pêcher dans les eaux en cause pour répondre à leurs besoins alimentaires lorsqu'il existe un surplus. Dans la mesure où le règlement ne reconnaît pas cela, il est incompatible avec la Constitution. L'article 52 requiert qu'un tel règlement soit déclaré inopérant.

Compte tenu de ce point de vue, l'argument voulant que les arrêts *R. v. Hare and Debassige*, précité, et *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (C.A. Sask.), établissent que le par. 35(1) ne justifie aucunement la restriction du pouvoir réglementaire doit être rejeté, comme l'a fait la Cour d'appel en l'espèce. Dans l'arrêt *Hare and Debassige*, où l'on aborde la question de savoir si le *Règlement de pêche de l'Ontario*, C.R.C. 1978, ch. 879, s'applique aux membres d'une bande indienne visée par le traité de l'île Manitoulin, qui est attributif de certains droits relatifs à la prise de poissons, le juge Thorson souligne la nécessité de donner la priorité aux mesures de gestion et de conservation des stocks de poisson en faisant remarquer (à la p. 17):

> [TRADUCTION] Depuis 1867 et sous réserve des restrictions imposées par la Constitution qui, bien entendu, comprend maintenant l'art. 35 de la *Loi constitutionnelle de 1982*, le pouvoir et la responsabilité constitutionnels de légiférer en matière de pêcheries reviennent au Parlement. La nécessité d'assurer la saine gestion et conservation de nos stocks de poisson ainsi que la nécessité de veiller à ce qu'ils ne soient réduits et que leur existence ne soit pas compromise par des pratiques ou des méthodes de pêche délétères, ont constitué, et constituent encore, des aspects fondamentaux de la responsabilité du Parlement à cet égard.
>
> Les interdictions énoncées aux art. 12 et 20 du règlement ontarien servent manifestement cette fin. Par conséquent, il est loisible à nos tribunaux de tenir compte du fait que, si ces interdictions imposent des restrictions aux droits de tous, leur raison d'être est de servir l'intérêt plus général qu'a tout le monde à ce qu'il y ait une saine gestion et conservation de ces ressources importantes.

Dans l'arrêt *Eninew*, le juge Hall de la Cour d'appel conclut, à la p. 368, que [TRADUCTION] «les droits issus de traités peuvent être limités par une réglementation raisonnable». Comme nous l'avons déjà fait remarquer, la gestion et la conservation de ressources constituent vraiment un objectif législatif important et régulier. Pourtant, le fait que cet objectif soit «raisonnable» ne saurait suffire

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R. v. Day Chief

Her Majesty the Queen (Respondent) and Sheldon Day Chief (Applicant)

Her Majesty the Queen (Respondent) and Clayton Small Legs (Applicant)

Alberta Court of Appeal (In Chambers)

M. Paperny J.A.

Heard: January 9, 2007
Judgment: January 23, 2007
Docket: Calgary Appeal 0601-0325-A, 0601-0326-A

Counsel: S.M. Folkins for Respondent

S. Day Chief for himself

C. Small Legs for himself

Subject: Public; Property

Aboriginal law --- Reserves and real property — Motor vehicle offences — General principles

Two Aboriginal accused were convicted of traffic offences on summary conviction — After trial, accused alleged that Crown had no jurisdiction on land where offences occurred, as land had been obtained from Aboriginal peoples by fraud — Accused brought application for leave to appeal — Application dismissed — Appeal had no chance of success — Aboriginal persons are generally subject to laws of Canada — No historic claim asserted — Aboriginal title, even if it existed, would not displace traffic laws — Assertion of rights does not render Crown impotent.

Cases considered by *M. Paperny J.A.*:

Aftergood v. Alberta (Minister of Municipal Affairs) (2006), 367 W.A.C. 189, 384 A.R. 189, 22 M.P.L.R. (4th) 175, 2006 ABCA 154, 2006 CarswellAlta 592 (Alta. C.A.) — considered

Delgamuukw v. British Columbia (1997), 220 N.R. 161, 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010, 99 B.C.A.C. 161, 162 W.A.C. 161, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14,

[1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — followed

Nowegijick v. R. (1983), (sub nom. *Nowegijick v. Canada)* [1983] 1 S.C.R. 29, 1983 CarswellNat 520, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123 (S.C.C.) — referred to

R. v. Bennett (2004), 354 A.R. 6, 329 W.A.C. 6, 28 Alta. L.R. (4th) 269, 2004 ABCA 116, 2004 CarswellAlta 390 (Alta. C.A. [In Chambers]) — considered

R. v. Chief (1997), [1997] 4 C.N.L.R. 212, 1997 CarswellSask 817 (Sask. Q.B.) — referred to

R. v. Ehli (2000), 2000 CarswellAlta 1624, 277 A.R. 170, 242 W.A.C. 170 (Alta. C.A. [In Chambers]) — considered

R. v. Francis (1988), [1988] 1 S.C.R. 1025, [1988] 4 C.N.L.R. 98, 51 D.L.R. (4th) 418, 85 N.R. 3, 85 N.B.R. (2d) 243, 41 C.C.C. (3d) 217, 5 M.V.R. (2d) 268, 1988 CarswellNB 8, 1988 CarswellNB 222, 217 A.P.R. 243 (S.C.C.) — considered

R. v. Jones (1996), 1996 CarswellOnt 3987, 1996 CarswellOnt 3988, 50 C.R. (4th) 216, (sub nom. *R. v. Gardner)* 138 D.L.R. (4th) 204, (sub nom. *R. v. Pamajewon)* 27 O.R. (3d) 95, (sub nom. *R. v. Pamajewon)* [1996] 4 C.N.L.R. 164, (sub nom. *R. v. Pamajewon)* 92 O.A.C. 241, (sub nom. *R. v. Gardner)* 109 C.C.C. (3d) 275, (sub nom. *R. v. Pamajewon)* 199 N.R. 321, (sub nom. *R. v. Pamajewon)* [1996] 2 S.C.R. 821 (S.C.C.) — referred to

R. v. Pena (1998), (sub nom. *R. v. Ignace)* 156 D.L.R. (4th) 713, (sub nom. *R. v. Ignace)* 103 B.C.A.C. 273, (sub nom. *R. v. Ignace)* 169 W.A.C. 273, 1998 CarswellBC 163 (B.C. C.A.) — referred to

R. v. Sparrow (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — considered

R. v. TwoYoungMen (1979), [1979] 5 W.W.R. 712, 3 M.V.R. 186, 101 D.L.R. (3d) 598, 1979 CarswellAlta 232, 16 A.R. 413, [1979] 3 C.N.L.R. 85, 48 C.C.C. (2d) 550 (Alta. C.A.) — referred to

R. v. Weir (1999), 27 C.R. (5th) 333, [1999] 12 W.W.R. 608, 1999 ABCA 275, 250 A.R. 73, 213 W.A.C. 73, 181 D.L.R. (4th) 30, 140 C.C.C. (3d) 441, 73 Alta. L.R. (3d) 303, 1999 CarswellAlta 902 (Alta. C.A.) — considered

R. v. Williams (1994), 52 B.C.A.C. 296, 86 W.A.C. 296, [1995] 2 C.N.L.R. 229, 1994 CarswellBC 1731 (B.C. C.A.) — referred to

Yellowhorn v. Alberta (2006), 33 M.V.R. (5th) 258, 2006 ABQB 307, 2006 CarswellAlta 541, 62 Alta. L.R. (4th) 143, [2006] 10 W.W.R. 722 (Alta. Q.B.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 11 — referred to

s. 15 — referred to

s. 24 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

Provincial Offences Procedure Act, R.S.A. 2000, c. P-34

s. 19 — considered

s. 19(1) — considered

Traffic Safety Act, R.S.A. 2000, c. T-6

Generally — referred to

s. 52(1)(a) — pursuant to

s. 54(1)(a) — pursuant to

Regulations considered:

Traffic Safety Act, R.S.A. 2000, c. T-6

Use of Highway and Rules of the Road Regulation, Alta. Reg. 304/2002

Generally — referred to

s. 37(a) — pursuant to

APPLICATION by accused for leave to appeal conviction for motor vehicles offences.

M. Paperny J.A.:

Background

1 The applicants, Sheldon Day Chief and Clayton Small Legs, seek leave to appeal their respective summary convictions. Day Chief has been convicted of two counts of operating a motor vehicle without a certificate of registration contrary to section 52(1)(a) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("*TSA*") and for driving

a motor vehicle on a highway without insurance contrary to section 54(1)(a) of the *TSA*. Small Legs has been convicted for failing to obey a stop sign before entering an intersection contrary to section 37(a) of the *Use of Highway and Rules of the Road Regulation*, AR 304/2002 ("*HRRR*"), which is enacted under the *TSA*. On October 30, 2006, appeals by both applicants were dismissed by a summary conviction appeal justice. The applicants now seek leave to appeal those decisions to a panel of this Court. As both appeals raise the same issue, they were heard together and will be similarly disposed of.

2 At trial, both applicants admitted all of the factual elements of the charges against them. They claim that although they committed these acts, the Province of Alberta has no jurisdiction to regulate in the geographic areas where the alleged violations took place and consequently that their convictions ought to be dismissed. Essentially, each submits that Alberta lacks jurisdiction to regulate their conduct - and indeed any conduct on the specific land where the offences are alleged to have occurred - because that land was acquired by fraud in the late 19th century, when treaties and land agreements were being negotiated between Aboriginal peoples and the Crown. They submit that the result of this fraud is that the land on which the offences occurred was never properly surrendered to the Crown and is therefore not subject to Crown regulation, including provincial traffic laws.

Test for Leave to Appeal

3 Section 19 of the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34 ("*POPA*") gives a judge of this Court jurisdiction to grant leave to appeal for convictions under both the *TSA* and the *HRRR*. Leave to appeal will be granted where a case raises a question of law that is of sufficient importance to justify a further appeal: *POPA*, s. 19(1). This Court has held that one of the factors to be considered when determining whether a proposed appeal raises an issue of public importance is whether the applicant's case has arguable merit: *R. v. Bennett*, 2004 ABCA 116 (Alta. C.A. [In Chambers]) at para. 10, (2004), 354 A.R. 6 (Alta. C.A. [In Chambers]), citing *R. v. Ehli* (2000), 277 A.R. 170 (Alta. C.A. [In Chambers]) at para. 9.

Application

Nature of the Question

4 The applicants assert a lack of jurisdiction on the part of the Province to regulate the highways that they were driving on when the various alleged offences occurred. In other words, they challenge the validity of the provincial act under which they were charged. The facta of the applicants also raise *Charter* issues and claim breaches of sections 11, 15 and 24. None of these *Charter* sections were argued in the court below and in the case of Small Legs, no notice of constitutional question was given to the Province. It also bears noting that despite their allegations of fraudulent surrender, neither applicant asserts an historic land claim.

5 This Court will generally not entertain constitutional arguments for the first time on appeal, particularly where the necessary evidentiary foundation is lacking: *Aftergood v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 154, [2006] A.J. No. 550 (Alta. C.A.) at para. 4. This is not an absolute bar, however, and in some circumstances the interests of justice will require that an appellate court consider such arguments for the first time: *R. v. Weir*, 1999 ABCA 275, [1999] A.J. No. 1134 (Alta. C.A.) at paras. 4, 14. In this case it is unnecessary to evaluate whether or not there is a sufficient evidentiary foundation, or whether the arguments would likely be considered by a full panel of this Court. The new submissions do not change the thrust of the applicants' argument that provincial traffic laws do not apply to them by virtue of a fraudulent surrender of lands. Thus, the only issue that needs to be determined is whether the applicants are subject to the *TSA*. This issue is a question of law. However, the second aspect of the test for leave, which involves a consideration of whether the

applicants' cases have arguable merit, is determinative of these applications.

Public Importance & Arguable Merit

Crown Sovereignty

6 The applicants have been found guilty of summary traffic offences and I must therefore consider whether or not they raise grounds upon which these convictions might be dismissed. Broader questions about the validity of the 19th century land agreements between Aboriginal peoples and the Crown are only relevant in so far as they affect the applicability of the Province's traffic laws to the applicants.

7 In my view the law is clear that Aboriginal persons are not immune, in a general sense, from the laws of Canada and the provinces. This has been stated by the Supreme Court of Canada and reiterated by many courts across the country (see, for example: *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.) at p. 36; *R. v. Jones*, [1996] 2 S.C.R. 821 (S.C.C.) at para. 42 (per concurring judgment of L'Heureux-Dubé, J.); *Yellowhorn v. Alberta*, 2006 ABQB 307, 62 Alta. L.R. (4th) 143 (Alta. Q.B.), at paras. 33-43 (*Yellowhorn*); *R. v. Pena* (1998), 103 B.C.A.C. 273, 156 D.L.R. (4th) 713 (B.C. C.A.) at paras. 10-11; *R. v. Williams* (1994), 52 B.C.A.C. 296, [1995] 2 C.N.L.R. 229 (B.C. C.A.) at paras. 16-18; *R. v. TwoYoungMen* (1979), 16 A.R. 413 (Alta. C.A.), at para. 6 (*TwoYoungMen*); *R. v. Chief*, [1997] 4 C.N.L.R. 212 (Sask. Q.B.) at paras. 9-11).

8 It is unnecessary for me to consider either the admissibility or the accuracy of the applicants' evidence in support of their claim that the "surrender documents" between Aboriginal peoples and the Crown are not valid. Even were I to accept that these documents might be fraudulent, such dubious provenance would not, without more, affect the Crown's underlying sovereignty over the land on which the applicants were charged. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), the Supreme Court of Canada held at page 1103 that:

> ...while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.
>
> [Emphasis added]

9 These comments were made in relation to land to which no treaty applied, and demonstrate conclusively that Crown title exists independently of surrender agreements or treaties.

10 This case does not assert an infringement of a unique or traditional aboriginal right nor does it assert a land claim. Rather, it is an assertion of complete immunity on the basis of a theory of fraudulent surrender. The sovereignty of the lands in question, however, cannot be challenged collaterally. Moreover, the mere assertion of a potential fraud in the surrender of the lands in question does not displace the Crown's sovereignty over those lands (*Yellowhorn* at paras. 45-48), as this sovereignty is not dependent on the validity of the surrender documents (*Sparrow* at page 1103).

11 I am not suggesting that the presence of a land agreement between Aboriginal peoples and the Crown is irrelevant to a potential claim for Aboriginal title or other similar rights. In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) ("*Haida*"), the Supreme Court of Canada emphasized that Aboriginal peoples were here before the arrival of Europeans, and have never been conquered. As

a result, where land agreements do not exist between Aboriginal peoples and the Crown, the Aboriginal peoples may have valid claims for land title and other rights (*Haida* at para. 25). These rights are protected by section 35 of the *Constitution Act*, and create a burden on the Crown's underlying title: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 145 (*Delgamuukw*). Mere assertion of these rights, however, does not *negate* Crown sovereignty.

12 Moreover, where a claim for Aboriginal title has been asserted but not yet proven, and negotiations have not yet led to an agreement, the Crown maintains title to the disputed land and the corresponding right to regulate it. As the Court stated in *Haida*, a claim for Aboriginal title does not render the Crown "impotent": *Haida* at para. 27. Thus even if the applicants had standing to, and did, assert a genuine land claim, the Crown maintains sovereignty over those lands until the ultimate determination of that claim. In other words a land claim, until proven, functions only as a burden on Crown title — it does not displace it.

13 Further, it cannot be said that provincial highway traffic laws, designed to protect the safety of all Albertans, will be found to have *any* adverse effect upon the Aboriginal title which might be claimed should the land agreements be displaced by reason of fraud.

14 It is clear that a pending land claim would not affect the Crown's legislative authority over the lands in question. It is also well-settled law that this authority includes a provincial right to regulate with regard to highways. See the Supreme Court of Canada's finding that provincial traffic legislation applies *ex proprio* to Indians, even on reserve, without touching their Indianness: *R. v. Francis*, [1988] 1 S.C.R. 1025 (S.C.C.) at p. 1028, and this Court's finding that "the laws of the Province apply to Indians so long as they are of general application throughout the Province and do not purport to legislate the conduct of an Indian qua Indian or to regulate land reserved for Indians qua land.": *TwoYoungMen* at para. 6. It is clear that a pending land claim would not affect the applicability of provincial highway regulations to Aboriginal peoples. Neither does an allegation of an invalidly executed treaty or land agreement: see *Yellowhorn*.

15 I agree with the conclusion reached by the summary conviction appeal court judge that whether or not the lands were improperly surrendered does not affect the jurisdiction of the Province to regulate highway safety. Accordingly, the validity of the applicants' argument surrounding the authenticity of those agreements is irrelevant to their convictions for traffic violations. There is no arguable merit to these appeals. Leave to appeal these convictions is accordingly denied.

Application dismissed.

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Minister of National Revenue *Appellant*

v.

Grand Chief Michael Mitchell also known as Kanentakeron *Respondent*

and

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

INDEXED AS: MITCHELL *v.* M.N.R.

Neutral citation: 2001 SCC 33.

File No.: 27066.

2000: June 16; 2001: May 24.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

The respondent is a Mohawk of Akwesasne and a descendant of the Mohawk nation, one of the polities of the Iroquois Confederacy prior to the arrival of Europeans. In 1988, the respondent crossed the international border bearing goods purchased in the United States. He declared the goods to Canadian customs agents but asserted that aboriginal and treaty rights exempted him from paying duty. He was permitted to continue into Canada but advised he would be charged duty. The goods except some motor oil were presented to the

Ministre du Revenu national *Appelant*

c.

Grand Chef Michael Mitchell alias Kanentakeron *Intimé*

et

Procureur général du Québec, Procureur général du Nouveau-Brunswick, Procureur général du Manitoba, Procureur général de la Colombie-Britannique, Conseil des Mohawks de Kahnawake, Assemblée des Premières nations et Union of New Brunswick Indians *Intervenants*

RÉPERTORIÉ : MITCHELL *c.* M.R.N.

Référence neutre : 2001 CSC 33.

N° du greffe : 27066.

2000 : 16 juin; 2001 : 24 mai.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Droits ancestraux — Droit de traverser le Saint-Laurent avec des marchandises à des fins commerciales — Les Mohawks d'Akwesasne ont-ils le droit de rapporter au Canada des marchandises des États-Unis à des fins commerciales sans payer de droits de douane? — Le droit revendiqué est-il incompatible avec la souveraineté canadienne? — Loi constitutionnelle de 1982, art. 35(1).

Preuve — Droits ancestraux — Preuve nécessaire pour établir un droit ancestral — Appréciation de la preuve dans les revendications autochtones.

L'intimé est un Mohawk d'Akwesasne et un descendant de la nation Mohawk, une des entités politiques de la Confédération iroquoise avant l'arrivée des Européens. En 1988, l'intimé traverse la frontière internationale, apportant avec lui des marchandises achetées aux États-Unis. Il déclare les marchandises aux agents de douane canadiens, mais affirme qu'il a des droits ancestraux et des droits issus de traités qui l'exemptent du paiement de droits de douane. Il est autorisé à entrer au Canada, mais on l'informe qu'il devra payer des droits.

Mohawk community of Tyendinaga as gifts. The oil was taken to a store in Akwesasne for resale to members of that community. The respondent was served with a claim for unpaid duty and sought declaratory relief. The Federal Court, Trial Division held that the respondent had an aboriginal right to cross the border freely without having to pay customs duties on goods destined for personal and community use as well as for noncommercial scale trade with other First Nations. The Federal Court of Appeal affirmed an aboriginal right to bring goods into Canada duty-free, subject to limitations based on the evidence of the traditional range of Mohawk trading.

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

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

The initial step is to ascertain the true nature of the claimed right, without assessing its merits or artificially broadening or narrowing the right. This requires examining (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right; (2) the nature of the governmental legislation or action

Il fait présent à la communauté mohawk de Tyendinaga des marchandises, sauf l'huile à moteur. L'huile à moteur est apportée à un magasin situé à Akwesasne pour y être revendue aux membres de la communauté. L'intimé, qui a reçu signification d'une demande de paiement de droits de douane, sollicite un jugement déclaratoire. La Section de première instance de la Cour fédérale conclut que l'intimé jouit d'un droit ancestral de traverser librement la frontière sans acquitter de droits de douane sur des marchandises destinées à un usage personnel et communautaire ainsi qu'à un petit négoce avec d'autres Premières nations. La Cour d'appel fédérale confirme l'existence d'un droit ancestral d'introduire des marchandises au Canada en franchise, sous réserve de restrictions fondées sur la preuve de l'étendue traditionnelle du commerce mohawk.

Arrêt : Le pourvoi est accueilli. Le droit ancestral revendiqué n'a pas été établi. L'intimé doit payer des droits sur les marchandises importées au Canada.

Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Arbour et LeBel : En droit colonial britannique, les lois et les intérêts préexistants des sociétés autochtones ont été incorporés dans la common law en tant que droits dès l'affirmation de la souveraineté de la Couronne, sauf s'ils étaient cédés, éteints ou incompatibles avec l'affirmation de la souveraineté de la Couronne. L'édiction du par. 35(1) de la *Loi constitutionnelle de 1982* a conféré un statut constitutionnel aux droits existants, ancestraux ou issus de traités, y compris les droits ancestraux reconnus en common law. Cependant, le gouvernement conservait le pouvoir de restreindre les droits ancestraux pour des motifs valables, dans la poursuite d'objectifs publics impérieux et réels. Le critère d'existence d'un droit ancestral est axé sur les caractéristiques déterminantes qui faisaient partie intégrante de la société autochtone en cause avant l'affirmation de la souveraineté de la Couronne. Le demandeur doit établir que la pratique, tradition ou coutume moderne a un degré raisonnable de continuité avec la pratique, tradition ou coutume qui existait avant le contact avec les Européens. La pratique, coutume ou tradition doit avoir fait partie intégrante de la culture distinctive de la société autochtone, au sens où elle doit avoir distingué ou caractérisé sa culture traditionnelle et avoir été au cœur de son identité.

La première étape consiste à établir la nature véritable du droit revendiqué, sans évaluer son bien-fondé et sans l'étendre ou le restreindre artificiellement. Pour cela, il faut examiner (1) la nature de l'acte qui, selon le demandeur, a été accompli en vertu d'un droit ancestral; (2) la nature de la loi ou de l'autre mesure gouvernementale

alleged to infringe the right, i.e. the conflict between the claim and the limitation; and (3) the ancestral traditions and practices relied upon to establish the right. An application of these factors in this case suggests that the claimed right is properly characterized as the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade. The claim is for a right to trade *simpliciter* and necessarily entails a mobility right because the right to bring goods across the St. Lawrence River for purposes of trade involves travel. The right should not be qualified as a right to bring goods without paying duty or taxes because such a limitation should be considered at the infringement stage. Technically, the right should be characterized as a right to bring goods across the St. Lawrence River as opposed to the international border, a construction of newcomers. However, in modern terms, the river and the border are equivalent.

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

There are no precise rules or absolute principles governing the interpretation or weighing of evidence in support of aboriginal claims. The laws of evidence must ensure that the aboriginal perspective is given due weight but consciousness of the special nature of aborig-

qu'il dit porter atteinte au droit, c.-à-d. le conflit entre la revendication et la restriction; et (3) les traditions et pratiques ancestrales invoquées pour établir l'existence du droit. L'application de ces facteurs en l'espèce indique que le droit revendiqué est caractérisé à juste titre comme étant le droit de transporter des marchandises à travers la frontière entre le Canada et les États-Unis, par le fleuve Saint-Laurent, à des fins commerciales. La revendication vise simplement un droit de commercer, et elle suppose nécessairement une liberté de circulation parce que le droit de traverser le Saint-Laurent avec des marchandises, à des fins commerciales, implique des déplacements. Le droit ne devrait pas être caractérisé comme un droit de rapporter des marchandises en franchise de taxes ou de droits parce qu'une telle restriction devrait être examinée à l'étape de l'atteinte. Techniquement, le droit devrait être caractérisé comme le droit de traverser le Saint-Laurent plutôt que la frontière, qui est une création des nouveaux arrivants, avec des marchandises. Toutefois, en langage contemporain, le fleuve et la frontière sont équivalents.

La revendication de droits ancestraux soulève des difficultés de preuve intrinsèques. Toutefois, il ne faudrait pas rendre illusoires les droits protégés par le par. 35(1) en imposant un fardeau de preuve impossible. Les règles de preuve doivent donc être appliquées avec souplesse, d'une façon adaptée aux difficultés inhérentes aux revendications autochtones. Comme les demandeurs doivent établir les caractéristiques de leur société avant le contact avec les Européens en l'absence d'écrits, les récits oraux peuvent fournir une preuve, impossible à obtenir d'une autre façon, des pratiques ancestrales et des points de vue autochtones. Les récits oraux sont admissibles en preuve lorsqu'ils sont à la fois utiles et raisonnablement fiables, sous réserve toujours du pouvoir discrétionnaire du juge de première instance de les exclure. Pour déterminer l'utilité et la fiabilité des récits oraux, les juges doivent se garder de faire des suppositions faciles fondées sur les traditions eurocentriques de collecte et de transmission des faits historiques. En l'espèce, les parties ont présenté des témoignages d'historiens et d'archéologues. Les récits oraux d'aînés, dont l'intimé, ont fourni le point de vue autochtone. Le témoignage de l'intimé, confirmé par la preuve archéologique et historique, était utile, et le juge de première instance n'a pas commis d'erreur en concluant que ce témoignage était crédible et fiable.

Il n'y a pas de règles précises ni de principes absolus régissant l'interprétation ou l'appréciation de la preuve relative aux revendications autochtones. Les règles de preuve doivent garantir qu'on accordera au point de vue autochtone le poids qui convient, mais la conscience de

inal claims does not negate general principles governing evidence. Claims must still be established on persuasive evidence demonstrating validity on a balance of probabilities. In the present case, the evidence indicates that the Mohawks travelled north on occasion and trade was a distinguishing feature of their society. The evidence does not show, however, an ancestral practice of trading north of the St. Lawrence River. Mohawk trade at the time of contact fell predominantly along an east-west axis. The relevant evidence supporting the claim consists of a single ceremonial knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade. While appellate courts grant considerable deference to findings of fact made by trial judges, the finding of a cross-border trading right in this case represents, in view of the paucity of the evidence, a "palpable and overriding error". Evidentiary principles must be sensitively applied to aboriginal claims but they cannot be strained beyond reason.

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

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

la nature particulière des revendications autochtones ne neutralise pas les principes généraux de preuve. Il faut encore établir le bien-fondé des revendications sur la base d'une preuve convaincante qui démontre leur validité selon la prépondérance des probabilités. En l'espèce, la preuve indique que les Mohawks voyageaient parfois au nord et que le commerce était une caractéristique distinctive de leur société. La preuve ne révèle pas, cependant, l'existence d'une pratique ancestrale de commerce au nord du Saint-Laurent. Le commerce mohawk au moment dù contact avec les Européens suivait principalement un axe est-ouest. La preuve pertinente à l'appui de la revendication consiste en un seul couteau rituel, des traités qui ne font pas mention d'un commerce antérieur et le simple fait de la participation des Mohawks au commerce de fourrure. Si les cours d'appel doivent s'en remettre largement aux conclusions de fait des juges de première instance, la conclusion sur le droit de faire le commerce transfrontalier en l'espèce est une « erreur manifeste et dominante », vu l'insuffisance de la preuve. Les principes de preuve doivent être appliqués de façon éclairée aux revendications autochtones, mais ne peuvent faire l'objet d'une extension déraisonnable.

Quoi qu'il en soit, même si l'on déférait à la conclusion du juge de première instance qu'il existait des relations commerciales entre les Mohawks et les Premières nations au nord du Saint-Laurent avant le contact avec les Européens, la preuve n'établit pas que ce commerce vers le nord est une caractéristique déterminante de la culture mohawk. Le droit revendiqué met en jeu une frontière internationale et, en conséquence, les considérations géographiques sont clairement pertinentes pour déterminer si le commerce en l'espèce fait partie intégrante de la culture mohawk. Même si l'interprétation libérale du juge de première instance était acceptée, la preuve révèle l'importance négligeable du transport et du commerce de marchandises par les Mohawks au nord du Saint-Laurent, avant le contact avec les Européens. Ce commerce n'était pas vital pour l'identité collective des Mohawks. Aucun droit ancestral de rapporter des marchandises à travers la frontière à des fins commerciales n'a donc été établi.

Comme l'intimé n'a pas établi l'existence du droit autochtone revendiqué, il n'est pas nécessaire de faire des commentaires sur la question de savoir dans quelle mesure le droit colonial en matière de succession des pouvoirs souverains est pertinent dans la définition des droits autochtones en vertu du par. 35(1) de la *Loi constitutionnelle de 1982*.

Per Major and Binnie JJ.: It is agreed that even if Mohawks did occasionally trade goods across the St. Lawrence River with First Nations to the north prior to contact, this practice was neither a defining feature of their culture nor vital to their collective identity. There are, however, additional considerations for allowing the appeal. In this case, an issue arises about the sovereignty implications of the international trading and mobility right claimed by the respondent as a citizen of the Iroquois Confederacy.

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

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

Counsel for the respondent does not dispute Canadian sovereignty. He seeks Mohawk autonomy within the broader framework of Canadian sovereignty. The respondent's claim is not just about physical movement of people or goods in and about Akwesasne. It is about

Les juges Major et Binnie : Il est admis que même si, avant le contact avec les Européens, les Mohawks faisaient occasionnellement le commerce de marchandises au-delà du fleuve Saint-Laurent avec des Premières nations établies au nord, cette pratique n'était pas une caractéristique déterminante de leur culture et elle n'était pas vitale pour leur identité collective. Il y a toutefois des raisons additionnelles d'accueillir le pourvoi. En l'espèce, une question se pose quant aux incidences qu'aurait sur la souveraineté le droit de commerce et de circulation internationaux revendiqué par l'intimé en sa qualité de citoyen de la Confédération iroquoise.

Akwesasne est à l'épicentre frontalier du Saint-Laurent, étant à cheval sur la frontière entre le Canada et les États-Unis ainsi que sur une frontière provinciale. Cet entrecroisement de frontières dans la communauté mohawk va au-delà du simple inconvénient et constitue un fardeau important dans la vie quotidienne. Les Mohawks cherchent à réduire les complications frontalières dans leurs vies, à unir de nouveau une communauté divisée et à trouver un avantage économique à la frontière internationale. La valeur économique de leur revendication, créée par une société non autochtone, n'est pas fatale. La théorie des droits figés est incompatible avec le par. 35(1) et les droits ancestraux peuvent s'accroître et évoluer.

Un droit ancestral doit découler d'une activité antérieure au contact avec les Européens et cette activité doit être un élément d'une coutume, pratique ou tradition qui faisait partie intégrante de la culture distinctive de la communauté autochtone. Les terres traditionnelles des Mohawks se trouvaient dans la vallée des Mohawks (État de New York), mais, historiquement, les Mohawks voyageaient au nord jusqu'à la vallée du Saint-Laurent. À cette époque, les Mohawks étaient, et agissaient comme, un peuple pleinement autonome au sein de la Confédération iroquoise. Les frontières territoriales ont changé avec l'extension d'une Confédération iroquoise militairement puissante jusqu'à la vallée du Saint-Laurent et le long de celle-ci, qui en chassait les autres habitants autochtones. Même si aucune des frontières entre les territoires des Premières nations avant le contact avec les Européens ne correspond à la frontière internationale actuelle à Akwesasne, ces frontières existaient et, selon les pratiques et coutumes traditionnelles, les Mohawks les respectaient en temps de paix.

L'avocat de l'intimé ne conteste pas la souveraineté canadienne. Il revendique l'autonomie mohawk dans le cadre plus large de la souveraineté canadienne. La revendication de l'intimé ne concerne pas seulement le déplacement physique de personnes ou de marchandises

the Mohawks' aspiration to live as if the international boundary did not exist.

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

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

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

British colonial law presumed that the Crown intended to respect aboriginal rights that were neither unconscionable nor incompatible with the Crown's sovereignty. Courts have extended this recognition to practices, customs or traditions integral to the aboriginal community's distinctive culture. While care must be taken not to carry forward doctrines of British colonial

à Akwesasne. Elle a trait à l'aspiration des Mohawks à vivre comme si la frontière internationale n'existait pas.

Bien qu'historiquement, la Couronne ait pu être représentée comme une entité lointaine par-delà les mers à laquelle on ne pouvait guère s'attendre que les autochtones s'identifient, cela n'était plus le cas en 1982 quand le processus de conciliation du par. 35(1) a été établi. Avec le rapatriement de la Constitution, tous les aspects de la souveraineté canadienne se sont fermement ancrés à l'intérieur de nos frontières. Si le principe de « souveraineté fusionnée » énoncé par la Commission royale sur les peuples autochtones doit avoir un sens véritable, il doit comporter au moins l'idée que les Canadiens autochtones et non autochtones forment ensemble une entité souveraine munie d'une certaine communauté d'objectifs et d'efforts. C'est avec cette nouvelle entité, héritière des attributs historiques de la souveraineté, qu'il faut concilier les droits existants ancestraux ou issus de traités. L'objectif constitutionnel est la conciliation et non pas l'isolement mutuel. Ce qui importe c'est que la Commission royale elle-même considère les autochtones comme étant des participants à part entière, avec les non autochtones, à une souveraineté canadienne partagée. Les autochtones ne s'opposent pas à la souveraineté canadienne, et ils ne lui sont pas asservis, ils en font partie.

La revendication de l'intimé présente deux éléments distinctifs. Il revendique un droit de commerce et de circulation à travers la frontière internationale et il lie ce droit au fait qu'il est actuellement citoyen non pas du Canada, mais de Haudenosaunee (Confédération iroquoise) dont la capitale est à Onondaga, dans l'État de New York.

Un droit issu d'un traité est une promesse affirmative de Sa Majesté, qui sera interprétée libéralement et mise en application d'une façon qui préserve l'honneur de la Couronne. Dans le cas de droits ancestraux, il n'y a aucun événement historique comparable au processus de conclusion des traités, où Sa Majesté a négocié le droit ou l'obligation qu'on cherche à faire respecter. La revendication de l'intimé est fondée sur des pratiques qui, selon lui, existent depuis bien avant le premier contact des Mohawks avec les Européens en 1609.

Il était présumé, en droit colonial britannique, que Sa Majesté avait l'intention de respecter les droits ancestraux qui n'étaient pas contraires à la conscience ou incompatibles avec sa souveraineté. Les tribunaux ont élargi cette reconnaissance aux pratiques, coutumes et traditions qui font partie intégrante de la culture distinctive de la communauté autochtone. Bien qu'il faille se

law into interpretations of s. 35(1) without careful reflection, s. 35(1) was not a wholesale repudiation of the common law. The notion of incompatibility with Crown sovereignty was a defining characteristic of sovereign succession and therefore a limitation on the scope of aboriginal rights. For example, important as they may have been to the Mohawk identity as a people, it could not be said that pre-contact warrior activities gave rise under successor regimes to a legal right under s. 35(1) to engage in military adventures on Canadian territory. This concept of sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada does not raise legitimate sovereignty issues at the definitional stage.

garder d'introduire des principes de droit colonial britannique dans l'interprétation du par. 35(1) sans mûre réflexion, le par. 35(1) n'est pas une répudiation globale de la common law. La notion d'incompatibilité avec la souveraineté de la Couronne était une caractéristique déterminante de la succession de pouvoirs souverains et constituait par le fait même une restriction à la portée des droits ancestraux. Par exemple, si importantes qu'elles aient été pour l'identité du peuple mohawk, on ne pourrait pas dire que les activités guerrières antérieures au contact avec les Européens ont donné naissance sous les régimes successeurs à un droit en vertu du par. 35(1) de se livrer à des opérations militaires sur le territoire canadien. Cette notion de l'incompatibilité avec la souveraineté continue d'être un élément de l'analyse du par. 35(1), bien qu'il s'agisse d'une restriction à appliquer avec modération. Dans la plupart des cas, la protection de pratiques, traditions et coutumes distinctives de cultures autochtones au Canada ne suscite pas de réelles questions de souveraineté à l'étape de leur définition.

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

Depuis la création de la frontière internationale en 1783, Akwesasne est l'endroit où la souveraineté britannique (et plus tard canadienne) fait face à la souveraineté des États-Unis. Le contrôle de la circulation des personnes et des marchandises à travers les frontières a toujours été un attribut fondamental et un pouvoir accessoire de la souveraineté. On s'attend à ce que les États exercent leur pouvoir sur les frontières dans l'intérêt public. L'obligation ne peut être soumise aux caprices d'un régime antérieur dont la souveraineté a été éclipsée. Le droit de commerce et de circulation internationaux revendiqué par l'intimé est donc incompatible avec les attributs historiques de la souveraineté canadienne. Puisque le droit ancestral revendiqué n'a pas survécu au passage à la souveraineté non mohawk, il n'existait rien en 1982 qui pouvait recevoir la protection donnée par le par. 35(1) aux droits ancestraux existants.

This conclusion is not at odds with the purpose of s. 35(1) to bring about a reconciliation of the interests of aboriginal peoples with Canadian sovereignty. Aboriginal people are part of Canadian sovereignty and the accommodation of their rights is not a zero-sum relationship between minority rights and citizenship. Affirmation of the sovereign interest of Canadians as a whole, including aboriginal peoples, should not in this case be seen as a loss of legitimate constitutional space for aboriginal peoples. To extend constitutional protection to the respondent's claim would overshoot the purpose of s. 35(1). In terms of sovereign incompatibility, the respondent's claim relates to national interests that all of us have in common rather than to distinctive inter-

Cette conclusion n'est pas contraire à l'objectif du par. 35(1), la conciliation entre les intérêts des peuples autochtones et la souveraineté canadienne. Les peuples autochtones font partie de la souveraineté canadienne et les accommodements requis pour les droits autochtones ne constituent pas un rapport à somme nulle entre droits de minorités et droits de citoyenneté. L'affirmation du droit souverain de l'ensemble des Canadiens, y compris les autochtones, ne devrait pas en l'espèce être considérée comme la perte pour les autochtones d'un espace constitutionnel légitime. L'élargissement de la protection constitutionnelle à la revendication de l'intimé irait au-delà de l'objet du par. 35(1). Pour ce qui est de l'incompatibilité avec la souveraineté, la revendication de

ests that for some purposes differentiate an aboriginal community. Reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty. This conclusion neither forecloses nor endorses any position on the compatibility or incompatibility of internal self-governing institutions of First Nations with Crown sovereignty, either past or present.

Cases Cited

By McLachlin C.J.

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, aff'g in part [1993] 5 W.W.R. 97; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Mabo v. Queensland* (1992), 175 C.L.R. 1; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Watt v. Liebelt*, [1999] 2 F.C. 455; *R. v. Campbell* (2000), 6 Imm. L.R. (3d) 1; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Badger*, [1996] 1 S.C.R. 771; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *Inasa v. Oshodi*, [1934] A.C. 99; *R. v. Jacobs*, [1999] 3 C.N.L.R. 239.

By Binnie J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; **explained:** *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; **distinguished:** *Watt v. Liebelt*, [1999] 2 F.C. 455; **referred to:** *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *United States v. Garrow*, 88 F.2d 318 (1937); *R. v. Côté*, [1996] 3 S.C.R. 139; *Attorney General for Canada v. Cain*, [1906] A.C. 542; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, aff'g in part [1993] 5 W.W.R. 97; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571;

l'intimé vise des intérêts nationaux que nous avons tous en commun plutôt que des intérêts distinctifs qui différencient les communautés autochtones à certaines fins. La conciliation de ces intérêts en l'espèce milite en faveur de l'affirmation de notre souveraineté collective. Cette conclusion n'écarte et n'appuie aucunement un point de vue quelconque quant à la compatibilité ou l'incompatibilité d'institutions autonomes internes des Premières nations avec la souveraineté de la Couronne, dans le passé ou dans le présent.

Jurisprudence

Citée par le juge en chef McLachlin

Arrêts appliqués : *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, conf. en partie [1993] 5 W.W.R. 97; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Pamajewon*, [1996] 2 R.C.S. 821; **arrêts mentionnés :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Mabo c. Queensland* (1992), 175 C.L.R. 1; *St. Catherine's Milling and Lumber Co. c. The Queer* (1888), 14 App. Cas. 46; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Watt c. Liebelt*, [1999] 2 C.F. 455; *R. c. Campbell* (2000), 6 Imm. L.R. (3d) 1; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Adams*, [1996] 3 R.C.S. 101; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Badger*, [1996] 1 R.C.S. 771; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *R. c. Levogiannis*, [1993] 4 R.C.S. 475; *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *Inasa c. Oshodi*, [1934] A.C. 99; *R. c. Jacobs*, [1999] 3 C.N.L.R. 239.

Citée par le juge Binnie

Arrêts appliqués : *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; **arrêt expliqué :** *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; **distinction faite d'avec l'arrêt :** *Watt c. Liebelt*, [1999] 2 C.F. 455; **arrêts mentionnés :** *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Adams*, [1996] 3 R.C.S. 101; *United States c. Garrow*, 88 F.2d 318 (1937); *R. c. Côté*, [1996] 3 R.C.S. 139; *Attorney General for Canada c. Cain*, [1906] A.C. 542; *Worcester c. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *R. c. Pamajewon*, [1996] 2 R.C.S. 821; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751; *Dick c. La Reine*, [1985] 2 R.C.S. 309; *Delgamuukw c Colombie-Britannique*, [1997] 3 R.C.S. 1010, conf. e partie [1993] 5 W.W.R. 97; *Attorney-General for*

Campbell v. British Columbia (Attorney General) (2000), 79 B.C.L.R. (3d) 122, 2000 BCSC 1123; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; *Oyekan v. Adele*, [1957] 2 All E.R. 785; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Mabo v. Queensland* (1992), 175 C.L.R. 1; *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1; *R. v. Eninew* (1984), 12 C.C.C. (3d) 365; *R. v. Hare* (1985), 20 C.C.C. (3d) 1; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Jacques*, [1996] 3 S.C.R. 312, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Ramsey*, 431 U.S. 606 (1977); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Wheeler*, 435 U.S. 313 (1978); *Akins v. United States*, 551 F.2d 1222 (1977); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

Statutes and Regulations Cited

Akwesasne Residents Remission Order, SOR/91-412.
Canadian Charter of Rights and Freedoms.
Constitution Act, 1867, s. 91(24).
Constitution Act, 1982, s. 35(1).
Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. General Conference of the International Labour Organisation, June 27, 1989, Art. 32.
Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 17, 31, 131, 153(*c*), 159.
Customs Tariff, R.S.C. 1985, c. 41 (3rd Supp.).
Draft of the Inter-American Declaration on the Rights of Indigenous Peoples. Inter-American Commission on Human Rights, September 18, 1995, Art. 24.
Draft United Nations declaration on the rights of indigenous peoples. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1994/45, Art. 35.
Immigration Act, R.S.C. 1985, c. I-2.
Royal Proclamation (1763), R.S.C. 1985, App. II, No.1.
Treaty of Paris (1763).
Treaty of Paris (1783).

Ontario c. Attorney-General for Canada, [1912] A.C. 571; *Campbell c. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122, 2000 BCSC 1123; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Marshall*, [1999] 3 R.C.S. 456; *Campbell c. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *Amodu Tijani c. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; *Oyekan c. Adele*, [1957] 2 All E.R. 785; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Mabo c. Queensland* (1992), 175 C.L.R. 1; *Wik Peoples c. Queensland* (1996), 187 C.L.R. 1; *R. c. Eninew* (1984), 12 C.C.C. (3d) 365; *R. c. Hare* (1985), 20 C.C.C. (3d) 1; *R. c. Simmons*, [1988] 2 R.C.S. 495; *R. c. Jacques*, [1996] 3 R.C.S. 312, *Almeida-Sanchez c. United States*, 413 U.S. 266 (1973); *United States c. Ramsey*, 431 U.S. 606 (1977); *Chae Chan Ping c. United States*, 130 U.S. 581 (1889); *Ekiu c. United States*, 142 U.S. 651 (1892); *Fong Yue Ting c. United States*, 149 U.S. 698 (1893); *Cherokee Nation c. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States c. Wheeler*, 435 U.S. 313 (1978); *Akins c. United States*, 551 F.2d 1222 (1977); *Johnson c. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

Lois et règlements cités

Charte canadienne des droits et libertés.
Convention (nº 169) concernant les peuples indigènes et tribaux dans les pays indépendants. Conférence générale de l'Organisation internationale du Travail, 27 juin 1989, art. 32.
Décret de remise visant les résidents d'Akwesasne, DORS/91-412.
Loi constitutionnelle de 1867, art. 91(24).
Loi constitutionnelle de 1982, art. 35(1).
Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.), art. 17, 31, 131, 153(*c*), 159.
Loi sur l'immigration, L.R.C. 1985, ch. I-2.
Proclamation royale (1763), L.R.C. 1985, App. II, nº 1.
Projet de déclaration des Nations Unies sur les droits des peuples autochtones. Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, Rés. 1994/45, art. 35.
Projet de la Déclaration interaméricaine relative aux droits des peuples autochtones. Commission interaméricaine des droits de l'homme, 18 septembre 1995, art. 24.
Tarif des douanes, L.R.C. 1985, ch. 41 (3e suppl.).
Traité de Paris (1763).
Traité de Paris (1783).

Authors Cited

Barsh, Russel L., and James Y. Henderson. "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993.

Blackstone, William. *Commentaries on the Laws of England*, 4th ed. Oxford: Clarendon Press, 1770.

Borrows, John. "The Trickster: Integral to a Distinctive Culture" (1997), 8 *Constitutional Forum* 27.

Borrows, John. "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001), 80 *Can. Bar Rev.* 15.

Canada. House of Commons. Special Committee on Indian Self-Government. *Indian Self-Government in Canada: Report of the Special Committee.* Ottawa: Queen's Printer for Canada, 1983.

Canada. National Film Board. *Between Friends/Entre Amis.* Toronto: McClelland & Stewart, 1976.

Canada. Royal Commission on Aboriginal Peoples. *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution.* Ottawa: The Commission, 1993.

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship.* Ottawa: The Commission, 1996.

Greschner, Donna. "Aboriginal Women, the Constitution and Criminal Justice", [1992] *U.B.C. L. Rev. (Sp. ed.)* 338.

Hogg, Peter W., and Mary Ellen Turpel. "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 *Can. Bar Rev.* 187.

Kymlicka, Will, and Wayne Norman, eds. *Citizenship in Diverse Societies.* New York: Oxford University Press, 2000.

Nicholson, Norman L. *The Boundaries of the Canadian Confederation.* Toronto: Macmillan of Canada, 1979.

Richter, Daniel K. *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization.* Chapel Hill, N.C.: University of North Carolina Press, 1992.

Ritchie, William A. *The Archaeology of New York State*, rev. ed., Harrison, N.Y.: Harbor Hill Books, 1980.

Slattery, Brian. "Making Sense of Aboriginal and Treaty Rights" (2000), 79 *Can. Bar Rev.* 196.

Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

Sopinka, John, and Sidney N. Lederman. *The Law of Evidence in Civil Cases.* Toronto: Butterworths, 1974.

Story, Joseph. *Commentaries on the Constitution of the United States*, 4th ed., vol. II. Boston: Little, Brown, 1873.

Doctrine citée

Barsh, Russel L., and James Y. Henderson. « The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand » (1997), 42 *R.D. McGill* 993.

Blackstone, William. *Commentaires sur les lois anglaises*, t. 1. Traduit de l'anglais par N. M. Chompré. Paris : Bossange, 1822.

Borrows, John. « The Trickster: Integral to a Distinctive Culture » (1997), 8 *Forum Constitutionnel* 27.

Borrows, John. « Uncertain Citizens: Aboriginal Peoples and the Supreme Court » (2001), 80 *R. du B. can.* 15.

Canada. Chambre des communes. Comité spécial sur l'Autonomie politique des Indiens. *L'autonomie politique des Indiens au Canada : Rapport du Comité spécial.* Ottawa : Imprimeur de la Reine, 1983.

Canada. Commission royale sur les peuples autochtones. *Partenaires au sein de la Confédération : Les peuples autochtones, l'autonomie gouvernementale et la Constitution.* Ottawa : La Commission, 1993.

Canada. Commission royale sur les peuples autochtones. *Rapport de la Commission royale sur les peuples autochtones*, vol. 2, *Une relation à redéfinir.* Ottawa : La Commission, 1996.

Canada. Office national du film. *Between Friends/Entre Amis.* Toronto : McClelland & Stewart, 1976.

Greschner, Donna. « Aboriginal Women, the Constitution and Criminal Justice », [1992] *U.B.C. L. Rev. (Sp. ed.)* 338.

Hogg, Peter W., and Mary Ellen Turpel. « Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues » (1995), 74 *R. du B. can.* 187.

Kymlicka, Will, and Wayne Norman, eds. *Citizenship in Diverse Societies.* New York : Oxford University Press, 2000.

Nicholson, Norman L. *The Boundaries of the Canadian Confederation.* Toronto : Macmillan of Canada, 1979.

Richter, Daniel K. *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization.* Chapel Hill, N.C. : University of North Carolina Press, 1992.

Ritchie, William A. *The Archaeology of New York State*, rev. ed. Harrison, N.Y. : Harbor Hill Books, 1980.

Slattery, Brian. « Making Sense of Aboriginal and Treaty Rights » (2000), 79 *R. du B. can.* 196.

Slattery, Brian. « Understanding Aboriginal Rights » (1987), 66 *R. du B. can.* 727.

Sopinka, John, and Sidney N. Lederman. *The Law of Evidence in Civil Cases.* Toronto : Butterworths, 1974.

Vattel, Emer de. *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Book II, new edition by Joseph Chitty. London: S. Sweet, 1834.

Woodward, Jack. *Native Law*. Toronto: Carswell, 1994 (loose-leaf updated 2000, release 2).

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

Graham Garton, *Q.C.*, and *Sandra Phillips*, for the appellant.

Peter W. Hutchins, *Anjali Choksi*, *Micha J. Menczer* and *Paul Williams*, for the respondent.

René Morin, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

Kenneth J. Tyler and *Robert J. C. Deane*, for the intervener the Attorney General of Manitoba.

Timothy Leadem and *Kathryn Kickbush*, for the intervener the Attorney General of British Columbia.

Murray Marshall and *François Dandonneau*, for the intervener the Mohawk Council of Kahnawake.

Jack R. London, *Q.C.*, and *Martin S. Minuk*, for the intervener the Assembly of First Nations.

Henry J. Bear, for the intervener the Union of New Brunswick Indians.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Arbour and LeBel JJ. was delivered by

Story, Joseph. *Commentaries on the Constitution of the United States*, 4th ed., vol. II. Boston : Little, Brown, 1873.

Vattel, Emer de. *Le Droit des gens ou Principes de la loi naturelle, appliquée à la conduite et aux affaires des nations et des souverains*, t. 1, nouv. éd. Paris : Aillaud, 1830.

Woodward, Jack. *Native Law*. Toronto : Carswell, 1994 (loose-leaf updated 2000, release 2).

POURVOI contre un arrêt de la Cour d'appel fédérale, [1999] 1 C.F. 375, 167 D.L.R. (4th) 702, 233 N.R. 129, [1999] 1 C.N.L.R. 112, [1998] A.C.F. nº 1513 (QL), qui a confirmé en partie un jugement de la Section de première instance, [1997] 4 C.N.L.R. 103, 134 F.T.R. 1, [1997] A.C.F. nº 882 (QL). Pourvoi accueilli.

Graham Garton, *c.r.*, et *Sandra Phillips*, pour l'appelant.

Peter W. Hutchins, *Anjali Choksi*, *Micha J. Menczer* et *Paul Williams*, pour l'intimé.

René Morin, pour l'intervenant le procureur général du Québec.

Gabriel Bourgeois, pour l'intervenant le procureur général du Nouveau-Brunswick.

Kenneth J. Tyler et *Robert J. C. Deane*, pour l'intervenant le procureur général du Manitoba.

Timothy Leadem et *Kathryn Kickbush*, pour l'intervenant le procureur général de la Colombie-Britannique.

Murray Marshall et *François Dandonneau*, pour l'intervenant le Conseil des Mohawks de Kahnawake.

Jack R. London, *c.r.*, et *Martin S. Minuk*, pour l'intervenante l'Assemblée des Premières nations.

Henry J. Bear, pour l'intervenante l'Union of New Brunswick Indians.

Version française du jugement du juge en chef McLachlin et des juges Gonthier, Iacobucci, Arbour et LeBel a été rendu par

THE CHIEF JUSTICE —

I. Introduction

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

2 Chief Mitchell is a Mohawk of Akwesasne, a Mohawk community located just west of Montreal, and a descendant of the Mohawk nation, one of the polities comprising the Iroquois Confederacy prior to the arrival of Europeans. On March 22, 1988, Chief Mitchell crossed the international border from the United States into Canada, arriving at the Cornwall customs office. He brought with him some blankets, bibles, motor oil, food, clothing, and a washing machine, all of which had been purchased in the United States. He declared the goods to the Canadian customs agents but asserted that he had aboriginal and treaty rights which exempted him from paying duty on the goods. After some discussion, the customs agents notified Chief Mitchell that he would be charged $142.88 in duty, and they permitted him to continue into Canada. Chief Mitchell, along with other Mohawks of Akwesasne, presented everything but the motor oil to the Mohawk community of Tyendinaga. The gifts were intended to symbolize the renewal of the historic trading relationship between the two communities. The oil was taken to a store in Akwesasne territory for resale to members of that community. In September of 1989, Chief Mitchell was served with a Notice of Ascertained Forfeiture

LE JUGE EN CHEF —

I. Introduction

La question en l'espèce est de savoir si les Mohawks canadiens d'Akwesasne ont le droit de rapporter au Canada des marchandises des États-Unis à des fins d'usage communautaire et de commerce avec d'autres Premières nations sans payer de droits de douane. Le grand chef Michael Mitchell soutient que les membres de sa communauté ont un droit ancestral qui écarte le droit canadien en matière de douanes. Le gouvernement répond que le droit revendiqué n'existe pas parce que, premièrement, il n'est pas établi par la preuve et que, deuxièmement, il serait fondamentalement contraire à la souveraineté canadienne. Au cœur du présent pourvoi se pose la question de la preuve qu'il faut soumettre pour établir un droit ancestral.

Le chef Mitchell est un Mohawk d'Akwesasne une communauté mohawk située juste à l'ouest de Montréal, et un descendant de la nation Mohawk, une des entités politiques de la Confédération iroquoise avant l'arrivée des Européens. Le 22 mars 1988, le chef Mitchell traverse la frontière des États-Unis au Canada, arrivant au bureau de douane de Cornwall. Il apporte avec lui des couvertures, des bibles, de l'huile à moteur, de la nourriture, des vêtements et une machine à laver, tous achetés aux États-Unis. Il déclare les marchandises aux agents de douane canadiens, mais affirme qu'il a des droits ancestraux et des droits issus de traités qui l'exemptent du paiement de droits de douane sur ces marchandises. Après discussion, les agents de douane informent le chef Mitchell qu'il devra payer des droits de 142,88 $ et ils l'autorisent à entrer au Canada. Le chef Mitchell, accompagné d'autres Mohawks d'Akwesasne, fait présent à la communauté mohawk de Tyendinaga de toutes les marchandises, sauf l'huile à moteur. Ces dons visent à symboliser le renouveau des relations commerciales historiques entre les deux communautés. L'huile à moteur est apportée à un magasin situé dans le territoire d'Akwesasne pour y être revendue aux membres de la communauté. En septembre 1989, l'intim reçoit un avis de confiscation compensatoire récla-

claiming $361.64 for unpaid duty, taxes and penalties.

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

II. Enactments

Constitution Act, 1982

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

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

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

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

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

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

mant 361,64 $ de droits impayés, de taxes et d'amendes

Je conclus que le droit ancestral revendiqué n'a pas été établi. La preuve éparse et ténue soumise en l'espèce pour démontrer l'existence d'un commerce mohawk au nord de la frontière entre le Canada et les États-Unis avant le contact avec les Européens ne permet tout simplement pas d'établir le droit revendiqué. Même si on déférait à la conclusion du juge de première instance sur ce point, un tel commerce était clairement accessoire dans la culture mohawk, et n'en faisait pas partie intégrante. En conséquence, le chef Mitchell est tenu de payer des droits de douane sur les marchandises qu'il a importées au Canada.

II. Les textes

Loi constitutionnelle de 1982

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.)

17. (1) Les marchandises importées sont passibles de droits à compter de leur importation jusqu'à paiement ou suppression des droits.

(2) Sous réserve des autres dispositions de la présente loi, le taux des droits payables sur les marchandises importées est celui qui leur est applicable au moment où elles font l'objet de la déclaration en détail ou provisoire prévue au paragraphe 32(1), (2) ou (5).

(3) Dès que l'importateur de marchandises dédouanées ou quiconque est autorisé à déclarer des marchandises en détail conformément à l'alinéa 32(6)*a*) devient redevable, en vertu de la présente loi, des droits afférents, la personne qui est propriétaire des marchandises au moment du dédouanement devient solidaire du paiement des droits.

31. Sous réserve de l'article 19, seul l'agent, dans l'exercice des fonctions que lui confère la présente loi ou une autre loi fédérale, peut, sauf s'il s'agit de marchandises dédouanées par lui ou par un autre agent, enlever des marchandises d'un bureau de douane, d'un entrepôt d'attente, d'un entrepôt de stockage ou d'une boutique hors taxes.

153. No person shall

. . .

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

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

III. Decisions

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

6 McKeown J. accepted that the Mohawks, like other aboriginal societies of North America, were accustomed to the concept of boundaries and paying for the privilege of crossing arbitrary lines established by other peoples. However, he con-

153. Il est interdit :

. . .

c) d'éluder ou de tenter d'éluder, délibérément et de quelque façon que ce soit, l'observation de la présente loi ou le paiement des droits qu'elle prévoit.

159. Constitue une infraction le fait d'introduire ou de tenter d'introduire en fraude au Canada, par contrebande ou non clandestinement, des marchandises passibles de droits ou dont l'importation est prohibée, contrôlée ou réglementée en vertu de la présente loi ou de toute autre loi fédérale.

III. Les décisions

En première instance ([1997] A.C.F. nº 882 (QL)) le juge McKeown déclare que le chef Mitchell jouit d'un droit ancestral existant, mais non d'un droit issu d'un traité, « de passer et de repasser librement l'actuelle frontière Canada-États-Unis, y compris le droit d'introduire au Canada, à partir des États-Unis, des marchandises destinées à un usage personnel et communautaire, sans acquitter de droits de douane [. . .] Ce droit ancestral comprend le droit d'introduire ces marchandises au Canada à partir des États-Unis aux fins d'un petit négoce avec les autres Premières nations » (par. 304). Il conclut que les ancêtres des Mohawks d'Akwesasne vivaient dans l'État actuel de New York, et que les monts Adirondacks représentaient la frontière nord de leur territoire. Ils voyageaient au nord dans le Canada actuel et traversaient ce qui est maintenant la frontière entre le Canada et les États-Unis, transportant avec eux des marchandises à usage personnel et communautaire. En outre, il conclut qu'avant l'arrivée des Européens, les Mohawks se servaient de la région entourant Akwesasne pour les voyages, les affaires diplomatiques et le commerce. L'histoire, selon lui, a établi l'existence d'un droit ancestral d'apporter en franchise des marchandises à travers la frontière actuelle et d'en faire le commerce avec d'autres Premières nations.

Le juge McKeown convient que les Mohawks, comme d'autres sociétés autochtones en Amérique du Nord, étaient accoutumés à la notion de frontières et au paiement de redevances pour franchir des frontières arbitrairement fixées par d'autres

cluded that this did not negate a modern right to cross such boundaries duty-free because it merely constituted regulation of the underlying aboriginal right to bring goods across boundaries freely. The *Customs Act* did not extinguish this right because it too was merely regulatory.

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

IV. Issues

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

A. What is the Nature of Aboriginal Rights?

B. What is the Aboriginal Right Claimed?

C. Has the Claimed Aboriginal Right Been Established?

(1) Evidentiary Concerns — Proving Aboriginal Rights

(a) Admissibility of Evidence in Aboriginal Right Claims

peuples. Toutefois, il conclut que cela ne dénie pas le droit moderne de traverser ces frontières hors douane parce qu'il s'agit simplement d'une réglementation du droit ancestral sous-jacent de franchir librement les frontières avec des marchandises. La *Loi sur les douanes* n'a pas éteint ce droit parce qu'elle aussi n'est qu'une loi de réglementation.

7 Le juge Sexton de la Cour d'appel fédérale ([1999] 1 C.F. 375), avec l'appui du juge en chef Isaac, confirme la conclusion du juge McKeown quant au droit ancestral d'introduire des marchandises au Canada en franchise, sous réserve de restrictions fondées sur la preuve de l'étendue traditionnelle du commerce mohawk : les marchandises doivent avoir été achetées dans l'État de New York; elles doivent être apportées à une frontière séparant l'État de New York de l'Ontario ou du Québec; et, si elles sont destinées au commerce, ce ne peut être qu'un commerce avec d'autres collectivités autochtones dans ces deux provinces. Le juge Létourneau aurait restreint le droit davantage : il aurait exclu le droit autonome de traverser librement la frontière, en exigeant que les Mohawks qui cherchent à exercer ce droit se présentent au bureau de douane de Cornwall, et aurait exclu le droit d'introduire des marchandises au Canada à des fins commerciales sans acquitter de droits de douane.

IV. Les questions en litige

8 La question du pourvoi est de savoir si le chef Mitchell a un droit ancestral qui empêche l'imposition de droits en application de la *Loi sur les douanes* sur certaines marchandises importées. Cette question peut être traitée de la manière suivante :

A. Quelle est la nature des droits ancestraux?

B. Quel est le droit ancestral revendiqué?

C. Le droit ancestral revendiqué a-t-il été établi?

(1) La preuve — Comment établir des droits ancestraux

a) L'admissibilité de la preuve dans les revendications de droits ancestraux

(b) The Interpretation of Evidence in Aboriginal Right Claims

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

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

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

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

V. Analysis

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

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

b) L'interprétation de la preuve dans les revendications de droits ancestraux

(2) La preuve révèle-t-elle l'existence d'une pratique ancestrale mohawk de commerce au nord du Saint-Laurent?

(3) La preuve établit-elle que la pratique alléguée d'un commerce à travers le Saint-Laurent faisait partie intégrante de la culture mohawk et s'est poursuivie jusqu'à aujourd'hui?

D. La reconnaissance du droit revendiqué est-elle interdite en raison de son incompatibilité avec la souveraineté de la Couronne?

Comme je conclus que le chef Mitchell n'a pas établi l'existence d'un droit ancestral, je n'ai pas besoin de traiter des questions d'extinction, d'atteinte et de justification.

V. L'analyse

A. *Quelle est la nature des droits ancestraux?*

Bien avant que les Européens explorent l'Amérique du Nord et s'y installent, les peuples autochtones occupaient et utilisaient la plus grande partie de ce vaste territoire en sociétés organisées et distinctives possédant leurs propres structures sociales et politiques. Les Français et les Britanniques ont été les premiers colons à s'établir dans la partie de l'Amérique du Nord qu'on appelle maintenant le Canada et, dès les premiers temps de leur exploration, ils ont revendiqué la souveraineté sur le territoire au nom de leur nation respective. Le droit anglais, qui a fini par régir les droits des peuples autochtones, acceptait que les Autochtones possédaient des lois et des intérêts préexistants, et reconnaissait leur maintien s'ils n'étaient pas éteints par la cession, la conquête ou la loi : voir par exemple la *Proclamation royale* de 1763, L.R.C. 1985, App. II, nº 1, et *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1103. Parallèlement, toutefois, Sa Majesté a affirmé sa souveraineté sur le territoire, et son titre sous-jacent à l'égard de ce territoire : *Sparrow*, précité. Cette affirmation de souveraineté a fait naître l'obligation de traiter le peuples autochtones de façon équitable et honora ble, et de les protéger contre l'exploitation, une

ized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

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

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

obligation qualifiée d'« obligation de fiduciaire » dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335.

10 En conséquence, l'établissement des Européens n'a pas mis fin aux intérêts des peuples autochtones qui découlaient de leur occupation et de leur utilisation historiques du territoire. Au contraire, les intérêts et les lois coutumières autochtones étaient présumés survivre à l'affirmation de souveraineté, et ont été incorporés dans la common law en tant que droits, sauf si : (1) ils étaient incompatibles avec l'affirmation de la souveraineté de la Couronne; (2) ils avaient été cédés volontairement par traité; ou (3) le gouvernement les avait éteints : voir B. Slattery, « Understanding Aboriginal Rights » (1987), 66 *R. du B. can.* 727. En dehors de ces exceptions, les pratiques, coutumes et traditions qui définissaient les diverses sociétés autochtones comme des cultures distinctives continuaient de faire partie du droit canadien : voir *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Mabo c. Queensland* (1992), 175 C.L.R. 1, p. 57 (le juge Brennan), p. 81-82 (les juges Deane et Gaudron), et p. 182-183 (le juge Toohey).

11 Leur statut de droits de common law rendait les droits ancestraux vulnérables à l'extinction unilatérale et, en conséquence, ils [TRADUCTION] « dépendaient de la bonne volonté du Souverain » : *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 App. Cas. 46 (C.P.), p. 54. Cette situation a changé en 1982, quand la Constitution canadienne a été amendée de façon à y inscrire les droits existants — ancestraux ou issus de traités : *Loi constitutionnelle de 1982*, par. 35(1). L'édiction du par. 35(1) a conféré un statut constitutionnel aux droits autochtones existants en common law (quoiqu'il soit important de noter que la protection donnée par le par. 35(1) s'étend au-delà des droits autochtones reconnus en common law : *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 136). Dès lors ces droits autochtones étaient couverts par la protection du par. 35(1) et ne pouvaient plus être unilatéralement abrogés par le gouvernement. Cependant, le gouvernement conservait le pouvoir de les restreindre

tives: see *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw*, *supra*.

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

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

pour des motifs valables, dans la poursuite d'objectifs publics impérieux et réels : voir *R. c. Gladstone*, [1996] 2 R.C.S. 723, et *Delgamuukw*, précité.

Dans les arrêts charnières *R. c. Van der Peet*, [1996] 2 R.C.S. 507, et *Delgamuukw*, précité, notre Cour confirme ces principes et énonce le critère permettant d'établir l'existence d'un droit ancestral. Comme le par. 35(1) vise à concilier l'occupation antérieure de l'Amérique du Nord par des sociétés autochtones avec l'affirmation de la souveraineté de la Couronne, le critère d'existence d'un droit ancestral est axé sur les caractéristiques déterminantes qui font partie intégrante de ces sociétés. Au strict essentiel, le demandeur autochtone doit établir l'existence d'une pratique, tradition ou coutume moderne qui a un degré raisonnable de continuité avec les pratiques, traditions ou coutumes qui existaient avant le contact avec les Européens. La pratique, coutume ou tradition doit avoir « fait . . . partie intégrante de la culture distinctive » autochtone, au sens où elle doit avoir distingué ou caractérisé leur culture traditionnelle et avoir été au cœur de leur identité. Elle doit être une « caractéristique déterminante » de la société autochtone, de sorte que la culture en cause serait « fondamentalement modifiée » sans elle. Il doit s'agir d'une caractéristique qui a une « importance fondamentale » dans la culture du peuple autochtone, qui « véritablement faisait de la société ce qu'elle était » (*Van der Peet*, précité, par. 54-59; souligné dans l'original). Cela exclut les pratiques, les traditions et les coutumes qui sont seulement marginales ou d'importance secondaire pour l'identité culturelle de la société autochtone, et met l'accent sur les pratiques, les traditions et les coutumes qui sont nécessaires à la vie, à la culture et à l'identité de la société autochtone en question.

Une fois établie l'existence d'un droit ancestral, il faut déterminer si l'acte qui est à l'origine du litige est une expression de ce droit. Les droits ancestraux ne sont pas figés dans l'état où ils s trouvaient avant le contact avec les Européens : ils peuvent trouver une expression moderne. La ques-

exercise of an ancestral practice, custom or tradition.

B. *What is the Aboriginal Right Claimed?*

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

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

Chief Mitchell characterizes his claim as the right to enter Canada from the United States with personal and community goods, without paying customs or duties, and the right to trade these goods with other First Nations. On the strength of this claimed right, he crossed the Canada-United States boundary with personal and community goods, the action giving rise to the case at bar. Although the motor oil was the only item transported by Chief Mitchell that was destined for

tion est de savoir si l'acte contesté constitue l'exercice moderne d'une pratique, coutume ou tradition ancestrale.

B. *Quel est le droit ancestral revendiqué?*

Avant de pouvoir déterminer si l'existence d'un droit ancestral a été établie, il faut caractériser le droit revendiqué. L'événement à l'origine du litige n'est que l'exercice allégué d'un droit sous-jacent; il ne révèle pas, en soi, la portée du droit revendiqué. Il faut donc déterminer la nature du droit revendiqué. Cette étape initiale de la définition est axée sur la nature véritable de la revendication, et non sur l'évaluation de son bien-fondé ou de la preuve présentée à son appui. 14

Dans *Van der Peet*, précité, par. 53, la majorité énonce trois facteurs qui devraient guider le tribunal dans la caractérisation d'un droit ancestral revendiqué : (1) la nature de l'acte qui, selon le demandeur, a été accompli en vertu d'un droit ancestral; (2) la nature de la loi ou de l'autre mesure gouvernementale qu'il dit porter atteinte au droit, c.-à-d. le conflit entre la revendication et la restriction; et (3) les traditions et pratiques ancestrales invoquées pour établir l'existence du droit. Le droit revendiqué doit être caractérisé en contexte et ne doit pas être déformé en fonction du résultat désiré. Il ne faut ni l'étendre ni le restreindre artificiellement. Une caractérisation trop étroite risque d'entraîner le rejet de revendications valides et une caractérisation trop large risque de déformer le droit en ne tenant pas compte de la culture et de l'histoire particulière de la société à laquelle appartient le demandeur : voir *R. c. Pamajewon*, [1996] 2 R.C.S. 821. 15

Le chef Mitchell définit le droit revendiqué comme étant le droit d'entrer au Canada en provenance des États-Unis avec des marchandises d'usage personnel et communautaire, sans acquitter de droits de douane, et le droit d'en faire le commerce avec d'autres Premières nations. Fort du droit revendiqué, il a traversé la frontière entre les États-Unis et le Canada avec des marchandises d'usage personnel et communautaire, et cet acte a donné lieu au présent litige. Même si l'huile à 16

resale, it can only be concluded that Chief Mitchell's actions — and his case — focused in fact on trade. The claimants asserted that "trade and commerce [is] central to their soul". Witness after witness was asked to describe historical Mohawk trading practices. Furthermore, when Chief Mitchell exercised his alleged right, all of the goods brought into Canada were trade-related: they were intended as gifts to seal a trade agreement with Tyendinaga and to signify renewed trading relations, in accordance with customary practice. Therefore the first factor, the action claimed as an exercise of an aboriginal right, suggests that the heart of the claim is the right to bring goods across the Canada-United States border for purposes of trade.

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

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

moteur était le seul article transporté par le chef Mitchell qui était destiné à la revente, nous devons conclure que les actes du chef Mitchell — et sa cause — étaient en fait axés sur le commerce. Les demandeurs ont affirmé que [TRADUCTION] « le commerce se situe au centre même [de leur] mode de vie ». On a demandé à de nombreux témoins de décrire les pratiques commerciales historiques des Mohawks. En outre, quand le chef Mitchell a exercé le droit qu'il revendique, toutes les marchandises apportées au Canada étaient liées au commerce : elles devaient être offertes pour conclure une entente commerciale avec les Tyendinaga et pour relancer les rapports commerciaux avec eux, conformément à la pratique coutumière. En conséquence, le premier facteur, l'acte censé constituer l'exercice d'un droit ancestral, indique que le droit de traverser la frontière entre le Canada et les États-Unis avec des marchandises, à des fins commerciales, est au cœur de la revendication en l'espèce.

Le deuxième facteur, la nature du conflit entre le droit revendiqué et la loi pertinente, bien que plus neutre, n'écarte pas cette conclusion. La loi en conflit avec le droit revendiqué est la *Loi sur les douanes*. Elle s'applique tant aux marchandises d'usage personnel qu'aux marchandises d'usage commercial.

Le troisième facteur à examiner pour caractériser le droit revendiqué concerne les traditions et pratiques des peuples autochtones en question. Les pratiques ancestrales autochtones que le demandeur invoque sont une forte indication de la nature et de la portée du droit revendiqué. En l'espèce, les demandeurs mettent l'accent sur leurs pratiques commerciales ancestrales; en fait, ces pratiques. et leur restriction contestée par l'appelant, sont au cœur du présent litige. Comme nous l'avons noté, les demandeurs affirment qu'historiquement, [TRADUCTION] « le commerce se situe au centre même [de leur] mode de vie ». Un des témoins experts du demandeur a déclaré que le commerce était une activité [TRADUCTION] « parfaitement naturelle » pour les Iroquois. Le gouvernement, sans nier q les Mohawks faisaient traditionnellement du com merce, soutient que ce commerce ne s'étendait pas

Act, 1982 extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty. Pursuant to this argument, any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under s. 35(1) as incompatible with the Crown's sovereign interest in regulating its borders.

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

This Court has not expressly invoked the doctrine of "sovereign incompatibility" in defining the rights protected under s. 35(1). In the *Van der Peet* trilogy, this Court identified the aboriginal rights protected under s. 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies: *Van der Peet*, *supra*, at para. 46. Subsequent cases affirmed this approach to identifying aboriginal rights falling within the aegis of s. 35(1) (*Pamajewon*, *supra*, at paras. 23-25; *Adams*, *supra*, at para. 33; *Côté*, *supra*, at para. 54; see also: Woodward, *supra*, at p. 75) and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.

selon lequel la protection du par. 35(1) de la *Loi constitutionnelle de 1982* vise uniquement les pratiques, coutumes et traditions autochtones qui sont compatibles avec l'exercice historique et contemporain de la souveraineté de la Couronne. Selon cet argument, toute pratique du commerce par les Mohawks à travers la frontière, même si elle était établie par la preuve, ne pourrait pas être reconnue en vertu du par. 35(1) parce qu'elle serait incompatible avec l'intérêt souverain de la Couronne à réglementer les frontières.

62 Cet argument a sa source dans le principe de la continuité qui a régi l'absorption des lois et coutumes autochtones dans le nouveau régime juridique dès l'affirmation de la souveraineté de la Couronne sur la région. Comme nous l'avons vu, l'incorporation des lois et coutumes locales dans la common law était assujettie à une exception visant les droits incompatibles avec la souveraineté du nouveau régime : voir Slattery, *loc. cit.*, p. 738; voir aussi *Delgamuukw c. British Columbia*, [1993] 5 W.W.R. 97 (C.A.C.-B.), par. 1021-1024, le juge Lambert; *Mabo*, précité, p. 61, le juge Brennan; *Inasa c. Oshodi*, [1934] A.C. 99 (P.C.); et *R. c. Jacobs*, [1999] 3 C.N.L.R. 239 (C.S.C.-B.).

63 Notre Cour n'a pas expressément invoqué le principe de « l'incompatibilité avec la souveraineté » lorsqu'elle a défini les droits protégés par le par. 35(1). Dans la trilogie *Van der Peet*, elle caractérise les droits ancestraux protégés en vertu du par. 35(1) comme étant les coutumes, pratiques et traditions faisant partie intégrante des cultures distinctives des sociétés autochtones : *Van der Peet*, précité, par. 46. Dans des arrêts subséquents, la Cour a confirmé cette approche de la définition des droits ancestraux que protège le par. 35(1) (*Pamajewon*, précité, par. 23-25; *Adams*, précité, par. 33; *Côté*, précité, par. 54; voir également : Woodward, *op. cit.*, p. 75); elle a aussi réaffirmé que les principes de l'extinction, de l'atteinte et de la justification constituaient le cadre d'analyse approprié pour résoudre les conflits entre des droits ancestraux et des revendications opposées, y compris des revendications fondées sur la souveraineté de la Couronne.

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

VI. Conclusion

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

The reasons of Major and Binnie JJ. were delivered by

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

67 It has been almost 30 years since this Court emphatically rejected the argument that the mere assertion of sovereignty by the European powers in North America was necessarily incompatible with the survival and continuation of aboriginal rights:

La Couronne soutient maintenant que « l'incompatibilité avec la souveraineté » est un élément implicite du critère établi dans *Van der Peet* pour caractériser les droits autochtones, ou en est le complément nécessaire. Vu ma conclusion selon laquelle le chef Mitchell n'a pas démontré que traditionnellement les Mohawks transportaient des marchandises à travers la frontière actuelle entre le Canada et les États-Unis pour en faire le commerce, et n'a donc pas établi l'existence du droit autochtone qu'il revendique, il n'est pas nécessaire que j'examine le bien-fondé de cet argument. Je préfère m'abstenir de tout commentaire sur la question de savoir dans quelle mesure le droit colonial en matière de succession des pouvoirs souverains est pertinent dans la définition des droits autochtones en vertu du par. 35(1), jusqu'à ce qu'il soit nécessaire pour la Cour de résoudre cette question.

VI. Conclusion

Je suis d'avis d'accueillir le pourvoi. Le chef Mitchell doit acquitter les droits que réclame le gouvernement. Je note que le gouvernement s'est engagé à payer les dépens du chef Mitchell.

Version française des motifs des juges Major et Binnie rendus par

LE JUGE BINNIE — J'ai pris connaissance des motifs du Juge en chef et je souscris au résultat qu'elle propose et à sa conclusion que, même si les Mohawks faisaient occasionnellement le commerce de marchandises au-delà du fleuve Saint-Laurent avec des Premières nations établies au nord, cette pratique n'était pas, selon la preuve, « une caractéristique déterminante de la culture mohawk » (par. 54) et elle n'était pas « vital[e] pour l'identité collective des Mohawks » (par. 60) avant le contact avec les Européens. Il y a toutefois d'autres considérations qui m'amènent à conclure que le pourvoi doit être accueilli.

Il y a près de 30 ans, notre Cour a rejeté catégoriquement l'argument selon lequel la simple affirmation de souveraineté par les puissances européennes en Amérique du Nord est nécessairement incompatible avec la préservation et le maintien de

regime, our Court has affirmed that "the intervention of French sovereignty [did not] negat[e] the potential existence of aboriginal rights within the former boundaries of New France under s. 35(1)": (*R. v. Côté*, [1996] 3 S.C.R. 139, at para. 51). The fighting between the French and the English and their respective First Nation allies continued until the fall of New France in 1759-60.

çais traitait les droits ancestraux différemment du droit colonial britannique, notre Cour a déclaré que « la souveraineté française [n'a pas] mis fin à l'existence potentielle de droits ancestraux visés au par. 35(1) à l'intérieur des frontières de ce qui constituait la Nouvelle-France » : *R. c. Côté*, [1996] 3 R.C.S. 139, par. 51. Les combats entre les Français et les Anglais, et leurs alliés respectifs au sein des Premières nations, se sont poursuivis jusqu'à la chute de la Nouvelle-France en 1759-60.

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

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

108 L'effet juridique du Traité de Paris de 1763 qui a suivi est décrit par le Comité judiciaire du Conseil privé dans *Attorney General for Canada c. Cain*, [1906] A.C. 542, p. 545-546 :

> [TRADUCTION] En 1763 le Canada et toutes ses dépendances, ainsi que les droits à la souveraineté, à la propriété et à la possession, et tous les autres droits qui avaient en tout temps été détenus ou acquis par la Couronne de France, ont été cédés à la Grande-Bretagne : *St. Catherine's Milling and Lumber Co.* c. *Reg.* (1888), 14 App. Cas. 46, p. 53. À partir de ce moment, la Couronne d'Angleterre a été investie de tous les pouvoirs législatifs et exécutifs au pays qui lui avaient été cédés et, sauf dans la mesure où elle s'est depuis départie de ces pouvoirs par loi, proclamation royale ou concession volontaire, elle en est toujours investie. Parmi les droits que possède le pouvoir suprême de chaque État il y a le droit d'en refuser l'entrée à un étranger, d'ajouter les conditions qu'il juge à propos à la permission d'entrer dans l'État et d'expulser ou de déporter de l'État, s'il le juge à propos, même un étranger amical, en particulier s'il estime que sa présence dans l'État est contraire à la paix, à l'ordre et au bon gouvernement, ou à ses intérêts sociaux ou matériels : Vattel, Law of Nations, t. 1, par. 231; t. 2, par. 125.

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

109 Les « étrangers » dans l'arrêt *Cain* étaient des citoyens américains. Pour les fins qui nous occupent, il convient de garder à l'esprit que l'intimé ne revendique pas en l'espèce une liberté de circulation accordée par la France, la Grande-Bretagne ou le Canada. Il a, bien entendu, les pleins droits de citoyen canadien. Mais en l'espèce, il ne revendique pas ces droits. Il revendique la liberté de circulation en tant que « citoyen de Haudenosaunee ». qui découle de la liberté de circulation des Mohawks antérieure à tous ces régimes.

110 Within two decades after the fall of New France, the American Revolution swept northwards. Troops of General George Washington on manoeuvres in New York State "destroyed the cornfields, burnt the Longhouses and basically wiped out as many of the Iroquois families that [*sic*] still existed", thereby reinforcing the northern migration of some of the Mohawks to British territory. The boundary that cuts through Akwesasne did not come into existence until the conclusion of the American War of Independence by a subsequent Treaty of Paris in 1783.

5. The Sovereignty Objection

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

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

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

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

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

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

Moins de 20 ans après la chute de la Nouvelle-France, la Guerre d'indépendance s'est étendue vers le nord. Les troupes du général George Washington en manœuvres dans l'État de New York [TRADUCTION] « ont détruit les champs de maïs, brûlé les cabanes longues et pratiquement exterminé toutes les familles iroquoises qui existaient encore » ce qui a renforcé la migration de Mohawks vers le nord dans le territoire britannique. La frontière qui traverse Akwesasne n'a été établie qu'après la conclusion de la Guerre d'indépendance par le Traité de Paris de 1783.

5. L'objection relative à la souveraineté

L'aspect inhabituel de la présente affaire tient à ce que non seulement la valeur, mais l'*objet* même du droit de commerce et de circulation revendiqué dépend d'une frontière qui, en soi, est l'expression de souverainetés non autochtones sur le continent nord-américain.

L'intimé est fier du patrimoine mohawk, et cela se comprend. On pense que la Confédération iroquoise a été formée vers 1450. À leur apogée, selon la preuve acceptée par le juge de première instance, au par. 100 :

> [TRADUCTION] . . . les Iroquois étaient parvenus à se doter de l'organisation sociale la plus remarquable du Nouveau Monde hormis le Mexique et le Pérou.

Les ancêtres de l'intimé au XVII^e siècle ne savaient certainement pas que des Rois d'une Europe lointaine revendiquaient la souveraineté sur le territoire mohawk. Comme l'a noté le juge en chef Marshall de la Cour suprême des États-Unis dans l'arrêt *Worcester c. Georgia*, 31 U.S. (6 Pet.) 515 (1832), p. 543 :

> [TRADUCTION] Il est difficile de comprendre que les habitants d'une partie du globe pouvaient avoir des revendications originales légitimes de suprématie sur les habitants de l'autre ou sur les terres qu'ils occupaient . . .

C'est pourtant ce qui est arrivé. En outre, selon le point de vue autochtone, ces premières revendications de « suprématie » européenne sont devenues réalité dans les décennies suivantes. L'avocat de l'intimé ne conteste pas la souveraineté cana-

seeks Mohawk autonomy within the broader framework of Canadian sovereignty.

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

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

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

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

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

This evidence with respect to the Haudenosaunee passport was said by respondent's counsel to go

dienne. Il revendique l'autonomie mohawk dans le cadre plus large de la souveraineté canadienne.

114 En common law, la notion de droits ancestraux est fondée sur le principe de la succession de pouvoirs souverains en droit colonial britannique. Les rédacteurs de la *Loi constitutionnelle de 1982* s'attendaient indubitablement à ce que les tribunaux tiennent compte de cette notion dans leur interprétation du par. 35(1). Cette question a été soulevée par le juge McLachlin maintenant Juge en chef (dissidente sur le résultat) dans *Van der Peet*, précité, par. 227 et 262 :

> Je suis d'avis que, pour répondre à la question de savoir ce qui constitue un droit ancestral, il convient d'examiner les droits qui ont historiquement été reconnus, en droit, comme étant des droits ancestraux fondamentaux.
>
> . . .
>
> Vu le caractère complexe et délicat de la question de la définition de droits ancestraux qui n'ont encore jamais été définis, l'approche pragmatique généralement appliquée en common law — le raisonnement fondé sur l'expérience découlant des précédents et des droits reconnus — présente maints avantages. [Je souligne.]

115 Je suis d'accord. La *Loi constitutionnelle de 1982* est l'introduction d'un nouveau chapitre et non d'un nouveau livre. Dans le cadre du par. 35(1), les tribunaux doivent considérer la common law (« les droits qui ont historiquement été reconnus, en droit ») pour déterminer ce qui constitue un droit ancestral.

116 L'intimé exprime ainsi sa revendication : de façon délibérée il passe et repasse la frontière internationale et présente son passeport haudenosaunee délivré dans la capitale de la Confédération mohawk à Onondaga, État de New York. Il explique ceci dans son témoignage :

> [TRADUCTION] Le [passeport] représente aussi pour moi non seulement la reconnaissance par ma propre Confédération iroquoise et la capitale de notre nation, Onondaga, du fait que je porte sur moi mon propre passeport, mais aussi [la] reconnaissance par le Canada et les États-Unis de la nation de qui relève ma citoyenneté.

L'avocat de l'intimé affirme que cette preuve relative au passeport haudenosaunee se rapporte [TRA-

"to the issue of the basis of the rights that the [respondent] is claiming in this case".

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

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

To which he adds at p. 135:

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

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

> Even though my grandfather didn't speak any English he was able to explain to me, as other elders have, that the promises made by the English to the Haudenosaunee that they would continue to recognize our nation as free and independent peoples. At one meeting they would recite it, what exactly were those words and the gist that we had to understand it.
>
> So, when our people in Akwesasne today say this border was not intended for us, they have an understanding in historical terms of the interpretation of those promises. In our language and the way it is passed down, the line of what is now known as the International Border belongs to somebody else. It wasn't meant

DUCTION] « à la question du fondement des droits que l'[intimé] revendique en l'espèce ».

Dans l'évaluation des revendications autochtones, les tribunaux sont tenus de prendre en considération le « point de vue des autochtones eux-mêmes » (*Sparrow*, précité, p. 1112; *Van der Peet*, précité, par. 49). Du point de vue de l'intimé, le droit ancestral découle de la souveraineté mohawk. Voici ce qu'il dit (pièce D-13, p. 107) :

> [TRADUCTION] Akwesasne est une communauté mohawk qui existe de temps immémorial, qui possède ses propres lois et son propre gouvernement, et nous avons de façon constante été déterminés à maintenir la souveraineté de notre nation.

Puis il ajoute, à la p. 135 :

> [TRADUCTION] Je me vois comme un chef de communauté, mais mes chefs nationaux sont les chefs de la nation mohawk. Je suis citoyen de Haudenosaunee; et si quelqu'un dit que je suis aussi citoyen canadien, j'admets tout au plus que nous bénéficions de certains avantages au Canada, par traité, les mêmes avantages qu'aux États-Unis.

Fondamentalement, l'intimé considère ses droits ancestraux comme un bouclier contre les lois non autochtones, y compris ce qu'il considère comme l'imposition d'une frontière [TRADUCTION] « qui n'était pas destinée à la nation kanienkehaka ou mohawk ni à aucun membre des Six-Nations ». Voici son témoignage au procès :

> [TRADUCTION] Même si mon grand-père ne parlait pas l'anglais, il pouvait m'expliquer, comme d'autres aînés l'ont fait, les promesses faites par les Anglais aux Haudenosaunees de continuer à reconnaître notre nation comme étant libre et indépendante. À une rencontre ils relataient l'événement, énonçaient exactement les mots qu'avaient prononcés les Anglais et l'essentiel que nous devions en comprendre.
>
> Alors, quand notre peuple à Akwesasne affirme aujourd'hui que cette frontière ne nous était pas destinée, ils ont une interprétation historique de ces promesses. Dans notre langue et de la façon dont cela nous a été transmis, la ligne de ce qui est maintenant connu comme étant la frontière internationale appartient à quelqu'un d'autre. Cette frontière n'était pas destinée à la nation kanienkehaka ou mohawk ou à aucun autre

for Kanienkehaka or the Mohawk Nation or any of the Six Nations. We understand that much.

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

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

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

> [T]he plaintiff as a Mohawk of Akwesasne resident in Canada has an existing aboriginal right which is constitutionally protected by sections 35 and 52 of the *Constitution Act, 1982*, when crossing the international border from New York to Ontario or Quebec, to bring with him

membre des Six-Nations. Nous comprenons au moins cela.

Dans ce témoignage, l'intimé évoque les « promesses faites par les Anglais aux Haudenosaunees », mais le juge de première instance a rejeté sa revendication visant à fonder les exemptions fiscales et le droit de commerce et de circulation sur un droit existant issu d'un traité, et cette décision n'a pas été portée en appel devant notre Cour. Il soutient ici que, avec ou sans promesse des Britanniques à cet effet par traité, les Mohawks étaient en fait libres en vertu du régime juridique mohawk [TRADUCTION] « de passer et de repasser [. . .] ce qui est maintenant la frontière Canada-États-Unis » avec des marchandises pour usage commercial et que cette liberté devrait maintenant être protégée par l'art. 35. Cette revendication du droit de commerce et de circulation à travers les frontières internationales, en tant que citoyen de Haudenosaunee, met en jeu la question de la souveraineté. 119

6. La non-allégation de certains aspects de la réclamation de l'intimé

Le jugement déclaratoire de la Section de première instance reconnaît un droit ancestral « de passer et de repasser librement ce qui est maintenant la frontière Canada-États-Unis, ce droit comprenant également le droit d'introduire au Canada des marchandises à usage personnel et communautaire, y compris des marchandises destinées au commerce avec les autres Premières nations, et ce sans avoir à acquitter à un gouvernement ou autre autorité canadienne des taxes ou des droits de douane » (par. 3 (je souligne)). Les mots « comprenant » et « y compris » ont par la suite été enlevés en vue de réduire la portée du droit ancestral revendiqué dans *ces* procédures et, par le fait même, de restreindre ce que pouvait contester l'appelant. La Cour d'appel fédérale a ajouté des restrictions géographiques au droit revendiqué. Finalement, le jugement déclaratoire de la Cour d'appel fédérale se lit comme suit (au par. 56) : 120

> Le demandeur, en sa qualité de Mohawk d'Akwesasne résidant au Canada, jouit d'un droit ancestral existant que protègent les articles 35 et 52 de la *Loi constitutionnelle de 1982*, savoir celui de rapporter en franchise des droits de douane et taxes du Canada, lorsqu'il tra-

to Canada, for personal use or consumption, or for collective use or consumption by the members of the community of Akwesasne, or for non-commercial scale trade with First Nation communities in Ontario or Quebec, goods bought in the State of New York without having to pay any duty or taxes to the government of Canada.

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

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

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

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

verse la frontière internationale pour aller de l'État de New York en Ontario ou au Québec, des marchandises achetées dans cet État pour son usage ou sa consommation personnelle, ou pour l'usage ou la consommation collective des membres de la communauté d'Akwesasne, ou encore à des fins d'échanges non commerciaux avec d'autres Premières nations en Ontario ou au Québec.

Dans son exposé introductif au procès, l'avocat de l'intimé a indiqué clairement que, dans *cette* action, on ne revendiquait pas le droit d'importer des marchandises prohibées ou contrôlées :

> [TRADUCTION] J'aimerais bien faire comprendre dès le début du procès que le demandeur affirme immédiatement et sans équivoque qu'il n'est pas ici pour revendiquer un droit de traverser la frontière entre les États-Unis et le Canada en transportant une forme quelconque d'arme à feu ou de drogue, alcool, plante ou produit semblable à usage restreint ou prohibé. Par ailleurs, les faits de l'espèce ne soulèvent pas la question de l'importation au Canada de marchandises commerciales en vue principalement d'être compétitif sur le marché canadien. Le demandeur ne demande pas qu'une décision judiciaire soit rendue sur cette question dans la présente affaire. [Je souligne.]

Quand le juge de première instance lui a demandé si la revendication comprenait la « vente commerciale » (telle que définie par ex. dans *Gladstone*, précité, par. 57), il a répondu : [TRADUCTION] « pas à ce moment ».

L'intimé prétend que les autochtones n'ont pas à revendiquer la pleine portée de leur droit. Il a répété que l'art. 35 visait à réconcilier la société canadienne et ses communautés autochtones (*Van der Peet*, précité), et a qualifié son consentement à exclure de sa revendication le droit de transporter au-delà de la frontière des marchandises prohibées (p. ex. des armes à feu et des drogues illicites) et des marchandises contrôlées (dont l'alcool, mais pas le tabac) de concession raisonnable dans la poursuite d'une telle réconciliation. Toutefois, pour déterminer si la preuve établit le droit revendiqué, il faut examiner *toute* la preuve pour déterminer si, dans son ensemble, elle établit non seulement une pratique antérieure au contact avec les Européens *susceptible* de se poursuivre sous les nouveaux

under the new European-based legal orders but a practice that is compatible with Canadian sovereignty.

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

7. The Substance of the Claim Disclosed by the Evidence

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

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

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

régimes juridiques européens mais aussi une pratique compatible avec la souveraineté canadienne.

124 Si on l'acceptait, l'analyse des jugements d'appel en faveur de la position de l'intimé signifierait qu'à l'avenir d'autres Mohawks pourraient soutenir avec une certaine fermeté que, puisque la pratique historique de la libre circulation des personnes et des marchandises a été établie en l'espèce, toute autre restriction à la circulation des marchandises, des personnes et peut-être même du capital devrait faire l'objet d'une justification en vertu du principe de l'arrêt *Sparrow*.

7. La nature de la revendication selon la preuve

125 Pour les motifs déjà exposés, la revendication de l'intimé, malgré les concessions faites au cours des débats, ne concerne pas seulement le déplacement physique de personnes ou de marchandises à Akwesasne. Elle vise à élargir au maximum l'autonomie mohawk au sein de la Constitution canadienne. Elle concerne l'aspiration des Mohawks à vivre comme si la frontière internationale n'existait pas. L'avantage financier qui découlerait de la capacité de transporter des marchandises au-delà de la frontière sans acquitter de droits est clairement accessoire à cette vision plus large.

126 Il est vrai que dans *R. c. Pamajewon*, [1996] 2 R.C.S. 821, par. 27, la Cour met en garde contre « un degré excessif de généralité » dans l'examen des droits ancestraux. Pourtant, quand la revendication, comme en l'espèce, vise clairement un droit de commerce et de circulation internationaux, il faut le considérer sous cet angle.

127 Dans le cadre constitutionnel qu'envisage l'intimé, le droit ancestral revendiqué est simplement une manifestation de la relation plus fondamentale entre les autochtones et les non autochtones. Dans la tradition mohawk, cette relation est symbolisée par le wampoum à « deux rangs », auquel se réfère l'intimé à la pièce D-13, p. 109-110, et dans son témoignage au procès (transc., vol. 2, p. 191-192), et qui est décrit comme suit dans l'exposé des

presentation to the Parliamentary Special Committee on Indian Self-Government in 1983 as follows:

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

(*Indian Self-Government in Canada: Report of the Special Committee* (1983), back cover)

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

129 The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship* (1996)), at p. 214, says that "Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil." This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in

Haudenosaunees au Comité spécial sur l'autonomie politique des Indiens en 1983 :

> Lorsque les Haudenosaunees sont entrés en contact avec les Européens, ils ont conclu avec eux des traités de paix et d'amitié. Chacun était symbolisé par la Gus-Wen-Tah ou ceinture de wampoums à deux rangs. Il y a un lit de wampoum blanc, qui est censé symboliser la pureté de l'entente. Il y a deux rangées en pourpre, et ces deux rangées sont conformes à l'esprit de vos ancêtres et des miens. Il y a trois perles de wampoum qui séparent les deux rangées. Elles symbolisent, ces trois perles, la paix, l'amitié et le respect.
>
> Les deux rangs représentent deux voies parallèles, deux embarcations navigant ensemble sur le même cours d'eau. L'une, un canot d'écorce, représente les Indiens, leurs lois, leurs coutumes et leurs traditions, tandis que l'autre, un navire, désigne les Blancs, leurs lois, leurs coutumes et leurs traditions. Les deux peuples voyagent côte à côte, chacun dans son embarcation, sans que ni l'un ni l'autre n'essaie de diriger l'embarcation de son voisin.

(*L'autonomie politique des Indiens au Canada : Rapport du Comité spécial* (1983), plat verso)

Le wampoum « à deux rangs » comporte deux courants parallèles. Le canot autochtone se déplace dans l'un d'eux et le navire européen dans l'autre. Les deux embarcations coexistent, mais ne se touchent jamais. Chacun d'eux est maître de sa propre destinée.

L'incarnation moderne du concept du wampoum « à deux rangs », modifié pour refléter certaines réalités de l'État moderne, est l'idée de souveraineté « fusionnée » ou « partagée ». Selon la « souveraineté fusionnée », les Premières nations n'ont pas été totalement assujetties à une souveraineté non autochtone mais, avec le temps, sont devenues des parties au fusionnement. Dans son rapport final, vol. 2 (« *Une relation à redéfinir* » (1996)), p. 236, la Commission royale sur les peuples autochtones affirme que « ce sont eux [les gouvernements autochtones] qui enracinent le plus profondément et le plus solidement la Constitution [du Canada] dans le sol canadien ». Cette notion nouvelle de la souveraineté de la Couronne est importante. Bien qu'historiquement, la Couronne ait pu être représentée comme une entité lointaine

1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

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

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

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

The s. 35(1) issue arising out of all this is signalled in the style of cause. The respondent sued as "GRAND CHIEF MICHAEL MITCHELL also known as KANENTAKERON". He lives with a

par-delà les mers à laquelle on ne pouvait guère s'attendre que les autochtones s'identifient, cela n'était plus le cas en 1982 quand le processus de conciliation du par. 35(1) a été établi. Avec le rapatriement de la Constitution, tous les aspects de la souveraineté canadienne se sont fermement ancrés à l'intérieur de nos frontières. Si le principe de « souveraineté fusionnée » énoncé par la Commission royale sur les peuples autochtones doit avoir un sens véritable, il doit comporter au moins l'idée que les Canadiens autochtones et non autochtones forment *ensemble* une entité souveraine munie d'une certaine communauté d'objectifs et d'efforts. C'est avec cette nouvelle entité, héritière des attributs historiques de la souveraineté, qu'il faut concilier les droits existants ancestraux ou issus de traités.

130 Le rapport final de la Commission royale sur les peuples autochtones, vol. 2, décrit ensuite la souveraineté « partagée » de cette façon (à la p. 266) :

> La souveraineté partagée est, à notre avis, une caractéristique de la fédération canadienne et un élément clé des rapports triangulaires qui lient les gouvernements autochtones, les gouvernements provinciaux et le gouvernement fédéral. Chacun d'eux est souverain à l'intérieur de sa propre sphère et détient ses pouvoirs en vertu de son statut constitutionnel et non par délégation. Néanmoins, dans la pratique, nombre de ces pouvoirs sont partagés et peuvent être exercés par plus d'un ordre de gouvernement.

Selon ce point de vue, pour reprendre la métaphore nautique du wampoum « à deux rangs », la souveraineté « fusionnée » est envisagée comme une seule embarcation (ou navire de l'État) constituée d'éléments historiques que sont le bois, le fer et la toile. Les éléments constitutifs de l'embarcation forment un tout harmonieux, mais le bois reste du bois, le fer reste du fer et la toile reste de la toile. Des dirigeants non autochtones, dont Sir Wilfrid Laurier, ont utilisé des métaphores semblables. Cela représente en peu de mots un partenariat sans assimilation.

131 La question qui découle de tout cela, aux fins du par. 35(1), ressort de l'intitulé. L'intimé poursuit en justice sous le nom de « GRAND CHEF MICHAEL MITCHELL alias KANENTAKE-

foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities. As Kanentakeron he describes learning from his grandfather the spiritual practices of the People of the Longhouse, whose roots in North America go back perhaps 10,000 years. Yet the name Michael Mitchell announces that he is also part of modern Canada who watches television from time to time and went to high school in Cornwall. As much as anyone else in this country, he is a part of our collective sovereignty. He writes in Exhibit D-13, at p. 135:

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

132 The dual aspect reflected in the style of cause of the respondent's action also finds its parallel in the Court's treatment of the rights of aboriginal peoples. What is "integral to the aboriginal community's distinctive culture" (*Van der Peet*, at para. 55) is constitutionally protected. In *other* respects however, the respondent and other aboriginal people live and contribute as part of our national diversity. So too in the Court's definition of aboriginal rights. They find their source in an earlier age, but they have not been frozen in time. They are, as has been said, rights not relics. They are projected into modern Canada where they are exercised as group rights in the 21st century by modern Canadians who wish to preserve and protect their aboriginal identity.

133 In the earlier years of the century the federal government occasionally argued that Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") was plenary. Indians were said to be federal people whose lives were wholly subject to federal "regulation". This was rejected by the courts, which ruled that while an aboriginal person could be characterized as an Indian for some purposes

RON ». Il appartient simultanément à deux communautés culturelles, qui ont chacune leur propre système de droits et de responsabilités juridiques. En tant que Kanentakeron, il relate comment son grand-père lui a enseigné les pratiques spirituelles du Peuple de la cabane longue, dont les racines en Amérique du Nord remontent à 10 000 ans peut-être. Pourtant le nom Michael Mitchell indique qu'il appartient aussi au Canada moderne; à l'occasion il regarde la télévision et il est allé à l'école secondaire à Cornwall. Comme quiconque au pays il fait partie de notre souveraineté collective. Voici ce qu'il dit, pièce D-13, p. 135 :

> [TRADUCTION] Si quelqu'un pense que les Mohawks sont anti-Canadiens ou anti-Américains, j'aimerais rappeler que les Premières nations en Amérique du Nord, proportionnellement à d'autres nationalités, ont envoyé plus de soldats aux Première et Seconde Guerres mondiales. Puisque nous nous retrouvions habituellement aux premières lignes du front, beaucoup parmi les nôtres ne sont pas revenus chez eux.

La dualité que révèle l'intitulé de l'action intentée par l'intimé fait parallèle à la façon dont la Cour traite les droits des autochtones. Ce qui est « partie intégrante de la culture distinctive de la société autochtone » (*Van der Peet*, par. 55) est protégé par la Constitution. À d'*autres* égards toutefois, l'intimé et d'autres autochtones font partie de notre diversité nationale et y contribuent. Cela est vrai aussi dans la définition donnée par notre Cour aux droits autochtones. Ils trouvent leur origine à une époque antérieure, mais ils n'ont pas été figés dans le temps. Comme on l'a dit, il s'agit de droits et non de reliques. Ils sont projetés dans un Canada moderne où ils sont exercés comme droits collectifs au 21e siècle par des Canadiens modernes qui souhaitent préserver et protéger leur identité autochtone.

Au début du 20e siècle, le gouvernement fédéral faisait occasionnellement valoir que la compétence du Parlement en vertu du par. 91(24) de la *Loi constitutionnelle de 1867* (« Les Indiens et les terres réservées aux Indiens ») était absolue. On disait que les Indiens étaient des « personnes fédérales » dont la vie était entièrement régie par la « réglementation » fédérale. Cette approche a été rejetée par les tribunaux, qui ont jugé que, bien

including language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. For other purposes he or she must be recognized and treated as an ordinary member of Canadian society. In a decision handed down soon after the coming into force of the *Constitution Act, 1982*, *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, a tax case, Dickson J. (as he then was) wrote at p. 36, "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities . . . of other Canadian citizens". See also *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 763, *per* Laskin C.J., and *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326, *per* Beetz J. In *Gladstone* (at para. 73) and again in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (at para. 165), Lamer C.J. repeats that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign" (emphasis added). The constitutional objective is reconciliation not mutual isolation.

The Royal Commission does not explain precisely how "shared sovereignty" is expected to work in practice, although it recognized as a critical issue how "60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities" would "interact with the jurisdictions of the federal and provincial governments" in cases of operational conflict (final report, vol. 2, *supra*, at pp. 166 and 216). It also recognized the challenge aboriginal self-government poses to the orthodox view that constitutional powers in Canada are wholly and exhaustively distributed between the federal and provincial governments: see, e.g., *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 (P.C.), at p. 581; P. W. Hogg and M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 *Can. Bar Rev.* 187, at p. 192; this issue

qu'un autochtone puisse être caractérisé comme Indien à certaines fins, notamment la langue, la culture et l'exercice des droits traditionnels, il ne cesse pas pour autant d'être résident d'une province ou d'un territoire. Pour d'autres fins, il doit être reconnu et traité comme un membre ordinaire de la société canadienne. Peu après l'entrée en vigueur de la *Loi constitutionnelle de 1982*, dans *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, une affaire fiscale, le juge Dickson (plus tard Juge en chef) écrit, à la p. 36 : « Les Indiens possèdent la citoyenneté canadienne et, dans les affaires qui ne sont régies ni par des traités ni par la *Loi sur les Indiens*, ils ont les mêmes responsabilités [. . .] que les autres citoyens canadiens ». Voir aussi *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751, p. 763, le juge en chef Laskin, et *Dick c. La Reine*, [1985] 2 R.C.S. 309, p. 326, le juge Beetz. Dans *Gladstone* (au par. 73) et encore une fois dans *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010 (au par. 165), le juge en chef Lamer répète que « les sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie et sur laquelle s'exerce la souveraineté de Sa Majesté » (je souligne). L'objectif constitutionnel est la conciliation et non pas l'isolement mutuel.

134 La Commission royale n'explique pas précisément comment la « souveraineté partagée » doit fonctionner en pratique, même si elle reconnaît qu'il est crucial de déterminer « quelles sont les interactions entre » les « 60 à 80 nations historiques au Canada, par comparaison à un millier de collectivités autochtones », et « [la compétence] des gouvernements fédéral et provinciaux » en cas de conflit opérationnel (rapport final, vol. 2, *op. cit.*, p. 185 et 239). Elle reconnaît également le défi que constitue l'autonomie gouvernementale des autochtones à l'égard du point de vue orthodoxe selon lequel toutes les compétences constitutionnelles au Canada sont réparties entre les gouvernements fédéral et provinciaux : voir, p. ex., *Attorney-General for Ontario c. Attorney-General for Canada*, [1912] A.C. 571, p. 581; P. W. Hogg et M. E. Turpel, « Implementing Aboriginal Self-Government: Constitutional and Jurisdictional

is presently before the courts in British Columbia in *Campbell v. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122, 2000 BCSC 1123. There are significant economic and funding issues. Some aboriginal people who live off reserves, particularly in urban areas, have serious concerns about how self-government would affect them, as discussed in part in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. With these difficulties in mind perhaps, the Royal Commission considered it to be "essential that any steps toward self-government be initiated by the aboriginal group in question and "respond to needs identified by its members" (*Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (1993), at p. 41). It rejected the "one size fits all" approach to First Nations' self-governing institutions in favour of a negotiated treaty model. The objective, succinctly put, is to create sufficient "constitutional space for aboriginal peoples to be aboriginal": D. Greschner, "Aboriginal Women, the Constitution and Criminal Justice", [1992] *U.B.C. L. Rev. (Sp. ed.)* 338, at p. 342. See also J. Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001), 80 *Can. Bar Rev.* 15, at p. 34. The Royal Commission Final Report, vol. 2, states at p. 214 that:

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

135 It is unnecessary, for present purposes, to come to any conclusion about these assertions. What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sover-

Issues » (1995), 74 *R. du B. can.* 187, p. 192; les tribunaux de Colombie-Britannique sont actuellement saisis de cette question dans *Campbell c. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122, 2000 BCSC 1123. Il y a d'importantes questions économiques et financières en jeu. Certains autochtones qui vivent à l'extérieur des réserves, en particulier dans les régions urbaines, ont de sérieuses inquiétudes quant aux incidences que l'autonomie gouvernementale aurait sur eux, comme on l'a analysé en partie dans l'arrêt *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203. C'est peut-être en raison de ces difficultés que la Commission royale a estimé « essentiel que toute mesure visant à instaurer l'autonomie gouvernementale soit prise par le groupe autochtone intéressé et qu'elle réponde aux besoins déterminés par ses membres » (*Partenaires au sein de la Confédération : Les peuples autochtones, l'autonomie gouvernementale et la Constitution* (1993), p. 42). Elle rejette l'approche « taille unique » à l'égard des institutions autonomes des Premières nations et lui préfère un modèle de négociation des traités. L'objectif, en bref, est de créer suffisamment de [TRADUCTION] « place dans la Constitution pour que les autochtones puissent être des autochtones » : D. Greschner, « Aboriginal Women, the Constitution and Criminal Justice », [1992] *U.B.C. L. Rev.* (*Sp. ed.*) 338, p. 342. Voir aussi J. Borrows, « Uncertain Citizens: Aboriginal Peoples and the Supreme Court » (2001), 80 *R. du B. can.* 15, p. 34. Dans son rapport final, vol. 2, la Commission royale affirme (à la p. 237) :

> L'article 35 n'autorise pas à revendiquer les pouvoirs gouvernementaux illimités ou la souveraineté totale communément reconnus aux États indépendants. Tout comme les gouvernements fédéral et provinciaux, les gouvernements autochtones doivent agir au sein d'une sphère de souveraineté définie par la Constitution. En résumé, les pouvoirs correspondant au droit ancestral à l'autonomie gouvernementale visé au paragraphe 35(1) sont circonscrits et non illimités.

Il n'est pas nécessaire, pour les fins du pourvoi, de tirer des conclusions au sujet de ces affirmations. Ce qui importe c'est que la Commission royale elle-même considère les autochtones comme étant des participants à part entière, avec

eignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.

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

Q. You made particular reference, Chief Mitchell, to going to Onondaga. What is the significance of Onondaga?

A. In the Iroquois world as we understand it Onondaga is the capital of the Confederacy, much like Ottawa is the capital of Canada, Washington is the capital of the United States, Onondaga is the capital of the Haudenosaunee, of the Six Nations.

. . .

Q. Chief Mitchell, do you consider yourself a citizen of the Confederacy?

A. I am a citizen of the Haudenosaunee, the Iroquois Confederacy . . . . Each of the member nations of the Haudenosaunee if they wish to apply for a passport they go to Onondaga. The passport that we use to travel, we use our own Iroquois Confederacy passport.

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

8. The Legal Basis of the Respondent's Claim

The respondent initially asserted both a treaty right and an aboriginal right but the conceptual

les non autochtones, à une souveraineté canadienne partagée. Les autochtones ne s'opposent pas à la souveraineté canadienne, et ils ne lui sont pas asservis, ils en font partie.

136 Dans ce contexte, je reviens à l'argument selon lequel, dans cette affaire-test, l'intimé ne fonde pas sa liberté de circulation sur sa citoyenneté canadienne. Son avocat reconnaît que le par. 35(1) en soi n'est pas censé créer de droits. Il ne fait que réaffirmer des droits *existants*. Dans sa preuve, l'intimé présente son droit de commerce et de circulation internationaux comme un droit accessoire à son statut de citoyen de Haudenosaunee, dont la capitale est à Onondaga, près de Syracuse, New York. Il explique dans son témoignage :

[TRADUCTION]

Q. Vous avez parlé en particulier, chef Mitchell, d'un voyage à Onondaga. Que signifie Onondaga?

R. Dans le monde iroquois tel que nous le comprenons, Onondaga est la capitale de la Confédération; comme Ottawa est la capitale du Canada et Washington est la capitale des États-Unis, Onondaga est la capitale de Haudenosaunee, des Six-Nations.

. . .

Q. Vous considérez-vous, chef Mitchell, comme un citoyen de la Confédération?

R. Je suis un citoyen de Haudenosaunee, de la Confédération iroquoise [. . .] Les membres des nations de la Confédération Haudenosaunee qui désirent présenter une demande de passeport se rendent à Onondaga. Nous utilisons notre propre passeport de la Confédération iroquoise pour voyager.

137 La revendication de l'intimé présente donc deux éléments distinctifs. Il revendique un droit de commerce et de circulation à travers la frontière internationale et il lie ce droit au fait qu'il est actuellement citoyen non pas du Canada, mais de la Confédération haudenosaunee dont la capitale est à Onondaga, dans l'État de New York.

8. Le fondement juridique de la revendication de l'intimé

138 L'intimé a d'abord fait valoir un droit issu d'un traité et un droit ancestral, mais la distinction con-

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

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

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

141 I return to the comment of McLachlin J., dissenting in the result, in *Van der Peet*, *supra*, at para. 227 that "[t]he issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights". There was a presumption under British colonial law that the Crown intended to respect the pre-existing customs of the inhabitants that were not deemed to be unconscionable (e.g., Blackstone in *Commentaries on the Laws of England* (4th ed. 1770), Book I, at p. 107, gave the example, now discredited, of "infidel" laws) or incompatible with the new sovereignty: *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.), at pp. 1047-48; *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), at paras. 1021-24. Professor B. Slattery formulated the traditional principle as follows:

> When the Crown gained sovereignty over an American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in

droit issu d'un traité est une promesse affirmative de Sa Majesté, qui sera interprétée libéralement et mise en application d'une façon qui préserve l'honneur de Sa Majesté : *R. c. Taylor* (1981), 62 C.C.C. (2d) 227; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Marshall*, [1999] 3 R.C.S. 456.

Le juge de première instance a reconnu que si des dispositions concernant la franchise de droits avaient été introduites dans un traité avec les Mohawks, la promesse serait exécutoire comme droit issu d'un traité au sens de l'art. 35. Un droit issu d'un traité est en soi une expression de la souveraineté de la Couronne.

Dans le cas de droits ancestraux, il n'y a aucun événement historique comparable au processus de conclusion des traités, où Sa Majesté a négocié le droit ou l'obligation qu'on cherche à faire respecter. La revendication de l'intimé est fondée sur des pratiques qui, selon lui, existent depuis bien avant le premier contact des Mohawks avec les Européens en 1609.

Je reviens au commentaire que faisait le juge McLachlin dissidente sur le résultat dans *Van der Peet*, précité, par. 227 : « Je suis d'avis que, pour répondre à la question de savoir ce qui constitue un droit ancestral, il convient d'examiner les droits qui ont historiquement été reconnus, en droit, comme étant des droits ancestraux fondamentaux. » Il était présumé, en droit colonial britannique, que Sa Majesté avait l'intention de respecter les coutumes préexistantes des habitants qui n'étaient pas contraires à la conscience (p. ex., Blackstone dans *Commentaires sur les lois anglaises* (1822), t. 1, p. 184, donnait l'exemple, maintenant discrédité, des lois « infidèles ») ou incompatibles avec la nouvelle souveraineté : *Campbell c. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.), p. 1047-1048; *Delgamuukw c. British Columbia*, [1993] 5 W.W.R. 97 (C.A.C.-B.), par. 1021-1024. Le professeur B. Slattery énonce le principe traditionnel comme suit :

> [TRADUCTION] Quand Sa Majesté avait acquis la souveraineté sur un territoire en Amérique, le droit colonial établissait une présomption selon laquelle les coutumes

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R. v. **Campbell**

Her Majesty the Queen and Bradley **Campbell**, Accused

Manitoba Court of Queen's Bench

Martin J.

Judgment: July 21, **2011**
Docket: Winnipeg Centre CR 11-01-30860

Counsel: Tim Chudy, Nathaniel Carnegie, for Crown

Accused, for himself

Subject: Criminal; Public; Constitutional

Criminal law --- General principles — Jurisdiction — Jurisdiction of court — Miscellaneous

Over Indians — Accused was charged with second degree murder and conspiracy to commit robbery — Accused took position that Canadian courts lacked jurisdiction over him because Criminal Code (Code) did not apply to Indians — Parties made submissions on issue — Court held to have jurisdiction over accused — Accused's arguments that criminal law of Canada did not apply to Indians had no merit — There were various precedents in which Canadian courts held that Code applied to Indians — Leading constitutional academic stated that there was no general exemption to criminal law for Indian tribe or band — There was nothing in accused's materials that even remotely resembled what might be needed to support challenging application of specific law to Indian tribe or band — Materials provided by accused were, at best, gross distortion and misunderstanding of snippets of legal and other writings — Canada has valid Constitution, and there are no treaties or international law that prevent Canada from prosecuting Indians accused of committing serious crimes in Canada.

Aboriginal law --- Constitutional issues — Miscellaneous

Application of Criminal Code to Indians — Accused was charged with second degree murder and conspiracy to commit robbery — Accused took position that Canadian courts lacked jurisdiction over him because Criminal Code (Code) did not apply to Indians — Parties made submissions on issue — Court held to have jurisdiction over accused — Accused's arguments that criminal law of Canada did not apply to Indians had no merit — There were various precedents in which Canadian courts held that Code applied to Indians — Leading constitutional academic stated that there was no general exemption to criminal law for Indian tribe or band — There was

nothing in accused's materials that even remotely resembled what might be needed to support challenging application of specific law to Indian tribe or band — Materials provided by accused were, at best, gross distortion and misunderstanding of snippets of legal and other writings — Canada has valid Constitution, and there are no treaties or international law that prevent Canada from prosecuting Indians accused of committing serious crimes in Canada.

Cases considered by *Martin J.*:

R. v. Jones (1996), 1996 CarswellOnt 3987, 1996 CarswellOnt 3988, 50 C.R. (4th) 216, (sub nom. *R. v. Gardner)* 138 D.L.R. (4th) 204, (sub nom. *R. v. Pamajewon)* 27 O.R. (3d) 95, (sub nom. *R. v. Pamajewon)* [1996] 4 C.N.L.R. 164, (sub nom. *R. v. Pamajewon)* 92 O.A.C. 241, (sub nom. *R. v. Gardner)* 109 C.C.C. (3d) 275, (sub nom. *R. v. Pamajewon)* 199 N.R. 321, (sub nom. *R. v. Pamajewon)* [1996] 2 S.C.R. 821 (S.C.C.) — followed

R. v. Jones (2000), [2000] 4 C.T.C. 27, [2000] 10 W.W.R. 116, 83 Alta. L.R. (3d) 103, 2000 CarswellAlta 591, 265 A.R. 96 (Alta. Q.B.) — considered

R. v. Moody (2004), 2004 CarswellMan 603, 2004 MBQB 247, 222 Man. R. (2d) 1 (Man. Q.B.) — con- sidered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

RULING on preliminary issue of whether court lacked jurisdiction over accused because *Criminal Code* did not apply to Indians.

***Martin J.*:**

Introduction

1 Mr. Campbell is charged with second degree murder and conspiracy to commit robbery. He refuses counsel. He believes he should not be detained in custody and he cannot be subject to a preliminary inquiry, or potentially a trial, as Canadian courts lack jurisdiction over him because the *Criminal Code*, R.S.C. 1985, c. C-46, does not apply to Indians.

Background

2 As will be explained more fully below, under normal circumstances I would have disposed of this issue summarily, but because of the way this matter has arisen and especially for the benefit of Mr. Campbell, and potentially other like-minded individuals, it is preferable to issue a written decision. I have no doubt Mr. Campbell is realistic enough to expect the result I will explain below and I sincerely hope, with this issue out of the way,

Mr. Campbell will focus his attention to the very serious allegations against him.

3 I acknowledge comments Mr. Campbell made several times: he is not stupid although he may be stubborn; and he firmly believes his argument and will not be dissuaded from it. I also note my observation that Mr. Campbell appears competent, but I am concerned that his understanding and views of the legal issues and processes are wholly misdirected. He appears to be significantly influenced by those who are promoting and writing his material. Further, based on the precedents provided to me, it appears those advising Mr. Campbell have a disturbing reach, as in the last few years several cases in the Provincial Court of Manitoba alone have been challenged using similar arguments and in some instances identical documents.

4 It is necessary to explain the appearances and materials relied on by Mr. Campbell in greater detail than might otherwise be required had this matter been advanced by counsel.

Judicial Process - Appearances

5 Mr. Campbell first appeared before me in February 2011 seeking judicial interim release regarding his charges that are alleged to have occurred in Winnipeg, Manitoba in 2010. Mr. Campbell strenuously asserted that he did not want any legal assistance, other than potentially that of an "orator". Before the hearing commenced he discharged his lawyer, an experienced and well-regarded defence counsel. He believed that having a lawyer would compromise his ability to advance his position that as an Indian no Canadian court had jurisdiction over him and, as such, he was not subject to the *Criminal Code*. I urged him to reconsider discharging his lawyer and adjourned without the bail hearing starting.

6 On March 1, 2011, he reaffirmed that he did not want a lawyer to assist him. I again urged him to reconsider. I also provided some general information about the process to make an application to have his position decided.

7 Mr. Campbell next appeared before me on April 26th. This was because the Crown had taken the initiative to file a motions brief, even though Mr. Campbell had not filed an application, regarding his claim that the court had no jurisdiction over him. Mr. Campbell said that he wanted the court to understand that he was not a citizen of Canada, as evidenced by certain papers he had or, alternately, the court could not prove he was a citizen. As Mr. Campbell had not been able to read the Crown's brief I adjourned the matter for him to do so.

8 On June 2nd, Mr. Campbell appeared again and made certain representations. As he had still not filed a notice of application, I tried to explicitly clarify what he was seeking and, ultimately, whether he wished me to rule on his assertion that the *Criminal Code* did not apply to him. At his request the matter was adjourned without a date.

9 He appeared next on June 28, 2011. In response to my asking what he wanted to do, he replied that he wanted me "to do my job" and that he was fighting the *Criminal Code*. He asked if I understood what he had faxed me and was referring to in court. I told him I understood the individual words but, bluntly, that as a coherent thought(s) it was nonsensical. This comment aroused an animated response from a spectator in the gallery who said he was the author of the document and identified himself (according to the transcript) as "high king and inherent chief Scott for the pace" (phonetic). He reiterated the *Criminal Code* did not apply to "our people" because "Canada is a business and is not England". Once order was restored Mr. Campbell gave a lengthy address and I reserved this decision.

Material Relied Upon by Mr. Campbell

10 For certainty, I note that during various appearances Mr. Campbell provided the following materials:

• "Notice of Exclusive Jurisdiction" — a document claiming, in part, that the court has no jurisdiction over Indians, which "is an exclusive right of the tribal government and can only be dealt with at international level".

• "Territory of the Anishinabe Tribe" - a document asserting, in part, that the court does not have jurisdiction over Signatory Indians. It states:

> Tribal Citizens give their allegiances only to the Law of our Territory (Clanmother) and are to be left undisturbed while fulfilling their responsibilities, as our Law takes precedence.

• A document addressed to the Provincial Court of Manitoba, asserting that Canada or Manitoba "... cannot pass legislation that could or would give legal trail [sic] for a Tribal Member to become a citizen of Canada..." It sets out various reasons that I will refer to regarding another document.

• A document purporting to be a transcript or excerpt of some remarks of the "Hon. J. J. Curran, Q.C., Solicitor General For Canada" on January 12, 1897.

• A notice to the Governor General of Canada, dated June 21, 2010, asserting, among other things, that Canada "... cannot pass legislation that could or would give legal trail [sic] for a Tribal Indian ruled by American-Indian Clan Mothers (Casus Omissus) is to become a Citizen of Canada..." because:

> • "It would be a violation of the Treaty stipulation that all Civilized nations are bound by since February 1491";
>
> • "It would violate the Te Deum filed with International court of the Hague, February 18, 1493";
>
> • "It would violate Manifest Destiny, renewed in 1990";
>
> • "It would violate basic international laws"; and
>
> • Canada must prove that "Tribal Beings" are citizens of Canada.

It continued that:

> For You to continue assuming Jurisdiction over Our Tribal Citizens would be a direct violation of the commands Your office received from the Queen dated 6th April, 2004, and would constitute the Crime of High Treason, still punishable by Death, and legal arrangements <u>are</u> already in place to make the necessary arrests to have this Crime adjudicated upon.

• Eight pages of handwritten notes explaining his argument;

• A document from the "Anishinabe-Tribal-Family", which purports to be a form of birth certificate for Mr. Campbell (to be known as Capay-Shicoot-Mayenghan);

• A document faxed to me on June 22, 2011 by Mr. Campbell asserting to be a notice from "The Occupant

of the Executor-Office for: BRADLEY-CAMPBELL, Estate". The document states many things including, for example,:

> ... the standing of this Executor-Office, and that the supposed decedent of BRADLEY-CAMPBELL, Estate, is in fact alive, having survived the presumption of death, and is not lost at sea nor incompetent, and is operating in his capacity without the waiver of any rights or defences as the living-heir and the beneficiary of the Estate for the Life, duly-appointed as the occupant of this Executor-Office.

It continued that: the government's claim against Mr. Campbell is adjourned; a hearing is scheduled for June 28, 2011; that no proceedings are authorized by "... this Executor-Office and all Estate property ... is directed to be immediately disbursed to the Executor-Office"; the presiding judge is a fiduciary trustee; and he is directed to "... align the trusts, dismiss all charges and release the Undersigned (Mr. Campbell) immedi- ately...".

Issue

11 The issue before me is whether Mr. Campbell, being charged with second degree murder and conspiracy to commit robbery contrary to the *Criminal Code*, is immune from prosecution by Canada because as an Indian he is not subject to the jurisdiction of Canada and its criminal law and procedures.

Positions

Mr. Campbell's Position

12 I shall do my best to explain Mr. Campbell's position, albeit in a summary or abbreviated fashion only.

13 Mr. Campbell explains, orally and through the eight-page argument referred to earlier, that as a member of the Anishinabe Tribe, "an exact people", he is only under the authority of the Clanmothers and cannot be charged with any crime by any court. The foundation for this position goes back as far as July 2, 408 A.D. when, he says, the "Iranius tribes" came to America for help defeating their enslavers, the Roman Empire. The treaty of "Iesis" followed which England was to honor — no one shall "detain, harass or molest a signatory indian [sic]". It flows, somehow, that Canada is a corporation and can only deal with corporate artificial people as (i) the "Imperial parliament" could not create a federal union in Canada by virtue of the British North America Act, and (ii) the people of Canada have not accepted a constitution, hence Canada does not have a constitution and has not since 1931. Perhaps as a partial explanation for why he has discharged counsel, he, and those who write his argument for him, say:

> For the record: "Rights" are violated with impunity by the privately owned Anglican Church legal system franchise known as the bar association via the Vatican and the British Crown!! Since 1933 everything occuring in the courtroom is not lawful, the judges and attorneys are signing orders and judgements. There is no law or legitimate government federal or state since 1861 the major law firms are running the courts "de facto"! ... [(sic) re: whole paragraph]

14 While much more could be noted, what I have summarized gives a reasonable flavour of his position.

Crown's Position

15 Not surprisingly, the Crown contends the criminal law of Canada applies to all persons who are alleged

to have committed a crime within the territorial jurisdiction of Canada.

Analysis

16 As noted, Mr. Campbell has not filed a notice of application specifying the relief he seeks or the grounds. Further, the materials referred to above do not meet any meaningful measure of authenticity or reliability. They are simply miscellaneous documents written by someone without any official capacity and no apparent authority. They are not evidence. They carry no weight or value. Finally, no brief was filed. The absence of these important procedural elements should normally cause a court to refuse to deal with the substantive issue or summarily dismiss it. Judicial resources should not be expended for the form of argument and material filed in this case. So, it is not without hesitation that I am nevertheless giving consideration to the essence of Mr. Campbell's position, articulated as the "issue" in these reasons. I do so because Mr. Campbell is an unrepresented person accused of offences carrying a potential consequence of life in prison and is apparently unwilling to address the practical realities of those allegations without first dealing with this issue. Further, importantly, the Crown agrees. Thus, I will deal with it but succinctly.

17 As I explained to Mr. Campbell in court, the Crown provided various precedents in which Canadian courts have held that the *Criminal Code* applies to Indians. In effect, the issue has already been decided.

18 Two such examples from superior courts are:

- *R. v. Jones* (2000), 265 A.R. 96 (Alta. Q.B.). In this case the native applicant took the position he was exempt from Canadian and Alberta income tax law because he was a member of a sovereign nation recognized by the Royal Proclamation of 1793 or because of ancestral treaty rights. Johnson J. dismissed the arguments noting at paragraphs 25 - 27:

  > 25. In *Regina v. Williams*, [1992] 1 S.C.R. 877 the Court held that the Aboriginal people are subject to the jurisdiction of the Court with respect to criminal offences and offences under Provincial law.
  >
  > 26. It is a clearly entrenched principle of sovereign integrity which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real and personal; within its own territory: *Regina v. Finta*, [1994] 1 S.C.R. 701 at 806.
  >
  > 27. In *Rex v. Beboning* (1908), 13 C.C.C. 405 at 413 (Ont. C.A.) Meredith, J.A. provides succinctly that:
  >
  > > The suggestion that the Criminal Code does not apply to Indians is also so manifestly absurd as to require no refutation ...

- *R. v. Moody*, 2004 MBQB 247, 222 Man. R. (2d) 1 (Man. Q.B.). Two Indians faced *Criminal Code* charges. They asserted they were immune from prosecution because their Indian status renders non-aboriginal laws inoperative against them. Menzies J. reviewed a number of precedents, including comments from the Supreme Court of Canada, and concluded at paragraph 14:

  > In my opinion the assertion by the Accused that they are immune from criminal prosecution due to their aboriginal status is inconsistent with the sovereignty of the federal and provincial governments. Their status is one found within and as a part of the broader community over which Canada is sovereign. The Accused are, for some intents and purposes "Indians" within the meaning assigned by the Constitution.

> However, for the purposes of the criminal law they remain ordinary members of Canadian society. To grant the Accused immunity from criminal prosecution would be inconsistent with the sovereignty of the Dominion of Canada.

19 As well, in Hogg, *Constitutional Law of Canada*, looseleaf, (Toronto: Carswell) at Chapter 28, the author writes extensively about aboriginal people and their rights. While noting that developing aboriginal law and interpretation of Canada's Constitution provide a mechanism, if specific criteria are established, for an Indian tribe or band to attempt to demonstrate that they are exempt from a law, it is also clear that there is no general exemption to the criminal law of Canada.

20 Specifically, there is nothing in law to suggest that Indians, just as anyone else in Canada whether a citizen, resident, visitor or immigrant, etc., are not generally subject to Canada's criminal law if they are alleged to have committed a crime in Canada.

21 By way of another example and binding precedent, the Supreme Court of Canada *in R. v. Jones*, [1996] 2 S.C.R. 821 (S.C.C.) [hereinafter Pamajewon], confirmed that the *Criminal Code* applies to Indians. In that case the Court rejected a claim by two First Nations that they could conduct high stakes gambling on their reserves, pursuant a law enacted by the band council but contrary to the *Criminal Code*. The case is an important one for many reasons, but relative to Mr. Campbell's assertions here, the Indian accuseds were convicted of violating gaming provisions of the *Criminal Code*. In other words, Canada had jurisdiction to prosecute them.

22 I pause to emphasize that whether an Indian tribe or band (often as represented by one or more individuals) is exempt from a federal or provincial law is a matter that must be considered on evidence properly before the court, tested against the criteria established by the Supreme Court of Canada in a number of seminal cases including *Jones* , *supra*, and other decisions referred to therein or issued since. I say this to emphasize that there is nothing in Mr. Campbell's materials that even remotely resembles what may be needed to support challenging a law.

23 Without in any way wishing to be offensive to Mr. Campbell, but recognizing the need for a plain and blunt assessment in order to emphasize the point to him: the arguments raised that the criminal law of Canada, specifically charges of murder and conspiracy to commit robbery, does not apply to Indians have no merit. Whoever is advising Mr. Campbell otherwise does not know what he is talking about and is simply wrong. All the materials provided here, by the "The Occupant of the Executor-Office for: BRADLEY-CAMPBELL, Estate" or otherwise are, at best, a gross distortion and misunderstanding of snippets of legal and other writings, or at worst, an incoherent rambling mass of words and phrases that taken together make no sense.

24 Despite what someone has told Mr. Campbell, Canada has a valid Constitution and there are no treaties or international law that prevent Canada from prosecuting anyone, specifically Indians, accused of committing serious crimes in Canada.

Conclusion

25 As noted at the outset, it will come as no surprise to Mr. Campbell that his assertion and arguments are dismissed. He is under the jurisdiction of Canada and the Crown is mandated to prosecute Mr. Campbell in accordance with the criminal law and procedure of Canada.

Final Remarks

26 Finally, I have no doubt that those people who have influenced or guided Mr. Campbell to take this futile position and raise these arguments in response to being charged with murder and conspiracy are a menace. Such people often use the bad circumstances of another person for their own purposes, ignoring the harm it can cause to that person's real interests. Here the harm shows itself by Mr. Campbell: discharging his lawyer because somehow it would otherwise compromise his jurisdiction argument; focusing on this matter rather than the murder and conspiracy allegations; and adjourning his bail application without a hearing on the merits.

27 Embracing aboriginal culture, heritage and tradition is important and often therapeutic or healing, but that is very different from believing the smoke and mirrors spouted by the likes of the "high king and inherent chief Scott...".

28 I again urge Mr. Campbell to focus on his upcoming preliminary inquiry and to reconsider having a lawyer represent him. Having received this decision, there is no valid reason not to seek a lawyer's help with the murder charge.

Order accordingly.

END OF DOCUMENT

2004 CarswellMan 603, **2004 MBQB 247**, 222 Man. R. (2d) 1

R. v. Moody

HER MAJESTY THE QUEEN and LESLIE MOODY and SAMUEL DYSART (Accused)

Manitoba Court of Queen's Bench

Menzies J.

Judgment: November 5, 2004
Docket: Thompson Centre CR 03-15-00037, 03-15-00039

Counsel: Heather Leonoff, Q.C., D. Coggan for Prosecution

Leslie Moody, Samuel Dysart, Accused for themselves

Subject: Public; Constitutional; Criminal

Aboriginal law --- Constitutional issues — Rights under constitutional statutes generally — Constitution Act, 1867 (British North America Act)

Accused were "Indians" within meaning of s. 91 ¶ 24 of Constitution Act, 1867 who faced numerous charges under Criminal Code of Canada — Accused claimed to be members of Nisichawayasihk Cree Nation (Nation), but led no evidence in support of this claim — Nation was signatory to Treaty No. 5, 1875 between Crown and Indians within ceded tract of land — Accused applied to oust criminal jurisdiction of court on grounds of immunity from prosecution under Code by virtue of their status as "Indians" under Constitution Act — Application dismissed — If accused were members of Nation, they were subject to prosecution under Code — Under Treaty No. 5, 1875, Nation accepted sovereignty of Queen, and agreed to obey law and maintain peace and good order — Any traditional right or custom which accused claimed created immunity from criminal prosecution was voluntarily surrendered in Treaty No. 5, 1875 — Even if accused did not fall under provisions of Treaty No. 5, 1875, this would not assist them in their assertion of immunity — Canadian criminal law applied to all First Nation peoples, since claim of immunity was inconsistent with sovereignty of Dominion of Canada — Accused's status as "Indians" was found within, and as part of, broader community over which Canada was sovereign — For purposes of criminal law, accused were ordinary members of Canadian society.

Aboriginal law --- Constitutional issues — Rights under constitutional statutes generally — Constitution Act, 1982

Accused were "Indians" within meaning of s. 35 of Constitution Act, 1982 who faced numerous charges under

Criminal Code of Canada — Accused claimed to be members of Nisichawayasihk Cree Nation (Nation), but led no evidence in support of this claim — Nation was signatory to Treaty No. 5, 1875 between Crown and Indians within ceded tract of land — Accused applied to oust criminal jurisdiction of court on grounds of immunity from prosecution under Code by virtue of their status as "Indians" under Constitution Act — Application dismissed — If accused were members of Nation, they were subject to prosecution under Code — Under Treaty No. 5, 1875, Nation accepted sovereignty of Queen, and agreed to obey law and maintain peace and good order — Any traditional right or custom which accused claimed created immunity from criminal prosecution was voluntarily surrendered in Treaty No. 5, 1875 — Even if accused did not fall under provisions of Treaty No. 5, 1875, this would not assist them in their assertion of immunity — Canadian criminal law applied to all First Nation peoples, since claim of immunity was inconsistent with sovereignty of Dominion of Canada — Accused's status as "Indians" was found within, and as part of, broader community over which Canada was sovereign — For purposes of criminal law, accused were ordinary members of Canadian society.

Criminal law --- Constitutional authority — Federal criminal law powers — Criminal power

Accused were "Indians" within meaning of Constitution Act who faced numerous charges under Criminal Code of Canada — Accused claimed to be members of Nisichawayasihk Cree Nation (Nation), but led no evidence in support of this claim — Nation was signatory to Treaty No. 5, 1875 between Crown and Indians within ceded tract of land — Accused applied to oust criminal jurisdiction of court on grounds of immunity from prosecution under Code by virtue of their status as "Indians" under Constitution Act — Application dismissed — If accused were members of Nation, they were subject to prosecution under Code — Under Treaty No. 5, 1875, Nation accepted sovereignty of Queen, and agreed to obey law and maintain peace and good order — Any traditional right or custom which accused claimed created immunity from criminal prosecution was voluntarily surrendered in Treaty No. 5, 1875 — Even if accused did not fall under provisions of Treaty No. 5, 1875, this would not assist them in their assertion of immunity — Canadian criminal law applied to all First Nation peoples, since claim of immunity was inconsistent with sovereignty of Dominion of Canada — Accused's status as "Indians" was found within, and as part of, broader community over which Canada was sovereign — For purposes of criminal law, accused were ordinary members of Canadian society.

Cases considered by *Menzies J.*:

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, *(*sub nom. *Mitchell v. M.N.R.)* 83 C.R.R. (2d) 1, 269 N.R. 207, *(*sub nom. *Mitchell v. M.N.R.)* 199 D.L.R. (4th) 385, *(*sub nom. *Mitchell v. M.N.R.)* [2001] 3 C.N.L.R. 122, 206 F.T.R. 160 (note), *(*sub nom. *Mitchell v. M.N.R.)* [2001] 1 S.C.R. 911, [2002] 3 C.T.C. 359 (S.C.C.) — considered

Statutes considered:

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91(24) — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Treaties considered:

Treaty No. 5, 1875 (Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House), 1875

Generally — referred to

APPLICATION by accused to oust criminal jurisdiction of court on grounds of immunity from prosecution under *Criminal Code* by virtue of their status as "Indians" under *Constitution Act*.

***Menzies J.*:**

The Position of the Accused

1 The two Accused come before the court facing numerous charges under the Criminal Code alleged to have occurred on or about April 18th, 2003 in the settlement of Nelson House in Manitoba.

2 The Accused claim they are 'Indians' within the meaning of section 91 (24) of the *Constitution Act*, 1867 and within the meaning of section 35 of the *Constitution Act*, 1982. The Crown does not dispute that assertion. The Accused assert they are immune from prosecution under the *Criminal Code of Canada* by virtue of their status as 'Indians' under the aforementioned Acts. It is the Accused's position their status renders non-aboriginal laws inoperative as against them.

Treaty Five

3 Although they offer no sworn evidence, the Accused claim to be members or at least residents of the traditional lands of the Nisichawayasihk Cree Nation. The Accused agrue that they have retained their aboriginal rights as an autonomous nation. The people of Nisichawayasihk Cree Nation were signatories to Treaty Five.

4 The Supreme Court of Canada dealt with the nature of Aboriginal Rights in the decision of *Mitchell v. Minister of National Revenue* also known as *Kanentakeron*, [2001] 1 S.C.R. 911 (S.C.C.). At paragraph 9 MacLachlin C. J. stated:

> English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation; see, e. g., the Royal Proclamation of 1763, R. S. C. 1985, App II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: Sparrow, supra.

5 And at paragraph 10:

> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via

the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727. Barring one of these exceptions, the practises, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British* Columbia, [1973] S. C. R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.). pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-183 (per Toohey J.).

6 With this legal framework the court must consider the assertion of immunity by the Accused as member of the Nisichawayasihk Cree Nation. Treaty Five contained the following provision:

> And the undersigned Chiefs, on their own behalf, and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and other of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts; and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.
>
> [The Honourable A. Morris, The Treaties of Canada with The Indians of Manitoba and the North-West Territories including the Negotiations on which they were based (Toronto: Belfords, Clark & Co., 1994) at 347]

7 By virtue of the provisions of Treaty Five, the Nisichawayasihk Cree Nation accepted the sovereignty of Her Majesty the Queen and agreed to obey and abide by the law. In addition, the peoples of the Nisichawayasihk Cree Nation agreed to maintain 'peace and good order'.

8 In my opinion, whatever traditional right or custom which the Accused assert creates immunity from criminal prosecution (which right was not articulated by either of the Accused) was surrendered voluntarily in Treaty Five. As members of the Nisichawayasihk Cree Nation, the Accused would be subject to prosecution under the *Criminal Code of Canada*.

Absence of a Treaty

9 Due to the lack of evidence led by the Accused, there may be some question as to whether the Accused are included in the provisions of Treaty Five or not. In my opinion this uncertainty does not assist the Accused in their assertion of immunity from prosecution.

10 Although the majority of the Supreme Court did not address the issue in the *Mitchell* case, supra, Binnie J. was of the opinion that even in the absence of a treaty, Canadian Criminal Law applies to all First Nation peoples because a claim of immunity is inconsistent with an assertion of sovereignty. Binnie J. stated at paragraph 133:

> In the earlier years of the century the federal government occasionally argued that Parliament's jurisdiction under s. 91(24) of the Constitution Act, 1867 ("Indians, and Lands reserved for the Indians") was plenary.

> Indians were said to be federal people whose lives were wholly subject to federal "regulation". This was rejected by the courts, which ruled that while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease to exist thereby to be a resident of a province or territory. For other purposes he or she must be recognized and treated as an ordinary member of Canadian society. In a decision handed down soon after the coming into force of the Constitution Act, 1982, *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, a tax case, Dickson J. (as he then was) wrote at p. 36, "Indians are citizens and, in affairs of life not governed by treaties of the Indian Act, they are subject to all of the responsibilities... of other Canadian citizens". See also *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 763, per Laskin C.J., and *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326, per Beetz J. In Gladstone (at para.73) and again in *Delgamuukw v. British* Columbia, [1997] 3 S. C. R. 1010 (at par. 165), Lamer C. J. repeats that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economical community, over which the Crown is sovereign" (emphasis added). The constitutional objective is reconciliation not mutual isolation.

11 And at para. 135:

> What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are a part of it.

12 Binnie J. continued at para. 141:

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

13 And finally at para. 150:

> Yet the language of s. 35 (1) cannot be construed as a wholesale repudiation of the common law. The subject matter of the constitutional provision is "existing" aboriginal and treaty rights and they are said to be "recognized and affirmed" not wholly cut loose from wither their legal or historical origins. One of the defining characteristics of sovereign succession and therefore a limitation on the scope of aboriginal rights, as already discussed, was the notion of incompatibility with the new sovereignty. Such incompatibility seems to have been accepted, for example, as a limitation on the powers of aboriginal self-government in the 1993 working report of the Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution, supra, at p. 23:
>
> > ...Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. Rather, they retained their ancient constitutions so far as these were not inconsistent with the new relationship. [Emphasis added.]

14 In my opinion the assertion by the Accused that they are immune from criminal prosecution due to their

aboriginal status is inconsistent with the sovereignty of the federal and provincial governments. Their status is one found within and as a part of the broader community over which Canada is sovereign. The Accused are, for some intents and purposes "Indians" within the meaning assigned by the Constitution. However, for the purposes of the criminal law they remain ordinary members of Canadian society. To grant the Accused immunity from criminal prosecution would be inconsistent with the sovereignty of the Dominion of Canada.

Decision

15 Having found no constitutional basis to oust the criminal jurisdiction of the Court, the Crown will be permitted to proceed with the criminal prosecutions against the Accused.

Application dismissed.

END OF DOCUMENT

1994 CarswellBC 1731, 52 B.C.A.C. 296, 86 W.A.C. 296, [1995] 2 C.N.L.R. 229

R. v. **Williams**

Regina, Respondent and Arnold **Williams**, Bernard Pascal, Keith James and Albert Pascal, Appellants CC930029 Reynold Joe, Appellant CC930030 Harold Pascal and Jason Wallace, Appellants CC930031 Henry Sauls, Appellant CC930032

British Columbia Court of **Appeal**

Donald J.A., Hinds J.A., Hollinrake J.A.

Heard: November 18, **1994**
Judgment: December 6, **1994**
Docket: CA018391

Proceedings: Affirmed (1993), [1994] 3 C.N.L.R. 173, 1993 CarswellBC 901 (B.C. S.C.)

Counsel: Harold Pascal, for himself and other Appellants.

P.G. Plant, for Respondent.

Subject: Public; Civil Practice and Procedure

Native Law --- Practice and procedure — Jurisdiction — Provincial Court

Accused claiming provincial Court not having jurisdiction over matters "beyond the treaty frontier" -- Wildlife Act, S.B.C. 1982, c. 57 — Criminal Code, R.S.C. 1985, c. C-46.

Accused were convicted of obstructing peace officers, mischief in relation to property and hunting with a firearm and light over cultivated land. Accused appealed on the ground that the provincial Court was without jurisdiction as the charges related to matters occurring "beyond the treaty frontier", namely, in places not surrendered or ceded to Crown by treaty. Held, the appeal was dismissed. The issue of juridical jurisdiction had been conclusively decided. No aboriginal jurisdiction superior to laws intended to govern provincial inhabitants survived the assertion of sovereignty. There was no residual aboriginal sovereignty capable of displacing the general jurisdiction of the provincial Court to try persons, whether aboriginal or non-aboriginal, for offences under the Act and the Code throughout the province, whether or not the alleged offences took place "beyond the treaty frontier". Accordingly, the provincial Court had jurisdiction.

***Mr. Justice Hollinrake*:**

1 On page 8, paragraph 18, line 2, of my reasons for judgment dated December 6, 1994, delete the word "unsurrounded" and substitute therefor the word "unsurrendered", so that the sentence shall read as follows: "In my opinion both *Delgamuukw* and *Sparrow* conclusively decide the issue before us whether the offence occurred on "unsurrendered Hunting Grounds" or not."

***Mr. Justice Hollinrake*:**

1 This matter comes before the Court by way of an application for leave to appeal from the decision of a summary conviction appeal court judge and, if leave be granted, an appeal.

2 The appellants are all aboriginal people.

3 I say at the outset that Crown counsel conceded that the issue before the Court is a question of law alone and, that being so, did not oppose the application of the appellants for leave to appeal.

4 I would grant leave to appeal.

5 I turn now to the appeal itself.

6 The appellants were not represented by counsel. The reason for this is well known by all the parties and I need not deal with it. Appearing before us was the appellant Harold Pascal who stood as spokesperson for himself and the other appellants. There was before the Court a factum and legal argument forming part of a notice of motion filed on behalf of the appellants. That factum was signed by Bruce Clark and the legal argument was signed by all the appellants "per ... Bruce Clark". Mr. Pascal, in addition to the submissions he made to the Court adopted everything found in the documents that had been filed by Mr. Clark.

7 The sole issue before the Court is whether the Provincial Court of British Columbia had jurisdiction over the appellants who had been charged with obstructing peace officers (s. 129(a) *Criminal Code*), mischief in relation to property (s. 430(3)(b) *Criminal Code*), and hunting with a firearm and a light over cultivated land (*Wildlife Act*, R.S.B.C. c. 57, ss. 27 (1)(e) and 40(1)(a)).

8 At trial in the provincial court the appellants objected to the court taking jurisdiction and not guilty pleas were deemed.

9 Harold Pascal and Jason Wallace were acquitted and the others found guilty.

10 The basis of the appeals of Harold Pascal and Jason Wallace is their assertion that while they were acquitted it was for the wrong reasons. Their acquittal was on the merits and they say the charges against them should have been dismissed on the ground that the provincial court judge had no jurisdiction to entertain them. The law is clear that an appeal is taken from the judgment of the court and not the reasons for that judgment. See: *Cole v. Cole*, [1943] 3 W.W.R. 532, 536 (B.C.C.A.).

11 In my view the proper disposition of the appeals of Harold Pascal and Jason Wallace is that they be quashed and I would so order.

12 I turn now to the other appellants.

13 Their position is that the Provincial Court of British Columbia was without jurisdiction as the charges re-

lated to matters occurring "beyond the treaty frontier", that is to say, in places which had not been surrendered or ceded to the Crown by treaty. These appellants say that in such a case neither the federal nor the provincial governments have legislative authority to constitute courts with jurisdiction over aboriginal people.

14 They say that *Delgamuukw*, [1993] 5 W.W.R. 97 (B.C.C.A.) and *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 do not settle this issue of juridical jurisdiction. The Crown's position as set out in its factum is that:

> The courts in their considered disposition of Sparrow and Delgamuukw specifically answered issues that undermine the Appellant's argument for a separate juridical jurisdiction. The reasoning in those cases provides a complete answer to the assertion that provincially constituted courts lack jurisdiction over aboriginal people in British Columbia.

15 The summary conviction appeal court judge, Cohen J., accepted the Crown's submissions and dismissed the appeals.

16 I quote at length from his judgment.

> The respondent's position is that the Provincial Court as constituted by the Provincial Court Act, S.B.C. 1969, c. 28, has absolute jurisdiction throughout the Province and there is no reservation of jurisdiction in respect of either aboriginal people or offenses committed in any part of the Province which may not have been ceded by treaty. The respondent claims further that the proposition that aboriginal people are not subject to the laws of Canada or the laws of British Columbia has been conclusively rejected. On this point, the respondent relies most heavily on the decision in ***Delgamuukw v. The Queen***, [1993] 5 W.W.R. 97 (B.C.C.A.) and contends that this case provides a complete answer to the appellants' arguments. With this contention, I agree. At pp.151-152, Macfarlane J.A., with whom Taggart and Wallace JJ.A. concurred, said:
>
> > 165. Rights of self-government encompassing a power to make general laws governing the land and resources in the territory, and the people in that territory, can only be described as legislative powers. They serve to limit provincial legislative jurisdiction in the territory and to allow the plaintiffs to establish a third order of government in Canada. Putting the proposition another way: the jurisdiction of the plaintiffs would diminish the provincial and federal share of the total distribution of legislative power in Canada.
> >
> > .....
> >
> > 167. It was on the date that the legislative power of the Sovereign was imposed that any vestige of aboriginal law-making competence was superseded. This likely occurred when the mainland colony was founded and became a territory under the jurisdiction of the Imperial Parliament in 1858.
> >
> > 168. Even if this view is inaccurate, a continuing aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867 and introduced into British Columbia in 1871. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada.
> >
> > .....
> >
> > 170. Any doubt that aboriginal people are subject to this distribution is eliminated by s. 91(24), which awards legislative competence in relation to Indians to Parliament.

> 171. With respect, I think that the trial judge was correct in his view that when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws. In 1871, two levels of government were established in British Columbia. The division of governmental powers between Canada and the Provinces left no room for a third order of government.

In a separate concurring judgment Wallace J.A. said at p. 200:

> 372. ...As a settled colony, the common law in British Columbia automatically came into force in 1846 when the Oregon Boundary Treaty established Britain's exclusive sovereignty north of the 49th parallel. It thereby superseded any indigenous system of laws.

And at pages 224-225, His Lordship said:

> 480. A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses in accordance with Gitksan, and Wet'suwet'en laws, and a declaration that the Province's jurisdiction is subject to the plaintiffs' jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846.
>
> 481. Thus, upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament. As Brennan J. stated in Mabo in relation to the aborigines in the colony of New South Wales at pp. 25-26:
>
> > The common law thus became the common law of all subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown...
> >
> > .....
> >
> > Thus the Meriam people ... became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided. (Emphasis added.)
>
> 482. Any possibility that aboriginal powers of self-government remained unextinguished was eliminated in 1871 by the exhaustive distribution of powers between the Province and the Government of Canada when British Columbia joined Confederation pursuant to the Terms of Union, 1871. Sections 91 and 92 of the Constitution Act, 1867 which provide for this division of powers have been repeatedly interpreted as distributing all legislative jurisdiction between Parliament and the provincial legislatures.
>
> 483. I agree with the conclusion of the trial judge that the plaintiffs, after 1846 and certainly after 1871, no longer retained any aboriginal right of self-government or jurisdiction over the territory nor any jurisdiction to govern the members of the Houses in accordance with Gitksan and Wet'suwet'en laws. As he observed at p. 386:
>
> > After that [the establishment of the separate colony of British Columbia in 1858] aboriginal customs, to the extent they could be described as laws before the creation of the colony, became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any

force, as laws, within the colony.

Then, at the time of union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts.

484. Section 35(1) of the Constitution Act, 1982 cannot revive or entrench any self-government jurisdiction of the plaintiffs since it is confirmed to aboriginal rights which existed in 1982. As I have made clear, no aboriginal rights of government existed after 1871.

I accept the respondent's submission that the result in ***Delgamuukw*** makes it plain that no aboriginal jurisdiction superior to laws intended to govern all inhabitants of this Province survived the assertion of sovereignty. Furthermore, as ***Delgamuukw*** upheld the finding of McEachern C.J.B.C. (as he then was) that the Royal Proclamation has never applied to this Province, the appellants cannot rely upon the Royal Proclamation as support for their position.

I conclude that the decision in ***Delgamuukw*** is binding upon this Court and governs the issues raised in the instant appeals. As, in my view, correctly stated by the Crown submission: "There is no residual aboriginal sovereignty capable of displacing the general jurisdiction of the Provincial Court to try persons, whether aboriginal or non-aboriginal, for offenses under the Wildlife Act and Criminal Code throughout British Columbia, whether or not the alleged offenses took place 'beyond the treaty frontier'.

17 I agree with these reasons expressed by Cohen J. in dismissing the appeals of the appellants.

18 In my opinion both *Delgamuukw* and *Sparrow* conclusively decide the issue before us whether the offence occurred on "unsurrounded Hunting Grounds" or not.

19 That being so, I would dismiss the appeals of the appellants other than Harold Pascal and Jason Wallace.

20 Mr. Pascal submitted to us that should we dismiss the appeals, as I would do, we should exercise the jurisdiction given to this Court by s. 37 of the *Supreme Court Act* and grant leave to appeal to the Supreme Court of Canada.

21 In my view this is a jurisdiction this Court should exercise sparingly. I think that this Court should exercise that jurisdiction only in the most exceptional circumstances. With respect, I do not think it can be said this case is such that this Court should grant leave to appeal to the Supreme Court of Canada. I do not question the significance of this case to the aboriginal people but in my view it is one that should go through the usual channel of seeking leave to appeal to the Supreme Court of Canada from that Court.

22 In result, I would quash the appeals of Harold Pascal and Jason Wallace and dismiss the appeals of the remaining appellants.

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1998 CarswellBC 163, (sub nom. R. v. Ignace) 156 D.L.R. (4th) 713, (sub nom. R. v. Ignace) 103 B.C.A.C. 273, (sub nom. R. v. Ignace) 169 W.A.C. 273

R. v. Pena

Regina, Respondent and Jones William Ignace, Shelagh Anne Franklin and James Allan Scott Pitawanakwat, Appellants

British Columbia Court of Appeal

Rowles, Prowse, Hall JJ.A.

Judgment: February 5, 1998
Docket: Vancouver CA023439, CA023440, CA023441

Proceedings: affirming (May 14, 1997), Doc. New Westminster X043738 (B.C.S.C.)

Counsel: J.W. Ignace, S.A. Franklin and J.A.S. Pitawanakwat, On their own behalf.

Charles F. Willms, Counsel for the Attorney General of British Columbia.

Subject: Public; Constitutional; Criminal

Criminal law --- Procedure at trial — Preliminary matters — Powers of court — General

Accused charged with offences which allegedly occurred on land which had not been originally purchased by crown from natives by treaty or purchase — Accused brought application for declaration that provincial supreme court without jurisdiction to hear indictment — Crown sought to dismiss application on basis that point of law argued had previously been determined by provincial court of appeal and was binding on provincial supreme court — Trial judge dismissed application — Accused appealed on ground that trial judge erred in dismissal of application for declaration that provincial supreme court had no jurisdiction to try accused for offences under Criminal Code — Well established that provincial courts have jurisdiction over aboriginal accused where offence allegedly committed within province, regardless of whether or not territory could be said to be "beyond the treaty frontier" or was "unsurrendered ground" — Immunity to prosecution claimed by accused framed in excessively general terms — Appeal dismissed.

Cases considered:

Delgamuukw v. British Columbia, [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 B.C.A.C. 1, 49 W.A.C. 1, [1993] 5 C.N.L.R. 1 (B.C. C.A.) — considered

Delgamuukw v. British Columbia, 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010 (S.C.C.) — considered

R. v. Clark (March 14, 1997), Doc. Vancouver CA022880 (B.C. C.A.) — referred to

R. v. Clark (July 31, 1997), Doc. 25988 (S.C.C.) — referred to

R. v. Jones, *(*sub nom. *R. v. Pamajewon)* 27 O.R. (3d) 95 (headnote only), *(*sub nom. *R. v. Pamajewon)* 92 O.A.C. 241, 50 C.R. (4th) 216, *(*sub nom. *R. v. Gardner)* 109 C.C.C. (3d) 275, *(*sub nom. *R. v. Gardner)* 138 D.L.R. (4th) 204, *(*sub nom. *R. v. Pamajewon)* 199 N.R. 321, *(*sub nom. *R. v. Pamajewon)* [1996] 2 S.C.R. 821, *(*sub nom. *R. v. Pamajewon)* [1996] 4 C.N.L.R. 164 (S.C.C.) — considered

R. v. Williams (1994), 52 B.C.A.C. 296, 86 W.A.C. 296, [1995] 2 C.N.L.R. 229 (B.C. C.A.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

APPEAL by accused from trial judge's dismissal of application for declaration that provincial supreme court had no jurisdiction to try accused for criminal offences.

The Court:

1 The appellants were convicted before Mr. Justice Josephson and a jury on 20 May 1997 of various offences charged under the *Criminal Code*, R.S.C. 1985, c. C-46 arising out of events which took place in the summer of 1995 at or near Gustafsen Lake in the Province of British Columbia.

2 During the course of the trial, the appellants brought an application for a declaration that the court was without jurisdiction to hear the Indictment on the grounds that the alleged offences occurred on land which had not been acquired originally by the Crown from the natives by treaty or purchase.

3 When the application was made by the appellants, the Attorneys General of British Columbia and Canada applied at the outset to dismiss the application on the grounds that the point of law upon which the application was based had been determined by the British Columbia Court of Appeal and, applying the principle of *stare decisis*, the determination was binding on the trial judge.

4 In dismissing the application, the trial judge referred to the following decisions of the Court of Appeal in which the same point had been considered and dismissed: *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C. C.A.); *R. v. Williams* (1994), [1995] 2 C.N.L.R. 229, 52 B.C.A.C. 296 (B.C. C.A.); and *R. v. Clark* (March 14, 1997), Doc. Vancouver CA022880 (B.C. C.A.) ; [leave to appeal to the Supreme Court of Canada refused, (July 31, 1997), Doc. 25988 (S.C.C.)] In the latter case, Gibbs J.A., whose reasons were concurred in by MacFarlane and Proudfoot JJ.A., declined to hear the jurisdictional argument on an appeal from a contempt conviction arising in the early pre-trial stages of these proceedings on the ground that arguments founded on similar jurisdictional propositions had been made in *Delgamuukw v. British Columbia* and *R. v. Williams* as well as in other jurisdictions and that the arguments had repeatedly been rejected.

5 On 20 May 1997, after 185 days at trial, the appellants were convicted as follows:

> Mr. Ignace was convicted of mischief, possession of a weapon for a purpose dangerous to the public peace, discharging a firearm at a police officer with intent to prevent the arrest of a person, and using a firearm in committing the assault of police officers. He received a sentence of four and one half years incarceration and a lifetime prohibition against possessing any firearm, ammunition or explosive substance.
>
> Ms. Franklin was convicted of mischief and received a sentence of twelve months incarceration to be served in the community followed by eighteen months on probation.
>
> Mr. Pitawanakwat was convicted of mischief and possession of a weapon for a purpose dangerous to the public peace and received a sentence of three years incarceration and a lifetime prohibition against possessing firearms, ammunition or explosive substances.

6 On 7 July 1997, the appellants filed notices of appeal from conviction challenging the jurisdiction of the court. None of the appellants sought to appeal from sentence. Subsequently, the appellants, Jones William Ignace and James Allan Scott Pitawanakwat, filed amended notices of appeal raising other grounds of appeal along with an appeal against sentence.

7 On 11 December 1997, the appellants, Mr. Ignace and Mr. Pitawanakwat, appeared in this Court, in person, before McEachern C.J.B.C., Cumming and Braidwood JJ.A. Mr. Ignace and Mr. Pitawanakwat applied to withdraw their amended notices of appeal and to have this appeal determined by this Court without oral argument. In granting the application to withdraw the amended notices of appeal, the Chief Justice, with whom Cumming and Braidwood JJ.A. concurred, said:

> ...I am prepared to accede to the wishes of the two appellants to withdraw their non-jurisdictional Notice of Appeal and Sentence Appeal.
>
> I am not persuaded that that is in your interests to do so and I believe that they are wrong in thinking that you cannot have both appeals, that you cannot have your conventional grounds of appeal and your jurisdictional of appeal, but I do not think that we should stand in your way of withdrawing the conventional or non-jurisdictional grounds of appeal and Sentence Appeal and I would so order.
>
> But in saying this I wish to record the fact that I think you are making a mistake in doing so and in my view this Court should give very careful consideration to allowing you subsequently to apply for an order to extend the time to refile those Notices of Appeal and to proceed with those appeals if at some time in the future you think you would like to deal with them on the grounds originally filed.

8 The Court ordered that the second notices of appeal were withdrawn as abandoned, that the appeals of the three appellants be consolidated and that the consolidated appeal could be determined by this Court on the basis of argument to be submitted in writing.

9 The issue before us is whether the trial judge erred in dismissing the application for a declaration that the Supreme Court of British Columbia had no jurisdiction to try the appellants for offences under the *Criminal Code*.

10 In *R. v. Williams* supra, at 233 (C.N.L.R.), this Court adopted the following concisely stated reasons of Cohen J. in rejecting the same argument in relation to jurisdiction over aboriginal accused:

> I accept the respondent's submission that the result in *Delgamuukw* [[1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470 (B.C.C.A.)] makes it plain that no aboriginal jurisdiction superior to laws intended to govern all inhabitants of this Province survived the assertion of sovereignty. Furthermore, as *Delgamuukw* upheld the finding of McEachern C.J.B.C. (as he then was) that the Royal Proclamation has never applied to this Province, the appellants cannot rely upon the Royal Proclamation as support for their position.
>
> I conclude that the decision in *Delgamuukw* is binding upon this Court and governs the issues raised in the instant appeals. As, in my view, correctly stated by the Crown submission: "There is no residual aboriginal sovereignty capable of displacing the general jurisdiction of the Provincial Court to try persons, whether aboriginal or non-aboriginal, for offenses under the *Wildlife Act* and *Criminal Code* throughout British Columbia, whether or not the alleged offenses took place 'beyond the treaty frontier'.

11 Nothing in the Supreme Court of Canada's recent decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), casts doubt on that reasoning. In *Delgamuukw*, in para. 141, the Supreme Court confirmed that "the purpose of s. 35(1) [of the *Constitution Act, 1982*] is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty...". The court also reaffirmed, at para. 170, its statement in *R. v. Jones*, [1996] 2 S.C.R. 821 (S.C.C.) that "rights to self-government, if they existed, cannot be framed in excessively general terms". The appellants claimed immunity to prosecution in this case is framed in excessively general terms.

12 It is well established that the courts of British Columbia have jurisdiction over aboriginal accused where an offence has allegedly been committed within the Province, regardless of whether or not the territory could be said to be "beyond the treaty frontier", or is "unsurrendered ground", as that terminology is used by the appellants in their argument before this Court.

13 The appeal is dismissed.

Appeal dismissed.

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2006 CarswellAlta 541, 2006 ABQB 307, [2006] A.W.L.D. 2248, [2006] A.W.L.D. 2262, [2006] A.W.L.D. 2261, [2006] A.W.L.D. 2224, 33 M.V.R. (5th) 258, 62 Alta. L.R. (4th) 143, [2006] 10 W.W.R. 722, 399 A.R. 144

Yellowhorn v. Alberta

Bella **Yellowhorn** (Appellant) and Her Majesty the Queen in Right of Alberta (Respondent)

Alberta Court of Queen's Bench

Langston J.

Heard: September 3, 2004
Judgment: April 19, **2006**
Docket: Lethbridge/Macleod 040281958S1

Counsel: Michael W. Swinwood for Appellant

Eric Brooks, Angela Edgington, Sandra Folkins for Respondent

Subject: Criminal; Public; Constitutional

Criminal law --- Trial procedure — Rights of accused — Right to retain counsel — Duty of court to ensure representation

Provision of counsel at public expense — Accused aboriginal person was charged with two offences under Motor Vehicle Administration Act, namely driving unregistered vehicle and driving without insurance — Accused was convicted in absentia of first charge, and unendorsed warrant was issued for her arrest on second charge — Accused was represented by agent, who was not lawyer, at trial of second charge — Trial judge convicted accused and fined her $2,500, which was minimum penalty available for offence — Accused was refused legal aid funding for her appeal — Accused brought application for order requiring Crown to fund her counsel on appeal — Application dismissed — Charge against accused ordinarily would not be sufficiently serious or complex to warrant provision of counsel at public expense — However, case was made complex by accused's assertion that, because of her status as aboriginal person, laws of Canada and of province were not applicable to her — Consideration of merits of appeal was required — Appeal related to constitutional and jurisdictional issues connected by overarching theme of aboriginal sovereignty — All of questions raised had been addressed by courts in past, and such arguments had been uniformly rejected — No merit existed in appeal, and while accused was entitled to fair trial and to fairness at appellate level, her representation by counsel at public expense was not necessary to achieve this end.

Criminal law --- Trial procedure — Costs — To whom payable — To defence by Crown

Interim costs — Accused aboriginal person was charged with two offences under Motor Vehicle Administration Act, namely driving unregistered vehicle and driving without insurance — Accused was convicted in absentia of first charge, and unendorsed warrant was issued for her arrest on second charge — Accused was represented by agent, who was not lawyer, at trial of second charge — Trial judge convicted accused and fined her $2,500, which was minimum penalty available for offence — Accused was refused legal aid funding for her appeal — Accused brought application for order requiring Crown to pay her interim costs — Application dismissed — Appeal related to constitutional and jurisdictional issues connected by overarching theme of aboriginal sovereignty — Accused levelled serious allegations against Canada, but no suggestion existed that any misconduct by Crown existed in respect of its conduct of present proceedings — Nor was there any suggestion that charge against accused was brought improperly — Award of costs against Crown was inappropriate, particularly at interim stage — In any event, accused failed to meet second and third criteria enunciated by Supreme Court of Canada regarding interim costs, namely no merit existed in her appeal, and issues raised had been considered and rejected by courts in previous cases.

Criminal law --- Post-trial procedure — Evidence — Fresh evidence — Factors to be considered — General

Accused aboriginal person was charged with two offences under Motor Vehicle Administration Act, namely driving unregistered vehicle and driving without insurance — Accused was convicted in absentia of first charge, and unendorsed warrant was issued for her arrest on second charge — On second charge, trial judge convicted accused and fined her $2,500, which was minimum penalty available for offence — Accused appealed and brought application to introduce fresh evidence, namely testimony of university professor on issues related to aboriginal sovereignty — Application dismissed — Information that professor proposed to impart was in his possession at time of accused's trial — Professor's testimony failed test for fresh evidence for reasons beyond just clear lack of due diligence — His testimony was not relevant to decisive issues on appeal, and evidence sought to be introduced was not such that, if believe, it could reasonably be expected to have affected result at trial.

Aboriginal law --- Constitutional issues — Bands and band government

Applicability of statute to aboriginal person.

Cases considered by *Langston J.*:

Atlantic Yarns Inc. / Les Filés Atlantique Inc., Re (1997), (sub nom. *Atlantic Yarns Inc., Re)* 192 N.B.R. (2d) 38, (sub nom. *Atlantic Yarns Inc., Re)* 489 A.P.R. 38, 1997 CarswellNB 388 (N.B. Q.B.) — referred to

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 114 C.R.R. (2d) 108, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161 (S.C.C.) — considered

Canadian Newspapers Co. v. Canada (Attorney General) (1986), 55 O.R. (2d) 737, 29 C.C.C. (3d) 109, 32 D.L.R. (4th) 292, (sub nom. *Canadian Newspapers Co. v. Canada)* 53 C.R. (3d) 203, 1986 CarswellOnt 127 (Ont. H.C.) — considered

Cardinal v. Alberta (Attorney General) (1973), [1974] S.C.R. 695, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553, 1973 CarswellAlta 154, 1973 CarswellAlta 89 (S.C.C.) — considered

Clark v. R. (1994), (sub nom. *Clark v. Canada)* [1995] 2 C.T.C. 2962, 1994 CarswellNat 1374 (T.C.C.) — considered

Clark v. R. (1997), 1997 CarswellNat 583, [1997] 2 C.T.C. 334, 97 D.T.C. 5289 (Fed. C.A.) — referred to

Clark v. R. (1997), (sub nom. *Clark v. Minister of National Revenue)* 223 N.R. 72 (note) (S.C.C.) — re- ferred to

Delgamuukw v. British Columbia (1993), [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 B.C.A.C. 1, 49 W.A.C. 1, [1993] 5 C.N.L.R. 1, 1993 CarswellBC 1167 (B.C. C.A.) — referred to

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

Four B Manufacturing Ltd. v. U.G.W. (1979), [1980] 1 S.C.R. 1031, [1979] 4 C.N.L.R. 21, 80 C.L.L.C. 14,006, 102 D.L.R. (3d) 385, 30 N.R. 421, 1979 CarswellOnt 715F, 1979 CarswellOnt 715 (S.C.C.) — considered

Nowegijick v. R. (1983), (sub nom. *Nowegijick v. Canada)* [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123, 1983 CarswellNat 520 (S.C.C.) — considered

R. v. Bernardo (1997), 1997 CarswellOnt 4956, 121 C.C.C. (3d) 123, 12 C.R. (5th) 310, 105 O.A.C. 244 (Ont. C.A.) — followed

R. v. Bonin (1989), 11 M.V.R. (2d) 31, 47 C.C.C. (3d) 230, 1989 CarswellBC 260 (B.C. C.A.) — not fol- lowed

R. v. Cai (2002), 2002 ABCA 299, 2002 CarswellAlta 1587, 170 C.C.C. (3d) 1, [2003] 3 W.W.R. 423, (sub nom. *R. v. Chan (M.K.))* 317 A.R. 240, (sub nom. *R. v. Chan (M.K.))* 284 W.A.C. 240, 9 Alta. L.R. (4th) 28, 9 C.R. (6th) 184, 104 C.R.R. (2d) 341 (Alta. C.A.) — referred to

R. v. Cai (2004), (sub nom. *R. v. Chan)* 328 N.R. 400 (note), 363 A.R. 199 (note), 343 W.A.C. 199 (note), 2004 CarswellAlta 193, 2004 CarswellAlta 194 (S.C.C.) — referred to

R. v. Chief (1997), [1997] 4 C.N.L.R. 212, 1997 CarswellSask 817 (Sask. Q.B.) — considered

R. v. Clark (1997), 1997 CarswellBC 3050 (B.C. Prov. Ct.) — considered

R. v. Crow Shoe (2004), 370 A.R. 213, 2004 ABPC 174, 2004 CarswellAlta 1360 (Alta. Prov. Ct.) — considered

R. v. Fournier (2004), 116 C.R.R. (2d) 253, 2004 CarswellOnt 1077 (Ont. S.C.J.) — considered

R. v. Francis (1988), [1988] 1 S.C.R. 1025, [1988] 4 C.N.L.R. 98, 51 D.L.R. (4th) 418, 85 N.R. 3, 85

N.B.R. (2d) 243, 41 C.C.C. (3d) 217, 5 M.V.R. (2d) 268, 217 A.P.R. 243, 1988 CarswellNB 8, 1988 CarswellNB 222 (S.C.C.) — considered

R. v. Janvier (2000), 2000 CarswellAlta 295, [2000] 9 W.W.R. 679, 262 A.R. 118, 83 Alta. L.R. (3d) 82, 2000 ABQB 187 (Alta. Q.B.) — considered

R. v. Jones (1996), (sub nom. *R. v. Pamajewon)* 27 O.R. (3d) 95, 50 C.R. (4th) 216, (sub nom. *R. v. Gardner)* 138 D.L.R. (4th) 204, (sub nom. *R. v. Pamajewon)* [1996] 4 C.N.L.R. 164, (sub nom. *R. v. Pamajewon)* 92 O.A.C. 241, (sub nom. *R. v. Gardner)* 109 C.C.C. (3d) 275, (sub nom. *R. v. Pamajewon)* 199 N.R. 321, (sub nom. *R. v. Pamajewon)* [1996] 2 S.C.R. 821, 1996 CarswellOnt 3987, 1996 CarswellOnt 3988 (S.C.C.) — considered

R. v. Jones (2000), 2000 CarswellAlta 591, [2000] 4 C.T.C. 27, [2000] 10 W.W.R. 116, 83 Alta. L.R. (3d) 103, 265 A.R. 96 (Alta. Q.B.) — considered

R. c. Lévesque (2000), 2000 SCC 47, 2000 CarswellQue 1994, 2000 CarswellQue 1995, 36 C.R. (5th) 291, (sub nom. *R. v. Lévesque)* 148 C.C.C. (3d) 193, (sub nom. *R. v. Lévesque)* 191 D.L.R. (4th) 574, 260 N.R. 165, [2000] 2 S.C.R. 487 (S.C.C.) — followed

R. v. Littlechild (2002), 2002 ABPC 163, 2002 CarswellAlta 1288, [2003] 1 C.N.L.R. 243 (Alta. Prov. Ct.) — considered

R. v. Loutfi (1998), 1998 CarswellAlta 114, 212 A.R. 156, 168 W.A.C. 156, 1998 ABCA 59 (Alta. C.A.) — considered

R. v. McMartin (1964), [1964] S.C.R. 484, [1965] 1 C.C.C. 142, 43 C.R. 403, 47 W.W.R. 603, 46 D.L.R. (2d) 372, 1964 CarswellBC 68 (S.C.C.) — considered

R. v. Morehouse (2005), 2005 ABCA 336, 2005 CarswellAlta 1419 (Alta. C.A.) — considered

R. v. Noltcho (2000), 2000 SKQB 223, 2000 CarswellSask 337, 196 Sask. R. 221 (Sask. Q.B.) — con- sidered

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — followed

R. v. Rain (1998), 1998 CarswellAlta 889, 223 A.R. 359, 183 W.A.C. 359, 56 C.R.R. (2d) 219, 130 C.C.C. (3d) 167, 68 Alta. L.R. (3d) 371, [1999] 7 W.W.R. 652, 1998 ABCA 315 (Alta. C.A.) — considered

R. v. Rain (1999), 250 A.R. 192 (note), 213 W.A.C. 192 (note), 239 N.R. 197 (note), 61 C.R.R. (2d) 375 (note), 132 C.C.C. (3d) vi (S.C.C.) — referred to

R. v. Robinson (1989), 70 Alta. L.R. (2d) 31, 63 D.L.R. (4th) 289, 100 A.R. 26, 51 C.C.C. (3d) 452, 73 C.R. (3d) 81, 1989 CarswellAlta 154 (Alta. C.A.) — referred to

R. v. Robinson (1999), 31 C.R. (5th) 134, 1999 CarswellAlta 1192, 75 Alta. L.R. (3d) 117, [2000] 3 W.W.R. 125, 142 C.C.C. (3d) 303, 250 A.R. 201, 213 W.A.C. 201, 71 C.R.R. (2d) 199, 1999 ABCA 367 (Alta. C.A.) — followed

R. v. Rowbotham (1988), 25 O.A.C. 321, 35 C.R.R. 207, 63 C.R. (3d) 113, 1988 CarswellOnt 58, 41 C.C.C. (3d) 1 (Ont. C.A.) — referred to

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — considered

R. v. TwoYoungMen (1979), 16 A.R. 413, [1979] 3 C.N.L.R. 85, 48 C.C.C. (2d) 550, [1979] 5 W.W.R. 712, 3 M.V.R. 186, 101 D.L.R. (3d) 598, 1979 CarswellAlta 232 (Alta. C.A.) — considered

R. v. Vanderpeet (1996), 50 C.R. (4th) 1, *(*sub nom. *R. v. Van der Peet)* 137 D.L.R. (4th) 289, *(*sub nom. *R. v. Van der Peet)* 109 C.C.C. (3d) 1, *(*sub nom. *R. v. Van der Peet)* 200 N.R. 1, *(*sub nom. *R. v. Van der Peet)* 80 B.C.A.C. 81, *(*sub nom. *R. v. Van der Peet)* [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, *(*sub nom. *R. v. Van der Peet)* [1996] 4 C.N.L.R. 177, *(*sub nom. *R. v. Van der Peet)* 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

R. v. W. (W.) (1995), 43 C.R. (4th) 26, 100 C.C.C. (3d) 225, 84 O.A.C. 241, 25 O.R. (3d) 161, 1995 CarswellOnt 983 (Ont. C.A.) — distinguished

R. v. Williams (1994), 52 B.C.A.C. 296, 86 W.A.C. 296, [1995] 2 C.N.L.R. 229, 1994 CarswellBC 1731 (B.C. C.A.) — considered

R. v. Williams (1995), 193 N.R. 239 (note) (S.C.C.) — referred to

R. v. Yellow Horn (2004), 2004 ABPC 27, 2004 CarswellAlta 93, 352 A.R. 324, 50 Alta. L.R. (4th) 340 (Alta. Prov. Ct.) — referred to

Vukelich v. Mission Institution (2005), 26 Admin. L.R. (4th) 82, 252 D.L.R. (4th) 634, 209 B.C.A.C. 39, 345 W.A.C. 39, 2005 BCCA 75, 2005 CarswellBC 328, 38 B.C.L.R. (4th) 132, 9 C.P.C. (6th) 137, 19 C.P.C. (6th) 171 (B.C. C.A.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 11 — referred to

s. 15 — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985,

App. II, No. 44

s. 35 — referred to

s. 35(1) — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 318 — referred to

s. 684 — referred to

s. 684(1) — referred to

s. 684(2) — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

Motor Vehicle Administration Act, R.S.A. 2000, c. M-23

Generally — referred to

s. 34(1)(a) — referred to

s. 71 — referred to

s. 71(1)(a) — referred to

s. 88 — referred to

s. 90 — referred to

Royal Proclamation, 1763 (U.K.), reprinted R.S.C. 1985, App. II, No. 1

Generally — referred to

Traffic Safety Act, R.S.A. 2000, c. T-6

Generally — referred to

Treaties considered:

Convention on the Prevention and Punishment of the Crime of Genocide, 1948, C.T.S. 1949/27; 78 U.N.T.S. 277

Generally — referred to

Treaty No. 7, 1877 (Between Her Majesty the Queen and the Blackfeet and other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort MacLeod), 1877

Generally — referred to

APPLICATION by accused for order requiring Crown to fund her counsel on appeal or to pay her interim costs, and for order permitting her to introduce fresh evidence on appeal.

***Langston J.*:**

Facts

1 On May 1, 2001, the Appellant was stopped on a main road in the City of Lethbridge and was charged with two offences under the *Motor Vehicle Administration Act*, R.S.A. 2000, c. M-23 ("MVAA"). (That statute was subsequently repealed and substituted by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, effective May 23, 2003.) Those offences were driving an unregistered vehicle and driving without insurance contrary to sections 34(1)(a) and 71(1)(a) of the MVAA, respectively. The latter provision reads as follows:

> 71(1) No person shall
>
> (a) drive a motor vehicle on a highway,
>
> .....
>
> unless the motor vehicle is an insured motor vehicle.

2 On September 6, 2001, the Appellant was convicted in absentia of the first charge, driving an unregistered vehicle, and an unendorsed warrant was issued for her arrest on the second charge.

3 The Appellant's trial on the second charge was heard by Provincial Court Judge Jacobson commencing on August 28, 2003. At the trial, the Appellant was represented not by counsel, but by an agent, James Craven, a professor of economics at Clark College in Washington State. On several occasions during the course of the trial, Judge Jacobson discussed with the Appellant her choice of using an agent rather than obtaining counsel. For example, he cautioned her as follows during a pre-trial proceeding on May 20, 2003:

> THE COURT: You see, there are two steps. The first step is to make sure that this is an informed choice to be represented by an agent who is not a lawyer. The second step is that even if that is the choice, the lawyer may not be competent, or because of the very nature of the role that that individual is playing may be the practice of law, which is not acceptable. If you challenge the competence of an agent at the start of the trial, it may, not necessarily, but it may, cause the individual to feel that the agent is being singled out and there will not be a fair trial.
>
> Now, we do not have the agent here, I am going to go on the assumption that you understand that by going with an agent, you are going with somebody who is unregulated and not subject to discipline, who, if makes a mistake in the conduct of the trial, you do not have the same remedies as if a lawyer had made a mistake, do you understand that?
>
> THE ACCUSED: Mm-hm.

THE COURT: You nodded your head in agreement. You can be seriously disadvantaged by having an agent who is not a member of the Law Society of Alberta, do you understand that?

THE ACCUSED: Yeah.

THE COURT: Knowing that there are many things that can go wrong by just having an agent, is it your wish to have Mr. Craven represent you as agent?

THE ACCUSED: Yeah.

THE COURT: You realize that you may not get the same standards as if you had a lawyer, do you understand that?

THE ACCUSED: Yeah.

4 Mr. Craven raised two broad defences to the charge against the Appellant. Judge Jacobson summarized Mr. Craven's submissions as follows at para. 11 of his judgment cited below:

a. The Defendant did not commit any offence based on credibility issues, but primarily on a "*mens rea* issue":

1. As a member of the Independent Sovereign Blackfoot Nation, she acted with "good-faith-based beliefs for which she has considerable support by recognized scholars of international law". She did not require insurance to operate her motor vehicle.

2. In any event, she claims that she did in fact have insurance and still had time to register and transfer the existing insurance to her recently purchased van.

3. She has shown due-diligence in attempting to obtain evidence to prove on a balance of probabilities, that she was validly insured and that her vehicle was properly registered, or alternatively;

4. Under constitutional and international law, she was not subject to the [MVAA].

b. The constitutional and international law challenges to the validity of Treaty 7 and the *Indian Act* are based on various factors including but not limited to the following grounds:

1. Treaty 7 was not properly executed: The terms and intent were misrepresented. It is not a legitimate binding treaty under international law. It is invalid.

2. Although Canada is a signatory to the 1948 *United Nations Convention on Prevention and Punishment of the Crime of Genocide* (Ratified in 1953), and as a result of the Convention enacted partial genocide provisions in Section 318 of the *Criminal Code*, the Canadian Government under both Treaty 7 and the *Indian Act* has, and is still subjecting the people of the Blackfoot Nation to the crime of genocide. Those actions are "in violation of the 'Supreme Law' of Canada".

3. The Defendant is "not a Canadian". As a matter of survival, the Blackfoot must reject the application of Treaty 7 and the *Indian Act*. Further, they cannot and will not recognize Canadian Law.

4. The Sovereign Blackfoot Nation has a right to succession. The Supreme Court of Canada prin-

ciples permit the Blackfoot people to leave Canada's domination and to govern their territory under traditional Blackfoot ways.

5 On February 9, 2004, in a lengthy judgment, Judge Jacobson convicted the Appellant and fined her $2,500.00, the minimum penalty available for the offence. See *R. v. Yellow Horn*, 352 A.R. 324, 2004 ABPC 27 (Alta. Prov. Ct.).

6 On March 9, 2004, the Appellant, through her agent Mr. Craven, filed a Notice of Appeal. The grounds of appeal were stated as follows:

1. Judicial Misconduct/Animus/Lack of Impartiality/Denial of Due Process/Proscription of Allowed De- fence;

2. Prosecutorial Misconduct — Obstruction of Discovery and Judicial Order;

3. *Indian Act*/Treaty 7/Genocide/Violation of UN Convention on Genocide and Canadian Constitution; and

4. Incorrect vehicle charged.

7 In May 2004, the Appellant retained Michael Swinwood, a barrister and solicitor from Ontario. Mr. Swinwood filed the application at bar on October 8, 2004.

8 The Appellant applied for Legal Aid funding of this appeal. That application was denied and the Appellant has exhausted all available appeals.

Issues

9 The Appellant seeks an order requiring the Crown to fund her counsel on this appeal or to pay her interim costs. She also seeks an order permitting her to introduce fresh evidence on this appeal.

10 Thus, the issues raised by this application are the following:

1. Is the Appellant entitled to publicly-funded counsel?

2. Is the Appellant entitled to the payment of interim costs?

3. Does the evidence that the Appellant seeks to introduce meet the criteria for the introduction of fresh evidence at the appellate level?

11 The resolution of all of these issues will require a consideration of the merits of the appeal.

Publicly-Funded Counsel

12 Section 684 of the *Criminal Code*, R.S.C. 1985, c. C-46 provides for counsel to be appointed for an accused on an appeal in certain circumstances. That section reads as follows:

684.(1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal, where, in the

> opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
>
> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
>
> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the register of the court of appeal and the registrar may tax the disputed fees and disbursements.

13 The wording of subsection (1) makes clear that the assignment of counsel for an accused is in the discretion of the court. Fortunately, I may take guidance from two judgments of our Court of Appeal: *R. v. Rain* (1998), 223 A.R. 359, 1998 ABCA 315 (Alta. C.A.), leave to appeal to S.C.C. denied (1999), [1998] S.C.C.A. No. 609 (S.C.C.) and *R. v. Cai* (2002), 317 A.R. 240, 2002 ABCA 299 (Alta. C.A.), leave to appeal to S.C.C. denied (2004), [2003] S.C.C.A. No. 360 (S.C.C.). The substance of the argument in favour of publicly-funded counsel is that such a measure is required to ensure that the accused receives a fair trial and that refusal to provide funded counsel breaches the accused's rights under s. 11 of the *Charter*.

14 In *Rain*, the Court of Appeal, relying on its own decision in *R. v. Robinson* (1989), 100 A.R. 26 (Alta. C.A.) and on the decision of the Ontario Court of Appeal in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), concluded that there is no general right to funded defence counsel. Nevertheless, the Court held at para. 35 that "... in some circumstances, where the assistance of counsel is essential in order to assure a fair trial, the *Charter* requires the provision of funded counsel." The Court then addressed the question of what circumstances will justify funded counsel.

15 The Court of Appeal started at para. 36 of *Rain* with the proposition that "[r]epresentation by a lawyer is not a pre-requisite for a fair trial." The Court then went on to articulate the test thus at para. 51:

> The test which has evolved from *Rowbotham* has two aspects which must be considered. One is the accused's circumstances. It must be determined if the accused can afford to retain counsel and if the accused has the education, experience and other abilities to conduct his or her own defence. The other is the nature of the charge or charges. Regard must be had to the seriousness of the offence, the complexity of the case and the length of trial. The central concern throughout is the fairness of the trial.

16 Consideration of the circumstances of the accused must, of course, include regard to the accused's means. If the accused can afford to retain counsel, provision of counsel at public expense is not at issue. If an accused is able to avail himself or herself of the assistance of Legal Aid, there is no need for publicly-funded counsel. This is inherent in the wording of subsection 684(2) of the *Criminal Code*, as set out above, and is clear from the case law. Our Court of Appeal stated in *Cai* at para. 10 that "...an application to the court for funding should be stayed until the applicant has exhausted all possible avenues for government-funded legal assistance..." and that "...[a] motion for funding may be dismissed where the accused has not exhausted Legal Aid or made reasonable efforts to get it...". In this case, there is no dispute that the Appellant is a person of limited means. Further, this proceeding was adjourned at one point to allow the Appellant to make application for Legal Aid. That application was refused and all avenues of appeal were exhausted, making it clear that Legal Aid is not available to the Appellant.

17 That, however, is not the end of the matter. Impecuniosity is a prerequisite for publicly-funded counsel, but it is not sufficient on its own. As the above quotation indicates, other factors requiring consideration include the seriousness and complexity of the charges.

18 In this case, the charge against the Appellant is not inherently complex. She is charged with driving an uninsured motor vehicle and, from that perspective, the issue is a simple one: was the vehicle insured or was it not? (There has never been any dispute that the Appellant was driving.)

19 Neither can this charge be regarded as particularly serious. It is, as the Crown pointed out in its Supplemental Brief, a regulatory offence which does not carry the possibility of imprisonment, except perhaps in default of the payment of a fine. The authorities canvassed by the Court of Appeal in *Rain* indicate that the bar is high in this respect; the Court noted at para. 54 that "[t]he authorities indicate that even where there are charges of some complexity and seriousness, depending upon the circumstances, counsel may not be necessary for a fair trial." The Court noted at para. 76 that even the possibility of imprisonment is not necessarily sufficient to satisfy this requirement:

> With respect, it is an error of law to conclude that the possibility of incarceration is enough to satisfy the requirement of "seriousness", in the assessment of need for counsel in cases such as this. If the possibility of incarceration was enough every offence in the *Criminal Code* and virtually every violation of most Alberta statutes would fall into the "serious" category. That is because s. 787(2) of the *Criminal Code* and s. 7(2) of the *Provincial Offences Procedure Act*, S.A. c. P-21.5 provide general authority for imposing imprisonment in default of payment of any fine.

20 Taking into account this guidance from the Court of Appeal, I am satisfied that the charge against the Appellant ordinarily would not be sufficiently serious or complex to warrant the provision of counsel at public expense.

21 What makes this particular case complex, however, is the Appellant's assertion that, because of her status as a Blackfoot person, the laws of Canada and of the Province of Alberta do not apply to her and cannot be enforced against her. This assertion brings into play another criterion — the merits of the appeal.

22 It is clear from the case law that an accused seeking the appointment of publicly-funded counsel has the onus of demonstrating that his or her appeal has merit and that, therefore, it is in the interests of justice that counsel be appointed to ensure that the arguments are properly put forward. This was recently stated as follows by Paperny J.A. of our Court of Appeal in *R. v. Morehouse*, 2005 ABCA 336 (Alta. C.A.) at para. 2:

> There is no right to counsel provided at public expense. Under s. 684, the applicant must show he cannot afford a lawyer and that it is in the interests of justice that he should have legal assistance. To be in the interests of justice, he must show that there is merit to his appeal: *R. v. Robinson* (1989), 51 C.C.C. (3d) 452 (Alta. C.A.), or that his appeal is arguable: *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.).

23 The Appellant has raised a number of issues; several of these might be characterized as technical constitutional and jurisdictional issues, but all are connected by the overarching theme of Blackfoot sovereignty. An assessment of the merits of the appeal requires that each issue be considered in turn and also that the general question of sovereignty be considered.

24 Paragraph 1 of the Appellant's Notice of Constitutional Question sets out the following as her first

ground of appeal:

> That the legislation, the Indian Act Section 88 and 90 and the Motor Vehicle Administration Act are void ab initio, as against an aboriginal person, owing to Her Majesty the Queen, the federal government and the provincial government being complicit in the crime of genocide, as against the Sovereign Blackfoot Nation people, thereby depriving Her Majesty the Queen, the federal government and the provincial government the proper legislative authority to enact the said legislation.

25 I note that this argument, if accepted as worded, would seem to deprive the federal and provincial governments of the authority to enact any legislation affecting any persons. However, it is understood that the argument is directed only to the authority of the federal and provincial governments to enact legislation affecting Blackfoot people.

26 This argument is without merit. The Appellant has provided no evidence of the alleged complicity and, as the Respondent points out, that allegation has been rejected by the courts in previous cases. The Appellant is not to be encouraged to make such an inflammatory and baseless allegation by being permitted to argue it at public expense.

27 Secondly, the Appellant argues that Treaty #7 was invalidly executed and therefore does not affect Blackfoot sovereignty. The Appellant takes the position that the assertion of sovereignty by the Crown violates the Royal Proclamation of 1763. This argument, too, has been roundly rejected in previous cases. The reality of Crown sovereignty was made clear several years ago by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). The following passage at p. 1103 has been quoted in many subsequent cases:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vests in the Crown...

28 It is also clear that the sovereignty of the Crown is unaffected by the validity, or indeed the existence, of a treaty. In *R. v. Williams* (1994), [1995] 2 C.N.L.R. 229 (B.C. C.A.), the British Columbia Court of Appeal held that the Crown had sovereignty over aboriginal persons within that province, notwithstanding that the offence in question occurred "beyond the treaty frontier". Leave to appeal this decision to the Supreme Court of Canada was refused at (1995), [1994] S.C.C.A. No. 566 (S.C.C.).

29 Third, the Appellant asserts that pursuant to the Order-in-Council of Queen Anne dated March 9, 1704, she has the right to have this dispute adjudicated by "an independent, objective third party tribunal, with no allegiance to either government or her Majesty the Queen". This document has been found to have no current relevance in Canada. In *Clark v. R.*, [1994] T.C.J. No. 1046 (T.C.C.), Bowman J. stated at para. 13 that "I do not read the orders-in-council of 1704, 1740 and 1773 referred to by Dr. Clark as having any such effect *or as having any relevance to Canada whatsoever*." [Emphasis added.] Bowman J.'s decision was affirmed by the Federal Court of Appeal at (1997), 97 D.T.C. 5289 (Fed. C.A.) and leave to appeal to the Supreme Court of Canada was denied at [1997] S.C.C.A. No. 261 (S.C.C.). Bowman J.'s reasons were adopted by the New Brunswick Court of Queen's Bench in *Atlantic Yarns Inc. / Les Filés Atlantique Inc., Re* (1997), 192 N.B.R. (2d) 38 (N.B. Q.B.). The same Dr. Clark referred to by Bowman J. also raised this Order-in-Council in the British Columbia Provincial Court. In *R. v. Clark*, [1997] B.C.J. No. 715 (B.C. Prov. Ct.), Friesen Prov. Ct. J. responded with the following comments at paras. 35 and 42:

> Our constitution is like a living tree — some new buds, some young branches, some old, supported by a healthy trunk with roots dating back to 1066. Occasionally the tree is pruned. However, the 1704 O.I.C. never got beyond the bud stage. It could have been nurtured and have become one of the healthy branches. The bud was allowed to die. Today, there is evidence of the bud, but it has no significance in the life of the tree.
>
> .....
>
> Despite these rulings, Clark continues to clothe Queen Anne's defunct tribunal with exclusive jurisdiction. The O.I.C. of 1704 may be of some interest to a few historians, but is [sic] has absolutely no legal or constitutional significance in Canada today.

30 These cases indicate that the Order in Council of 1704 has no present legal significance and the Appellant has presented no authority to the contrary. Therefore, I reject this argument. I am satisfied that the courts of this Province have jurisdiction to deal with matters involving the Appellant.

31 The Appellant also states the following at para. 6 of her Notice of Constitutional Question:

> By virtue of Section 35, the Applicant invokes both her aboriginal right to sovereignty and other rights to claim immunity from prosecution by either level of government.

32 Thus, the Appellant takes the somewhat curious position that the Constitution, being the supreme law of Canada, entitles her to certain rights and protections notwithstanding her prior assertions, through Mr. Craven, that she is "not a Canadian" and "cannot and will not recognize Canadian Law".

33 Notwithstanding this apparent dissonance, there is no doubt that the Appellant, as an aboriginal person, is entitled to the protection of s. 35 and, indeed, of the Charter as a whole. However, it is abundantly clear from the case law that this protection does not go so far as to exempt the Appellant from the application of all federal and provincial laws nor to "immunize" her from prosecution under those laws. The courts in numerous jurisdictions and at all levels, including the Supreme Court of Canada, have stated unequivocally that aboriginal persons are subject to the laws of Canada and of the provinces.

34 In *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.) Dickson J. (as he then was) of the Supreme Court of Canada stated at p. 36 that "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities ... of other Canadian citizens." In her concurring judgment in *R. v. Jones*, [1996] 2 S.C.R. 821 (S.C.C.), L'Heureux-Dubé J. referred to her reasons in the previous case of *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) and said at para. 42 that "... the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory."

35 In addition to this Supreme Court jurisprudence, the argument that aboriginal peoples are not subject to Canadian law has been rejected by the courts in Saskatchewan and British Columbia. In *Williams* at para. 16, the British Columbia Court of Appeal quoted as follows from the decision of the summary conviction appeal court judge:

> The respondent's position is that the Provincial Court as constituted by the *Provincial Court Act*, S.B.C. 1969, c. 28, has absolute jurisdiction throughout the Province and there is no reservation of jurisdiction in

> respect of either aboriginal people or offences committed in any part of the Province which may not have been ceded by treaty. The respondent claims further that the proposition that aboriginal people are not subject to the laws of Canada or the laws of British Columbia has been conclusively rejected. On this point, the respondent relies most heavily on the decision in *Delgamuukw v. The Queen*, [1993] 5 W.W.R. 97 (B.C.C.A.) and contends that this case provides a complete answer to the appellants' arguments. With this contention, I agree. At pp. 151-152, Macfarlane J.A., with whom Taggart and Wallace JJ.A. concurred, said:
>
> . . . . .
>
> > 171. With respect, I think that the trial judge was correct in his view that when the Crown imposed English law on all inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws. ...
>
> I accept the respondent's submission that the result in *Delgamuukw* makes it plain that no aboriginal jurisdiction superior to laws intended to govern all inhabitants of this Province survived the assertion of sovereignty.

The Court of Appeal expressly agreed with these reasons and held that *Delgamuukw v. British Columbia* [1993 CarswellBC 1167 (B.C. C.A.)] and *Sparrow* "conclusively decide the issue before us whether the offence occurred on 'unsurrendered Hunting Grounds' or not."

36 In Saskatchewan, the Court of Queen's Bench held as follows in *R. v. Chief*, [1997] 4 C.N.L.R. 212 (Sask. Q.B.) at paras. 9-11:

> Except for the Canadian forces and persons who are granted diplomatic immunity, the provisions of the *Criminal Code* apply to all persons in Canada, whether they are citizens or not. In addition, the *Criminal Code* replaces all criminal laws that were in effect in any province or territory before they became a part of Canada.
>
> The Court of Queen's Bench, as I have said, although a court of original jurisdiction, receives its authority through legislation. It has no inherent authority or power to exempt members of the Dene Nation or any other group of people from the laws which have been proclaimed by either the Parliament of Canada or the legislature in Saskatchewan. The application of Mr. Chief is not one which involves the *Charter of Rights and Freedoms*. Indeed, if the argument on his behalf is accepted, Mr. Chief would not be subject to any law in Canada, including the *Charter of Rights and Freedoms*, and all the laws of Canada would have to be declared *ultra vires* the powers of the legislatures that enacted them as they relate to Clarence Chief. That is not my understanding of the law as it applies in Canada.
>
> I am of the opinion that no such exemption or exclusion exists, either in law or through custom. To accede to such an argument would be to render this country incapable of either governing the people within its borders or managing its own affairs. Accordingly, the application on behalf of Mr. Chief is dismissed.

37 Dielschneider J. of the same Court held as follows at paras. 3-6 in *R. v. Noltcho*, 196 Sask. R. 221, 2000 SKQB 223 (Sask. Q.B.):

> Ms. Janvier, herself a member of the Dene nation, speaks eloquently. Nor is her sincerity an issue. Nevertheless the point of law she raises for discussion has been settled by other judges on numerous previous oc-

casions.

The significant point is that the criminal law which charges Noltcho with an offence applies to all persons residing within the territorial boundaries of Canada regardless of whether a treaty has or has not been entered into. The obvious corollary is that all persons residing in Canada, irrespective of race, colour, or creed, receive the protection of the law, in the case at hand the criminal law as set out in the *Criminal Code* of Canada.

As I said, other judges have stated the same principle of law. See the judgment of my colleague Krueger J. in *The Queen v. Clarence Chief* handed down in Battleford on February 17, 1997. See also the judgment of Provincial Court Judge White in *The Queen v. Norbert Wolverine* handed down in Meadow Lake on September 24, 1996, and the several judgments of Provincial Court Judge Bekolay in *R. v. Wayne Kahpeechoose*, *R. v. Patricia C.E. Joseph*, *R. v. Raymond Joseph*, *R. v. Sally Keenatch*, and *R. v. Joseph Rabbitskin*, all handed down in Prince Albert on August 15, 1997.

All these judgments affirm the sovereignty of the Crown over all the lands comprising this country of Canada and over all the peoples residing within its boundaries, including of course the accused Skylar Gregory Noltcho.

38 The application of Canadian law to aboriginal peoples has also been expressly accepted in this Province. In *R. v. Jones* (2000), 265 A.R. 96 (Alta. Q.B.), my colleague Johnstone J. of this Court held as follows at paras. 22 and 25-6:

Pursuant to Treaty No. 6, the Aboriginal peoples were bound by and governed by the same laws of the Dominion of Canada as applied to the rest of the Canadian citizenry. The law is clear and was upheld recently by our Supreme Court of Canada in *Delgamuukw et al. v. British Columbia et al.*, [1997] 3 S.C.R. 1010; 220 N.R. 161; 99 B.C.A.C. 161; 162 W.A.C. 161, at p. 1096 [S.C.R.]. There is no residual Aboriginal sovereignty capable of displacing the general jurisdiction of the Provincial Court for trying individuals for offences under provincial or federal legislation.

. . . . .

In *Williams v. Minister of National Revenue*, [1992] 1 S.C.R. 877; 136 N.R. 161, the court held that the Aboriginal people are subject to the jurisdiction of the court with respect to criminal offences and offences under Provincial law.

It is a clearly entrenched principle of sovereign integrity which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real and personal, within its own territory: *R. v. Finta*, [1994] 1 S.C.R. 701; 165 N.R. 1; 70 O.A.C. 241; 88 C.C.C. (3d) 417; 112 D.L.R. (4th) 513; 28 C.R. (4th) 265; 20 C.R.R. (2d) 1, at p. 806 [S.C.R.].

39 This view has also found favour in our Provincial Courts. For example, in *R. v. Crow Shoe*, 370 A.R. 213, 2004 ABPC 174 (Alta. Prov. Ct.) noted as follows at para. 12:

The question of the applicability of the *Criminal Code* to aboriginal peoples has been discussed in many previous cases, all of which affirm the sovereignty of the Crown over all lands and peoples situate within the boundaries of the nation of Canada. Some of the cases are: *R. v. Janvier*, *supra*; *R. v. Nottcho*, [sic]

> [2000] S.J. No. 394; *R. v. David*, [2000] A.J. No. 561; *R. v. Kahpeechoose (W.)*, [1997] 4 C.N.L.R. 212 (Sask. Prov. Ct.); *R. v. Edenshaw*, [1985] B.C.J. No. 307; *R. v. S.J.*, [1994] O.J. No. 2454; *R. v. Jones (D.)*, [2000] A.J. No. 715 (Q.B.); *R. v. Chief (C.)*, [1997] 4 C.N.L.R. 212 (Sask. Q.B.); *R. v. Poitras* (1994), 121 Sask. R. 95 (Q.B.); *R. v. Ignace (J.W.) et al.* (1998), 103 B.C.A.C. 273, 169 W.A.C. 273; 156 D.L.R. (4th) 713 (C.A.); *R. v. Avrett*, [2001] B.C.J. No. 2345; 2001 CarswellBC 2453; 2001 BCPC 281. I see no reason to restate the conclusions reached by the various courts in these cases. They all support the position that the *Criminal Code* applies to all peoples in Canada, aboriginal or otherwise, on or off reserves.

40 More specifically, it has been held that provincial laws respecting the operation of motor vehicles apply to aboriginal persons, whether on or off reserve. The Supreme Court of Canada in *R. v. Francis*, [1988] 1 S.C.R. 1025 (S.C.C.) held at p. 1028 that "...provincial motor vehicle laws of general application apply *ex proprio vigore* on Indian reserves." The Court went on in the same paragraph to note that "... Beetz J., speaking for the Court in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326, expressly stated that provincial traffic legislation applies to Indians without touching their Indianness."

41 In this Province, the Court of Appeal in *R. v. TwoYoungMen* (1979), 16 A.R. 413 (Alta. C.A.) was faced with a situation similar to the case at bar in that an aboriginal person was charged with operating a motor vehicle without insurance under a previous version of the MVAA. The Court imposed a conviction, holding as follows at para. 6:

> In the absence of any legislation by the Parliament of Canada under s.91(24) of the *British North America Act, 1867*, which gives to the Parliament of Canada exclusive authority to legislate in respect of "Indians, and Land reserved for the Indians," the laws of the Province apply to Indians so long as they are of general application throughout the Province and do not purport to legislate the conduct of an Indian qua Indian or to regulate land reserved for Indians qua land.

It should be noted that the offence in that case had occurred on a reserve and the question required consideration of whether the MVAA applied on reserve land. Nevertheless, I am satisfied that the principle laid down by the Court of Appeal is of general application.

42 In *R. v. Janvier*, 262 A.R. 118, 2000 ABQB 187 (Alta. Q.B.), this Court heard the summary conviction appeals of three aboriginal persons, two of whom had been convicted of traffic-related offences. My colleague Lefsrud J. reviewed a number of previous cases, concluded that the courts of Canada and of Alberta had jurisdiction over the appellants and confirmed the convictions.

43 Finally, in *R. v. Littlechild* (2002), 55 W.C.B. (2d) 522, 2002 ABPC 163 (Alta. Prov. Ct.), it was argued that s. 71 of the MVAA, the same provision as is at issue here, was not applicable to aboriginal persons. In that case, as here, the offence was alleged to have occurred off reserve. Rae Prov. Ct. J. referred to *Delgamuukw v. British Columbia* [1997 CarswellBC 2358 (S.C.C.)] and held that s. 71 of the MVAA applied to all persons in Alberta, including the aboriginal accused.

44 As noted above, all of the foregoing arguments are connected by the notion of Blackfoot sovereignty. The Appellant argues that she is a member of a sovereign Blackfoot nation and that, as such, she is not subject to the laws of Canada or of the Provinces, but only to the laws of the Blackfoot nation. In her Notice of Constitutional Question at para. 5, the Appellant states, in part, as follows:

> ... the applicants [sic] invoke their right to pursue their spiritual values, embodied in the Anishnabe tradition

> of asserting their sovereignty and freedom from the levels of government which have invaded their territory and unilaterally imposed laws, when viewed through the prism of international law, render the Indian Act and the Criminal Code of Canada as inapplicable as against a member of the Blackfoot Nation.

45 An assertion of sovereignty of this breadth cannot be accepted. I note that, at one time, it was argued that federal and provincial laws had no application on reserve lands. This "enclave" theory was rejected by the Supreme Court of Canada several years ago in the cases of *Cardinal v. Alberta (Attorney General)* (1973), [1974] S.C.R. 695 (S.C.C.) and *Four B Manufacturing Ltd. v. U.G.W.* (1979), [1980] 1 S.C.R. 1031 (S.C.C.). In *Cardinal*, Martland J. held as follows at p. 703:

> A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial Legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

46 In *Four B*, Beetz J. held as follows at pp. 1049-1050:

> Counsel for appellant has also stressed that the civil rights in issue are not only the civil rights of Indians, but Indian civil rights exercised on a reserve. The import of this submission, as I understand it, is that the exclusive character of federal jurisdiction is somehow reinforced because it is derived from two related heads of federal authority instead of one, federal authority over Indians and over Lands reserved for the Indians.
>
> In my view, this submission is an attempt to revive the enclave theory of the reserves in a modified version: provincial laws would not apply to Indians on reserves although they might apply to others. The enclave theory has been rejected by this Court in [*Cardinal*] and I see no reason to revive it even in a limited form. Section 91.24 of the *British North America Act, 1867* assigns jurisdiction to Parliament over two distinct subject matters, Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians. The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve.

47 In 1988, the Supreme Court confirmed in *Francis* that the enclave theory had been rejected and ought not to be "resuscitated".

48 The difficulty with the Appellant's argument is that it is tantamount to saying that she is an enclave unto herself with a separate set of laws, different from those enacted by Parliament and the Provincial Legislatures, that apply to her wherever she goes. This cannot be so. If the enclave theory has been rejected with respect to reserves, it must surely not be resurrected with respect to individuals.

49 In a similar vein, the Supreme Court in *Sparrow* at p. 1093 cautioned against creating a "constitutional patchwork quilt" by considering the aboriginal rights of various bands to have been "frozen" in 1982. As I read the decision, the Court was concerned about creating a plethora of regulatory regimes, each applicable to a specific band. It seems to me that accepting the Appellant's contention that she is subject only to those laws put into place by the Blackfoot people would create a similar patchwork effect, with individual aboriginal persons claiming to be subject to varying sets of laws. This approach, in my view, is contrary to the established body of case law.

50 It was pointed out by Mr. Swinwood, counsel for the Appellant, that he has made arguments similar to those advanced in this case in Ontario and has been met with some success. In *R. v. Fournier* (2004), 116 C.R.R. (2d) 253 (Ont. S.C.J.), O'Neill J. characterized the constitutional questions at para. 43 as "clearly novel and complex". With great respect for his opinion, I disagree. In my view, the foregoing discussion demonstrates that all of the questions raised here have been addressed by the courts in the past. More to the point, the arguments advanced by the Appellant have been uniformly rejected. Mr. Swinwood merely has enumerated various arguments that have failed before and has given this Court no reason to question or depart from previous decisions.

51 Therefore, I conclude that there is no merit to the appeal. I note that the Ontario Court of Appeal held in *R. v. Bernardo* [1997 CarswellOnt 4956 (Ont. C.A.)] at para. 22 that "Appeals which are void of merit will not be helped by the appointment of counsel." I agree. Since meritless appeals do not require the assistance of counsel, publicly-funded counsel is not warranted in this case and the application for such funding is dismissed. While the Appellant is unquestionably entitled to a fair trial and to fairness at the appellate level, I am satisfied that her representation by counsel at public expense is not necessary to achieve this end.

Interim Costs

52 The Appellant also seeks an order for payment of her interim costs and cites the case of *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.) in support of that application. That case involved a dispute between a provincial government and an Indian Band over logging rights and was, accordingly, a civil proceeding. The Crown argues that that case is inapplicable here because this is a criminal proceeding and that, therefore, different principles apply.

53 Admittedly, the Appellant in this case has not been charged under the Criminal Code. Nevertheless, without wishing to belabour the point, I note simply that this is not a situation in which litigants have chosen to have resort to the courts to resolve their private dispute. Rather, this case is one in which the state has brought its machinery to bear against an individual and, therefore, I am satisfied that this proceeding is more properly characterized as criminal or quasi-criminal. Therefore, the costs principles applicable to the criminal context are appropriate here.

54 Those principles have been outlined in a number of cases. For example, MacFadyen J.A. of our Court of Appeal held as follows at para. 29 of *R. v. Robinson* (1999), 250 A.R. 201, 1999 ABCA 367 (Alta. C.A.):

> While costs may be awarded against the Crown in the exercise of the court's general jurisdiction, the clear rule has been that such costs will only be awarded where there has been serious misconduct on the part of the Crown. (See *R. v. Pawlowski (M.)* (1993), 61 O.A.C. 276, 79 C.C.C. (3d) 353; 20 C.R. (4th) 233 (C.A.); *R. v. C.A.M.*, [1996] 1 S.C.R. 500, 194 N.R. 321; 73 b.C.A.C. 81; 120 W.A.C. 81; *Berry v. British Transportation Commission*, [1961] 3 All E.R. 65 (CA).) The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions re-

> specting prosecutions in the public interest. In the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out public duties.

55 In *Vukelich v. Mission Institution*, 38 B.C.L.R. (4th) 132, 2005 BCCA 75 (B.C. C.A.), the British Columbia Court of Appeal was divided on the question of whether the proceeding in that case was properly characterized as civil or criminal. Ryan J.A. was in the minority in considering the matter criminal and his reasons were therefore given in dissent. Nevertheless, I am of the view that his comments at para. 104 with respect to the costs principles applicable in criminal matters are apt:

> I think that the respondent is correct. The resort to costs in a criminal context is very much unlike the usual contest between litigants in a civil suit. In a civil suit the plaintiff brings an action for his own ends and to benefit himself or herself. If the plaintiff loses, it is fair that he or she should pay the costs, and if the plaintiff wins, it is fair that he or she should recover the costs. The situation as presented by the case at bar is not the same. It goes without saying that maintaining order in a penitentiary is delicate and difficult work. The Warden must make decisions, not to benefit him or herself, but to maintain order for the sake and safety of all staff and inmates of the institution. However, in recognizing the Warden's mandate we must not lose sight of the prisoner who is being disciplined. A prisoner in that situation is at the mercy of the power of the state. We expect the authorities to appreciate this relationship and to respect the rights and dignity accorded by law to prisoners. Thus it seems to me costs should only be awarded in such cases where there has been a flagrant injustice.

56 In this case, though the Appellant has levelled serious allegations against Canada, there has been no suggestion that there has been any misconduct by the Crown in respect of its conduct of these proceedings. Nor has there been any suggestion that the charge against the Appellant was brought improperly, apart from the Appellant's position with respect to the application of Canadian law as a whole. Therefore, the above principles lead me to conclude that an award of costs against the Crown is inappropriate in this case, particularly at this interim stage.

57 Even if I were to accept that the principles set out in *Okanagan* apply to this case, I would nevertheless decline to make an order for interim costs in the Appellant's favour. I am of the view that this case fails to meet the criteria set forth by the Supreme Court of Canada. Those criteria were enumerated as follows at para. 40:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious, that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

58 As discussed above, it is clear that the Appellant is impecunious and that funding for this case is not available from Legal Aid. Though the Crown suggested that the Appellant should seek funding through her band or from other aboriginal organizations, I am prepared to conclude that the Appellant does not have the means to carry this litigation forward and that, therefore, the first *Okanagan* criterion is met.

59 On the second and third criteria, however, the Appellant fails. As discussed above, I am of the view that there is no merit to this appeal. Of course, if the Appellant wishes to pursue this matter further, she is free to do so, if it is within her means. But she cannot expect to do so at public expense, which would be the result if interim costs were to be awarded against the Crown. I am mindful that the Supreme Court in *Okanagan* at para. 28 adopted the caution articulated in *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.) at p. 306 that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged." This appeal is just the kind of marginal case that should not be permitted to burden the public purse.

60 The third *Okanagan* criterion also presents an insuperable obstacle for the Appellant. The Crown takes the position that the issues raised by the Appellant do not transcend her individual interests and are not of public importance. The Crown argues that the Appellant does not represent her band and that the band would be the appropriate party to raise issues respecting Blackfoot rights. I do not need to make a finding on this issue, as I am satisfied that the Appellant has failed to meet the latter part of the third criterion, which requires that the issues raised have not been resolved in previous cases. As outlined in my reasons above, all of the issues raised by the Appellant have been considered, and rejected, by the courts in previous cases.

61 Therefore, the Appellant's application for interim costs against the Crown is refused.

Fresh Evidence

62 The final issue raised by the Appellant is the introduction at this appeal stage of evidence not heard at the Provincial Court trial. The evidence the Appellant seeks to have heard is the testimony of Dr. Anthony Hall, a professor at the University of Lethbridge. The Appellant's Affidavit sworn October 5, 2004 puts the matter thus at paras. 6 and8:

> 6. My request for the presentation of fresh evidence would be for the purpose of hearing one witness, Anthony Hall, PH.D. [sic], University of Lethbridge, put into context the issues raised in my trial surrounding genocide, lack of jurisdiction of the Indian Act, inapplicability of Treaty 7 and lack of jurisdiction of the police and courts established by the Proclamation of 1763, in order for there to be a proper and fair determination of my appeal of the conviction under the Provincial Statute.
>
> 8. I am making this request for funding and the presentation of fresh evidence at the hearing in order to assist my own people to understand the slavery to which they are subjected to on a daily basis, and as an opportunity to identify to the court the disparity between the so-called normal white society and the plight of the sovereign Blackfoot nation people.

63 Dr. Hall's Affidavit sworn October 13, 2004 attaches his curriculum vitae, which indicates that he has been an Associate Professor in the Department of Native American Studies at the University of Lethbridge since 1990.

64 The starting point for consideration of applications for the admission of fresh evidence at the appellate level is the Supreme Court of Canada's decision in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). In that case, the Supreme Court enumerated the following four criteria at p.775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *Mc-*

Martin v. The Queen.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it cold reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

65 The Crown rightly acknowledged that the due diligence criterion is not applied as strictly in criminal matters as in civil cases. As I determined above, the principles applicable in criminal matters are appropriate here, though this is not a Criminal Code matter. In *Palmer*, the Supreme Court adopted the following statement from its previous decision in *R. v. McMartin*, [1964] S.C.R. 484 (S.C.C.) at 491:

In all the circumstances, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

66 As the Crown acknowledges, the overriding consideration in respect of the admission of fresh evidence on appeal is the interests of justice. Where those interests require it, the evidence will be admitted, even if the applicant has not been as diligent in bringing the evidence forward as he or she ought to have been.

67 Nevertheless, the due diligence criterion is not without meaning. There are other aspects to the interests of justice that require the exercise of such diligence. Our Court of Appeal put the matter thus at paras. 2 and 3 of *R. v. Loutfi*, 212 A.R. 156, 1998 ABCA 59 (Alta. C.A.):

The system to maintain its autonomy and integrity demands that trials cannot be open-ended. They have to conclude sometime. Unless there is freshly discovered and material evidence relating to the fairness of the trial conviction, the court is obliged to proceed on the record as submitted for its review. ...

... loose acceptance of "fresh" evidence in criminal conviction and sentence appeals (which by itself commissions new trials in matters of guilt or innocence) could encourage the deliberate holdback of relevant evidence at trial to be offered on appeal as a ticket to a new trial, like an insurance policy against possible convictions.

68 In order to achieve the appropriate balance, the approach to be taken to the issue of due diligence is that adopted by the Supreme Court in *R. c. Lévesque*, [2000] 2 S.C.R. 487 (S.C.C.) at para. 14 as follows:

In *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 410, Doherty J.A. wrote the following concerning these [*Palmer*] principles:

The last three criteria are conditions precedent to the admission of evidence on appeal. Indeed, the second and third form part of the broader qualitative analysis required by the fourth consideration. The first criterion, due diligence, is not a condition precedent to the admissibility of "fresh" evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the admission of the evidence: *McMartin v. The Queen*, *supra*, at pp. 148-50; *R. v. Palmer*, *supra*, at p. 205.

In my view this is a good description of the way in which the principles set out in *Palmer* interact.

69 In this case, it cannot be seriously argued that Dr. Hall's testimony could not have been available at trial. As noted above, he has been a professor at the University of Lethbridge since 1990 and there is no suggestion that the information he proposes to impart was not in his possession at the time of the Appellant's trial. Indeed, Mr. Swinwood does not take the position that Dr. Hall was not available; rather, he relies on the principle that the due diligence criterion is not a condition precedent that prohibits the introduction of evidence that meets the other *Palmer* criteria.

70 However, I am of the view that Dr. Hall's testimony fails the *Palmer* test for reasons beyond just the clear lack of due diligence. The second criterion requires that the evidence sought to be admitted be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. Dr. Hall's Affidavit sworn November 24, 2004 indicates that he is prepared to comment on various matters pertaining to aboriginal rights. The following excerpts from the Affidavit are illustrative:

> 4. ... I am prepared to present proof to demonstrate that the Indian Act in its entirety is inconsistent with Section 35(1) of the Constitution Act, 1982. Moreover, I am prepared to assess the question of constitutional infractions by a number of parties for their failure to live up to the constitutional requirements to recognize and affirm the existing aboriginal and treaty rights of the aboriginal people of Canada, particularly with respect to land use in their traditional territories. I am prepared to comment on section 15 and 35 of the of the [sic] Constitution Act, 1982, the former emphasizing the right of the individuals to be free from negative discrimination and the latter emphasizing the group rights of Aboriginal collectives. I am also prepared to render opinions on the genesis of treaty federalism in the written and unwritten constitution of British Imperial Canada up to and including the British North America Act of 1867.
>
> 5. The central constitutional question concerns the systemic failure on the part of all Crown officials involved in this matter to recognize and affirm the existence of the Aboriginal and treaty rights of the Aboriginal peoples of Canada as called for in Section 35 of the Constitution Act, 1982. Indeed, in this case, as in most others of its ilk, the predominant patter is for Crown officials to deny and negate rather than recognize and affirm the existing Aboriginal and treaty rights. ...
>
> 6. My core contention in rendering a professional opinion on the issues relevant to this case is that many aspects of Canadian legislation, policy, legal interpretation and legal enforcement fail to recognize and affirm the existence of Aboriginal and treaty rights of the Aboriginal peoples of Canada referred to in section 35 of the Constitution Act, 1982. ...
>
> 7. One of the strongest examples of the systematic propensity of the government of Canada not to recognize and affirm but to deny and negate the existence of Aboriginal and treaty rights is the body of legislation known as the Indian Act and the entire machinery of administration and political representation that has grown up around it. From its inception in The Act for the Civilization of the Indian Tribes of Canada as passed by the Legislative Assembly of the province of Canada in 1857, the Indian Act has been aimed at the eventual termination of distinct Indian status. It has treated registered Indians as wards of the Dominion government to be governed under the fiduciary responsibility of the Crown until such time as the Indian wards and the Indian lands are assimilated culturally and legally into the matrix of regular Canadian citizenship and regular Canadian proprietary relations. Hence the unchanging goal of the Indian Act has been from its inception the termination of distinct Aboriginal polities.

. . . . .

> 11. Many Aboriginal individuals and groups share the conviction that the Indian Act negates rather than affirms the existence of Aboriginal and treaty rights. The insistence of the federal government to limit its Aboriginal funding primarily to band councils and to those agencies derived from band councils, including the Assembly of First nations, has created the basis of a simmering divide among Indigenous peoples.

71 With all due respect to Dr. Hall, I am not satisfied that his testimony would be relevant to the decisive issues on this appeal. The question of whether the laws of Canada and of its Provinces, including the provision under which she is charged, apply to the Appellant is a question of law within the competence of the courts and, as discussed above, that question has been answered clearly and affirmatively. Nor would Dr. Hall's testimony have any bearing on the determination of the elements of the offence with which the Appellant was charged. Thus, the Appellant has failed to demonstrate that Dr. Hall's testimony meets the second *Palmer* criterion.

72 The Crown took the position that the third *Palmer* criterion was not satisfied, submitting that Dr. Hall is not credible. In light of my findings in respect of the other *Palmer* criteria, I do not need to make a finding in this respect and I decline to do so.

73 Finally, the fourth *Palmer* criterion requires that the evidence sought to be introduced be such that, if believed, it could reasonably be expected to have affected the result at trial. The application fails on this ground as well. As noted above, the Appellant was charged with driving without proper insurance. Leaving aside her position that she is not subject to the statute in question, a position I have found to be without merit, this is a relatively straightforward matter. It is not reasonable to expect that Dr. Hall's testimony would have affected the Appellant's conviction.

74 The Appellant also argued that the traditional criteria for the introduction of fresh evidence do not apply where the material to be introduced is relevant to a determination made at trial and challenges the very validity of the trial process. The Appellant cites *R. v. W. (W.)* (1995), 25 O.R. (3d) 161 (Ont. C.A.) in support of this proposition. I do not believe that this case is of assistance to the Appellant. In *W. (W.)*, a husband and wife were represented at trial by the same counsel and it was argued that this joint representation gave rise to a miscarriage of justice. There has been no such miscarriage of justice here. The Appellant challenges the validity of this process on the grounds that she is not subject to the laws of Canada or to the jurisdiction of Canada's courts. That assertion having been rejected, the validity of the Appellant's trial is not in question and I reject this submission.

75 Finally, at para. 21 of her Factum, the Appellant cites *R. v. Bonin* (1989), 47 C.C.C. (3d) 230 (B.C. C.A.) in support of the proposition that "an appeal court should take notice of relevant matters of social and economic facts, whether or not they have been available to the trial judge." In *Bonin*, the British Columbia Court of Appeal received evidence from the Crown with respect to impaired driving in the province. That evidence was directed at an analysis of the limits permitted by s. 1 of the *Charter* and the reasonableness of the province's efforts to curb impaired driving. I do not consider this case analogous to *Bonin*. While Dr. Hall may be in a position to testify to "social and economic facts", I have already concluded that his testimony would not be relevant to the matters before this Court. Therefore, *Bonin* is of no assistance to the Appellant.

76 For the foregoing reasons, I conclude that the testimony of Dr. Hall does not meet the *Palmer* criteria for the introduction of fresh evidence at the appellate level and the Appellant's application to call Dr. Hall as a witness is refused.

Application dismissed.

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R. *v.* Pamajewon, [1996] 2 S.C.R. 821

Howard Pamajewon and Roger Jones *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Arnold Gardner, Jack Pitchenese and Allan Gardner *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General for Alberta,
the Assembly of Manitoba Chiefs,
the Federation of Saskatchewan Indian Nations and
White Bear First Nations,
and Delgamuukw et al. *Interveners*

Indexed as: R. *v.* Pamajewon

File No.: 24596.

Hearing and judgment: February 26, 1996.

Reasons delivered: August 22, 1996.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Aboriginal rights -- Self-government and high stakes gambling -- First nations passing lotteries by-laws -- By-laws not passed pursuant to s. 81 of Indian Act -- Criminal charges laid for alleged breach of gambling provisions -- Whether an aboriginal right to gamble -- Whether an aboriginal right to self-government which includes the right to regulate gambling activities -- Constitution Act, 1982, s. 35(1) -- Criminal Code, R.S.C., 1985, c. C-46, ss. 201(1), 206(1)(d), 207 -- Indian Act, R.S.C., 1985, c. I-5, s. 81.

The Shawanaga First Nation and the Eagle Lake First Nation both passed by-laws dealing with lotteries. Neither by-law was passed pursuant to s. 81 of the *Indian Act* and neither First Nation had a provincial licence authorizing gambling operations. The Shawanaga First Nation asserted an inherent right to self-government and the Eagle Lake First Nation asserted the right to be self-regulating in its economic activities.

The appellants Howard Pamajewon and Roger Jones, members of the Shawanaga First Nation, were charged with keeping a common gaming house contrary to s. 201(1) of the *Criminal Code*. The charges arose out of high stakes bingo and other

gambling activities on the reserve. The appellants Arnold Gardner, Jack Pitchenese and Allan Gardner, members of the Eagle Lake First Nation, were charged with conducting a scheme for the purpose of determining the winners of property, contrary to s. 206(1)(*d*) of the *Code*. The charges related to the band's bingo activities on the reserve. All were convicted and the convictions were upheld on appeal. At issue here was whether the regulation of high stakes gambling by the Shawanaga and Eagle Lake First Nations fell within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The constitutional question before the Court queried whether ss. 201, 206 or 207 of the *Code*, separately or in combination, were of no force or effect with respect to the appellants by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is that laid out in *R. v. Van der Peet*. Claims to self-government made under s. 35(1) are no different from other claims to the enjoyment of aboriginal rights and must be measured against the same standard.

In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether that activity could be said to be "a defining feature of the culture in question" prior to contact with Europeans.

The most accurate characterization of the appellants' claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands. To characterize the appellants' claim as "a broad right to manage the use of their reserve lands" would cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.

The evidence presented at trial did not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations at the time of contact. The activity was therefore not protected by s. 35(1).

Per L'Heureux-Dubé J.: To characterize the appellants' claim as the existence in their bands of a broad authority, protected by s. 35(1) of the *Constitution Act, 1982*, to make decisions regarding natives' social, economic, and cultural well-being (including the regulating of gambling activities) is overly broad. The claim, nevertheless, should not be characterized as "the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands". The proper inquiry focuses upon the activity itself and not on the specific manner in which it has been manifested. The claim must be broadly characterized: do the appellants possess an existing aboriginal right to gamble? If such a right can be shown to exist it would oblige the government to justify the infringement upon that right by the *Criminal Code*, which essentially prohibits gambling.

The definition of aboriginal rights should refer to the notion of the "integral part of a distinctive aboriginal culture", and to be recognized under s. 35(1), must be sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. The evidence presented did not show that gambling ever played an important role in the cultures of the Shawanaga and Eagle Lake First Nations. Gambling as a practice was not connected enough to the self-identity and self-preservation of the aboriginal societies involved here to deserve the protection of s. 35(1). It was unnecessary to consider whether s. 35(1) encompasses a broad right of self-government which includes the authority to regulate gambling activities on the reservation. Even if some rights of self-government existed before 1982, there was no evidence that gambling on reserve lands generally was ever the subject matter of aboriginal regulation.

Cases Cited

By Lamer C.J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

By L'Heureux-Dubé J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723.

Statutes and Regulations Cited

Constitution Act, 1867, s. 91(24).

Constitution Act, 1982, s. 35(1).

Criminal Code, R.S.C., 1985, c. C-46, ss. 15, 201(1), 206(1)(*d*), 207 [rep. & subs. c. 52 (1st Supp.), s. 3].

Indian Act, R.S.C., 1985, c. I-5, s. 81 [am. c. 32 (1st Supp.), s. 15].

Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron. Reprinted from the edition of 1939. Ottawa: Queen's Printer, 1964.

Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

APPEAL from a judgment of the Ontario Court of Appeal (1994), 21 O.R. (3d) 385, 120 D.L.R. (4th) 475, 95 C.C.C. (3d) 97, 36 C.R. (4th) 388, 77 O.A.C. 161, 25 C.R.R. (2d) 207, [1995] 2 C.N.L.R. 188, dismissing appeals by Howard Pamajewon and Roger Jones from convictions by Carr Prov. Ct. J. and by Arnold Gardner, Jack Pitchenese and Allan Gardner from convictions by Flaherty Prov. Ct. J. Appeal dismissed.

Arthur C. Pape, *Clayton C. Ruby* and *Jean Teillet*, for the appellants.

Scott C. Hutchison, for the respondent.

Ivan G. Whitehall, *Q.C.*, and *Kimberley Prost*, for the intervener the Attorney General of Canada.

Pierre Lachance, for the intervener the Attorney General of Quebec.

Kenneth J. Tyler and *Richard A. Saull*, for the intervener the Attorney General of Manitoba.

Paul J. Pearlman, for the intervener the Attorney General of British Columbia.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Margaret Unsworth, for the intervener the Attorney General for Alberta.

Jack R. London, Q.C., and *Martin S. Minuk*, for the intervener the Assembly of Manitoba Chiefs.

Mary Ellen Turpel-Lafond and *Lesia Ostertag*, for the interveners the Federation of Saskatchewan Indian Nations and White Bear First Nations.

Louise Mandell and *Peter W. Hutchins*, for the interveners Delgamuukw et al.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

THE CHIEF JUSTICE --

I. Introduction

1 This appeal raises the question of whether the conduct of high stakes gambling by the Shawanaga and Eagle Lake First Nations falls within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

2 The appeal was heard on February 26, 1996 and judgment was given dismissing the appeal. The following brief reasons will explain the basis for this decision.

II. Statement of Facts

Pamajewon and Jones

3 The appellants Pamajewon and Jones are members of the Shawanaga First Nation. On March 29, 1993, both were found guilty of the offence of keeping a common gaming house contrary to s. 201(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. Section 201(1) of the *Criminal Code* reads:

> **201.** (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

4 The charges arose out of the high stakes bingo and other gambling activities which took place on the Shawanaga First Nation Reservation between September 11, 1987 and October 6, 1990. Throughout this period Jones was Chief of the Shawanaga First Nation and Pamajewon was a member of the Shawanaga Band Council

5 Gambling on the reservation took place pursuant to the authority of the Shawanaga First Nation lottery law. This lottery law, enacted by the Band Council in

August 1987, was not a by-law passed pursuant to s. 81 of the *Indian Act*, R.S.C., 1985, c. I-5.

6 The Shawanaga First Nation did not have a provincial licence authorizing its gambling activities. The band had met with the Ontario Lottery Corporation but had refused the Corporation's offer of a gambling licence on the basis that such a licence was unnecessary because the band had an inherent right of self-government.

7 At trial the appellants Pamajewon and Jones were convicted. Their convictions were upheld by the Ontario Court of Appeal.

Gardner, Pitchenese and Gardner

8 The appellants Arnold Gardner, Jack Pitchenese and Allan Gardner are all members of the Eagle Lake First Nation. On November 19, 1993 they were found guilty of conducting a scheme for the purpose of determining the winners of property, contrary to s. 206(1)(*d*) of the *Code*. Section 206(1)(*d*) of the *Code* reads:

> **206.** (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
>
> . . .
>
> (*d*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of....

9 At the time they were charged Arnold Gardner was Chief of the Eagle Lake Band and chairman of the bingo committee. Jack Pitchenese managed the bingo operations. Allan Gardner was the chief bingo caller.

10 The gambling activities on the Eagle Lake Reserve were conducted pursuant to the Eagle Lake First Nation Band Council's lottery law, enacted in March 1985. This lottery law was not a by-law passed pursuant to s. 81 of the *Indian Act*.

11 The Eagle Lake First Nation did not have a provincial licence authorizing its gambling operations; the band had refused to negotiate with the Ontario Lottery Commission, even though it was approached for this purpose by the Ministry of Consumer and Commercial Relations. The band would not negotiate because it asserted the right to be self-regulating in its economic activities.

12 The appellants Gardner, Pitchenese and Gardner were convicted at trial. Their convictions were upheld by the Ontario Court of Appeal.

III. Judgments Below

Provincial Court

Pamajewon and Jones

13 At trial the appellants Pamajewon and Jones argued that the Crown had failed to prove the essential elements of the offence. Carr Prov. Ct. J. rejected this argument. It has not been pursued on appeal. The appellants argued further that they should not be convicted because their actions were taken pursuant to laws enacted by persons in possession of *de facto* sovereignty, as per s. 15 of the *Code*. Carr Prov. Ct. J. also rejected this argument, holding that the appellants had not demonstrated either that they were acting in "obedience" to the Shawanaga First Nation's lottery law (it did

not require them to act as they did) or that the band council had *de facto* sovereignty. This argument has not been pursued on appeal.

14 The appellants' final argument was that the application of s. 201(1) of the *Code* was an unconstitutional violation of the Shawanaga First Nation's inherent right of self-government. Carr Prov. Ct. J. rejected this argument. Relying on the terms of the *Royal Proclamation of 1763* and the Robinson Huron Treaty of 1850, and the granting of exclusive jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government under s. 91(24) of the *Constitution Act, 1867*, he held that any right of self-government which was once held by the Shawanaga First Nation had been extinguished by the clear and plain intention of the Crown, with the result that the appellants could not rely on such a right as a defence to the charges against them.

15 In the result, Carr Prov. Ct. J. convicted the appellants and sentenced them to a fine of $1,500 each.

Gardner, Pitchenese and Gardner

16 The appellants Gardner, Pitchenese and Gardner argued that they should not be convicted because s. 206 of the *Code* unjustifiably interfered with the Eagle Lake First Nation's s. 35(1) right to self-government. Flaherty Prov. Ct. J. rejected this argument. He held that the appellants' argument amounted, in essence, to an attempt to base the right to self-government on the economic disadvantages suffered by the Eagle Lake First Nation. Flaherty Prov. Ct. J. held that such a claim must fail:

> However one may wish to complain about ones economic disadvantage and however apparent it might be, redress needs to be found in other ways. People need to find ways of creating wealth and generating revenue that are

> not contrary to the Criminal law. . . . I am not persuaded that the economic disadvantages of the Eagle Lake First Nations people as evident as they have been established to be in these proceedings and of First Nations people generally can be addressed by activity which contravenes the Criminal law nor can I strike down a section of the Criminal Code which is otherwise constitutionally valid for the reasons carefully and ably submitted in this case.

17 Flaherty Prov. Ct. J. convicted the appellants Gardner, Pitchenese and Gardner and sentenced them to a fine of $1,500 each.

Ontario Court of Appeal (1994), 21 O.R. (3d) 385

18 At the Ontario Court of Appeal the appellants argued that their convictions violated their respective bands' rights to self-government. They argued that the right to self-government existed either as an incident to aboriginal title in the reserve land or as an inherent aboriginal right. The Court of Appeal rejected this argument. Osborne J.A. held that the basis of aboriginal title, as was held by Macfarlane J.A. at the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97, is the aboriginal use and occupation of the land, and that the content of such title is determined by the nature of the traditional aboriginal enjoyment of that land. Osborne J.A. held that in light of this basis and content it could not be said that aboriginal title gave rise to a broad right of self-government. Instead, the specific right of self-government claimed must be considered and a determination made as to whether that specific right arises from the traditional aboriginal culture and land use of the particular claimants. In this case the specific right of self-government claimed was the right to regulate high stakes gambling; Osborne J.A. held, at p. 400, that there "is no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nations' historic cultures and traditions, or an aspect of their use of their land".

19 Osborne J.A. held further that *R. v. Sparrow*, [1990] 1 S.C.R. 1075, is authority for the proposition that any broad inherent right to self-government held by the appellants was extinguished by the British assertion of sovereignty. The success of a claim to any more specific right of self-government will depend on the historical evidence regarding the aboriginal community of the particular claimant. In this case he held at p. 400 that the appellants' claim to self-government was not supported by the evidence: "there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation. Moreover, there is no evidence of an historic involvement in anything resembling the high stake gambling in issue in these cases". Osborne J.A. went on to hold that, in any case, any regulatory right over gambling held by the appellants in these cases was extinguished by Parliament's enactment of prohibitions on gambling in the *Code*.

IV. Grounds of Appeal

20 Leave to appeal to this Court was granted on June 1, 1995: [1995] 2 S.C.R. viii. On July 6, 1995 the following constitutional question was stated:

> Are s. 201, s. 206 or s. 207 of the *Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s. 52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellants?

21 The appellants appealed on the basis that the Court of Appeal erred in restricting aboriginal title to rights that are activity and site specific and in concluding that self-government only extends to those matters which were governed by ancient laws

or customs. The appellant argued further that the Court of Appeal erred in concluding that the *Code* extinguished self-government regarding gaming and in not addressing whether the *Code*'s gaming provisions unjustifiably interfered with the rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

22 The Federation of Saskatchewan Indian Nations and White Bear First Nations intervened on behalf of the appellants. The Attorney Generals of Canada, Quebec, Manitoba, British Columbia, Saskatchewan and Alberta intervened on behalf of the respondent.

V. Analysis

23 The resolution of the appellants' claim in this case rests on the application of the test, laid out by this Court in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, for determining the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The appellants in this case are claiming that the gambling activities in which they took part, and their respective bands' regulation of those gambling activities, fell within the scope of the aboriginal rights recognized and affirmed by s. 35(1). *Van der Peet, supra*, lays out the test for determining the practices, customs and traditions which fall within s. 35(1) and, as such, provides the legal standard against which the appellants' claim must be measured.

24 The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation. Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet, supra*. Assuming s. 35(1) encompasses claims to aboriginal self-government, such

claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*, *supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.

25 In *Van der Peet*, *supra*, the test for identifying aboriginal rights was said to be as follows, at para. 46:

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

In applying this test the Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be (*Van der Peet*, at para. 59) "a defining feature of the culture in question" prior to contact with Europeans.

26 I now turn to the first part of the *Van der Peet* test, the characterization of the appellants' claim. In *Van der Peet*, *supra*, the Court held at para. 53 that:

> To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.

When these factors are considered in this case it can be seen that the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation. The activity which

the appellants organized, and which their bands regulated, was high stakes gambling. The statute which they argue violates those rights prohibits gambling subject only to a few very limited exceptions (laid out in s. 207 of the *Code)*. Finally, the applicants rely in support of their claim on the fact that the "Ojibwa people ... had a long tradition of public games and sporting events, which pre-dated the arrival of Europeans". Thus, the activity in which the appellants were engaged and which their bands regulated, the statute they are impugning, and the historical evidence on which they rely, all relate to the conduct and regulation of gambling. As such, the most accurate characterization of the appellants' claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands.

27 The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

28 I now turn to the second branch of the *Van der Peet* test, the consideration of whether the participation in, and regulation of, gambling on the reserve lands was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. The evidence presented at both the Pamajewon and Gardner trials does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive

cultures of the Shawanaga or Eagle Lake First Nations. In fact, the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and prevalence of gaming in Ojibwa culture. While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.

29 I would note that neither of the trial judges in these cases relied upon findings of fact regarding the importance of gambling to the Ojibwa; however, upon review of the evidence I find myself in agreement with the conclusion arrived at by Osborne J.A. when he said first, at p. 400, that there "is no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nations' historic cultures and traditions, or an aspect of their use of their land" and, second, at p. 400, that "there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation". I also agree with the observation made by Flaherty Prov. Ct. J. in the Gardner trial when he said that

> commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized.

30 Given this evidentiary record, it is clear that the appellants have failed to demonstrate that the gambling activities in which they were engaged, and their

respective bands' regulation of those activities, took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

VI. Conclusion

31 These are my reasons for dismissing the appeal and for affirming the decision of the Court of Appeal upholding the trial judge's conviction of the various appellants for violating ss. 201 and 206 of the *Code*. There will be no order as to costs.

32 For the reasons given above, the constitutional question must be answered as follows:

Question : Are s. 201, s. 206 or s. 207 of the *Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s. 52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellants?

Answer : No.

The following are the reasons delivered by

33 L'HEUREUX-DUBÉ J. -- This appeal, as well as the appeals considered contemporaneously in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse*

Ltd., [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, concern aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982.*

34 The broad issue of the nature and extent of constitutionally protected aboriginal rights was dealt with in the companion case of *Van der Peet, supra.* In this case, the particular question is whether the Shawanaga and Eagle Lake First Nations, of which the appellants are members, possess an existing aboriginal right to conduct and regulate high stakes gambling operations which take place on their reserves

35 The Chief Justice has set out the facts and judgments and there is no need to restate them here. On July 6, 1995, he formulated the following constitutional question:

> Are s. 201, s. 206 or s. 207 of the *Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s. 52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellants?

36 The Court is unanimously of the view that the above-noted question should be answered in the negative, and the appeal was dismissed from the bench. The Chief Justice has applied the test he set out in *Van der Peet, supra*, and finds as a result that the gambling activities, and the bands' regulation of those activities do not fall within the scope of the aboriginal rights protected under s. 35(1). I have come to the same conclusion as the Chief Justice; however, I do so by a different route.

37 The appellants have asserted that a broad authority exists in their bands to make decisions regarding natives' social, economic, and cultural well-being which

includes regulating gambling activities. In their view, this authority is protected under s. 35(1) of the *Constitution Act, 1982*.

38 I agree with the Chief Justice that to characterize the claim in such a way is overly broad. I would not, however, as he has (at para. 26), characterize the nature of the claimed right as "the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands". In my view, the proper inquiry focuses broadly upon the activity itself and not on the specific manner in which it has been manifested. As well, the purpose for which the aboriginal activity in question is undertaken will often help characterize the right in question. Here, in order to assess the scope of the right properly we must characterize the claim broadly and determine whether, in this case, the Shawanaga First Nation, of which the appellants Jones and Pamajewon are members, and the Eagle Lake First Nation, of which the appellants Gardner, Pitchenese and Gardner are members, possess an existing aboriginal right to gamble. If such a right can be shown to exist it would oblige the government to justify the infringement upon that right by the *Criminal Code*, which essentially prohibits gambling.

39 In *Van der Peet*, I concluded at para. 180 that the definition of aboriginal rights should refer to the notion of the "integral part of a distinctive aboriginal culture" and set out the following guidelines:

> In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the *Constitution Act, 1982* if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not

> involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time. [Emphasis added.]

Therefore, an inquiry is necessary to determine whether the right asserted by the natives here satisfies the criteria listed above.

40 In this regard, the Chief Justice has evaluated the evidence presented at both the Pamajewon and Gardner trials and concluded that it does not show that gambling ever played an important role in the cultures of the Shawanaga and Eagle Lake First Nations. I agree. In my view, the appellants have failed to demonstrate that the gambling activities in which they were engaged took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Based on the evidence adduced, it cannot be said that gambling as a practice is connected enough to the self-identity and self-preservation of the appellants' aboriginal societies to deserve the protection of s. 35(1).

41 The appellants have also asserted that s. 35(1) encompasses a broad right of self-government, and that this right includes the authority to regulate gambling activities on the reservation. Given the conclusion I have reached regarding gambling as a practice in these particular bands, it is unnecessary for me to even consider the question of self-government.

42 However, to the extent that it is necessary to deal with this issue, I merely refer to my reasons in *Van Der Peet*, *supra*, at para. 117, where I stated:

> This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands: see Brian Slattery, "Understanding Aboriginal Rights" [(1987),

> 66 *Can. Bar Rev.* 727], at pp. 743-44. The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory.

43 In addition, I am also in general agreement with the reasons of Osborne J.A. in the Court of Appeal (1994), 21 O.R. (3d) 385, at p. 400, where he states with respect to this case:

> If the Shawanaga First Nation and Eagle Lake Band had some rights of self-government which existed in 1982 (I am prepared to assume that they did), the right of governance asserted must be viewed like other claimed aboriginal rights; it must be given an historic context. Here, there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation. Moreover, there is no evidence of an historic involvement in anything resembling the high stake gambling in issue in these cases.

44 Accordingly, I would dispose of this appeal and answer the constitutional question in the manner proposed by the Chief Justice.

Appeal dismissed.

Solicitors for the appellants: Ruby & Edwardh, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitors for the intervener the Attorney General of British Columbia: Fuller & Pearlman, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitors for the intervener the Assembly of Manitoba Chiefs: Buchwald, Asper, Gallagher, Henteleff, Winnipeg.

Solicitor for the interveners the Federation of Saskatchewan Indian Nations and White Bear First Nations: Mary Ellen Turpel-Lafond, Saskatoon.

Solicitors for the interveners Delgamuukw et al.: Rush, Crane, Guenther & Adams, Vancouver.

1996 CarswellNS 309, 38 C.R.R. (2d) 15, 154 N.S.R. (2d) 1, 452 A.P.R. 1, [1997] 2 C.N.L.R. 103

R. v. Murdock

Marion Murdock and Stanley Johnson (Appellants) and Her Majesty the Queen (Respondent) and Union of Nova Scotia Indians (Intervenor)

Nova Scotia Court of Appeal

Hallett, Chipman and Freeman JJ.A.

Heard: June 10, 1996
Judgment: August 19, 1996
Docket: C.A.C. 119999, 120006, 120007

Counsel: *Mary O. Hebb* and *Donna Hollister Smith*, for Marion Murdock.

Stanley Johnson in person.

Robert E. Lutes, Q.C., and *James Clarke*, for respondent.

Bruce H. Wildsmith, Q.C., for intervenor.

Subject: Public; Constitutional; Criminal; Provincial Tax

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Native law --- Constitutional issues — Taxation — Liability for provincial tax — .

Criminal law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Right to be tried within reasonable time — Pre-trial delay.

Criminal law --- Invasion of privacy — Interception of private communications — Admissibility — Authorization — General.

Native Law — Constitutional issues — Taxation — Liability for provincial tax — Status Indians charged with conspiracy to defraud province of tax levied under Tobacco Tax Act — Indians arguing tax regime inconsistent Indian Act, ultra vires the province and infringing aboriginal rights protected by Constitution Act, 1982 — System ensuring tax-exempt tobacco on reserves did not exceed Indians' reasonable requirements — System not inconsistent with tax exemption or legislating with respect to matters provided for in Indian Act — System not

taxing Indian consumer and only incidentally affecting extra-provincial trade — System not ultra vires the province — Indians not traditionally trading in tobacco — Indians not having aboriginal right to trade in tobacco — Tobacco Tax Act, R.S.N.S. 1989, c. 470, ss. 6, 14(1), (2), 25(1) — Constitution Act, 1982, s. 35(1) — Indian Act, R.S.C. 1985, c. I-5, ss. 87(1)(b), 88 — Tobacco Marking Regulations, ss.2(2)(d), 4(3)(a).

Criminal Law — Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Right to be tried within reasonable time — Pre-trial delay — Status Indian charged with conspiracy to defraud province of tax levied under Tobacco Tax Act — Information laid in July 1992 but trial in June 1995 — Accused causing or consenting to one year of delay — Delay due to complexity and number of charges and limited resources of trial venue — Accused out on bail and not restricted in movement — Accused shielded from stigma by living outside jurisdiction — Evidence not supporting allegations that delay causing medical problems of accused or prevented her school attendance — Delay not unreasonable and no prejudice resulting — Canadian Charter of Rights and Freedoms, s. 11(b) — Tobacco Tax Act, R.S.N.S. 1989, c. 470 — Indian Act, R.S.C. 1985, c. I-5.

Criminal Law — Invasion of privacy — Interception of private communications — Admissibility — Authorization — Status Indians charged with conspiracy to defraud province of tax levied under Tobacco Tax Act — Evidence including intercepted communications — Authorization for interceptions granted based on information from unnamed informants — Accused arguing evidence inadmissible under s. 186 of Criminal Code and s. 8 of Charter — Section 186 not requiring naming of informants — Police finding informants reliable in past — Crime of conspiracy normally requiring interception of communciations — Authorization obtained after extensive observation of apparent illegal activity — Criminal Code, R.S.C. 1985, c. C-46, s. 186 — Tobacco Tax Act, R.S.N.S. 1989, c. 470 — Indian Act, R.S.C. 1985, c. I-5, Canadian Charter of Rights and Freedoms, s. 8.

The accused, M and J, held Indian status under the *Indian Act* (the "IA"). M lived on an Ontario reserve while J lived on a Nova Scotia reserve, where he operated three retail stores. Two of the stores were located on a provincial highway and were patronized by non-Indians. The evidence showed that M acquired tobacco in Ontario and the U.S. and sold it to J. Neither M nor J reported the bringing of the tobacco into Nova Scotia as required under s. 6 of the *Tobacco Tax Act* (the "TTA"), and neither held a wholesale or retail vendor permit as required under s. 14(1) and (2) and s. 25(2) of the TTA. J was not a designated vendor allowed to sell unmarked (and thus untaxed) tobacco under s. 2(2)(d) of the *Tobacco Marking Regulations*, as part of the quota imposed by the TTA on tax-free tobacco available on reserves. M did not have a wholesalers permit to sell to designated reserve vendors as required under s. 4(3)(a) of the regulations. J sold the tobacco to non-Indians and neither M nor J paid the tobacco tax required under s.6 of the TTA.

Following a police investigation operation, which included intercepting M's phone conversations, M and J were charged with conspiring to defraud the province of Nova Scotia of tobacco tax in excess of $1000. M and J were convicted and sentenced to six months and 18 months incarceration, respectively. They appealed on the grounds that, (1) M was not tried within a reasonable time, contrary to her rights under s. 11(b) of the *Canadian Charter of Rights and Freedoms*; (2) that the evidence did not show M and J had the necessary mens rea for the offence, or that the value of the tax allegedly evaded was in excess of $1000; (3) that M and J were exempt from the TTA quota system because it was inconsistent with s. 87(1)(b) of the IA and attempted to legislate in respect of activities provided for in the IA; (4) that the TTA was ultra vires the province insofar as it attempted to legislate with respect to Indians on reserves; (5) that the TTA was ultra vires the province insofar as it resulted in indirect taxation; (6) that the TTA was ultra vires the province insofar as it attempted to restrict extraprovincial trade; (7) that the system infringed an aboriginal right contrary to s. 35(1) of the *Constitution Act, 1982* (the "CA"); (8)

that the evidence of intercepted communications should not have been admitted because the authorization was based on evidence of unnamed informants, contrary to s. 186 of the *Criminal Code*; (9) that the intercepted conversations were inadmissible as they resulted from an unreasonable search and seizure contrary to s. 8 of the *Charter*; (10) that the voice identification of M should have been excluded, as the identification was obtained in violation of her right to counsel; (11) and that the evidence admitted included conversations which were not authorized to be intercepted. M and J also appealed from sentence.

Held:

The appeals were dismissed.

The informations against M was laid in July 1992, and the trial did not commence until June 1995. However, M consented to or caused over a year of the delay. The delay was also due to the numerous trials spawned by the police operation which severely taxed the institutional resources of the one courtroom trial venue. As M had not retained counsel by April 1993, earlier scheduling of the October 1993 preliminary hearing would have been adjourned anyway. Given the circumstances, there was no unreasonable delay.

The primary purpose of s. 11(b) was to protect an accused's right to a fair trial. While a potential witness died prior to trial, that witness died in September 1992, long before the trial could have occurred. Given the adverse findings the trial judge made as to M's credibility, it was unlikely the witness' evidence could have helped M anyway. Any stress caused to M's family by the delay did not bear on the fairness of the trial. While M may have experienced anxiety during the delay, she did not suffer any more than any accused person would. The stigma of the charge was blunted by the fact that she did not reside where the trial was taking place. M was out on bail and thus her liberty was not restrained, and she was only in a court a few days during the period of delay. There was no evidence that the delay caused any of M's medical problems or prevented her from attending school, as she alleged. Thus, there was no evidence that M was prejudiced by the delay or that her right to a fair trial was infringed.

M testified that she and J believed that, as J operated a store on a reserve, he was not subject to the TTA. M testified that she believed she could move "quota" tobacco from one reserve to another. However, the trial judge, after considering M's testimony as well as taped conversations where M said the police could not touch "quota" tobacco, found that M and J intended to defraud the province. The finding was based on reasonable inferences from the evidence. The trial judge also heard evidence from the Provincial Tax Commission that the tax revenue from the illegal tobacco would have exceeded $1000. The evidence supported the finding of conspiracy to defraud in excess of $1000.

Under s. 88 of the IA, provincial laws of general application apply to Indians unless they are inconsistent with the IA or provide for matters which are provided for in the IA. Section 87(1)(b) of the IA exempts from tax the sale of personal property to an Indian on a reserve, including property purchased on a reserve which was destined for sale exclusively to Indians. However, s. 87(1)(b) of the IA did not exempt Indian retailers from prepaying tax to wholesalers on purchases of tobacco made off the reserve or for sale to non-Indians. Sections 6, 14(1) and 25(2) of the TTA were provisions of general application designed for the effective collection of tax and applied to retail vendors on reserves under the regulations. The quota system under those provisions did not restrict retail vendors beyond what was necessary to ensure that the volume of tax exempt tobacco on a reserve did not exceed the reasonable requirements of Indians on reserves. There was no erosion of Indian consumers' rights to purchase tax-free tobacco and thus there was no inconsistency with s. 87 of the IA. Neither did the

quota system provide for matters provided for in the IA. Rather, the system was a means by which the province delivered the tax exemption provided for under s. 87 of the IA.

A province is entitled to tax personal property sold within the province even if the property originates outside the province. The pith and substance of the TTA was to levy a direct tax on sales of tobacco in the province and to control its sale within the province. Sections 6 and 14(1) of the TTA, which regulate importation of tobacco into the province through a licensing system, are necessary to control tobacco sales in the province. Those provisions were incidental to the exercise of the provincial power, under s. 92 of the *Constitution Act, 1867* to impose direct taxation and to rule with respect to property and civil rights. Any incidental encroachment on the federal power to regulate inter-provincial trade did not invalidate s. 6 or s. 14(1) of the TTA.

The essence of a direct tax is that the tax burden falls on the last purchaser of the article. The regime under the TTA met that criteria. M argued that because J, an Indian retailer who was not designated to handle quota tobacco, was required to prepay tax on the tobacco but could not pass on the tax to the purchaser, it resulted in indirect taxation on J. However, the evidence was that J sold the tobacco to non-Indians, to whom he could have passed on the tax. J was not the consumer of the tobacco, and as a retailer who sold tobacco to anyone, did not have the benefit of the exemption in s. 87(1)(b) of the IA. There was no indirect taxation on J.

Section 35(1) of the CA affirmed aboriginal rights other than treaty rights. Traditional aboriginal rights may be exercised in a contemporary matter, if shown to have previously existed in a traditional form. The evidence was that Indians used wild tobacco before the arrival of European settlers for ceremonial purposes. However, there was no evidence that the traditional use of tobacco included trading in tobacco products between bands in different parts of Canada. While there might be an aboriginal right to use tobacco for personal consumption or ceremonial purposes, the scope of that right did not include inter-provincial trading, or sale to non-Indians. The evidence was that under the TTA quota, an Indian consumer was entitled to purchase the equivalent of 80 cigarettes per day, tax-free, and that increased amounts of tax-free tobacco for ceremonies was available on request. Therefore, the TTA and its regulations did not infringe the aboriginal right to use tobacco.

The confidentiality of informants is often necessary. Sections 185 and 186 of the Code do not require that informants be named in order to authorize interception of communications. The judge authorizing the interception of M's conversations did not consider that the informants' identities were necessary. The affiant was able to swear that the informants had provided reliable information in the past. The defence received full and frank disclosure even without knowing the names of the informants and the authorization was not granted contrary to s. 186 of the Code.

Detection of conspiracy to commit fraud will in most cases require interception of private communications. All possible steps in an investigation need not be exhausted before authorization of such interception can be made. The information before the authorizing judge included tips from reliable informants and evidence of months of police sureveillance which found apparent illegal activity. Considering the number of people involved in the conspiracy, the large distances separating them, and their experience with distributing tobacco illegally, concrete evidence of shipments to Nova Scotia would not likely have been found without intercepting their communications. There was no credible evidence that the information upon which the authorization was granted was demonstrably unreliable on its face. Obtaining the authorization was nessessary in the proper administration of justice and did not breach s. 8 of the *Charter*.

The identification of M's voice was made by a police officer who had contact with M prior to M turning herself

into police in October 1992. Therefore, the issue of whether M should have been advised of her s. 10 rights when she turned herself in was moot with respect to admissibility of the voice identification evidence. There was also no evidence that the trial judge considered any intercepted communications which were not authorized. The appeals from conviction should be dismissed.

J was a mature experienced man with a Bachelor of Commerce degree and an extensive criminal record dealing specifically with tobacco-related charges. His offence was carefully orchestrated and pre-meditated and resulted in direct personal gain. While M was a widow with two children and was enrolled as a full-time student, she was not a first offender with respect to tobacco-related charges. The trial judge was entitled to consider the province's lost revenues from the illegal tobacco trade in sentencing M and J, and did consider M's rehabilitiave efforts and the effect incarceration would have on her family. The sentences were not excessive and the appeals from sentence should be dismissed.

Cases considered:

Atlantic Smoke Shops Ltd. v. Conlon, [1943] 3 W.W.R. 113, [1943] A.C. 550, [1943] 2 All E.R. 393, [1943] 4 D.L.R. 81 (P.C.) — *applied*

Bomberry v. Ontario (Minister of Revenue), [1989] 3 C.N.L.R. 27, 34 O.A.C. 17, 2 T.C.T. 4234, 63 D.L.R. (4th) 526, 70 O.R. (2d) 662 (Div. Ct.) [appeal dismissed as abandoned (1993), 107 D.L.R. (4th) 448, [1994] 2 C.N.L.R. vi (note) (Ont. C.A.)] — *considered*

Francis v. R., [1956] S.C.R. 618, 56 D.T.C. 1077, 3 D.L.R. (2d) 641 — *referred to*

Gallagher v. Lynn, [1937] A.C. 863 (H.L.) — *considered*

Hill v. Ontario (Minister of Revenue) (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537, [1986] 1 C.N.L.R. 22 (H.C.) — *considered*

Johnson v. Nova Scotia (Attorney General), 96 N.S.R. (2d) 140, 253 A.P.R. 140, 3 T.C.T. 5148, [1990] 2 C.N.L.R. 62 (C.A.) [leave to appeal to S.C.C. refused (1990), [1991] 1 C.N.L.R. vi (note), 100 N.S.R. (2d) 180 (note), 272 A.P.R. 180 (note), 124 N.R. 319 (note) (S.C.C.)] — *referred to*

Manitoba v. Air Canada, [1980] 2 S.C.R. 303, [1980] C.T.C. 428, 4 Man. R. (2d) 278, 111 D.L.R. (3d) 513, 32 N.R. 244 — *considered*

Milhelm Atea & Bros. Inc. v. New York (Department of Taxation & Finance), 599 N.Y. Supp. 2d 5510 (U.S. 1993) — *referred to*

Mitchell v. Sandy Bay Indian Band, (sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 2 S.C.R. 85, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, 110 N.R. 241, 67 Man. R. (2d) 81 — *applied*

Nowegijick v. R., [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 46 N.R. 41, 144 D.L.R. (3d) 193, 83 D.T.C. 5041 — *referred to*

R. v. Denny, 94 N.S.R. (2d) 253, 247 A.P.R. 253, 55 C.C.C. (3d) 322, [1990] 2 C.N.L.R. 115 (C.A.) — *considered*

R. v. Garofoli, 80 C.R. (3d) 317, 116 N.R. 241, 60 C.C.C. (3d) 161, 43 O.A.C. 1, [1990] 2 S.C.R. 1421, 50 C.R.R. 206, 36 Q.A.C. 161 — *applied*

R. v. Isaac, MacKeigan C.J.N.S. — *considered*

R. v. Johnson (1993), 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129 (C.A.) [leave to appeal to S.C.C. granted (1993), 164 N.R. 79 (note), 133 N.S.R. (2d) 80 (note), 380 A.P.R. 80 (note) (S.C.C.), granting of leave to appeal quashed (1994), 179 N.R. 77 (note), 140 N.S.R. (2d) 80 (note), 399 A.P.R. 80 (note) (S.C.C.)] — *applied*

R. v. Johnson (1995), 141 N.S.R. (2d) 133, 403 A.P.R. 133 (C.A.) — *applied*

R. v. Marshall (June 27, 1996) (N.S. T.D.) [unreported] — *cnsidered*

R. v. Morgentaler, 157 N.R. 97, 25 C.R. (4th) 179, [1993] 3 S.C.R. 463, 125 N.S.R. (2d) 81, 349 A.P.R. 81, 85 C.C.C. (3d) 118, 107 D.L.R. (4th) 537 — *applied*

R. v. Morin, 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 134 N.R. 321, 8 C.R.R. (2d) 193, 53 O.A.C. 241, [1992] 1 S.C.R. 771 — *applied*

R. v. Nikal, [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, (sub nom. *Canada v. Nikal)* 35 C.R.R. (2d) 189 (S.C.C.) — *applied*

R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390 — *referred to*

R. v. Sparrow, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *considered*

R. v. Therens, [1985] 1 S.C.R. 613, [1985] 4 W.W.R. 286, 32 M.V.R. 153, 45 C.R. (3d) 97, 38 Alta. L.R. (2d) 99, 18 C.C.C. (3d) 481, 13 C.R.R. 193, 40 Sask. R. 122, 18 D.L.R. (4th) 655, 59 N.R. 122 — *con- sidered*

R. v. Yebes, [1987] 6 W.W.R. 97, 17 B.C.L.R. (2d) 1, 78 N.R. 351, 59 C.R. (3d) 108, [1987] 2 S.C.R. 168, (sub nom. *Yebes v. R.)* 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424 (S.C.C.) — *applied*

Russell v. R. (1882), 7 App. Cas. 829, 2 Cart. B.N.A. 12, , 51 L.J.P.C. 77, 46 L.T. 889, C.R. [8] A.C. 502 (Can. P.C.) — *considered*

Shannon v. British Columbia (Lower Mainland Dairy Products Board), [1938] 2 W.W.R. 604, [1938] A.C. 708, [1938] 4 D.L.R. 81 (P.C.) — *applied*

Tseshaht Indian Band v. British Columbia, 94 D.L.R. (4th) 97, 15 B.C.A.C. 1, 27 W.A.C. 1, (sub nom. *Tse- shaht Band v. British Columbia)* 69 B.C.L.R. (2d) 1, [1992] 4 C.N.L.R. 171 (C.A.) — *applied*

Union of New Brunswick Indians v. New Brunswick (Minister of Finance) (1996), 135 D.L.R. (4th) 193 (N.B. C.A.) — *considered*

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1988), 54 D.L.R. (4th) 639, 89 N.S.R.

(2d) 121, 227 A.P.R. 121, [1989] 1 T.S.T. 3055, 2 T.C.T. 4244, [1989] 2 C.N.L.R. 168 (T.D.) — *referred to*

Statutes considered:

Canada Temperance Act, 1878, S.C. 1878, c. 16

generally*considered*

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

generally*referred to*

s. 8*considered*

s. 10*considered*

s. 11(b)*considered*

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3

generally*referred to*

s. 91(2)*considered*

s. 92(2)*considered*

s. 92(13)*considered*

s. 91(24)*considered*

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), c. 11

s. 35(1)*considered*

Criminal Code, R.S.C. 1985, c. C-46

s. 186*considered*

s. 185*considered*

Government of Ireland Act, 1920, (U.K.), 10 & 11 Geo. 5, c. 67

s. 4(7)*considered*

Health Services Tax Act, R.S.N.S. 1989, c. 198

generally*referred to*

Indian Act, R.S.C. 1985, c. I-5

generally*considered*

s. 87*considered*

s. 87(1)(b)*considered*

s. 88*considered*

Milk and Milk Products Act, 1934, 24 & 25 Geo. 5, c. 16

generally*considered*

Motor Fuel Tax Act, S.B.C. 1985, c. 76

generally*referred to*

Social Services and Education Tax Act, R.S.N.B. 1973, c. S-10

generally*referred to*

Tobacco Tax Act, R.S.B.C. 1979, c. 404

generally*considered*

Tobacco Tax Act, R.S.N.S. 1989, c. 470

generally*considered*

s. 2(h)*considered*

s. 2(k)*considered*

s. 2(l)*considered*

s. 2(m)*considered*

s. 6*considered*

s. 14*considered*

s. 14(1)*considered*

s. 14(1)(a)*considered*

s. 14(1)(b)*considered*

s. 14(2)*considered*

s. 25(2) [am. S.N.S. 1994, c. 34, s. 4(1)]*considered*

s. 33*considered*

s. 44*referred to*

Regulations considered:

Tobacco Tax Act, R.S.N.S. 1989, c. 479

Tobacco Marking Regulations, N.S. Reg. 51/91,

generally

s. 2(2)(d)

s. 4(1)

s. 4(3)

s. 4(3)(a)

s. 4(4)

s. 5(1)

s. 5(2)

Treaties considered:

Treaty of 1752

s. 4*considered*

Appeals by accused from convictions on charges of conspiracy to defraud the province of Nova Scotia of tobacco tax; appeals from sentence.

The judgment of the court was delivered by *Hallett J.A.*:

1 The appellants were charged and convicted:

> That between the 1st day of January, 1991 and the 8th day of July, 1992 at, or near Truro, in the County of Colchester, Indian Brook, in the County of Hants, Hilden, in the County of Colchester, all in the Province of Nova Scotia, and elsewhere in the Province of Nova Scotia; Moncton, in the Province of New Brunswick; and Hagersville in the Province of Ontario, *not being the holders of wholesale vendor's permits* issued pursuant to the Tobacco Tax Act and Regulations, R.S.N.s. 1989 Chapter 470, as amended, *did unlawfully conspire together*, the one with the other and others of them, and with John Moses Bernard and with persons unknown to, *by deceit, falsehood or other fraudulent means defraud* Her Majesty the Queen in Right of *the Province of Nova Scotia*, of Her lawful revenue, payable as tax in respect to tobacco, pursuant to the Tobacco Tax Act, as and when brought into Nova Scotia, of a value exceeding one thousand dollars ($1,000.00) contrary to Sections 380(1)(a) and 465 (1)(c) of the Criminal Code. {Emphasis added}

2 Mr. Johnson and Ms. Murdock are status, or registered Indians, registered under the provisions of the *Indian Act*, R.S.C. 1985, c. I-5. Johnson is a Mi'kmaq who is a member of the Millbrook Indian Band and who resides on the Millbrook Indian Reserve, Truro, Nova Scotia. Murdock is an Iroquois (Mohawk) who resides on the Six Nations Reserve at Hagersville, Ontario.

3 Johnson operates three retail variety stores on the Millbrook Indian Reserve under the names of Abenaki Food Store, Crafts and Butts Store and 1752 Treaty Truck House. Two of the stores are located on provincial highways that pass through the reserve; the other is located at 17 James Street in the Town of Truro.

4 The evidence shows that Ms. Murdock sold tobacco to Johnson and arranged for the purchase by Johnson and delivery to him of tobacco products acquired in either Ontario or the United States and delivered to him in Nova Scotia by "her boys". The tobacco was transported from Ontario and brought to Johnson's stores on the Millbrook Reserve in Nova Scotia. Neither Johnson nor Murdock reported to the Commissioner under the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470 the fact that they had brought tobacco into Nova Scotia. Neither of them held a Wholesale Vendor permit or a Designated Retail Vendor permit nor any other permit issued under the *Tobacco Tax Act* or the *Health Services Tax Act*, R.S.N.S. 1989, c. 198. The evidence also shows that Johnson (i) was in possession of the tobacco on an Indian reserve for the purpose of resale from his three stores; (ii) that he sold tobacco products to a non-native; and (iii) that tobacco tax was not paid on any of the tobacco acquired through Ms. Murdock and imported into the Province of Nova Scotia.

5 Prior to commencement of the trial the appellants had brought an application which was heard by Justice MacLellan that their *Charter* right to be tried within a reasonable time had been infringed. Justice MacLellan dismissed the application. His order was appealed to this Court; the appeal was dismissed as being premature (*R. v. Murdock* (1995), 141 N.S.R. (2d) 251 (N.S.C.A.).

6 The appellants have appealed Justice MacLellan's order alleging that systemic delay from August 5th, 1992, when the charges were laid, until the commencement of the trial on June 20th, 1995, was unreasonable and contrary to the appellants' s. 11(b) *Charter* right.

The Trial

7 The trial was scheduled to start on June 20th, 1995 as trial with judge and jury. There were pre-trial conferences on April 24th and May 16th, 1995.

8 On June 12th, 1995, counsel for Ms. Murdock, Naugle (a co-accused) and the Crown, as well as Johnson personally, appeared before the judge designated to preside over the trial. At that time all accused, through their counsel, indicated a desire to re-elect to be tried by a judge alone. At that hearing Johnson, who was the only accused actually present, also re-elected to be tried by judge alone. On June 12th there was a motion by counsel for Ms. Murdock for an order to require the R.C.M.P. to provide copies of transcripts of intercepted telephone conversations which the Crown did not intend to introduce at trial. The motion was made without prior notice to the Crown. The trial judge commented on the lateness of the request but nevertheless issued an order that the tapes requested be provided.

9 At this conference there was also a change of venue from Truro to Halifax which was agreed to by counsel for the accused persons; the pre-trial conference concluded and the trial was scheduled to commence on June 20th, 1995.

10 On June 20th, 1995, Mr. MacDonnell appeared as counsel for Johnson. The court was advised by Ms. Murdock's counsel that her client was in hospital in Ontario and would be in hospital for several days. The record shows that the trial was accordingly adjourned to June 26th. Then adjourned from June 26th to June 28th; then to July 4th, then to July 5th when Ms. Murdock finally appeared in court and elected trial by judge alone.

11 The record for July 7th shows that Ms. Murdock was half an hour late for the commencement of the trial on June 7th, this, on top of the delays that had been experienced between June 20th and July 6th when it seemed to be impossible to ascertain just when it would be that Ms. Murdock would be in Halifax for the trial. The trial judge showed remarkable patience.

12 On July 7th an application was made on behalf of Mr. Naugle to exclude certain wiretap evidence against him. The trial judge granted the motion and ruled that the evidence against Naugle was inadmissible. The trial of the charges against Johnson and Murdock proceeded.

13 On July 7th counsel for Ms. Murdock brought a motion that the *Tobacco Tax Act* of the Province of Nova Scotia was unconstitutional. In her introductory remarks counsel stated:

> *Ms. Hebb*: Yes, just a few introductory remarks. As your Ladyship will be aware that the argument that we're advancing is on behalf of both the defendants, Johnson and Murdock, is that the *Tobacco Tax Act* is, in pith and substance, a law in relation to ours coming under s. 91(24) of the *Constitutional Act 1867*, which puts it in the Federal field the powers with respect to Indians. We will attempt to convince the court that the Provincial control of tobacco in the hands of Indians is an intrusion on that Federal jurisdiction and that we will show that the tobacco tax in both its dominant purpose and legal and practical effect, is an exercise of Federal powers. Rather than today, tomorrow we will introduce the Exhibits, such as the Preliminary evidence from the Preliminary Enquiry, a Hansard Exhibit, and establish the status of Indians of both Mr. Johnson and Ms. Murdock. Right now, we have a witness, Mr. David Gehue. We have two witnesses, one of whom will be called tomorrow and the purpose of their testimony is to show that tobacco is a an integral part of Indian, of Mi'kmaq culture. We will try to establish them as expert witnesses because we believe they both might be able to give opinions in that capacity which would be of little more assistance to the court. However, we do think that their day-to-day experience as Elders...Professor Marshall as a teacher and Mr. Gehue as a healer in the Mi'kmaq community, that their day-to-day knowledge and experience will be sufficient to establish the points we wish to make. I will call Mr. Gehue.

14 The Crown expressed concern as to the relevancy of the proposed expert evidence to the issue of the constitutionality of the *Tobacco Tax Act*. Counsel for the Crown stated:

> .... if all they're going to say is that tobacco or form of leaf has been smoked or used in ceremonial aspects, not only of the Mi'Kmaq Nation, but of the Aboriginal Nation, in this area, which was, over the years, referred to as Nova Scotia or Acadia or Isle de Royale, or whatever, the Crown is prepared to admit that tobacco or a form of tobacco or a form of leaf, not necessarily tobacco, may have some ceremonial aspects to it.

15 Evidence of the two witnesses was heard on Friday, July 7th. On Monday, July 10th Justice Stewart rendered an oral decision on the constitutional challenge to the *Tobacco Tax Act*. She stated:

> *THE COURT*: As indicated, dealing then with my ruling with respect to constitutionality issues that have been raised and argued.

I am not prepared to hold that the *Tobacco Tax Act* and regulation *ultra vires* the Legislature of the Province of Nova Scotia on the grounds that the *Act* is legislation whose dominant purpose, or its pith and substance, is in relation to Indian matters falling within the exclusive legislative jurisdiction of the Parliament of Canada under s.91(24) of the *Constitution Act* of 1867.

For a court to strike down an enactment, it's squarely substituting its judgment for that of a democratically elected legislature. There is a presumption of constitutionality, which carries with it a very, very heavy burden. There is a need for an overwhelming degree of evidence, and I am satisfied that, in the matter before the court, that has not been met.

Nor am I prepared to find, within the *Tobacco Tax Act*, a limitation on the use of tobacco, being a significant element of traditional Indian ways, so that the *Act* should be held inapplicable to Indians. The issue was raised, but not established.

Neither am I prepared to hold that the *Tobacco Tax Act*, or any section of it, is a provincial law that singles out Indians for specific treatment so that it is classified as a law in relation to Indians, thereby usurping a federal jurisdiction and having no force and affect.

Having made that ruling, I am satisfied that we are in a position to proceed with the trial on the matter that the *Act*, the *Tobacco Tax Act*, as it stands, is constitutional and not *ultra vires*.

16 The trial judge indicated she would provide more detailed reasons at some point during the trial.

17 On July 10th and 11th a motion made by counsel for the appellants to exclude evidence of intercepted telephone communications between the appellants and others. Evidence was heard on the motion. On July 12th the trial judge dismissed the motion and on July 13th the trial in chief commenced.

18 On July 14th counsel for Ms. Murdock made a motion that Corporal Gay, who had been called by the Crown to give voice identification evidence with respect to the voice of Ms. Murdock on the intercepted telephone communications, had detained Ms. Murdock and had failed to advise her of her right to counsel at that time. Counsel submitted that Ms. Murdock's *Charter* right to counsel had been infringed and that the intercepted communications should not be admitted into evidence. Ms. Murdock did not testify on the motion. On July 17th the motion was dismissed.

19 On July 14th counsel for Ms. Murdock made an application to exclude certain limited intercepted telephone communications on a telephone in the name of Elizabeth Harnish who lived at the same address as John and Annie Bernard, on the basis that the interception of communications on that telephone had not been authorized. On July 14th the trial judge ruled the interception of communications on that telephone had been lawfully authorized and accordingly dismissed the motion.

20 On July 18th the trial judge dismissed a motion to exclude evidence of tobacco found in an R.C.M.P. search of a motor vehicle owned by Fontaine Hughes. The search was made on June 22nd, 1992. Hughes testified that the tobacco in his vehicle had been picked up at a storage locker in Dieppe, New Brunswick on the instructions of Johnson. The trial judge dismissed the motion; she applied the decision of this Court in *R. v. Johnson* (1995), 141 N.S.R. (2d) 133 which appeal involved the same incident. This Court, in that case, held that an accused cannot challenge the admissibility of evidence obtained by the infringement of a third party's right to privacy.

21 Throughout these days, when the court was not hearing various motions made by the defence, the Crown was putting in its case in chief against the appellants.

22 On July 19th Ms. Murdock testified, having been called as a witness by counsel for Johnson. On July 20th counsel made their submissions to the trial judge. The trial was adjourned until July 31st for decision. On that date the trial judge elaborated on her oral decision rendered on the constitutionality of the *Tobacco Tax Act* as valid provincial legislation and then rendered an oral decision convicting the appellants as charged. The matter of sentencing was adjourned to September 26th.

23 Ms. Murdock was sentenced to six months incarceration to be followed by a period of two years probation. Johnson was sentenced to a period of 18 months incarceration to be followed by two years probation.

Issues on Appeal

24 The eleven issues raised on the appeal from conviction and sentence are described in the factum filed on behalf of Ms. Murdock as follows:

> **Issue I**
>
> Is the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470, as amended by 1990, c. 10, s. 3, a law of general application which would be referentially incorporated by s. 88 of the *Indian Act*, R.S.C., c. I-6, in that its intent, purpose or policy was shown to impair the status or capacities of a particular group, the Mi'Kmaq and other first nations people of Nova Scotia?
>
> **Issue II**
>
> Is the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470, as amended by 1990, c. 10, s. 3, ultra vires the Province of Nova Scotia insofar as it applies to Indians and the Property of Indians on a Reserve, which is the exclusive legislation jurisdiction of the Parliament of Canada under s. 91(24) of *The Constitution Act, 1967*? Or alternatively, does the *Act* infringe upon an aboriginal right of the Mi'Kmaq Nation protected by the *Constitution Act, 1982* s. 35?
>
> **Issue III**
>
> Is the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470 as amended by 1990, c. 10, s. 3, *ultra vires* the province of Nova Scotia as indirect taxation when it requires an importer and wholesaler who is a registered Indian to hold a wholesale vendor's permit and pay an amount equal to the tax, regardless of whether the tobacco was bought on an Indian reserve outside Nova Scotia, was brought into Nova Scotia to an Indian reserve and was sold or intended to be sold to registered Indians?
>
> **Issue IV**
>
> Is the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470, as amended by 1990, c. 10, s. 3, *ultra vires* the province of Nova Scotia as regulation of extraprovincial trade contrary to s. 91(2) of the *Constitution Act, 1867*, when it requires an importer or wholesaler who is a registered Indian to hold a wholesale vendor's permit and pay an amount equal to the tax regardless of whether the tobacco was bought on an Indian reserve outside Nova Scotia and was brought into Nova Scotia to a reserve and was then sold or intended to be sold to registered Indians?

Issue V

Did the Trial Judge err in allowing the admissibility of the wiretap evidence after it was challenged as an unreasonable search and seizure contrary to s. 8 of the *Charter* and for non-compliance with s. 186 of the *Criminal Code?*

Issue VI

Did the Trial Judge err in not finding that the Appellant Murdock was detained by the police and denied legal counsel when police officers spoke to her for the primary purpose of having her verbal responses in order to identify her voice on wiretap interceptions?

Issue VII

Did the Trial Judge err in denying the defence's motion for exclusion of wiretap evidence on the grounds that evidence adduced during the trial that the master wiretap tapes submitted as evidence contained conversations specifically prohibited by the authorization and thus were an abuse of process and would bring the administration of justice into disrepute?

Issue VIII

Did the Trial Judge err in using a lower standard of proof than "beyond a reasonable doubt" in the inferences she drew from the wiretap evidence?

Issue IX

Did the Trial Judge err in fact in her conclusion respecting the "amount involved", i.e., $1,000.00 in the alleged conspiracy?

Issue X

Did the Trial Judge err in failing to consider the evidence of the subjective beliefs of the Appellants in determining if the requisite mens rea for fraud was present?

Issue XI

Did the Trial Judge err in considering as evidence unsubstantiated assertions by the Crown about the prevalence of tobacco tax abuses and thus used wrong principles in the sentencing?

25 Issues III and IV were not raised in the Notice of Appeal. A motion was made at the hearing of the appeal to amend the Notice of Appeal to include these issues. We reserved decision and have subsequently decided that leave should be granted. Therefore, the issues are before us and were addressed by counsel for Ms. Murdock and the respondent in their factums and in oral argument.

The Intervenor

26 The Union of Nova Scotia Indians had been granted Intervenor status prior to the hearing of the appeal; the Order granting such status states:

IT IS ORDERED THAT USNI is granted leave to intervene in this appeal, its intervention restricted to the record before the trial court and limited to the grounds of appeal stated by the appellants and directed to the issue concerning the *Tobacco Tax Act* as stated in Ground 1 of the Notice of Appeal filed on behalf of the appellant Murdock and dated August 30, 1995.

27 Ground 1 of that Notice of Appeal states:

1. *THAT* the learned trial judge *erred in finding* that the *Tobacco Tax Act*, R.S.N.S. 1989, ch. 470 and Regulations made pursuant thereto, O.I.C. 90-38, N.S., was constitutional and validly enacted provincial legislation applicable to Indians and property of Indians on reserves *and in particular the learned trial judge erred in finding*:

(a) That the *Tobacco Tax Act* and the Regulations made under the Act are intra vires the legislature of the Province of Nova Scotia on the grounds that the Act and Regulations are not in pith and substance and in legal and practical effect legislation in relation to Federal Indian matters falling with the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(24) of the *Constitution Act*, 1867.

(b) That the *Tobacco Tax Act* and the Regulations do not impose limitations on tobacco and do no affect a significant element of traditional Indian ways, and that the Act is inapplicable to Indians as it is a law of general application pursuant to s. 88 of the *Indian Act*, R.S.C. 1985, C. 1-5.

(c) That the Mi'Kmaq are unrestricted in their ability to gather wild tobacco or grow their own tobacco for spiritual, ceremonial, and cultural practices.

(d) That the *Tobacco Tax Act* with its regulations and any administrative directives issued pursuant to it, nor any sections of it, is a provincial law that does not single out Indians for specific treatment and cannot be classified as a law in relation to Indians, thereby not usurping federal jurisdiction, and has full force and effect over Indians with status under the *Indian Act*.

(e) That there are in existence agreements between Mi'Kmaq Band Councils in Nova Scotia and the Government of Nova Scotia restricting the quantity of tax exempt tobacco available on Indian reserves, when no evidence was adduced in the trial that any such agreement had ever been reached and the finding was contrary to Crown submissions to the Court.

28 Counsel for the intervenor, in his factum, states under the heading "Points in Issue":

The charge alleges as essential ingredients two facts that are said to be germane on the basis that the *Tobacco Tax Act (Nova Scotia)* applies in the circumstances of this case to the Indian Appellants. Johnson and Murdock (collectively, the "Appellants") are said to be required to: 1) hold wholesale vendor's permits; and 2) pay tobacco tax as and when they bring tobacco into Nova Scotia. The first requirement is allegedly imposed by s. 14(1)(a) and the second by s. 6(c) of the *Tobacco Tax Act (Nova Scotia)*.

The Intervenor submits that these two requirements do not apply in the circumstances because the tobacco in question was sold from one registered Indian to another and transported from one Indian reserve to another for resale on-reserve there. While the Intervenor submits that three constitutional bases support this proposition, it does not in light of Justice Bateman's decision on the Intervenor's Motion for Leave to Intervene propose to argue in its Factum the issues of indirect taxation and extraprovincial trade. Therefore, the sole

basis argued herein is the tax exemption created by s. 87 of the *Indian Act (Canada)*. The issue may be stated as follows:

> Are ss. 6(c) and/or 14(1)(a) of the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470, which on their face require that registered Indians who for resale bring tobacco into Nova Scotia from outside the Province hold a wholesale vendor's permit [s. 14(1)(a)] and pay tobacco tax in respect of such tobacco as and when brought into Nova Scotia [s. 6(c)], constitutionally inapplicable in respect of the Appellants as being inconsistent with s. 87 of the *Indian Act*, R.S.C. 1985, c. I-5 when regard is had to all or some of the following facts:
>
> a) the tobacco is Indian property bought by a registered Indian on an Indian reserve outside Nova Scotia from another registered Indian,
>
> b) the tobacco is Indian property brought or intended to be brought to an Indian reserve in Nova Scotia, and/or
>
> c) the tobacco is Indian property sold or intended to be sold on an Indian reserve by a registered Indian?

29 On the hearing of this appeal Johnson was unrepresented by counsel. He had filed a factum. He did not make oral argument but agreed to allow counsel for the intervenor to make representations on his behalf. The issues raised in Johnson's notice of appeal were covered in Ms. Murdock's notice of appeal.

The Relevant Legislation

30 In addition to s. 35(1) of the *Constitution Act, 1982* the statute law relevant to consideration of this appeal are certain provisions of the *Indian Act* and the *Tobacco Tax Act and Regulations*. I will set them out as follows: Section 87 of the *Indian Act*:

> 87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the *following property is exempt from taxation*, namely,
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) *the personal property of an Indian or a band situated on a reserve.*
>
> (2) *No Indian* or band *is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.*
>
> (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs 1(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian. R.S., c. I-6, s. 87; 1980-81-82-83, c. 47, s. 25.
>
> 88. Subject to the terms of any treaty and any other Act of Parliament, *all laws of general application from*

time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. {Emphasis added}

Sections 6, 14(1) and 25(2) of the *Tobacco Tax Act*:

6 *Every person who brings tobacco into the Province* or who receives delivery in the Province of tobacco acquired by that person for value for that person's own consumption in the Province, or for the consumption in the Province of other persons at that person's expense, or on behalf of, or as agent for, a principal who desires to acquire the tobacco for consumption in the Province by such principal or other persons at that person's expense, *shall immediately*

(a) report the matter in writing to the Commissioner;

(b) supply to the Commissioner the invoice and all other pertinent information as required by the Commissioner in respect of the consumption of the tobacco; and

(c) *pay to Her Majesty in right of the Province the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province.* R.S., c. 470, s. 6.

14(1) *No person shall*

(a) *import or bring into the Province* or sell, hold out for sale or agree to sell tobacco for resale in the Province *unless that person holds a wholesale vendor's permit that is issued pursuant to this Act* and that is in force;

(b) sell or agree to sell tobacco to a consumer, by any means, including vending machines, unless the person holds a registration certificate issued pursuant to the *Health Services Tax Act* and that is in force.

25(2) No retail vendor shall be in possession of tobacco other than tobacco purchased by the retail vendor from a wholesale vendor who, at the time of the purchase, held a wholesale vendor's permit that was issued pursuant to this Act and that, at the time of the purchase, was in force. {Emphasis added}

31 The Regulations:

2(2)(d) "designated retail vendor" means a retail vendor designated by the Commissioner who sells tobacco in the Province to a consumer at a retail sale on a reserve, as defined in the Indian Act, being Chapter I-5 of the Revised Statutes of Canada, 1985, as amended;

4. (3) The Commissioner may, provided the applicant is not a person described in clause 3(7)(a) or (b), issue a permit to purchase and sell unmarked cigarettes to an applicant if the applicant requires unmarked cigarettes

(a) *for sale in Nova Scotia to designated retail vendors situated on a reserve*, as defined in the Indian Act, being Chapter I-5 of the Revised Statutes of Canada, 1985, as amended;

.....

(4) A retail vendor, except as provided in subsection 3, shall not purchase, possess, store or sell unmarked cigarettes in Nova Scotia. {Emphasis added}

The Tobacco Tax Regime

32 Nova Scotia exercises control over the distribution and sale of tobacco through the *Tobacco Tax Act* and *Regulations* made under the authority of that *Act*. It requires those who bring tobacco into the Province or hold out tobacco for resale to possess a wholesale vendor's permit issued by it (s. 14(1)(a)). The *Act* prohibits wholesalers from selling tobacco to anyone other than a retail vendor holding a retailer's registration certificate issued by it under the *Health Service Tax Act* (ss. 14(2) and 14(1)(b)). A retail vendor shall not be in possession of tobacco unless it was purchased from a wholesale vendor possessing a wholesale vendor's permit (s. 25(2)). It prohibits anyone who is not a registered retailer from selling tobacco to a consumer (*Act* s. 14(1)(b)). The tobacco tax is imposed on all consumers (*Act* s. 5(1)) but collected by the wholesaler from the retailer (*Tobacco Marking Regulations*, N.S. Reg. 51/91, s. 5(2). Cigarettes on which tax has been paid bear a mark, or indicium (*Tobacco Marking Regulations*). No one may sell or possess unmarked cigarettes unless they hold a special permit (*Reg.* s. 4(3)). No one selling tobacco may advertise or hold out that the seller will assume or absorb the tax or that, if tax is an element of the purchase price, it will be refunded (*Act* s. 33). Possession of tobacco except in accordance with the *Act* and regulations is prohibited.

33 The tobacco tax legislation in Nova Scotia makes two references to Indians. In one reference, the *Tobacco Marking Regulations* defines a "designated" retail vendor as a "retail vendor designated by the [Provincial Tax] Commissioner who sells tobacco in the Province *to a consumer at a retail sale on a reserve.* as defined in the *Indian Act*" (s. 2(2)(d)). In the second reference, the same set of regulations authorizes the Provincial Tax Commissioner to issue a permit to a wholesaler to purchase and sell *unmarked* cigarettes to a designated retail vendor situated on an Indian reserve (s. 4(3)(a)). Otherwise, unmarked cigarettes (i.e., those on which provincial tobacco tax has not been paid) may not be sold by a manufacturer to a wholesaler (*Reg.* s. 5(1)) or possessed or sold by a wholesaler (*Reg* s. 4(1)) or a retail vendor (*Reg.* s. 4(4)).

34 Johnson is not a designated retail vendor.

Overview of the Appeal

35 The appellants' and the intervenor's principal argument is that the *Tobacco Tax Act* is not valid legislation due to the fact that it interferes with federal legislative powers respecting "Indians and Land Reserves for Indians" (s. 91(24) of the *Constitution Act*, 1867). The alleged interference comes, in particular, with reference to s. 87(1)(b) of the *Indian Act*, the exemption from taxation of personal property of an Indian situate on a re- serve.

36 The respondent asserts that the evidence clearly shows that the appellants were avoiding the provincial tax regime created under the *Tobacco Tax Act*.

37 Issues on the appeal include whether the appellants were justified in avoiding the tax collection system due to their tax exempt status under the *Indian Act* or, alternatively, that their actions were permitted as part of their aboriginal right to use tobacco which it is asserted is a right that is protected by s. 35(1) of the *Constitution*

Act, 1982.

38 The respondent takes the position that the *Tobacco Tax Act* is valid provincial legislation passed under the power to legislate in the area of direct taxation pursuant to s. 92(2) of the *Constitution Act, 1867* and, alternatively, it is valid due to the referential incorporation pursuant to s. 88 of the *Indian Act*. The position of the respondent is that the *Tobacco Tax Act* and *Regulations* are directed towards the control of tobacco and the collection of tax on a controlled product. The respondent acknowledges that Indians are affected by this legislation, however, the respondent asserts that its purpose is to capture taxes for sales not exempt from taxation as opposed to an intent to interfere with either the personal use of tobacco by Indians or aboriginal rights personally exercised on reserves. The respondent asserts that it has legislated a scheme for the control of tobacco and its taxation that recognizes and accommodates the rights of Indians on reserves who choose to use tobacco for their personal use. This accommodation is achieved by reason of the quota system that has been put in place whereby tobacco can be sold by a designated retail vendor for the use of Indians on a reserve; sales to these consumers are tax exempt. The Province asserts that this is simply a recognition of Indians right to be exempt from taxation of personal property situate on a reserve as provided for in s. 87(1)(b) of the *Indian Act* and recognition of their aboriginal right to use tobacco.

39 In addition to the constitutional issues raised on this appeal, the appellants, in Issues VIII, IX and X challenge the findings of the trial judge that there was a conspiracy to defraud the Province of tobacco tax levied under the *Tobacco Tax Act*.

The Trial Judge's Decision on the Constitutionality of the Tobacco Tax Act

40 In her written decision on the constitutional question the trial judge stated there were three issues. She described these issues as follows:

> 1. Whether the *Tobacco Tax Act* and the *Regulations* made under the *Act* are *ultra rites* the legislature of the Province of Nova Scotia on the grounds that the *Act* and the *Regulations* are, in pith and substance, legislation in relation to Federal Indian matters falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(24) of the *Constitution Act, 1867* and exercised by it under s. 87 of the *Indian Act*, R.S.C. 1985, C. I-5?
>
> 2. Whether the *Tobacco Tax Act* and the *Regulations* impose limitations on tobacco, thereby affecting a significant element of traditional Indian ways so that the *Act* should be held inapplicable to Indians, even if it is a law of general application pursuant to s. 88 of the *Indian Act*?
>
> 3. Whether the *Tobacco Tax Act* or any sections of it is a provincial law that singles out Indians for specific treatment so that it is classified as a law in relation to Indians, thereby usurping federal jurisdiction and having no force and effect?

41 After referring to the relevant legislative powers of the Parliament of Canada and the provinces under the *Constitution Act, 1867* and the relevant provisions of the *Indian Act* she dealt with issue 1. She summarized the position of the defence where she stated at p. 7 of her decision:

> The Provincial Government has made an improper attempt to use Federal powers to pass legislation, the true character of which is actually directed at levying taxes on tobacco products belonging to Indians on reserves and controlling their acquisition and possession and use of tax exempt tobacco and preventing

> them from bringing it into the Province for sale on the reserves to other natives. Given the true character of the *Act*, it cannot be said to be a law of general application pursuant to s. 88 of the *Indian Act*.
>
> . . . . .
>
> The defence relies upon the jurisprudence relating to the *Health Services Tax Act*, being the predecessor to the *Tobacco Tax Act*, to show the passing of the *Tobacco Tax Act* on June 12th, 1989 was a direct response to Burchell, J.'s December 12th, 1988 determination in the *Union of Nova Scotia Indians, et al v. Nova Scotia (A.G.)*, supra, that s. 87 of the *Indian Act* tax exemption applied to the *Health Services Tax Act*, specifically, the May 17, 1987 s. 10(A) amendment to the *Act*, which required purchasers of tobacco to pay the tax and, if exempt, to pay an amount equal to the tax and apply for a rebate, leaving the entitlement to the exemption from tax with the Provincial Tax Commissioner. As a result of Burchell, J.'s decision, registered Indians in Nova Scotia had a right to purchase, on an Indian reserve, tobacco products for their own consumption and for the consumption of other registered Indians without paying health services tax, pursuant to the *Health Services Tax Act* and to purchase tobacco products outside Nova Scotia for use by Indians on reserves in Nova Scotia, without paying tax and, therefore, they did not have to comply with the form of rebate set up under the *Health Services Tax Act* or be subject to monitoring of the quantity by the Commis- sioner.
>
> The defence submits the *Tobacco Tax Act* was brought into place as a result of Burchell, J.'s decision and as a result of the government wishing to deal in some way with the problem of "buttlegging" which was occurring on reserves. They contend that the purpose and effect of the *Tobacco Tax Act* was to gain control of the trade of tobacco on native reserves in Nova Scotia. The legislation is aimed at the Mi'Kmaq natives' involvement in tobacco and except for this perceived problem, the legislation would not have existed.

42 The trial judge described the position of the Crown as follows:

> The Crown, relying on the Province's stated purpose of collecting and protecting provincial revenue in regards to all consumers of tobacco products and, in so doing, establishing regulatory control and procedure for the import and sale of tobacco for everyone involved in tobacco products, contends the *Tobacco Tax Act* is an Act with respect to Class 2 of s. 92 of the *Constitutional Act, 1867*. It is valid Provincial Legislation, an Act pursuant to Provincial Legislature authority over direct taxation and is a law of general application pursuant to s. 88 of the *Indian Act*.

43 After making reference to the presumption of constitutionality of legislation and that the courts have traditionally exercised constraint in declaring legislation to be *ultra vires* she asked herself the following question:

> Does the evidence support the defence's assertion that the pith and substance of the legislation relates to federal jurisdiction as it is directed at regulating and controlling the ability of natives on reserves to acquire tax exempt tobacco *OR* does the evidence support the Crown's assertion that the pith and substance of the legislation relates to provincial jurisdiction over imposing, collecting and protecting through administrative regulatory procedures tax for the Province in respect to all consumers in the Province?

44 She then made reference to the decision of the Supreme Court of Canada in *R. v. Morgentaler* (1993), 125 N.S.R. (2d) 81 (S.C.C.) that the key to constitutional validity is to determine the legislation's dominant purpose. She then stated:

> I have reviewed and attempted to apply the analysis set out by the Supreme Court of Canada in *R. v. Mogentaler, supra*, in order to arrive at the true character or the pith and substance of the *Tobacco Tax Act and Regulations* and thereby be able to determine the *Act's* subject matter for constitutional purposes. The dominant purpose and certainly the legal effect of the legislation is relevant to characterizing the subject matter in relation to which a law is enacted. In the end, more than a look at the four corners of the legislation is needed to see what the legislation is really about. A review of the legislative history, the course of events and surrounding circumstances, including the legislative debates leading up to the *Act* being passed and the making of the regulations, and the absence or presence of evidence about purported purposes are all relevant and admissible to determine background and the primary and incidental, if any, purposes of the legislation.

45 The trial judge then reviewed the *Act* and the evidence in *Hansard* of the debate in the House of Assembly respecting the introduction and debates on the proposed legislation. She concluded that the dominant purpose of the *Tobacco Tax Act* is the collection and protection by way of regulatory procedures of provincial revenue on tobacco products from all consumers and that the legislation was within the provincial power of direct taxation.

46 The trial judge then made reference to the decision of Jones J.A. in *R. v. Johnson* (1993), 120 N.S.R. (2d) 414 (C.A.) and the fact that in neither the British Columbia *Tobacco Tax Act* nor the Nova Scotia *Tobacco Tax Act* is there specific legislative authority to implement restrictions on purchases of tax exempt tobacco on the reserves. She quoted from the decision of Cummings J.A. in *Tseshaht Indian Band v. British Columbia* (1992), 94 D.L.R. (4th) 97 (B.C. C.A.) at p. 137 where Cummings J.A. concluded that the quota system was simply a means by which the province, as a matter of policy, delivered the exemptions to which Indians were entitled pursuant to s. 87 of the *Indian Act*. She adopted the reasoning in the *Tseshaht Indian Band* decision. She concluded on issue #1 as follows:

> It may be that there are restrictions placed as to the number of tobacco products purchased per month per native Mi'Kmaq through the agreement of the band council with the provincial government in order to ensure that the volume of tax exempt products bears some relationship to the legitimate demand for these products but this is not reflected in the *Tobacco Tax Act* or the *Regulations* and to the degree, if any, it can be inferred from the regulation providing for "designated retail vendors" on the reserve. I am satisfied it is incidental to the primary purpose of the legislation as contended by the Province and in compliance with a provincial obligation under s. 87.
>
> Having regard for all the factors raised by the defence, I am satisfied, the heavy onus has not been met, and the presumption of constitutionally prevails with respect to the *Tobacco Tax Act*.

47 With respect to issue #2 the trial judge reviewed the submission of the defence that the Act intrudes on federal jurisdiction:

> ..... because control of tobacco as an essential and even sacred substance can only be exercised by the federal government and even the federal government would have to legislate with a view to s. 35 of the *Constitutional Act, 1982*. The defence contends a Mi'Kmaq, in going to the designated retail vendor on the reserve, is only able to obtain tax free 12 cartons of cigarettes a month or thirty tins of tobacco and is unable to acquire more tax-free tobacco products that month. This limitation impacts on their Indianness, given the significant role of tobacco in their culture.

48 The trial judge concluded:

> If native use of tobacco can be held to be an aboriginal right lying at the core of rights, held by Indians qua Indians, I am unable to characterize the *Tobacco Tax Act* as a law so affecting that essential characteristic or "Indianness", by limiting their use of the tobacco, as to make the *Act* inapplicable to them or *ultra vires* to the extent the law purports to apply to them, as a subject matter of exclusive federal jurisdiction. In other words, I am unable to find within the *Tobacco Tax Act* a limitation on their Indianness to the degree that federal power is being usurped and the *Act* should be held *ultra vires*.

49 The learned trial judge based this conclusion on her finding that the legitimate needs of Indians was being met by the quota system which restricts access to tax exempt tobacco to legitimate personnel and culture uses.

50 With respect to issue #3 the trial judge stated:

> To the extent the *Tobacco Tax Act* may be seen to single out Indians, it does so pursuant to the obligation of the Province to ensure that the rights of Indians to tax-free personal property, including tobacco, as required under s. 87 of the *Indian Act* has been met. The legitimate rights of Indians to tax-free property under s. 87 is as per the British Columbia Court of Appeal's decision in *Tseshaht Indian Band v. B.C., supra*, limited to legitimate demands. Cummings, J.A. held the Province is, therefore, entitled to enact legislation or create regulations that ensures the legitimate rights of Indians under s. 87 have been met and, at the same time, also ensures that personal property in excess of these legitimate rights and, therefore, in excess of s. 87 are subject to the same rules including taxation as apply to the remainder of Nova Scotians. Of necessity, such a mandate requires a scheme that singles out those to whom limited special rights have been provided. As stated by Cummings, J.A., the authority rests in s. 87 and is reflected in Nova Scotia in Regulation 4(3)(a) by the designated retail vendor provision. To the extent, however, the *Tobacco Tax Act* does not identify or single out Indians, then there is, in the context of this case, no issue as to the constitutionality of the *Tobacco Tax Act* on its individual provisions.

51 The trial judge upheld the constitutionality of the *Tobacco Tax Act and Regulations*.

Facts and the Trial Judge's Decision on the Conspiracy Charge

52 There was evidence of purchases of tobacco by a non native from each of Johnson's three stores on the Millbrook Indian Reserve. The tobacco products purchased were not marked as having had the tobacco tax paid on them. Neither Johnson nor Murdock held a wholesale vendor's permit or any other permit issued under the *Tobacco Tax Act* or the *Health Services Tax Act*. There were large quantities of tobacco seized from his stores on which no Nova Scotia tax had been paid by a retail vendor to a wholesale vendor. Included in the tobacco seized was tobacco that was imported from Ontario that had Ontario markings indicating Ontario provincial tax had been paid and on which the federal tax had been paid, although no Nova Scotia tax had been paid. This tobacco was referred to in the evidence of Constable Briggs and Mr. Kennedy as "yellow band". There was also tobacco seized that had no Canadian duties paid on it and, therefore, had been illegally brought into Canada. There was no Nova Scotia tax paid on this tobacco referred to in the evidence as "clear bag" tobacco. Also seized was tobacco that had Canadian duty paid on it and referred to as "clear band" tobacco. It, too, had no indication of tobacco tax having been paid in this Province. Tobacco products on which federal excise duties had not been paid were seized from the trunk of Fontaine Hughes vehicle; he had picked this tobacco up from a locker in Dieppe, New Brunswick on Johnson's instructions. Johnson was a retail seller of tobacco products. There was extensive evidence from intercepted telephone communications between the appellants and with others that

satisfied the trial judge beyond a reasonable doubt that the appellants were members of the conspiracy to defraud the Province of tobacco tax. Generally, Ms. Murdock denied transporting tobacco into Nova Scotia and having any involvement in the agreement with Johnson to illegally transport tobacco into this Province. There was wiretap evidence of a telephone conversation between Ms. Murdock and Johnson re her shipping 38 cartons of cigarettes to him. There was wiretap evidence of a conversation between Ms. Murdock and Johnson in which he informed her that the R.C.M.P. had seized "a load". During this conversation Ms. Murdock questioned Johnson whether the load was hers to which he responded it was not but that it was from a Mr. Robichaud. The trial judge made specific findings of fact that she did not believe Ms. Murdock explanation of these intercepted conversations as relating to the sale and transportation of horses to Nova Scotia. The trial judge was satisfied that the evidence showed that Ms. Murdock was involved in acquiring and delivering tobacco from Ontario to Nova Scotia. Ms. Murdock denied buying tobacco. Other than the 20 cartons Ms. Murdock brought with her to Nova Scotia, there is no evidence as to the originating source of the tobacco seized from Johnson. But is clear that the tobacco was not obtained from a Nova Scotia wholesaler and that no Nova Scotia tax was paid. Ms. Murdock testified that it was legal to transfer quota tobacco acquired in Ontario to a reserve in Nova Scotia as that is what Johnson had told her. She explained that her conversations with Johnson respecting tobacco prices were to assist Johnson in knowing market conditions in Ontario. She and Johnson were involved in "a personal relationship" and that is why she spoke to him regularly by telephone and why she came to Nova Scotia.

53 After reviewing all the evidence that implicated Ms. Murdock in the conspiracy and after considering Ms. Murdock explanation of her involvement with Johnson, the trial judge concluded:

> After examining the evidence on the issue of Murdock's credibility and, therefore, the presence or absence of an agreement, applying the general rules relating to credibility, and after considering all the evidence, it is my view Murdock evidence is not believable, nor does it raise a reasonable doubt in my mind as to her agreeing with Johnson and Bernard to *bring tobacco products into Nova Scotia knowing that the provincial tobacco tax would not be paid.* {Emphasis added)

54 A review of the trial judge's decision, in which she reviews in chronological sequence certain intercepted telephone calls, shows beyond any doubt that Ms. Murdock's testimony that she did not acquire tobacco for Johnson, was entirely lacking in credibility.

55 After reviewing the extensive evidence in the case, the trial judge asked herself two questions. The first question, she phrased as follows:

> Did Murdock and Johnson agree with John Bernard, one with the other or others of them, to bring tobacco products into Nova Scotia knowing that the Provincial Tobacco Tax would not be paid?

56 Having asked this question the learned trial judge stated:

> I find all tobacco seized by Constable Briggs as well as Exhibit #2, 49 and 97 being tobacco seized from Johnson's stores to be contraband tobacco and part of the agreement.
>
> I am satisfied beyond a reasonable doubt that the answer to the first question is *Yes*. Murdock and Johnson and Bernard agreed to bring tobacco products, including contraband tobacco, into Nova Scotia knowing no provincial tax was going to be paid on the tobacco.

57 The learned trial judge then asked herself the second question which she phrased as follows:

> Did Murdock and Johnson know by agreeing to do this that they were conspiring to commit the criminal offence of fraud?

58 She reviewed the evidence against the appellants and concluded:

> The answer to the second question is clearly *Yes*. The only possible explanation for their actions as described by the tapes cited is that they were involved in a plan to defraud the Province of Nova Scotia of legitimate tobacco tax money. No innocent explanation can account for the circumspection and subterfuge that characterizes their agreement. Rather the only possible explanation is that they knew full well that they were committing the act of fraud and I infer the requisite *mens rea* from the totality of their acts.

59 The trial judge then reviewed the evidence admissible against Murdock and Johnson respectively and concluded that Murdock was a member of the conspiracy. She further concluded that Johnson, too, was probably a member of a conspiracy.

60 She ultimately found that she was satisfied beyond a reasonable doubt from reviewing all of the evidence, that the Crown had proven beyond a reasonable doubt the existence of the conspiracy and that the appellants were members of the conspiracy to defraud as charged.

The Issues

61 I will first deal with the appeal from Justice MacLellan's decision dismissing Ms. Murdock's motion that she was not tried within a reasonable time as was her right under s. 11(b) of the *Charter*.

62 Justice MacLellan had before him an affidavit of Ms. Murdock in support of the application and an affidavit of the Crown prosecutor, Mr. Gary Holt, filed on behalf of the Crown. In addition, transcripts of court hearings in the proceedings that had taken place on September 30th, 1993, October 7th, 1993, January 11th, 1994, January 20th, 1994, February 15th, 1994, and October 20th, 1994 were put forward for his consideration. Both Ms. Murdock and Mr. Holt were examined on the contents of their respective affidavits.

63 A very substantial period of time had elapsed between the laying of the Informations on July 8th, 1992, and the scheduled commencement of the trial on June 20th, 1995. The question of unreasonable delay being the very heart of the matter, it is necessary to review in a chronological order, the events and evidence relating to the progress of the proceedings through this period.

Chronology

64

> July 8/92 An Information was sworn in Provincial Court in Halifax alleging the conspiracy offence with which the appellants and others were charged. The evidence shows there were numerous other Informations against other persons involved in other alleged crimes that were detected as a result of an extensive investigation by the R.C.M.P. over a period of many months prior to July 8, 1992. The Indictment against Ms. Murdock also named as co-accused a number of other persons, including John Bernard, Stanley Johnson and David Naugle, some of whom appeared and were arraigned in Provincial Court on July 8, 1992. Ms. Murdock did not appear as she had not been served with any process. The matter was adjourned to August 5, 1992;

August 5/92 Arraignment in Provincial Court at Halifax was again adjourned, this time until September 22, 1992. As Marion Murdock had failed to appear a warrant was issued for her arrest;

September 8/92 Annie Bernard, one of the co-accused, died;

September 22/92 A number of the co-accused, including Johnson and Naugle, appeared in Provincial Court and arraignment was adjourned to December 1st, 1992. The charges against Annie Bernard were withdrawn. Ms. Murdock did not appear;.

October 2/92 Ms. Murdock appeared voluntarily before a justice of the peace and was released on her undertaking to appear on December 1st, 1992. This was her first appearance in Nova Scotia on these charges;

December 1/92 In Provincial Court at Halifax two accused elected trial in Provincial Court; others elected trial by judge without jury. The matter was adjourned until August 3rd, 1993, for preliminary inquiry scheduled to last until August 27, 1993. With respect to Ms. Murdock and several other co-accused, the matter was adjourned for election to January 4, 1993 for hearing in Provincial Court at Shubenacadie;

January 4/93 Ms. Murdock did not appear in Provincial Court in Shubenacadie. The court was informed that she was in hospital. A warrant was issued with directions that it be held. The matter was adjourned to February 18, 1993. Several co-accused were still unrepresented by counsel, including Ms. Murdock;

February 18/93 Ms. Murdock did not appear in Provincial Court at Shubenacadie. The warrant continued to be held. Her matter was adjourned to April 8, 1993, as well as the matter with respect to other co-accused unrepresented by counsel;

April 6/93 Ms. Murdock was advised by the Crown that it would not be necessary for her to appear in Provincial Court at Shubenacadie on April 8, 1993;

April 8/93 In Provincial Court at Shubenacadie the matter was adjourned until April 20, 1993. Ms. Murdock was still unrepresented. Judge McDougall, who was presiding, specifically directed that Ms. Murdock was to appear on April 20, 1993. The Crown prosecutor so advised Ms. Murdock;

April 20/93 Ms. Murdock appeared unrepresented in Provincial Court at Shubenacadie. The matter was adjourned to August 3-26, 1993 for preliminary inquiry;

July 12/93 The Crown withdrew the charge against a number of the co-accused so that the co-accused remaining in the Information were the appellants, David Naugle and John Bernard;

August 3/93 A motion to quash the Information was made on behalf of Ms. Murdock in Provincial Court at Shubenacadie. The motion was made on her behalf by Ms. Mary Hebb, who made her first appearance as counsel for Ms. Murdock;

August 9/93 Motion to quash the Information was denied;

August 10/93 Bernard and Johnson waived a preliminary inquiry and consented to committal for trial;

August 24/93 At the conclusion of the preliminary inquiry Marion Murdock and David Naugle were committed to stand trial. The four co-accused were ordered to appear at the Supreme Court at Truro on Septem-

ber 30, 1993, for election and arraignment;

September 30/93 At Supreme Court in Truro the four co-accused appeared with counsel and were arraigned on the Indictment. With respect to that court appearance, Mr. Holt, on the hearing before Justice MacLellan, was questioned by counsel for the defence whether there had been any discussion with counsel for Ms. Murdock respecting trial dates and methods of trial prior to Johnson announcing at that hearing that he wished judge and jury. Mr. Holt responded as follows:

> ..... when we arrived at court on September 30th, everybody was of the understanding, I think, at least, at the point that we came into court, that we were going to have a judge alone situation for all four accused. And it came as a surprise to all of us, including Mr. Johnson's own counsel, Joseph MacDonnell that when he stood up and announced that he wanted a trial by judge and jury. So at that point, we, my recollection is that we adjourn for a while. There were some further discussion and then the matter was put over to another date, which escapes me right now, uh, to try to sort it, to try to sort it out.

The matter was set over to October 7, 1993, to set a trial date. A notice of motion to sever was filed by counsel for Bernard. This was adjourned to October 7, 1993, for hearing. The co-accused election to be tried by judge alone was denied.

October 7/93 All four accused remaining on the Indictment consented to be tried by judge and jury. The date for the trial was confirmed for October 25-December 5, 1994. However, counsel for Ms. Murdock advised the court that the trial dates as set were not acceptable and that a *Charter* motion would be made based on unreasonable delay. In her affidavit in support of the motion made before Justice MacLellan Ms. Murdock states in paragraphs 27-31 as follows:

> 27. THAT I wished to be tried by Judge alone, which would give me an earlier trial, as did Naugle and Bernard. However, Johnson elected trial by Judge and Jury. The matter was adjourned to October 7, 1993.
>
> 28. THAT I was informed by my legal counsel that Bernard and Naugle wished to sever their trial from Johnson in order to have their trial held earlier before a Judge alone, as did I, but the Crown vigorously opposed this move.
>
> 29. THAT on October 7, 1993 the Crown, Gary Holt, Q.C. indicated to the Court that there were only two prosecutors for all of the various charges pertaining to tobacco sales and that they were booked for most of 1994.
>
> 30. THAT my trial date was set for October 25, 1994.
>
> 31. THAT my legal counsel on my instructions informed the Court that the October 25, 1994 date reflected an unreasonable systemic delay and violated my rights under the *Charter* to a speedy trial.

December 1/93 A pre-trial conference was held by Justice Saunders at Halifax with regard to *another trial* scheduled to be commenced January 20, 1994, involving the same Crown prosecutors and the accused Johnson, Naugle and Bernard. In attendance were Crown prosecutors Holt and Clarke, as well as counsel for the aforesaid accused. Ms. Hebb and an associate also attended the conference as interested parties as their clients were involved in the proceedings which we have under consideration all of which arose out of the same

investigation. Counsel for Johnson raised the issue of the 1752 Treaty and as well the status of an appeal to the Supreme Court of Canada from a decision of this Court upholding his conviction for a violation of the *Tobacco Tax Act*. The conference adjourned until December 15, 1993;

December 15/93 The pre-trial conference continued at Halifax. The defence counsel involved in that proceeding gave notice of *Charter* arguments and other arguments ranging from the constitutionality of the *Tobacco Tax Act* to the validity of the 1752 Treaty and the ramifications of such application with respect to the various cases before the courts arising out of Operation HYPE.

January 11/94 On this date a motion for adjournment by the accused Lacey, Bernard and Johnson in the other criminal proceeding was made before Justice Felix Cacchione. The application was based on two issues: the first being there was an appeal to the Supreme Court of Canada by Johnson from the decision of this Court in (1993) *R. v. Johnson* and secondly, that the defence in those proceedings had not had time to adequately prepare for the aboriginal and 1752 Treaty arguments they wished to raise. It was indicated to the Court that their researchers had stated that it would be upwards of eight months before they would have an opportunity to be in a position to proceed to trial. These charges against Lacey, Bernard and Johnson had been scheduled for trial in January of 1994. The Crown opposed the motion for the adjournment.

On the hearing before Justice MacLellan, Crown counsel Mr. Holt was asked what was his understanding of the result of the hearing before Justice Cacchione. He responded:

> My understanding of it was, that the application was being made, by primarily Mr. English on behalf of Mr. Bernard and Mr. MacDonnell on behalf of Mr. Johnson but that all, all of the accused on all of these matters were join....were joining in with that application. And that on, despite the objections of the Crown, we, it was my position on behalf of the Crown that we wanted to leave these matters where they were and get on with them. Uh, but in spite of those objections, Mr. Justice Cacchione decided that the application for the adjournment was appropriate. However, he, because they were Truro matters, didn't want to get involved in setting trial dates. So everything was set over to uh, January 20th, in Truro, for Mr. Justice Saunders to deal with, because he was the judge scheduled to preside at the first trial, which at that point was scheduled to begin on January 20, 1994.

Justice Cacchione determined that it would be in the interest of the accused to grant the adjournment. He stated this was so because "first that their ability to make full answer and defence requires that an adjournment be given since their experts who are doing research in the Treaty of 1752 have indicated to them that it will take some 8 or 9 months in order to properly research this question. Secondly, that the Supreme Court of Canada has granted Mr. Johnson's leave to appeal from a decision from our Court of Appeal wherein it was indicated that particular treaty was not applicable."

Justice Cacchione set the matter over to January 20, 1994, to the Supreme Court at Truro to set a new date for trial of the other proceeding which did not involve the charge against Ms. Murdock;

In her affidavit in support of the motion heard by Justice MacLellan, Ms. Murdock stated at paragraphs 32, 33, 34 and 35:

> 32. THAT in late January I was informed that two of my co-accused Bernard and Johnson made a successful motion in the Supreme Court on January 11, 1994 to have their cases adjourned until the Supreme Court of Canada reached a decision in an appeal on the validity of the *Nova Scotia Tobacco Tax*

Act as it relates to the *Indian Act*. That the adjournment was to October 20, 1994.

33. THAT I had no knowledge of this until later that month when my counsel asked me to agree to the adjournment.

34. THAT since my trial was not set to start until October 24, 1994 and my counsel had been instructed to put my objection on record that this date was an unreasonable delay and, as I could not be tried alone, I felt I had no choice; it would be decided that way anyhow by the Court. My action did not delay the trial any more than it had already been delayed by the dates set by the Court on the advice of the availability of the Crown.

35. THAT on October 20, 1994 the Crown and Defense appeared in Supreme Court to set dates for various trials including my own. Once my counsel asked the Court to set a date for this *Charter* application, the Crown Attorney rearranged the order of the cases so that my trial would be heard second on his roster, instead of last.

It is clear from the record that there were numerous trials arising out of the R.C.M.P. investigation known as HYPE. Many involved Johnson and Bernard and as a consequence their counsel, MacDonnell and English.

With respect to the delays in bringing the matter to trial Mr. Holt was asked when testifying before Justice MacLellan on redirect:

Q. And to your knowledge, what if at any time, has the Crown requested a delay or an adjournment in these matters for any particular reason.

A. The only time would be very earlier in the process, uh, through July up to, uh I guess December of 1992. Simply because we were not in the position to give full disclosure at that point. The investigators were still working on putting together the evidence so that it could be disclosed to the defence.

Q. And what type of evidence was that.

A. For the most part it was wiretap evidence involving transcripts. A lot of hours and volumes of transcripts that were application to them.

January 19/94 Justice Saunders faxed Ms. Hebb, counsel for Ms. Murdock, with a copy to Mr. Holt in which Justice Saunders confirmed his conversation with Ms. Hebb that she would not be in attendance at the hearing on January 20, 1994. Justice Saunders requested that Ms. Hebb inform him of her client's instruction when she ascertained them from Ms. Murdock;

January 20/94 On this date at the Supreme Court in Truro the other trial that was scheduled to proceed before the Court on January 20, 1994, was adjourned until October 20, 1994, for an up-date on the status of the Johnson appeal which was before the Supreme Court of Canada. All other matters arising from the HYPE investigation were adjourned to the same date to set new trial dates;

February 1/94 Ms. Hebb, on behalf of Ms. Murdock, notified the Court in writing that she was prepared to set down a date to formalize the adjournment of the trial on October 20, 1994;

February 15/94 On this date Ms. Hebb on behalf of Ms. Murdock, and Mr. Holt on behalf of the Crown, ap-

peared before Justice Saunders. The transcript of those proceedings which was placed before Justice MacLellan show the following:

> *JUSTICE SAUNDERS*: ... there had been a motion made some weeks ago by defence counsel to adjourn the course of these cases one of the reasons being that it was expected the Supreme Court of Canada might decide some issues in another case which would make the Hearing of these matters moot and on that basis Justice Cacchione ordered that they be adjourned. I attended in Truro and counsel in the other cases indicated their consent as did their clients to a formal adjournment to the next Chambers day in Truro, which was Thursday, October the 20th, 1994, and this morning, Ms. Hebb, is appearing on behalf of her client, Ms. Murdock and Mr. Holt on behalf of the Crown.
>
> *MR. HOLT*: That is correct, my lord.
>
> *THE COURT*: Ms. Hebb, are you now able to confirm formally your client's consent to the adjournment to Truro, October 20, 1994?
>
> *MS. HEBB*: Yes, I am.

Justice Saunders concluded "Now all matters are adjourned, by consent, to Truro, Thursday, October 20, 1994, at 9:30 in the morning." There then ensued some discussion between counsel and the court that emphasized they were adjourning to await a decision from the Supreme Court of Canada on the appeal of the decision of this Court in (1993), *R. v. Johnson*. The Crown Attorney undertook to monitor the proceedings that were expected to take place in the Supreme Court of Canada.

October 4/94 The Supreme Court of Canada, after re-consideration of the application for leave to appeal the decision of the Nova Scotia Court of Appeal in (1993) *R. v. Johnson* quashed the leave to appeal which the Supreme Court of Canada had previously granted;

October 20/94 On this date the Supreme Court at Truro set the trial of Ms. Murdock down for June 20, 1995, to July 14, 1995. At that time the court was appraised of the proposed s. 11(b) *Charter* motion that Ms. Hebb was making on behalf of Ms. Murdock. No formal documents had been filed at that time. Justice Scanlan who was presiding directed that Ms. Hebb file formal documents and her submission in the matter by December 5, 1994, and that the Crown was to respond by December 16, 1994.

December 1/94 The Crown was informed by Justice Scanlan that the defence had requested an extension of time to file documents.

January 26/95 The affidavit of Ms. Murdock in support of her application before Justice MacLellan was sworn in which she deposed the following in paragraphs 39-42 inclusive:

> 39. THAT these delays have caused me and my family much anxiety and grief. My mother died in December, 1993, not knowing if I would be found innocent or guilty.
>
> 40. THAT my two sons who were excellent students in school are now failing courses or receiving only conditional passes because of the stress and loss of self esteem caused by the uncertainty of my future.
>
> 41. THAT I was accepted in 1992 at McMaster University for a credit course which would have led to a business degree. However, I could not proceed because of the charge laid against me. In 1993, I was ac-

cepted and received funding to attend our Community College, the Grand River Polytechnic Institute, for a course in computers, business and accounting. But no absences other than three days are allowed and no absences for court appearances are permitted, otherwise you are dismissed from the college. I have been accepted for subsequent years, but because of the required court appearances I have missed the 92-93 term, 93-94 term and the 94-95 term. As I am now 49 years of age, my future economic opportunities have gone out the window.

42. THAT I have developed cardiovascular problems for which I have been hospitalized and the memory problems caused by my meningitis have not improved as had been anticipated by my physi- cians.

February 2/95 The application alleging infringement of Ms. Murdock's s. 11(b) *Charter* right to be tried within a reasonable time was heard by Justice MacLellan and dismissed. Accordingly, he refused her application for a remedy of a stay of proceedings. In the course of the proceeding before Justice MacLellan Ms. Murdock was cross-examined by the Crown with respect to the allegations made in paragraphs 39-42 respecting the stress and impact on her and her family that these proceedings in Nova Scotia had caused. The questions and answers on this issue are as follows:

Q. Now you've indicated on the record, and it's in your affidavit, that all this prejudice, if I use the word prejudice, but all your family problems, your mother's death, your health condition, but your health has been in serious problems since 1988?

A. I had meningitis. My memory problem has been ... I mean I didn't even know who I was for about 9 months.

Q. And that, your son's schooling problems and all this is because of this trial.

A. Yes sir.

Q. And the delay.

A. There is nothing else happening in our lives to, to ....

Q. Do you recall being in Provincial Court in Hamilton Ontario in the fall of 1992?

A. In the fall of 1992?

Q. That's correct.

MARY HEBB: I don't know whether or not I should object to that or not My lord. I don't know the an- swer.

THE COURT: It seems to me Miss Hebb if this witness is suggesting that her problems are caused by this proceedings, if there were other proceedings, that it would be relevant.

JIM CLARKE: It is My Lord, from the Crown's perspective.

Questioning of Witness by James Clarke Resumes

Q. In 1992 do you recall facing a charge, your solicitor's name was Dean Paquette, initial solicitor?

A. Yes.

Q. And you appeared in the Ontario Court Provincial Division, 125 Main Street, East Hamilton, Ontario before Justice of the Peace, Katherine Warren for a bail hearing?

A. On what date? On what date?

Q. 13 of October, 1993. [should be 1992]

A. Right, I thought you said September. In October, after I had been out here.

Q. That's correct.

A. Yes.

Q. Well no. Yes, after here. Because you were here on the 2nd of October right?

A. Right.

Q. Do you require, being required to go back to court again on the 13th of November 1992 to set trial dates or preliminary dates on those matter?

A. Yes.

Q. Do you require, attending in court on January 3 .. or 1993 before the Honourable Judge Bernard Zabel or Zable at which time a request by the accused in the matter to adjourn until January of 93 because of a .... letting go of your solicitors.

A. Huh ....letting of of my sol....

Q. Yea, you changed, changed counsel half way through the matter.

A. No.

Q. Ended up with a Broadsky or Brodsky?

A. Oh Okay. Broadsky.

Q. Broadsky. Do you remember Mr. Broadsky's name?

A. Oh yes.

Q. You recall that there were a number of appearances in court in March and May 93?

A. Yes.

Q. In June 93 again an attendance in court in Ontario?

A. Yes.

Q. You failed to appear that date. Mr. Broadsky showed up on your behalf, did he?

A. Okay well, there were several appearances, I can't .... I can't swear to these dates.

Q. Do you recall pleading or admitting the facts in that case in August 1994 and being found guilty and being sentenced to a fine?

A. No I never admitted to any facts.

Q. Oh, you were found guilty then though?

A. No. Uh, what they did was, I did not agree to anything.

Q. You didn't agree to anything?

A. No, I didn't agree to ... I did not agree to the facts...

Q. Um Hum.

A. And I, told them that they were not true and the judge and the lawyer and the d... Crown Prosecutor all got together and says well, you can plead not guilty, don't agree to the facts and we will find you guilty without a trial and, hold this, on a ... something to do with a Supreme Court decision.

Q. Which decision was that?

A. I don't remember.

Q. If I suggest to you it was R. v. Johnson, Supreme Court of Canada, Stanley Gordon Johnson, a matter that came out of Nova Scotia Court of Appeal here.

A. It could be.

Q. Could very well be?

A. It could be ... and even ...

Q. You were fined $5,600.00 correct?

A. Yea well, that, that doesn't have to be paid unless there are two conditions and one is, that if Stanley Johnson won his case, then I would be found, then they would reverse that and I would be found not guilty. Even if he was found, even if the Supreme Court did not find in his favour, there is still a right to appeal and have the decision overturned and the judge told me ...

This evidence shows that through the years 1992, 1993 and 1994 Ms. Murdock was involved in criminal proceedings in Ontario. It would appear that she pleaded guilty and was fined $5,600.

March 3/95 Mr. Murdock filed a notice of appeal from the decision of Justice MacLellan;

March 17/95 The Crown applied to quash the notice of appeal;

April 7/95 The Crown's application was heard by the Court of Appeal;

May 11/95 The Court of Appeal granted the Crown's application to quash the notice of appeal as being premature;

June 20/95 The trial of Ms. Murdock and her co-accused commenced in the Supreme Court at Halifax before a judge alone.

65 After reviewing the facts relevant to the events that transpired from the laying of the Information in July, 1992, to the commencement of the trial on June 20, 1995, Justice McLellan stated:

The applicant in this case contends that there is a thirty five month period from the date of the first charge, that is July 9, 1992 to June 20, 1995. Counsel has referred me to two of the leading cases on point, namely *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.) and *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.). I have also been referred by counsel for the Crown to all the leading cases on the question of unreasonable delay. Some of these cases include from our Appeal Division: *R. v. Green J.A.*, (1994) 127 N.S.R. (2d) and 335 A.P.R. 179 (N.S.C.A.), *R. v. Firth* (1992), 109 N.S.R. (2d) 342 (N.S.C.A.), *R. v. Weaver* (1992), 110 N.S.R. (2d) 341 (N.S.C.A.), *R. v. Harris* (1991), 108 N.S.R. (2d) 113 (N.S.C.A.), *R. v. Wood* (1991), 108 N.S.R. (2d) 196 (N.S.C.A.) and other cases. Also I have been referred to cases from the Supreme Court of Canada namely: *R. v. Potvin* (1993), 83 C.C.C. (3d) 97 (S.C.C.), *R. v. CIP Inc.* (1992), 71 C.C.C. (3d) 129 (S.C.C.), *R. v. Smith* (1989), 52 C.C.C. (3d) 97 (S.C.C.) and *R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.) and other cases.

I have referred counsel to *R. v. Brassard* (1993), 85 C.C.C. (3d) 287 (S.C.C.). In that case the Court held that consent by an accused to adjournments would be considered a waiver of his right to object to the delay of his trial. Here the case against the accused is one of a series of cases involving individuals involved in alleged illegal activities involving importing tobacco products into the Province of Nova Scotia. The charge against the accused is conspiracy and this, I understand based mainly on wiretap evidence.

I find, based on the review of the transcript and the other materials presented to me, that the accused did consent to the adjournment from February 1994 to October 1994. I reject the suggestion that she didn't understand the consequences of the adjournment. Ms. Hebb on her behalf clearly understood that, by agreeing to adjourn the trial date, it would be scheduled for a later date. I therefore deduct that period from the total time involved here as has been indicated by the case law.

The time from July to December 1992, I also consider as attributable against the accused. A warrant for her arrest was issued because she could not be summonsed to court. I conclude that there must have been reasonable grounds for the Provincial Court Judge to issue a warrant based on the accused evading service.

I therefore find that the time I should consider here are the times from December 1st, 1992 to August 23rd, 1993, the date of committal to trial and from that date to February 1994, the date on which her case was adjourned. I also considered the period from October 20, 1994 to June 1995.

Therefore I have:

1. December 1, 1992 to August 23, 1993 - a period of eight months twenty two days, according to my calculations;

2. The period from August 23, 1993 to February 15, 1994 - a period of five months 23 days;

3. The period from October 20, 1994 to June 1995 - a period of eight months.

Making a total of twenty (21) months forty-five (45) days or twenty (22) months and fifteen (15) days.

I find that in this case, the prejudice suffered by the accused is no more than any accused person would suffer who is charged. I consider that, at the time of these charges, she was also facing another charge in the Province of Ontario. I do not find that the accused has suffered prejudice to her right to fair trial because of the lapse of time. I also do not find that the Crown did anything to unnecessarily delay the accused's trial.

Considering the complexity of the case and the number of issues raised by the charges and the actions of the other accused persons, and considering the case law, I find that the delays here are not unreasonable.

I would therefore dismiss the application for relief under Section 11(b) of the *Charter*.

66 Counsel for Ms. Murdock states that the crux of the appeal relates to the circumstances under which Ms. Murdock agreed on February 15, 1994, to the adjournment of Ms. Murdock's trial to October 20th, 1994, to set new trial dates. Ms. Murdock's trial had originally been scheduled to been on October 25th, 1994. That date had been fixed on October 7th, 1993, at which time Ms. Murdock's counsel had advised the court that the trial date was not acceptable and that a *Charter* motion would be made on the ground of unreasonable delay.

67 Ms. Murdock's counsel asserts that on February 15, 1994, she really did not have any option but to agree to the adjournment of October 20th, 1994, as on January 20th, 1994, all the trials that had been scheduled arising out of the HYPE investigation were adjourned awaiting the results of the appeal to the Supreme Court of Canada of the (1993) *R. v. Johnson* decision of this Court and to enable counsel in other trials to prepare constitutional arguments. Furthermore, a motion to sever by a co-accused had been refused.

68 Counsel for Ms. Murdock frames the issues on this aspect of the appeal as follows:

ISSUE I Was the agreement made on February 15, 1994, to adjourn to October 20, 1992, made voluntarily or were the circumstances such that the Applicant was acquiescing to the inevitable?

ISSUE II If the answer to Issue I is "yes" was the delay from August 4, 1992, to June 20, 1995, unreasonable systemic delay contrary to s. 11(b) of the *Charter of Rights and Freedoms* (the "*Charter*")?

ISSUE III If the answer to Issue II is "yes", should the relief be a stay of proceedings under s. 24(i) of the *Charter*?

69 I assume in Issue II counsel is saying that if this Court agrees that the consent to the adjournment was not voluntary then the delay from July 8th, 1992, to June 20th, 1995, is unreasonable delay.

70 Counsel for Ms. Murdock submits:

12. The multiplicity of the charges against the Appellant's co-accused — it should be noted that there was only one charge against the Appellant, and it was the most minor in the *Tobacco Tax Act* investigation - and the fact that only two prosecutors were assigned to some fourteen informations involving twenty-five accused — created the circumstances which allowed for systemic abuse of the Appellant's rights to a speedy

trial.

13. Her very first objection to the delay was ignored. Her requests to have Johnson severed so her trial with Naugle and Bernard could proceed was rejected by the Crown. Her evidence that she completely misunderstood the significance of an adjournment to October 20, 1994, when she believed that her trial was going ahead on the 25th of that month, is uncontroverted.

16. The Appellant relies on *R. v. Morin* (1992), 71 C.C.C. (3d) 1 and *R. v. Askov* (1990), 59 C.C.C. (3d) 449 , the Appellant taking the view that *Askov* lives on, just somewhat modified.

The Crown did not gain any ground against her position in cross-examination. As to their onus on the Crown for reasons for the delay, Mr. Holt's affidavit only covered the period from *July 8, 1992* and ends on *August 24, 1993*. There were some transcripts submitted *but* most were about unrelated cases and *no* evidence was let by the Crown as to the interpretation of what was going on with these various proceedings.

71 In oral argument counsel for Ms. Murdock submitted that Justice MacLellan failed to consider paragraphs 39-42 of Ms. Murdock's affidavit that was sworn on June 26th, 1995. These paragraphs deal with the effect of the proceedings and the length of proceedings on her children, her health, her educational opportunities and prejudice to her as an accused through witnesses dying, etc.

72 Counsel for Ms. Murdock submits that Justice MacLellan erred in not inferring prejudice from the long delay between the laying of the charges and the commencement of the trial.

The Law

73 In *R. v. Morin* (1992), 71 C.C.C. (3d) 1 the Supreme Court of Canada enunciated the principles to be applied by a Court in determining if the right of an accused to be tried within a reasonable time as guaranteed by the *Charter* has been infringed.

74 With respect to the charge against Ms. Murdock the delay from the date of the charge to the commencement of the trial was 35 months and 11 days. This lengthy delay warrants an inquiry into the reasons for the delay. The first matter to consider is whether Ms. Murdock waived in whole or in part her right to complain of the delay; the waiver must be clear and unequivocal (*R. v. Morin* (supra)).

75 Justice MacLellan found that Ms. Murdock's counsel "clearly understood that by agreeing to adjourn the trial date it would be scheduled for a later date." He found, based on the evidence before him, that there was a consent to the adjournment. He therefore deducted the time involved (February 15, 1994, to October 20, 1994) eight months, from the total time involved from the laying of the charge to June 20th, 1995. His finding that there was a voluntary consent is supported by the evidence. It was clearly open to Ms. Murdock to refuse to consent to the adjournment. Justice Saunders, on January 19th, 1994, had instructed Ms. Hebb to obtain instructions from her client respecting an adjournment. On February 1st, 1994, Ms. Hebb advised the court, in writing, that she was prepared to formalize the adjournment. On February 15th, 1994, Justice Saunders asked Ms. Hebb, at a formal court proceeding:

THE COURT: Ms. Hebb, are you now able to confirm formally your client's consent to the adjournment to Truro, October 20, 1994?

MS. HEBB: Yes, I am.

Ms. Murdock's counsel understood that new dates would be fixed on October 20th, 1994. She chose to consent on behalf of Ms. Murdock and, therefore, Ms. Murdock waived her right to complain about delay with respect to that eight month period.

76 The trial judge deducted another portion of time as being attributable to actions of the accused Ms. Murdock. That is, the time period between the laying of the charges on July 19, 1992 and December 1st, 1992, when Ms. Murdock made her first appearance in a Nova Scotia court in connection with these charges. A warrant for her arrest had been issued on August 5th. In my opinion Justice MacLellan did not err in inferring there must have been reasonable grounds for a Provincial Court judge to have issued a warrant based on the accused evading service or it would not have been issued.

77 Justice MacLellan calculated that there remained a period of 22 months and 15 days as relevant to the determination of the issue as to whether there was a reasonable delay in proceeding to trial.

78 In my opinion the delay of 22 months and 15 days is sufficiently long to demand a consideration of other factors which might explain the delay. While this is not an exhaustive list the court will consider:

i. the degree of complexity of the case which impacts on the time to prepare for trial;

ii. the inherent time requirements for accused persons to engage counsel, for the Crown to make disclosure and for defence counsel to prepare the defence;

iii. whether or not there was a preliminary inquiry. Obviously when a preliminary inquiry is held more time is required before the charges reach the trial state than would otherwise be the case;

iv. the limits on institutional resources. The Supreme Court of Canada in *R. v. Morin* (supra) has recognized that institutional resources are not limitless. This period starts to run when the Crown and the defence are ready for trial or ought to be ready for trial;

v. the presence or absence of prejudice to the accused caused by the delay;

vi. other reasons in a particular case.

79 There is no question that the trial was complex. Not only was the charge one of conspiracy which is complex in itself as it involved a number of accused persons but key evidence for the Crown consisted of intercepted telephone communications between various accused which were required to be disclosed. It is to be remembered that Ms. Murdock made her first appearance in a Nova Scotia Court on December 1st, 1992. On April 20th, 1993, Ms. Murdock was still without counsel when she appeared in Provincial Court and the matter was adjourned to August 3rd to the 26th, 1993 for a preliminary inquiry. The scheduling of the preliminary inquiry did not involve an unreasonable lapse of time given the numerous charges that arose out of Operation HYPE and the scheduling of other preliminary hearings in the matter. In addition, Ms. Murdock and other accused who were initially unrepresented would not have been well served by the system had the preliminary hearing been scheduled earlier. Had it been scheduled earlier there, no doubt, would been an application to adjourn to accommodate counsel for Ms. Murdock's preparation for the preliminary as counsel did not make her first appearance until the preliminary inquiry itself. The evidence shows that Ms. Murdock was unrepresented as late as April 20th, 1993, when she appeared in Provincial Court at Shubenacadie.

80 One cannot say that up to this point in time matters were not proceeding at a reasonable pace. On

September 30th, 1993, all trials arising out of Operation HYPE were set down for hearing with the exception of the charges against Ms. Murdock and the co-accused on that Indictment. On October 7th, 1993, the charges against Ms. Murdock and others on that Indictment were set down for trial to commence on October 25th, 1994, with days reserved through to December 5th, 1994. This was a delay of approximately one year. I am satisfied that this delay was within an acceptable range given that the institutional resources are not limitless and the trials arising out of Operation HYPE put severe strains on the system in that there is only one court room available at Truro, the venue of the trials. In addition, counsel for Bernard and counsel for Johnson were involved on behalf of their clients, in several trials as were Crown counsel assigned to prosecute the charges arising out of Operation HYPE.

81 In my opinion it was reasonable to schedule the trials over a period of time and that under the circumstances the trial date of October 25th, 1994, did not involve an unreasonable delay. I would note that Justice MacLellan did not attribute any of the delay to the actions of the Crown. This finding of Justice MacLellan accords with the facts.

82 Therefore, the proceedings involving Ms. Murdock was progressing at a reasonable pace in October of 1993 with a trial date fixed for October 25th, 1994. However, on December 1st, 1993, at the pre-trial conference relating to another trial arising out of Operation HYPE, which had been scheduled to be tried on January 20th, 1994, counsel for Johnson sought an adjournment on several grounds including the submission that the trial should await the outcome of the appeal to the Supreme Court of Canada of the decision of this Court in (1993) *R. v. Johnson*. The adjournment was granted. Counsel for Ms. Murdock consented to the adjournment of Ms. Murdock's trial to October 20th, 1994, for the purpose of setting new dates at that time. Counsel for Ms. Murdock was aware that all the trials which had been adjourned would have to be rescheduled. Considering the issues raised in the appeal of the decision of this Court in (1993) *R. v. Johnson* it made sense that the trials arising out of Operation HYPE be adjourned as the outcome of the appeal to the Supreme Court of Canada could quite conceivably have resolved issues that would be raised by the defence in Ms. Murdock's trial and the other trials. These issues involved the constitutionality of the *Tobacco Tax Act*.

83 As noted on October 4th, 1994, the Supreme Court of Canada revoked the leave to appeal that it had previously granted. Therefore, the appeal to the Supreme Court of Canada did not proceed.

84 As scheduled, on October 20th, 1994, new trial dates were set. Ms. Murdock's trial was set for June 20th, 1995, a delay of a further eight months. In my opinion, considering the number of trials that spawned from Operation HYPE and the strain it put on institutional resources of the justice system this was not an unreasonable delay.

85 With respect to the issue of prejudice to the accused, Justice MacLellan after reviewing the evidence before him stated:

> that the prejudice suffered by the accused is no more than any accused person would suffer who is charged. ... I do not find that the accused has suffice prejudice to her right to a fair trial before of the lapse of time.

86 The primary purpose of s. 11(b) of the *Charter* is to protect the accused's right to security of the person, the right to liberty and the right to a fair trial. In *R. v. Morin* (supra) Sopinka J., for the Court, stated at p. 12:

> The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize expos-

> ure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

87 In my opinion Justice MacLellan did not err in finding that the prejudice suffered by the accused was no more than any accused person who is charged with a criminal offence would suffer in the circumstances. There is always anxiety and concern. With respect to the stigma of being charged it was blunted by the fact that Ms. Murdock was charged with an offence in Nova Scotia and, therefore, was miles away from the media coverage that would have been more intense in this Province than in Ontario. The remarks made to her by members of the native community on her reserve about alleged criminal activities probably reflected the fact that at the time she was awaiting trial in Nova Scotia she had been charged with tobacco related offences in Ontario which, no doubt, contributed to the way she was viewed by some members of the Indian community if, in fact, her evidence on this issue is credible. I say this in the context of the ruling made by the trial judge at the trial proper that Ms. Murdock was not credible and in light of certain other matters which I will deal with subsequently in these reasons.

88 As far as Ms. Murdock's right to liberty was concerned she was on bail and there were no unusual restraints on her movements.

89 With respect to the right to a fair trial being impaired by the delays there is no evidence to support a finding that she did not receive a fair trial nor that her ability to make full answer and defence was infringed by the delay in getting to trial. Whether Annie Bernard had any evidence that would have assisted Ms. Murdock's defence is very questionable given the trial judge's findings as to Ms. Murdock's lack of credibility in explaining the telephone calls between herself and Johnson were about. In any event, Annie Bernard died in September of 1992, long before the trial could possibly have commenced. The fact that Ms. Murdock's mother died in December of 1993 did not affect Ms. Murdock's fair trial interest based on any evidence that was put before Justice MacLellan. Whether Ms. Murdock's two sons who are now doing poorly in school according to her affidavit, and which she submits was caused by the "stress and loss of self esteem" caused by Ms. Murdock's uncertain future is a matter of speculation on her part. Ms. Murdock has not provided any evidence that her health problems are as a result of the delay in the commencement of the trial, in fact, on cross-examination she acknowledged that she had a serious health problem going back to 1988.

90 With respect to the assertion in paragraph 41 of her affidavit that the delay in the trial has resulted in her missing the 1992/93, 93/94, and 94/95 terms at Grand River Polytechnic Institute she agreed on cross-examination that in 1992 she had only been in court in Nova Scotia on two days, although it involved a week's travel; she drove from Ontario rather than travel by air. Ms. Murdock could not remember how many days she had been in hospital from September to December 1992. In the 92/93 term at the Polytechnic Institute it would appear that any inability of Ms. Murdock to attend the Institute was due primarily to her illness rather than caused by court appearances in Nova Scotia.

91 Under cross-examination she acknowledged that in the calendar year 1993 she was in court in Nova Scotia on one day up until the preliminary hearing in August when she was in Nova Scotia for one month. Obviously this August sitting would not have affected any term at the Polytechnic Institute in 1993.

92 Ms. Murdock was in attendance at court for one further day in 1993 September 30. She was asked under cross-examination:

Q. If I suggested that you have not been to court in Nova Scotia on these charges since September 30, 1993 would that be correct?

A. Uh...

Q. To your recollection?

A. Yea. I think so.

93 The evidence shows that Ms. Murdock was not in attendance at any court proceedings in Nova Scotia in 1994; she had been excused by the court. Therefore, court appearances in Nova Scotia did not interfere with attendance at Polytechnic Institute in the spring or fall of 1994.

94 The motion before Justice MacLellan was heard on February 2, 1995.

95 Her affidavit evidence that the charges in Nova Scotia caused a serious disruption in her eduction does not seem to be supported by the facts. On October 7th, 1993, trial dates were fixed for October 25th, 1994. This would have interfered with the academic term for the fall of 1994 had the trial proceeded as scheduled in the fall of 1994. However, by February 15th, 1994, the trial had been adjourned to October 20th, 1994, for the sole purpose of fixing new trial dates which would have freed her up to attend the fall term at Polytechnic Institute. I would also note that the Court had agreed that Ms. Murdock need not attend the hearing scheduled for October 20th, 1994 at which the new trial date of June 20th, 1995 was set. She was not in attendance at that hearing but was represented by counsel.

96 Accordingly, Ms. Murdock could reasonably have anticipated that she could have attended the entire year 94/95 at the Polytechnic Institute. The evidence simply does not support a finding that the delay in the proceedings to trial was the cause of her interrupted educational training.

97 I am satisfied that Justice MacLellan did not err in finding that the right of the accused protected by s. 11(b) of the *Charter* were not infringed despite the lengthy delay between the laying of the charge and the commencement of the trial. I would dismiss the appeal from Justice MacLellan's decision on the motion.

98 I will now deal with Issues VIII, IX and X; these issues relate directly to the convictions. I will then deal with the constitutional and other *Charter* issues as well as the appeals from sentence.

Issue X

99 With respect to this issue the appellants assert that the trial judge erred in finding that they had the necessary *mens rea* for the offence. Murdock testified at trial that she and Johnson believed that as Johnson was a Mi'kmaq operating a store on the Reserve he was not subject to the *Tobacco Tax Act*. The evidence of Murdock was that she held the subjective belief that status Indians were permitted in law to move "quota" cigarettes from one Indian reserve to another and that Johnson also held the firm belief that the 1752 Treaty exempted him from provincial tax on tobacco. *Johnson did not testify at trial.*

100 In her decision on the conspiracy charge the learned trial judge stated:

Murdock and Johnson and Bernard agreed to bring tobacco products, including contraband tobacco, into Nova Scotia knowing no provincial tax was going to be paid on the tobacco.

101 She then addressed the question of the requisite *mens rea*; she stated:

> In response to Mr. MacDonell's question as to what Murdock understood Johnson's belief to be in regard to whether or not tax was payable in Nova Scotia, she stated Johnson was very specific in that they had many discussions about "1752 Treaty" and the rights that allowed the Mi'kmaq of Nova Scotia to carry on their business not paying tax and this was over and above the issue of quota cigarettes which I shall deal with momentarily. She received a copy of the Treaty from him as a gift. I am satisfied, this belief, even if honest, would be a mistake in law and does not constitute a defence.
>
> In the alternative, defence argues the answer is no because both Johnson and Murdock believe that, even if the law did apply to them, the tobacco in question was quota tobacco from other reserves and was part of legitimate non-taxable personal property under the law. *(s. 87 Indian Act.)*
>
> *This is not true in fact.* ..... {My emphasis}

102 The trial judge reviewed the evidence from intercepted telephone calls between Johnson and Murdock in which Murdock expressed the view that the R.C.M.P. could not touch "quota" tobacco shipped from Ontario to Johnson in Nova Scotia. The trial judge then concluded:

> I find rather that they did know they were agreeing to partake in the commission of the unlawful object the act of fraud. I do not believe that Murdock and Johnson did not know the act to be unlawful rather their actions, the actions of the co-conspirators and the surrounding circumstances cause me to draw the inference Murdock, and Johnson and the other co-conspirators knew full well that their action was unlawful.
>
> This finding relates to the fact that Murdock and Johnson were not dealing solely with quota tobacco products, as I have found the agreement included discussion of and the bringing in of contraband tobacco and so the defence of honest but mistaken belief of fact would not then apply.
>
> .....
>
> The conduct of the parties alluded to by the Crown is consistent with the finding that the agreement included not only quota but also contraband tobacco.
>
> The Crown submits, in any event, that the accused erroneous belief that they were entitled to import quota tobacco products is a mistake of law and not of fact and cites *R. v. Paul and Copage* (1978), 24 N.S.R. (2d) 313. It is unnecessary for me to decide the question in view of my finding that in addition to quota tobacco the accused were agreeing and actually importing contraband tobacco. It is not necessary for me to determine in respect to quota tobacco if their mistaken belief was one of belief in fact or law.

103 The trial judge inferred from the totality of the acts of Murdock and Johnson that they had the requisite intent for the offence. The trial judge stated:

> Proof of the agreement is a matter of inference drawn from the conduct of the alleged conspirators and the circumstances in which that conduct occurred. The Crown has proven that Johnson and Murdock and Bernard acted concurrently towards a common goal, therefore, the inference may be drawn they did so as a result of the agreement to achieve that goal. The inference is obviously not automatic but is a strong one and appropriate to draw in this case because of the evidence I have accepted and that which I have disbelieved. Although Murdock and Johnson both denied such an intention, their words and actions belie that denial.

{Emphasis added}

104 Counsel for Murdock submits that the evidence does not support the finding that the appellants had the requisite *mens rea* for the element of fraud.

105 Counsel for the respondent asserts that the findings of the trial judge on the credibility of Ms. Murdock is a full answer to this ground of appeal. I agree. I have set out passages from the trial judge's decision where she made specific findings of fact: (i) that Murdock and Johnson were involved in the importation into the Province of Nova Scotia of not only "quota" tobacco but contraband tobacco (tobacco on which no federal excise tax had been paid); (ii) that she did not believe Ms. Murdock's explanations of her telephone communications with Johnson; (iii) that she was satisfied beyond a reasonable doubt that Murdock and Johnson had the intention to defraud the Province of Nova Scotia of tobacco tax.

106 These findings of fact were supported by the evidence. It is the province of the trial judge to draw appropriate and reasonable inferences from the evidence as to the intention of an accused.

107 The trial judge clearly considered the subjective beliefs of the appellants in determining that the appellants had the requisite intent to commit the offence of conspiracy as charged. In my opinion, not only did the trial judge not make a palpable error in this finding, her findings on this issue are clearly supported by the evid- ence.

Issue IX

108 The appellants submit that it was not proven beyond a reasonable doubt that the conspiracy involved a plan to defraud the Province of an amount in excess of $1,000 as charged. The trial judge considered the evidence of Mr. Claude J. Bordage, an employee of the Audit & Compliance Division of the Provincial Tax Commission. He was familiar with the tax rates on various tobacco products. The trial judge made the following findings at p. 32 of her decision:

> I further find, beyond a reasonable doubt, on the evidence of Claude Bordage with respect to tobacco tax rates in 1992, the value of tax revenue with respect to the contraband tobacco seized from Hughes was in excess of $1,000.00. Claude Bordage testified in 1992, there were four product types resulting in four tobacco tax rates based on cigarettes, proportion sticks, fine cut and cigarettes and others at a 1992 tax rate of 6.8¢ or $13.60 per carton of 200 cigarettes and 5.2¢ per or $10.50 per 200 gram tin/tub/pouch of fine cut tobacco. Therefore, 100 cartons of cigarettes or 100 tin/can/pouch of fine cut were valued at over $1,000.00.
>
> Given that I am dealing with conspiracy, I am also satisfied quantities of tobacco products discussed during the various conversations, for example May 26, 1992, Bernard and Johnson discuss 300 cans and 1080 bags of tobacco, in June, 1992, Murdock and Johnson discussed shipment of 200 cartons to Johnson, places the value over $1,000.00 without the evidence of the Hughes seizure.

109 I have reviewed the transcript of the trial and am satisfied that the evidence supports the finding that the conspiracy involved an intention to defraud the Province of tobacco tax in excess of $1,000.

Issue VIII

110 I am also satisfied that the trial judge did not apply a lower standard of proof than "beyond a reasonable doubt" to the inferences she drew from the wire tap evidence. This is evident from the portions of the trial

judge's decision which I have previously set out in these reasons. The trial judge considered not only the wire tap evidence but also the evidence of the quantities of tobacco seized and the circumstances of the seizure. The words of her decision conclusively show that the trial judge was satisfied beyond a reasonable doubt that there was a conspiracy to defraud and that the appellants were members and active participants in the conspiracy.

111 In summary, the trial judge did not err, as asserted by the appellants, with respect to Issues VIII, IX and X; the evidence supported the trial judge's findings.

112 The appellants have not challenged the trial judge's understanding and application of the law relating to a charge of criminal conspiracy. On the whole of the evidence the trial judge was satisfied beyond a reasonable doubt that the appellants had committed the offence.

113 There remains the need to deal with the constitutional and other *Charter* issues as well as the appeals from the sentences imposed on the appellants by the trial judge.

114 I will deal with Issues I and II together as they tend to overlap. The issues are described somewhat differently in the Factums of the appellant Murdock and that of the Intervenor. I have previously set out the issues as framed by them.

Issues I and II

Section 87(1)(b) Indian Act

115 Although expressed in various forms by counsel for the appellant and the intervenor, the essence of these grounds of appeal is the assertion that the tax scheme created by the *Tobacco Tax Act* and *Regulations*, while it may be valid provincial legislation with respect to non natives, does not apply to the appellants who are natives within the meaning of the *Indian Act* with respect to their personal property situate on a reserve which they assert is exempt from taxation by reason of s. 87(1)(b) of the *Indian Act*.

116 The intervenor submits that ss. 6 and 14(1) of the *Tobacco Tax Act* are constitutionally inapplicable:

> ..... in respect of the Appellants as being inconsistent with s. 87 of the *Indian Act*, R.S.C. 1985, c. I-5 when regard is had to all or some of the following facts: (a) the tobacco is Indian property bought by a registered Indian on an Indian reserve outside Nova Scotia from another registered Indian; (b) the tobacco is Indian property brought or intended to be brought to an Indian reserve in Nova Scotia; and/or (c) the tobacco is Indian property sold or intended to be sold on an Indian reserve by a registered Indian

117 This submission does not have a sound foundation on the facts as found by the trial judge.

118 Despite the many constitutional issues raised by counsel, the issue of the constitutionality of the *Tobacco Tax Act and Regulations* vis-a-vis s. 87(1)(b) of the *Indian Act* has been either expressly or impliedly decided by this Court's decision in *R. v. Johnson* (1993), 120 N.S.R. (2d) 414. This Court decided that tobacco in the possession of an Indian on a reserve which is intended to be sold by an Indian retailer to non natives is not exempt from taxation by reasons of the provision of s. 87(1)(b) of the *Indian Act*. As stated by Jones, J.A. in (1993), *R. v. Johnson* at p. 430, "the cases make it clear that the exemption applies to personal property on a Reserve and the sale of the personal property to an Indian on a reserve". As the *Tobacco Tax Act* imposes the tax

on the consumer, I would infer that Justice Jones, in making the foregoing statement, was referring to a sale of tobacco to an Indian consumer on a reserve.

119 In that case Johnson (the appellant in this case) was the accused. He was described as an Indian retail vendor. He was charged with possession of tobacco not purchased from a wholesale vendor holding a wholesale vendor's permit contrary to s. 25(2) of the *Tobacco Tax Act*. Taxes had not been paid by Johnson on those tobacco purchases. He was convicted. On appeal to this Court he submitted, inter alia, that s. 87(1)(b) of the *Indian Act* exempted him from the application of s. 25(2) of the *Tobacco Tax Act*. The evidence in that case showed that Johnson operated a variety store at the Millbrook Indian Reserve known as the 1752 Treaty Truck House. The evidence showed that he sold American cigarettes which were not labelled as indicating any Canadian duty had been paid to a non-native. This sale was to an auditor with the Department of Finance of the Province. As a result a search warrant was issued and a very substantial quantity of cigarettes was seized from Johnson. There was no evidence that the cigarettes were obtained from a legitimate source such as a licensed wholesaler.

120 Mr. Justice Jones, writing for the Court, referred to decisions in *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)* (1989), 89 N.S.R. (2d) 121, 227 A.P.R. 121, 54 D.L.R. (4th) 639 (T.D.),; *Johnson v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 140, 253 A.P.R. 140 (C.A.); *Hill v. Ontario (Minister of Revenue)* (1985), 18 D.L.R. (4th) 537 (Ont. H.C.); *Tseshaht Indian Band v. British Columbia* (1992), 15 B.C.A.C. 1, 27 W.A.C. 1, 94 D.L.R. (4th) 97 (C.A.); *Francis v. The Queen*, [1956] S.C.R. 618; *Nowegijick v. Minister of National Revenue*, [1983] 1 S.C.R. 29, 46 N.R. 41; *Mitchell v. Sandy Bay Indian Band* (sub nom. *Mitchell v. Peguis Indian Band*), [1990] 2 S.C.R. 85, 110 N.R. 241, 67 Man. R. (2d) 81, [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 93; *Bomberry v. Ontario (Minister of Revenue)* (1989), 34 O.A.C. 17, 63 D.L.R. (4th) 526 (Div. Ct.); and *R. v. Simon* (1985), 62 N.R. 366, 71 N.S.R. (2d) 15, 171 A.P.R. 15 (S.C.C.). After quoting extensively from the decisions in *Mitchell, Hill* and *Tseshaht Indian Band* he concluded at paragraph 32:

> Section 87 of the *Indian Act* exempts the personal property of an Indian on a reserve from taxation. The exemption extends to ownership, occupation, possession or use of personal property on a reserve. *The cases make it clear that the exemption applies to personal property on a reserve and the sale of personal property to an Indian on a reserve.* The *Tobacco Tax Act* can only apply to Indians on reserves to the extent that it does not conflict with the provisions of the *Indian Act* or any treaty. The general provisions of the *Tobacco Tax Act* which do not conflict with s. 87 apply to reserves and Indians. I agree with the reasoning in the *Tseshaht Indian Band* case and of Krever, J., in *Re Hill. Section 87 does not exempt Indians from prepaying the tax to wholesalers on purchases made off the reserve as contended by the intervenor.* While s. 25(1)(a) of the *Act* may not apply to the possession of tobacco on a reserve, *s. 25(2) is a provision of general application designed for the effective collection of the tax and applies to retail vendors on reserves.* It follows therefore that the conviction on the second count is valid. {Emphasis added}

121 In my opinion the following issues expressly or impliedly were resolved by this Court by the decision in (1993) *R v. Johnson*: (i) Section 25(2) of the *Tobacco Tax Act* is valid provincial legislation; (ii) s. 87(1)(b) of the *Indian Act* does not exempt an Indian retail vendor from prepaying the tax to wholesalers on purchases of tobacco made off reserve as required by s. 25(2) of the *Act*; (iii) s. 25(2) is a provision of general application designed for the effective collection of tax and applies to "retail vendors on reserves"; (iv) that the *Tobacco Tax Act* imposes a direct tax; (v) that the quota system in force in this Province is a means by which the Province as a matter of policy delivers the tax exemption Indian consumers claim that they are entitled to pursuant to the obligations created under s. 87 of the *Indian Act*; (vi) by adopting the reasoning of the Courts in *Hill v. Ontario* and in the *Tseshaht Indian Band v. British Columbia* this Court rejected the reasoning in *Bomberry v. Ontario*

that the quota system was *ultra vires* the Ontario government as it was not authorized by the Ontario Act; (vii) despite the fact that there is nothing in the British Columbia or Nova Scotia *Tobacco Tax Act* that expressly authorize the creation of a quota system by regulation, the creation of such a system is a valid exercise of the power to make regulations conferred on the Governor-in-Council by s. 44 of the *Act*; and (viii) there is nothing in s. 4 of the 1752 Treaty which exempts Indians from complying with the general provisions of the *Tobacco Tax Act* regarding the collection and payment of tobacco tax ((1993) *R. v. Johnson* at para. 35).

122 Do ss. 6 and 14(1)(a) of the *Tobacco Tax Act* offend the s. 87(1)(b) tax exempt status of Indians with respect to property on a reserve?

123 A "vendor" is defined in the *Tobacco Tax Act* as:

> 2(l)'vendor' means a retail vendor or a wholesale vendors;

124 A "wholesale vendor" means:

> 2 (m) 'wholesale vendor' means a person who sells tobacco in the Province for the purpose of resale and who purchases not less than ninety per cent of the person's tobacco products for resale from Canadian tobacco manufacturers.

125 A "retail vendor" means:

> 2(h) 'retail vendor' means a person who sells tobacco in the Province to a consumer at a retail sale;

126 Section 6 of the *Tobacco Tax Act* provides that *every person* who *brings tobacco into* the Province or who *received delivery in the Province of tobacco* acquired by that person for value for that person's own consumption shall immediately report the matter in writing to the Commissioner, supply the Commissioner with invoices and other pertinent information respecting the consumption of the tobacco and pay to the Province the same tax in *respect of the* consumption of the *tobacco as would have been payable if the tobacco had been purchased at a retail sale.*

127 Section 14(1)(a) provides that no person shall import or bring tobacco into the Province unless that person *holds a wholesale vendor's permit* that is issued pursuant to the *Act*.

128 Sections 6 and 14(1)(a) are clearly designed to create a system whereby tobacco cannot be brought into the Province without the person paying the sales tax levied as if it were a purchase at a retail sale (s. 6) or the person bringing the tobacco into the Province is a person that holds a wholesale vendor's permit (s. 14). The *Tobacco Tax Act* was amended subsequent to the decision of Burchell J. in *Union of Nova Scotia Indians et al v. Nova Scotia (Attorney General)* (supra). The amended scheme was found by Justice Jones to have the effect of bringing the Nova Scotia tobacco tax collection system in line with similar legislation in Ontario and British Columbia.

129 With respect to the validity of the *Tobacco Tax Act* and the quota system in place in Nova Scotia, Jones J.A. in (1993) *R. v. Johnson* (supra) at paragraph 32 (previously quoted) approved the reasoning of the British Columbia Court of Appeal in *Tseshaht* (supra).

130 The British Columbia legislation was held to be valid provincial legislation by the British Columbia Court of Appeal in *Tseshaht* (supra). That Court also held that s. 87 of the *Indian Act* could have no application

on the facts of that case; the Court found the quota system did not infringe Indians s. 87(1)(b) rights.

131 In *Tseshaht* the British Columbia Court of Appeal, with respect to the quota system in place in that Province, stated in its decision at 94 D.L.R. (4th) at p. 137:

> Mr. Pearlman submitted that the province requires no specific legislative authority to implement a quota system. The authority for the exemption of Indian consumers and purchasers of tobacco or motor fuel products from the payment of tax is s. 87 of the *Indian Act*. The quota systems are simply the means by which the province, as a matter of policy, delivers those exemptions in conformance with its constitutional obligation under s. 87 of the *Indian Act*.
>
> In essence, all that the quota system does is unburden the retailers (both Indian and non-Indian) from the requirement to remit an amount equal to tax in circumstances where it is predicted and predictable that no tax will be payable by the ultimate consumers. In the absence of the quota system the carrying burden on the amount which the band would otherwise have to pay when purchasing these products from a wholesaler, an amount equivalent to the total tax assessable, and which, it would later seek to recover, in respect of sales to Indian customers, would be that much greater.
>
> Unlike the *Bomberry* case, *supra*, where the Ontario court found that the quota system imposed significant restrictions on the capacity of Indian retail merchants to engage in business, the quota system in British Columbia imposes no restrictions beyond those necessary to ensure that the volume of 'tax exempt' products bears some realistic relationship to the legitimate demand for those products.
>
> In the circumstances I am unable to accept the respondents' submission that the quota system requires more in the way of specific legislative authority.
>
> In my view it is constitutionally valid and *intra vires* the provincial legislature. .....

132 The Parliament of Canada has exercised its legislative power to enact laws with respect to Indians and Indian bands by the enactment of the *Indian Act*. By s. 88 of that Act Parliament has stated that provincial laws of general application apply to Indians except to the extent that these laws are: (i) inconsistent with the *Indian Act* or (ii) make provision for any matter for which provision is made by or under the *Indian Act*.

133 In my opinion, this Court, having decided that s. 25(2) of the *Tobacco Tax Act* is valid provincial legislation for the effective collection of tobacco tax and applies to Indian retail vendors on reserve, it follows that ss. 6 and 14(1)(a) of the *Act* are similarly valid as these sections are simply part of the necessary tax collection regime established by the *Tobacco Tax Act*. Sections 6 and 14(1)(a) are provisions of general application like s. 25(2) designed for the effective collection of tax and apply to retail vendors on reserves. Sections 6 and 14(1)(a) of the *Tobacco Tax Act*, like s. 25(2) of the *Act*, enable the Province to exercise control over the importation of tobacco into the Province as the necessary *incidence* of an effective collection system.

134 I do not agree with the argument made by counsel for the intervenor that the burdens imposed on Indians by the *Tobacco Tax Act* respecting quotas, etc. are significant in that they restrict the source from which cigarettes may be obtained and the quantity that may be obtained tax free. Counsel asserts that the *Act and Regulations* "restrict competition for Indian retailers and for Indian consumers" and, therefore, interfere with the freedom of Indian retailers to obtain and offer for a sale on reserve tax free personal property and as a result erode the benefit conferred on Indians by s. 87 of the *Indian Act*. He argues that accordingly the burdens are inconsist-

ent with the s. 87 rights of the Indians and inapplicable to the appellants. This argument is based on a decision of the New York Court of Appeal in *Milhelm Attea & Bros. Inc. v. New York (Department of Taxation & Finance)*, 599 N.Y. Supp. 2d 5510 (U.S. 1993).

135 In my opinion the quota system in Nova Scotia does not impose restrictions on a retail vendor of tobacco products beyond those necessary to ensure as a matter of policy that the volume of tax exempt products on a reserve do not exceed the reasonable requirements of the Indians on reserves. In my opinion the regulations which allow for the designation of a retail vendor to deal with quota tobacco on a reserve is simply part of the necessary administrative machinery to effectively control and collect tax on tobacco products in the Province of Nova Scotia. Under the present collection regime there is no erosion of the Indian consumers' alleged right to purchase tax free tobacco. The Indian consumers on the reserve have the benefit of the quota system which, by implication, was found by Jones, J.A. in (1993), *R. v. Johnson*, accommodates the Indians' claim to have tobacco situate on a reserve exempt from taxation.

136 Although made in the context of a case dealing with aboriginal rights the Supreme Court of Canada in *R. v. Nikal*, S.C.C. No. 23804, April 25, 1996 [reported at [1996] 5 W.W.R. 305], made the following statement which has relevancy to the validity of a licensing scheme to ensure the collection of direct taxes levied by the Province even though there is an insignificant encroachment on the right of an Indian on a reserve to acquire tax exempt tobacco from an Indian retailer of his choice:

> With respect to licensing, the appellant takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.
>
> This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights are necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at p. 524, are persuasive and convincing.

137 In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at p. 130, LaForest, J., writing for the majority, stated:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative 'package' which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.
>
> It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the mod-

> ern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

138 I would take the matter one step further than the Supreme Court of Canada did in *Mitchell v. Peguis Indian Band.* Indian retail vendors who sell tobacco products on reserves to non-natives (as does Johnson) deal with the tobacco on the same basis as all other retail vendors. Johnson, as a retail vendor, does not have a s. 87(1)(b) exemption with respect to sales to non-natives as Parliament could never have intended that an Indian dealing in the commercial mainstream, as does Johnson, would not do so on the same basis as other Canadians. Johnson, a retail vendor, who sells to non natives must purchase tobacco from a wholesaler and pay an amount equivalent to the tax that is levied on the consumer unless he has quota under the quota system. If he imports he must have a wholesale vendor's permit. Johnson did not acquire the tobacco in question as an Indian consumer on a reserve but as a retail vendor who sells to non-natives. He paid no tax on the tobacco seized from his store.

139 The *Tobacco Tax Act* imposes a tax on a purchaser of tobacco at a retail sale. It may be that, if the consumer is an Indian on the reserve and the sale takes place on the reserve, the Indian purchase is exempt, by reason of s. 87(1)(b) of the *Indian Act*, from payment of the tobacco tax levied under Nova Scotia's *Tobacco Tax Act* even if purchased from a retailer who has not been designated by the Commissioner to sell on a reserve. This is contrary to Mr. Claude J. Bordage's understanding of the Nova Scotia tax regime; he is with the Provincial Tax Commission. He stated that such a purchaser would be required to pay the tobacco tax. However, the s. 87(1)(b) *Indian Act* right to tax exemption of property situate on a reserve may apply to such purchases. I hasten to add that this *obiter* comment does not mean that an Indian retail vendor of tobacco products on a reserve can ignore the provisions of the *Tobacco Tax Act and Regulations*.

140 The tax levied by the *Tobacco Tax Act* is payable by the consumer. Therefore, an Indian retailer of tobacco products who is required to pay to a wholesaler an amount equal to the tax cannot benefit from s. 87(1)(b) of the *Indian Act* as the retail vendor is not the consumer and, therefore, not the taxpayer.

141 The intervenor's arguments revisit issues which have been expressly or impliedly decided by this Court in (1993), *R. v. Johnson.* Before moving on to the other issue, however, I wish to address what I regard as the absence of evidence to support the premises upon which the intervenor relies.

142 The Intervenor has founded his argument upon several premises in particular that: (a) the tobacco is Indian property bought by a registered Indian on an Indian reserve outside Nova Scotia from another registered Indian; (b) the tobacco is Indian property brought or intended to be brought to an Indian reserve in Nova Scotia; and/or (c) the tobacco is Indian property sold or intended to be sold on an Indian reserve by a registered Indian"

143 These assumptions are reflected in paragraph 21 of the Intervenor's factum where it is stated:

> The Appellant submits that s. 87 exempts Indian retailers from tax-related burdens and the payment of tax at the time and point when they acquire and import merchandise from outside Nova Scotia to an Indian reserve in Nova Scotia. The Province may not, for the purpose of collecting tax from non-Indians, limit access by an Indian retailer to a lawful substance, that is, tobacco, *prima facie* destined for sale on-reserve to tax-exempt Indians. In our submission, s. 87 prevents a province from burdening Indian-to-Indian trade within or

> between Indian communities. Since the Appellants are registered Indians possessing their property on-reserve and their possession is consistent with sale to an end user of the tobacco that is clearly tax-exempt under s. 87 of the *Indian Act*, the tax-exempt status of the Indian consumer, we respectfully submit, allows tax-free products to flow into Indian hands and be possessed on-reserve.

144 The evidence at trial conclusively shows that Johnson is a retail vendor of tobacco products on the Millbrook Indian Reserve. Johnson did not hold a retail vendor's permit, a wholesale vendor's permit or a registration certificate issued pursuant to the *Health Services Tax Act*. He was not the designated retail vendor on the re- serve.

145 The evidence does not support a finding that all the tobacco in question was bought on an Indian reserve outside Nova Scotia by a registered Indian from a registered Indian. The only tobacco that may have had as its originating site, a reserve in Ontario, is the 20 cartons brought to Nova Scotia by Ms. Murdock. The evidence shows quantities of the tobacco were imported from the U.S.; no federal duty had been paid (the federal indices of payment of duty were not on the product). There is no evidence where all the rest of the tobacco came from in Ontario. Johnson did not testify. Murdock did not testify as to the source of the tobacco. Apart from testifying that she brought 20 cartons of quota cigarettes to Nova Scotia, Ms. Murdock asserted that she was not dealing with tobacco in her conversation with Johnson but dealing in horses and their transportation to Nova Scotia. The trial judge found that Ms. Murdock's evidence lacked credibility.

146 The facts do not support a statement that the possession of the tobacco by Johnson was "consistent with sale to an end user of the tobacco that is clearly tax exempt under s. 87 of the *Indian Act*, the tax exempt status Indian consumer" The evidence shows that Johnson sold tobacco to a non native from each of his three stores. The only reasonable inference is that the tobacco in question was not possessed by Johnson solely for the purpose of selling it to Indians on the reserve.

147 The evidence in the case we have under appeal, like the evidence in *Hill v. Ontario*, proves that the tobacco in the possession of Johnson was not destined for sale exclusively to Indians. In that case Krever J. stated:

> The result might well be different if the evidence could be interpreted as supporting a finding, or even a reasonable inference, that the consumers of the cigarettes sold were themselves Indians on a reserve and thus exempt from taxation either in respect of themselves or their property, the cigarettes purchased by them. It will be recalled, however, that the conclusion cannot be avoided that the cigarettes were sold by the applicant to persons off the reserve and persons who, one must infer from the volume sold and the size of the Indian population in the region, were not Indians within the meaning of the *Indian Act*.

148 In view of the findings on credibility by the trial judge, the evidence at trial does not support the premises underlying the Intervenor's argument. The foregoing assertions by counsel do not accord with any reasonable inference to be drawn from the evidence at trial.

149 On May 28, 1996, subsequent to the preparation of the Intervenors factum the New Brunswick Court of Appeal rendered a split decision in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance) 164/94/CA* [reported at (1996), 135 D.L.R. (4th) 193]. The majority of the Court held that the *Social Services and Education Tax Act* of New Brunswick does not apply to the acquisition of chattels destined for use or for consumption on a reserve by an Indian or an Indian band and that certain tax notices issued were invalid to the extent that they were in contravention with the exemption provided in s. 87(1)(b) of the *Indian Act*.

150 With respect to the opinion expressed by the majority of the New Brunswick Court of Appeal I prefer the reasoning of the minority decision written by Chief Justice Hoyt. He stated:

> If, as a matter of policy, governments, such as Saskatchewan, Ontario and Prince Edward Island, wish to exempt Indians from taxes on off-reserve purchases, they may do so in their legislation. Indeed, as noted, that generally was the situation in New Brunswick until April 1, 1993. But, in my view, the use of s. 87(1)(b) of the *Indian Act* cannot achieve that purpose. Off-reserve purchases within New Brunswick attract provincial sales tax at the time of purchase. Thus, to use the terminology in *Mitchell*, the provincial sales tax does not result in the dispossession of Indian property "situated on a reserve". Section 87(1)(b) exempts an Indian's personal property from taxation after it becomes situated on a reserve. To hold otherwise, in my view, would be to amend the *Indian Act*. We would be saying that "situated on a reserve" in s. 87(1)(b) means "destined for ultimate use on a reserve" or "notionally situated on a reserve" or some similar phrase. In other words, we would be deeming the property at the time of purchase to be on a reserve. I must conclude that if Parliament had meant to deem the *situs* of property mentioned in s. 87 of the *Indian Act*, it would have used language similar to that found in s. 90 and not leave it to the courts to judicially amend s. 87.
>
> I would conclude with *Lewis*, where the Supreme Court of Canada considered the phrase "on the reserve" found in s. 81(1)(o) of the *Indian Act*. Iacobucci, J., writing for a unanimous court, after applying the principles of interpretation to be used when Indian interests are involved and noting that similar phrases in the *Indian Act* (including the phrase "on a reserve" in s. 87(1)(b)) should receive uniform interpretation, said at para. 66 that "the phrase 'on the reserve' ... means within the boundaries of the reserve". At para 70, he said that s. 87(1)(b), among other provisions of the *Act*, was "particularly supportive" of his view that "Parliament had only the intention of limiting the scope of a Band's power to within the boundaries of the reserve". Iacobucci, J. concluded at para. 80:
>
> > Based on the above analysis, I conclude that the phrase "on the reserve" in the context of s. 81(1)(o) should receive its ordinary and common sense meaning and be interpreted as "within the reserve" or "inside the reserve" or "located upon or within the boundaries of the reserve".
>
> In my view, the same result must obtain when interpreting s. 87(1)(b) of the *Indian Act*. Accordingly, it is the *Social Services and Education Tax Act* and not the *Indian Act* that applies to the imposition of taxes on off-reserve purchases of personal property even though such property may later become situate on a reserve.
>
> For the above reasons, I would dismiss the appeal, but without costs.

151 In summary, I do not find the arguments of counsel for the appellant or intervenor persuasive. Counsel have raised issues which have already been decided in (1993), *R. v. Johnson* or issues which are unsupported by the evidence. I conclude that ss. 6 and 14(1)(a) of the *Tobacco Tax Act* should be interpreted in exactly the same manner as Justice Jones interpreted s. 25(2) of the *Act* as being provisions of general application designed for the effective collection of tax and applies to Indian retail vendors on reserves.

152 The sections are not inconsistent with the tax exempt status of Indian property created by s. 87(1)(b) of the *Indian Act* nor is the tax collection regime (including licensing) as established by the *Tobacco Tax Act* a matter provided for in the *Indian Act*. Therefore the sections to do fall within the exceptions provided for in s. 88 of the *Indian Act*.

153 The tax imposed under the *Tobacco Tax Act* does not dispossess Johnson of property which he held as

an Indian. The *Act* imposes a tax on the persons who purchase cigarettes from him as a retail vendor.

154 On the facts of this case the appellants' s. s. 87(1)(b) rights under the *Indian Act* have not been in- fringed.

Section 35 of the Constitution Act, 1982

155 I will now deal with the question whether the "*Tobacco Tax Act* infringes the aboriginal rights of the Mi'kmaq nation protected by the *Constitution Act, 1982*, s. 35."

156 Section 35(1) of the *Constitution Act, 1982*, states:

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

157 Aboriginal rights are not defined in the *Constitution*. The decision of the Supreme Court of Canada in *R. v. Sparrow* (1990), 56 C.C.C. (3d) 263 suggests a case-by-case approach to determining what is an aboriginal right under s.35(1). The other cases that have considered constitutional challenges under s.35(1) are helpful in that they illustrate what facts and evidence may prove the existence of an aboriginal right.

158 In *Sparrow* fishing from time immemorial in a certain section of the Fraser River in British Columbia was held to be an aboriginal right of a band to fish for food and that the right had not been extinguished. In that case the evidence indicated that the Musqueam had a history as an organized society going back long before the coming of the white man to British Columbia and that the taking of salmon from the area in question was an integral part of their life and had continued to be so up until the time of the charges laid in that case. The Supreme Court of Canada held that the accused, in that case, was at the relevant times exercising an existing aboriginal right to fish for food.

159 In *R. v. Nikal* (supra) the Supreme Court of Canada was dealing with a case in which the trial judge found that the appellant had proven he had an aboriginal right to fish for food and ceremonial purposes in the Bulkley River at Moricetown, British Columbia.

160 In *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S. C.A.) the appellants had been charged with violations of regulations made under the *Fisheries Act*. The evidence established that they had an aboriginal right to fish for food which extended beyond the strict perimeter of reserve lands to the waters incidental and adjacent to the reserve. Clarke C.J.N.S., writing for the Court, dealt with the relevant matters a Court must consider when faced with a claim based on aboriginal rights including what constitutes an aboriginal right and how such rights may be extinguished; he stated as follows:

> *The appellants' claim to an aboriginal right to fish for food*
>
> The appellants contend that they enjoy an aboriginal fight to fish. Support for this proposition is stated in the following manner at p. 21 of their factum:
>
> > ...This is because the Micmac in their treaties have never given up these rights, unlike most treaty Indians in Canada. From Northern Ontario through the Prairie Provinces and in northeast British Columbia, the model for Indian treaties was the extinguishment of Indian rights as part of the cession of land rights, in exchange for the promises contained in the treaties. In the Maritimes the treaties confirmed

> pre-existing aboriginal rights ... that the concept of aboriginal rights is legally recognized as a legitimate, enforceable right by the courts of Canada is no longer the subject of debate ... Thus, the Appellants as Micmac Indians in Nova Scotia continue to enjoy aboriginal rights as well as treaty rights.

A definition of the term "aboriginal rights" is provided by Brian Slatterly in his article entitled: "The Constitutional Guarantee of Aboriginal and Treaty Rights", 8 Queen's L.J. 232, where he writes at p. 243:

> The expression, "aboriginal rights" ... refers to a range of rights held by native peoples, not by virtue of Crown grant, agreement or legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands now making up Canada.

Professor Hogg, in his text, *Constitutional Law of Canada*, 2nd ed. (1985), states at p. 563:

> ...it seems likely that the aboriginal peoples of Canada held rights of some kind with respect to the lands that they occupied at the time of European settlement, and that those rights, unless voluntarily surrendered or taken away by statute, survived the reception of French and English law that occurred as the result of European settlement.

In *Calder v. A.G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, the Supreme Court of Canada recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. The Supreme Court of Canada has confirmed the existence of such rights in subsequent decisions including *R. v. Guerin* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, and *Simon v. The Queen* (1985), 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, [1985] 2 S.C.R. 387 . In *Simon*, Chief Justice Dickson, referring to the Treaty of 1752, wrote at p. 250:

> The fact that the right to hunt already existed at the time the treaty was entered into by virtue of the Micmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the treaty.

The aboriginal rights of Indians (to fish, for example) can be extinguished. Such abrogation could take place in either of two ways:

> 1. The federal government could enact legislation for such a purpose pursuant to its power to make laws in relation to "Indians, and lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*: see Hogg, *Constitutional Law of Canada, ibid.*, p. 563; *Calder v. A.G. B.C., supra*, at p. 151; *R. v. Derriksan* (1976), 31 C.C.C. (2d) 575n, 71 D.L.R. (3d) 159n, [1976] 6 W.W.R. 480n (leave to appeal to S.C.C. refused), and *Jack v. The Queen* (1979), 48 c.c.c. (2d) 246, 100 D.L.R. (3d) 193, [1980] 1 S.C.R. 294.
>
> 2. Voluntary surrender of the rights by the Indians: *Constitutional Laws of Canada, ibid*, p. 563.

In *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.C.A.), this court recognized the existence of Indian aboriginal rights to hunt and fish. The decision of Chief Justice MacKeigan is also relevant for his particularly thorough historical analysis of the basis upon which the Micmac aboriginal rights exist. The court found that the "original Indian rights" of Nova Scotian Indians to hunt and fish had not been diminished by treaty, other agreement or competent legislation. Chief Justice MacKeigan stated at p. 478:

> The original Indian rights as defined by Chief Justice Marshall were not modified by any treaty or or-

> dinance during the French regime which lasted until 1713 in Acadia, and until 1758 in Cape Breton, and must be deemed to have been accepted by the British on their entry. Such acceptance is shown by the British *Royal Proclamation* of October 7, 1763 (R.S.C. 1970, Appendices, pp. 123-129), which has been perhaps a little extravagantly termed the "Indian Bill of Rights"...

The Chief Justice continued:

> I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p. 127) acknowledged that in all colonies, including Nova Scotia, all land which had not been "ceded to or purchased by" the Crown was reserved to the Indians as "*their Hunting Grounds*". Any trespass upon any lands thus reserved to the Indians was forbidden ....

As to the issue of whether the Indians of Nova Scotia had given up these particular rights, Chief Justice MacKeigan noted at pp. 479-80 of the decision:

> No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves, although thorough archival research might well disclose record of informal agreements, especially in the early 1800's when reserves were established by executive order.
>
> Agreements with the Indians in the Maritimes were primarily treaties of peace, informal and sometimes oral. ... They often acknowledged gifts to the Indians and sometimes specifically assured hunting and fishing rights to the Indians.

In determining that these rights continued to exist, the Chief Justice stated at p. 483:

> I have been unable to find any record of any treaty, agreement or arrangement after 1780, extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians.

Having stated earlier in his decision (p. 478) that a usufructuary right is a right to the use of land and includes "the right to catch and use the fish and game and other products of the streams and forest of that land", the Chief Justice wrote at p. 485:

> This Part [of the decision] has established that Indians in Nova Scotia had a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act.

The result in *Isaac* was stated succinctly in *R. v. Cope* (1981), 65 C.C.C. (2d) 1 at p. 2, 132 D.L.R. (3d) 36, 49 N.S.R. (2d) 555 (C.A.):

> ... Indians had a personal and usufructuary right to hunt, a right historically associated with their lands, and that that aboriginal right had been affirmed by various treaties ... the lands in Nova Scotia where that aboriginal right might still be enjoyed were essentially limited to Indian reserve land. We thus concluded that the aboriginal right to hunt, which impliedly included a right to fish, had been preserved for the Indians on reserve land and could not be affected by provincial laws, having regard to the exclusive federal power in respect of Indians and lands reserved for the Indians. (Emphasis added)

> Relying upon *Isaac* and the fact situation upon which it was based, it is appropriate in the circumstances that give rise to these appeals to find that the aboriginal rights of Nova Scotian Micmac Indians extend beyond the strict perimeter of reserve lands to the waters incidental and adjacent to the reserves. To limit an aboriginal fishing right purely to reserve lands is inconsistent with the fact that, in Nova Scotia, no treaty has been found to exist clearly showing that the Indians have released that right.

161 I would note that in the reasons of MacKeigan C.J.N.S. in *R. v. Isaac* and those of Clarke C.J.N.S. in *R. v. Denny*, both Chief Justices were careful to state that their conclusions were premised on the fact that no treaty had been found to exist at the time those decisions were rendered that clearly showed that the Mi'kmaq had released their aboriginal rights to hunt and fish. I would note that apparently no such treaty has subsequently been found to exist.

162 In *Isaac* (supra) this Court held that aboriginal rights to fish and hunt were limited to reserve lands. In *Denny* (supra) this Court extended the right to fish "to waters incidental and adjacent to reserve lands".

163 The Slattery description of aboriginal rights which is quoted in the decision of this Court in *Denny* and by the Supreme Court of Canada in *Sparrow* is about as vague as one can imagine. However, courts have determined that Indian bands have proven an aboriginal right to fish and/or hunt in specific locations for food and ceremonial purposes (for example, see *Isaac, Denny, Sparrow* and *Nikal*).

164 Whether Indians can prove aboriginal rights in other subject-matters is very questionable given that Indian bands do not have written records that would assist in proving rights of a legal nature that may have been exercised prior to the arrival of European settlers and continued thereafter in original or contemporary form. Opinion evidence of experts in such areas of knowledge will always be questioned as there will not likely be any recognized and visible body of information upon which such opinions expressed are founded and against which the validity of the opinions can be tested.

165 This case provides a good illustration of the difficulty of proving an aboriginal right and the extent of such a right if it exists. Furthermore, there is the recognition by the Supreme Court of Canada that if an aboriginal right exists it does not exist in a vacuum (*Nikal* (supra)). The fact that Indians unquestionably used wild tobacco, water, the wood in the forests and gathered food to sustain themselves in their daily lives does not mean that they can utilize natural resources free from restraint of relevant federal or provincial laws or the proprietary rights of others. What is an aboriginal right and what is the extent of that right will always be a nebulous issue.

166 In *R. v. Marshall* the accused claimed that a treaty made in 1760-61 between the Mi'kmaq and the Governor and Commander-in-Chief of His Majesty's Province of Nova Scotia provided him with a right to fish *and to sell fish* as he was doing. In a decision released June 27th, 1996, the trial judge concluded, after hearing a great deal of evidence with respect to the history of treaties with the Indians that the 1760-61 Treaty did not provide the accused with the right he asserted. I would note that Mr. Wildsmith, counsel for Mr. Marshall, specifically requested the court in that case not to consider:

> Other sources of rights, such as the concept of aboriginal rights, the treaty of 1752, the treaty of 1725-26 and Belcher's Proclamation of 1762 need not be formally adjudicated upon. ... If the rights in question cannot be found in the treaties of 1760-61, the Defence submits that the case should be disposed of without prejudice to other possible sources of Mi'kmaq rights.

167 In *Sparrow* (supra) the Supreme Court of Canada held that, based on the facts presented at trial, it was

not possible to determine the full scope of the existing aboriginal rights claimed as the case had not been presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. In *Sparrow* the Supreme Court of Canada was interpreting s. 35(1) of the *Constitution Act, 1982* for the first time. In the course of its decision the Court stated at p. 289:

> In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case by case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

168 In *Sparrow* the constitutional question that had been posed by the Court was as follows:

> Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations* and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?

169 The Court concluded its decision with the following comments which are relevant to the problem faced by this Court on this appeal:

> **Application to this case - Is the net length restriction valid?**
>
> The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.
>
> Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He did, however, find that the evidence called by the appellant
>
> > ... casts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. That case was not fully met by the Crown.
>
> According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this court. We also would order a retrial which would allow findings of fact according to the tests set out in these reasons.

170 The Supreme Court of Canada answered the constitutional question as follows:

> This question will have to be sent back to trial to be answered according to the analysis set out in these reas- ons.

171 In the appeal we have under consideration the alleged right to use tobacco was not based on any treaty but is argued to have been a right exercised by the Mi'Kmaq from a time long before the arrival of European settlers. The appellants assert that they were exercising this aboriginal right to use tobacco. I would infer that they justified their importation of tobacco from Ontario into Nova Scotia, and Johnson's sale of tobacco to his retail customers on the basis of the alleged "aboriginal right".

172 It must first be determined what is the content and scope of their right to use tobacco. In particular, whether the right to use tobacco extends so far as to preclude regulation of its use by Mi'kmaq Indians including dealing or trading in tobacco with other Indians in other parts of the country.

173 The appellant called two expert witnesses. The evidence was scant in parts, however it was not contradicted by the respondent. The expert evidence of Ms. Murdena Marshall and Mr. J.W.D. Gehue deal with the historical use of tobacco by Mi'kmaq people. Their evidence shows that the use of tobacco was an essential part of their culture. However, the evidence goes no further than this.

174 Ms. Marshall indicated that before the Treaty of 1752 the Mi'Kmaq people had grown wild tobacco. However, the gathering of tobacco is not protected under the Treaty. The evidence shows that it has been used on ceremonial and social occasions such as at Sweat Lodges and Pow Wows. It is also part of their daily culture at meal time where a host might honour guests in his or her home by inviting him to share a pipe of tobacco.

175 Ms. Marshall described the role of tobacco in preparation for the Sweat Lodge ceremony. Tobacco is hung all over the Lodge and before the ceremony, offerings of tobacco take place with the fire outside. She testified that it is a communal ceremony that may occur on a daily basis.

176 In describing the use of tobacco at the Pow Wow celebrations, Ms. Marshall indicated that tobacco played a significant part in the ceremony. She explained how there are Pow Wows regularly held throughout Canada and aboriginal people will travel to these different locations to attend. When asked if guests of a Pow Wow who are from out of province bring their own tobacco, she answered "no ... sometimes yes ... they might bring tobacco for their own personal use, for the pipe and for giving as a gesture of honour, but most of the time we provide ... the people in the community provide tobacco for ceremonial purposes, like for the sweat, for the pipe, and for the sacred fire and the drums."

177 Ms. Marshall also testified that she begins to "stock pile" her allotment of quota tobacco about one month before the Pow Wow is held. Later on in her testimony, when asked how she obtains her tobacco quota, she said that "I, myself, who isn't fussy on what brand I take has never hardly any problems picking up tobacco because I just take tobacco, as tobacco as it is."

178 According to *Sparrow*, (p.281) a traditional aboriginal right may be exercised in a contemporary manner. In that case, it was argued before the Supreme Court of Canada that the aboriginal right to fish extended to the right to fish commercially. While no commercial fishery existed at the time of the arrival of the European settlers, it was contended that the Musqueam indians practice of bartering in early society might have been revived as a modern right to fish for commercial purposes. The court noted the argument but did not make any further reference to it in its decision. This argument has parallels to what the appellant is suggesting in challenging regulations under the *Tobacco Tax Act*.

179 Before an aboriginal right may be exercised in a contemporary manner, it must first be shown to have previously existed in traditional form. Here there is no evidence that the Mi'kmaq's traditional use of tobacco in-

cluded dealing, bartering or trading in tobacco products between different natives in different parts of Canada. Nor was there evidence with respect to access or trading routes for the tobacco from outside the Province. The only evidence is that people attending a Pow Wow in the Province might bring tobacco with them but only for ceremonial purposes.

180 The trial judge did not find that the appellants had an aboriginal right; she simply stated that tobacco had a "unique" place in the life and culture of the Nova Scotia Mi'kmaq. Ms. Murdock is not a Nova Scotia Mi'kmaq although Johnson is.

181 Aboriginal rights tend to be site and band specific (*R. v. Nikal* (supra)).

182 The appellants, if anything, may have established an existing aboriginal right to use tobacco for personal consumption and for ceremonial purposes although the trial judge did not make such a finding.

183 Even if one were to conclude that this use of tobacco constitutes an aboriginal right of some sort, in the absence of evidence, the appellants have failed to prove that the scope of the aboriginal right to use tobacco extends to include Mi'kmaq Indians dealing, or trading in tobacco between different Indians or Indian Bands in different parts of Canada. And it clearly would not involve selling tobacco to non-natives.

184 Without having established the extent of the aboriginal right at trial, it can not be said that the appellants were justified in dealing in tobacco between natives in different reserves in different parts of Canada, or that Johnson was justified in trading in tobacco to whomsoever he chose, without being subject to the *Tobacco Tax Act*.

185 The evidence does not support a finding that the regulatory regime created by the *Tobacco Tax Act and Regulations* interferes with the Mi'kmaq's traditional use of tobacco at the Millbrook Indian Reserve.

186 The regulatory scheme under the *Tobacco Tax Act* does not impose unreasonable limitations, or undue hardship on the Mi'Kmaq people's right to use tobacco for traditional and ceremonial purposes [*Sparrow* p. 290]. In fact, the quota system accommodates the Mi'kmaq's possession and use of tobacco on the reserve without being subject to tobacco tax. This was recognized by the decision of this Court in (1993) *R. v. Johnson* (supra).

187 The evidence does not support a finding that the appellants had an aboriginal right to deal in tobacco products in the manner they did. Therefore, the *Tobacco Tax Act and Regulations* as they affect the appellants' activity in dealing tobacco do not infringe any aboriginal right protected under s. 35(1) of the *Constitution Act, 1982*. Having so decided, there is no need to consider whether the regulatory regime under the *Tobacco Tax Act and Regulations* is reasonably justified according to the test set out in *Sparrow* (supra).

188 There are several points raised in the notice of appeal filed by Ms. Murdock's counsel which were not specifically raised in the eleven issues described in the factum filed on behalf of Ms. Murdock. They essentially relate to the tax exemption contained in s. 87(1)(b) of the *Indian Act* and the argument based on the existence of aboriginal rights. I will deal with these matters which are described in Ground #1 of the notice of appeal as (b), (c), (d) and (e) previously set out in this decision.

189 The first point raised bears directly on the issue concerning the trial judge's finding regarding the alleged infringement of the appellants' aboriginal right to use tobacco. In my opinion the trial judge did not err in finding that the *Tobacco Tax Act and Regulations* do not impose limitations on Indians' use of tobacco to the ex-

tent that the supply of tobacco to the designated retail vendor and the quotas imposed on Indian consumers on the reserve affects a significant element of traditional ways. This was a question of fact for the trial judge. There was evidence from expert witnesses called by the appellants that the tobacco available through the quota system was inadequate to accommodate the Indians traditional use of tobacco. However, the trial judge stated that neither witness testified to ever being short of tobacco.

190 On the other hand, the Crown called evidence as to the extent of tobacco available to Indian consumers on a reserve through the quota system. An Indian consumer on a reserve is entitled to purchase tax exempt from a designated retail vendor 12 cartons of cigarettes a month. There are 200 cigarettes in a carton. In short, an Indian on a reserve is entitled to purchase tax exempt 2,400 cigarettes a month which works out to 80 cigarettes a day. Alternatively, substantial quantities of tinned tobacco are available to Indian consumers tax free. In addition, tax free tobacco for ceremonial purposes is available upon request. Mr. Claude J. Bordage testified that reserves made, on many occasions, requests for increased amounts of tobacco to be delivered if they were hosting a special event such as a Pow Wow or if natives from other reserves in Canada or the United States were visiting or staying for a period of time. The host reserve would want to ensure that there was a sufficient amount of tobacco for the visit. When such a request for an increase in tobacco allotment was made it was normally not questioned except that inquiries were made by the Commission as to the number of people expected to attend the event.

191 The assessment of opinion evidence was for the trial judge. She did not make any palpable error in her assessment of the evidence; this Court ought not to interfere (*R. v. Yebes* (1987), (sub nom. *Yebes v. R.)* 36 C.C.C. (3d) 417 (S.C.C.)). I would only add that it seems to me the provision of tobacco under the quota system is more than adequate to meet the legitimate needs of Indian consumers on a reserve.

192 With respect to (c) the trial judge held that "the Mi'Kmaq remain unrestricted in their ability to gather *wild* tobacco being the first type of tobacco used by natives".

193 Tobacco is defined in the *Tobacco Tax Act*:

> 2(k) 'tobacco' means tobacco in any form, whether consumed by smoking, by chewing or as snuff;

194 Section 25(1) of the *Tobacco Tax Act* provides:

> 25 (1) No person shall be in possession of tobacco
>
> (a) on which tax has not been paid;
>
> (b) not bearing a prescribed mark; or
>
> (c) not purchased from a retail vendor who holds a retail vendor's permit and is in force, where the person in possession is a consumer.

195 Therefore, the finding of the trial judge that the Mi'Kmaq are unrestricted in their ability to gather *wild* tobacco could be an error as such tobacco would be in possession of the Indian and would not meet the requirements of s. 25(1). However, the finding is irrelevant to the issues respecting: (i) the validity of the *Tobacco Tax Act* as provincial legislation that does not encroach on the federal Parliament's power to legislate respecting Indians; or (ii) the Mi'Kmaq's s. 87(1)(b) tax exemption in the *Indian Act* as s. 25(1) does not impose a tax but

merely restricts the right of a consumer to be in possession of tobacco to the extent stated in the section. The validity of s. 25(1) was not specifically raised at trial or on the appeal and need not be ruled upon as it is irrelevant on the facts of this case. This case did not deal with the gathering of wild tobacco by Indians but with a conspiracy to defraud the Province of tax revenues.

196 With respect to (d) the trial judge did not err. The decision of this Court in (1993), *R. v. Johnson* (supra) supports this finding.

197 With respect to (e) it is irrelevant whether or not there are formal agreements between the Band Councils and the Government of Nova Scotia respecting quota. The designated retail vendor on the Millbrook Reserve was designated by both the band Council and the Provincial Tax Commissioner. That retailer was, therefore, authorized to distribute to the residents of that reserve tobacco products exempt from provincial tax. The tobacco products were obtainable from a designated wholesaler in accordance with the quota for the reserve. The quota system has been impliedly held to be *intra vires* the Province by this Court's decision in (1993) *R. v. Johnson*. Although there was a formal agreement with the band in the *Tseshaht* case, the existence of an agreement is not a prerequisite to a valid quota system.

198 I would dismiss grounds #1 and #2 of the appeal.

Issue III

199

> Is the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470 as amended by 1990, c. 10, s. 3, *ultra vires* the province of Nova Scotia as indirect taxation when it requires an importer and wholesaler who is a registered Indian to hold a wholesale vendor's permit and pay an amount equal to the tax, regardless of whether the tobacco was bought on an Indian reserve outside Nova Scotia, was brought into Nova Scotia to an Indian reserve and was sold or intended to be sold to registered Indians?

200 In *Tseshaht v. British Columbia* (supra) the British Columbia Court of Appeal, after reviewing the provisions of the British Columbia *Tobacco Tax Act* and *Motor Fuel Tax Act*, stated:

> The legislative scheme is strikingly similar to that under consideration in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 4 D.L.R. 81, [1943] A.C. 550, [1943] 3 W.W.R. 113 (J.C.P.C.), which held that taxes of the sort imported by the *Motor Fuel Tax Act* and the *Tobacco Tax Act* are direct taxes.

201 Justice Jones in (1993) *R. v. Johnson* (supra) after reviewing the decision in the *Tseshaht* case, stated at paragraph 30:

> As I have noted the provisions of the *Tobacco Tax Act*, R.S.N.S., c. 470 are essentially the same as those in force in British Columbia

202 Justice Jones approved of the reasoning of the British Columbia Court of Appeal in *Tseshaht* (para. 32, (1993) *R. v. Johnson* (supra)).

203 I have reviewed the decision of the Judicial Committee of the Privy Council in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550. That case involved the 1940 *Tobacco Tax Act* of New Brunswick which provided that a tax of 10% of the retail price would be paid at the time of making the purchase by anyone who

buys tobacco for his own consumption from a retail vendor in the Province and that the tax is paid by an agent when he purchases on behalf of a principal (s. 4). The *Act* also provides that if a person residing or carrying on business in New Brunswick brought tobacco into the Province or received delivery of it there for his own consumption he or his agent, if the transaction is so effected, shall pay the same tax as would have been payable if the tobacco had been purchased as a retail sale in the Province (s. 5). The Judicial Committee held that in all respects this was a valid exercise of the powers of a provincial legislature under the head of s. 92(2) of the *British North America Act*, 1867 as constituting direct taxation within the province.

204 The Judicial Committee held that the essence of a direct tax is that the burden of the tax falls on the last purchaser of the article. In my opinion, the regime created by the Nova Scotia *Tobacco Tax Act* meets this criter- ia.

205 The Indian consumer purchasing tobacco on a reserve is tax exempt under s. 87(1)(b) of the *Indian Act*. If the purchase is made from an Indian retailer that has not been designated to handle quota tobacco products the burden of the tax is left on the Indian retailer. Counsel for the appellant Murdock argues that a collection scheme which demands that tax be paid regardless of the fact that it cannot be legally passed on as a tax to the person intended to bear it, is, when so applied, indirect taxation. Counsel for the appellant submits that the *Tobacco Tax Act* should be read down so as not to apply to Indian retailers selling tobacco products on a reserve. Counsel submits that the approach of the Supreme Court of Canada in *Manitoba v. Air Canada*, [1980] 2 S.C.R. 303 in which the court read down a provincial tax Act so as to exempt aircraft flying over the province from the tax should be applied to the interpretation of the *Tobacco Tax Act* of this Province with respect to the payment of tax on tobacco products on the reserve. This Court is being asked to find that the legislation should be held inapplicable to an Indian retailer acquiring and possessing on a reserve tobacco for sale to "tax exempt Indian consumers."

206 In my opinion, an Indian retail vendor acquiring and possessing on a reserve tobacco for sale to tax exempt Indian consumers might warrant a reading down of the *Tobacco Tax Act* but that is not the factual situation that arises on this appeal. The evidence shows Mr. Johnson sells to non-natives.

207 Although the regime created by the *Tobacco Tax Act* applies to both Indians and non Indians in that it required Johnson when he imported tobacco into the Province to comply with the requirement of the *Act* and pay the tax which he could not recoup from an Indian who purchases tobacco from him on the reserve, it does not mean that the tax has changed in nature from a direct tax to an indirect tax. It simply means that due to the exemption from tax granted Indians with respect to their personal property situate on the reserve, the Indian retail tobacco vendor who is not designated by the Commissioner and therefore cannot obtain quota tobacco, cannot recover the prepaid tax. That is not a reason to declare the *Act* invalid or inoperative with respect to Johnson (or other Indian retailers who sell to non-natives) or to read down the *Act* so as to exempt Johnson from payment of the tax on imports of tobacco into the Province. This question could only be considered if it was unequivocally proven that the tobacco would be sold only to Indians on the reserve. To do otherwise would frustrate the objective of the *Act* of providing an effective method of tobacco tax collection merely for the purpose of allowing Johnson to disregard the law which has been developed and enacted to recognize the claim of Indian consumers (by the adoption of the quota system) to tax exempt purchases of tobacco pursuant to their right created under s. 87(1)(b) of the *Indian Act*. Johnson is not a consumer of the tobacco products; he sells in his stores to anyone and, therefore, with respect to such sales does not have the benefit of the s. 87(1)(b) exemption. I would dismiss this ground of appeal.

Issue IV

208

> Is the *Tobacco Tax Act*, R.S.N.S. 1989, c. 470, as amended by 1990, c. 10, s. 3, *ultra vires* the province of Nova Scotia as regulation of extraprovincial trade contrary to s. 91(2) of the *Constitution Act, 1867*, when it requires an importer or wholesaler who is a registered Indian to hold a wholesale vendor's permit and pay an amount equal to the tax regardless of whether the tobacco was bought on an Indian reserve outside Nova Scotia and was brought into Nova Scotia to a reserve and was then sold or intended to be sold to registered Indians?

209 The appellant submits that because s. 14(1)(a) of the *Tobacco Tax Act* prohibits importation of tobacco into the Province unless the person is the holder of a wholesale vendor's permit, the *Act* regulates inter-provincial trade and is unconstitutional as it affects the federal legislative power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

210 The respondent submits that s. 14(1)(a) of the *Act* is a section that is *incidental* to the tobacco tax regime put in place in the Province of Nova Scotia. The respondent's counsel asserts that in order to control the tax on tobacco within the Province it is necessary to have some control over tobacco which comes into the Province. Counsel for the respondent asserts that there is nothing to prevent the Province from controlling tobacco at the point where it comes into the Province and that it is this intention which has been legislated by the enactment of these provisions of the *Tobacco Tax Act*.

211 In *Russell v. R.*, (1882) 7 App. Cas. 829 (P.C.) at 839 the Judicial Committee of the Privy Council set out the proper approach to determine whether the *Canada Temperance Act, 1878* was within the power of Parliament or infringed upon the right of a province to legislate in the area of "property and civil rights". The Privy Council held that in answering such a question one looks to the true nature and character of the legislation.

212 In *Gallagher v. Lynn*, [1937] A.C. 863 the House of Lords had occasion to again consider the distribution of power between legislative bodies in a federal system. In that case the appellant was a dairy farmer in the County of Donegal, in the Irish Free State, where for many years he had carried on business and had been selling milk in the City of Londonderry for human consumption.

213 The Parliament of Northern Ireland in 1934 passed the *Milk and Milk Products Act* in which it required that persons selling milk have certain licenses, etc. The appellant applied for it but was refused a license under the *Act* so as to enable him to continue to sell in the Londonderry market. The appellant continued to sell milk in Londonderry without a license and proceedings were taken against him. He was convicted. Eventually the matter worked its way to the House of Lords. The issue on appeal was whether the *Act* in question was a statute in respect of trade within the meaning of s. 4(7) of the *Government of Ireland Act*, 1920. The Court concluded that it was an *Act* for the peace, order and good government of Northern Ireland in respect of precautions for the securing of the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. The *Act* was therefore within the competency of the Parliament of Northern Ireland to enact though its provisions included a person whose premises were outside Northern Ireland from obtaining a license for sale of milk in Northern Ireland. In the course of its decision Lord Atkin stated at p. 870:

> These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole

> range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the "true nature and character of the legislation": *Russell v. The Queen*, 7 App. Cas. 839 "the pith and substance of the legislation". If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed "in respect of" the forbidden subject. In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed "in respect of" trade, and is therefore not subject to attack on that ground. I am of opinion, therefore, that this appeal should be dismissed with costs.

214 In *Shannon v. British Columbia (Lower Mainland Dairy Products Board)*, [1938] A.C. 708 the Judicial Committee of the Privy Council held that the British Columbia Natural Products Marketing Act was *intra vires* the power of the legislature of the Province of British Columbia and did not encroach on the federal power to regulate trade and commerce. The Court concluded that it was within the provincial legislature's power because the legislation in question was confined to regulating transactions that take place wholly within the Province. The Judicial Committee stated at p. 720: "the pith and substance of this *Act* is that it is an *Act* to regulate particular businesses entirely within the Province and it is therefore *intra vires* of the Province." The decision also confirms the right of a province to pass legislation setting up a license or permit scheme as an incident of the right to control and regulate activity of a certain business within the province.

215 It is my opinion that ss. 6 and 14(1)(a) of the *Tobacco Tax Act* which, in effect, regulate importation of tobacco into the Province are provisions incidental to the exercise of the provincial legislative power conferred by s. 92(2) - direct taxation and 92(13) - property and civil rights. The sections do not conflict with the federal legislative power respecting inter-provincial trade although these sections may incidentally encroach on the federal power. The provisions are necessary to having control over all tobacco sales in the Province. A province is entitled to tax property sold within the province even if the property has its origin outside the province. For example, motor vehicles manufactured outside the province and sold in the province are subject to a tax on the sale to the consumer similar to the tax on tobacco sold to consumers in the province. The is a legitimate exercise of the province's power to levy direct taxes against personal property. The requirement for licenses for those who import tobacco is a legitimate exercise of the provincial power under s. 92 of the *Constitution Act*, 1867.

216 The latter part of Issue IV as framed by Ms. Murdock's counsel is premised on the assumption that the tobacco was quota tobacco bought on an Indian reserve outside Nova Scotia and imported by Johnson with the intention that it be sold to Indians; this assumption does not accord with the facts. There is no evidence that the tobacco was bought on an Indian reserve nor that it was sold or intended to be sold by Johnson to Indians on the reserve. It is not necessary or appropriate to deal with this issue on the facts of this case.

217 The pith and substance of the *Tobacco Tax Act* is to levy a direct tax on sales in the province and to regulate a controlled product within the Province. Any incidental encroachment on the federal power to regulate inter-provincial trade does not invalidate either s.6 or s.14(1) of the *Tobacco Tax Act*.

Issue V

218

Did the Trial Judge err in allowing the admissibility of the wiretap evidence after it was challenged as an unreasonable search and seizure contrary to s. 8 of the *Charter* and for non-compliance with s. 186 of the *Criminal Code*?

219 The appellant submits that the trial judge erred in admitting the wire tape evidence at trial on the basis that:

(1) the affidavits were missing essential detail;

(2) the informants relied upon in the affidavit are not identified, rendering their reliability suspect;

(3) the information from the informants was demonstrably unreliable on the face of the affidavit;

(4) other investigative techniques were tried and were successful. There were no investigative techniques which were tried and failed;

(5) there was no factual basis for a conclusion that other investigative methods were unlikely to succeed. Moreover, assertions were made that RCMP officers could not effectively carry out surveillance on "Indian" or "Lebanese" communities because the Police Officers were "white" would be, if acted upon, against public policy as enunciated in Human Rights Codes and equality provisions of the *Charter*.

220 I have reviewed the trial judge's decision in which she dismissed the appellant's motion that the interception of telephone conversations involving the appellants constituted an unreasonable search and seizure contrary to s. 8 of the *Charter*. She correctly stated that her function was not to substitute her view for that of the authorizing judge. The learned trial judge reviewed the affidavit evidence before the authorizing judge and, in particular, the two affidavits of Constable Vincent Wood. She quoted from a decision of the Supreme Court of Canada in *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 at p. 189 where Sopinka J., writing for the majority, stated:

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

221 The trial judge then stated:

... the information, the record that was before the authorizing judge, has been "amplified" before me. However, the additional information that I have on the issue and additional argument made do not cause me to conclude that the authorizing judge could not have granted the authorization on the information before him. In fact, it only serves to confirm the correctness of his determination — here I am recalling Constable Wood's further testimony obviously available but not relayed to Judge Anderson as to the R.C.M.P.'s only trained native undercover agent not being available for them to contemplate something similar to the Ontario undercover operation. Other reasons were, however, relayed to Judge Anderson which he accepted

by his granting of the authorization. He was at liberty to question further if troubled. Although I accept that the test is "am I left with no evidence," I also find the additional information and elaboration from Constable Wood on cross does not cause me to question the sufficiency of the evidence so as to raise concerns about the validity of the authorization.

Much of the amplified evidence that defence would have me consider in order to find that there no longer continues to be *any* basis for the decision of the authorizing judge suggests that the police were not exhaustive in their use of other investigative techniques or use of existing ones, such as further questioning of sources and further use of named and unnamed sources in undercover capacity. The Ontario Court of Appeal in both *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97 and in *R. v. Morrison* (1979), 50 C.C.C. (3d) 353, has adopted as a guide a United States decision of *People v. Baris*, 500 NYS (3d) 572 that not all possible steps need to be exhausted before a request for authorization to intercept private communication is sought. At the same time, while wiretaps need not be the last resort, it cannot be resorted to just as a "useful tool," to the authorities, and this requires the authorizing judge being apprised of the progress and difficulties in the investigation. *Some credence must be given to the opinion of experienced investigators while trying to balance a standard of investigative necessity with pure investigative utility.* For example, the Ontario experience with Constable Patry, even with the evidence of the location of his car, is still a consideration as to atmosphere and reception if one is a stranger in the community and an experience to be drawn upon when considering undercover work, especially if untrained.

Reviewing everything in its totality, I have concluded that I should not interfere with the finding of the authorizing judge, and I do not find the authorization herein to be invalid on this point.

As for Constable Vincent Wood's affidavit in support of the application for authorization on its face being insufficient to enable Judge Anderson to find that the criteria for authorization had been met, and for me to conclude he had no basis upon which he could be satisfied that the pre-conditions for the granting of the authorization exist, I find the lack of appendices to the first affidavit is not crucial, given the sufficient and detailed information cited in paragraphs referring to Appendices A-I. I agree with the Crown summation that the appendices only serve to expand upon what is, in essence and substance, already in the affidavit and the integrity is not affected. Only the criminal record of Joseph Bernard is not cited in any way within the body of the affidavit and the judge is left only knowing he has a criminal record and not the details. This is not essential to the granting of the wiretap application. All information is before the authorizing judge.

I conclude there was a valid authorization and full compliance with the authorization under which the private communications were intercepted and no unreasonable search and seizure in violation of the accused's s. 8 *Charter of Rights*. I find the intercepted communications should not be excluded with respect to either accused.

222 With respect to submission #1, the affidavit of Constable Wood did not have attached to it appendices "A to I" inclusive, when the sealed packet containing the material that was supposedly before the authorizing judge was opened prior to the commencement of the application before the trial judge. This is not a fact that would warrant this Court finding that the trial judge erred in admitting the wire tap evidence. The trial judge found the affidavits contained sufficient detailed information to warrant the granting of the application even without the appendices attached.

223 I have reviewed the affidavits and agree with the trial judge's finding. Furthermore, there is no evidence

to suggest that the appendices were not before the authorizing judge. On the contrary, there was evidence that led the trial judge to make the following finding of fact:

> At the time of the application Constable Wood delivered the affidavit with accompanying appendices to the courthouse. When the package was re-opened prior to the commencement of this application, no appendices accompanied the affidavit in the authorization package.

224 To conclude this matter, there was no evidence to show when these appendices went missing. There is no basis upon which to interfere with the trial judge's finding that there was sufficient evidence in the affidavit itself without the appendices being attached to warrant the granting of the authorization.

225 With respect to submission #2, the informants who provided information to the R.C.M.P. were only identified in Wood's affidavits as A, B, C and D. The following submission is made in the appellant's factum:

> To allow informants to be identified only by code as "A" or "B" is *not* full, fair and frank disclosure. Compounding this problem is that at page 749 of the transcript Constable Wood told the Court that he did not even know the names of all the sources. The authorizing judge and the reviewing judge and the Crown have the right to know the identity of the informants being relied upon, but the accused's right to know is limited. This is why an elaborate system of editing the affidavits has been developed in Canadian criminal procedural jurisprudence. To allow the police to keep this information from the Court and the Crown invites abuse.

226 I reject this argument; it has long been recognized that the confidentiality of informants is often necessary. The authorizing judge apparently did not consider it necessary to seek out the informant's identity. There is nothing in the requirement of s. 185 or 186 of the *Criminal Code*, R.S.C. 1985, c. C-46 that requires the affidavits to identify the informants. A review of the affidavit shows that Constable Wood was able to swear that the informants had provided reliable information in the past. There is no reason to interfere with the decision of the trial judge on the basis of submission #2.

227 With respect to submission 3 the appellant asserts:

> On Page 7 of the first affidavit (Exhibit Book I, Tab 8), the affiant quotes an RCMP officer from Quebec quoting an alleged voluntary statement from David Naugle implicating Stanley Johnson in illegal tobacco products. The affidavit goes on to say that David Naugle was acquitted of a charge of possession of these illegal tobacco products. On cross examination of Constable Wood, counsel for the Appellant Murdock obtained the admission that this alleged voluntary statement had been found not to be admissible evidence against Mr. Naugle in his trial, (Transcript, page 773).
>
> At page 9 of each affidavit, Constable Wood introduces his source "C". In the four years that Constable Wood had been receiving information from source "C", this person had assisted in the seizure of seven pounds of marijuana and some stolen goods. The Appellants submit that the foregoing record could only result in source "C" being characterized as a small time snitch. Nevertheless, Constable Wood tells us that on May 30, 1991, he was informed by source "C" that "Stanley Gordon Johnson is the leading distributor of smuggled non duty paid tobacco products in Atlantic Canada." No other information is given to support this sweeping statement.
>
> In paragraph 37 of the second affidavit, Constable Wood is advised by an Ontario RCMP officer that Marion Murdock is the sister of Reginald Hill who is the subject of an undercover surveillance operation. (This

> Mr. Hill is the party involved in the recent Ontario jurisprudence respecting aboriginal rights and the tobacco trade).

228 The fact that the statement taken from David Naugle was held to be involuntary does not necessarily reflect on the reliability of that part of the statement that implicated Johnson in illegal tobacco sales. This is particularly so when one considers that Johnson has been previously involved May 14, 1990 in the possession of and the sale of tobacco products to non-natives on which no tobacco tax was paid. ((1993), *R. v. Johnson* (supra)).

229 With respect to the information obtained from C that Johnson is the "leading distributor of smuggled and non-duty paid tobacco products in Atlantic Canada" this is an opinion of the informant that Wood could reasonably have believed, given Johnson's activities respecting the sale of tobacco products. The informant C had provided reliable information over a period of four years to the police with respect to criminal activities. This evidence was for the authorizing judge to assess as to its reliability. It was not a matter on which the trial judge reviewing the material on which the authorization was granted ought to have substituted her view for that of the authorizing judge. Even more so this Court should not substitute its view.

230 The April 29th, 1992, affidavit of Constable Wood stated that Ms. Murdock was the sister of Raymond Hill and that "she participates in the smuggling and distribution of illegal tobacco products." This information had been obtained from R.C.M.P. undercover operations at Ms. Murdock's reserve. In the absence of any evidence to the contrary, with the exception of Ms. Murdock's evidence which the trial judge rejected as not being credible, there is no reason to question the reliability of the information obtained from the undercover operations at the reserve in Ontario.

231 I disagree with the submission that the aforesaid pieces of information were demonstrably unreliable on their face.

232 With respect to submissions #4 and #5 the trial judge reviewed this question and specifically addressed the relevant evidence in the affidavits that were before the authorizing judge as well as reviewed the evidence given before the trial judge on the motion to exclude the wire tap evidence. There was evidence in the affidavits that a member of the Lebanese community was involved in the illegal sale of tobacco products as were a number of Indians. There was evidence at trial that the R.C.M.P. did not have any members who could have worked undercover on the reserve without detection. The learned trial judge followed recognized authorities in concluding that all possible steps need not be exhausted before an authorization to intercept private communications can be made. After reviewing all of the circumstances she concluded she should not interfere with the decision of the authorizing judge to grant the order to make the interception. The criminal offence of conspiracy to commit a fraud will, in most cases, necessitate the interception of private electronic communications as an investigative tool. Considering the number of people involved in this conspiracy, the large geographic distances separating them, and the experience of the persons involved with respect to distribution of tobacco products in contravention of the *Tobacco Tax Act*, obtaining an authorization to intercept private telephone communications between the suspected parties was necessary in the interests of the proper administration of justice.

233 It is necessary to consider if the conditions described by Sopinka J. at p. 191 in *R. v. Garofoli* (supra) have been met. He stated:

> Although *Greffe* concerns admissibility under s. 24(2), in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable

grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this court in *Debot and*

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

(a) the degree of detail of the "tip";

(b) the informer's source of knowledge;

(c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot *ex post facto*, provide evidence of reliability of the information.

234 With respect to these propositions, the authorizing judge had far more evidence before him than a mere tip from an informer. The informants had provided reliable evidence in the past; Wood's affidavit gave specific instances. The evidence shows that there had already been months of surveillance by R.C.M.P. on the suspects. The R.C.M.P. had ascertained there was apparently illegal activity in tobacco products that would involve many people, including the appellants. The R.C.M.P. needed concrete evidence when shipments would be made to Nova Scotia. It would have been unlikely to have obtained this information other than through interception of telephone communications between the persons involved.

235 The trial judge considered the totality of the evidence. She did not err in finding that the granting of the authorization and the carrying out of the interception did not breach s. 8 of the *Charter* nor was there a failure by the R.C.M.P. to comply with the requirements of ss. 185 and 186 of the *Code* in obtaining the authorization. I would dismiss this ground of appeal.

Issue VI

236

Did the Trial Judge err in not finding that the Appellant Murdock was detained by the police and denied legal counsel when police officers spoke to her for the primary purpose of having her verbal responses in order to identify her voice on wiretap interceptions?

237 Counsel for Ms. Murdock submits that Constable Wayne Gay testified at trial that he spent four hours in the company of Marion Murdock on October 2nd, 1992, when she turned herself in *at the Halifax* R.C.M.P. Detachment and was processed there and then attended at Provincial Court where she was eventually released. That he spent this time in her company so that he would be able to identify her voice at trial as one of the participants in the intercepted telephone calls. Ms. Murdock was not advised of her right to counsel as required by s.

10 of the *Charter* if, in fact, she was detained having voluntarily attended at the detachment.

238 The defence moved at trial to have this voice identification evidence excluded based on the argument that with the advice of counsel Ms. Murdock might not have said a word to the officer that would be able to be used to identify her voice on the tapes of the intercepted communications. The trial judge ruled that Ms. Murdock had not been detained within the definition of detention as established in *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.).

239 Relevant to the issue of voice identification, subsequent to her attendance at the R.C.M.P. Detachment in Halifax, Ms. Murdock attended at the R.C.M.P. Detachment in Hamilton, Ontario. At that time she was in the presence of Constable Monica Duykers who also gave evidence at trial identifying one of the voices on the intercepted telephone calls as that of Ms. Murdock.

240 Counsel for Ms. Murdock asserts that there is no evidence that when Ms. Murdock was being processed at the R.C.M.P. Detachment in Hamilton, that she had been given her s. 10 *Charter* right to consult counsel. Ms. Murdock's counsel submits that in both instances Ms. Murdock was detained and that the voice identification evidence ought to have been excluded. Contrary to counsel's assertion a review of the evidence shows that Ms. Murdock was given her s. 10 rights when she was processed in Hamilton after being arrested.

241 Counsel for the respondent submits that the issue as to whether or not Ms. Murdock was detained while in the presence of Constable Wayne Gray is moot as Constable Monica Duykers was able to identify Ms. Murdock's voice from several contacts with her in Ontario in the fall of 1990 and from conversations Constable Duykers had with Ms. Murdock over a two hour period on October 13th, 1992, at the R.C.M.P. Detachment in Hamilton following the arrest of Ms. Murdock.

242 A review of the transcript of the trial shows that Constable Duykers was questioned by Crown counsel as follows with respect to what I have inferred was the contact between Constable Duykers and Ms. Murdock on October 13th, 1992:

> Q. When she arrived at the R.C.M.P. Detachment in Hamilton, was she advised of her rights, as we generally know them, the police warning of right to silence and the Charter warning with respect to right to counsel. Was that done?
>
> A. Yes it was.

243 I am satisfied from a review of the transcript that the following line of questioning by the Crown related to the contact Constable Duykers had with Ms. Murdock on October 13th, 1992 even though the question does not make reference to a specific date. The transcript shows the following questions and answers:

> *MR. HOLT*: Tell the court the extent to which you had an opportunity to speak with Marion Murdock on that occasion? A. On that particular occasion, I had to ask Ms. Murdock a number of questions with respect to a form I was completing. There was a lot of bio-data, such as name, address, date of birth, etc. After that, there was just strictly general conversation. I spent more than two hours with herself and another individual and another officer so we just spoke, generally, about nothing to do with why she was there, but just, you know.
>
> *Q.*You say you were with her for two hours. Did these administrative things that you were doing take the

whole two hours to complete?

A. No, they didn't. We had an appointment to go across to the court at a certain time and that was what resulted in most of the delay.

Q. Would you do your best to describe to the court Ms. Marion Murdock's voice, particular...anything in particular that you recall about it, phraseology she used, anything at all that you can recall about the voice?

A. As far as I can describe a voice, I would consider Ms. Murdock to be soft spoken. She has, not a low voice, but a little bit of a rasp to her voice and she has a little bit of, what I would consider an American type of...I can't think of the word. Some of the 'A' letters sound like '*THAT*'. I don't know what you would call that. Not a drawl, but a...

Q. Any other words that you can recall that she says in that way? A. Specific words, em. I need a moment to think about some of the words. I can't think of any specific words.

MR. HOLT: Okay, I propose to have Constable Wood play the same tape that Constable Gay listened to.

PLAYING OF TAPE COMMENCES (11:56)

PLAYING OF TAPE CONCLUDES (12:00)

MR. HOLT: On the conversation you just listened to Constable Duykers, were you able to recognize any of the voices that you heard?

A. Yes, I was.

Q. And what voice did you recognize?

A. The voice I recognized was that of Marion Murdock.

244 The consequence of Constable Gray having failed to advise Ms. Murdock of her right to counsel when she was at the R.C.M.P. Detachment in Halifax on October 2nd, 1992, is moot. Constable Duykers was able to identify Ms. Murdock's voice from her contacts with Ms. Murdock. No challenge was made at trial to the legality of the circumstances of these contacts from which Constable Duykers was able to identify the voice of Ms. Murdock on the tapes of the intercepted telephone calls. I would dismiss this ground of appeal.

Issue VII

245

Did the Trial Judge err in denying the defence's motion for exclusion of wiretap evidence on the grounds that evidence adduced during the trial that the master wiretap tapes submitted as evidence contained conversations specifically prohibited by the authorization and thus were an abuse of process and would bring the administration of justice into disrepute?

246 Constable Wood was cross-examined with respect to the taping of the intercepted telecommunications. Under cross-examination he testified that the master tapes continuously record. He acknowledged that if somebody who was not to be intercepted according to the authorization was a party to a line being monitored, the

conversation would be intercepted on the master tape. He testified that the reason for this is for continuity of the line itself. He testified the master tape automatically continues from the time it starts until it stops and that this could be for the whole duration of the authorization. Constable Wood acknowledged that the master tapes, that is those that recorded constantly, were admitted into court as exhibits. However, the composites prepared from the masters were also tendered as exhibits. The composites did not contain all the recorded conversations but only those that were relevant.

247 Both authorizations that had issued by the authorizing judge had provisions in them for interception of named persons and named places and provided that with respect to interception at other places used by named persons, telecommunications could be intercepted save and except that "the interception of private communications pursuant to the authorization were required to cease forthwith once it had been determined that none of the persons specifically named were a party thereto".

248 Counsel for Ms. Murdock submits that:

> Given the evidence that all conversations were recorded on the master tapes, that many unauthorized conversations were intercepted, that the recording was only paused on the secondary or slave tape, and that the master tapes were in the Courtroom as official exhibits, the defence made a motion to exclude the tapes. The Appellants submit that the acceptance of these tapes as evidence in violation of the Court authorization is an abuse of process and their inclusion would bring the administration of justice into disrepute.

249 Apart from the David Naugle conversations which were ruled inadmissible, there is no evidence that the master tapes which were running continuously included conversations not authorized to be accepted. On this appeal, counsel for Ms. Murdock has not identified one intercepted communication that was not covered by the authorization and which ought not to have been intercepted.

250 There is no indication that the trial judge considered any evidence on master tapes which contained intercepted communications which were not authorized by the orders granted by the authorizing judge on April 29th, 1992, and May 26th, 1992.

251 I am satisfied it was necessary for the master tapes to be available as a continuous record of the communication at telephones in places at which telecommunications could be intercepted according to the authorizing order. Composite tapes were prepared by the Crown and introduced as Crown exhibits. These tapes dealt with relevant intercepted telecommunications. There is no suggestion that these composites contained unauthorized telecommunications.

252 In the absence of concrete evidence that the master tapes contained a record of unauthorized interceptions (apart from David Naugle's) there is no basis upon which to conclude that the trial judge erred in refusing to grant the motion made at trial to exclude the master tape. Accordingly, there is no evidence of an abuse of process that would bring the administration of justice into disrepute. I would dismiss this ground of appeal.

Issue XI - Sentence Appeals

Johnson

253 The trial judge imposed a period of 18 months incarceration to be followed by two years probation.

254 I have reviewed the reasons given by the trial judge for imposing this sentence. She applied the recog-

nized principles of sentencing to the facts.

255 The learned trial judge described Johnson, who is 51 years of age and holding a Bachelor of Commerce degree from university as a "mature, experienced man with an extensive criminal record which deals specifically with tobacco related charges and that's been pointed out by his counsel. It's not other areas, it's tobacco related charges and they are extensive."

256 The sentence is not excessive given that the crime was as described by the trial judge:

> a carefully orchestrated and pre-meditated conspiracy to defraud which resulted in an immediate, or I think a direct, personal gain to Mr. Johnson over an extended period of time. ...

257 In my opinion the sentence imposed is fit. It could be argued that the sentence is lenient given Johnson's record and the burden Johnson's persistent activities are placing on the law enforcement authorities and the courts both in terms of time and money. I would dismiss Johnson's appeal from sentence.

Ms. Murdock

258 Ms. Murdock was sentenced to a period of six months' incarceration to be followed by a two year period of probation.

259 At the sentencing hearing Ms. Murdock made an emotional plea for leniency as she is a widow with children ages 11 and 16 who are still at home and dependent on her. She is 50 years of age and as of September 1995 was enrolled as a full-time student in a native university access program at Grand River Polytechnic Institute. Ms. Murdock expressed concern about completing her year if incarcerated. The pre-sentence report and attached letters showed that Ms. Murdock has a very positive image in the Indian community, however, she is not a first time offender. The trial judge stated in her reasons:

> She has been found guilty of one related offence of possession of tobacco improperly marked in Ontario in August of 1994, and has been sentenced to a $5,624.00 fine and in default one year. I'm advised at this point that there is a default in this matter.
>
> Unquestionably she was one of, if not the main, Ontario tobacco supplier for Johnson for the period of January 1992 to July of 1992. At times using her own funds in sending her shipment to him for sale at her price. She coordinated and arranged when and how her boys would leave, sometimes paying them, other times leaving it to Johnson to pay them, and regularly contacting them and monitoring them throughout.
>
> After listening to the wiretaps of she and Johnson's numerous daily conversations, I was left with the impression that Johnson was however, the primary mover. She looked to him to comment on what was and was not a good price to buy at, what was a good deal - often seeking his advice of what to buy before making any deal. Certainly an element of this would be needing to know if he was interested in it, but my sense was that she was a novice in the tobacco trade, although keen and very emotionally involved with Johnson.

260 The trial judge commented on the seriousness of the offence in that:

> ...the premeditated actions over a period of time resulting in direct personal gains to herself are all the factors that are there. .....

261 Counsel for Ms. Murdock asserts that the trial judge erred in considering as evidence, unsubstantiated assertions by the Crown about the prevalence of tobacco tax abuses and, thus, used wrong principles in the sentencing. Counsel asserts:

> The decisions rendered on sentencing by the trial judge show that (1) she relied on unsubstantiated assertions by the Crown of substantial tax losses to emphasize deterrence in sentencing and (2) she gave no weight to the Applicant Murdock's rehabilitation efforts underway or (3) the damage that incarceration of a single mother (the father was killed in an industrial accident in February, 1993) of eleven and sixteen year old sons would do to that family's existence.

262 The trial judge was entitled to consider the loss of revenues to the Province as a result of illegal trade in tobacco products particularly given that Ms. Murdock's co-conspirator Johnson is a very active participant in the trade. The consideration of this evidence was not challenged at the sentencing hearing.

263 The sentencing judge did consider Ms. Murdock's rehabilitation efforts as is clear from her remarks. The trial judge was very concerned and recommended that the penal authorities consider a leave of absence so Ms. Murdock could complete her year at the Institute. The trial judge was certainly mindful of the effect of incarceration on the family. However, the trial judge had to balance these factors against the other factors, such as premeditation and the seriousness of the offence in determining what would be a fit sentence given all the circumstances. The trial judge considered and applied generally accepted principles of sentencing. I am satisfied the sentence was fit for the offence and this offender. I would dismiss Ms. Murdock's appeal from sentence.

Conclusion

264 Neither Justice MacLellan nor the trial judge, Justice Stewart made a reversible error in their disposition of the issues which have been subsequently raised on the appeal. For the reasons which I have set out, the appeals of Ms. Murdock and Johnson ought to be dismissed.

Appeals dismissed.

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1996 CarswellNS 496, 156 N.S.R. (2d) 71, 461 A.P.R. 71, [1997] 3 C.N.L.R. 206

1996 CarswellNS 496, 156 N.S.R. (2d) 71, 461 A.P.R. 71, [1997] 3 C.N.L.R. 206

R. v. **Johnson**

Stanley Gordon **Johnson** (appellant) and Her Majesty the Queen (respondent) and The Union of Nova Scotia Indians (intervenor)

Nova Scotia Court of **Appeal**

Freeman, Bateman and Flinn JJ.A.

Heard: November 25, **1996**
Judgment: December 6, **1996**
Docket: C.A.C. 116660, 116661

Counsel: Appellant did not appear.

Robert E. Lutes, Q.C., and *James E. Clarke*, for respondent.

Bruce H. Wildsmith, Q.C., for intervenor.

Subject: Public; Criminal; Provincial Tax

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Taxation --- Provincial and territorial taxes — Nova Scotia — Tobacco tax.

Native law --- Taxation — Miscellaneous issues.

Taxation --- Provincial taxation — Tobacco tax.

Native law — Taxation — Miscellaneous issues — Accused status Indian selling tobacco on reserve to non-Indians — Accused being convicted of possession of tobacco not purchased from authorized wholesale vendor and possession of tobacco not bearing prescribed mark — Whether accused being exempt from taxation on personal property under s. 87(1)(b) of Indian Act or under Treaty — Accused unsuccessfully appealing — Accused being retail vendor to whom all provisions of Act applying — Indian Act, R.S.C. 1985, c. I-5, s. 87(1)(b) — Tobacco Tax Act, R.S.N.S. 1989, c. 470, ss. 25(1)(b), 25(2), 40 — Tobacco Marking Regulations, N.S. Reg. 215/90 — Treaty of 1752.

Taxation — Provincial taxation — Tobacco tax — Accused status Indian selling tobacco on reserve to non-

Indians — Accused being convicted of possession of tobacco not purchased from authorized wholesale vendor and possession of tobacco not bearing prescribed mark — Whether accused being exempt from taxation on personal property under s. 87(1)(b) of Indian Act or under Treaty — Accused unsuccessfully appealing — Accused being retail vendor to whom all provisions of Act applying — Indian Act, R.S.C. 1985, c. I-5, s. 87(1)(b) — Tobacco Tax Act, R.S.N.S. 1989, c. 470, ss. 25(1)(b), 25(2), 40 — Tobacco Marking Regulations, N.S. Reg. 215/90 — Treaty of 1752.

The accused was a status Indian who operated shops on reserve lands. He was convicted by a provincial court judge on three charges of possession of tobacco not purchased from an authorized wholesale vendor, contrary to s. 25(2) of Nova Scotia's *Tobacco Tax Act*. He was convicted by a second provincial court judge on four charges of possession of tobacco not bearing a prescribed mark pursuant to s. 7 of the *Tobacco Marking Regulations*, and contrary to ss. 25(1)(b) and 40 of the *Tobacco Tax Act*. The summary conviction appeal court judge upheld all of the convictions, finding that the evidence was sufficient and of such quality that a properly instructed jury would have reached the same conclusions as the two trial judges. The Union of Nova Scotia Indians was granted intervenor status, and raised arguments based on s. 87(1)(b) of the *Indian Act*, which exempts the personal property of Indians on reserves from taxation. The Union took a position only with respect to the three convictions entered at the first trial on the ground that there was no evidence of sales to non-Indians in those matters.

The accused appealed from the decision of the summary conviction appeal court judge.

Held:

The appeal was dismissed.

The accused could not claim the protection of s. 87(1)(b) of the Act, nor any protection provided by the *Treaty of 1952*, because the evidence showed that sales from the accused's stores were to natives and non-natives alike. By selling in the commercial mainstream to non-Indian consumers, the accused made himself liable to collect and remit tax owed by those consumers under the *Tobacco Tax Act*. He thereby became a retail vendor to whom all provisions of that Act applied with respect to all such transactions.

Cases considered:

R. v. Johnson (1993), 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129 (C.A.), leave to appeal to S.C.C. granted (1993), 164 N.R. 79 (note), 133 N.S.R. (2d) 80 (note), 380 A.P.R. 80 (note) (S.C.C.), granting of leave to appeal quashed (1994), 179 N.R. 77 (note), 140 N.S.R. (2d) 80 (note), 399 A.P.R. 80 (note) (S.C.C.) — *referred to*

R. v. Murdock (1996), 38 C.R.R. (2d) 15 (N.S. C.A.) — *applied*

Statutes considered:

Indian Act, R.S.C. 1985, c. I-5

s. 87(1)(b)*considered*

Tobacco Tax Act, R.S.N.S. 1989, c. 470

s. 25(1)(b)*referred to*

s. 25(2)*referred to*

s. 40*referred to*

Treaties considered:

Treaty of 1752

generally*considered*

Regulations considered:

Tobacco Tax Act, R.S.N.S. 1989, c. 470

Tobacco Marking Regulations, N.S. Reg. 215/90

s. 7

APPEAL by accused status Indian from decision of summary conviction appeal court, upholding conviction of accused on three charges of possession of tobacco not purchased from authorized wholesale vendor contrary to s. 25(2) of *Tobacco Tax Act* (N.S.), and on four charges of possession of tobacco not bearing prescribed mark pursuant to s. 7 of *Tobacco Marking Regulations*, contrary to ss. 25(1)(b) and 40 of *Tobacco Tax Act*.

The judgment of the court was delivered by *Freeman J.A.*:

1 The appellant was convicted in Provincial Court before Judge R.A. Stroud on three charges of having in his possession tobacco not purchased from an authorized wholesale vendor contrary to s. 25 (2) of the *Tobacco Tax Act* R.S.N.S. 1989, c. 470. and before Judge Ross Archibald on four charges of possession of tobacco not bearing a prescribed mark pursuant to s. 7 of the *Tobacco Marking Regulations*, contrary to s. 25 (1) (b) and s. 40 of the *Tobacco Tax Act* R.S.N.S. 1989, c. 470.

2 The convictions were appealed together to summary conviction appeal court and upheld by Justice Nathanson of the Supreme Court of Nova Scotia. He found there was sufficient evidence and of such a quality that a properly instructed jury would have reached the same conclusions as the two trial judges. He dismissed the appeals.

3 The appeal from Justice Nathanson's decision with respect to the convictions before Judge Stroud is on the ground that "the Learned Trial Judge erred in law in his interpretation of the Tobacco Tax Act and Regulations in determining whether the Appellant was a retail vendor." The evidence clearly supports the finding that Mr. Johnson was selling tobacco at retail within the meaning of the *Tobacco Tax Act*.

4 The appeal with respect to the convictions by Judge Archibald asserts that the trial judge's finding that "the appellant was in possession of tobacco in contradiction of the *Tobacco Tax Act* was so perverse as to amount to an error of law." Substantial quantities of tobacco were seized, none with the prescribed markings required for sales to non-Indians. This created a strong *prima facie* case, requiring explanation. Mr. Johnson did

not testify on his own behalf, a fact of which we are entitled to take notice. The trial judge made findings of fact based on an abundance of relevant evidence; no question of law arises.

5 It is also asserted that the summary conviction appeal court judge should have remitted the matters heard by Judge Archibald for further evidence in support of defence arguments under the *Indian Act*, R.S.C. 1985, c. I-5 and a Treaty of 1752. Counsel in the matters before Judge Archibald had filed an agreement that in the event of a conviction that was appealed on the basis of aboriginal treaty rights, both sides would request the court to remit the matter to the Provincial Court to permit additional evidence to be called. Justice Nathanson expressed doubts as to his jurisdiction to entertain the request, and refused it. It was within his discretion to do so: the appellant's defences should have been asserted at his trial. In any event the issues to which such evidence would have related have become moot.

6 The Union of Nova Scotia Indians was granted intervenor status and raised arguments based on s. 87(1)(b) of the *Indian Act*, which exempts the personal property of Indians on reserves from taxation. Mr. Johnson is a status Indian and the stores in which the offences took place are on reserve lands, but he cannot claim the protection of s. 87(1)(b) nor any protection provided by the Treaty because he sells tobacco to non-Indians. Mr. Johnson was not present and not otherwise represented on the appeal.

7 The Union of Nova Scotia Indians took a position only with respect to the three convictions entered by Judge Stroud on the ground that there was no evidence of sales to non-Indians in those matters. That evidence was called in a *voir dire* respecting search warrant evidence, not in the main trial. However counsel had agreed that if the search warrant evidence subject to the *voir dire* were found admissible, as it was, the *voir dire* evidence would be adopted as part of the evidence in chief This is a common and acceptable practice. There was evidence before both Provincial Court judges that the appellant sold tobacco to non-Indians.

8 Similar arguments were dealt with by Justice Jones in *R. v. Johnson* (1993), 120 N.S.R. (2d) 414 (C.A.) which was followed by Justice Nathanson. Since the summary conviction appeal, which was heard and decided April 5, 1995, this court heard *R. v. Murdock* (Unreported) on June 10, 1996 [reported at (1996), 38 C.R.R. (2d) 15 (N.S. C.A.) and issued its decision on August 19, 1996. In that case similar aboriginal treaty and *Indian Act* issues were argued on behalf of the same appellant.

9 Justice Hallett found that "the Tax imposed under the *Tobacco Tax Act* does not dispossess Johnson of property which he held as an Indian. The *Tobacco Tax Act* imposed a tax on the persons who purchase cigarettes from him as a retail vendor." He held:

> Indian retail vendors who sell tobacco products on reserves to non-natives (as does Johnson) deal with the tobacco on the same basis as all other retail vendors. Johnson, as a retail vendor, does not have a s. 87(1)(b) exemption with respect to sales to non-natives as Parliament could never have intended that an Indian dealing in the commercial mainstream, as does Johnson, would not do so on the same basis as other Canadians. Johnson, a retail vendor who sells to non-natives, must purchase tobacco from a wholesaler and pay an amount equivalent to the tax that is levied on the consumer unless he has quota under the quota system. If he imports he must have a wholesale vendor's permit. Johnson did not acquire the tobacco in question as an Indian consumer on a reserve but as a retail vendor who sells to non-natives. He paid no tax on the tobacco seized from his store.
>
> The *Tobacco Tax Act* imposes a tax on a purchaser of tobacco at a retail sale. It may be that, if the consumer

> is an Indian on the reserve and the sale takes place on the reserve, the Indian purchase is exempt, by reason of s. 87(1)(b) of the *Indian Act*, from payment of the tobacco tax levied under Nova Scotia's *Tobacco Tax Act* even if purchased from a retailer who has not been designated by the Commissioner to sell on a reserve. ....
>
> The tax levied by the *Tobacco Tax Act* is payable by the consumer. Therefore, an Indian retailer of tobacco products who is required to pay a wholesaler an amount equal to the tax cannot benefit from s. 87(1)(b) of the *Indian Act* as the retail vendor is not the consumer and, therefore, not the taxpayer.

10 The evidence showed that sales from Mr. Johnson's stores were to natives and non-natives alike. By selling in the commercial mainstream to non-Indian consumers, Mr. Johnson made himself liable to collect and remit the tax owed by those consumers under the *Tobacco Tax Act*. He thereby became a retail vendor to whom all provisions of the *Tobacco Tax Act* applied with respect to all such transactions. Therefore the convictions under appeal do not relate to a tax imposed on the personal property of an Indian on a reserve within the meaning and intent of s. 87(1)(b) of the *Indian Act*. Mr. Johnson was required to comply with s. 25 (2), s. 25(1)(b) and s. 40 of the *Tobacco Tax Act* and 7 of the *Tobacco Marking Regulations*.

11 Leave to appeal is granted but the appeal is dismissed.

Appeal dismissed.

END OF DOCUMENT

2009 CarswellQue 14580, J.E. 2009-1964, [2010] 2 C.N.L.R. 96

Conway c. Québec (Sous-ministre du Revenu)

Stewart **Conway**, Demandeur, c. Le sous-ministre du Revenu du Québec, Défendeur, et Le procureur général du Québec, Intervenant

Cour du Québec

Massol J.C.Q.

Heard: 25 mai **2009** - 26 mai **2009**
Judgment: 3 septembre **2009**
Docket: C.Q. Qué. Terrebonne 700-80-001837-068

Counsel: *Me Jocelyne Mailloux Martin*, pour le défendeur

Me Judith Kucharsky, pour l'intervenant

Subject: Constitutional; Provincial Tax; Public

***Massol J.C.Q.*:**

[OFFICIAL ENGLISH TRANSLATION]

1 In a motion dated September 15, 2006, the plaintiff appealed a decision made by the Direction des oppositions [Objections Directorate] of the Deputy Minister of Revenue dated June 21, 2006, upholding the assessments dated November 14, 2005, number 6545671 and November 28, 2005, number 7315321, refusing the plaintiff the refunds he had claimed of $54,832.17 and $50,203.92.

2 The first application for a tax refund concerns the period of September 1 to 30, 2005, and the second is related to the period from October 1 to 16, 2005.

3 The dispute also involves a difference of $846.78 that the Deputy Minister refused to refund to the plaintiff for the period of August 1 to 31, 2005. Although this last part was not the subject of a notice of assessment *per se*, the defendant did not object to it being included in the dispute.

4 In any case, s. 21.1 of the *Act respecting the ministère du Revenu* prescribes:[FN1]

> A person having made an application for a refund under section 21 and having received no response from

the Minister may, at any time after the expiry of 180 days following the day of mailing of the application, send a notice of objection in respect of the application and Chapters III.1 and III.2 apply, with the necessary modifications.

THE PROCEEDINGS

5 The plaintiff's notice of appeal is dated September 15, 2006, and is nine paragraphs long. In this notice, the plaintiff essentially argues that he was misled by the public servants of the Deputy Minister of Revenue with whom he had dealt. He also adds that the *Tobacco Tax Act*[FN2] does not apply in the Mohawk territory of Kanesatake because it is exempt from taxes.

6 After two court appearances, the Chief Judge of the Court of Quebec ordered special case management of the proceeding on December 7, 2006, and designated the undersigned to see to the orderly conduct of the proceeding in accordance with art. 151.11 *C.C.P.*

7 On December 19, 2006, the Court scheduled a case management conference for February 7, 2007. The plaintiff was [TRANSLATION] "accompanied" at the time by an attorney, Mtre Jack Miller. On February 13, 2007, Mr. Conway filed a motion for interim costs, which gave rise to a judgment dismissing the application, dated March 16, 2007.

8 Since the undersigned was designated to manage this proceeding, the parties have appeared before the Court ten times. The final hearing was at last held on May 25 and 26, 2008, with the plaintiff alone representing himself.

9 At one of these meetings, upon the Court's suggestion, the plaintiff prepared a notice in accordance with article 95 *C.C.P.*, as he intended to invoke his constitutional rights. Until December 3, 2008, only the Deputy Minister of Revenue was involved as a defendant.

10 To facilitate the orderly conduct of the proceeding, Mtre Jocelyne Mailloux Martin, legal counsel for the Deputy Minister, very kindly helped the plaintiff prepare his notice and received a copy in lieu of service and consent to file.

11 Following receipt of the notice, the Attorney General of Quebec appeared on December 8, 2008.

12 On the same date, the plaintiff filed a bundle of documents that he intended to use at the hearing, including a document by Michael Doxtater, a professor at McGill University. On January 27, 2009, the intervener, the Attorney General of Quebec, filed its reasons for intervening in addition to two motions, one for the insufficiency of the notice served by the plaintiff under art. 95 *C.C.P.* and the other to dismiss the report by Michael Doxtater because it could not be qualified as an expert report.

13 At the hearing, the Court took under advisement the two motions filed by the Attorney General of Quebec. Apart from Mr. Conway, three other persons were heard for the plaintiff, including Professor Doxtater. For the defence, the Deputy Minister called three public servants from the Ministère du Revenu who had worked on the file.

THE FACTUAL BACKGROUND

14 The plaintiff is an Indian established in the territory of Kanesatake. In the past, he allegedly had a permit

to sell cigarettes that has since expired. Whatever the case may be, he applied for another permit in 2005, which was issued on June 14. The evidence shows that the plaintiff went to pick up his permit at the office of the ministry. He was then given, *inter alia*, two documents bearing the numbers TA-330 and TA-331 respectively, which were to be used in the future to apply for a tobacco tax refund from the ministry.

15 It has been shown that there were several meetings between Mr. Conway and the public servants at the ministry.

16 For the purpose of the present dispute, it was established that the plaintiff proceeded as follows: since he held only a retail vendor permit, he had to buy his tobacco products from a wholesaler. He paid between $46 and approximately $58 per carton, including provincial taxes. Mr. Conway was aware of the principles underlying the system, to the effect that the federal Goods and Services Tax (GST) was not applied to him when he made purchases but that he had to collect tax if he sold his products to non-Indians.

17 The plaintiff began selling on August 11, 2005. On August 18, he went to the office of the ministry and met with Denis Perron, a supervisor in the Service d'émission des permis [Permit Issuance Department], concerning tobacco. Mr. Conway showed him the TA-331 form, which he had partially completed and which seemed to contain the necessary elements.

18 It should be mentioned that the TA-330 form (Application for a Refund - *Tobacco Tax Act*) outlines the conditions of eligibility for a refund. It specifically indicates that the tobacco product must be sold to an Indian for his or her personal consumption. The additional form TA-331 requires, *inter alia*, the name of the Indian buyer, the buyer's band number and signature, the date of purchase, and the quantity.

19 It has been shown that the plaintiff made sales between August 11, 2005, and October 16, 2005. He always bought his supplies from the same wholesaler.

20 For his August 2005 sales, he filed his application for a refund, which was received at the defendant's office on September 7, 2005 (see Exhibit D-1). The plaintiff stated that his accountant had completed all the documents. The accountant was not called as a witness in the proceeding.

21 The document shows that he claimed a refund of $6,180, which corresponds to the provincial taxes paid to his supplier. It is accompanied by the purchase slips and the TA-331 form as well as seven pages. It provides details about all the elements required for the tax refund, namely, the name of the Indian buyers, their band number, the quantity of cigarettes purchased, and their signature. Rounding out this document was an accounting summary showing that only three sales were made to non-Indians.

22 In a first decision, the ministry gave a refund for this period, but only for $5,333.22, first deducting the taxes related to purchases by non-Indians from the amount claimed. It was also considered that the tax refund was not calculated on the purchases made by the retailer but rather on his sales.

23 It has been established that at the end of the period for the month of August, the plaintiff had not sold all of the merchandise purchased and had kept a certain quantity in inventory for a subsequent period.

24 Mr. Conway, however, only became aware of this position after the period in dispute, namely, after November 4, 2005, the date appearing on the ministry's decision (see Exhibit D-4).

25 As for the following period, namely, September 2005, the record shows that the plaintiff proceeded in a

completely different manner (see Exhibit D-2).

26 It can be seen in one of the summaries accompanying his tax refund application that he paid his wholesaler $66,126 in provincial taxes out of a total purchase cost of $172,817.50. He had total sales of $161,808.50 for that month and had collected $11,293.83 of GST. The TA-331 form that should have given the breakdown of sales to Indians was blank. Also, the accounting summary indicated that all these sales were to non-Indians.

27 As for the October period, the plaintiff proceeded in the same manner as the previous month, indicating that all sales were made to non-Indians. Nevertheless, for those two months, he claimed a refund for the provincial taxes he had paid to his wholesaler.

28 For the September period, however, Mr. Conway claimed a refund of only $54,832.17, even though he had paid $66,126 in provincial taxes. The reason for the difference was that the plaintiff had applied an offset between the GST of $11,293.83 he had collected from his customers, which he had not yet remitted to the tax authorities, deducting it from the amount of provincial taxes paid to his wholesaler, resulting in the balance appearing in his application for a refund.

29 The ministry refused to make a refund for these last two months because the sales were made to non-Indians (see Exhibits D-5 and D-7).

30 Notices of assessment setting out the same reasons were issued a few days later (see Exhibits D-6 and D- 8).

31 The plaintiff objected to these decisions with the ministry, which upheld them. These are the decisions that have been submitted to the Court on appeal.

31 *CLAIMS OF THE PARTIES*

32 Essentially, the plaintiff's contestation relies on two grounds.

33 First, he was misled by the public servants with whom he had dealings.

34 Second, the mechanism of the *Tobacco Tax Act* violates his rights as an Indian. Mr. Conway argues, *inter alia*, that Daniel Gendron, one of the public servants with whom he had met, told him in late August or early September 2005 that he no longer had to obtain the Indian band number from his buyers. After receiving this information, Mr. Conway told his accountant that it was no longer necessary to provide information about Indian buyers, which would explain the absence of any details in this regard for the months of September and October. He adds that all the sales were to Indians. It must be noted, however, that the evidence in this regard is based solely on his testimony.

35 Mr. Conway adds that another public servant, Jacques Charpentier, was involved in the decision.

36 Jacques Charpentier denies the plaintiff's statement, adding that he met with him only once, namely, in November 2007, during an out-of-court examination for this case.

37 Daniel Gendron, for his part, denies the words attributed to him by Mr. Conway. Furthermore, he files a letter dated June 13, 2005 (Exhibit D-11), which was given to the plaintiff along with the permit, reminding him that he could apply for a refund of the provincial taxes paid in accordance with the legal conditions summarized

in the TA-330 and TA-331 forms that he was being given at the same time.

38 Concerning the other ground argued by Mr. Conway, the notice of appeal states in a summary manner that the levying of taxes cannot apply on the Mohawk territory of Kanesatake. It was only on December 3, 2008, that the plaintiff added certain other grounds of a constitutional nature. In his notice given under art. 95 *C.C.P.*, he states:

> Take notice that I, Stewart Conway, have the intention of raising my constitutional rights, my inherent treaty rights since I am a Mohawk of the Iroquois Confederacy.

39 As mentioned earlier, on the same date he filed a document prepared by Michael Doxtater for an earlier event. Two documents were appended. One is entitled "A deed from the five Nations to the King, of their beaver hunting ground, made at Albany, New York, July 19, 1701". The other is an article published in a periodical, written by Audra Simpson and entitled "Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent".

40 In defence it is argued that the tax collection system does not violate the *Indian Act* and that the plaintiff is badly placed to argue that his aboriginal rights have been infringed because of the insufficiency of the notice given under art. 95 *C.C.P.* on the one hand, and the fact that the document filed as an expert report is not relevant on the other.

40 *ISSUES*

> 1) *Was the plaintiff misled by the representations of the ministry's public servants?*
>
> 2) *Did the Deputy Minister properly apply the mechanism specified in the Tobacco Tax Act?*
>
> 3) *Does this mechanism violate s. 88 of the Indian Act?*
>
> 4) *Does this mechanism violate s. 87 of the Indian Act?*
>
> 5) *Have the plaintiff's aboriginal rights been violated, and did he serve notice in compliance with the prescriptions in art. 95 C.C.P.?*

40 *ANALYSIS AND DECISION*

40 *BURDEN OF PROOF*

41 Section 1014 of the *Taxation Act* states:[FN3]

> An assessment shall, subject to being varied or vacated on an objection, appeal or summary appeal and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding relating thereto.

42 The abundance of case law interpreting this section is to the effect that this presumption can be reversed by the taxpayer, although the burden of proof is on him.

43 In this regard, it is the burden set out in arts. 2803 and 2804 *C.C.Q.*[FN4] that applies:

2803. A person wishing to assert a right shall prove the facts on which his claim is based.

A person who alleges the nullity, modification or extinction of a right shall prove the facts on which he bases his allegation.

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

1) Was the plaintiff misled by the representations of the ministry's public servants?

44 The plaintiff's evidence in this regard is shaky. On one hand, he seems to say that some of the public servants he dealt with told him that he no longer had to identify the Indians to whom he sold cigarettes.

45 Moreover, in his testimony, Stewart Conway elaborates further on the discussions he had concerning a 7.5% rebate that people at the ministry had promised him.

46 Then, in his motion to institute proceedings, he indicated that he had been misled by the public servants to the effect that he only had to collect the 7.5% GST, it being implied that the provincial taxes would be refunded to him with no delay.

47 Mr. Conway's vague testimony and the multiple versions of it must give way to the submissions of the representatives of the ministry, who testified clearly and transparently, without any personal interest in the matter, giving a much simpler version that corresponds to the documentary evidence.

48 The first is Daniel Gendron, a customer service employee, who met the plaintiff a few times. He states that he only sporadically responded to Mr. Conway's requests for information. He firmly denies telling him that he no longer needed to obtain the information from his buyers that was necessary to obtain a tax refund. Similarly, Denis Perron testified that he explained how the GST worked to the plaintiff and told him that he could apply for a refund by following the conditions listed in the TA-330 and TA-331 forms.

49 Contrary to Mr. Conway's claim, Jacques Charpentier denies meeting him in August along with Daniel Gendron. He did not meet Mr. Conway until November 2007 during an out-of-court examination.

50 There are also other reasons for not accepting the plaintiff's explanation.

51 First, it is hard to explain why he completed his application for a refund for August, essentially complying with requirements, and did not do this for other two months concerned, even though it was still the same form that he completed and signed.

52 What is more, a taxpayer cannot hide behind an interpretation, even an erroneous one, given by a public servant. The prescriptions of the law, which are imperative and of public order, must be respected, and a public servant has no authority to change them. These directives, interpretations, or promises cannot be raised, at least not in the context of an appeal of an assessment. The only possible recourse would be an action for damages against the persons who led the taxpayer into error; naturally, this would be up to the taxpayer to prove in another action.

53 In 1995, the Federal Court of Appeal upheld a prior judgment by the Tax Court of Canada, which made the following decision:[FN5]

> Let me first dispose of the appellant's argument to the effect that it acted, i.e. considered itself exempt on the advice of certain of the Minister's officials and thus the Minister was now barred or precluded from changing his position. Quite simply the law is, and has been for many years, that the Minister is not bound by representations made and interpretations given to taxpayers by authorized officials of the respondent where such representations or interpretations are contrary to the provisions of the law.

54 In *Sous-ministre du Revenu du Québec v. Freneco Ltée*,[FN6] the Court of Appeal of Quebec ruled that the taxpayer could not argue an erroneous interpretation or erroneous information provided by an employee of the Ministère du Revenu.

55 In sum, the plaintiff has not discharged his burden of proof to establish that he had been misled by the representations of the ministry's public servants.

2) Did the Deputy Minister properly apply the mechanism in the Tobacco Tax Act?

56 The retail tobacco vendor's obligation to collect the tobacco tax as a mandatary is set out in the *Tobacco Tax Act*.[FN7]

> 8. Every person must, at the time of a retail sale of tobacco in Québec, pay a tobacco consumer tax equal to . . .
>
> 11. Every retail vendor shall collect, as a mandatary of the Minister, the tax provided for in section 8 on every sale of tobacco made by the retail vendor.
>
> 17.2. The holder of a collection officer's permit shall collect, as a mandatary of the Minister, an amount equal to the tax provided for in section 8 from every person to whom he sells, delivers or causes to be delivered tobacco in a package identified in accordance with section 13.1 or any other package of tobacco intended for retail sale in Quebec.

57 There is a specific obligation incumbent on the retail vendor, and there is every indication that the tax refund mechanism is in accord with the legislation and regulations passed.

3) Does this mechanism violate s. 88 of the Indian Act?

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.[FN8]

58 At least twice, the Supreme Court of Canada has had to rule on the legal controversy surrounding the appropriate interpretation of s. 88 of the *Indian Act*.

59 First, in *Kruger v. The Queen*,[FN9] the Court was asked to decide whether provincial wildlife legislation applied to members of an Indian band. The Court had to rule on whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore* (by their own force). The Court did not settle the matter, finding that on either view of this issue in the case before it, the appellants

had failed.[FN10]

60 In 2005, in *Dick v. The Queen*,[FN11] Beetz J. of the Supreme Court stated:

> I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians.
>
> Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88...[FN12]

61 Later he added:

> I have come to the view that it is to the laws of the second category that s. 88 refers. I agree with what Laskin C.J. wrote in *Natural Parents v. Superintendent of Child Welfare.*[FN13]

62 In either of the interpretations, it must be concluded that s. 88 of the *Indian Act* is of no help to the plaintiff.

63 First, the *Tobacco Tax Act* is a law of general application that applies consistently throughout the territory of the province of Quebec to all tobacco retailers. Its purpose and object do not specifically concern Indians. Nor are there any specific provisions or a special treatment for Indians in its mechanism.

64 Next, even if it were found that the *Tobacco Tax Act* could not be applied without affecting Indian status, it is nevertheless applicable through s. 88 of the *Indian Act*.

65 To sum up, one possibility is that the mechanism provided in the *Tobacco Tax Act* does not affect the plaintiff in his status or rights as an Indian, in which case it continues to apply to him *ex proprio vigore*, as would any other law of general application.

66 The other possibility is that, if the *Tobacco Tax Act* is considered a law of general application but cannot be applied without touching his "Indianness", it is nevertheless applied through s. 88 of the *Indian Act*, provided that this statute is not inconsistent with any other legislation.

4) Does this same mechanism violate s. 87 of the Indian Act?

> 87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to s. 83 and s. 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

> (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

67 A consideration of the relevant section of the *Tobacco Tax Act* shows that purchasers of tobacco products must pay a consumer tax (s. 8). Retail vendors, on the other hand, must "collect" the tax as a mandatary of the Minister (ss. 11 and 17.2). Thus, retail vendors ultimately do not have to pay the tax; they simply pay taxes in advance and then collect them from the purchaser.

68 Such a mechanism is not unique to the statute under consideration; indeed it exists in a variety of juris- dictions.

69 In *Tseshaht Indian Band v. British Columbia*,[FN14] the Court stated:

> The payment by the retailer of an amount equivalent to the tax is simply part of the collection scheme held to be valid by this court in *Chehalis;* it is not the payment of a tax and so s. 87 of the *Indian Act* can have no application.

70 In *Pictou v. Canada*,[FN15] the Court had to decide whether status Indians in Nova Scotia were required to collect and remit GST on sales to non-Indians. Among other arguments, the appellants submitted that GST should be considered a tax on Indian retail vendors, which was prohibited by the application of s. 87 of the *Indian Act.*

71 The Court, however, was of the opinion that the tax in question was obviously imposed on the purchaser and not on the vendor, whose sole obligation was to collect and remit it.

72 In *R. v. Johnson*,[FN16] the Nova Scotia Court of Appeal decided similarly:

> . . . I see nothing in the article which would exempt Indians from complying with the general provisions of the Tobacco Tax Act regarding the payment and collection of tax. I would dismiss this ground of appeal.

73 Closer to us, in Quebec, the courts have unanimously endorsed such a system.

74 In *Groslouis v. Bouchard*,[FN17] the Court stated that ss. 17 *et seq.* of the Act simply set up an advance collection system involving the manufacturer, wholesaler, and retailer, but that the provisions do not levy a tax.

75 In *Quebec (Deputy Minister of Revenue) v. Vincent*,[FN18] the Court of Appeal ruled that s. 87 of the *Indian Act* does not make the *Tobacco Tax Act* inoperative with regard to Indians operating a cigarette retail sales business on a reserve because the tax is definitely paid by the consumer and not by the retailers who buy the tobacco for resale.

76 The undersigned cannot stray from these principles set out in the case law.

5) Have the plaintiff's aboriginal rights been violated, and did he serve notice in compliance with the prescriptions in art. 95 C.C.P.?

77 It was only at the end of 2008 that the plaintiff argued infringement of aboriginal rights by way of the notice under art. 95 *C.C.P.*, *supra*, and by filing certain documents collated by Michael Doxtater.

78 The Attorney General has filed a preliminary objection to this evidence, which the Court has taken under advisement.

79 First he states that the notice served by Mr. Conway was insufficient, that, in fact, the evidence he had submitted regarding any infringement of aboriginal rights was non-existent, and finally that, in any case, there had been no violation of the existing rights of aboriginal peoples.

80 Whether regarding the form (the proceeding) or the substance (the evidence), all teachings point in the same direction: the Rule of Law presupposes the supremacy of the law by which the validity and constitutionality of a provision is assumed. A law must be challenged in a very specific framework, following established rules.

81 First, the prior notice that must be given by a litigant to challenge the constitutional validity of a law must follow the principles established in the third paragraph of article 95 *C.C.P.*; namely, it must set forth, in a precise manner, the claim and the grounds relied upon.

82 In an article about the requirements in article 95 *C.C.P.*,[FN19] Mtre Danielle Pinard stated:

> [TRANSLATION]
>
> The presumption of constitutional validity and procedural fairness are in fact theoretical justifications of the requirement imposed by the *Code of Civil Procedure* to inform the Attorney General of any challenge to the constitutional validity of a law. It is a way of acknowledging the respect that is required from both judges and the population as a whole for legislative choices made democratically. A finding of constitutional invalidity is a serious conclusion that may be reached only if the public authority has had the opportunity to come before the court to justify the merits of the contested law.

83 In *Eaton v. Brant County Board of Education*,[FN20] the Supreme Court reiterated that the power to declare laws invalid should not be exercised except after the government has been accorded the fullest opportunity to support their validity.

84 Closer to home, our colleague Richard Côté J. considered this issue when dealing with a motion for dismissal of a notice of intention presented under art. 95 *C.C.P.*, which contained 62 paragraphs. He granted the motion for dismissal after analyzing the principles in question, from which the following conclusions can be drawn: [FN21]

[TRANSLATION]

> All of the recent case law of the Supreme Court shows that aboriginal rights claims cannot be generally decided.
>
> When courts have such claims before them, they must proceed on a case-by-case basis and specifically examine the customs, practices, and traditions of the aboriginal group claiming the right. The facts are therefore important.

> The obligation to analyze these claims, focusing on the specific characteristics of the aboriginal group concerned, also applies if the right claimed is the right to self-government.
>
> The guidelines set by the Supreme Court imply that those claiming an aboriginal right must circumscribe their claim and base it on facts specific to their community.
>
> Consequently, in a dispute like the one before us, the notice of intention required by art. 95 of the *Code of Civil Procedure* must include sufficient details of the nature of the aboriginal right claimed and of the factual context in which it exists. It must also specify how the impugned statute affects this right.
>
> The content of the notice of intention must be sufficiently precise to enable the Attorney General to narrow down the evidence and arguments to be made in support of the validity of the law.
>
> Counsel for the parents failed to set out their claims in a sufficiently precise manner, particularly regarding the following:
>
> The nature of the custom or tradition constituting the aboriginal right claimed, as well as its source.
>
> The aboriginal community concerned. Is it the Innu Nation as a whole or a local community? Does the claim affect aboriginals living outside the community?
>
> How is the custom or tradition a central and distinctive element of the community concerned?
>
> How does the *Youth Protection Act* violate the exercise of the aboriginal right claimed?
>
> The Court concludes that the notice served on the Attorney General is insufficient with regard to the parents' claims and the grounds relied upon.

85 Of course, art. 95 *C.C.P.* must be interpreted with a certain amount of flexibility, but the importance of the principles raised do not permit a dilution of the burden on the challenging party.

86 The fact that counsel for the Deputy Minister of Revenue, Mtre Jocelyne Mailloux Martin, was able to give the plaintiff some advice on December 3, 2008, so that he could prepare and (finally) serve his notice under art. 95 *C.C.P.* (after numerous previous requests) cannot justify relief from the applicable rules.

87 Conway's notice states that he intends to invoke his constitutional rights.

88 Although he neither mentioned the provision in his notice nor raised it in argument, let us assume that he was referring to the rights listed in s. 35 of the *Constitution Act, 1982*:[FN22]

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> In this Act, « aboriginal peoples of Canada » includes the Indian, Inuit and Métis peoples of Canada.
>
> For greater certainty, in subsection (1) « treaty rights » includes rights that now exist by way of land claims agreements or may be so acquired.
>
> Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1)

are guaranteed equally to male and female persons.

89 This being so, the plaintiff refers to his "inherent treaty rights" without naming them. In the documents filed by Professor Michael Doxtater, on the same day that the notice under art. 95 *C.C.P.* was prepared, can we find any reference to these treaties, customs, practices, or traditions?

90 In the document submitted by Professor Doxtater, written to commemorate Canada Day and published in several periodicals, he provides an overview of the relations between the British invader and the indigenous peoples of North America.

91 Both in this text and in his testimony before the Court, he discussed the mutual respect pledged by the two peoples, confirmed by treaties such as the Two Row Treaty and the Treaty of Montreal in 1701. He concluded that the *Indian Act*, and specifically s. 87 thereof, continues in the tradition of earlier principles.

92 We can find nothing in these writings to demonstrate that the cigarette business should be tax exempt because it constitutes an aboriginal right practised by the Indians before contact between aboriginal and European societies.

93 Therefore, we must conclude that, in the case before us, not only is there a defect in form, the plaintiff has also failed to discharge the burden of proving that his aboriginal rights were infringed by the State.

94 In 1996, the Supreme Court of Canada established the guidelines for the case to be met by a plaintiff claiming of an aboriginal right.[FN23]

95 The following excerpts from *Van der Peet* clearly summarize the applicable criteria: [FN24]

> In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 5(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> . . .
>
> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
>
> . . .
>
> The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights. (Emphasis added.)

96 More recently, in *Mitchell*,[FN25] the Supreme Court reiterated that, while a certain amount of flexibility should be allowed with respect to evidence dating back several centuries, evidence must nevertheless be useful and reliable, and the prejudice resulting from the admissibility of such evidence does not overshadow its probative value.

97 As the Chief Justice stated:

> As discussed in the previous section, claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim...
>
> ...The *Van der Peet* approach, while mandating the equal and due treatment of evidence supporting aboriginal claims, does not bolster or enhance the cogency of this evidence. The relevant evidence in this case - a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade - can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold.[FN26] (Emphasis added.)

98 In a case involving an Indian reserve in Saskatchewan that was contesting its obligation to collect taxes and remit them to the government, the provincial court of that province first recognized that the legislative mechanism did not violate s. 87 of the *Indian Act*.[FN27]

99 The Court added:

> There is nothing in the evidence of the elders on which to conclude that this law, which requires vendors to collect and remit tax from customers, is one which affects activity arising from a cultural practice so as to be an aboriginal right within the criterion of *R v Van der Peet* 1996 CanLII 216 (S.C.C.), (1996) 2 S.C.R. 507, or *Mitchell v M.N.R.* 2001 SCC 33 (CanLII), [2001] 1 S.C.R. 911 or that it is a treaty right within the criterion of *Marshall v. Her Majesty The Queen*, [1999] S.C.J. No. 55.[FN28]

100 In short, although the historical account developed by Professor Doxtater may be fascinating, it is not relevant and does not help in any way to support the allegations, however vague, of the plaintiff.

101 The Court therefore finds that the plaintiff's notice dated December 3, 2008, is insufficient and that, in any case, the evidence he filed did not demonstrate that his aboriginal rights had been violated.

FOR THESE REASONS, THE COURT:

DISMISSES the application;

AFFIRMS the decision on the objection dated June 21, 2006;

MAINTAINS the notices of assessment bearing numbers 6545671 and 7315321, dated respectively November 14 and 28, 2005;

UPHOLDS the departmental decision delivered on November 4, 2005, for the period from August 1 to 31, 2005;

THE WHOLE, without costs.

FN1 R.S.Q., c. M-31.

FN2 R.S.Q., c. I-2.

FN3 R.S.Q., c. I-3. Section 1014 is applicable by reference via s. 95 of the *Act respecting the ministère du Revenu.*

FN4 S.Q. 1991, c. 64.

FN5 *C.A.D. Ringrose Therapy Institute Ltd. v. The Queen*, [1993] G.S.T.C. 54 (54-3).

FN6 [1982] R.D.F.Q. 214 (CA).

FN7 R.S.Q., c. I-2 at paras. 8, 11 and 17.2.

FN8 R.S., 1985, c. I-5.

FN9 [1978] 1 S.C.R. 104.

FN10 *Ibid.* at 116.

FN11 [1985] 2 S.C.R. 309.

FN12 *Ibid.* at 326.

FN13 *Ibid.* at 327.

FN14 1992 CanLII 5970 (B.C.C.A.), leave to appeal granted but appeal subsequently abandoned).

FN15 [2003] 2, F.C. 737.

FN16 [1993] CanLII 3181 (NS C.A.), at 149.

FN17 [1995] R.D.F.Q. 153, appeal abandoned.

FN18 [1996] R.J.Q. 239.

FN19 Danielle Pinard, *L'Exigence d'avis préalable au Procureur général, prévu à l'article 95 du Code de procédure civile.* 50:4 R. du B. 629.

FN20 [1997] 1 S.C.R. 241.

FN21 *Adolescent (In the matter of)*, [2001] R.J.Q. 1660 at 1664-5.

FN22 Being Schedule B to the *Canada Act 1982 (*U.K.*)*, 1982, c. 11.

FN23 *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R v. Pamajewon*, [1996] 2 S.C.R. 821.

FN24 Paras. 46, 55, and 60.

FN25 *Mitchell v. M.N.R.*, [2001], 1 S.C.R. 911.

FN26 *Ibid.* at para. 51.

FN27 *Canada (Minister of National Revenue) v. Ochapowace Ski Resort Inc.*, [2002] SKPC 84.

FN28 *Ibid.* at para. 85.

END OF DOCUMENT

1993 CarswellNS 294, 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129, (sub nom. Johnson v. R.) 1 G.T.C. 6150

1993 CarswellNS 294, 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129, (sub nom. Johnson v. R.) 1 G.T.C. 6150

R. v. **Johnson**

Stanley Gordon **Johnson** Appellant v. Her Majesty The Queen Respondent v. Union of Nova Scotia Indians Intervenor

Nova Scotia Court of **Appeal**

Jones, Hart, Chipman JJ.A.

Heard: February 2, **1993**
Judgment: March 15, **1993**
Docket: Doc. 02671

Counsel: *Robert A. Carruthers* for the Appellant.

Robert C. Hagell Jim Spurr for the Respondent.

Bruce H. Wildsmith for the Intervenor.

Subject: Public; Provincial Tax

Taxation --- Provincial and territorial taxes — General taxation principles — Liability of native persons for provincial or territorial tax.

Native law --- Taxation — Sales tax.

S. 25(2) of Tobacco Tax Act applying to retail vendors on reserves — Tobacco Tax Act, R.S.N.S. 1989, c. 470, s. 25(2), (3) — Indian Act, R.S.C. 1985, c. I-5, s. 87.

Accused, who was a status Indian, was convicted of being in possession of and selling tobacco which was not purchased from a licenced wholesale vendor, contrary to s. 25(2) and (3) of the Tobacco Tax Act. Accused appealed the conviction and sentence on the ground that the provisions of the Act did not apply to Indians on reserves. Held, the appeal was dismissed. S. 87 of the Indian Act exempted the personal property of an Indian on a reserve from taxation. The exemption extended to the ownership, occupation, possession or use of personal property on a reserve. It also applied to the sale of personal property to an Indian on a reserve. Therefore, the Tobacco Tax Act could only apply to Indians on reserves to the extent that it did not conflict with the Indian Act provisions. S. 87 of the Indian Act did not exempt Indians from prepaying the tax to wholesalers on purchases

made off the reserve and s. 25(2) of the Tobacco Tax Act was a provision of general application designed for the effective collection of tax, and applied to retail vendors on reserves.

The Court:

1 Appeal dismissed from the conviction and sentence on the second count per reasons for judgment of Jones, J.A.; Hart and Chipman, JJ.A. concurring.

Jones, J.A.:

2 On June 29, 1990, the appellant was charged in an information that he:

> at or near Truro in the County of Colchester, Nova Scotia, on or about the 14th day of May, 1990 did sell tobacco to a consumer while not holding a registration certificate pursuant to the *Health Services Tax Act* that was in force at the time, contrary to Section 14(1)(b) of the *Tobacco Tax Act*;
>
> AND FURTHER, on or about the 14th day of May, 1990, did, as a retail vendor, have in his possession tobacco other than tobacco purchased from a wholesale vendor who was in possession of a wholesale vendor's permit that was issued pursuant to this *Act* and that was in force, contrary to Section 25(2) of the *Tobacco Tax Act*;
>
> AND FURTHER, on or about the 14th day of May, 1990, did sell tobacco in contravention of the *Tobacco Tax Act*, contrary to Section 25(3) of the *Tobacco Tax Act*.

3 There was evidence that the appellant operates a variety store at Millbrook on the Indian Reserve. There is a sign outside the store which states "1752 Treaty Truck House". There is no evidence that the appellant operates the store as an agent or representative of the Millbrook Band. The appellant is a status Indian and a member of the Millbrook Band.

4 On May 14, 1990, Wayne Lacey, an auditor with the Department of Finance, went to the store in the course of his duties as an auditor. He purchased a pack of Winston cigarettes for $2.75 from the clerk in the store. There were no labels on the package that indicated that any Canadian duty had been paid. There was evidence that the package was an American product. Mr. Lacey concluded as the duty was not paid the cigarettes had not been purchased from a licensed wholesaler in the Province of Nova Scotia. Mr. Lacey knew that neither the store nor Mr. Johnson were licensed tobacco retailers.

5 Mr. Lacey applied for a search warrant and returned to the store on May 19, 1990 where he seized 61 packages of cigarettes. There were three bands, Winston, Camel and More. As the cigarettes had not been purchased from a licensed wholesaler the cigarette tax had not been paid. There was no evidence that the cigarettes were obtained from a legitimate source. Indeed there was evidence that they may have been obtained in violation of the customs regulations. The cases of *Union of Nova Scotia Indians et al. v. A.G.N.S. et al.*, 54 D.L.R. (4th) 639 and *Johnson et al v. Nova Scotia (Attorney General)* 96 N.S.R. (2d) 140 outlined the difficulties experienced by the Province in collecting sales tax on tobacco products under the *Health Services Tax Act*, R.S.N.S. 1967, c. 126. By Ch. 13 S.N.S. 1989 the province passed the *Tobacco Tax Act*. The present charges were laid under the new legislation. Mr. Lacey testified regarding the procedure followed in collecting the tax under the *Tobacco Tax Act*. He stated:

A. The scheme under which the Tobacco Tax is collected is one whereby a retailer purchases tobacco from a wholesaler and the tobacco tax ... at presently, at this point in time, of 6.8¢ per cigarette is collected from retailer by the wholesaler and that ... and the wholesaler subsequently remits that to the Province of Nova Scotia. Of course, when the retailer sells the products to a consumer, he is obtaining his an tobacco tax back. In other words, it's paid in ... paid in advance by a wholesaler when the retailer purchases.

Q. What if any knowledge do you have of any other alternative method of obtaining a product of that nature?

A. There is no other scheme that I know of whereby a retailer can legally obtain products per resale in the Province of Nova Scotia.

Q. And we're referring to tobacco product are we?

A. Yes. There is, I might just one step further. There are certain designated native retailers within the Province who may obtain a quantity of tobacco products through a contract with our department and those products are for resale by that designated vendor, they're purchased from a wholesaler, tobacco tax exempt, and are then sold to natives on reserves for their own consumption.

Q. In relation to ah the ... those products, what if any distinguishing marks would be on those products?

A. There isn't other than the fact that they're products that are legally in the hands of the wholesaler and contain all the Canadian and Canadian duty paid markings, ah and Canadian stamps applicable to the product.

Q. In relation to, you say designated retailer, what if any list is maintained in this ... of the retailer?

A. We maintain all the contracts in our office and ah we keep a total of all quantities available to natives in the Province and a list of all native retailers.

Q. In relation to the Millbrook Band area, or reservation, what if any knowledge do you have of the designated retailers in that area?

A. There is a designated retailer and ah who's under contract and who obtains their quantity of cigarettes per month and they sell them out of a store located on the reserve, a small store, one room store, that ah sells just tobacco products to their own ... to their own people.

Q. And what if any knowledge do you have who the designated retailer is?

A. The ah designated retailer at the time or the representative, their contract is with one Jeanette, Jeanette Gloade, yes Jeanette Gloade.

Q. And was that at the time you're referring to, what time was that?

A. That is the ah present retailer. Ah there was a change from one Barry Gloade to Jeanette Gloade and I'm not sure of the time frame but since the program went into place in approximately um it was early in 1989, there was a ... the names on ... their contract changed from Barry to Jeanette. I can't remember right exactly when it is.

6 He also testified that there was no such arrangement with Mr. Johnson or his store. The effect of these changes was to bring the *Act* and regulations into line with the collection systems outlined in *Re Hill and Minister of Revenue et al.*, 18 D.L.R. (4th) 537 and *Re Tseshaht Indian Band et al. and The Queen in right of British Columbia*, 94 D.L.R. (4th) 97.

7 The charges were tried before Judge Donald MacDonald in the Provincial Court. The appellant was acquitted on the first count and convicted on counts 2 and 3. On count two the trial judge imposed a fine of $5,000.00 plus costs and the surcharge for a total of $5,950.00. On the third count the fine was $2,500.00 plus costs and surcharge for a total of $2895.00.

8 The appellant appealed to the County Court and the appeal was heard by Hall, J.C.C. Judge Hall allowed the appeal with respect to the third count and entered an acquittal. He dismissed the appeal on the second count but reduced the fine to $2500.00. The appellant has applied for leave to appeal on the second count to this court. The Union of Nova Scotia Indians was granted intervenor status.

9 There are three main issues on this appeal:

1. Whether the learned County Court Judge erred in finding that the search warrant was lawfully issued and that there was no violation of the appellant's *Charter* rights.

2. Whether s. 87 of the *Indian Act* exempts the appellant from the application of s. 25(2) of the *Tobacco Tax Act*.

3. Whether the Treaty of 1752 exempted the appellant from the provisions of the *Tobacco Tax Act*.

10 With respect to the first issue the appellant contends that the search warrant did not disclose proper grounds for the issuance of the warrant and therefore the search was unreasonable and in violation of s. 8 of the *Charter*. Judge Hall concluded that the warrant was valid on its face. The onus of establishing that there was a *Charter* violation in the first instance was on the appellant. The information on which the warrant was based was not adduced in evidence. In the absence of the information one cannot conclude that the warrant was improperly issued. On the face of it, the warrant discloses violations of the *Tobacco Tax Act*. It was not incumbent on the justice to determine that the offences were in fact committed. The fact that the charges as laid may not have corresponded with the allegations in the warrant did not make the warrant invalid... I would dismiss this ground of appeal.

11 I turn to the second issue.

12 Sections 87(1) and (2) and 88 of the *Indian Act* provide as follows:

87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any

property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

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

13 In *Francis v. The Queen*, [1956] S.C.R. 618 the Supreme Court of Canada had to decide whether items brought into Canada from the United States by an Indian were subject to duties of customs and sales tax under the relevant statutes of Canada. Kerwin, C.J. in dealing with s. 86 of the *Indian Act* stated at p. 622:

I agree with Mr. Justice Cameron that clause (b) of s. 86 of *The Indian Act* does not apply, because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada.

14 Kellock. J. stated at p. 630:

Before the property here in question could become situated on a reserve, it had become liable to customs duty at the border. There has been no attempt to impose any other tax.

15 In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, the Supreme Court of Canada had to determine whether the appellant, a registered Indian, could claim an exemption from income tax by virtue of the *Indian Act*. Dickson, J. in delivering the judgment of the Court stated at p. 36:

Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties 'must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians'.

There is little in the cases to assist in the construction of s. 87 of the *Indian Act*.

16 The Court went on to hold that wages paid on the reserve were exempt from the payment of income tax by virtue of s. 87 of the *Indian Act*.

17 *Mitchell v. Peguis Indian Band*, 71 D.L.R. (4th) 193 dealt with the right to garnishee money due to the band. La Forest, J. reviewed the history of sections 87 and 89 of the *Indian Act*. La Forest, J. stated at p. 226:

In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which

the deeming provision of s. 90 applies, constitute part of a legislative 'package' which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.

It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decision bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

The Cases

The approach I have taken is fully supported by the cases. In *Francis v. The Queen*, [1956] S.C.R. 618, this Court made it clear that Indians were liable to pay custom duties in respect of goods brought directly over the international border onto a reserve. The tax exemption conferred by the then s. 86 (now s. 87) was held to have no application because of the fact that the excise tax attached at the international border, and hence before the property in question could become situated on a reserve.

Reference should also be made to the decision of the British Columbia Court of Appeal in *Leonard v. R. in right of British Columbia* (1984), 52 B.C.L.R. 389, leave to appeal to this Court refused, [1984] 2 S.C.R. viii. There it was held that Indians could be assessed provincial sales tax in respect of purchases made on portions of their lands that they had conditionally surrendered to Her Majesty in right of Canada for the purpose of attracting commercial leases. I find myself in respectful agreement with the following observation of Macfarlane J.A. as to the limits of s. 87(b), at p. 395:

> It is a reasonable interpretation of the section to say that a tax exemption on the *personal* property of an Indian will be confined to the place where the holder of such property is expected to have it, namely on the lands which an Indian occupies as an Indian, the reserve. Indians who surrender their lands to non-Indians on lease give up the right to occupation, and when they own or possess personal property on those surrendered lands I think that they are in no different position than any other citizen. (Emphasis in original.]

In another recent decision, *Leighton v. B.C. (Gov't)*, [1989] 3 C.N.L.R. 136, the British Columbia Court of Appeal again had occasion to consider the significance of the phrase 'situated on a reserve' in s. 87(b) of the *Indian Act*. In what I take to be a sound approach, Lambert J.A. held that when considering whether tangible personal property owned by Indians can benefit from the exemption from taxation provided for in s. 87, it will be appropriate to examine the pattern of use and safekeeping of the property in order to determine if the paramount location of the property is indeed situated on the reserve. I have no doubt that it will normally be appropriate to take a fair and liberal approach to the problem whether the paramount location of tangible property or a chose-in-action is situated on the reserve; see *Metlakatla Ferry Service Ltd. v. B.C. (Gov't)* (1987), 12 B.C.L.R. (2d) 308 (C.A.) But I would reiterate that in the absence of a discernible nexus between the property concerned and the occupancy of reserve lands by the owner of that property the protections and

privileges of ss. 87 and 89 have no application.

I draw attention to these decisions by way of emphasizing once again that one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not disposed of their entitlements. The Alberta Court of Appeal in *Bank of Nova Scotia v. Blood*, [1990] 1 C.N.L.R. 16, captures the essence of the matter when it states, at p. 18, in reference to s. 87, that: 'In its terms the section is intended to prevent interference with Indian property on a reserve.'

If any additional evidence is needed to confirm this conclusion, it may be found in an examination of s. 89(2). By the terms of this provision, personal property sold to an Indian may still be subject to attachment, even when situated on a reserve, in that a person who sells to an Indian purchaser under a conditional sales agreement retains his right to the property pending completion of the agreement. There could be no clearer illustration of the fact that s. 89 is not meant to arm Indians with privileges they can exercise in acquiring and dealing with property in the general market-place, but, rather, is simply limited in its purpose to preventing non-natives from interfering with the ability of Indians to enjoy such duly acquired property as they hold on their reserve lands. That, of course, is why s. 89 places no constraints on the ability of Indians to charge, pledge, or mortgage property among themselves.

18 In *Re Williams and The Queen*, 90 D.L.R. (4th) 129 Gonthier, J. in delivering the judgment of the Supreme Court of Canada after referring to Mitchell stated at p. 135:

La Forest J. also noted that the protection from seizure is a mixed blessing, in that it removes the assets of an Indian on a reserve from the ordinary stream of commercial dealings (at p. 239).

Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.

The purpose of the *situs* test in s. 87 is to determine whether the Indian holds the property in question as part of the entitlement of an Indian *qua* Indian on the reserve. Where it is necessary to decide amongst various methods of fixing the location of the relevant property, such a method must be selected having regard to this purpose.

19 The Court held that all of the unemployment benefits in question in that case were exempt from taxation.

20 The decisions in the provincial courts are not entirely consistent. They stem mainly from the application of provincial sales tax legislation to Indian reserves and the exemption under s. 87 of the *Indian Act*. In *Union of Nova Scotia Indians v. A.G.N.S.*, 89 N.S.R. (2d) 121, Burchell, J. in our Supreme Court held that registered Indians in Nova Scotia have the right to purchase on an Indian reserve tobacco products for their own consumption or for the consumption of other registered Indians without paying health services tax pursuant to the *Health Ser-*

vices Tax Act. The exemption under s. 87 of the *Indian Act* applied. He also held that Indians had the right to purchase tobacco products outside Nova Scotia for use by Indians on reserves in Nova Scotia without paying the tax. The first proposition is consistent with the provisions of s. 87 of the *Indian Act*, the second does not appear to accord with the decision of La Forest, J. in *Mitchell v. Peguis Indian Band, supra*. I have already noted that Burchell J. was dealing with the provisions of the *Health Services Tax Act*. It is unnecessary therefore to deal further with the decision in that case.

21 In *Re Hill and Minister of Revenue*, 18 D.L.R. (4th) 537 the issue was whether an Indian was immune from an assessment made by the Minister of Revenue under the Ontario *Tobacco Tax Act*. Krever J. stated at p. 545:

> The tax reflected in the notice of assessment dated October 24, 1984, is not a tax on the applicant. It does not tax the property of the applicant situated on a reserve. Nor does it purport to tax the applicant in respect of the ownership, possession or use of any of his personal property situated on a reserve. It follows, then, that s. 87 of the *Indian Act* is, in the circumstances of this case, of no assistance to him. The *Tobacco Tax Act* is a law of general application in Ontario and, as such, is one to which the applicant is subject by reason of the provisions of s. 88 of the *Indian Act*:
>
> > 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.
>
> I add, for clarification, that, for the purposes of this application, the applicant does not quarrel with the amount of the assessment. The applicant is, I hold, not exempt from the provisions of the *Tobacco Tax Act*, and, as a result, the notice of assessment cannot be said to be of no force or effect.

22 At p. 546 the learned judge stated:

> It is difficult to find fault with Professor Bartlett's thesis and his analysis of the Supreme Court of Canada's decision in *Francis v. The Queen*, [1956] S.C.R. 618, 3 D.L.R. (2d) 641, and its implications. Nevertheless, the facts of this case seem to me to dictate a conclusion other than an entitlement to an exemption from taxation. The result might well be different if the evidence could be interpreted as supporting a finding, or even a reasonable inference, that the consumers of the cigarettes sold were themselves Indians on a reserve and thus exempt from taxation either in respect of themselves or their property, the cigarettes purchased by them. It will be recalled, however, that the conclusion cannot be avoided that the cigarettes were sold by the applicant to persons off the reserve and persons who, one must infer from the volume sold and the size of the Indian population in the region, were not Indians within the meaning of the *Indian Act*. Moreover, as I have said, no complaint is made about the assessment of the amount of taxes that these non-exempt consumers should have paid.

23 In *Bomberry et al and the Minister of Revenue for Ontario*, 63 D.L.R. (4th) the applicants applied for a declaration that the tobacco quota imposed on Indian retailers on reserves by the Minister of Revenue was invalid. The divisional court concluded that the quota system imposed by the Minister was not authorized by the *Tobacco Tax Act*. The court went on to state at p. 544:

To apply that principle to this case, even if the *Tobacco Tax Act* and regulations could be considered unimpeachable, does the purported administration of the Act in the form of the Indian tobacco quota overreach not only the Act but also the constitutional authority of the province by intruding into jurisdiction over Indians reserved to Parliament and exercised by it in s. 87 of the *Indian Act*?

In our view, it does.

The Indian tobacco quota, because Mr. Bomberry has no quota, prevents him from buying tax-exempt tobacco for sale to his Indian customers on the reserve. He cannot buy tax-exempt tobacco from the wholesalers because he is not on the quota list. He could get tobacco by paying the tax on it, but then he would not be able to recover that tax from his Indian customers on the reserve because they, like him, are not liable to pay tax. The quota thereby directly infringes his right under s. 87 of the *Indian Act* to be exempt from tax on his personal property on the reserve. Because Mr. Hill has a limited quota and can only purchase as much tobacco as his quota permits, it directly infringes his right under s. 87 in the sense that it limits that right.

To that extent, the Indian tobacco quota exceeds the constitutional authority of the province by intruding into the constitutional jurisdiction over Indians reserved to Parliament and exercised in s. 87 of the *Indian Act.*

A similar conclusion was reached with respect to a somewhat different tax scheme in *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)* (Burchell J., December 12, 1988, [since reported 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, [1989] 2 C.N.L.R. 168 (N.S.S.C.)].

This case does not involve any measure aimed at the transfer of tax-exempt tobacco from Indians to non-Indians. Although it may achieve that goal indirectly, the Indian tobacco quota aims directly at Indian retailers. By aiming directly at Indians, rather than at the transfer of tax-exempt tobacco to non-Indians, the Indian tobacco quota is unconstitutional in the sense explained above.

24 It is questionable whether that conclusion is consistent with the judgment of Krever J. in *Re Hill, supra. Re Bomberry* was decided before *Mitchell et al.* in the Supreme Court of Canada.

25 The most recent decision is *Re Tseshaht Indian Band and The Queen in right of British Columbia*, 94 D.L.R. (4th) 97. In that case the British Columbia Court of Appeal reviewed the earlier decisions. The Court considered the application of the *British Columbia Tobacco Tax Act* and the *Motor Fuel Tax Act* to purchases of tobacco and motor fuel by the Tseshaht Indian Band for resale on the reserve to Indians and non-Indians.

26 Cummings J.A. who delivered the judgment for the majority stated at p. 121:

With respect to tobacco products the province had, at the time the petition was heard, entered into agreements with 95 Indian bands located throughout the province (but not including the Tseshaht Band), implementing the quota system established by policy of the province. That policy is described in Consumer Taxation Branch Bulletin No. 085.

Generally, under the terms of each agreement, one or more retailers were authorized by the province to purchase a specific quantity of tobacco products from its wholesaler at a price which does not include an amount equivalent to the tax on tobacco tax. The quantity of tobacco products which could be purchased without payment of an amount equivalent to tobacco tax was established by the Consumer Taxation Branch in consultation with the band. Usually it was calculated as 10 cigarettes per day for every Indian man, wo-

man and child permanently resident on the band's reserve. After the band and the Consumer Taxation Branch had concluded an agreement in writing, the branch notified the wholesaler who supplied the retailer on the reserve, who then was permitted to sell up to an agreed amount of tobacco products each month to that retailer on the reserve without being required to account to the branch for the tax due on those products.

The quantity under the quota may be varied to meet the circumstances of the particular retailer. For example, in one case, where a band store served more than one reserve, the quantity under the quota was increased. In another case, where an additional retailer indicated a desire to operate on a reserve, that retailer was also give [sic] a quota.

Under provincial policy, where a band has entered into an agreement with the province in respect of tobacco products, the retailer is not required to account to the province for tobacco tax on products purchased under the agreement.

In the case of each of the 95 bands with which the province had an agreement, the quota of tobacco products allocated to the retailer(s) on the reserve was not less than the amount of tobacco products which were actually resold to status Indians.

In May, 1988, the Tseshaht Bank proposed to the province that the Tseshaht Market be permitted to obtain from its wholesaler unlimited quantities of cigarettes at prices that did not include amounts equal to the tax that would be payable by the ultimate consumer on a taxable retail sale. The province rejected this proposal. The band then notified the province that it would pay its wholesaler a price that included amounts equal to the tax and thereafter claim a refund of these amounts paid on cigarettes sold to Indians. The province subsequently accepted the band's proposal as to the method of providing sufficient evidence to the province to support the band's claims to those refunds.

When the Tseshaht Market purchased its supplies of tobacco products from tobacco wholesalers, all such purchases were made at a price which included an amount equal to the tax. The wholesaler is not permitted to sell without including this component.

In order to recover the 'amount equal to tax' which the Tseshaht Market paid to its tobacco wholesalers, but which was not collected from tax-exempt purchasers, the band had to apply for a refund from the province. The 'carrying costs' incurred by the band if it had entered into a tobacco quota agreement rather than a refund system would have been less because, under the quota system, the band would not have been required to prepay an amount equivalent to the tax to its wholesalers with respect to these products which it purchased for resale to status Indians.

Issues on appeal

1. Is the collection of an 'amount equal to tax' itself a tax, the collection of which from the respondent is contrary to s. 87 of the *Indian Act*?

2. Are the 'quota' system applied by the province to the Tseshaht Band with respect to gasoline products, and the 'refund' system applied by the province to the band with respect to tobacco products, authorized by the *Motor Fuel Tax Act* or by the *Tobacco Tax Act*, R.S.B.C. 1979, c. 404, or by any other statute?

3. Even if the 'quota' system and the 'refund' system are authorized by statute (which the respondents dis-

pute) are they an unlawful interference with the rights of the respondents under s. 87 of the *Indian Act*?

Counsel for the appellant submitted that the learned chambers judge erred in holding that s. 87 of the *Indian Act* afforded the band, in respect of tobacco and motor fuel products purchased by it for resale, an exemption from payment of an amount equivalent to the tax to be paid by the ultimate non-Indian consumers or purchasers of such products.

27 At p. 124, Cumming J.A. stated:

In order to ascertain whether the respondent band, *qua* retailer, is entitled to avail itself of any exemption from taxation afforded by s. 87 of the *Indian Act*, it is first necessary to determine whether the *Tobacco Tax Act* or the *Motor Fuel Tax Act* imposes a tax at all on any retailer, Indian or non-Indian.

28 He then referred to the provisions of the *Tobacco Tax Act* and the *Motor Fuel Tax Act*. He continued at p. 127:

The *Tobacco Tax Act* imposes a tax on the 'consumer' of tobacco products: s. 2(1.2). 'Consumer' is defined in s. 1 to be a person who purchases for his own consumption or use. Since the Tseshaht Band does not purchase for its own consumption or use, it is not a 'consumer' under the *Act*, and is not required under that *Act* or pay tax.

The *Tobacco Tax Act* (ss. 2 and 15) and the regulations (s. 5) require a retail dealer (such as the Tseshaht Band) to remit tax to 'collectors' on demand. All wholesale dealers in tobacco products are designated as 'collectors'. For reasons of efficiency and administrative convenience for the wholesale dealer, the retail dealer and the province, each wholesaler dealer requires each of its customers who is a retail dealer to pay, at the time the retail dealer pays the wholesale dealer for the tobacco, an amount equal to the tax that will be collected on the retail sale.

The scheme of the *Motor Fuel Tax Act* is similar. That *Act* imposes a tax on the 'purchaser', of motor fuel (ss. 4 to 9). The definition of 'purchaser', somewhat like the definition of 'consumer' under the *Tobacco Tax Act*, refers to a person who purchases for his own use (s. 1). As with the *Tobacco Tax Act*, retail dealers of motor fuel are required to remit to their wholesale dealer amounts equal to the tax payable by the ultimate purchasers of that fuel. As with the tobacco tax scheme, each retailer dealer includes the amount equivalent to the tax in the price it pays to its wholesaler dealer for the fuel it purchases.

These prepayment schemes appears, although it is not necessary to decide the question as it was neither pled nor argued otherwise, to be authorized by the provisions of the *Motor Fuel Tax Act* and the *Tobacco Tax Act* .

And at p. 128:

Under s. 2(6) of the *Tobacco Tax Act* every dealer is deemed to be an agent for the Minister and as such as required to levy and collect the tax imposed by the *Act* on the purchaser. Section 4 prohibits the sale of tobacco either at retail or wholesale by anyone unless he is registered as a retail dealer or wholesale dealer and holds a valid permit issued by the director. Under s. 5.1(1) a wholesale dealer is required in respect of tobacco delivered to him to pay as security to the director, within the time required by him, an amount equal

to the tax that would be collectible if tobacco were sold to a consumer.

By s. 31(1)(b) the Lieutenant-Governor in Council is empowered to make regulations prescribing the method of collection and remittance of the tax and any other conditions and requirements affecting the collection and remittance.

By s. 6(1) of the *Tobacco Tax Act Regulation*, B.C. Reg. 83/71:

> 6(1) Every collector shall
>
> (a) on or before the 20th day of each month in respect of the previous month, deliver to the Director such return as he requires; and
>
> (b) remit with the return required by paragraph (a) the amount of the tax as computed in the return.

The legislative scheme is strikingly similar to that under consideration in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 4 D.L.R. 81, [1943] A.C. 550, [1943] 3 W.W.R. 113 (J.C.P.C.), which held that taxes of the sort imposed by the *Motor Fuel Tax Act* and the *Tobacco Tax Act* are direct taxes.

In *Chehalis Indian Band v. British Columbia* (1988), 53 D.L.R. (4th) 761, [1989] 1 C.N.L.R. 62, 31 B.C.L.R. (2d) 333, this court held that the tax imposed by the *Gasoline Tax Act*, R.S.B.C. 1979, c. 152, a predecessor statute to the *Motor Fuel Tax Act* (and not different in any material way), was a direct tax imposed upon the consumer. The Court described the tax collection scheme in these terms, at p. 765:

> The collection scheme employed in this case was designed for ease of administration and accounting. A retailer's inventory of gasoline is turned over relatively fast and the amount of tax that will be collected on the gasoline when sold to a retail purchaser is known. Thus, each seller in the chain, from manufacturer to wholesale dealer, collects an amount equal to the tax at the time it makes its sale. The commercial effect is that the selling price of the gasoline, at each stage of the chain, is a price which includes an amount equal to the tax, *although the legal liability for the tax does not arise under the statute until the retail sale is made.* [Emphasis in original.]

In *Chehalis*, as in the case at bar, the Indian band was operating as a retail dealer on a reserve. The court, after describing at pp. 766-7, the collection scheme under the *Gaoline Tax Act* and *Motor Fuel Tax Act* continued, at p. 767:

> We are not persuaded that the collection scheme in this case involves the levy of a tax upon the retail dealer. The parties knew that the tax was to be paid by the 'purchaser'. The Band did not object to tax being collected from it, as a retail dealer, but protested the imposition of tax on its members whom it alleged, were exempt from taxation. The scheme was a practical method of collecting a known amount, equal to the tax which must be paid by the ultimate purchaser, and remitted by the Band, as a retail dealer, to the Minister. There is no suggestion that the Minister receive more tax than what was paid by those who purchased gas from the Chehallis gas bar.
>
> *We conclude that the Band did not pay tax, but remitted an amount equal to what it collected, and cannot now take the position that the Band made an overpayment of tax in error. Thus, the Band is not entitled to relief under the refund provisions in the legislation.* (*Emphasis added*).

In *Chehalis*, this court drew a clear distinction between the liability of the ultimate consumer of gasoline products to pay tax under the *Gasoline Tax Act*, and the obligation of a retailer (whether Indian or non-Indian) to remit an amount equal to the tax to the wholesaler as part of the tax collection scheme. At p. 767, the court quoted from an Ontario Supreme Court decision which aptly described the 'scheme';

> *In 423092 Ontario Ltd. v. Minister of Revenue* ... Mr. Justice Barr referred to the [tobacco] tax collected under such a scheme as 'a direct tax which is collected indirectly'.

Simply stated, the retailer, when it remits an amount equal to the tax is not itself paying tax.

29 He then referred to the provisions of the *Tobacco Tax Act* and the *Motor Fuel Tax Act*. He continued at p. 131:

> The provisions of s. 87 of the *Indian Act* are not intended to arm Indians with any competitive advantage or special privileges in the market-place, but rather are intended to prevent interference with Indian property on a reserve.

30 He then referred to the passages by La Forest, J. in *Mitchell* which I have set out above. He distinguished the decision of Burchell, J. in *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)*, *supra*. He continued at p. 136:

> In my view, all three cases relied upon by Mr. Woodward are distinguishable. In the case at bar, the personal property in question, the tobacco products and motor fuel, was not used or consumed by the band in the sense that the tangible personal property that was held to be subject to taxation in *Cairns Construction Ltd. v. Government of Saskatchewan* (1960), 24 D.L.R. (2d) 1, [1960] S.C.R. 619, 35 W.W.R. 241 (component or prefabricated parts purchased for use or incorporation in the construction of houses to be offered for sale), and *Army & Navy Department Store Ltd. v. Com'r Social Services Tax* (1965), 54 D.L.R. (2d) 245, 53 W.W.R. 285 (B.C.C.A.) (labels showing the prices and sizes of goods to be sold purchased to be affixed by string, pin or gum to the goods before putting them on display) was used or consumed by the taxpayers in those two cases.
>
> On the contrary, rather than being used or consumed by the band they retained their identity and were resold at retail to the consumers of tobacco or the purchasers of motor fuel who acquired them, if they were non-Indians, subject to the payment on the applicable tax, or, if they were Indian, tax exempt. As Lambert J.A. pointed out in the course of the argument before us, the only people who are taxed are the ultimate consumers or purchasers. This is constitutionally valid direct taxation. There cannot be two taxes, and so the payment of an amount equivalent to the tax which must ultimately be paid cannot itself be a tax.
>
> The payment by the retailer of an amount equivalent to the tax is simply part of the collection scheme held to be valid by this court in *Chehalis*; it is not the payment of a tax and so s. 87 of the *Indian Act* can have no application.
>
> Mr. Woodward further submitted here, as he did in the court below, that the administration of the *Motor Fuel Tax Act* in the form of a quota cannot be upheld because there is nothing in the *Motor Fuel Tax Act* that authorizes its imposition.In acceding to this submission the learned trial judge relied on *Bomberry v. Ontario (Minister of Revenue)* (1989), 63 D.L.R. (4th) 526, [1989] 3 C.N.L.R. 27, 70 O.R. (2d) 662, (Div.

Ct.), and said, at p. 720:

> The *Motor Fuel Tax Act* and its regulations do not provide authority for the quota system imposed by the province upon the Tseshaht Market. Further, there is no provision in the *Motor Fuel Tax Act* or its regulations which could support a quota system as necessarily incidental to the powers under that statute and as such the province has no authority to institute such a scheme.

Mr. Pearlman submitted that the province requires no specific legislative authority to implement a quota system. The authority for the exemption of Indian consumers and purchasers of tobacco or motor fuel products from the payment of tax is s. 87 of the *Indian Act*. The quota systems are simply the means by which the province, as a matter of policy, delivers those exemptions in conformance with its constitutional obligation under s. 87 of the *Indian Act*.

In essence, all that the quota system does is unburden the retailers (both Indian and non-Indian) from the requirement to remit an amount equal to tax in circumstances where it is predicted and predictable that no tax will be payable by the ultimate consumers. In the absence of the quota system the carrying burden on the amount which the band would otherwise have to pay when purchasing these products from a wholesaler, an amount equivalent to the total tax assessable, and which, it would later seek to recover, in respect of sales to Indian customers, would be that much greater.

Unlike the *Bomberry* case, *supra*, where the Ontario court found that the quota system imposed significant restrictions on the capacity of Indian retail merchants to engage in business, the quota system in British Columbia imposes no restrictions beyond those necessary to ensure that the volume of 'tax exempt' products bears some realistic relationship to the legitimate demand for those products.

In the circumstances I am unable to accept the respondents' submission that the quota system requires more in the way of specific legislative authority.

In my view it is constitutionally valid and *intra vires* the provincial legislature. Even if I am wrong in this regard I am further of the view, although this point was not argued before us, that there is specific legislative authority for the quota system at least with respect to motor fuel.

Section 24(1) of the *Motor Fuel Tax Act* provides: 'The Director may, in writing, exempt a collector from the requirement to collect tax from a person who buys fuel for resale.' Surely, if a total exemption can be granted, a partial exemption can also be granted.

31 As I have noted the provisions of the *Tobacco Tax Act*, R.S.N.S., c. 470 are essentially the same as those in force in British Columbia. The following provisions are contained in the *Act*:

> 2 In this Act,
>
> (h) 'retail vendor' means a person who sells tobacco in the Province to a consumer at a retail sale;
>
> (l) 'vendor' means a retail vendor or a wholesale vendor;
>
> (m) 'wholesale vendor' means a person who sells tobacco in the Province for the purpose of resale and who purchases not less than ninety per cent of the person's tobacco products for resale from Canadian tobacco manufacturers.

5(1) Every consumer shall pay to Her Majesty in right of the Province a tax

(a) at the rate of six and eighttenths cents per cigarette for tobacco purchased in the form of a cigarette;

(b) at the rate of five and one-quarter cents per gram of tobacco for fine-cut tobacco;

(c) at the rate of six cents per gram of tobacco for tobacco in the form of pre-proportioned tobacco sticks; and

(d) at the rate of fifty per cent of the purchase price of tobacco for tobacco in any other form.

(2) For the purpose of this *Act*, every consumer of tobacco is deemed to have purchased the tobacco from a vendor at a retail sale in the Province and the tobacco is deemed to have passed at the sale.

6 Every person who brings tobacco into the Province or who receives delivery in the Province of tobacco acquired by that person for value for that person's own consumption in the Province, or for the consumption in the Province of other persons at that person's expense, or on behalf of, or as agent for, a principal who desires to acquire the tobacco for consumption in the Province by such principal or other persons at that person's expense, shall immediately

(a) report the matter in writing to the Commissioner;

(b) supply to the Commissioner the invoice and all other pertinent information as required by the Commissioner in respect of the consumption of the tobacco; and

(c) pay to Her Majesty in right of the Province the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province.

8(1) The tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as may be required by this Act or the regulations.

14(1) No person shall

(a) import or bring tobacco into the Province or sell, hold out for sale or agree to sell tobacco for resale in the Province unless that person holds a wholesale vendor's permit that is issued pursuant to this Act and that is in force;

(b) sell or agree to sell tobacco to a consumer, by any means, including vending machines, unless the person holds a registration certificate issued pursuant to the *Health Services Tax Act* and that is in force.

(2) No person who holds a wholesale vendor's permit shall sell, hold out for sale or agree to sell tobacco to a person who does not hold a permit referred to in subsection (1) and that is in force.

25(1) No person shall be in possession of tobacco

(a) on which tax has not been paid;

(b) not bearing a prescribed mark, or

> (c) not purchased from a retail vendor who holds a registration certificate issued pursuant to the *Health Services Tax Act* and is in force, where the person in possession is a consumer.
>
> (2) No retail vendor shall be in possession of tobacco other than tobacco purchased by the retail vendor from a wholesale vendor who, at the time of the purchase, held a wholesale vendor's permit that was issued pursuant to this Act and that, at the time of the purchase, was in force.
>
> (3) No person shall distribute, sell, barter or offer for sale or as a gift tobacco except as permitted by this Act or by the regulations.

32 Section 5(2) of the regulations provides as follows:

> (2) Every wholesale vendor shall collect and remit the tax imposed by the Act in the manner set out in Sections 8 and 11 thereof from each retail vendor to whom the wholesale vendor sells packages of cigarettes, cartons or cases that are marked or stamped with an indicium or cigars or other tobacco products.

33 Section 87 of the *Indian Act* exempts the personal property of an Indian on a reserve from taxation. The exemption extends to ownership, occupation, possession or use of personal property on a reserve. The cases make it clear that the exemption applies to personal property on a reserve. The cases make it clear that the exemption applies to personal property on a reserve and the sale of personal property to an Indian on a reserve. The *Tobacco Tax Act* can only apply to Indians on reserves to the extent that it does not conflict with the provisions of the *Indian Act* or any treaty. The general provisions of the *Tobacco Tax Act* which do not conflict with s. 87 apply to reserves and Indians. I agree with the reasoning in the *Tseshalt Indian Band* case and of Krever J. in *Re Hill*. Section 87 does not exempt Indians from prepaying the tax to wholesalers on purchases made off the reserve as contended by the intervenor. While s. 25(1)(a) of the *Act* may not apply to the possession of tobacco on a reserve, s. 25(2) is a provision of general application designed for the effective collection of the tax and applies to retail vendors on reserves. It follows therefore that the conviction on the second count is valid.

34 The third ground of appeal refers to the 1752 Treaty. Section 4 of the Treaty provides as follows:

> 4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and Fishing as usual and that if they shall think a Truck house needful at the River Chibenaccadle, or any other place of their resort they shall have the same built and proper Merchandize, lodged therein to be exchanged for what the Indians shall have to dispose of and that in the mean time, the Indians shall have free liberty to being to Sale to Halifax or any other settlement within this Province Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.

35 In *R. v. Simon* (1985) 71 N.S.R.(2d) 15 the Supreme Court of Canada held that Indian treaties should be given a fair, large and liberal construction in favour of the Indians. The appellant contends that the words in the Treaty giving Indians the liberty to dispose of their goods to their best advantage, frees them from any obligation to collect or remit sales taxes or comply with any of the provisions of the *Tobacco Tax Act* regarding licensing. The intervenor's essential position is stated in its factum as follows:

> Fundamental to the free liberty to sell to best advantage is the right to seek out a source of supply. A free trading system must include the right of retailers to choose a supplier on the basis of such factors as price,

brand, freshness, reliability, and delivery.

36 Apart from hunting rights which were considered in *R. v. Simon*, there is no authority interpreting article 4 of the Treaty. Obviously the Indians did not have access to the English settlement for the sale of their goods before the Treaty. That right was conferred. There is a reference to articles which the Indians would have for sale at that time. The Crown concedes that the article would have to be interpreted in the light of present day conditions. It is unnecessary to expand on the meaning of the article as in my view, I see nothing in the article which would exempt Indians from complying with the general provisions of the *Tobacco Tax Act* regarding the payment and collection of tax. I would dismiss this ground of appeal.

37 In the result I would dismiss the appellant's appeal from the conviction and sentence on the second count.

***Hart. J.A., Chipman, J.A.*:**

38 Concurred in.

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2000 CarswellOnt 540, [**2000**] O.J. No. 561

R. v. David

Her Majesty The Queen and Dwayne David

Ontario Superior Court of Justice

Rutherford J.

Judgment: February 21, 2000
Docket: Cornwall 2070-98

Counsel: *Diane M. Lahaie*, for Attorney General of Canada.

Dwayne David, for himself.

Subject: Criminal; Public; Tax — Miscellaneous

Criminal law --- Judicial interim release (bail) — Type of release orders — Breach of conditions — General

Accused was aboriginal person — Accused was charged with smuggling and sale of cigarettes — Accused breached recognizance and was detained in custody — Accused applied for release from custody by way of habeas corpus — Application dismissed — Cigarettes were manufactured in Canada for sale in United States — Cigarettes did not bear duty paid stamps — Accused sold cigarettes to non-aboriginal person — Accused did not present evidence with respect to aboriginal right to sell contraband tobacco — Accused did not have aboriginal sovereignty — Customs Act and Excise Act were valid legislation — Excise Act, R.S.C. 1985, c. E-14 — Customs Act, R.S.C. 1985, c. 1 (2nd Supp.).

Native law --- Constitutional issues — Taxation — Miscellaneous issues

Accused was aboriginal person — Accused was charged with smuggling and sale of cigarettes — Accused breached recognizance and was detained in custody — Accused applied for release from custody by way of habeas corpus — Application dismissed — Cigarettes were manufactured in Canada for sale in United States — Cigarettes did not bear duty paid stamps — Accused sold cigarettes to non-aboriginal person — Accused did not present evidence with respect to aboriginal right to sell contraband tobacco — Accused did not have aboriginal sovereignty — Customs Act and Excise Act were valid legislation — Excise Act, R.S.C. 1985, c. E-14 — Customs Act, R.S.C. 1985, c. 1 (2nd Supp.).

Cases considered by *Rutherford J.*:

Delgamuukw v. British Columbia, [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 B.C.A.C. 1, 49 W.A.C. 1, [1993] 5 C.N.L.R. 1 (B.C. C.A.) — referred to

Mabo v. Queensland (1992), 107 A.L.R. 1 (Australia H.C.) — referred to

Marshall v. Canada, *(*sub nom. *R. v. Marshall)* 177 D.L.R. (4th) 513, *(*sub nom. *R. v. Marshall)* 246 N.R. 83, *(*sub nom. *R. v. Marshall)* 138 C.C.C. (3d) 97, *(*sub nom. *R. v. Marshall)* [1999] 4 C.N.L.R. 161, *(*sub nom. *R. v. Marshall)* 178 N.S.R. (2d) 201, *(*sub nom. *R. v. Marshall)* 549 A.P.R. 201 (S.C.C.) — referred to

Mitchell v. Minister of National Revenue (1998), 233 N.R. 129, 167 D.L.R. (4th) 702, [1999] 1 F.C. 375, *(* sub nom. *Mitchell v. Canada (Minister of National Revenue))* [1999] 1 C.N.L.R. 112, 159 F.T.R. 158 (note) (Fed. C.A.) — referred to

Post Office v. Estuary Radio Ltd. (1967), [1968] 2 Q.B. 740, [1967] 1 W.L.R. 1396, [1967] 3 All E.R. 663 (Eng. C.A.) — referred to

R. v. Agawa, 28 O.A.C. 201, 43 C.C.C. (3d) 266, 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73, 53 D.L.R. (4th) 101 (Ont. C.A.) — referred to

R. v. Jacobs (1998), [1999] 3 C.N.L.R. 239 (B.C. S.C.) — referred to

R. v. Jones (1994), 36 C.R. (4th) 388, *(*sub nom. *R. v. Pamajewon)* 21 O.R. (3d) 385, *(*sub nom. *R. v. Pamajewon)* 25 C.R.R. (2d) 207, *(*sub nom. *R. v. Pamajewon)* [1995] 2 C.N.L.R. 188, *(*sub nom. *R. v. Pamajewon)* 77 O.A.C. 161, *(*sub nom. *R. v. Gardner)* 95 C.C.C. (3d) 97, *(*sub nom. *R. v. Gardner)* 120 D.L.R. (4th) 475 (Ont. C.A.) — referred to

R. v. McBride (1989), [1990] 2 C.N.L.R. 158 (Ont. Dist. Ct.) — considered

R. v. Poitras, [1994] 7 W.W.R. 686, 121 Sask. R. 95, [1994] 3 C.N.L.R. 157 (Sask. Q.B.) — referred to

R. v. Sparrow, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — applied

R. c. Vincent, 12 O.R. (3d) 397 (Fr.), 11 T.T.R. 210, 12 O.R. (3d) 427 (Eng.), [1993] 2 C.N.L.R. 165, 80 C.C.C. (3d) 256, 61 O.A.C. 371 (Ont. C.A.) — referred to

Sobhuza II v. Miller, [1926] A.C. 518, 95 L.J.P.C. 137, 135 L.T. 215, 42 T.L.R. 446 (Australia P.C.) — referred to

Statutes considered:

Canada Act, 1982, c. 11

Generally — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — considered

s. 25 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — considered

s. 35 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — considered

s. 8(1) — considered

s. 145 — referred to

s. 784(3) — referred to

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

Generally — considered

Excise Act, R.S.C. 1985, c. E-14

Generally — considered

Indian Act, R.S.C. 1927, c. 98

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

Royal Proclamation, 1763 (U.K.), reprinted R.S.C. 1985, App. II, No. 1

Generally — referred to

Treaties considered:

Albany Treaty of 1664

Generally — referred to

APPLICATION by accused for release from custody.

Rutherford J.:

Procedural Background

1 On Monday February 14, 2000, the trial of Dwayne David was scheduled to begin at Cornwall, Ontario. In early 1996 he was arrested and charged with a number of counts under the *Customs Act* and the *Excise Act* alleging the smuggling into Canada and sale of cigarettes, the packaging of which did not bear the required stamps and markings indicating that the necessary Canadian tax had been paid, and with possession of money that was the proceeds of *Excise Act* violations. He was released on a recognizance with conditions, including weekly reporting to the RCMP in Cornwall. After appearing in the Provincial Division of the Court on several occasions, he ceased reporting in late fall of 1996 and failed to appear in court as required on and after December 16, 1996. He was at large with a warrant outstanding for his arrest for some two years before being re-arrested. He has been in custody since then and was committed for trial in this Court on the original counts together with counts under section 145 of the *Criminal Code* for failing to report and failing to attend in court as required.

2 Mr. David chooses to represent himself and not to be assisted by a lawyer. He contends that he is a member of the Mohawk nation, the "Haundenosaunee" and as such, this Court does not have jurisdiction to try him on these charges. He filed an application in the nature of *habeas corpus* seeking to be released on the basis that the provisions of the statutes he is charged with violating do not apply to him and his actions and sought to have that application determined before entering upon the trial itself. No affidavit evidence was filed in support of the application. Concerned for the need for some factual foundation on which to understand the argument Mr. David wishes to make, I reserved hearing and determining the application until the case for the prosecution had been put in. Accordingly, I brought in the jury panel and commenced the trial.

3 Trial in this Court with a jury follows a "deemed election" on Mr. David's behalf for that mode of trial by his failure to make any election as to mode of trial when called upon to do so in the Provincial Division. Consistent with his "no jurisdiction" argument, he declines to participate in the procedure. When arraigned before jury selection, he entered no plea and I directed that pleas of "not guilty" be recorded. When jurors came to the book to be sworn, he signified neither approval nor did he challenge any one of them. He did not cross-examine any of the witnesses the prosecution called by the prosecutor, Ms. Lahaie.

The Factual Context

4 The factual background as shown by the evidence in the case for the Crown is as follows. Mr. David resides in a home on Cornwall Island. Cornwall Island lies in the St. Lawrence River immediately south of the City of Cornwall. The Island is in Stormont County in the East Judicial Region and is part of Akwesasne Indian Reserve No.59 in the Province of Ontario. A bridge connects the City of Cornwall to the Island and another bridge leads south from the Island across the St. Lawrence River and the international boundary, and into the United States of America. The territory into which that bridge leads is also lands reserved for Indians. A Canadian Customs and Immigration undertaking through which travelers must pass is situated on Cornwall Island between the two bridges. One can drive from Cornwall Island into Reserve lands in the USA and through that Reserve directly into the St. Regis Reserve lands in the Province of Quebec situate on the south side of the St. Lawrence River. All these contiguous Reserve lands are referred to generally as Akwesasne and occupied by members of the Mohawk nation. This unique geographical setting brings a multiplicity of jurisdictional powers and claims to power, municipal, Band-Council, provincial, State and federal to bear in one region.

5 The Ontario Provincial and Royal Canadian Mounted Police witnesses who testified for the Crown indicated that problems involving smuggling and selling of contraband liquor, tobacco products, firearms and illegal drugs had lead to a joint-forces Task Force approach to law enforcement in the area. The investigation that led to the charges in this case was undertaken on the basis of investigative information developed by the Task Force

leading to Mr. David and others becoming targets of "undercover" attempts to buy contraband, in order to verify who were participating in illegal importation and sale transactions.

6 On the 5th, 6th, 7th, 11th and 13th of July 1995, Detective Staff Sergeant Tom Girling of the Ontario Provincial Police, acting under cover as someone from up in the Huntsville area of Ontario looking for drugs and contraband cigarettes to supply a "dry" market in northern Ontario, went to Dwayne David's home on Cornwall Island. He was introduced initially to Mr. David by a mutual acquaintance, since deceased, who was acting as a paid police informant. On each occasion, Sergeant Girling bought and took away in his vehicle, cases of cigarettes. In all, he bought 38 cases, each one containing 50 cartons. Each carton contained 8 packages of 25 cigarettes. Sergeant Girling paid Mr. David a total of $ 20,870, in cash, for the cases of cigarettes. Except for 12 cases, the packaging indicates that the cigarettes were manufactured in Montreal for export and sale in the USA. They do not have the "duty paid" stamp required by the *Excise Act* for sale in Canada, and, indeed, are marked "Not For Sale In Canada". The Packages bear "Surgeon General's Warnings", presumably required by federal law in the USA. The remaining 12 cases, purchased on July 11, appear from their packaging to have been manufactured in the USA. They bear no *Excise Act* "duty paid" stamp.

7 It was clear from their discussions that Mr. David knew that in selling the cigarettes to Sergeant Girling, he was selling to a non-aboriginal who intended, in turn, to re-sell the product off Reserve lands in other parts of the Province. While he was at the premises, Sergeant Girling observed other buyers purchasing and taking away quantities of cases of cigarettes. Mr. David showed him a price list that he had received from his supplier showing prices, according to brand, that had apparently been recently increased. Each occasion on which Sergeant Girling bought cigarettes, the cases were brought up from a storage facility down a trail leading to the St. Lawrence River about 400 yards behind Mr. David's house and loading garage. From the garage where he waited while the cases were brought up for loading, Sergeant Girling could see houses on the USA mainland on the other side of the River which he estimated to be about $^1/_4$ of a mile wide at that point.

8 Absent any additional consideration, there is sufficient evidence supporting all the counts in the indictment to warrant calling upon the accused for any defence evidence he might wish to call and then instructing the jury accordingly and putting the case in its hands. Prior to proceeding to put Mr. David to the election, however, I adjourned the trial, sent the jury home, and invited Mr. David to present his submissions on the application for relief by way of *habeas corpus*.

Mr. David's Argument

9 Mr. David made an oral presentation to the Court and filed a number of documents to help illustrate his position, including copies of The Royal Proclamation of 1763 and of a compilation of "The Covenants that are known to exist with the People of the Long House". He read excerpts from submissions made on behalf of the Six Nations Council to the Special Joint Committee of the Senate And The House of Commons which was examining and considering the *Indian Act* at its session on May 22, 1947.

10 This verbatim portion of Mr. David's presentation captures the essence his position:

> I understand that this court has criminal jurisdiction to try indictable offences such as the charges brought before this court today. I also understand that the court has jurisdiction to convict and sentence persons who are found guilty of committing offences such as these, but I would also like the court to understand that I as a Kanienkeha:ka or Mohawk have laws, the Keyanerekowa. The common English equivalent of Keyanerekowa is The Great Law and Path of Peace. It is the constitution and fundamental law of the Kanien-

keha:ka and other Onkwehonwe or Turtle Island aboriginal peoples. My name is Roriwiio, aka: Howard Dwayne David of the clan known as Rotiskarewaka with the symbol of the bear. The Mohawk are of the Haundenosaunee, people of the Longhouse, Keepers of the Eastern Door. The Longhouse, both physical and metaphorical, is the traditional seat of spiritual beliefs and values and of Legal principles of the Kanienkeha:ka. The lives of people of the Longhouse are governed in all matters of law, policy and spirit by their traditional law, Keyanerekowa. I make a motion to the court to be tried by the Kanienkeha:ka Nation, I believe this is a matter of sovereignty and jurisdiction. There are provisions and protocols that are established in the Albany Treaty of 1664, otherwise referred to as the Two Row Wampum and the Silver Covenant Chain Treaties, The Royal Proclamation of 1763, as further defined in the Northwest Territories Act of 1982, and subsequent legislation and common law, I would like to further state to the Court that I am not Indian in terms of the Indian Act, but am "others" as protected in the Constitution Act of 1982. Not to say that this is the basis of my argument, but to only use the Constitution Act of 1982 to help the Court to understand the definition of "Indian", and become aware of who I rightfully am, an Onkwehonwe. Further, that I am under the Keyanerekowa, The Great Law and Path of Peace which explicitly forbids our submission to any type of foreign law or authority. The terms of the Treaty of Albany, the Two Row Wampum calls for the extradition of "Indians" who may be charged before Canadian/British Law, to be extradited to his/her own people. With respect to my situation, with the subject of these proceedings in the Court. With all due respect to your Honour and the Court I am prepared and willing to resolve these issues under Keyanerekowa. If requested by my elders to subject myself to Mohawk legal process in respect to the conduct that is the subject of the complaints or charges presently before Ontario Court. I am willing to do so and would honour and abide by the determinations and instructions of my people. However, until such time as new nation to nation treaties are developed that bind the Kanienkeha:ka as Nation and People, I take the position that I cannot subject myself to foreign legal process, for to do so would be going against the very law by which I live by: The Great Law.

11 Mr. David made no attempt to carve out in evidentiary terms, a right to do what he is charged with doing, on the basis of some specified treaty or aboriginal right recognized and protected in Canadian domestic law. Unlike the fishing or hunting rights cases such as *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) or the more recent *Marshall v. Canada*, (S.C.C., September 17, 1999) [reported (1999), 246 N.R. 83 (S.C.C.)], or indeed the limited duty-free entry claimed in *Mitchell v. Minister of National Revenue* (1998), 167 D.L.R. (4th) 702 (Fed. C.A.), it would seem quite untenable in the circumstances of this case to torture some historical provision or practice into a justification for Mr. David being a domestic outlet and supply depot for high volume contraband that both evaded the legal revenue and flooded the open market at a cost base with which honest retailers could not compete. Mr. David advanced neither claim nor evidence on which to base any assertion of a right recognized or affirmed under section 35 of the *Constitution Act, 1982*. He does make reference to a denial of his "...constitutional right under section 25..." of the *Charter* in his written application. That provision appears designed to shield treaty and other aboriginal rights from interference from other Charter provisions [See: *R. v. Agawa* (1988), 43 C.C.C. (3d) 266 (Ont. C.A.) at 272] and I was unable to understand in oral submissions, just how any issue in relation to it arose.

12 His contention is that he and his forebears were neither subjugated nor did they submit to being governed by Great Britain or by Canadian authority and that this Court lacks jurisdiction to enforce the laws of Canada invoked here, against him. The regulation of his behavior, he says, flows from the authority of Mohawk law and custom. He asserts that relations between Great Britain and subsequently Canada on the one hand, and the Mohawk nation and its confederational affiliates on the other, had always been worked out on the basis of entente

between "sovereign and sovereign" and that irritants such as the contraband problem, of which this case is but a small example, must be resolved in a similar fashion.

13 In his written application, brought in the form of *habeas corpus*, Mr. David seeks release from "unconstitutional imprisonment". Ms. Lahaie advised me that some months ago a similar application by Mr. David was dismissed in this Court at Napanee by Hurley J. She brought my attention to the prohibition against a subsequent, similar application for *habeas corpus* on the same evidence, found in subsection 784(3) of the *Criminal Code*. No Court file or copy of any documentation or decision in the previous application was produced and I did not, therefore, feel compelled to invoke that provision. In any case, while the form of application used by Mr. David may be *habeas corpus*, Ms. Lahaie took no objection to my dealing with it as a motion to quash proceedings on grounds that the Court lacked jurisdiction. Mr. David agreed that such was his intent.

Decision on Jurisdiction

14 Mr. David's claim, essentially a claim for full aboriginal Mohawk sovereignty, is not a novel one. It is a proposition that has been considered by Canadian courts on numerous occasions. It has never been accepted and I am certainly bound to reject it as well. Canadian sovereignty is a legal reality recognized by the "law of nations". Claims such as has been advanced in this case by Mr. David do not make that reality less real. Perhaps the judicial pronouncements of this reality have not always been clear enough. Aboriginal rights judgments in recent years have more often than not been lengthy dissertations attempting to explain how Canada's constitutional legal framework endeavours to achieve an inter-societal accommodation of long-standing practices to create a bridge between dissimilar cultures, thus permitting their just co-existence. I shall try to keep this decision brief and clear. It is nothing new. It is a mere reflection, a re-iteration of statements in courts of higher authority.

15 The certain reality of Canadian sovereignty, which has as its root the sovereignty of the British Crown, was confirmed by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) at p. 1103, in these terms:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, ***there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.*** [Emphasis added]

The sovereignty of the Crown in right of Canada and the applicability of federal legislation throughout the country has been re-iterated as well by provincial Courts of Appeal. [see: *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C. C.A.) per Wallace J.A. at p. 565: and *R. v. Jones* (1994), 120 D.L.R. (4th) 475 (Ont. C.A.)]

16 Through the *Criminal Code*, both for its substantive provisions as well as as a procedural vehicle for the enforcement of other federal enactments, Parliament has asserted jurisdiction throughout Canada.

> 8. (1) The provisions of this Act apply thoughout Canada...

Cornwall Island is part of Canada. Whether any part of Canada came under British control by conquest, was ceded by treaty, or was simply annexed in a peaceful fashion, the whole country became a "settled colony" and through a constitutional metamorphosis capped by the enactment of the *Canada Act, 1982* in the U.K. Parliament and *The Constitution Act, 1982* in Canada's Parliament, Canada became a sovereign nation with plenary

authority to exercise its legislative jurisdiction under its constitution and govern throughout its territory.

17 Even if there existed some basis on which to challenge the acquisition of sovereign jurisdiction by Canada, the domestic or "municipal" courts of Canada lack competence to question it. Wallace J.A. in *Delgamuukw v. British Columbia* [*supra*] makes that point, relying upon *Sobhuza II v. Miller*, [1926] A.C. 518 (Australia P.C.) and *Mabo v. Queensland* (1992), 107 A.L.R. 1 (Australia H.C.). Turned another way, this proposition is sometimes put positively by saying that the claim of the executive as a matter of territorial sovereignty, is binding and conclusive. See: *Post Office v. Estuary Radio Ltd.*, [1967] 3 All E.R. 663 (Eng. C.A.).

18 While the laws of Canada must be shaped to recognize the rights and freedoms guaranteed in the *Constitution Act, 1982*, such shaping and moulding by the integrated actions of the legislative and judicial branches of government is, nonetheless, the exercise of Canada's sovereignty. It seems probable that some observers have misconstrued this shaping of certain laws to accord with treaty or other aboriginal rights, particularly where activity is governed by variable regulation, as deference on the part of the government of Canada to another sovereign authority. To construe the process that way is wholly erroneous and has been the root of much trouble and frustration.

19 The right to control who and what crosses its borders and to raise a revenue on which to govern are fundamental features of a sovereign nation. There has been no decision that I have been referred to in which it has been held that native or aboriginal persons are immune to or exempt from the provisions of the statutes in play in this case. In *R. v. McBride* (1989), [1990] 2 C.N.L.R. 158 (Ont. Dist. Ct.), Forget D.C.J. convicted the accused who claimed to be "a native North American" for violating the *Customs Act* when he came off Cornwall Island into the City of Cornwall in possession of cigarettes and tobacco on which no duty had been paid. Mr. Justice Forget held that the *Customs Act* was valid legislation that bound the accused. A similar conviction of a member of the Lorette Huron Band was upheld by the Ontario Court of Appeal in *R. c. Vincent* (1993), 12 O.R. (3d) 427 (Eng.) (Ont. C.A.). The provisions of the *Customs Act* and the *Excise Act* were held applicable to the native or aboriginal accused notwithstanding their defence claims on treaty and aboriginal rights grounds in *R. v. Poitras*, [1994] 7 W.W.R. 686 (Sask. Q.B.) and *R. v. Jacobs* (1998), [1999] 3 C.N.L.R. 239 (B.C. S.C.).

19 There being no tenable claim to treaty or other aboriginal right to do, on Cornwall Island, what the *Customs Act*, the *Excise Act* and the *Criminal Code* have, in this case prohibited, and there being no other basis on which to find that the laws of Canada are not fully applicable to the actions of the accused as revealed in the evidence thus far, this Court has full jurisdiction to embark upon and complete the trial of the charges brought in the indictment against Dwayne David.

20 The application brought by him by way of *habeas corpus* for release from custody and from the jurisdiction of this Court is dismissed.

Application dismissed.

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2008 CarswellNS 47, **2008 NSPC 3**, [**2008**] 4 C.T.C. 185, 843 A.P.R. 62, 263 N.S.R. (2d) 62

R. v. Mason

Her Majesty the Queen v. Christine Mason

Nova Scotia Provincial Court

C.H. Williams Prov. J.

Judgment: January 25, 2008
Docket: 1499704, 1499705, 1499706, 1499707, 1499708, 1499709, 1499710, 1499711, 1499712, 1499713, 1499714, 1499715, 1499716, 1499717, 1499719, 1499720, 1499721, 1499722, 1499723, 1499724, 1534603, 1534604, 1534605, 1575408, 1575409, 1575410, 1575411, 1575412, 1575413, 1575414, 1575415, 1575416, 1575417, 1575418, 1575419, 1575420, 1575421, 1575422, 1575423, 1664685, 1664686, 1664687, 1664688, 1664689, 1664690, 1664691, 1664692, 1664693, 1664694, 1664695, 1664696, 1664697, 1664698, 1664699, 1664700

Counsel: J.E. Clarke for Crown

B.A. Jones for Defendant

Subject: Public; Property; Provincial Tax; Tax — Miscellaneous

Aboriginal law --- Reserves and real property — "Reserve land"

Accused was "status Indian" as defined in Indian Act — Accused owned convenience store that had two locations, on on reserve land, other on federal Crown land — Federal Crown land on which accused's convenience store was located was bought in 1965 by Department of Indian and Northern Affairs Canada ("INAC") to provide housing assistance to Indians who were ready and capable of relocating from reserves to urban areas — Land remained under administration of INAC for benefit of First Nations people in Nova Scotia and was never set aside as First Nation reserve — Accused obtained "designated retail vendor's licence" to sell quota tobacco products on reserve, but only "retail vendor" at other store — Accused operated store on non-reserve land as if it was on reserve land — Authorities informed accused that land was not on reserve and was subject to federal, provincial and municipal statutes, regulations, orders or bylaws in force — Accused was charged with multiple counts of possession and/or sale of unmarked and tax-exempt tobacco products on Crown land, contrary to provisions of Revenue Act and Revenue Act Regulations — Accused convicted — Land was not reserve and therefore, accused's convenience store was not located on reserve land as defined in Act — Land was not acquired to be added to any band reserve lands and neither was it acquired for any specific band — Land was meant to provide any member of First Nation Band in Maritimes who lived on reserve and who wanted to live closer to

centre of employment a place to do so on this tract of land — When land was acquired it was never contemplated that it was serve land but rather wanted it as Crown land that would be available for establishment of First Nation families from any part of region to its best employment area — INAC neither ceded control of nor did it recognize any band as competent authority on land.

Tax --- Provincial taxation — Nova Scotia — Tobacco tax

Accused was "status Indian" as defined in Indian Act ("IA") — Accused owned convenience store that had two locations, one on reserve, other on federal Crown land — Accused obtained "designated retail vendor's licence" to sell quota tobacco products on reserve, but only "retail vendor" at other store — Accused operated store on non-reserve land as if it was on reserve land — Authorities informed accused that land was not on reserve and was subject to federal, provincial and municipal statutes, regulations, orders or bylaws in force — Accused was charged with multiple counts of possession and/or sale of unmarked and tax-exempt tobacco products on Crown land, contrary to provisions of Revenue Act ("RA") and Revenue Act Regulations ("RAR") — Accused convicted — Accused possessed and sold unmarked and tax-exempted tobacco products contrary to ss. 39(3), 39(1)(a), 39(1)(b) of RA and s. 76(14) of RAR — Convenience store was located on land that was not reserve land as defined in IA — Whether or not store was located on reserve, law required that retail vendor of tobacco products must comply with provisions of RA and RAR — By operating store on non-reserve land, and by selling in commercial mainstream to non-First Nation consumers, tobacco products on which tax was not paid and which did not bear prescribed mark, accused was "retail vendor" within meaning of RA and RAR and was liable to collect and remit tax owed by those consumers — Retail vendor's licence did not permit accused to possess, or sell unmarked or tax-exempt products at convenience store which she did on several occasions — Accused, as reasonable person in her position and possessed with all information that she had, knew or ought to have known what was applicable law and her corresponding legal responsibilities — She acted unreasonably and chose to ignore law that she knew or reasonable ought to have known that she had to obey — Accused did not present any evidence to meet requisite applicable elements of burden of proof for it to apply defence of officially induced er- ror.

Tax --- First Nations taxation — Liability of aboriginal persons for provincial or territorial tax

Accused was "status Indian" as defined in Indian Act ("IA") — Accused owned convenience store that had two locations, one on reserve, other on federal Crown land — Accused obtained "designated retail vendor's licence" to sell quota tobacco products on reserve, but only "retail vendor" at other store — Accused operated store on non-reserve land as if it was on reserve land — Authorities informed accused that land was not on reserve and was subject to federal, provincial and municipal statutes, regulations, orders or bylaws in force — Accused was charged with multiple counts of possession and/or sale of unmarked and tax-exempt tobacco products on Crown land, contrary to provisions of Revenue Act ("RA") and Revenue Act Regulations ("RAR") — Accused convicted — Accused possessed and sold unmarked and tax-exempted tobacco products contrary to ss. 39(3), 39(1)(a), 39(1)(b) of RA and s. 76(14) of RAR — Convenience store was located on land that was not reserve land as defined in IA — Whether or not store was located on reserve, law required that retail vendor of tobacco products must comply with provisions of RA and RAR — By operating store on non-reserve land, and by selling in commercial mainstream to non-First Nation consumers, tobacco products on which tax was not paid and which did not bear prescribed mark, accused was "retail vendor" within meaning of RA and RAR and was liable to collect and remit tax owed by those consumers — Retail vendor's licence did not permit accused to possess, or sell unmarked or tax-exempt products at convenience store which she did on several occasions — Accused, as reasonable person in her position and possessed with all information that she had, knew or ought to have known

what was applicable law and her corresponding legal responsibilities — She acted unreasonably and chose to ignore law that she knew or reasonable ought to have known that she had to obey — Accused did not present any evidence to meet requisite applicable elements of burden of proof for it to apply defence of officially induced er- ror.

Cases considered by *C.H. Williams Prov. J.*:

Jeddore v. R. (2003), 2003 CarswellNat 2528, 2003 FCA 323, 310 N.R. 305, 2003 CAF 323, 2003 CarswellNat 5025, 2004 D.T.C. 6387, 231 D.L.R. (4th) 224, [2004] 1 C.T.C. 268, (sub nom. *Jeddore v. Canada)* [2004] 1 C.N.L.R. 131 (F.C.A.) — considered

Lévis (Ville) c. Tétreault (2006), 36 C.R. (6th) 215, 2006 CarswellQue 2911, 2006 CarswellQue 2912, 2006 SCC 12, 31 M.V.R. (5th) 1, (sub nom. *Lévis (City) v. Tétreault)* 346 N.R. 331, 207 C.C.C. (3d) 1, [2006] 1 S.C.R. 420, (sub nom. *Lévis (City) v. Trétreault)* 266 D.L.R. (4th) 165 (S.C.C.) — considered

Montana Band v. R. (2006), 2006 CarswellNat 465, (sub nom. *Montana Band v. Canada)* [2006] 3 C.N.L.R. 70, 2006 FC 261, (sub nom. *Montana Indian Band v. Canada)* 287 F.T.R. 159 (Eng.) (F.C.) — referred to

R. v. Catagas (1977), [1978] 1 W.W.R. 282, 9 C.N.L.C. 476, 1977 CarswellMan 110, 7 C.E.L.R. 49 (note), 2 C.R. (3d) 328, 38 C.C.C. (2d) 296, 81 D.L.R. (3d) 396 (Man. C.A.) — considered

R. v. Johnson (1993), (sub nom. *Johnson v. R.)* 1 G.T.C. 6150, 120 N.S.R. (2d) 414, 332 A.P.R. 414, [1994] 1 C.N.L.R. 129, 1993 CarswellNS 294 (N.S. C.A.) — considered

R. v. Jorgensen (1995), 1995 CarswellOnt 1185, [1995] 4 S.C.R. 55, 1995 CarswellOnt 985, 43 C.R. (4th) 137, 102 C.C.C. (3d) 97, 129 D.L.R. (4th) 510, 189 N.R. 1, 87 O.A.C. 1, 32 C.R.R. (2d) 189, (sub nom. *R. v. Hawkins)* 25 O.R. (3d) 824 (S.C.C.) — considered

R. v. Loomis (2006), 772 A.P.R. 90, 243 N.S.R. (2d) 90, 2006 CarswellNS 144, 2006 NSPC 14 (N.S. Prov. Ct.) — considered

R. v. MacDougall (1982), 1982 CarswellNS 24, [1982] 2 S.C.R. 605, 54 N.S.R. (2d) 562, 112 A.P.R. 562, 18 M.V.R. 180, 31 C.R. (3d) 1, 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216, 44 N.R. 560, 1982 CarswellNS 112 (S.C.C.) — considered

R. v. Murdock (1996), 38 C.R.R. (2d) 15, 154 N.S.R. (2d) 1, 452 A.P.R. 1, [1997] 2 C.N.L.R. 103, 1996 CarswellNS 309 (N.S. C.A.) — considered

R. v. Pugliese (1992), 71 C.C.C. (3d) 295, 8 O.R. (3d) 259, 52 O.A.C. 280, 1992 CarswellOnt 1461 (Ont. C.A.) — referred to

R. v. Sault Ste. Marie (City) (1978), 1978 CarswellOnt 24, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 1978 CarswellOnt 594 (S.C.C.) — considered

R. v. Shiner (2007), 2007 CarswellNfld 101, 264 Nfld. & P.E.I.R. 186, 801 A.P.R. 186, 46 C.R. (6th) 268, 2007 NLCA 18, 29 C.E.L.R. (3d) 157 (N.L. C.A.) — considered

Ross River Dena Council Band v. Canada (2002), 2002 SCC 54, 2002 CarswellYukon 58, 2002 CarswellY-

ukon 59, 2002 D.T.C. 7079 (En.), 2002 D.T.C. 7093 (Fr.), 213 D.L.R. (4th) 193, 3 B.C.L.R. (4th) 201, [2002] 3 C.N.L.R. 229, [2002] 9 W.W.R. 391, 289 N.R. 233, 168 B.C.A.C. 1, 275 W.A.C. 1, [2002] 2 S.C.R. 816 (S.C.C.) — considered

Union of New Brunswick Indians v. New Brunswick (Minister of Finance) (1998), 1998 CarswellNB 179, 1998 CarswellNB 180, [1998] 3 C.N.L.R. 295, 227 N.R. 92, 200 N.B.R. (2d) 201, 512 A.P.R. 201, [1998] 1 S.C.R. 1161, (sub nom. *Minister of Finance (New Brunswick) v. Union of New Brunswick Indians)* 98 G.T.C. 6247, 161 D.L.R. (4th) 193 (S.C.C.) — considered

Union of Nova Scotia Indians v. Nova Scotia (Attorney General) (1998), 170 N.S.R. (2d) 36, 515 A.P.R. 36, 1998 CarswellNS 298, [1999] 1 C.N.L.R. 277, 165 D.L.R. (4th) 126 (N.S. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 8 — referred to

s. 15 — referred to

s. 24 — referred to

s. 25 — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 — considered

s. 92 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 35 — considered

s. 35(1) — referred to

s. 91 — considered

s. 92 — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 19 — considered

Health Services Tax Act, R.S.N.S. 1989, c. 198

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 2(1) "Indian" — referred to

s. 2(1) "reserve" — considered

s. 6(1) — referred to

s. 87 — considered

s. 87(1) — considered

s. 88 — considered

Revenue Act, S.N.S. 1995-96, c. 17

Generally — referred to

s. 12 — referred to

s. 27 — referred to

s. 31C — referred to

s. 39 — referred to

s. 39(1)(a) — referred to

s. 39(1)(b) — referred to

s. 39(3) — considered

s. 43 — referred to

s. 92 — referred to

Summary Proceedings Act, R.S.N.S. 1989, c. 450

s. 7(1) — considered

Tobacco Tax Act, R.S.N.S. 1989, c. 470

Generally — referred to

Pt. III — referred to

s. 32(c) "permit" — considered

s. 32(e) "retail vendor" — considered

Regulations considered:

Revenue Act, S.N.S. 1995-96, c. 17

Revenue Act Regulations, N.S. Reg. 63/96

Generally — referred to

s. 39 — considered

s. 39(3) — referred to

s. 43 — referred to

s. 76 — referred to

s. 76(1)(d) "designated retail vendor" — considered

s. 76(13)(a) — considered

s. 76(14) — considered

s. 92 — referred to

TRIAL of accused charged with multiple counts of possession and/or sale of unmarked and tax-exempt tobacco products on Crown land.

***C.H. Williams Prov. J.*:**

Introduction

1 The accused, Christine Mason, is a "status Indian" as defined in the *Indian Act*, R.S.C. 1985, c. I-5, s.6(1) (as amended). She is also a member of the Shubenacadie First Nation Band, Indian Brook Reserve, in the Province of Nova Scotia. Likewise, she is the owner/proprietor of a retail commercial enterprise called "Chrissy's Trading Post" that has two locations, one of which is on irrefutable reserve land and the other on federal Crown land.

2 The Compliance Branch of the Department of Service Nova Scotia and Municipal Relations has charged her with multiple counts of possession and/or sale of unmarked and tax-exempt tobacco products on the Crown land, contrary to the provisions of the *Revenue Act* and its *Regulations*. The accused argues that she ought to be absolved of any penalties as she reasonably believed that her activities were sanctioned not only by her Band Council but also were condoned by government officials thus creating the result of an officially induced error.

Background

3 In this Court's opinion, in order to determine her culpability, it is necessary to first establish, from the many bureaucratic attempts to ameliorate an intractable problem and the corresponding reactions, as presented by the parties, a bridgehead that, in a rational and coherent manner, would allow the Court to assess and evaluate the relevant chronological historical documentary facts and incidents for their efficaciousness. This approach would also allow the Court to view objectively the many issues that have been raised with highly emotive undercurrents.

4 The genesis of this perceived impasse took roots in 1965. Then, a Treasury Board Minute, dated November 25, 1965, authorized and approved the purchase by the Department of Citizen and Immigration, now the Department of Indian and Northern Affairs Canada, herein after referred to as "INAC," from Crown Assets Disposal Corporation, a tract of land comprising one hundred and fifty-six acres, more or less, that was surplus and owned by the Department of National Defence, known as Wallace Hill and located on the Hammond Plains Road in the Halifax Regional Municipality.

5 The acquisition of the land was to allow INAC "to provide housing assistance to Indians who are ready and capable of relocating from Reserves to an urban area." Additionally, the Minute specified that "the land would not be made an Indian Reserve but assistance would be given to Indians to establish homes . . ." It was also to provide a base for economic activities and a site for housing and housing financial assistance for the relocation of Aboriginal peoples from reserves anywhere in the Maritime Region to a location closer to the centre of employment and employment opportunities. (Exhibit C2, Tabs A and B).

6 Of particular interest, however, is the motion of the Union of Nova Scotia Indians, dated November 29, 1977, requesting that the land be made a reserve to "be held in common by all the Mic Mac Bands in the Province of Nova Scotia." (Exhibit D 49). However, because of the rationale for the land acquisition and the affiliated practical administrative difficulties, INAC, by letter dated January 18, 1978, did not approve this motion. Similarly, by a separate letter dated May 11, 1979, it also rejected a motion for the exclusive use of the land by the Shubenacadie First Nation Band. (See: Exhibit C2, Tabs C and D.) Additionally, by letter dated April 21, 1986, INAC, through its Deputy Minister, advised the then Chief of the Shubenacadie Band, at Exhibit C2, Tab H, that:

> Since your Band has a suitable land base, the proposal to establish the Wallace Hill property as reserve does not address the criteria contained in Departmental policy on additions to reserves . . . I cannot see how we can proceed with a new reserve at Wallace Hill now.

As a result, the land remains under the administration of INAC for the benefit of the First Nations people in Nova Scotia and, although requested, it has never been set aside as a First Nation Reserve by an Order- in-Council.

7 In any event, when the accused lived on the Indian Brook Reserve she operated a retail store called "Chrissy's Trading Post" and was authorized by her Band Council to sell "quota cigarettes." She, however, was encouraged and supported by her Band Council to relocate to Wallace Hill and she did so with her family. On relocating to Wallace Hill, she opened, in March 1995, another retail store that carried the same name of "Chrissy's Trading Post." As a result, she now owns and operates two commercial enterprises, both selling, among other commodities, tobacco products. One store is located physically on the Indian Brook Reserve and the other at Wallace Hill where she sells tobacco products to all and every consumer.

8 Even so, on May 16, 1995, in her initial application for a Tobacco Retail Vendor's Permit for the Wallace

Hill location, she had agreed to accept the responsibilities set out in the *Tobacco Tax Act*, (the predecessor legislation to the *Revenue Act*) then in force. (Exhibit C6, Tab D). She only received a Tobacco Tax Act — Retail Vendor's registration No. R13-08-49391-3, issued May 17, 1995 for the place of business at Wallace Hill. (Exhibit C6, Tab G).

9 Nonetheless, under the provisions of the *Revenue Act*, Stats. N.S. 1995-96, c. 17, as amended, [the "*Revenue Act*"] and its *Regulations*, that then came into force and as authorized by her Band Council Resolutions, the accused is licenced by the Province as a "designated retail vendor" of cigarettes only on the Indian Brook Reserve. (See for example, Exhibit C16). At the Wallace Hill store her retail licence indicated that she was only a "retail vendor" of cigarettes. (See for example; Exhibit C6, Tab J).

10 All the same, the question on what to do about the status of Wallace Hill has been for years an ongoing vexing issue. First Nations Bands and in particular the Shubenacadie First Nation Band wanted to have the land set aside as a reserve and become an integral part of its land base. At one point in time, July 19, 1994, INAC offered, as an alternative to reserve status, to transfer the land to the Shubenacadie First Nation for it to hold title in fee simple. (Exhibit C2, Tabs K and L.) It would appear that the Band rejected this proposal. Furthermore, there were proposals and correspondences that reviewed the possibility of designating the land a reserve and, in 2005, these discussions led to an approval in principle. (See for example: Exhibit C, Tabs G to N, inclusive.)

11 Meanwhile, the persisting operation of "Chrissy's Trading Post" at Wallace Hill, as a retail vendor of tobacco products, became problematical as the accused was operating the commercial enterprise under the same observances as if it were actually and physically located on Reserve land. Upon the matter coming to the attention of INAC, it notified the accused by letter dated August 24,1995, that the land was not subject to the *Indian Act*. The letter also informed her that "this land, its occupants and any operation thereon are subject to any and all applicable federal, provincial and municipal statutes, regulations, orders or bylaws now in force." (Exhibit C2, Tab P).

12 Similarly, on August 30, 1995, the Nova Scotia Department of Finance, Provincial Tax Commission Audit and Compliance Division, wrote to the accused informing her that as Wallace Hill was not a reserve they were concerned about her noncompliance with the existing provincial laws that required her to collect and to remit taxes due and collectable on her sale of tobacco products at Wallace Hill. They also advised her that they expected her immediate compliance and that her failure to do so may result in them pursuing "all available recourse permitted by legislation." (Exhibit C6, Tab F).

13 These communications created some confusion in the mind of the accused concerning the actual status and use of the land. From her perspective and on advice, the land was "set aside for the use and benefit of Indians" and, as Federal bureaucrats apparently acquiesced in the improvement and maintenance of the land for her occupancy and, Provincial bureaucrats were aware of the commercial enterprise, without any intervention, for all practical intent and purposes, if not a *de jure* reserve it was treated as if it were, in fact, a reserve.

14 As a result, on September 13, 1995, senior Federal and Provincial bureaucrats and representatives from the Union of Nova Scotia Indians that later would act as an established tripartite forum or negotiating forum, the accused and her lawyer, met to discuss the apparent impasse concerning perceptions of the status of the land. From the perspective of the Aboriginal Affairs, Executive Branch, of the government of the day, the high priority from its inauguration in 1993, was to improve the economic opportunities for Nova Scotia's First Nations and, it adopted the philosophical approach of "negotiation not litigation." Consequently, Provincial departments'

policies such as those involving tobacco seizures, investigation and enforcement actions *on reserves* were co-ordinated and modified so as not to undermine this new approach. As well, the government of the day, had issued an administrative directive to its enforcement personnel not to conduct seizures of tobacco products on land occupied by First Nations members whether or not it had the legal status of a reserve.

15 However, the outcome of the meeting was at best ambivalent and, as a result, it was open to several interpretations depending on one's point of view. From the Aboriginal Affairs perspective, although the Tax Commission did not like the idea of "quota cigarettes" being sold to "non-natives" without the taxes collected, it would not pursue charges against the accused as long as there were ongoing negotiations on the larger issues or until she was told otherwise. Chrissy's Trading Post was a separate side issue that could have a spill over effect on the larger issues so it was set aside pending the resolution of the bigger ones.

16 From INAC's perspective the land was not a reserve as there was no Order-in-Council creating that designation. It, however, acknowledged that Wallace Hill was an anomaly as, in general, INAC did not hold land that was not reserve land. Also, expenditures on behalf of residents on the property, although also anomalous, were permitted and the long term plan was to continue negotiations with the Shubenacadie Band with a view of the land becoming an addition to their reserve lands. Even so, an Order-in-Council was required for the land to become reserve land.

17 Nevertheless, it was the accused perspective that, because of her unique situation, there was a decision and an agreement, until another similar meeting was convened, to treat her as if "it were a reserve" and that she could continue to sell quota cigarettes from that location. In short, there was no change in the status quo concerning her sale of tobacco products. Subsequent and immediate lack of compliance enforcement at Wallace Hill reinforced this viewpoint.

18 Even so, the day after the meeting, Aboriginal Affairs, as a follow-up, offered the accused, through her lawyer, to treat her business located at Wallace Hill in the same manner as if it were located on a *de jure* reserve but not that Wallace Hill itself would be treated as if it were a reserve. In short, she could "sell quota cigarettes [if approved by her Band] to non-native purchasers" and collect the taxes from them. (See also Exhibit D 52). Put another way, her business at Wallace Hill would be treated as if she were on a reserve and enforcement would be in the same manner as with other aboriginal retailers. This offer, however, was rejected by the accused through her lawyer. But, there was also an indication by Aboriginal Affairs that it would still move forward with the moratorium. Even so, there is nothing in writing signed by anyone.

19 Subsequent to all this, on December 11, 1997, the authorities seized from the accused tobacco products that were being transported to Wallace Hill and they charged her, along with others, under the provisions of the *Revenue Act*. However, further to a pre-trial conference, the parties agreed to a resolution of the issues and the charges against the accused were dropped. Significantly, a pivotal stipulation of the agreement to discontinue the prosecution against her and to which the accused signed on September 23, 1998, signifying her understanding of and her accord with the settlement resolution, was that she "must agree to comply with the *Revenue Act and Regulations.*" (Exhibit C6, Tab G). The Crown, in good faith, satisfied all the terms of the settlement resolution with the anticipated *quid pro quo* compliance by the accused. (See also Exhibit D56).

20 Wallace Hill still remained a durable focus for discord. In response to a query from a lawyer representing the Band concerning First Nation Exempt Tobacco, by letter dated June 30, 1999, (Exhibit C19), and referring to a letter dated June 23, 1999 from INAC to the Band Manager, the Department of Business and Consumer Ser-

vices, Revenue, Compliance and Registry Services, Audit and Examinations Section advised that:

> We have reviewed the letter from Indian and Northern Affairs Canada and find that the granting of reserve status for Wallace Hill is far from conclusive. It would appear that several events must occur before being presented to the Governor-General in Council. Further, while we have given consideration to Wallace Hill prior to the granting of reserve status, we have since received legal opinion that we would be contravening our own legislation (see Clause 76(1)(d) of the *Revenue Act Regulations*). *Accordingly, we are unable [to] accept any retail vendor for "designation" unless they are located on a reserve, as defined in the* ***Indian Act*** . [Emphasis added.]

21 Meanwhile, the accused had made application, dated April 13, 1999, for a retail vendor's permit (Exhibit C7) using her Nova Scotia Health Services Tax Registration Number for Chrissy's Trading Post, R13-08-49391-3, for her business on the Shubenacadie First Nation reserve for the Wallace Hill location as a second location under the same registration number. However, by letter dated November 2, 1999, the Department of Business and Consumer Services informed her of the procedure that was required for the consolidation of her business and requested confirmation of the addresses and locations so that they could issue separate registrations and/or permits. Importantly, they informed her that;

> Upon resolution, *those locations on Shubenacadie Band reserve land will be eligible to be "designated" by the Provincial Tax Commissioner to sell unmarked tax exempt tobacco to status Indians.* [Emphasis added]

22 Furthermore, by letter dated February 9, 2000, (Exhibit C12), Business and Consumer Services informed her that under the *Revenue Act*, s. 76(1)(d), Chrissy's Trading Post was designated as a retailer "for the purposes of selling unmarked exempt tobacco to status Indians on the Shubenacadie band reserve lands." They also informed her that the unmarked cigarettes that she would obtain from her Band wholesaler may only be sold from 13 Eagle Feather Road, the address of her designated permit. (See also, Exhibits C11 and C14, confirming the location of her store on the reserve).

23 Additionally, they advised her that, "The sale of unmarked tax-exempt tobacco products to non-status Indians is prohibited." The accused was required to sign this letter acknowledging its receipt and acceptance of its terms. However, before signing she added the words, "as long as my Chief still agrees with terms set." In any event, on February 10, 2000, Business and Consumer Services issued her a "designated retail vendor" permit for her business located on the reserve at 13 Eagle Feather Road. (Exhibit C16).

24 Furthermore, pursuant to the licencing agreements with Nova Scotia, by a Band Council Resolution dated February 16, 2003, Chrissy's Trading Post was authorised to be a "designated retail vendor" on Shubenacadie Band Reserve Lands, location 463375. (Exhibits C21, C22 and D57). However, when the accused applied to the Province to renew her "designated retail vendor's" permit, on her application form she listed the location of the two stores and indicated that she had a "retail vendor's" permit number 651447TE. (Exhibit 23). Service Nova and Municipal Relations issued her a "designated retail vendor" permit number 135879070NS0001 only for the location number 463375 which is, 13 Eagle Feather Road, on reserve lands. (See also Exhibit C25). As well, by an application dated May 21, 1966 [sic] the accused notified the licencing authority that she had relocated her 13 Eagle Feather Road store, location 463375, to 430 Hollywood Drive, Indian Brook Reserve. (Exhibit C 27). As a result, they issued her with a "designated retail vendor" permit 135879070NS0001 for location number 747063 which is 430 Hollywood Drive that was effective from October 7, 2003. (Exhibits C28, C29, C30).

25 Notwithstanding, by her application dated April 15, 2002 for a "Retail Vendor Permit" (C6 Tab I) the accused identified that the permit was for the store at Hammond Plains Road which was confirmed by Service Nova Scotia. They issued her with a permit number 135879070NS0001 as a "retail vendor" at location number 651447TE which is the 2290 Hammonds Plains Road address, effective May 16, 2002 to May 15, 2005. (Exhibit C6 Tab I). Her current retail vendor's permit for this location expires on May 14, 2008. (Exhibit C6 Tab J).

26 At the same time, the accused sold "quota cigarettes" to all consumers, regardless to status, from the Wallace Hill location and without collecting any taxes as required. Specifically, she made sales to "non-native" consumers on December 21 and 23, 2004 and January 14, 2005. (Exhibit C36). She is being prosecuted for these offences.

27 Even so, the status of the land was again addressed in 2005 by an undated letter, (March 8, 2005?) from INAC to the Council of Shubenacadie Band. (Exhibit C2, Tab M). This letter informed that there was an approval in principle that included six preconditions to grant reserve status to the land. It also emphasized that an approval in principle did not "grant reserve status" and therefore the land was "still considered Federal Crown Land" under INAC's control "for the use and benefit of Indians."

28 Still, on March 23, 2005, the accused was again charged with possession and offer for sale of prohibited tobacco products arising out of a search and seizure by the Canada Revenue Agency. (Exhibits C39, C42, C45, C46, C47). Provincial enforcement agents visited the seized storage facility and identified the seized prohibited tobacco products and accordingly charged the accused.

29 Additionally, Service Nova Scotia, on August 25, 2005 generated a "to whom it may concern" memorandum. It gave notice that Chrissy's Trading Post at location 651447 which is 2290 Hammonds Plains Road, as of March 23, 2005, was not an approved tobacco "designated retail vendor." (Exhibit C34).

30 Nonetheless, on August 27, 28 and 29, 2005 the accused again sold unmarked tobacco to a prohibited consumer. She was charged accordingly. She committed the same offence on September 1, 2005. Likewise, she was charged. (Exhibit C37).

31 On January 3, 2006, Service Nova Scotia issued another memorandum. It again gave notice "to whom it may concern" that on a research of the Shubenacadie/Indian Brook reserve files going back to June 13, 1989, there was no current Band Council Resolution for the store at Hammonds Plains Road and that there had never been a Band Council Resolution "designating" that store. (Exhibit C 35).

32 The accused, however, committed similar offences on February 3 and 8, 2006 and again was charged with violating the provisions of the *Revenue Act*. The same activities happened on March 31, 2006 and June 29, 2006. She was also charged for these occurrences.

33 What is more, by letter dated August 23, 2006, INAC again informed the accused that the land was Federal Crown land and was under its administration and control. Moreover, any permission that she might have received from her Band Council "to construct a residence or business on this property is void." This was because, "anyone, regardless of status, requires a licence from Canada . . ." to acquire the right, without trespassing, to be on crown lands such as Wallace Hill. It also informed her that because of the ongoing discussions with the Shubenacadie Band it was not possible to create a legal interest that would complicate matters. In any event, they also advised her that should the land become a Reserve for the benefit of her Band "the lands and assets affixed to that property would fall under the authority of [her] Band Council." (Exhibit C2, Tab Q).

Discussion and Overview

34 Therefore, this case came before this Court as a result of a series of investigations by the compliance section of the Tax Commission for Service Nova Scotia and Municipal Relations. They were acting under their mandate to enforce the provisions of the *Revenue Act*, as amended, and more particularly Part 111, *Tobacco Tax Act* and the *Regulations* made pursuant to the *Revenue Act*, ss.43 and 92.

35 As a result of these investigations, four separate Informations are being prosecuted before this Court. They are dated in time as, January 18th 2005, May 4th, 2005, September 16, 2005 and July 5th 2006. These Informations also aver a total of fifty-five charges, of which forty-two allege violations of the *Revenue Act*, s.39 and thirteen allege violations of the *Regulations*, s.76.

36 The Information dated January 18, 2005 was before the Court on March 3, 2005 and that which is dated May 4, 2005, was presented on May 26, 2005. These matters were joined and set down for trial in January and February 2006. However, the Information dated September 16, 2005 came before the Court on October 17, 2005 and on October 28, 2005 it too was joined with the first two matters. Similarly, the Information dated July 5, 2006 came before the Court on August 10, 2006, was adjourned for pleas to October 13, 2006 and then it too was joined with the other offences for trial.

37 At a pre-trial conference on August 23, 2005, counsel for the accused informed the Court that she would not be relying on the *Constitution Act* 1982, s.35, as amended, for a defence to the charges. However, on September 22, 2005, she sought an adjournment of the original trial dates so that they could prepare and raise a *Charter* argument concerning the constitutional validity of the relevant provisions of the *Revenue Act* and the *Regulations*. On September 30, 2005, the Court granted the requested adjournment and the matter was set over to June 12 and 23, 2006 to hear the *Charter* challenge and for trial.

38 Additionally, on October 28, 2005, the Court directed counsel for the accused to file a *Notice of Constitutional Challenge* by December 23, 2005. She filed the *Notice* on December 23, 2005 that, put succinctly, averred that the *Revenue Act Regulations*, ss.39(3), 39(1)(a), and 39(1)(b) of the *Revenue Act*, discriminated against the accused in violation of the *Charter*, s.15 and therefore should be of no force and effect pursuant to the *Charter*, ss. 15 and 24. Likewise, she presented scenarios on the status of the land at Wallace Hill as to whether or not it was a reserve as defined in the *Indian Act*.

39 The crown requested a hearing to clarify questions raised by the filed *Notice*. To this end, the Court convened a hearing on February 24, 2006. Defence counsel submitted that she was raising only a *Charter*, s.15 argument and not *Constitution Act*, ss.35, 91 or 92 arguments that would challenge the validity of the Provincial legislation. At the end of the hearing, the Court directed counsels to file briefs on the primary issue which was: "what, in law, is a reserve?" The crown filed its brief.

40 Before filing her brief, as directed, counsel for the accused sought permission to withdraw as counsel of record due to irreconcilable differences between her and the accused. After hearing submissions, the Court, on April 4, 2006, granted its permission and directed that the accused return with new counsel on April 28, 2006. Also, on April 4, 2006, the accused informed the Court that she was advised by her "Chief" that she had a "treaty defence" to the charges. This approach by the accused, now without counsel, resurrected the issue of a *Constitution Act* 1982, s. 35(1) defence that the Court was advised at an earlier date was not a viable position.

41 However, on April 28, 2006 the accused appeared with new counsel who requested an adjournment of

the June 2006 trial dates. Subsequently, the Court granted the adjournment and set new trial dates for February and March 2007. January 26, 2007 was set for the new counsel for the accused to confirm the *Constitutional* defenses that they would be relying upon. Even though on that date, her new counsel withdrew as counsel of record, the Court confirmed to the accused that, because of the inordinate delays through adjournments and differences between her and her retained counsels, the trial would begin as scheduled whether or not she had counsel.

42 The trial commenced as scheduled on February 19, 2007 and the accused was self-represented. After the crown had presented its case, the matter was then adjourned until March 5, 2007 for the accused to respond and to present her defence. On that date, she appeared with one of her previous counsels who had withdrawn. Her counsel, now on the record, advised the Court and confirmed that the accused was no longer relying on either of the *Constitutional* or *Charter* challenges but that she was now putting forward a defence based solely on an "officially induced error." The trial recommenced and the accused called and presented evidence in support of this defence of "officially induced error." In total, the Court heard, fifteen witnesses and between them the parties presented fifty-seven exhibits.

Issue

43 Consequently, in this Court's opinion, upon reviewing all the evidence, the decisive issue in this case, despite the many twists and turns, is not whether the accused has a license to sell tobacco products at Wallace Hill, because she does have a "retail vendor's" license to do so. Rather, it is whether Nova Scotia, in the peculiar set of circumstances of this case, is estopped from enforcing its legal and constitutional right to collect from the accused the appropriate tobacco taxes. Put another way, before the current prosecutions commenced, did the accused receive any advice that was specific and tailored to her operations at Hammonds Plains Road, that was reasonable in the circumstances, from any Nova Scotian official, in a position to do so and to bind the Crown, and she relied upon that advice so as to afford her the defence of officially induced error?

44 Thus, this case, with the greatest of respect, is not about the accused exercise of her constitutionally guaranteed and protected Aboriginal right, that has been accepted by the Courts, to possess and sell tax-exempt tobacco products on a reserve. In essence, and with great respect, it is about her unrelenting conduct of selling tax-exempt tobacco products to "non-natives," without collecting taxes, on an off reserve location where she apparently took the position that she had an absolute freedom to do so without any restrictions and regardless of the law. Or, as the question is posited: are we dealing with an individual whose persistent conduct infers a belief in the freedom to live without the acceptance or recognition of any established laws?

Analysis

(a) Status of Land at Wallace Hill

45 The question of what in law is required to create a reserve within the meaning of the *Indian Act*, was before the Supreme Court of Canada in *Ross River Dena Council Band v. Canada*, [2002] S.C.J. No. 54 (S.C.C.). The facts of the case, taken from its head note are:

> Following a claim for the refund of taxes paid on tobacco sold in an Indian village in the Yukon, a dispute arose concerning the status of the village. If it was a reserve, an exemption from the tax could rightfully be claimed. The respondents maintained that a reserve had never been created there. In the 1950s, members of the appellant Band, which is recognized as a band under the Indian Act, were allowed to settle on the site of what is now their village, there being no treaty governing the lands. Various administrative discussions and

> actions with respect to the status of the community took place between 1953 and 1965. In 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch of the then Department of Citizenship and Immigration that the village site had been reserved for the Branch. The letter was entered in the Reserve Land Register under the Indian Act. On a motion by the appellants, the chambers judge declared the lands occupied by the Band to be a reserve. The Court of Appeal, in a majority decision, allowed the respondents' appeal.

46 The full court held that the land in question was not a reserve within the meaning of the *Indian Act*. Of importance here is the summary of the principles governing the creation of a reserve as was pronounced by LeBel J., at para 67:

> Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; Woodward, supra, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.

47 Thus, the key issue, as here, was whether there was an intention or a representation to create a reserve made by persons who had the authority to bind the Crown. Additionally, the land must have been set aside for an identifiable First Nation Band which they must have accepted and had begun to use. Furthermore, the process is "fact-sensitive." See also: *Jeddore v. R.* (2003), 231 D.L.R. (4th) 224 (F.C.A.), concerning the efficacy of oral history and confirming that a reserve must be land as defined in the *Indian Act*, s.2(1), as distinct to one wanting the land to be a reserve or treating it as if it were a reserve.

48 Applying the above principles to the case at bar, this Court accepts and finds that the Treasury Board Minute, Exhibit C2, Tab A, is the only legal document that identified the program and rationale under which INAC acquired the land. It was that if any member of a First Nation Band in the Maritimes who lived on a reserve and who wanted to live closer to a centre of employment they could come and do so on this tract of land. The Court finds that the document is clear in stating that the land was not acquired to be added to any Band reserve lands and neither was it acquired for any specific Band. Moreover, the evidence has established that when the land was acquired, INAC never contemplated that it is reserve land but rather wanted it as Crown land that would be available for the establishment of First Nation families from any part of the Region to its best employment area.

49 This Court also accepts and finds that the Treasury Board Minute, as it has neither been amended nor changed, is the only commanding document in force concerning the status of the land. The evidence discloses and the Court accepts and finds that, even though the land may have been an administrative nightmare for INAC, any change of identification of its current legal status as Crown land and for it to become an addition to and, in law, reserve land would, of necessity, require among other procedures, an amendment to the Treasury Board Minute and an approval by the Governor-in-Council.

50 Similarly, the evidence discloses and this Court accepts and finds that over the years, the Shubenacadie First Nation Band, and the accused, through correspondences, knew or ought to have known of this fact. Moreover, this Court accepts and finds, as it is not contradicted by any other evidence, that INAC neither ceded control of nor did it recognize the Shubenacadie First Nation Band, or for that matter any other First Nation Band in Nova Scotia, as a competent authority on the land at Wallace Hill. (See for example: Exhibit C2, Tabs C, through I, inclusive, Tabs K, M, O, P, Q, the testimony of Stephen Wells, and Exhibit C5).

51 Notwithstanding the above, the accused position on the status of the land warrants some scrutiny. As the Court apprehended her submissions and the evidence on her behalf, Wallace Hill was held by INAC for the benefit of First Nation peoples. Realistically, it functioned as if it were a reserve in that the Shubenacadie Band has spent Federal monies, for such things as housing and social assistance that only could be spent lawfully on a reserve, on the Wallace Hill property for the benefit of the residents.

52 Therefore, from her perspective, the Band, which is her only organ of government, by its financial outputs, exercised some administration over the land. This perception is reinforced by the fact that it was her Band that encouraged and authorized her to relocate. Furthermore, the relationship that existed between her and her Band concerning her licences for operating her stores was consistent with her belief that the Band also felt that the property was reserve land.

53 However, upon closer analysis, the evidence presented does not support rationally this position concerning the status of the land. First, the Court points to Exhibit C18 — letter to Dave English (lawyer for the Band) from Business and Consumer Services, dated June 30,1999, referring to a letter of June 23, 1999 from INAC (also forming part of Exhibit C 19) advising that the property at Wallace Hill was not a reserve and that the department would be in violation of its own legislation should it, for the purposes of the *Revenue Act* and *Regulations* "designate" Wallace Hill, unless it was a reserve pursuant to the provisions of the *Indian Act*.

54 Similarly, concerning the issue of whether the Band was aware of the status of the land, the Court reviewed the testimony of Chief Reg Maloney who was the Band Chief at the time when the accused relocated to Wallace Hill, until 2003. Significantly, on the point, he stated in the trial transcript at page 717:

> Q. Okay. During that period of time, what was your . . . as the chief, what was your concept of the land? Was it a reserve? Was it land set aside for natives? Was it something different? What was . . .
>
> A. No. I considered it to be land set aside for the use of natives.
>
> Q. Now when you say that . . . sir that you considered it land set aside for natives, why did you think that?
>
> A. Because that's what it was. That's what it was set for, you know. There was no black man allowed to live there, no white man. It was just set aside for the Mi' kmaqs.

55 The evidence also discloses that Chief Maloney had approached the other Chiefs to obtain their support to have the land made a reserve. Mr. Rufus Copage, an elected councillor of the Shubenacadie Band since 1990, also testified that the land was not a reserve but "was set aside as [sic] the use and benefit of Indians." Moreover, he acknowledged that the land was never declared a reserve.

56 Additionally, there is the letter to Mr. Alex Denny, President of the Union of Nova Scotia Indians dated

January 18, 1978 (Exhibit C2, Tab C) that rejected emphatically the proposal that the land be an "Indian Reserve for all Micmac of Nova Scotia." It also informed that the purpose of the acquisition was to provide a "residential site close to the areas of employment for Indians wishing to establish themselves off Reserve."

57 Also, Mr. Daniel Paul, Executive Director of the Confederacy of Mainland Micmac, by letter dated April 6, 1988 (Exhibit C2 Tab I), was informed that the property was not reserve land. In further addition, the Court considered the letter dated August 25, 1995, (Exhibit C2, Tab P) from INAC to the accused, with a copy to the Council of Shubenacadie First Nation, informing her that the property was not a reserve and that:

> Therefore, the use of the land is not subject to the ***Indian Act***. This means, therefore, that this land, its occupants and any operation thereon are subject to any and all applicable federal, provincial and municipal statutes, regulations, orders or bylaws now in force.

58 INAC again informed the accused by undated letter (evidence submitted was 23 August 2006), (Exhibit C2, Tab Q) on the possibility of her constructing a home for her daughter on the property, that the status of the land remained constant since the correspondence of 1995. The letter further reiterated;

> The land known as Wallace Hill at Hammonds Plains(PID 452611) is public land of Canada (federal Crown land) under the administration and control of this Department. These lands have not been set aside for the benefit or use of the Shubenacadie First Nation or any other First Nation, therefore, ay permission that may have been given to you in the past by the Chief, Councillors, or the Council of the Shubenacadie First Nation to construct a residence or business on this property is void.
>
> We want to confirm that anyone, regardless of status, requires a licence from Canada in order to lawfully occupy federal Crown lands such as the lands at Wallace Hills. Individuals occupying federal Crown land without a licence are considered to be trespassing and maybe removed. Any assets affixed to the land without the authority of a licence may also be forfeited to the Crown as the landowner.

59 Although it appeared that INAC may have considered the accused a trespasser as she had no licence to occupy the property, it also appeared to have recognized the resulting problems should it seek to exercise its legal options. Therefore, since it was negotiating with the Shubenacadie Band, of which she was a member, it did not wish to complicate matters by creating a new legal interest by issuing her with a licence. It also informed her of the possible consequences to her should the land become a reserve.

60 This Court also accepts and finds that since the land was acquired by INAC in 1965, it neither considered nor treated the land as a reserve. Similarly, it had never assigned the land to any identifiable First Nation Band for administrative purposes. There is also uncontradicted testimony that, as up to the trial and its conclusion, the preconditions set out to move forward have not been met. For example, the Council of the Shubenacadie Band has not provided INAC with the required Band Council Resolution confirming that they would address the accused interest as a resident on the property and also acknowledging the limited access to the land.

61 Likewise, INAC sought and apparently received an amendment to the preconditions clause 3 that re- quired:

> Indian and Northern Affairs Canada must obtain Band Council Resolutions from all 12 Nova Scotia First Nations giving up any interest they may have in the property and requesting Indian and Northern Affairs Canada give Wallace Hill reserve status for the benefit of the Shubenacadie Band.

62 As a result, INAC sought from First Nation Bands in Nova Scotia, through public advertisements, any interests or concerns that they might have about the process. This advertisement appeared in the local newspaper, the *Daily News* on February, 9, 2007 at page 34. (Exhibit C5).

63 It is therefore this Court's opinion, that the accused has presented insufficient evidence for it to find, on the balance of probabilities, that Wallace Hill and, more specifically the location of her store on that property, is on reserve land as defined in the *Indian Act*. In this Court's opinion, she has not met the evidentiary burden pronounced in *Ross River. supra*. Consequently, this Court, on the evidence presented, does not accept the accused argument that because Wallace Hill was acquired by the Federal Crown "to provide housing assistance to Indians who are ready and capable of relocating from Reserves to an urban area" that the property automatically becomes burdened with an Indian interest and thereafter constitutes "reserve lands" held by the Crown for the benefit of "Indians". See: *Montana Band v. R.*, [2006] F.C.J. No. 334 (F.C.) at para. 458. Moreover, it is clear from the case authorities that it is not the character of the land itself but rather its designation under the *Indian Act* that makes it a reserve.

64 Thus, this Court finds that it is rational to conclude, without a reasonable doubt, that the accused and the Shubenacadie Band Council were aware of, knew of and acknowledged that the property at Wallace Hill was and is not a reserve pursuant to the provisions of the *Indian Act*. This view is reinforced when the Court considered Exhibit C5 — the *Daily News* — articles containing the comments allegedly made by the accused and Chief Maloney that are supported by their testimonies before the Court. Additionally, the Court also considered and assessed, in its deliberations, the included advertisement on page 34 to "First Nation Members and Indians (as defined in section 2(1) of the Indian Act)," inviting any concerns or comments about the proposed change in the status of the property.

65 Hence, this Court does not doubt and concludes and finds that the accused and the Shubenacadie Band Council had been made aware, in no uncertain terms, of the status of the land. As well, this Court finds that, the accused was personally notified of the status of the land and was informed that she had acquired no legal rights or interests by her squatting on it.

66 Likewise, this Court finds that her testimony, although sincere, however was based upon unfounded beliefs and unsubstantiated hearsay evidence which was self-contradicted by her presentations as disclosed in Exhibit C5 that she never, in testimony, disavowed satisfactorily. Consequently, this Court is not left in any doubt and finds that all parties concerned knew and was fully aware that the property at Wallace Hill was and is not a reserve as defined in the *Indian Act*.

67 In short, this Court concludes and finds, on the total evidence, that Wallace Hill was not and is not a reserve as defined in the *Indian Act*. Further and as a result, this Court concludes and finds that Chrissy's Trading Post at 2290 Hammonds Plains Road, in the Halifax Regional Municipality, Retail Vendor's Permit Location Number 651447TE, is not situate on reserve land as defined in the *Indian Act*.

(b) Legislation

68 Here, in the Court's opinion, the conclusive statutes are the *Constitution Act* 1867 and the *Constitution Act 1982* that set out the authority of Parliament and the Provinces and the guaranteed protected rights under the *Charter of Rights and Freedoms*. Succinctly put, by virtue of the *Constitution Act* 1867, s. 91, Parliament has exclusive legislative authority in relation to "Indians, and Lands reserved for Indians" while pursuant to s.92, the Provincial legislature can make exclusive laws in relation to "direct taxation within the province."

69 Similarly, the *Constitution Act*, 1982, Part 1, the *Charter of Rights and Freedoms*, s. 25 and Part 11, *Rights of the Aboriginal Peoples of Canada*, s.35, guarantee all the accrued aboriginal rights, treaty rights and land claims agreements. Likewise, the *Indian Act*, created INAC whose Minister is responsible for Indian and Inuit affairs. INAC fulfils the lawful obligations of the federal government to Aboriginal peoples arising from treaties, the *Indian Act* and other legislation. Among its other services and responsibilities, INAC also administers Indian reserve lands.

70 The *Indian Act*, s.2(1) states that "reserve":

> (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
>
> (b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;

71 Pursuant to s.87(1):

> 87.(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal and Statistical Management Act, the following property is exempt from taxation:
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.

72 Also, by virtue of s.88;

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal and Statistical Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

73 The *Revenue Act* like its predecessors the *Health Services Tax Act* and the *Tobacco Tax Act*, allows the Provincial government to determine the designation, regulation, collection and enforcement of direct taxation on specified goods and services within its exclusive jurisdiction. Part 111, the *Tobacco Tax Act*, s.32 defines the following:

> (c) "permit" means, unless the context otherwise requires, a wholesale vendor's permit or a retail vendor's permit issued pursuant to this Part;
>
> (e) "retail vendor" means a person who sells tobacco in the Province to a consumer at a retail sale, whether or not that vendor holds a retail vendor's permit;

74 Pursuant to s.39:

> 39 (1) No person shall be in possession of tobacco

(a) on which tax has not been paid;

(b) not bearing a prescribed mark; or

(c) not purchased from a retail vendor who holds a valid retail vendor's permit, where the person in possession is a consumer.

. . . . .

(3) No person shall distribute, sell, barter or offer for sale or as a gift tobacco except as permitted by this Part or the regulations

75 Pursuant to the *Revenue Act Regulations*, s.76(1)(d) (made under ss.12, 27, 31C, 43 and 92 of the *Reven- ue Act*):

"designated retail vendor" means a retail vendor designated by the Commissioner who sells tobacco in the Province to a consumer at a retail sale *on a reserve, as defined in the Indian Act, being Chapter I-5 of the Revised Statutes of Canada, 1985.* [*Emphasis added*]

(13) The Commissioner may, provided the applicant is not as person described in clauses 8(a) or (b), issue a permit to purchase and sell unmarked tobacco to an applicant if the applicant requires unmarked tobacco

(a) for sale in the Province to designated retail vendors situated on a reserve, as defined in the Indian Act, being Chapter I-5 of the Revised Statutes of Canada, 1985;

(14) A retail vendor, except as provided in subsection (13), shall not purchase, possess, store or sell unmarked tobacco in the province.

76 Even though founded on a different set of facts, with respect to the provincial authority to collect taxes under the *Revenue Act*, the *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)*, [1998] N.S.J. No. 301 (N.S. C.A.), provides an excellent summary of the various cases heard by that Court concerning tax collection under the *Revenue Act and Regulations* and the tobacco "quota system" as it applies to First Nations peoples in Nova Scotia,

77 The head note states that:

Appeal by the Union of Nova Scotia Indians and Francis from the dismissal of an application for a declaration that Indians have the right to sell tobacco on reserves without complying with the Revenue Act. Francis was an aboriginal who lived on a reserve. He wanted to buy tobacco products from Indians on a reserve in Quebec and resell them to Indians acting as retailers on reserves in Nova Scotia. He applied for a permit as a wholesaler under the Revenue Act. The Act established a quota system for tax free tobacco products that may be sold to reserve Indians. Francis failed to comply with the requirements, including specific licensing and packaging, of the quota system and his application was rejected. Francis submitted that the Revenue Act did not apply to the purchase and sale of tobacco products by Indians for resale to reserve Indians. He further argued that the Revenue Act was unconstitutional as it interfered with the rights of reserve Indians to be exempt from taxation under section 87 of the Indian Act.

78 Jones J.A., in his concurring and separate reasons and addressing the legality of the quota system, wrote at para. 4:

> The Act and Regulations apply to the purchase and sale of all tobacco products in Nova Scotia. The Province, as a matter of policy, has established a quota system for the amount of tax free tobacco products that may be sold to Indians on reserves in Nova Scotia. The quota for each reserve is sold through licensed wholesalers and retailers approved by resolution of the Band Council for each reserve. The appellants dispute whether the quota system was devised with the consent of the Indians. There is no real dispute that it exists and how it operates. The parties agree that it is essentially the same as the quota system in British Columbia. As the appellant Francis failed to comply with the provisions of the Act and the quota system, his application for a wholesaler's permit was rejected.

79 After a review of previous case law he pronounced at para 24:

> I have referred to the decisions in *R. v. Johnson* (S.G.) and *R. v. Murdock* (m.) and Johnson (S.G.) at length to show that essentially the same issues were raised in those cases which are being put forward in this case with some slight variations. In the Johnson cases, the appellants were importing tobacco products from reserves outside the Province for sale to Indians and non-Indians on reserves. The appellants in those cases argued that the provisions of the Tobacco Tax Act did not apply to Indians and lands reserved for Indians and that s. 87 of the Indian Act exempted sales to Indians on reserves. As pointed out in *R. v. Johnson* (S.G.) and *R. v. Murdock* (M.) the situation was out of control. The current provisions were enacted to control the illicit sale of tobacco products in the Province and to protect the revenue. The Court held that the provisions were constitutionally valid as being of general application and did not offend s. 87 of the Indian Act. They applied to all with respect to the importation and sale of tobacco products. It is immaterial that the product is imported from a reserve outside the province by Indians for sale solely to Indians on reserves in Nova Scotia. Those cases did not turn solely on the fact that sales were also being made to non-Indians. No authorities have been cited for the proposition that Indians are free to trade between reserves exempt from restrictions imposed by provincial laws of general application. With respect, the decisions of the Supreme Court of Canada in *Francis v. The Queen*, [1956] S.C.R. 618 and *Mitchell and Milton Management v. Peguis Indian Band*, [1990] 2 S.C.R. 85 do not support the claim that Indians have the right to purchase and transport tobacco products from reserve to reserve for the purpose of resale.

80 In her concurring but separate reasons, Bateman J.A., referred to Hallet J. decision in *R. v. Murdock* (1996), 154 N.S.R. (2d) 1 (N.S. C.A.), she stated at para.43:

> In my view the above observation of Hallett, J.A. does not alter the fact that the wholesaler and retailer are subject to the requirements of the Revenue Act, even though the "purchase" by the consumer may be exempt of tax. Justice Hallett, in his comment, is speaking about the tax relief that may be available to the Indian consumer and is not addressing the obligation of the wholesaler and retailer to comply with the Act. Indeed, he specifically qualifies his remark by stating that an Indian retail vendor on a reserve cannot ignore the provisions of the Act. Additionally, his comment is clearly obiter and made without a factual context. The case before us suffers from that same defect. Notwithstanding the stated intentions of the appellant to sell the tobacco only to Indian retailers who will sell only to Indian consumers, he cannot know whether the retail vendor will ultimately sell the tobacco product to a native or a non-native. *Retail vendors on reserves are not restricted with respect to whom they sell their products. The tax exemption to the consumer is only available if the final purchasers are Indians on a reserve.* [Emphasis added]

81 Here, there is no issue about the quota system that was "developed specifically to ensure that Indians on a reserve who are free from taxation have access to a sufficient amount of tax-free tobacco."(para.45). Thus, the authorities are clear and this Court accepts and finds that the accused cannot ignore the provisions of the *Revenue Act*, whether as a "retail vendor" or as a "designated retail vendor" and whether or not her commercial business is located on a reserve. The provisions of the *Revenue Act* are laws of general application and not only are they constitutionally valid but also they do not offend the stipulations set out in the *Indian Act*, s.87. They were "enacted to control the illicit sale of tobacco products in the Province and to protect the revenue." *Union of Nova Scotia Indians*, para. 24. The *Indian Act*, s.87 applies only to property situated on a reserve and cannot be extended in any artificial way to cover property that is not physically situated on a reserve. See: *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161 (S.C.C.), at para.56.

82 Applying the above principles to the case at bar, this Court finds that the accused did apply for and did receive a "designated retail vendors" licence for her store located on the Indian Brook reserve. Similarly, on application, she did receive a "retail vendor's" licence for her store at Wallace Hill. Thus, in order to sell tobacco products on the Indian Brook Reserve, as part of the Band's tobacco quota, the accused was obliged to obtain from her Band a Band Council Resolution that designated her as a retail vendor on the reserve. It is clear from the evidence and the Court finds that she applied for and did receive such a designation as supported by the Band Council Resolutions and permits specifically for her store location on the Indian Brook Reserve.

83 It is also clear and the Court finds that she applied for a "retail vendor's permit" for her store location at 2290 Hammonds Plains Road, Wallace Hill. Significantly, she could not and never did receive from the Province a "designated retail vendor's permit" for this location. Moreover, she has no Band Council Resolution and none was ever issued by her Band for the Wallace Hill location. The Court noted that her several attempts to obfuscate the licencing process concerning her stores' location and to cover Wallace Hill under her Indian Brook Reserve location was rejected by the Province and was not successful. As a result, she received only a "retail vendor's permit" specific to the Wallace Hill location.

84 However, it should be clear that, from the evidence presented, the Court accepts and finds that the *Revenue Act* and *Regulations* are merely the mechanisms that allows the Province to meet its constitutional obligations to provide tax-exempt (quota) tobacco products to First Nation peoples in Nova Scotia. The particular First Nation Band would identify the retailer who has their permission to sell quota tobacco on their reserve. Moreover, as licences or permits to sell tobacco products are location specific, once the Band passes the requisite Band Council Resolution identifying the retailer only then does the Tax Commission issue a "designated vendor's permit" to the retailer that is valid only for an address on that specific reserve.

85 Therefore, this Court concludes and finds, on the legislative and case authorities, that by operating her store at Wallace Hill, which the Court has found is not a reserve, and by selling in the commercial main stream to non-First Nation consumers, tobacco products on which tax has not been paid and which did not bear the prescribed mark, the accused is a "retail vendor" within the meaning of the *Revenue Act* and *Regulations*. This is supported by her possession of a "retail vendor's permit" specific to 2290 Hammonds Plains Road. As a result, it is this Court's opinion and it concludes and finds that, under the provisions of the *Revenue Act* and *Regulations*, she has made herself liable to collect and to remit the tax owed by those consumers.

(c) The Offences

86 On a complaint from an individual who was not a First Nation member and who testified that he had pur-

chased tax-exempt tobacco product from Chrissy's Trading Post at 2290 Hammonds Plains Road without paying the required tax, the Compliance Section of Service Nova Scotia and Municipal Affairs commenced a series of investigations. To this end, Paul Merrick, a compliance officer went to the location and on three separate occasions, December, 21, 23, 2004 and January 14, 2005 purchased cigarettes that had peach colour tear strips on the packages. (Exhibit C 36). Merrick also purchased the same packaged type cigarette from the store on June 29, 2006. (Exhibit C 38). Matthew Brewer, also a compliance officer, went to the location on December 23, 2004 and on January 14, 2005 and purchased peach tear packaged cigarettes. (Exhibit C36).

87 The Compliance Section also received information in March 2005 that Canada Revenue Agency, under a search warrant, had seized tobacco products from 2290 Hammonds Plains Road that belonged to the accused. The seized products were held at an AMJ Campbell Warehouse in Burnside. They were invited by the custodian to view the products which they did. Obtaining a search warrant, Merrick and Brewer returned to the warehouse and seized all the products that had "peach tear tape." (Exhibits C 39, C 42, C 43, C 44). They testified that "peach tear tape" are on tax-exempt cigarettes, (provincial taxes have not been paid) that should only be sold by a "designated retail vendor" on a store located on a reserve. A "retail vendor" is permitted only to possess and sell purple tear tape products.

88 The issue was raised that the conduct of Merrick and Brewer, in seizing the tobacco products from AMJ Campbell Warehouse, had violated the accused *Charter*, s.8 protected right against unlawful search and seizure. On this point, the Court finds that the location where the seizure was effected was a warehouse in which the accused had no legal interest or any legitimate right to privacy. Furthermore, she has no standing to object, at trial, to the entry of the exhibits seized from the warehouse of a third party where she was not in a position to refuse entry. Therefore, the Court concludes and finds that, in the circumstances, she had no constitutionally protected right. *R. v. Pugliese*, [1992] O.J. No. 450 (Ont. C.A.). As a result, the tobacco products and exhibits are properly before the Court.

89 Again on August 29, and September 1, 2005 Brewer returned to the store location at 2290 Hammonds Plains Road and purchased peach tear packaged cigarettes (Exhibit C 37). Similarly, Sidney Shaw, supervisor of the Compliance Section went to the same store location on August 27 and 28, 2005 and purchased peach tear packaged cigarettes. (Exhibit C37). Likewise, on February 3, and 8, 2006 and March 31, 2006, Shaw again went to the same location and purchased peach coloured tear taped packaged cigarettes, (Exhibit C 38).

90 Ches Manning worked for the Canada Revenue Agency and on March 23 under the authority of a search warrant, he along with sheriff deputies went to the store location on Hammonds Plains Road and seized a quantity of tobacco products. The seized products were transported to a warehouse in Burnside where upon taking inventory he discovered that some of the products bore purple tears tabs while other had peach tear tabs. He notified the provincial compliance and enforcement personnel who inspected the products. Subsequently, under the authority of a search warrant the provincial officers seized the products. (Exhibits, C 42, C 43 C 44, C 47, C 48.)

91 Consequently, this Court concludes and finds that the accused, holding only a retail vendor's permit for her location at 2290 Hammonds Plains Road was not, by law, permitted to possess and/or sell peach taped packaged cigarettes at that location. She does not possess a "designated retail vendor's permit" specific to this location. Therefore, the only cigarettes that she is permitted lawfully to possess and/or sell at that location, as a retail vendor, are purple tear packaged products.

92 Upon a review of the Supreme Court's decision of *R. v. Sault Ste. Marie (City)*, 40 C.C.C. (2d) 353, 1978

CarswellOnt 24 (S.C.C.), it is clear that offences under provincial statutes and regulations are strict liability offences. Thus, here, it is also open to the accused to establish that she acted with due diligence in response to all offences under the *Revenue Act* and *Regulations*.

93 Besides, as was stated by this Court in *R. v. Loomis*, [2006] N.S.J. No. 140, 2006 NSPC 14 (N.S. Prov. Ct.), at paras. 18-19:

> 18 Several cases have dealt with the issue of due diligence and its applicability. Even so, in *R. v. Canada Brick Ltd.*, [2005] O.J. No. 2978, (Ont. S.C.J.), at paras. 129 through 153, C. Hill J., presented a review of the salient cases which is of great assistance. Put succinctly, the defence of due diligence as was established in Sault Ste. Marie (City), at para. 60 and 61 (C.C.C. pp. 373-374) contains two branches, namely, "if the accused reasonably believed in a set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid theparticular event."
>
> 19 In summary, the authorities aver that due diligence is a question of fact depending on each particular set of circumstances. Further, it is a determination of whether the act was reasonable with regard to the alleged prohibited act and not some other broad notion of reasonableness. Moreover, the Crown must prove beyond a reasonable doubt the actus reus of the alleged offence and then it is open to the defendant to show, on the balance of probabilities that he believed in either a set of facts that if true would render his act or commission innocent or that he took all reasonable steps to avoid the particular event. See: R. v. Coyle, 2003 NSPC 31, 216 N.S.R. (2d) 170, 680 A.P.R. 170 reversed on other grounds [2004] N.S.J. No. 471, 2004 NSSC 253, *R. v. Kelly*, [1997] N.S.J. No. 579 (Prov.Ct.), *R. v. Henneberry*, [2001] N.S.J. 398 (Prov. Ct.), *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at pp.205-6, 248.

94 Here, when the Court applies these principles to the facts before it the Court concludes and finds that the accused, given all the information in her possession, could not have reasonably believed that by her actions and the official reactions, that what she was doing at Wallace Hill was legally permissible. In the Court's opinion, a reasonable person in her position would have exercised due diligence and would not have persisted on the considered course of an implacable and calculated disregard of the law, as she did, without pausing to ascertain if she was truly correct in her position. Furthermore, as she took no reasonable steps to confirm what was her true legal position the Court concludes and finds that she was wilfully blind and intentionally chose to ignore rather than to comply with the law.

95 Therefore, in the Court' opinion, the total evidence leads to only one conclusion which is that, at Wallace Hill, she possessed and sold unmarked and tax-exempted tobacco products contrary to the *Revenue Act* and *Regulations*. In doing so, she has violated the *Revenue Act*, ss. 39(3), 39(1)(a), 39(1)(b) and the *Regulations*, s.76(14). As a consequence, this Court finds her guilty of all fifty-five counts in the four Informations tried before it.

(d) The Defence of Officially Induced Error

96 The salient position of the accused is that she relied upon the presentation of Judge William "Bill" MacDonald, then Deputy Minister of Aboriginal Affairs in 1995, which she stated that she understood to be that unless and until she was told otherwise or another meeting was held to discuss the problem, she would not be prosecuted if she sold "quota cigarettes" at her Wallace Hill location.

97 The strong inference is that there was an attempted benevolent dispensation to curtail prosecutorial dis-

cretion as she was only technically guilty of an offence. However, although not on all fours but on similar facts as before this Court, the case of *R. v. Catagas* (1977), 81 D.L.R. (3d) 396 (Man. C.A.), presents some instructive observations. The facts of that case as taken from the head notes are:

> The accused Indian was charged with unlawfully and without lawful excuse having in his possession migratory game birds contrary to s. 6 of the Migratory Birds Convention Act, R.S.C. 1970, c. M-12. At trial the accused argued that the prosecution constituted an abuse of process because of a "no — prosecution" policy of federal and provincial officials. This policy was initiated in 1968 following a decision of the Supreme Court of Canada holding that the Migratory Birds Convention Act applied to Indians hunting for game for food on unoccupied Crown land, and constituted a direction to the police and conservation officers not to lay charges against Indians hunting for game on unoccupied Crown land or reserve lands. The accused also argued that the community belief among Indians engendered by this policy provided him with a lawful excuse within the meaning of s. 6 of the Act. At trial the charge was dismissed and a Crown appeal by way of trial de novo was also dismissed on the basis that the prosecution constituted an abuse of process. On further appeal by the Crown to the Court of Appeal, held, the appeal should be allowed and a verdict of guilty substituted.
>
> Although the Crown has the right, in the exercise of prosecutorial discretion, to stay proceedings in an individual case, it has no right to dispense with the application of a statute in favour of a particular group or race. The executive's power to dispense with the application of a statute, in the absence of a statutory provision authorizing the exercise of the dispensation power, was abolished as far back as 1688 with the enactment of the Bill of Rights, 1688, 1 Will & Mar., c. 2.
>
> The policy which the accused sought to rely on here was a clear case of the exercise of a purported dispensing power by executive action in favour of a particular group. Such a power does not exist and the dispensation which it sought to create was void and of no effect. Accordingly, it was not available as an answer to the charge against the accused and he must be found guilty. Furthermore, the doctrine of abuse of process could not in any event be the foundation for the dismissal of the charge.

98 Additionally, the accused has asserted that she was not aware of the operation of the law and that she relied on her lawyer, her Chief and her Band Council for advice. However, the Court must point out that, "ignorance of the law by a person who commits an offence is not an excuse for committing the offence." *Criminal Code*, s.19. This principle is also applicable to provincial regulatory offences by virtue of the *Summary Proceedings Act*, R.S.N.S. 1985, c.450, s.7(1). See also: *R. v. MacDougall*, [1982] 2 S.C.R. 605 (S.C.C.).

99 In *Lévis (Ville) c. Tétreault*, [2006] 1 S.C.R. 420 (S.C.C.), the Supreme Court approved the defence of "officially induced error". Writing for the majority, LeBel J., after reviewing the law, referred to and adopted Lamer C.J., constituent elements of the defence in *R. v. Jorgensen*, [1995] S.C.J. No. 92 (S.C.C.), at paras. 24-26:

> 24 In Lamer C.J.'s view, this defence constituted a limited but necessary exception to the rule that ignorance of the law cannot excuse the commission of a criminal offence:
>
> > Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a re-

> sponsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating [page435] a limited exception to the rule that *ignorantia juris neminem excusat*.

(*Jorgensen*, at para. 25)

25 Lamer C.J. equated this defence with an excuse that has an effect similar to entrapment. The wrongfulness of the act is established. However, because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay of proceedings rather than an acquittal (*Jorgensen*, at para. 37).

26 After his analysis of the case law, Lamer C.J. defined the constituent elements of the defence and the conditions under which it will be available. In his view, the accused must prove six elements:

> (1) that an error of law or of mixed law and fact was made;
>
> (2) that the person who committed the act considered the legal consequences of his or her actions;
>
> (3) that the advice obtained came from an appropriate official;
>
> (4) that the advice was reasonable;
>
> (5) that the advice was erroneous; and
>
> (6) that the person relied on the advice in committing the act.
>
> (*Jorgensen*, at paras. 28-35)

100 Further, he pronounced at para. 27:

> It should be noted, as the Ontario Court of Appeal has done, that it is necessary to establish the objective reasonableness not only of the advice, but also of the reliance on the advice (*R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295; *Cranbrook Swine*). Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion (*Cancoil Thermal*, at p. 303). It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.

101 Furthermore, as was put by Mercer J.A. writing for the court in *R. v. Shiner*, [2007] N.J. No. 101 (N.L. C.A.), at para 31:

> It is beyond question that the defence of officially induced error can only succeed in the clearest of cases. **Jorgensen**; **Alexander**. That means, at a minimum, that the court must find that the constituent elements of the defence have been proven by the accused on a balance of probabilities. Proof of those elements cannot be waived

102 Consequently, applying these principles to the case at bar:

1. Did the accused make an error of law or of mixed law and fact?

103 To succeed in this defence the accused must establish, on the balance of probabilities, that on December 21, 2004 and subsequent, at the times of her impugned activities, namely possessing unmarked and tax-exempt tobacco products and / or selling unmarked and tax-exempt tobacco products at Wallace Hill, she was proceeding on the view that her action was legal. On the evidence, the accused on May 16, 1995, under the provisions of the *Tobacco Tax Act*, then in force, applied for and received a licence as a tobacco retail vendor for her new store location at Wallace Hill. By signing the application she agreed to accept the responsibilities set out in the *Act*. This action was after the decision in *R. v. Johnson*, [1993] N.S.J. No. 114 (N.S. C.A.), that essentially settled the issue that "Indians" on reserves had to comply with the provisions of the *Act* and were not exempt from prepaying the tax on tobacco products to wholesalers on purchases made off the reserve.

104 However, the Court finds that the activities of the store at Wallace Hill came to the attention of both the federal and provincial authorities and on August 24, 2005, INAC notified her that as the property was not governed by the *Indian Act*, in addition to other statutes, she would have to comply with all applicable provincial statutes. Likewise, on August 30, 1995, the provincial Tax Commission informed her that as Wallace Hill was not a reserve they expected her to collect and remit the taxes on her sale of tobacco products at that location.

105 Even so, when the accused sought some support for and /or a clarification or confirmation of her belief that, notwithstanding the retail vendor's permit she could still sell "quota cigarettes" at Wallace Hill, in this Courts opinion, she was, in fact, acknowledging and recognizing, however subtly, that her activities in selling and possessing "quota cigarettes" from that location were questionable. There was a conflict between her perceptions and the realities that confronted her. So, through her Band representative she called for a meeting between her lawyer, her Band representatives and senior government bureaucrats.

106 Thus, the meeting held on September 13, 1995 was specifically in relation to the Wallace Hill property and the status of the land was an issue that was discussed. However, the Court concludes and finds, on the evidence that it accepts, that it was a fact finding meeting where there were just only discussions and no decision was made nor any policy was determined. The status of Wallace Hill was a Federal Government issue and its representative made it clear that the land was not a reserve but discussions to that end were ongoing. However, as the critical issue was one concerning provincial revenues the discussion became whether the province was prepared to make an accommodation for Chrissy's Trading Post to operate at that location with the minimum of inconvenience and at the same time not offending the established tax collection regime.

107 Further, on the evidence, the Court accepts and finds that in 1995, the government of the day had adopted a policy of "negotiations not litigation" concerning the investigation and enforcement of the law pertaining to tobacco products and the prosecution of First Nation members on reserves. Even so, the evidence suggests and a reasonable inference can be drawn that the government officials present at the meeting were aware of the law and the concept of Crown prerogative concerning the prosecution of offences. This view is supported by some evidence that the Tax Commission, the legislated mandated investigators and enforcers under the *Revenue Act* and *Regulations* were not too keen on waiving or deferring the collection of taxes from an operation that was not on a reserve. The Court accepts and finds that the meeting adjourned without any decision being taken concerning what to do with the operations located on Wallace Hill for, as it was a personal issue to the accused, a definitive resolution could have an impact on broader and more global issues.

108 However, following the meeting, the Deputy Minister of Aboriginal Affairs who was a participant, con-

tacted the accused lawyer to discuss whether some accommodation could be made. By a letter dated September 14, 2005, Exhibit D52, he made an offer through her lawyer of a possible accommodation. The proposal was that the province would treat the accused business at Wallace Hill as if it were operating on a reserve and that, should her Band agree, she could sell "quota cigarettes" to non-First Nation persons, but, she must collect the taxes. Should she meet those stipulations the province would not prosecute her. The accused did not agree with this proposal and, in fact, there was no agreement of any kind between her and any government official.

109 In this Court's opinion, the meeting of September 13, 1995 was also an attempt by the accused to seek clarification and to resolve the issues concerning expected provincial tax collection and remittance on the sale of tobacco products at Wallace Hill. By the letters that prompted this meeting and her apparent reaction, the Court finds that the accused was not only aware of the legal status of the land but also she was aware that, as a result, the Tax Commission expected her to collect and remit taxes. From this perspective the Court finds the there was no mistake in law and no mistake as to the legal consequences should she continue to operate in the manner frowned upon by the Tax Commission.

110 Nevertheless, it is this Court's opinion that the inconclusive ending and further discussions after the meeting sent mixed messages to the accused. But, on the evidence the Court accepts and finds that there certainly was no statement made or information furnished by the Deputy Minister of Aboriginal Affairs specifically respecting the legality of her selling "quota cigarettes" from the Wallace Hill location. However, it is the Court's view that a strong suggestion, with the aura of authority, was conveyed to the accused which was sufficient to reinforce her sense of immunity from prosecution in that she could operate as if she were on a reserve until the big issues were resolved or until she was told otherwise. It is therefore reasonable to conclude and the Court concludes and finds that, given her uncorrected misperception that as a First Nation member who also sold "quota cigarettes" on her reserve, it may have reinforced her belief, however unreasonably when viewed objectively, that she could also sell quota cigarettes at Wallace Hill, and that there must have been some bureaucratic error concerning this point. Why could she not sell "quota cigarettes" at her new location? She had sought clarification of her legal predicament and its consequences from officials whom she thought could bind the Crown but received only an ambiguous outcome which she interpreted to her advantage. Therefore, from this perspective it is the Court's opinion that the issue became one of mixed law and fact.

111 But, in the Court's opinion that was the situation in 1995. The critical question therefore is whether the same view of the situation or the same set of parameters were subsisting and contemporaneous to the events in 2004 and subsequent. Moreover, this Court accepts and finds that in the absence of any correspondences or communications between the accused, her Band Council or her lawyer and any government official, in a position to bind the Crown, the issue of any inaction cannot constitute a representation that her possession and sale of unmarked and tax exempted tobacco products at Wallace Hill was legal. Similarly, the failure of the crown to prosecute her cannot constitute a representation having to do with the legality of her possession and sale of the prohibited tobacco products at 2290 Hammonds Plains Road, Wallace Hill. See: *R. v. Shiner*, [2007] N.J. No. 101 (N.L. C.A.), at para.48.

112 Thus, following a hiatus, the enforcement authorities, on December 11, 1997 seized tobacco products belonging to the accused and charged her, along with others, for violating the provisions of the *Revenue Act* and *Regulations*. However, as part of the settlement resolution that the prosecution would not continue against her, the accused signed a document agreeing to comply with the *Revenue Act* and *Regulations*. The fact that she struck out the reference to the land not being a reserve, in this Court's opinion, was a *non sequitur*.

113 The settlement agreement was between the accused and the Crown with respect to a specific prosecution under the *Revenue Act* and the *Regulations*. She, however, appeared to be attempting to invoke or to resurrect the vague and ambivalent government directives of 1995. All the same, there had been a change of administration and court decisions, in particular that of the *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)*, *supra.*, delivered on November 27, 1997, had made it clear, that First Nation members, living on or off a reserve, must comply with the provisions of the *Revenue Act* and the *Regulations* that dealt with the designation of retail tobacco vendors and the proper payment of tobacco tax. Thus, in the Court's opinion, her amendment to the agreement, if intended to, had no legal effect respecting any future prosecution should the Crown choose to exercise its prosecutorial prerogative. Furthermore, the property was federal Crown land and was not a reserve under the *Indian Act*. Significantly, however, in the Court's view, the accused now was put on notice and did acknowledge that she would be subjected to prosecution should she fail to comply with existing laws.

114 Moreover, her Band Council had been informed through a letter dated June 23, 1999, that the Province would be contravening its own legislation if it were to "designate" a store that was not located on a reserve. In other words, as Wallace Hill was not a reserve, the store at that location could not receive a "designated retail vendor's permit" to sell tobacco products.

115 Likewise, on April 13, 1999, when the accused applied for a license for the Wallace Hill store she attempted to cover and include it under her Indian Brook reserve licence and location. However, the Provincial officials rejected this approach and instructed her to identify properly the locations of the stores so that she could receive the proper permits that were allowed. They also informed her that only stores that were located on the Shubenacadie Band reserve land would be eligible to receive a "designated retail vendor's permit" to sell "unmarked tax exempt tobacco to status Indians."

116 Again, by letter, they informed her on February 9, 2000 that was followed by a permit issued February 10, 2000, that her store on the Shubenacadie Reserve lands was designated only to sell unmarked tax-exempt tobacco on the Shubenacadie band reserve lands and that the unmarked tobacco could only be sold at her store that was located on the reserve. Furthermore, they pointed out that the "sale of unmarked tax-exempt tobacco products to non-status Indians is prohibited." The accused was required to sign this letter signifying her acknowledgment of and consent to the terms contained. In signing the letter she appended, "as long as my Chief still agrees with terms set." This appendage in the Court's view is also a *non sequitur* and, if intended, had no legal effect, as following the *Union of Nova Scotia Indians* decision, all First Nations persons are compelled to comply with the provisions of the *Revenue Act* and *Regulations* concerning the possession and sale of tobacco products.

117 Additionally, in this Court's opinion it is reasonable to conclude and find and it concludes and finds that her licencing application experiences ought to have impressed upon her, as a reasonable person in her position, that the tobacco products licencing regime agreements between Nova Scotia and all First Nations in Nova Scotia compelled her, as with all "status Indians" to comply with the provisions of the *Revenue Act* and *Regulations*. Significantly, and it is this Court's opinion, that it was because of this legal impediment why her Band Council, her governmental organ, could not and did not "designate" her store at Wallace Hill to sell "quota cigarette". They had and still do not have any legal or constitutional jurisdictional authority to do so even though advised by INAC in 2005 that there was an approval in principle to add the land to their reserve base.

118 All this, in the Court's opinion, supports the conclusion that the accused was well informed of the legal status of the land, the legal prohibition and inability to possess and sell tax exempt and unmarked tobacco

products at Wallace Hill. Likewise, by her many efforts to secure a "designated retail vendor's permit" for Wallace Hill, the Court concludes and finds that she was aware of the legal distinction between a "designated retail vendor" and a "retail vendor" tobacco permit and their implications. Additionally and significantly, the Court accepts and finds that her current permit to sell tobacco product at 2290 Hammonds Plains Road at Wallace Hill is a "retail vendor's permit".

119 However, despite her many official notifications concerning the status of her store at Wallace Hill, and the impediment placed upon her to sell "quota cigarettes" from this location, there is no evidence before the Court that the accused, in 2004, before or at the time of the current charges, sought or was given any legal statement, representation, departmental guidelines, regulatory board approval, or advice from any government official in a position to bind the Crown, concerning the legality of her selling and possessing unmarked and tax-exempt tobacco products at Wallace Hill. In fact, the government officials of the day were clear and unambiguous and were insisting that she must comply with the law. The framework of the official parameters were distinct from that which presumably existed in 1995. She was now on notice, in no uncertain terms, that she had to comply with the applicable laws and that the crown was prepared to exercise its prosecutorial prerogative if she did not do so.

120 Consequently, in this Court's opinion there is no doubt that as a reasonable person in possession of all the information that she had and with the knowledge and awareness of all the regulatory enforcement activities, it is difficult to conclude that she did not know or ought to have known that her conduct was illegal. But, on the evidence, it does not appear that she considered that her conduct might be illegal. It appears that, despite all reasonable efforts to nudge her compliance with the law, she inexplicably assumed that her contrary conduct was permissible. Also, it would appear that she was unsuccessfully attempting to create a new and illegal reality.

121 Therefore, this Court is not satisfied that she has presented even the minimum of evidence for it to find, on the balance of probabilities, that she has met the first constituent element of the defence of officially induced error. The Court concludes and finds that before the commencement of the prosecutions that are before it, the accused neither sought nor did she receive any specific official advice, or at all, from any government official that was tailored to her store operation at 2290 Hammonds Plains Road. Thus, as no advice was sought or received it is not possible for this Court to adjudge whether it was reasonable or if it could bind the Crown. Neither can it determine, in the absence of evidence of such advice, whether she relied upon any such advice in committing the offences charged or whether she even considered the legal consequences of her conduct in the light of any such advice.

122 In the result, the Court concludes and finds that the accused error is not one of law or of mixed law and facts but one that is based on her misapprehension of the facts and the hopes of a new reality. Consequently, the Court finds that, in the case at bar, the defence of officially induced error has no merit, has not been made out and therefore it is not available to her.

Conclusions

123 This Court accepts and finds, upon its assessment of the total evidence including its impressions of the witnesses as they testified and on an assessment of their testimonies, on the above cited authorities and on the above analysis, that the property located at Wallace Hill at Hammonds Plains Road in the Halifax Regional Municipality is federal Crown land and is not a reserve as defined in the *Indian Act*. As a result, Chrissy's Trading Post, the convenience store located at 2290 Hammonds Plains Road that is situated on the land is not on reserve

land as defined in the *Indian Act*. Moreover, whether or not the store is located on a reserve, which it is not, the law requires that a retail vendor of tobacco products must comply with the provisions of the *Revenue Act* and *Regulations*.

124 Additionally, this Court accepts and finds that the accused applied for and was issued a "retail vendor's permit" for her store at 2290 Hammonds Plains Road. Likewise, she applied for and received, as a result of Band Council Resolutions of the Shubenacadie First Nation reserve a "designated retail vendor's licence" to sell "quota tobacco" products only on the Indian Brook reserve. However, in law, the licences are location specific and are not transferable between the locations. The "retail vendor's" licence does not permit her to possess, or sell unmarked or tax-exempt tobacco products, "peach tear tape," at her Hammonds Plains location which she did on several occasions. Further, it is this Court's opinion and it accepts and finds that through her many and varied official correspondences, representations and contacts, both personally and to her Band Council, and through her personal licensing applications and experiences, as a reasonable person in her position and possessed with all the information that she had, the accused knew or ought to have known what was the applicable law and her corresponding legal responsibilities.

125 Furthermore, the Court is not satisfied that she has presented any evidence to meet the requisite applicable elements of the burden of proof for it to apply the defence of officially induced error. Additionally, the Court finds that, in all the circumstances, she did not act with due diligence and was wilfully blind. Also, it finds that as a reasonable person in her position and possessing the information that she had, she acted unreasonably and chose to ignore the law that she knew or reasonably ought to have known that she had to obey. Therefore, in the result, this Court finds her guilty as charged of all the counts tried in the Informations before it and will enter convictions on the record.

Accused convicted.

END OF DOCUMENT

Reference re Quebec Sales Tax, [1994] 2 S.C.R. 715

IN THE MATTER OF Section 53 of the *Supreme Court Act*;

AND IN THE MATTER OF the questions referred by the Governor in Council concerning the authority of the Legislature of Quebec or of the Legislature of a Province to enact legislation imposing a tax similar to the goods and services tax imposed by Part IX of the *Excise Tax Act*, by Order in Council P.C. 1993-1740 dated the 26th day of August 1993;

and

The Attorney General of Canada and the Attorney General of Quebec *Interveners*

and

Wilfrid Lefebvre, Q.C. *Amicus curiae*

Indexed as: Reference re Quebec Sales Tax

File No.: 23690.

1993: December 9; 1994: June 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Major JJ.

reference by the governor in council

Constitutional law -- Distribution of legislative powers -- Taxation -- Provincial sales tax -- Proposed amendments to Quebec sales tax designed to transform it into tax similar to federal goods and services tax -- Whether proposed amendments within legislative authority of province -- Constitution Act, 1867, s. 92(2).

The Governor General in Council referred to this Court two questions concerning the constitutional validity of proposed amendments to Quebec's sales tax ("QST") designed to transform the QST into a tax similar in all essential respects to the federal goods and services tax ("GST"). Under the proposed amendments, every purchaser of a taxable supply must pay a tax equal to 8 percent of the value of the consideration given for the supply. As with the GST, a purchaser who uses the good or service in the production of other taxable supplies will be entitled to a refund from the government equal to the amount of tax initially paid on its inputs. Zero-rated supplies will be subject to the tax in the same way as any other taxable supply as they move through the production chain to the ultimate consumer, but the consumer will pay a tax set at 0 percent, and suppliers will be entitled to the input tax refund. In contrast to zero-rated supplies, the vendor of an exempt supply will not be entitled to the input tax refund. The collection of the tax will be assured by every person engaged in commercial activities who makes a taxable supply. The persons collecting the tax are agents of the Minister of Revenue and are required to be registered with the Minister. Small suppliers -- those whose annual revenues are less than $30,000 -- will be exempted from the obligation to register and thus collect the tax.

The questions referred to this Court read as follows:

1. Is it within the legislative authority of the Legislature of Quebec to impose, by way of provisions similar to those in the schedule attached hereto, a tax in respect of the supply of property or a service to a recipient who receives it for the sole purpose of making a new supply of it, or in respect of the supply of a property or a service to a recipient who receives it for the sole purpose of its becoming a component part of another property or service to be supplied by the recipient, particularly in view of the input tax refund provisions? If not, in what particular or particulars and to what extent?

2. Is it within the legislative authority of the Legislature of a Province to impose a tax within the province similar to the goods and services tax imposed pursuant to the *Excise Tax Act*, R.S.C., 1985, c. E-15, Part IX, as amended by S.C. 1990, c. 45? If not, in what particular or particulars and to what extent?

Held: Both questions should be answered in the affirmative.

The proposed tax could be validly adopted by the Quebec legislature pursuant to s. 92(2) of the *Constitution Act, 1867*. The fact that the tax is recouped through a series of indemnifications before the good reaches the final consumer does not make it an indirect tax for constitutional purposes. Imposing the tax at each level in the consumption chain is simply a method of tax collection by instalments. The reimbursement of the tax initially "paid" through the mechanism of the input tax refund means that there is no tax to be passed on. Since the person who ultimately pays the tax is the one intended to bear the burden, the tax is direct. While registrants are likely to pass on to consumers the administrative burdens they bear as tax collectors, these burdens are not taxes. Nor will the proposed tax result in taxation of persons outside the province by indirect means. Since a supply shipped outside Quebec is identified as a zero-rated supply, no tax is collected from the recipient and the

registrant making the supply is eligible for an input tax refund corresponding to the tax initially paid. The fact that someone might not bother claiming the exemption and would thereby pass on the tax to consumers in other provinces would not alter the general tendency of the tax.

The exemption in the draft legislation for zero-rated supplies does not give rise to an indirect tax since it is simply an application of the general regime with a tax rate of zero. The ultimate consumer of zero-rated supplies pays no tax, while the person supplying the good or service is entitled to the input tax refund for any tax paid prior to making the zero-rated supply. Exempt supplies are similar in that the person receiving such supplies does not pay any tax, but the suppliers of exempt supplies are generally not entitled to the input tax refund, raising the possibility that they might seek to recover the amount paid from the ultimate consumer. Since nearly all the exempt supplies enumerated are services, however, virtually all of their inputs must be "transformed" before they are resold. It will therefore be impossible for the tax to be passed on with the good or service. While there will clearly be exceptions to this general characterization of services as necessarily involving transformation or consumption, the general tendency of this exemption is to create a direct tax consistent with the constitutional imperatives recognized in earlier decisions.

The exemption of small suppliers from the obligation to register with the Minister of Revenue and collect the tax on the Minister's behalf would, standing alone, unquestionably have the effect of creating indirect taxation. Small suppliers are required to pay the tax on the goods they purchase and

unless they choose to register and incur the accompanying administrative costs, they will not be eligible for the input tax refund and will inevitably seek to recoup any money they pay from the consumers of their products. This fact does not, however, alter the general tendency of the tax. The exemption recognizes non-compliance with the tax scheme by certain small suppliers who face prohibitive costs of administration. The statistics relating to the importance of small suppliers in the total value of taxable supplies demonstrate that their position is exceptional in the overall scheme. The exemption is thus simply an incidental element of the efficient administration of the proposed tax.

Cases Cited

Referred to: *Reference Re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Brewers and Maltsters' Association v. Attorney-General for Ontario*, [1897] A.C. 231; *Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] A.C. 550; *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. 141; *Canadian Pacific Railway Co. v. Attorney General for Saskatchewan*, [1952] 2 S.C.R. 231; *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619; *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45.

Statutes and Regulations Cited

Act respecting the Québec sales tax and amending various fiscal legislation, S.Q. 1991, c. 67, ss. 93 to 172.

Constitution Act, 1867, ss. 91, 92(2).

Education and Hospitalization Tax Act, R.S.S. 1953, c. 61, s. 5(3).

Excise Tax Act, R.S.C., 1985, c. E-15 [am. 1990, c. 45], Part IX, Schedule V, Parts I to VI.

School Cafeteria Food and Beverages (GST) Regulations, SOR/91-29.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Authors Cited

Canada. Department of Finance. *Budget 89: The Goods and Services Tax.* Ottawa: Department of Finance, April 27, 1989.

Canada. Department of Finance. *Goods and Services Tax: An Overview.* Ottawa: Department of Finance, August 1989.

Canada. Department of Finance. *Goods and Services Tax: A Summary.* Ottawa: Department of Finance, 1990.

Canada. Department of Finance. *The White Paper: Tax Reform 1987.* Ottawa: Department of Finance, 1987.

La Forest, G. V. *The Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed. Canadian Tax Paper No. 65. Toronto: Canadian Tax Foundation, 1981.

Mill, John Stuart. *Principles of Political Economy, with Some of Their Applications to Social Philosophy*, vol. II. Boston: Little & Brown, 1848.

Whalley, John, and Deborah Fretz. *The Economics of the Goods and Services Tax.* Canadian Tax Paper No. 88. Toronto: Canadian Tax Foundation, 1990.

REFERENCE by the Governor General in Council, pursuant to s. 53 of the *Supreme Court Act*, concerning the constitutional validity of proposed amendments to Quebec's sales tax. Both questions answered in the affirmative.

Jean-Marc Aubry, Q.C., James M. Mabbutt, Q.C., and *Marie-Claude P. Larin*, for the intervener the Attorney General of Canada.

Jean-François Jobin and *Monique Rousseau*, for the intervener the Attorney General of Quebec.

Wilfrid Lefebvre, *Q.C.*, and *Patrice Marceau*, for the *amicus curiae*.

The judgment of the Court was delivered by

GONTHIER J. --

I - Introduction

In this reference, we are asked to consider the constitutional validity of proposed amendments to the Province of Quebec's sales tax ("QST"). These amendments are designed to transform the QST into a tax similar in all essential respects to the federal goods and services tax ("GST"). Pursuant to an agreement between the Province of Quebec and the Government of Canada on August 30, 1990, the tax bases of the federal and provincial consumption taxes were substantially harmonized and the Province of Quebec accepted responsibility for administering the GST in Quebec. The proposed amendments which form the subject of this reference would represent the final steps in harmonizing the QST and GST. The GST was the subject of an earlier reference to this Court and was held to be *intra vires* Parliament (*Reference Re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*")). The validity of the federal tax, however, is in no way determinative of the issues raised in this reference. Although the desire to harmonize federal and provincial

consumption taxes is administratively and politically attractive, it remains to be determined whether the proposal is compatible with the Constitution.

II - The Facts

The principal difference between the existing QST and the GST derives from the concept of "non-taxable supplies" present in the provincial regime. This concept ensures that the QST is a retail sales tax, that is, one which is collected at the retail level. The GST, in contrast, is a value-added tax which is collected and reimbursed at every stage along the production and marketing chain with the final consumer ultimately being the one to pay the tax. The net result of the two taxes is identical: the ultimate consumer pays the tax; however, the mechanism for achieving this end differs. Pursuant to s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, the Governor General in Council seeks to determine whether the mechanism through which the GST is collected as well as certain other aspects of the GST would be *intra vires* the provincial legislatures. A draft set of provisions which would transform the QST into a tax similar to the GST was annexed to the Order-in-Council containing the questions referred to this Court by the Governor General in Council. These provisions (the "draft Act") are found in the annex to this judgment.

As was noted by this Court in the *GST Reference*, the GST contemplates three classes of goods and services: taxable supplies, exempt supplies and zero-rated supplies. In addition to the three classes, there is also a special exemption for small business: the small supplier exemption. It is this structure which has been reproduced in the draft provisions and which was the

focus of oral argument before the Court. A brief review of these elements will set the factual background for the constitutional questions submitted by the Governor General in Council.

The general operation of the proposed tax is clear from an examination of the concept of taxable supply. A taxable supply is defined in s. 1 of the draft Act as the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, lease, gift or alienation in the course of a commercial activity. Every purchaser of a taxable supply must pay a tax equal to 8 percent of the value of the consideration given for the supply (in certain cases reduced to 4 or 0 percent (zero-rated supplies); draft Act, s. 2). As with the GST, the purchaser of a taxable supply who uses that good or service in the production of other taxable supplies will be entitled to a refund from the government equal to the amount of tax initially paid on its inputs (the input tax refund or the input tax credit under the GST; draft Act, s. 13). To the extent that taxable supplies are not used by the purchaser to produce other taxable supplies, by definition they will be consumed by the purchaser for non-commercial purposes. In such a case, the purchaser will not be eligible for an input tax refund. The tax will thus be collected and refunded at each stage of the production and marketing process until the ultimate consumer is reached. The input tax refund mechanism, in the case of taxable supplies, thus ensures that the tax is paid by the ultimate consumer.

Zero-rated and exempt supplies, in contrast, will not attract any tax from the ultimate consumer. Zero-rated supplies will be subject to the tax in the same way as any other taxable supply as they move through the production

chain to the ultimate consumer. The consumer, however, will pay a tax set at "0 percent", and suppliers will be entitled to the input tax refund. The result is that no net revenue will be raised for the government at any stage in the production and marketing chain. In contrast to zero-rated supplies, the vendor of an exempt supply will not be entitled to the input tax refund. In the case of exempt supplies, therefore, the tax will be paid to the government at the penultimate stage in the supply chain rather than by the ultimate consumer.

The collection of the tax will be assured by every person engaged in commercial activities who makes a taxable supply. The persons collecting the tax are agents of the Minister of Revenue and are required to be registered with the Minister (draft Act, ss. 25 and 28). Registration must occur before a taxable supply is made and is a condition precedent of eligibility for the input tax refund. Registrants are required to file returns in which they calculate their net tax for a reporting period (draft Act, s. 30). The net tax is essentially the difference between the amount of tax collected and the input tax refund for which the person is eligible in a given reporting period (draft Act, s. 29). On the basis of these calculations, the registrant will either be entitled to a refund from the government or be obliged to pay over the excess tax collected. Registrants will face significant administrative costs in complying with the proposed scheme. As is the case with the GST, certain persons, however, will be exempted from the obligation to register and thus collect the tax. Anyone whose annual revenues are less than $30,000 will have the option of registering (draft Act, ss. 18, 19 and 25). These persons are identified as small suppliers.

In order to test the constitutionality of the proposal to harmonize the QST and GST, the Governor General in Council, by Order-in-Council dated August 26, 1993, referred the following two questions to this Court:

> 1. Is it within the legislative authority of the Legislature of Quebec to impose, by way of provisions similar to those in the schedule attached hereto, a tax in respect of the supply of property or a service to a recipient who receives it for the sole purpose of making a new supply of it, or in respect of the supply of a property or a service to a recipient who receives it for the sole purpose of its becoming a component part of another property or service to be supplied by the recipient, particularly in view of the input tax refund provisions? If not, in what particular or particulars and to what extent?
>
> 2. Is it within the legislative authority of the Legislature of a Province to impose a tax within the province similar to the goods and services tax imposed pursuant to the *Excise Tax Act*, R.S.C., 1985, c. E-15, Part IX, as amended by S.C. 1990, c. 45? If not, in what particular or particulars and to what extent?

These same two questions were stated by Chief Justice Lamer as constitutional questions on September 7, 1993.

III - Analysis

The first constitutional question deals with the basic operation of the proposed tax and the elimination of the concept of non-taxable supplies from the current QST. The second and more general constitutional question requires that I address not only the basic operation of the tax, but the various exemptions which form part of the existing federal regime and which were highlighted above. The central issue in this reference is whether the proposed tax, in its general operation as well as its specific details, is a tax within the provincial

taxing power contained in s. 92(2) of the *Constitution Act, 1867*. Section 92(2) stipulates:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --
>
> . . .
>
> 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

The *amicus curiae* and the Attorneys General of Quebec and Canada have agreed that the tax will be collected within the province only and that it will be used to generate revenue for provincial purposes. My analysis of the proposed tax will therefore focus on determining if it is direct.

I begin with an examination of the legal principles applicable to determining whether a tax is direct within the meaning of s. 92(2). I then analyze the proposed QST in light of these principles beginning with the general scheme. Finally, I consider the constitutional validity of the three categories of exemptions: "zero-rated supplies", "exempt supplies" and the "small supplier exemption".

1. *The Applicable Principles of Law*

It is well established that whether a given tax is direct or indirect in terms of the *Constitution Act, 1867* is a question of law and not of economic incidence. The test predominately relied on in the jurisprudence to distinguish

between the two types of taxes is the formulation employed by John Stuart Mill in his 1848 treatise, *Principles of Political Economy*, Book V, c. III, at p. 371:

> A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such as the excise or customs.

Though this formulation is no longer used by economists, it has served and continues to serve the legal purpose of providing a relatively clear bench mark for applying the division of taxation powers contained in ss. 91 and 92 of the *Constitution Act, 1867*. Definitively adopted for that purpose in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 (P.C.), the distinction has subsequently been applied in a number of cases including *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371.

The application of Mill's distinction during the last century allows us to predict the constitutional fate of some taxes with a measure of confidence. In analyzing a given tax, it should be remembered that the courts examine the general tendency of the tax, rejecting exceptional factual circumstances as legally irrelevant (*Lambe, supra*; *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario*, [1897] A.C. 231). Customs duties and excise taxes, as Mill noted, are indirect taxes. The tax in these two cases is paid by the importer or manufacturer with, it has been said, "the expectation and intention" that it will generally be passed on to the purchaser as an element of the price. There is no intention in either case to place the burden of the tax on the manufacturer or importer, who simply act as conduits through which to pass on

the burden to others. The tax is therefore not paid by the person who is intended to bear the burden. Property, income and consumption taxes, in contrast, have been historically held to be direct taxes since their general tendency is that the person intended to bear the burden of the tax is the one who pays it. The intention apparent in the case of customs duties and excise taxes that the tax be passed on with the good is absent from property, income and consumption taxes.

The case law interpreting s. 92(2) contains various indicia or propositions which serve to guide the courts. Five of these are of particular relevance in determining the constitutionality of the proposed provincial value-added tax.

As noted above, one indicium is whether the intention of the legislator as to who should bear the tax is clear. In the case of direct taxes, Viscount Simon recognized that "the taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a `peculiar contribution' on the particular party selected to pay the tax" (*Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] A.C. 550, at p. 564). A related indicium of direct taxation is whether everyone knows how much tax they really pay (Mill, Book V, c. VI, cited with approval by Viscount Simon in *Atlantic Smoke Shops*; see also *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. 141 (P.C.)). At Confederation, the decision to limit the provincial legislatures to direct taxation was aimed at transparency and thought to enhance political accountability. Though the criterion of accountability may not be the

central focus of the more recent jurisprudence pertaining to s. 92(2), transparency still serves to identify a tax as direct.

A third indicium, one of indirectness, was recognized by Rand J. in *Canadian Pacific Railway Co. v. Attorney General for Saskatchewan*, [1952] 2 S.C.R. 231. He pointed to the attachment of a tax to a good as a strong indication that the tax is indirect (at pp. 251-52):

> If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

Thus, where the tax "clings" to the product in the sense that its amount attaches to the good and moves together with the good through the chain of supply, an element of indirectness may be present. The validity of Rand J.'s indicator is demonstrated most vividly by customs duties and excise taxes. This test was recently applied in *Allard Contractors*, *supra*, at pp. 394-98, to identify a volumetric fee on soil removal as an indirect tax.

At first glance, provincial consumption taxes would appear to be taxes which attach to a good; however, the case law has unequivocally and correctly recognized such taxes as direct (see *Atlantic Smoke Shops*, *supra*, and *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619). In particular, a number of cases have held that consumption taxes will be direct even though they may be passed on when the good or service initially taxed is incorporated or transformed into a new good or service (see *Attorney-General*

for British Columbia v. Kingcome Navigation Co., [1934] A.C. 45; *Cairns*, *supra*). Thus where a tax is imposed on the consumption of fuel oil, the fact that the oil may be used in the manufacture of another good and thereby passed on as part of the cost of that good does not render the tax unconstitutional. The good is consumed and the tax therefore cannot be passed on with the good as is the case with an import duty.

The final proposition of relevance in determining the constitutional validity of the proposed value-added tax is that the nature of a tax is not affected by the system of collection (see *Kingcome*, *supra*; *Atlantic Smoke Shops*, *supra*, and *Cairns*, *supra*). The fact that a retailer collects the tax from a consumer on behalf of the government and then physically pays the money over to the government does not alter the characterization of such a tax as direct. The person intended to bear the burden of the tax, the consumer, is still the one who in reality pays it even though the retailer as agent for the government collects it. It is true that the retailer bears a burden in relation to the collection of the tax; however, this burden is part of the general cost of doing business and cannot be related to or passed on in a recognizable form with any particular good.

In approaching new taxes, the constitutional fate of which is unknown, it is not without interest to refer to an important effect of the s. 92(2) limitation to direct taxation. In addition to the historical desire to promote transparency and accountability, one finds a concern in the case law and literature regarding taxation of persons outside the province by indirect means or taxation which interferes with interprovincial or international trade. The

prohibition against excise taxes and customs duties clearly achieves this latter purpose. As my colleague La Forest J. noted in his study of the taxation power under the Canadian Constitution, "the person who ultimately pays an excise tax may have no other connection with the province benefiting from the tax than that the product was originally produced or manufactured there" (G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 202).

My review of the jurisprudence interpreting s. 92(2) has revealed that apart from excise taxes, import duties, or taxes of a similar nature and the two more general limitations highlighted in the preceding paragraph, the provinces have come to enjoy considerable freedom in constructing their tax systems. Having examined the basic principles informing the interpretation and application of s. 92(2), I now turn to a detailed examination of the tax proposed in the draft Act.

2. *The General Scheme of the Proposed Tax*

A perusal of the economics literature reveals that value-added taxes are often seen as refined versions of consumption taxes (see, for example, Whalley and Fretz, *The Economics of the Goods and Services Tax* (1990)). Collection earlier in the production and marketing chain is thought to increase compliance by collecting the bulk of tax revenues from larger organizations believed to have more dependable accounting systems. Furthermore, until someone resells a good they have purchased, they can be assumed to be the consumer and therefore liable to pay the tax. To avoid the ultimate burden of

paying the tax, they must prove that the good or service was used in the provision of another taxable supply. This "onus" is easily discharged by collecting the tax on behalf of the government when taxable supplies are made to other persons and by filing returns which detail the amount of tax collected and the amount "paid" in respect of inputs. Enforcement is thereby enhanced by the documentary record created.

As was noted above, consumption taxes have historically been held to be direct taxes. In *Cairns*, *supra*, this Court held that a tax on consumers of tangible personal property purchased at the retail level was direct. A similar conclusion was reached in *Atlantic Smoke Shops*, *supra*, where the tax was on tobacco purchased for consumption from a retail vendor. To the extent that the proposed value-added tax is in fact a consumption tax on the ultimate consumer, these cases provide some support for its validity. The real question in determining if the tax is direct, however, is not whether it is a consumption tax, but whether the person intended to bear the burden of the tax is the person paying the tax.

The unique feature of a value-added tax, its collection along the production and marketing chain, may be the chief attraction for governments. However, the collection mechanism, which provides for the tax as the good moves through the consumption chain, may at first sight appear to raise the spectre of an indirect tax.

It was maintained before us that value-added taxes are similar to excise taxes or customs duties in that the tax is in some sense passed on with

the good and indemnification occurs when the good is sold. It will be remembered that Rand J. in *Canadian Pacific Railway Co. v. Attorney General for Saskatchewan*, *supra*, identified the fact that the tax tended to cling to a good as an indication of indirectness. The fact that the tax is recouped through a series of indemnifications before the good reaches the final consumer does not, however, make the value-added tax an indirect tax for constitutional purposes. Close examination of the proposed tax reveals that the person who ultimately pays the tax is the one intended to bear the burden, and, therefore, the tax is direct.

As noted above, the proposed tax will be paid and then reimbursed at each stage until final consumption. Imposing the tax at each level in the consumption chain is simply a method of tax collection by instalments. The persons who collect the tax along the chain and who are reimbursed are really tax collectors. The draft Act, it will be remembered, explicitly identifies these persons as agents of the Minister of Revenue in their capacity as tax collectors (draft Act, s. 28). Rather than putting forward a new and different type of tax, the essence of the proposed amendments is simply to substitute a new mechanism of collection.

The availability of the input tax refunds is the key to understanding what is truly going on prior to the stage of ultimate consumption. Eligibility for an input tax refund relieves the consumer turned supplier from the burden of the tax which is then charged to the person who purchases the good. The reimbursement of the tax initially "paid" through the mechanism of the input tax refund means that there is no tax to be passed on. The input tax refund thus

guarantees that the person who ultimately pays the tax is the one who was intended should bear the burden and that therefore the proposed tax is a form of direct taxation. Though the input tax refund mechanism operates behind the scenes to produce this result and though the GST, for example, can be included in the price and appear only on the final invoice, consumers are fully aware, often to their dismay, that they are paying the tax. Indeed the federal government made it very clear in the background papers to the GST, that in replacing the hidden federal sales tax it was "committed to ensuring that Canadians [be] informed in a clear and visible manner that the GST is being applied" (*Goods and Services Tax: An Overview*, Department of Finance, August 1989, at p. 20; see also *Budget 89: The Goods and Services Tax*, Department of Finance, April 27, 1989, at pp. 19 and 25). As noted above, such transparency is one of the hallmarks of direct taxation.

The *amicus curiae*, however, attacked the proposed tax by focusing on the input tax refund. The *amicus curiae* argued that the person who initially "pays" the tax is not the person whom the legislature has chosen to bear the burden. These persons, it was argued, pass the tax and the burden back to the government by the mechanism of the input tax refund. I cannot accept this argument. The registrants are not in any constitutionally significant sense the persons paying the tax when they resell the good or another good or service which the taxed good was used to produce. The input tax refund in such a case operates to ensure that any tax initially paid is fully reimbursed. Registrants therefore do not pay the tax or bear the burden, as stated above, they merely function as tax collectors transferring the revenues to the government as was the case in *Cairns*, *supra*, and *Kingcome*, *supra*.

This view of the tax is supported by the presence of provisions in earlier versions of retail sales taxes which required a vendor to collect the tax even though the person alleged the good was being purchased for the purpose of resale. Section 5(3) of *The Education and Hospitalization Tax Act*, R.S.S. 1953, c. 61, the Act considered in *Cairns*, required persons in such a situation to deposit with the vendor an amount equal to the tax otherwise payable under the Act. The "deposit" was then refunded on receipt of evidence satisfactory to the Minister that the property was purchased for the purpose of resale. In other words, the "deposit" was refunded only when the Minister received sufficient evidence that the tax would be paid further down the chain. Under the draft Act and the GST, eligibility for a refund results from simply filing a return; however, as with s. 5(3) in the Saskatchewan Act, compliance with the statutory regime is thereby enhanced.

It is true that as tax collectors registrants bear hidden burdens in relation to the role assigned them under the scheme. These burdens consist of the administrative cost of keeping records and filing returns as well as the cost of transferring funds to the government prior to reimbursement. In the *GST Reference*, these costs were identified as administrative burdens and it was held that the obligation on a province to collect and remit the GST was not taxation of a province's property (*supra*, at pp. 483 and 481). It is likely that these burdens will be passed on to consumers; however, this fact does not alter the general tendency of the tax for the purposes of s. 92(2). These burdens are not taxes. These costs will not attach to any particular good, but rather will be part of the general cost of doing business. As a general cost of doing business, the burdens would often be transferred in one form or another, but they are not

related to any particular good. It is not "the tax" that is passed on. The requirement that the tax be direct is satisfied. It is paid by the very person intended to bear its burden.

As to the concern that a value-added tax might result in taxation of persons outside the province by indirect means, it must be recognized that the collection of the bulk of tax revenues prior to the retail level creates the possibility that a good shipped to another province will carry with it the provincial tax as part of its price. This situation does not arise with the existing sales taxes because they are imposed exclusively at the retail level and not at the wholesale or manufacturing level. Absent provision for a refund in cases where the good is shipped outside the province, the manufacturer or wholesaler would clearly attempt to recoup the tax paid on the particular good from the consumers in the destination province.

The drafters of the proposed Act, however, have avoided this problem. Section 12 identifies "a supply shipped outside Québec" as a zero-rated supply. As a zero-rated supply, no tax is collected from the recipient and the registrant making the supply is eligible for an input tax refund corresponding to the tax initially paid. The refund thus ensures that the proposed tax has no extra-territorial effects. The fact that someone might not bother claiming the exemption and would thereby pass on the tax to consumers in other provinces would not alter the general tendency of the tax.

The preceding review of the general scheme of the proposed tax and my conclusion that the tax, through the mechanism of the input tax refund,

operates as a direct tax leads to an affirmative answer in respect of the first constitutional question.

3. *The Various Exemptions*

Having found the general operation of the proposed tax to be constitutional, it is necessary to consider the three categories of exceptions contained in the draft Act. As noted by the *amicus curiae*, the fact that the general tendency of the basic tax is direct cannot justify the creation of an exemption which would in effect be an indirect tax. The general tendency doctrine justifies ignoring, for constitutional purposes, particular factual exceptions; it does not allow the provincial legislatures to create indirect taxes by calling them exceptions to a tax the general tendency of which is direct.

(a) The Zero-Rated Supplies

Section 12 of the draft Act identifies the supply of a number of goods and services as zero-rated supplies. This exemption poses no concerns from the point of view of s. 92(2). As noted above in respect of a supply outside Quebec, this exemption is simply an application of the general regime with a tax rate of zero. The ultimate consumer of zero-rated supplies therefore pays no tax. The person supplying the good or service, on the other hand, is entitled to the input tax refund for any tax paid prior to making the zero-rated supply. The net result is that no tax revenues are generated in the case of zero-rated supplies. My finding that the mechanism of the general regime is valid can thus be extended to this category of exceptions.

(b) The Exempt Supplies

The category of exempt supplies, created by s. 11 of the draft Act, is similar to the zero-rated supplies in that the person receiving such supplies does not pay any tax. The difference between exempt supplies and zero-rated supplies, as noted above, however, is that the suppliers of exempt supplies are generally not entitled to the input tax refund. Provision has been made for a partial rebate for certain identified organizations (see draft Act, ss. 20 to 23). In the case of exempt supplies, therefore, the tax is paid at the penultimate stage in the consumption chain by the supplier. This scenario raises the possibility that the proposed tax will operate as an excise tax with the supplier seeking to recover the amount paid from the ultimate consumer. In such a case, the tax would be indirect and would be *ultra vires* the provinces.

The Attorney General of Canada and the Attorney General of Quebec argued that the category of exempt supplies does not create an indirect tax in practice. The essence of their argument was that because of the nature of the exempt supplies the vast majority of taxed inputs will be consumed or transformed in the production of the exempt supplies and, therefore, it will be impossible for the tax to be passed on with the good or service. The consumption or transformation of the inputs means that any tax paid becomes part of the general cost of producing the good or service rather than being passed on to the consumer with the particular good. This argument is supported by the decisions of the Privy Council and this Court which recognized that a tax will be direct even though the good which is subject to the tax is incorporated or transformed into a new good or service (see *Kingcome*, *supra*; *Cairns*, *supra*).

The *amicus curiae* conceded that the exemption is valid as far as taxed inputs are in fact consumed in the production of exempt supplies, but argued that the exemption is invalid to the extent it allows goods to be supplied without transformation or consumption. Although the *amicus curiae* did not convincingly point to specific examples to justify his position, it is necessary to test the validity of the argument advanced by the Attorneys General by examining the specific supplies covered by s. 11.

The supply of a residential complex, health care service, educational service, child and personal care service, legal aid service, and a supply made by a public sector body are the exempt supplies enumerated in s. 11. The full content of these various supplies is ascertained by examining the corresponding provisions of the GST (Schedule V, Parts I to VI of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended by S.C. 1990, c. 45) and the supplies described in ss. 93 to 172 of the *Act respecting the Québec sales tax and amending various fiscal legislation* (S.Q. 1991, c. 67, "*QST amending Act*").

For the purposes of this reference, it is not necessary to undertake a detailed examination of each of these provisions. Since nearly all the categories enumerated in s. 11 of the draft Act are services, the section itself suggests that virtually all of the inputs of the exempt supplies must be "transformed" before they are resold. None of these categories are analogous to retail sales where the retailer merely takes an existing good and resells it. For example, paper, pens, computers and charts are all transformed by the educator in order to produce an educational service such as a course. Similarly, child care and legal aid workers do not buy child care and legal aid services and then resell them. In each case,

they take various inputs and transform them into a product which is entirely different from the inputs.

There will clearly be exceptions to this general characterization of services as necessarily involving transformation or consumption. One might argue, for example, that the toilet used in the construction of an apartment is not "transformed" in the creation of a residential complex. However, in *Cairns* it was held that a tax on such inputs is valid because there is a transformation in putting the components together to make a house. A similar analysis applies to the other categories of services enumerated in s. 11. Taking medical services as an example, the more detailed provisions of the federal and Quebec legislation exempt the supply of drugs and medical or surgical equipment when they are administered in conjunction with the supply of laboratory, radiological or other diagnostic services in a "health care establishment" (see *QST amending Act*, ss. 108 to 110; *Excise Tax Act*, Schedule V, Part II, ss. 1 to 3). I therefore agree with the Attorneys General that the general tendency of this exemption is to create a direct tax consistent with the constitutional imperatives recognized in earlier decisions.

In addition to the above reasons, my conclusion is based on the fact that the specific provisions related to exempt supplies contained in both the federal and Quebec legislation cited above are extremely detailed and therefore narrowly limit the scope of the exemption. It is conceivable, however, that there will be instances where the wording of the statute could authorize simple resale and therefore the classic passing on of the tax characteristic of indirect taxes. While recognizing the theoretical potential of this possibility, my

examination of both the federal and Quebec legislation revealed that the legislators have taken some care to limit such results. In the case of educational services, for example, while cafeteria meals are exempted, the supply of carbonated beverages and pre-packaged goods for sale to consumers are not, nor are supplies from vending machines (see *QST amending Act*, s. 131; *Excise Tax Act*, Schedule V, Part III, s. 12; and *School Cafeteria Food and Beverages (GST) Regulations*, SOR/91-29, December 18, 1990). Similarly, the provisions applicable to public sector bodies exhaustively list the municipal and provincial government services which are exempt (see *QST amending Act*, ss. 161 to 168; *Excise Tax Act*, Schedule V, Part VI, ss. 19 to 22). In the case of charities, which are included in the definition of public sector bodies, supplies of corporeal property acquired for the purposes of resale are, as a general rule, subject to the tax (see *QST amending Act*, s. 141(5); *Excise Tax Act*, Schedule V, Part VI, s. 2(*e*)). Three exceptions to this general rule exist for cases where a supply of corporeal moveable property is made in the context of fund-raising campaigns, in the course of a business activity carried on exclusively by volunteers or where the supply is made at cost (for the volunteer and direct cost exemptions respectively, see *QST amending Act*, ss. 142 and 148; and *Excise Tax Act*, Schedule V, Part VI, ss. 3 and 6). The fund-raising exemption is limited by a number of conditions which include that the body does not carry on the business of selling such property, that all sales persons are volunteers and that the consideration for each item sold does not exceed $5 (see *QST amending Act*, s. 144; *Excise Tax Act*, Schedule V, Part VI, s. 4). The overwhelming impression one gets from these provisions is that the exceptions are limited in scope and, as such, particular cases of any recoupment of the tax would not affect the general tendency of the tax.

(c) The Small Supplier Exemption

The final element of the proposed tax challenged before us was the small supplier exemption. As noted above, every person engaged in a commercial activity would be obligated under the draft Act to register with the Minister of Revenue and collect the tax on the Minister's behalf. This mandatory registration imposes unavoidable administrative costs, the relative significance of which will vary with the size of the business involved. As I concluded above, though these costs will form part of the costs of doing business and will in all likelihood be passed on to the purchasers of taxable supplies, they do not make the tax indirect. The provisions pertaining to small suppliers which exempt certain businesses from these costs would, standing alone, unquestionably have the effect of creating indirect taxation. Small suppliers are required to pay the tax on the goods they purchase and unless they choose to register and incur the accompanying administrative costs, they will not be eligible for the input tax refund. There can be no doubt, however, that unregistered small suppliers will inevitably seek to recoup any money they pay from the consumers of their products. As will be seen though, this reality does not lead to the conclusion that the exemption is *ultra vires* the provincial legislature.

It would seem that a likely cause of non-compliance with the tax scheme by small suppliers, assuming rational economic behaviour, would be that the costs of administration are prohibitive as a result of resource constraints and the competitive circumstances of the market. The proposed regime and the GST could be seen as explicitly acknowledging this possibility by creating an

exception for the smallest suppliers. The *amicus curiae*, however, questioned the legitimacy of this exception because it was recognized explicitly by the legislator. With respect, I am unable to agree with the position taken by the *amicus curiae*. The choice of the legislator to recognize and legalize particular factual realities by providing an option to small suppliers not to participate in the collection system cannot alter the general tendency of the tax.

The statistics relating to the importance of small suppliers in the total value of taxable supplies demonstrate that the position of small suppliers is exceptional in the overall scheme. Though there are an estimated 400,000 small suppliers in Quebec, they account for a very small portion of total economic activity. The statistics provided to us indicate that small suppliers were responsible for approximately 0.61 percent of the taxable supplies made by Canadian firms and individuals and a slightly higher percentage when Quebec is viewed in isolation. It should be recognized that these figures include small suppliers who transform their taxed inputs. In those cases, the tax is direct under the principles recognized in *Cairns*, *supra*, and other cases. Furthermore, the Attorney General of Quebec noted that a large number of small suppliers choose to register in any event as they are entitled to do (or are obliged to because their customers insist). Finally, the exceptional nature of the circumstances contemplated by the exemption as reflected in these statistics and facts seems particularly persuasive when one considers that the persons envisaged by this exemption under the GST are typically students who run their own summer business, small non-profit and charitable groups selling goods or services to raise funds and people who work part-time such as retired

accountants or persons selling goods from their home (*Goods and Services Tax: A Summary*, October 1990, Department of Finance, at p. 58).

To hold that the exemption is *ultra vires* the provincial legislatures would be an absurd result given that the exemption, as it was conceived in the case of the GST, was originally created because of the significantly higher compliance costs for small firms relative to large firms (see, for example, *The White Paper: Tax Reform 1987*, Department of Finance, June 18, 1987, at p. 23). The exemption in the proposed legislation is therefore an express policy decision based on, we can presume, the unjustifiable nature of imposing these administrative costs on firms below a certain level of revenues. The Attorney General of Quebec suggested that incurring these costs would be untenable both for the Minister of Revenue, presumably in terms of revenues generated, as well as for the small suppliers given the particular competitive circumstances and resource constraints they face.

The small supplier exemption is thus simply an incidental element of the efficient administration of the proposed consumption tax. It is, however, a crucial element of the efficient collection of the tax. The acceptance by this Court and the Privy Council that provincial consumption taxes could be collected by suppliers necessarily laid the foundation for the particular case raised by this exemption as well as its validity. Implicit in the decision to accept that suppliers could collect consumption taxes without transforming the tax into an indirect tax through the imposition of the associated costs was the recognition that the administration of such taxes will necessarily cause certain costs to be attached to the scheme which will not affect the scheme's

constitutional validity. No doubt the small supplier (exempted from these costs) would attempt to collect the tax from the consumer, but that in my mind is precisely the person who the legislature intended would pay it. That is what the Act as a whole is aimed at. Small suppliers, like all other suppliers, may register for reimbursement, but they may if they find it convenient choose not to do so. They are simply exempted in this way, then, for administrative convenience and not to change the general incidence of the tax. By the effect of the general scheme, of which their operations form a minimal part, they are effectively agents of the government for collection of the tax like other suppliers. What we have here is a mere administrative device to complete the contours of the scheme by avoiding expensive collection machinery in this residuary part of the scheme as well as inconvenience to these small suppliers. Because of the minimal role small suppliers play in the total scheme envisaged by the tax, they would be effectively in the same position as all other retailers who fall within the scheme.

IV - Conclusion

Careful scrutiny of the proposal to transform the QST into a value-added tax similar in all essential respects to the GST reveals that the proposed tax could be validly adopted by the Legislature of Quebec pursuant to s. 92(2) of the *Constitution Act, 1867*. Both the general regime of the tax, through the mechanism of the input tax refund, and the various exemptions create a tax the general tendency of which is direct. The constitutional questions are therefore answered as follows:

1. Is it within the legislative authority of the Legislature of Quebec to impose, by way of provisions similar to those in the schedule attached hereto, a tax in respect of the supply of property or a service to a recipient who receives it for the sole purpose of making a new supply of it, or in respect of the supply of a property or a service to a recipient who receives it for the sole purpose of its becoming a component part of another property or service to be supplied by the recipient, particularly in view of the input tax refund provisions? If not, in what particular or particulars and to what extent?

Answer: Yes.

2. Is it within the legislative authority of the Legislature of a Province to impose a tax within the province similar to the goods and services tax imposed pursuant to the *Excise Tax Act*, R.S.C., 1985, c. E-15, Part IX, as amended by S.C. 1990, c. 45? If not, in what particular or particulars and to what extent?

Answer: Yes.

SCHEDULE

DRAFT HARMONIZATION
QUÉBEC SALES TAX -- GOODS AND SERVICES TAX

Definitions

1. For the purposes of this document, unless the context indicates otherwise,

"commercial activity" means

(1) any business carried on by a person,

(2) any adventure or concern of a person in the nature of trade, and

(3) any activity engaged in by a person that involves the supply of an immovable or of a right or interest in respect of an immovable by that person;

however, "commercial activity" does not include

(4) an activity engaged in by a person to the extent that it involves the making of an exempt supply by the person,

(5) an activity engaged in by an individual without a reasonable expectation of profit, or

(6) the performance of any activity or duty in relation to an office or employment;

"person" means a corporation, trust, individual, partnership or succession or a body that is an association, club, commission, union or other organization of any kind;

"prescribed" means prescribed by regulation or determined in accordance with rules prescribed by regulation;

"recipient", in respect of a supply, means the person who pays or agrees to pay consideration for the supply or, if no consideration is or is to be paid for the supply, the person to whom the supply is made;

"registrant" means a person who is registered, or who is required to apply to be registered, under this document;

"service" means anything other than property, money and anything that is supplied to an employer by a person who is or agrees to become an officer or employee of the employer in the course of or in relation to his office or employment;

"small supplier", at any time, means a person who, at that time, is a small supplier under sections 18 and 19, unless the person is not, at that time, a small supplier under section 148 of the Excise Tax Act (Statutes of Canada);

"supplier", in respect of a supply, means the person making the supply;

"supply" means the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, lease, gift or alienation;

"taxable supply" means a supply that is made in the course of a commercial activity, but does not include an exempt supply.

TAXATION

Imposition of tax

Taxable supply made in Québec

2. Every recipient of a taxable supply made in Québec shall, on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due, pay to the Minister of Revenue a tax in respect of the supply equal to 8 % of the value of the consideration for the supply.

Notwithstanding the first paragraph, the rate of the tax is 4% in respect of the supply of incorporeal movable property or an immovable or service, other than

(1) the supply of a telephone service;

(2) the supply of a telecommunication or a telecommunication service in respect of which the tax prescribed by the Telecommunications Tax Act (R.S.Q., chapter T-4) would apply but for section 14 of the said Act.

However, the rate of the tax in respect of a taxable supply that is a zero-rated supply is 0 %.

Corporeal property brought into Québec

3. Every person who brings into Québec corporeal property for consumption or use in Québec by the person or at his expense by another person shall, immediately after arrival of the property in Québec, pay to the Minister a tax equal to 8 % of the value of the property, except in the case of an immovable, in which case the tax shall be equal to 4 % of its value.

For the purposes of the first paragraph, the value of the property means

(1) in the case of property produced by the person outside Québec but in Canada and brought into Québec within 12 months after it is produced, the cost price of the property, including the tax paid or payable by the person under Part IX of the Excise Tax Act (Statutes of Canada) in respect of the elements of the cost price;

(2) in the case of property supplied to the person outside Québec by way of sale and consumed or used in Québec within 12 months after it is supplied, the value of the consideration for the supply;

(3) in the case of property supplied to the person by way of lease, licence or similar arrangement outside Québec, the value of the consideration for the supply that can reasonably be attributed to the right of enjoyment of the property in Québec;

(4) in any other case, the fair market value of the property.

Notwithstanding the second paragraph, the value of property brought into Québec in prescribed circumstances shall be determined in the prescribed manner.

The first paragraph does not apply in respect of

(1) corporeal property, where tax under section 2 is payable in respect of the supply of the property;

(2) prescribed goods;

(3) corporeal property brought into Québec by a registrant for exclusive consumption or use in the course of the commercial activities of the registrant and in respect of which the registrant would, if he had paid tax under the first paragraph in respect of the property, be entitled to apply for an input tax refund.

A person who brings corporeal property into Québec includes any person who causes such property to be brought into Québec.

Taxable supply made outside Québec

4. Every recipient of a taxable supply of incorporeal movable property or a service that is made outside Québec shall pay to the Minister a tax in respect of the supply, calculated at the rate provided for in the second paragraph on the basis of the value of the consideration for the supply, if the recipient is resident in Québec and may reasonably be regarded as having received the property or service for use in Québec otherwise than exclusively in the course of a commercial activity.

The rate of tax to which the first paragraph refers is the rate that would be applicable in respect of the supply under section 2 if the supply were made in Québec.

Taxable supply of a road vehicle

5. A supply, made otherwise than in the course of a commercial activity, of a road vehicle that must be registered under the Highway Safety Code (R.S.Q., chapter C-24.2) following an application by the recipient of the supply is deemed to be a taxable supply.

Presumptions respecting place of supply

Supply deemed to be made in Québec

6. A supply is deemed to be made in Québec if

(1) in the case of a supply by way of sale of corporeal movable property, the property is, or is to be, delivered in Québec to the recipient of the supply;

(2) in the case of a supply of corporeal movable property otherwise than by way of sale, possession or use of the property is given or made available in Québec to the recipient of the supply;

(3) in the case of a supply of incorporeal movable property,

(a) the property may be used in whole or in part in Québec and the recipient is resident in Québec or registered under this document, or

(b) the property relates to an immovable situated in Québec, to corporeal movable property ordinarily situated in Québec or to a service to be performed in Québec;

(4) in the case of a supply of an immovable or of a service in relation to an immovable, the immovable is situated in Québec;

(5) in the case of a supply of a telecommunication service, the instrument or facility for the emission, transmission or reception of the service in respect of which the invoice for the supply is, or is to be, issued is ordinarily situated in Québec;

(6) the supply is a supply of a prescribed service; or

(7) in the case of a supply of any other service,

(a) the service is or is to be performed wholly in Québec; or

(b) the service is or is to be performed in part in Québec.

Consideration

Value of consideration - general rule

7. The value of the consideration, or any part thereof, for a supply is deemed to be equal,

(1) where the consideration or that part is expressed in money, to the amount of the money; and

(2) where the consideration or that part is expressed otherwise than in money, to the fair market value of the consideration or that part at the time the supply was made.

Duties, fees and taxes

8. The consideration for a supply includes any duty, fee or tax imposed under an Act of the legislature of Québec, another province, the Northwest Territories, the Yukon Territory or of the Parliament of Canada on the recipient or the supplier of the supply in respect of the supply, production, importation into Canada, consumption or use of the property or service supplied that is payable by the recipient or the supplier.

Notwithstanding the first paragraph, the consideration for a supply does not include the tax payable under this document or a prescribed duty, fee or tax.

Expense incurred in supply of a service

9. Where, in making a supply of a service, a person incurs an expense for which the person is reimbursed by the recipient of the supply, the amount of the reimbursement is deemed to be part of the consideration for the supply of the service, except to the extent that the expense was incurred by the person as a mandatary of the recipient.

Specific rules respecting taxation

Supply by a small supplier

10. Where a person makes a taxable supply and the consideration, or a part thereof, for the supply becomes due, or is paid before it becomes due, at a time when the person is a small supplier who is not a registrant, that consideration or part thereof, as the case may be, shall not be included in calculating the tax payable in respect of the supply.

This section does not apply to a supply of an immovable by way of sale.

EXEMPT SUPPLY

Exempt supply[1]

11. The following supplies are exempt:

(1) a supply of a residential complex;

(2) a supply of a health care service;

(3) a supply of an educational service;

(4) a supply of a child and personal care service;

(5) a supply of a legal aid service;

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1 *Supplies described in sections 93 to 172 of the Act respecting the Québec sales tax and amending various fiscal legislation* (S.Q. 1991, c. 67).

(6) a supply made by a public sector body.

ZERO-RATED SUPPLY

Zero-rated supply[2]

12. The following supplies are zero-rated:

(1) a supply of medication;

(2) a supply of a medical device;

(3) a supply of basic groceries;

(4) a supply of agriculture and fishing products;

(5) a supply shipped outside Québec;

(6) a supply of a travel service;

(7) a supply of a transportation service.

INPUT TAX REFUND

Exclusively commercial activities

13. Where property or a service is acquired or brought into Québec by a registrant for consumption, use or supply exclusively in the course of commercial activities of the registrant, the input tax refund of the registrant in respect of the property or service for a reporting period of the registrant is the amount of any tax that became payable or, if it had not become payable, was paid by the registrant in that period in respect of the acquisition or bringing into Québec by the registrant of the property or service.

For the purposes of this section, where an invoice for an amount is issued to a registrant in respect of a taxable supply made in Québec to the registrant, tax under section 2 calculated on that amount is deemed to have become payable on the date of the invoice.

Application

14. Where property or a service is acquired or brought into Québec by a registrant for non-exclusive consumption, use or supply (in this section referred to as the "intended use") in the course of commercial activities of the registrant, the input

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2 *Supplies described in sections 173 to 198 of the Act mentioned in footnote 1.*

tax refund of the registrant in respect of the property or service for a reporting period of the registrant is the amount determined by the formula

A X B.

For the purposes of this formula,

(1) A is the amount that would be determined under the first paragraph of section 13 in respect of the property or service if that section were read without reference to the word "exclusively"; and

(2) B is the percentage that the intended use of the property or service in those commercial activities of the registrant is of the total intended use of the property or service.

Restriction

15. In determining an input tax refund of a registrant, no amount shall be included in respect of the tax payable by the registrant in respect of the following supplies made to, or brought into Québec by, the registrant:

(1) a supply of a membership in a club the main purpose of which is to provide recreational, sporting or dining facilities;

(2) a supply or the bringing into Québec of property or a service that is acquired or brought in by the registrant at any time in or before a reporting period of the registrant exclusively for the personal consumption, use or enjoyment (in this section and in section 16 referred to as the "benefit") in that period of a particular individual who was, is or agrees to become an officer or employee of the registrant, or of another individual related to the particular individual;

(3) a supply made in or before a reporting period of the registrant of property, by way of lease, licence or similar arrangement, primarily for the personal consumption, use or enjoyment in that period of

(a) where the registrant is an individual, the registrant or another individual related to the registrant;

(b) where the registrant is a partnership, an individual who is a member of the partnership or another individual who is an employee, officer or shareholder of, or related to, a member of the partnership;

(c) where the registrant is a corporation, an individual who is a shareholder of the corporation or another individual related to the shareholder; and

(d) where the registrant is a trust, an individual who is a beneficiary of the trust or another individual related to the beneficiary.

Exceptions

16. Paragraph 2 of section 15 does not apply in the following cases:

(1) the registrant makes a taxable supply of the property or service to the particular individual or the other individual for consideration that becomes due in that period and that is equal to the fair market value of the property or service at the time the consideration becomes due; or

(2) if no amount were payable for the benefit by the particular individual who was, is or agrees to become an officer or employee of the registrant, no amount would be included under sections 34 to 47.17 of the Taxation Act (R.S.Q., chapter I-3) in respect of the benefit in computing the income of the particular individual.

Similarly, paragraph 3 of section 15 does not apply where the registrant makes a taxable supply of the property in that period to such an individual for consideration that becomes due in that period and that is equal to the fair market value of the supply at the time the consideration becomes due.

Restriction

17. In determining an input tax refund of a registrant, no amount shall be included in respect of the tax payable by the registrant in respect of the supply or bringing into Québec of a book for which he is entitled to compensation under section 24.

SMALL SUPPLIER

Small supplier

18. A person is a small supplier throughout a particular calendar quarter and the first month immediately following the particular calendar quarter if the total referred to in paragraph (1) does not exceed the sum of the total referred to in paragraph (2) and $30 000:

(1) the total of all amounts each of which is the value of consideration that became due in the four calendar quarters immediately preceding the particular calendar quarter, or that was paid in those four calendar quarters without having become due, to the person or an associate of the person at the beginning of the particular calendar quarter for taxable supplies, other than supplies by way of sale of capital property of the person or of the associate, made by the person or the associate in the course of commercial activities;

(2) where, in the four calendar quarters immediately preceding the particular calendar quarter, the person or an associate of the person at the beginning of the particular calendar quarter made a taxable supply of a right to participate in a game of chance, the total of all amounts each of which is

(a) an amount of money paid or payable by the person or associate as a prize or winnings in the game or in satisfaction of the bet; or

(b) consideration paid or payable by the person or the associate for property or a service that is given as a prize or winnings in the game or in satisfaction of the bet.

Exception

19. Notwithstanding section 18, where at any time in a calendar quarter, the total referred to in paragraph (1) exceeds the sum of the total referred to in paragraph (2) and $30 000:

(1) the total of all amounts each of which is the value of the consideration that became due in the calendar quarter or was paid in that calendar quarter without having become due, to a person or to an associate of the person at the beginning of the calendar quarter for taxable supplies, other than supplies by way of sale of capital property of the person or of the associate, made by the person or the associate in the course of commercial activities;

(2) where, in the calendar quarter, the person or an associate of the person at the beginning of the calendar quarter made a taxable supply of a right to participate in a game of chance, the total of all amounts each of which is

(a) an amount of money paid or payable by the person or associate as a prize or winnings in the game or in satisfaction of the bet; or

(b) consideration paid or payable by the person or the associate for property or a service that is given as a prize or winnings in the game or in satisfaction of the bet;

the person is not a small supplier throughout the period beginning immediately before that time and ending on the last day of the calendar quarter.

REBATE AND COMPENSATION

Rebate to certain organizations

Definitions

20. For the purposes of this section and sections 21 to 23,

"charity" includes a non-profit organization that operates an institution, or part thereof, for the purpose of providing nursing home intermediate care service or residential care service, within the meaning of those expressions in the Canada Health Act (Statutes of Canada);

"claim period" of a person at any time means the reporting period of the person that includes that time;

"municipality" includes an organization designated by the Minister to be a municipality, but only in respect of supplies (other than taxable supplies) made by the organization of municipal services specified in the designation;

"percentage of government funding" of a person for a fiscal year of the person means the percentage determined in prescribed manner;

"selected public service body" means

(1) a hospital authority;

(2) a school authority or university that is established and operated otherwise than for profit;

(3) a public college; or

(4) a municipality.

Tax payable

21. For the purposes of sections 22 and 23, the tax payable by a person in respect of property or a service does not include an amount that the person has claimed or is entitled to claim as an input tax refund in respect of the property or service.

Qualifying non-profit organization

22. For the purposes of this subdivision, a person is a qualifying non-profit organization at any time in a fiscal year of the person if, at that time, the person is a non-profit organization and the percentage of government funding of the person for the year is at least 40%.

Rebate

23. A person who, on the last day of the claim period or the fiscal year of the person, is a selected public service body, a charity or a qualifying non-profit organization, is entitled to a rebate equal to one of the following percentages, as the case may be, of the amount of the tax that became payable during that period in respect of property or a service:

(1) 50% for a charity or a qualifying non-profit organization, unless it is a selected public service body;

(2) 40% for a municipality;

(3) 30% for a school authority, a public college or a university;

(4) 19% for a hospital authority.

This section does not apply to tax payable in respect of a prescribed property or service.

Compensation

Compensation in respect of a printed book

24. Where a person pays tax in respect of a supply of a book or in respect of a book brought into Québec by the person, the person is entitled to compensation in an amount equal to that tax.

The supplier shall pay to that person the amount of the compensation and the supplier may deduct the amount of the compensation from the amount the supplier is required to remit to the Minister under section 30.

Such compensations are deemed to be repayments for the purposes of the Act respecting the Ministère du Revenu (R.S.Q., chapter M-31).

This section refers to a printed book or its updating, identified by an International Standard Book Number (ISBN) issued in accordance with the international book numbering system, or a talking book or the carrier thereof, acquired by a person because of a visual handicap.

TAX COLLECTION AND REMITTANCE

Registration

Required registration

25. Every person who is engaged in a commercial activity in Québec shall, before the day the person first makes, otherwise than as a small supplier, a taxable supply in Québec in the course of that activity, apply to the Minister to be registered.

The following persons are not required to apply for registration pursuant to the first paragraph:

(1) a person who is a small supplier;

(2) a person whose only commercial activity is making supplies of immovables by way of sale otherwise than in the course of a business; and

(3) a non-resident person who does not carry on any business in Québec.

Optional registration

26. Notwithstanding the second paragraph of section 25, any person who is engaged in a commercial activity in Québec may apply to the Minister to be registered.

Any person not resident in Québec who in the ordinary course of carrying on business outside Québec regularly solicits orders for the supply of corporeal movable property for delivery in Québec may also apply to be registered.

Notwithstanding the first paragraph, no person who is a small supplier may make an application to be registered under that paragraph unless he applies to the Minister of National Revenue to be registered under subsection 3 of section 240 of the Excise Tax Act (Statutes of Canada).

Registration by the Minister

27. The Minister may register any person applying to be registered and, for that purpose, the Minister, or any person he authorizes, shall assign a registration number to the person and notify the person in writing by way of a registration certificate of the registration number and the effective date of the registration.

The registration certificate shall be kept at the principal place of business of its holder in Québec and may not be transferred.

Collection

Mandatary of the Minister

28. Every person who makes a taxable supply other than a supply referred to in section 5 shall, as mandatary of the Minister, collect the tax payable by the recipient under section 2 in respect of the supply.

Remittance

Determination of net tax

Net tax of a registrant

29. The net tax for a particular reporting period of a registrant is the positive or negative amount determined by the formula

A - B.

For the purposes of this formula,

(1) A is the total of

(a) all amounts that became collectible and all other amounts collected by the registrant in the particular reporting period as or on account of tax under section 2, and

(b) all amounts that are required under this document to be added in determining the net tax of the registrant for the particular reporting period;

(2) B is the total of

(a) all amounts each of which is an input tax refund for the particular reporting period or a preceding reporting period of the registrant claimed by the

registrant in the return under this document filed by the registrant for the particular reporting period, and

(b) all amounts each of which is an amount that may be deducted by the registrant under this document in determining the net tax of the registrant for the particular reporting period and that is claimed by the registrant in the return under this document filed by the registrant for the particular reporting period.

Net tax remittance or refund

Net tax of a registrant

30. Every registrant who is required to file a return under this document shall in the return calculate his net tax for the reporting period for which the return is required to be filed.

Where the net tax for a reporting period of a registrant is a positive amount, the registrant shall remit that amount to the Minister on or before the day on or before which the return for that period is required to be filed.

Where the net tax for a reporting period of a registrant is a negative amount, the registrant may claim in the return for that reporting period that amount as a net tax refund for the period, payable to the registrant by the Minister.

Payment of net tax refund

31. Where a net tax refund payable to a registrant is claimed in a return filed under this document by the registrant, the Minister shall pay the refund to the person with all due dispatch after the return is filed.

Input tax refund

Food, beverages and entertainment

32. Where sections 421.1 to 421.4 of the Taxation Act (R.S.Q., chapter I-3) apply, or would apply if the registrant were a taxpayer under that Act, in respect of a supply of food, beverages or entertainment to, or any allowance in respect of such a supply paid by, a registrant in a taxation year of the registrant, *x* % of the total of all amounts, each of which is an input tax refund in respect of such a supply that the registrant may claim during that taxation year, shall be added in determining the net tax

(1) where the registrant ceases in or at the end of that taxation year to be registered, for the last reporting period of the registrant in that taxation year;

(2) where the reporting period of the registrant is the calendar year, for the calendar year in which the taxation year ends; and

(3) in any other case, for the reporting period of the registrant that begins immediately after the end of that taxation year.

Reporting period and return

Reporting period

Reporting period

33. The reporting period of a registrant or of a person who is not a registrant is a calendar month.

Notwithstanding the first paragraph, a registrant whose accounting period is not the calendar month may use a reporting period corresponding to that period, where the following conditions are met:

(1) the accounting system of the registrant comprises twelve periods;

(2) the periods end within seven days prior or subsequent to the last day of a particular calendar month;

(3) the periods comprise no fewer than 28 days and no more than 35 days.

A reporting period referred to in the second paragraph is deemed to end on the last day of the particular calendar month.

Return

Filing by a registrant

34. Every registrant shall file a return with the Minister for each reporting period of the registrant within one month after the end of that reporting period.

Taxable supply made outside Québec

35. Every person who is liable to pay tax under section 4 (in this section referred to as the "taxpayer") shall prepare a return for the reporting period of the person in which the tax becomes payable.

Every taxpayer shall file the return with and as prescribed by the Minister and remit the amount of tax under section 4 that became payable in the reporting period to which the return relates to the Minister not later than the day that is one month after the end of that reporting period.

Remittance of tax

36. Every person who is liable to pay tax under section 2 in respect of a supply referred to in section 5 shall, at the time of the supply, remit to the Minister or a prescribed person the tax payable in respect of the supply.

Both questions referred were answered in the affirmative.

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

Solicitors for the intervener the Attorney General of Quebec: Monique Rousseau, Alain Gingras and Jean-François Jobin, Québec.

Solicitor appointed by the Court as amicus curiae: Wilfrid Lefebvre, Montréal.

THE TOBACCO TAX ACT
(C.C.S.M. c. T80)

Sale of Marked Tobacco on Indian Reserves Regulation

Regulation 63/2006
Registered March 3, 2006

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2 Purposes
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4 Refundable sales limit for reserve
5 Allocation of reserve's limit among retailers

Definitions and interpretation

1(1) The following definitions apply in this regulation.

"**Act**" means *The Tobacco Tax Act*. (« *Loi* »)

"**band**", "**council of the band**", "**Indian**", "**member of a band**" and "**reserve**" have the same meaning as in subsection 2(1) of the *Indian Act* (Canada). (« bande », « conseil de la bande », « Indien », « membre d'une bande » et « réserve »)

LOI DE LA TAXE SUR LE TABAC
(c. T80 de la C.P.L.M.)

Règlement sur la vente de tabac marqué dans les réserves indiennes

Règlement 63/2006
Date d'enregistrement : le 3 mars 2006

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3 Remboursement versé au vendeur au détail
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5 Répartition

Définitions et interprétation

1(1) Les définitions qui suivent s'appliquent au présent règlement.

« **accord de perception fiscale** » Accord conclu entre le ministre et le conseil d'une bande concernant la perception par le ministre, au nom de la bande, des sommes payables par les acheteurs, dans le cadre d'un système de taxation établi par le conseil, à l'égard des achats au détail de tabac marqué. ("band assessment collection agreement")

"**band assessment collection agreement**" means an agreement between the minister and the council of a band respecting the collection by the minister, on behalf of the band, of amounts payable by purchasers under a band assessment imposed by the council in respect of retail purchases of marked tobacco. (« accord de perception fiscale »)

"**council**", in relation to a reserve, means the council of the band of that reserve. (« conseil »)

"**marked tobacco**" means cigarettes or fine cut tobacco the packaging of which is marked or stamped for the tax purposes of Manitoba as required by the Act. (« tabac marqué »)

"**non-taxable retail purchase**" of marked tobacco means a purchase of marked tobacco by an adult Indian, for consumption and not for resale, that is not taxable under the Act because of section 87 of the *Indian Act* (Canada). (« achat au détail non taxable »)

"**refundable sales limit**" means

(a) in relation to a reserve, the refundable sales limit of the reserve determined under section 4; and

(b) in relation to a retailer located on a reserve, the portion of the reserve's refundable sales limit that is allocated under section 5 to the retailer. (« plafond des ventes donnant droit à un remboursement »)

"**retailer**" means a retail dealer who

(a) is located on a reserve that is not covered by a band assessment collection agreement; and

(b) sells marked tobacco to Indians in the ordinary course of his or her business on the reserve. (« vendeur au détail »)

1(2) For the purposes of this regulation, a retailer who is located on more than one reserve is to be treated as a separate retailer in respect of each of those reserves.

« **achat au détail non taxable** » Achat de tabac marqué qu'effectue un Indien d'âge adulte — pour consommation uniquement — et qui n'est pas taxable sous le régime de la *Loi* en raison de l'application de l'article 87 de la *Loi sur les Indiens*. ("non-taxable retail purchase")

« **bande** », « **conseil de la bande** », « **Indien** », « **membre d'une bande** » et « **réserve** » S'entendent au sens que leur attribue le paragraphe 2(1) de la *Loi sur les Indiens* (Canada). ("band", "council of the band", "Indian", "member of a band" and "reserve")

« **conseil** » Le conseil de la bande d'une réserve. ("council")

« ***Loi*** » La *Loi de la taxe sur le tabac*. ("Act")

« **plafond des ventes donnant droit à un remboursement** »

a) Le plafond des ventes donnant droit à un remboursement imposé à une réserve et déterminé conformément à l'article 4;

b) la partie du plafond des ventes donnant droit à un remboursement imposé à une réserve qui est attribuée en vertu de l'article 5 à un vendeur au détail installé dans la réserve. ("refundable sales limit")

« **tabac marqué** » Cigarettes ou tabac à coupe fine dont l'emballage est marqué ou timbré conformément à la *Loi* à des fins fiscales pour le Manitoba. ("marked tobacco")

« **vendeur au détail** » Détaillant qui :

a) est installé dans une réserve non visée par un accord de perception fiscale;

b) vend du tabac marqué à des Indiens dans le cours normal de ses activités dans la réserve. ("retailer")

1(2) Pour l'application du présent règlement, le vendeur au détail qui est installé dans plus d'une réserve est réputé être un vendeur au détail distinct à l'égard de chacune des réserves.

Purposes

2 The purposes of this regulation are

(a) to facilitate non-taxable retail purchases of marked tobacco on reserves by providing for refunds to retailers of amounts paid by them on account of tax on that tobacco; and

(b) to establish refund limits designed to ensure that the refunds to retailers are available only in respect of non-taxable retail purchases.

Refund to retailer

3(1) Subject to subsection (2), the minister must refund to a retailer the amounts paid by the retailer on account of tax in respect of marked tobacco if the minister is satisfied that the tobacco was purchased on a reserve from the retailer by way of non-taxable retail purchases.

3(2) No amount is refundable under subsection (1) to a retailer in respect of sales of marked tobacco made by the retailer in any month in excess of the retailer's refundable sales limit for that month.

Refundable sales limit for reserve

4(1) The following definitions apply in this section.

"**carton equivalent**" means a quantity of marked tobacco consisting of 200 cigarettes or 200 grams of fine cut tobacco, or a combination of them equal to 200 grams, calculated on the basis of cigarettes weighing one gram each. (« équivalent d'une cartouche »)

"**community**", in relation to a reserve, means those who are

(a) members of the band of that reserve who reside on or off that reserve, but do not reside on another reserve; or

(b) members of another band who reside on that reserve. (« communauté »)

Objets

2 Le présent règlement a pour objets :

a) de faciliter les achats au détail non taxables de tabac marqué dans les réserves en prévoyant le versement de remboursements aux vendeurs au détail à l'égard des montants qu'ils paient au titre de la taxe sur ce tabac;

b) de fixer, relativement aux remboursements, des plafonds permettant de garantir que les remboursements destinés aux vendeurs au détail ne soient accordés qu'à l'égard d'achats au détail non taxables.

Remboursement versé au vendeur au détail

3(1) Sous réserve du paragraphe (2), le ministre rembourse au vendeur au détail les montants que celui-ci a payés au titre de la taxe sur du tabac marqué s'il est convaincu que le tabac a été acheté dans une réserve auprès du vendeur au détail dans le cadre d'achats au détail non taxables.

3(2) Le vendeur au détail n'a droit à aucun remboursement en vertu du paragraphe (1) à l'égard des ventes de tabac marqué qu'il a effectuées au cours d'un mois et qui dépassent le plafond des ventes donnant droit à un remboursement qui lui est imposé pour ce mois.

Plafond des ventes donnant droit à un remboursement

4(1) Les définitions qui suivent s'appliquent au présent article.

« **communauté** » Selon le cas :

a) les membres de la bande d'une réserve qui résident dans la réserve ou à l'extérieur de celle-ci, sans toutefois résider dans une autre réserve;

b) les membres d'une autre bande qui résident dans la réserve. ("community")

« **équivalent d'une cartouche** » Quantité de tabac marqué constituée de 200 cigarettes ou de 200 grammes de tabac à coupe fine, ou d'un mélange de cigarettes et de tabac à coupe fine équivalant à 200 grammes, les cigarettes étant réputées peser un gramme chacune. ("carton equivalent")

4(2) Subject to subsections (3) and (4), a reserve's refundable sales limit for each month is the number of carton equivalents of marked tobacco determined by the following formula:

Limit = P × 44% × 2.5 carton equivalents

In this formula, P is the population of the adult members of the reserve's community as determined by the director based on the most current issue of *Registered Indian Population by Sex and Residence* published by Indian and Northern Affairs Canada.

4(3) The director may adjust a reserve's refundable sales limit if the director is satisfied, based on reliable statistics obtained by the director, that

(a) the population of the adult members of the reserve's community is greater or less than the population determined under subsection (2);

(b) the proportion of the adult members of the reserve's community who are daily smokers is greater or less than 44%; or

(c) the average quantity of marked tobacco consumed by the adult members of the reserve's community who are daily smokers is greater or less than 2.5 carton equivalents per month.

4(4) At the request of a reserve's council, the director may temporarily increase the reserve's refundable sales limit to take into account special events or circumstances.

4(5) The director must notify a reserve's council of the reserve's refundable sales limit determined under this section, and of any changes to that limit.

4(2) Sous réserve des paragraphes (3) et (4), le plafond des ventes donnant droit à un remboursement imposé à une réserve pour chaque mois correspond au nombre d'équivalents d'une cartouche de tabac marqué déterminé à l'aide de la formule suivante :

Plafond = P × 44 % × 2,5 équivalents d'une cartouche

Dans la présente formule, P représente la population adulte de la communauté de la réserve, telle qu'elle est déterminée par le directeur en fonction de la version la plus récente du document intitulé *Population indienne inscrite selon le sexe et la résidence*, publié par Affaires indiennes et du Nord Canada.

4(3) Le directeur peut rajuster le plafond des ventes donnant droit à un remboursement imposé à une réserve s'il est convaincu, en fonction de statistiques fiables qu'il a obtenues, selon le cas :

a) que la population adulte de la communauté de la réserve est supérieure ou inférieure à celle déterminée conformément au paragraphe (2);

b) que le pourcentage d'adultes qui font partie de la communauté de la réserve et qui fument quotidiennement est supérieur ou inférieur à 44 %;

c) que la quantité moyenne de tabac marqué consommée par les adultes qui font partie de la communauté de la réserve et qui fument quotidiennement est supérieure ou inférieure à 2,5 équivalents d'une cartouche par mois.

4(4) À la demande du conseil de la réserve, le directeur peut hausser temporairement le plafond des ventes donnant droit à un remboursement imposé à celle-ci afin de prendre en compte des circonstances ou des événements particuliers.

4(5) Le directeur avise le conseil de la réserve du plafond des ventes donnant droit à un remboursement imposé à celle-ci et déterminé en conformité avec le présent article ainsi que de tout changement dont il fait l'objet.

Allocation of reserve's limit among retailers

5(1) A reserve's council may allocate the reserve's refundable sales limit among the reserve's retailers. Until the council makes the allocation and provides the director with a certified copy of the council resolution making the allocation, the director may make the allocation.

5(2) If the reserve's refundable sales limit increases or decreases, the reserve's council may allocate the increase or decrease among the reserve's retailers. Until the council makes the allocation and provides the director with a certified copy of the council resolution making the allocation, the director may allocate the increase or decrease.

5(3) The reserve's council may amend, or replace with a new allocation, an allocation made by it or by the director.

5(4) Except as otherwise permitted by subsection (2), the director may amend an allocation only if

(a) the allocation to be amended was made by the director; and

(b) the director has not received a certified copy of a council resolution amending the director's allocation or replacing it with a new allocation.

5(5) As soon as practicable after the director makes the allocation or amendment, or receives a certified copy of the council resolution making the allocation or amendment, the director must notify each retailer whose refundable sales limit is affected by the allocation or amendment. The notice must state

(a) the retailer's refundable sales limit; and

(b) the effective date, which must be the first day of a calendar month;

and must be served on the retailer at least one month before the effective date.

Répartition

5(1) Le conseil de la réserve peut répartir le plafond des ventes donnant droit à un remboursement imposé à celle-ci entre les vendeurs au détail qui y sont installés. Le directeur peut procéder à la répartition tant que le conseil ne l'a pas fait et ne lui a pas remis une copie certifiée conforme de la résolution pertinente.

5(2) Si le plafond des ventes donnant droit à un remboursement imposé à la réserve change, le conseil de la réserve peut répartir le montant de l'augmentation ou de la diminution entre les vendeurs au détail qui y sont installés. Le directeur peut procéder à la répartition tant que le conseil ne l'a pas fait et ne lui a pas remis une copie certifiée conforme de la résolution pertinente.

5(3) Le conseil de la réserve peut modifier ou remplacer une répartition, même celle effectuée par le directeur.

5(4) Sauf dans la mesure où le paragraphe (2) le permet, le directeur ne peut modifier une répartition que dans le cas suivant :

a) il a lui-même effectué la répartition en question;

b) il n'a pas reçu une copie certifiée conforme d'une résolution du conseil modifiant ou remplaçant sa répartition.

5(5) Dès que possible après qu'il a effectué la répartition ou la modification ou qu'il a reçu une copie certifiée conforme de la résolution prise à cette fin par le conseil, le directeur avise chaque vendeur au détail concerné. L'avis indique :

a) le plafond des ventes donnant droit à un remboursement qui est imposé au vendeur au détail;

b) la date de prise d'effet, laquelle doit correspondre au premier jour d'un mois civil.

Il est signifié au vendeur au détail au moins un mois avant la date de prise d'effet.

5(6) Despite subsection (5), to the extent that a retailer's refundable sales limit is temporarily increased because of a temporary increase under subsection 4(4) in the reserve's refundable sales limit, the director may apply the retailer's increase to the period to which the reserve's increase applies.

5(6) Par dérogation au paragraphe (5), dans la mesure où le plafond des ventes donnant droit à un remboursement imposé à un vendeur au détail est relevé temporairement en raison de la hausse temporaire prévue au paragraphe 4(4), le directeur peut appliquer le nouveau plafond imposé au vendeur au détail à la période à laquelle s'applique le nouveau plafond imposé à la réserve.

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