C A N A D A

PROVINCE OF NOVA SCOTIA

Police File No. 2024-685139

IN THE PROVINCIAL COURT OF NOVA SCOTIA

[Amherst]

BETWEEN:

HIS MAJESTY THE KING
[Public Prosecution Service of Canada]

- and –

CONNOR PETER PAUL and SCOTT JAMES PAUL

THE CROWN'S PRE-TRIAL HEARING BRIEF RE: INDIGENOUS AND TREATY RIGHT CLAIMS UNDER SECTION 35 OF THE *CONSTITUTION ACT, 1982*

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INDEX

PART I – STATEMENT OF FACTS

Offences Charged

1. The defendants are charged with a number of offences in relation to the illicit distribution of cannabis arising out of a events on June 3, 2024.

Procedural history and going forward

2. In May of 2024, police responding to a complaint began an investigation into illegal cannabis sales at a location on Hwy 2 in Fenwick, Cumberland County, Nova Scotia. The investigation led to the issuance of a *Cannabis Act* search warrant which was executed on June 3, 2024. Police arrested the defendants and seized a truck and enclosed trailer at the location. A search revealed large quantities of illicit cannabis products as well as related paraphernalia, including cash in the truck and cell phones from the defendants.

3. The defendants have pled not guilty to the charges and indicated on the record that they intend to advance an Indigenous rights defence. A Notice of Constitutional Question was later filed by the defendants, raising a s. 35 defence and challenging the provisions under which they have been charged.

4. The Crown takes the position that the Court should first deal with the "*actus reus*" of the alleged offences before moving on to hear whether the accused can establish an Indigenous rights defence. The *actus reus* portion of the trial has been scheduled for February 17 and 18, 2026, in Amherst Provincial Court. The s. 35 evidence is scheduled to be heard April 15, 16, 21, 22 and 23, 2026.

5. If the Court is satisfied that the Crown has proven any of the charges against the defendants, the Court can then turn to the constitutional question of the Indigenous rights claim. In this portion of the proceedings, the legal burden of proof is on the defendant to establish that they were exercising an existing aboriginal or treaty right when they committed the alleged offences on the date and at the location set out in the charge, and that right was infringed by the application to them of the restrictions imposed by the regulatory provisions

contravened. The Crown has prepared this brief to inform the defendants and the Court of the following:

(a) The matters in issue that must be established by the defendants (i.e., the essential factual elements of the aboriginal and treaty right claim) so that the evidence they present to the Court will relate to those specific matters;

(b) The analytical framework, tests and legal principles to be applied in assessing aboriginal and treaty right claims; and

(c) The unique evidentiary issues that are involved in aboriginal and treaty rights cases, and in particular, the rules governing the admissibility of oral history and tradition evidence.

6. Crown counsel retains the right to make submissions in respect of the evidence presented by the defendants and to provide argument in respect of a motion to dismiss their defence where no admissible evidence is presented on an essential factual element of his aboriginal and treaty right claim. That is the procedure in which the Crown submits we are engaged.

PART II - ISSUES

7. The issue to be determined by this Court is whether the defendants were acting pursuant to an existing aboriginal or treaty right as recognized and affirmed by s. 35 of the *Constitution Act, 1982*, when they committed the alleged offences on the date and at the location set out in the charge and, if so, whether the provisions contravened under the *Cannabis Act*, *Criminal Code* or the *Excise Act* infringed upon that right without proper justification.

8. The constitutional question is whether, in the circumstances of these proceedings, the contravened provisions, as they read on the violation date are inconsistent with s. 35 of the *Constitution Act, 1982* and, therefore, of no force or effect by virtue of s. 52 of the *Constitution Act, 1982*.

PART III - THE LAW

The Indigenous Right Claim and The Powley Framework of Analysis

9. Section 35 of the *Constitution* Act, 1982 provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

10. In *Powley*, the Supreme Court of Canada held for the first time that Métis communities can possess *aboriginal*[1] rights protected by s. 35 of the *Constitution Act, 1982*. The Court also confirmed that aboriginal rights, including Métis aboriginal rights, are communal rights, grounded in the existence of a historic and present-day community, and must be established on a case-by-case basis. Previously, such rights had only been found to exist for Indian and Inuit communities.

> ***R v. Powley***, [2003] 2 S.C.R. 207

11. Prior to the decision *in Powley*, the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, outlined the framework for analyzing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified. In *Sparrow*, the basic elements of the tests for extinguishment, infringement and justification were laid out by the Court. However, it was not seriously disputed that the Indigenous Band in question had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to articulate a test for identifying aboriginal rights recognized and affirmed by s. 35(1). This issue was subsequently addressed by the Supreme Court of Canada in *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

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

[1] A note on language. In current parlance the term 'Indigenous' has supplanted the term 'aboriginal'. In this brief, 'aboriginal' will still be used when paraphrasing specific cases or legislative sections that use the term.

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

12. In *Van der Peet*, the Supreme Court of Canada affirmed its previous decision in *Sparrow* in respect of the proper framework for analyzing s. 35(1) claims; articulated a test for identifying aboriginal rights recognized and affirmed by s. 35(1); and provided the factors to be considered in the application of that test.

13. After having considered the general principles applicable to legal disputes between Indigenous peoples and the Crown, and the purposes behind s. 35(1), Chief Justice Lamer, writing for the majority in *Van der Peet*, formulated the "integral to a distinctive culture test" to identify whether an applicant has established an aboriginal right protected by s. 35(1). At para 46, the Chief Justice articulates the test as follows:

> In light of the suggestion of Sparrow, and the purposes underlying s. 35(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.
>
> ***R. v. Van der Peet***, s*upra*, at para. 46

14. As noted above, the Supreme Court of Canada in *Van der Peet* also enumerated the factors to be considered in the application of the "integral to a distinctive culture test":

(a) Courts must take into account the perspective of aboriginal peoples themselves;

(b) Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right;

(c) In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question;

(d) The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact;

(e) Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims;

(f) Claims to aboriginal rights must be adjudicated on a specific rather than general basis;

(g) For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists;

(h) The "integral to a distinctive culture test" requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct;

(i) The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence; and

(j) Courts must take into account both the relationship of aboriginal peoples to the land and to the distinctive societies and cultures of aboriginal peoples.

Van der Peet, supra, at para. 48-74

15. In *Van* der *Peet*, the Court stated that the first step in the application of the "integral to a distinctive culture test" requires the Court to identify the precise nature of the right being claimed. The nature of the applicant's claim can be seen through the specific acts which led to the applicant being charged, the provision under which the applicant is charged and the practice, custom or tradition the applicant invokes in support of his or her claim. After having identified the precise nature of the applicant's claim, the Court must then turn to the fundamental question of the "integral to a distinctive culture test": Was the practice, custom or tradition integral to the specific distinctive culture of the aboriginal group claiming the right prior to contact with Europeans?

16. In *Van der Peet*, the appellant failed to demonstrate that she was acting pursuant to an aboriginal right (i.e., failed to demonstrate that the practice of "exchanging fish for money or other goods" was an integral part of the specific distinctive culture of the Indian society prior to contact with Europeans). Therefore, it was unnecessary for the Court to consider the tests for extinguishment, infringement and justification as laid out in *Sparrow*.

17. In *Powley*, the Supreme Court of Canada outlined a ten-part framework for analyzing Métis aboriginal right claims under s. 35(1) of the *Constitution Act, 1982*. The Court endorsed *Sparrow* and accepted *Van der Peet* as the template for its analysis. That is to say, the Court affirmed the basic elements (or criteria) of the tests for extinguishment, infringement and justification as laid out in *Sparrow* and confirmed that these applied to Métis claims. The court also affirmed the basic elements (or criteria) of the "integral to a distinctive culture test" articulated in *Van der Peet* and applied these to Métis claims. However, the pre-contact focus of the "integral to a distinctive culture test" as applied in *Van der Peet* has been modified to account for the difference between 'Indian' and Métis claims. In

other words, the *Powley* analytical framework is to be applied in assessing both 'Indian'[2] and Métis aboriginal right claims. When the claimants are Métis, however, the Indigenous rights recognized and affirmed by s. 35(1) are those practices, customs and traditions that were integral to the specific distinctive culture of the Métis community prior to the time of effective European control, and that persist in the present day.

18. As noted, the *Powley* framework of analysis involves ten distinct parts. As a consequence, the appropriate tests and legal principles for determining each part must be applied by the Court to the findings of fact derived from the evidence presented.

19. This brief will now provide an overview of the appropriate tests and legal principles to be applied in determining each part of the *Powley* framework of analysis.

Characterization of the Right Being Claimed

20. As noted in both *Van der Peet* and *Powley*, the first step is to characterize the right being claimed.

21. *Van der Peet* and *Mitchell v. MNR*, [2001] 1 S.C.R. 911, both outline the appropriate test for characterizing the right being claimed.

> ***Mitchell v. MNR***, [2001] 1 S.C.R. 911

22. In *Van der Peet*, Chief Justice Lamer, writing for the majority, explains the importance of identifying precisely the nature of the claim being made and provides three factors that should guide a Court's characterization of a claimed aboriginal right:

> [51] Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.

[2] S. 35(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada. CONSTITUTION ACT, 1867 30 & 31 Victoria, c. 3 (U.K.)

…

> [53] 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. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.
>
> [54] It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis, the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.
>
> ***R. v. Van der Peet****, supra*

Identification of the Historic Rights-Bearing Community

23. As indicated above, the "integral to a distinctive culture test" articulated in *Van der Peet* requires that the right claimed be an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. To be integral, the practice, custom or tradition must be of central significance to the aboriginal society in question. Furthermore, to constitute an aboriginal right, this practice, custom or tradition must have continuity with the practice, custom or tradition that existed prior to contact with European society (prior to effective European control for Metis claims). *Van der Peet*, and now *Powley*, clearly requires the identification of a historic community capable of holding aboriginal rights.

24. In discussing the purposes behind s. 35(1), Lamer, C.J.C. in *Van der Peet* at para. 30 states as follows:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in

> distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> ***R. v. Van der Peet***, *supra*

Identification of the Contemporary Rights-Bearing Community

25. In addition to establishing a historic rights-bearing community, a claimant must also establish the existence of a contemporary Indigenous community with a connection to the historic rights-bearing community that existed prior to contact with European society. At para. 24 in *Powley*, the Court states:

> Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community.
>
> ***R v. Powley***, *supra*, at para. 24

26. A reading of *Powley* indicates that a "community" in the context of s. 35 rights, should demonstrate a people with a distinctive, collective identity, sharing a common way of life and living together in the same geographic area.

27. There must be evidence of sufficient continuity between the historic community and a contemporary community in the relevant area. To meet this onus, a claimant must proffer evidence demonstrating a sufficient continuity of practice, custom and tradition with the specific identified historic community. In Powley at para. 27, the Court stated:

> 27. The continuity requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself.
>
> ***R v. Powley***, *supra*, at para. 27

28. Where it is alleged that a historic community has persisted to the present day but has become somewhat invisible, then that invisibility must be dispelled with admissible evidence. If it is dispelled, there remains the necessity of calling sufficient evidence of a

continuation of the relevant practices of members of that community from the time of the historic community to the present.

Verification of the Claimant's Membership in the Relevant Contemporary Community

29. Legitimate rights-holders must be identified. The Courts have made it clear that Indigenous claims have to be assessed on a case-by-case basis and that the inquiry in such cases must take into account the value of community self-definition and the need for the process of identification to be objectively verifiable. However, it is important to remember that no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim s. 35 rights. Therefore, verifying membership is crucial since individuals are only entitled to exercise aboriginal rights by virtue of their ancestral connection to and current membership in an aboriginal community.

30. In *Powley*, the Court indicated that the following three criteria must be satisfied: (i) long-standing self-identification; (ii) an ancestral connection to the historic aboriginal community; and (iii) community acceptance.

(i) Self-identification – The Court noted that "self-identification should not be of a recent vintage" and went on to state that "claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement". (para. 31)

(ii) Ancestral connection – The Court noted that this does not require proof of a minimum blood quantum but does require proof that the claimant's ancestors belonged to the historic aboriginal community by birth, adoption, or other means. (para. 32)

(iii) Community acceptance – The Court stated that membership in a political organization may be relevant to the question of community acceptance but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the aboriginal community. The Court went on to note that other indicia of community acceptance might include evidence of participation in community activities, and testimony from other members about the claimant's connection to the community and its culture. (para. 33)

R v. Powley, *supra*

Identification of the Relevant Time Frame

The relevant time period for the examination of Indigenous activity is prior to European contact. The claimant must demonstrate that a practice, custom or tradition was integral to the Indigenous community's distinctive existence and relationship to the land in the period before European contact.

Determination of Whether the Practice is Integral to the Claimant's Distinctive Culture

31. The following test should be used to identify whether an applicant has established an Indigenous 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 Indigenous group claiming the right. This is the "integral to a distinctive culture test" articulated in *Van der Peet* and modified in *Powley* to accommodate Métis claims.

Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

32. The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society.

33. At paras. 62-65 in *Van der Peet*, the Court discusses the concept of "continuity",

> [62] That this is a relevant time should not suggest, however that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the

aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[63] I would note in relation to this point the position adopted by Brennan J. in Mabo, supra, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land and its customs and laws has continued to the present day:

> . . . when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

[64] The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in Sparrow, supra, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The

> evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.
>
> [65] I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, infra, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.
>
> ***R. v. Van der Peet***, s*upra*

Determination of Whether or Not the Right was Extinguished

34. In *Mitchell v. M.N.R.* at paras. 10 and 11, the Supreme Court of Canada outlined the general principles of extinguishment:

> [10.] Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests, and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (*per* Brennan J.), pp. 81-82 (*per* Deane and Gaudron JJ.), and pp. 182-83 (*per* Toohey J.).
>
> [11.] The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see *St.*

> *Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: *Constitution Act, 1982*, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(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 objectives: see *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw, supra*.
>
> ***Mitchell v. MNR***, *supra*, at para. 10-11

35. *Sparrow* has laid out the test for extinguishment where it has alleged to have occurred by statute prior to the enactment of s. 35(1).

36. The onus of proving that an aboriginal or treaty right has been extinguished lies upon the Crown. There must be strict proof of the fact of extinguishment and evidence of a clear and plain intention on the part of the government to extinguish aboriginal or treaty rights.

R. v. Badger, [1996] 1 S.C.R. 771 at para. 41

If There is a Right, Determination of Whether There is an Infringement

37. *Sparrow* sets out the test for *prima facie* interference with an existing aboriginal right. At paras. 68-70, the Court states as follows:

> [68] 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 the s. 35(1) analysis. The inquiry with respect to interference begins with a reference to characteristics or incidents of the right at stake. Our earlier observations [page 1112] 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.)
>
> [69] 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.
>
> [70] 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 [page 1113] the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.
>
> **R. v. Sparrow**, *supra* at paras. 68-70

38. Supreme Court of Canada decisions subsequent to *Sparrow* in regard to licensing will also be relevant to the issue of infringement. For example, in ***R. v. Nikal***, [1996] 1 S.C.R. 1013, at paras. 91-95, the Supreme Court of Canada had this to say about licensing and the regulation of Indigenous rights:

> 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 license 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 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 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

> . . . Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of *Charter* rights must be justified as reasonable in a free and democratic society.

This conclusion is consistent with the approach to interpreting s. 35 rights as set out in *Sparrow, supra*, at para. 65:

> 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.

> This case provides an example of the wisdom of the reasoning referred to in *Sparrow* and *Agawa*. Here, the aboriginal right to fish must be balanced against the need to conserve the fishery stock. The existence of an aboriginal right to fish cannot automatically deny the ability of the government to set up a licensing scheme or program since the exercise of the right itself is dependant on the continued existence of the resource. The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program.
>
> It must also be remembered that aboriginal rights, by definition, can only be exercised by aboriginal peoples. Moreover, the nature and scope of aboriginal rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities. In this context, a licence may be the least intrusive way of establishing the existence of the aboriginal right for the aboriginal person as well as preventing those who are not aboriginals from exercising aboriginal rights.
>
> ***R. v. Nikal,*** [1996] 1 S.C.R. 1013

Determination of Whether the Infringement is Justified

39. Once a *prima facie* infringement has been established, the onus shifts to the Crown to establish that the infringement was justified in accordance with the two-part test set out in *Sparrow*.

40. At para. 48 in *Powley*, the Court found that the blanket denial of their right to hunt for food was not justified, even if it was found that there were grounds for conservation of the resource, since the Métis would still be entitled to a priority allocation to satisfy their sustenance needs in accordance with the criteria set out in *Sparrow* (i.e. in *Sparrow*, the Supreme Court of Canada held that any allocation of priorities after valid conservation measures have been implemented must give top priority to the relatively limited aboriginal right to fish for food, social and ceremonial purposes).

Evidence in Aboriginal Rights Cases

Burden of Proof

41. In the case at bar, the persuasive or legal burden of proof is on the claimant to establish the following:

    (a) The existence of an identifiable historic Indigenous community in southwestern Nova Scotia with a degree of continuity and stability sufficient to support a site-specific aboriginal right claim. This means a distinct community "on the land", participating in a distinctive culture, in a specific area, prior to European contact;

    (b) The existence of an identifiable contemporary Indigenous community in the same geographical area as the historic community with sufficient continuity to the historic rights-bearing community that existed prior to European contact;

    (c) That he has self-identified as a member of the contemporary Indigenous community, which self-identification is long-standing and not of recent vintage;

    (d) That he has an ancestral connection to the historic rights-bearing community - only those members with a demonstrable ancestral connection to the historic community can claim s. 35 rights;

    (e) That he has been accepted by the modern Indigenous community whose continuity with the historic community provides the legal foundation for the right being claimed;

    (f) The right being claimed is a practice, custom or tradition that has a reasonable degree of continuity with a practice, custom or tradition that existed prior to European contact;

    (g) The practice, custom or tradition that existed prior to European contact must have been "integral" to the distinctive culture of the historic Indigenous community; and

    (h) If there is an existing aboriginal right, that right has been infringed by the application to the defendant of the restrictions imposed by the license condition and regulatory provision contravened.

42. Is the right being claimed an aboriginal right? The test for identifying aboriginal rights recognized and affirmed by s. 35 was first established in *Van der Peet* and re-affirmed in *Sappier*. That test is:

    (a) First, identify the precise nature of the right being claimed;

    (b) Second, determine whether the claimant has proved:

        (i) the existence of the pre-contact practice advanced as supporting the claimed right; and

(ii) that this practice was "integral" to the aboriginal community's pre-contact way of life;

(c) Finally, determine whether the claimed modern right has a reasonable degree of continuity with the integral pre-contact practice. In other words, is the claimed right a logical evolution of the pre-contact practice.

R. v. Van der Peet, supra
R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686

43. The burden of proving that an aboriginal right has been extinguished lies upon the Crown.

44. As well, once an applicant has established an aboriginal right and a prima facie infringement of that right, the burden shifts to the Crown to establish that the infringement was justified in accordance with the two-part test set out in *Sparrow*.

Standard of Proof

45. The standard of proof determines the extent or degree to which the trier of fact must be satisfied before a matter in issue can be said to be proven.

46. The applicant must establish each requirement or element of their claims on a "balance of probabilities." Existing jurisprudence provides ample support for the proposition that the balance of probabilities standard applies in aboriginal rights cases, which, in fact, has recently been confirmed by the Supreme Court of Canada in *Mitchell v. M.N.R.* At para. 39 the Supreme Court stated that aboriginal "[c]laims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities".

Mitchell v. MNR, *supra*, at para. 39

47. Without demonstrating any clear evidence themselves, defendants who advance aboriginal or treaty right claims will often attempt to draw a positive inference from a perceived incompleteness of the historical record. For example, they may begin with a presumption that a historic Mi'kmaq community existed in a given area and, in the absence of what they characterize as "highly cogent evidence" to the contrary, ask the Court to accept on a balance of probabilities the existence of a culturally distinctive, geographically identifiable

historic Mi'kmaq community in that area. The Crown cautions the Court with respect to this type of fallacious reasoning.

48. Furthermore, defendants or claimants are the ones who bear the onus of proving that they were acting pursuant to an existing Indigenous right and a *prima facie* infringement of that right. It is not for the Crown to "disprove" an assumed existence of a factual requirement or element of an aboriginal right claim. As indicated in both *Van der Peet, Powley and Marshall 2*, the claimant must demonstrate that he was acting pursuant to an existing Indigenous right which includes establishing the factual elements set out in paragraph 44 hereof. Similarly, concerning interference with an existing right, the Supreme Court of Canada stated in *Sparrow* at p. 411: "the onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation".

49. Although the rules of evidence must be adapted to accommodate the admissibility of oral history and oral tradition evidence in Indigenous cases, the test for admitting such evidence has no bearing on the issues of onus, weight and sufficiency. The onus remains with the defendant to adduce the evidence necessary to meet his case on a balance of probabilities. There must be sufficient evidence to elevate the possibility to the probability.

50. In the *Mitchell* decision the Supreme Court of Canada clarified its comments in *Van der Peet* and in *Delagamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, on the interpretation and weighing of evidence in Indigenous rights cases. The clarification seems to be driven by a concern that the Court's comments in earlier cases were resulting in trial courts deciding Indigenous rights cases on insufficient evidence. The Crown submits the decision is directly applicable to this case where the sufficiency of the claimant's evidence is very much in issue.

Delagamuukw v. British Columbia, [1997] 3 S.C.R. 1010

51. As indicated, the burden of proving that an Indigenous right has been extinguished lies upon the Crown. The Supreme Court of Canada has applied a stringent standard of proof. The Crown must show a "clear and plain intent" to extinguish Indigenous rights. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 199 the Supreme Court wrote that:

> The legislative intention to extinguish aboriginal rights will be implied only if the interpretation of the statute permits no other result. *Sparrow* has made it clear that if the intention is only to limit the exercise of the right it should not be inferred that the right has been extinguished.

52. In regard to the issue of justification, *Sparrow* provides that the Crown must demonstrate on a "balance of probabilities" that the infringement is justifiable.

Evidence in Treaty Rights Cases

Burden of Proof

53. In the case at bar, the persuasive or legal burden of proof is on the claimant to establish, on a balance of probabilities, the following:

(a) The existence of an identifiable historic Indigenous community, in the geographical area of the location of the offences, that entered into a treaty (or treaties) with the Government of Nova Scotia representing the British Crown;

(b) The existence of an identifiable contemporary Indigenous community in the same geographical area with a connection to the historic community that benefited from the treaty. There must be evidence of sufficient continuity between the historic community that was a party to the treaty and the modern community in the relevant area. The contemporary Indigenous community must be a modern manifestation of the collective that benefited from the treaty;

(c) That he has self-identified as a member of the contemporary Indigenous community, which self-identification is long-standing and not of recent vintage;

(d) That he has an ancestral connection to the historic Indigenous community that entered into the treaty - only those members with a demonstrable ancestral connection to the historic community can claim s. 35 rights;

(e) That he has been accepted as a member of the contemporary Indigenous community whose continuity with the historic community provides the legal foundation for the right being claimed;

(f) The treaty (or treaties) relied on confers a specific treaty right to trade;

(g) This specific treaty right to trade extends to the item or commodity at issue (i.e. there must be evidence that the historic community engaged in trading the item before the treaty, or that it was a trade item reasonably contemplated by the parties to the treaty); and

(h) If there is an existing treaty right to trade in the item or commodity at issue, that right has been infringed by the application to the claimant of the restriction imposed by the statutory or regulatory provision contravened.

54. The Supreme Court of Canada has stated that the Mi'kmaq treaties conferred a specific treaty right to trade but limited to those items traditionally harvested as part of their hunting, fishing and gathering activities. In other words, items reasonably in the contemplation of the parties, or items traditionally gathered.

R. v. Marshall, [1999] 3 S.C.R. 456 (*Marshall No. 1*)
R. v. Marshall, [1999] 3 S.C.R. 533 (*Marshall No. 2*)
R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220

55. The burden of proving that a treaty right has been extinguished lies upon the Crown.

56. As well, once an applicant has established a treaty right and a prima facie infringement of that right, the burden shifts to the Crown to establish the infringement was justified in accordance with the two-part test set out in *Sparrow* (*R. v. Badger* makes the two-part test in *Sparrow* applicable to treaties) and the notion of priority, as articulated in *R. v. Gladstone,* [1996] 2 S.C.R. 723.

R. v. Gladstone, [1996] 2 S.C.R. 723

Standard of Proof

57. The defendant must establish each requirement or element of his treaty right claim on a "balance of probabilities."

58. As indicated, the burden of proving that a treaty right has been extinguished also lies upon the Crown. The Supreme Court of Canada has applied a stringent standard of proof, as the crown must show a "clear and plain intent" to extinguish treaty rights.

59. In regard to the issue of justification, *Sparrow* provides that the Crown must demonstrate on a "balance of probabilities" that the infringement is justifiable.

The Geographic Extent of Aboriginal and Treaty Rights

60. The geographic extent of site-specific aboriginal and treaty rights is generally restricted to the territory traditionally used by the historic aboriginal community at the time of European contact (i.e. that community's traditional hunting and fishing grounds). Evidence of occasional and sporadic visits by members of the historic aboriginal community to another area does not establish that the visited area was part of the area traditionally used by that historic aboriginal community.

61. In ***R. v. Sappier; R. v. Gray***, [2006] 2 S.C.R. 686, the Supreme Court of Canada noted that it had imposed a site-specific requirement on aboriginal hunting and fishing rights it recognized in *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Cote*, [1996] 3 S.C.R. 139; *Mitchell v. MNR*, [2001] 1 S.C.R. 911; and *R. v. Powley* [2003] 2 S.C.R. 207.

Admissibility of Oral History and Oral Tradition Evidence

General Principles

62. Aboriginal and treaty rights cases raise unique evidentiary issues. Parties asserting or refuting claims of aboriginal and treaty rights must adduce evidence as to facts and events that occurred hundreds of years ago. Determining the admissibility and weight to be properly accorded to oral history and oral tradition evidence of a particular aboriginal community involved in an action is an emerging area of law.

63. The extent to which a court must subject oral history and oral tradition evidence to the technical rules governing evidence is not clear. In *Delgamuukw v. British Columbia* and *R. v. Van der Peet* the Supreme Court clarified courts should receive evidence of oral history and oral tradition and the rules of evidence must be accommodated to allow for their admissibility. However, in *Mitchell v. M.N.R.* the Supreme Court clarified traditional rules of evidence must be applied to aboriginal rights and title cases. This evidence must meet traditional tests for admissibility.

> Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles.
>
> ***Mitchell v. MNR***, *supra*, at para. 38

64. It is trite to say that in aboriginal and treaty rights cases, oral history and oral tradition evidence may be admitted to the court as an exception to the hearsay rule. Nonetheless, questions remain as to the admissibility of this type of evidence and the weight to be given to this type of evidence.

65. Recently, in ***R. v. Ironeagle***, Justice Moxley for the Saskatchewan Provincial Court stated:

> While oral history evidence is now routinely accepted as an exception to the hearsay rule and admissible in Canadian Courts, judges are nevertheless left with the problem of the weight to be given to that evidence. Judges in Canada cannot take judicial notice of the unique cultural traditions of each of the various First Nations in Canada that give authenticity to their oral history.
>
> ***R. v. Ironeagle***, 1999 CanLII 12418 (SK PC), at para. 3

66. In *Mitchell*, Chief Justice McLachlin provided some guidance on the test for admissibility of evidence in aboriginal and treaty rights cases by clarifying that the principles articulated in *Van der Peet* and *Delgamuukw* do not signify a departure from traditional rules of evidence.

> *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, *supra*, at para 62) and meaningful consideration of various forms of oral history (*Delgamuukw*, *supra*).
>
> ***Mitchell v. MNR*, *supra* at 935**

67. Chief Justice McLachlin cautioned triers of fact faced with determining the admissibility of aboriginal oral history and tradition evidence against abandoning traditional rules of evidence.

> Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed, in a manner that fundamentally contravenes the principles of

> evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense" …
>
> . . . .
>
> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence [page 940] offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of supporting evidence on "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para 68), neither should it be artificially strained to carry more weight than it can reasonably support...
>
> ***Mitchell v. MNR***, *supra*, at para. 38-39

68. Finally, Chief Justice McLachlin emphasized that oral history evidence should not be presumed admissible. Like other evidence, it must meet traditional tests for admissibility and be both useful and reliable.

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

Particular Problems

69. There are a number of particular challenges faced by courts when determining if evidence of aboriginal oral histories and oral traditions should be received. Some of them include:

(i) Reliability of the witness' recollections, which may include memory failure and the impact of outside influences on the witness' recollections.

(ii) Information based on third party knowledge whose expertise is not established. Can the witness verify the source of their information?

(iii) Are the witnesses properly qualified to tender the evidence or are they permitted to and/or do they have a significant connection to the community whose oral tradition/history they are purporting to relay?

(iv) Did this particular aboriginal community have an oral tradition and how have they preserved traditions and history?

(v) Is the witness providing the best evidence of the community's oral traditions and oral history?

Hearsay

70. In general, evidence is not admissible if it is hearsay. Hearsay may be broadly defined as follows:

> Written or oral statements, or communicative conduct made by persons otherwise than in the testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or proof of the assertions implicit therein.
>
> **Sopinka, Lederman and Bryant, *The Law of Evidence in Canada***, 2nd Ed., (Vancouver: Butterworths, 1999) at 173

71. Generally speaking, evidence of oral history or oral tradition is a form of hearsay. In *Delgamuukw*, Chief Justice Lamer, as he then was, noted:

> . . . Another feature of oral histories, which creates difficulty, is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.
>
> ***Delgamuukw***, *supra*, at para. 86

72. In *R. v. Khan*, the Supreme Court of Canada established a simple rule for the admission of hearsay evidence; namely, that hearsay evidence can be admitted where it is both necessary and reliable. As such, the question for the Court in Aboriginal rights and title litigation is whether the oral history evidence that is proffered is, in fact, necessary (or useful) and reliable.

R. v. Khan, [1990] 2 S.C.R. 531

73. Evidence of aboriginal oral history and oral tradition may meet the test of usefulness in the following ways:

(i) Oral histories may provide the Aboriginal perspective on the particular right claimed or at issue.

Mitchell v. MNR, *supra*, at para. 32

(ii) They may offer evidence of an ancestral practice, the significance of which would not otherwise be available to the courts. In other words where there is no other means of obtaining the same evidence, given the absence of contemporary records or other types of evidence.

Ibid.

74. The principle of necessity or usefulness mandates that oral history and oral tradition evidence should only be given by the individual or individuals most qualified to give that evidence within the community, rather than indirectly through other witnesses.

75. The issue of reliability of oral tradition evidence must be determined on a case-by-case basis because the mechanisms for guaranteeing reliability are specific to each Indigenous community.

76. However, certain questions will normally be asked in assessing the reliability of oral history evidence. Is the Indigenous oral history or oral tradition evidence reliable? Does the particular witness tendered to provide the evidence represent a reasonably reliable source of the particular Indigenous community's history and tradition?

> The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
>
> ***Mitchell v. MNR***, *supra*, at para. 33

77. In *Delgamuukw*, the Court learned of the "checks and balances" that ensured the reliability of the *adaawk* and *kungax*, the oral tradition evidence of the Gitksan and Wet'suwet'en respectively. In Gitksan and Wet'suwet'en culture, only specifically appointed speakers were authorized to repeat the traditions of the community, and the authenticity of the narrative was guaranteed by its recitation before the group.

78. In *Mitchell*, the Chief Justice observed:

> In this case, the parties presented evidence from historians and archaeologists. The aboriginal perspective was supplied by oral histories of elders such as Grand Chief Mitchell. Grand Chief [page 938] Mitchell's testimony, confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence credible and relied on it. He did not err in doing so and we may do the same.
>
> ***Mitchell v. MNR***, *supra*, at para. 35

79. An aboriginal litigant adducing such evidence must demonstrate that some "checks and balances" exist within their oral tradition, sufficient to establish reliability.

The Process and Test for Admitting Oral History and Oral Tradition Evidence

80. In *William et al. v. British Columbia et al.*, 2004 BCSC 148, Mr. Justice Vickers of the British Columbia Supreme Court provided a procedure for admitting oral history and oral tradition evidence that reconciles aboriginal methods of preserving and transmitting cultural information by oral means with the rationale behind traditional common law approaches to the admissibility of evidence in court.

> ***William et al. v. British Columbia et al.***, 2004 BCSC 148

81. The Crown objected to the admissibility of oral history and oral tradition evidence in *that* case. The Crown sought to establish a procedure for admission of oral history and tradition

evidence that would address concerns related to necessity and reliability, and be in keeping with Chief Justice McLachlin's comments in *Mitchell* at p. 937:

> . . . inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
>
> ***Mitchell v. MNR***, *supra*, at para. 33

82. Mr. Justice Vickers' reasons for judgement were released on February 6, 2004. At paras. 17 and 22 of that judgment, he states as follows:

> [17] First, the court must decide whether the evidence tendered will be "useful in the sense of tending to prove a fact relevant to the issues in the case." Next, the court must decide, in each instance, whether the hearsay evidence is admissible. In that regard, the Supreme Court of Canada has mandated a flexible approach to such evidence. Hearsay evidence must pass a twofold test of necessity and reliability before its admission. (*R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Mohan*, [1994] 2 S.C.R. 9). Hearsay evidence of the kind proffered in this case should not be put to any different test. Nor should a *voir dire* necessarily be required to determine the admissibility of such evidence.
>
> [22] Where no witnesses of an event remain alive and the evidence is relevant, the test for necessity is met. In this trial, the real question on the issue of admissibility turns on the reliability of the evidence to be heard. How are the defendants to test the admissibility of the evidence if they cannot have some way of challenging its reliability? How are they to do the very thing contemplated by McLachlin C.J.C. in *Mitchell*, *supra*, para 33? What principled approach can be adopted in this case that would be free of the criticism that all oral history evidence was admitted leaving it up to the trial judge at the end of the case to sort out the weight to be given that evidence? How is this to be done bearing in mind that counsel for the plaintiff must be given some latitude to decide how the case is to be presented?
>
> ***William et al. v. British Columbia et al.***, *supra*, at paras. 17 and 22

83. The procedure adopted by Mr. Justice Vickers for the admission of oral history and tradition evidence can be summarized as follows:

> The Court must decide, in each instance, if the evidence is admissible. This is a twofold test, where by the Court must be satisfied the evidence is both necessary and reliable. The Court must be satisfied that both branches of the test for admissibility of hearsay evidence are met. The necessity requirement is a low threshold; if the persons who observed or

participated in an event are unable to attend trial due to illness, infirmity or death; hearsay evidence is likely necessary.

At the outset of the trial counsel are to outline the traditions of the aboriginal community relating to the questions of:

> 1) How their oral history, stories, legends, customs and traditions are preserved;
>
> 2) Who is entitled to relate such things and whether there is a hierarchy in that regard;
>
> 3) The community practice with respect to safeguarding the integrity of its oral history, stories, legends and traditions; and
>
> 4) Who will be called at trial to relate such evidence and the reasons they are being called to testify. (at paragraph 24)

If the test for necessity is met, when a witness is called to provide oral history evidence, counsel are to provide a brief outline of the nature of the hearsay/oral history evidence the witness will give. Before the evidence is heard, there will be a preliminary examination of the witness to determine:

> a) Personal information concerning the attributes of the witness relating to his or her ability to recount hearsay evidence of oral history, practices events, customs or traditions;
>
> b) In a general way, evidence of the sources of the witness, his or her relationship to those sources and the general reputation of the source; and
>
> c) Any other information that might bear on the issue of reliability.

This inquiry will not be a *voir dire*. The inquiry will be evidence in the case. At the conclusion of Plaintiff counsel's questions, the defendants may cross-examine the witness on the issues of necessity and reliability. At the conclusion of the preliminary stage, arguments on admissibility of the evidence will be heard. However, this will not preclude counsel from raising a specific objection to particular portions of a witness' evidence if the objection could not have been foreseen at the preliminary stage. (at paragraphs 28 and 29).

Finally, weight of oral history evidence is always an issue open for debate during final argument.

William et al. v. British Columbia et al.*, supra*

The Interpretation and Weighing of Evidence

84. If the Court decides that hearsay evidence is both necessary and reliable, then it is admitted. After it is admitted, the Court must, in reaching its factual conclusions, decide what weight will be given to the evidence. In that regard, it is open to the Court to accept the hearsay evidence in whole, in part or not at all.

85. The Crown submits that the procedure proposed by Mr. Justice Vickers for the admission of oral and tradition evidence will also generate useful information the Court will need to consider when evaluating the weight to be given to such evidence, if the evidence is admissible, such as:

i. Is the witness' evidence internally consistent?

ii. Is the witness' evidence uncontradicted?

iii. Is the witness sufficiently disinterested and capable of giving unbiased evidence?

iv. Is the oral tradition evidence of the witness consistent with the evidence in the case as a whole?

v. Is there 'triangulation', or corroboration in other witnesses' testimony or documentary evidence?

vi. Does the oral tradition evidence logically connect with the facts that must be proven by the rights claimant?

William et al. v. British Columbia et al., *supra*

86. At paras. 36-39 in *Mitchell*, McLachlin C.J., addressed the issue of the interpretation of evidence in aboriginal right claims:

> [36] The second facet of the *Van der Peet* approach to evidence, and the more contentious issue in the present case, relates to the interpretation and weighing of evidence in support of aboriginal claims once it has cleared the threshold for admission. For the most part, the rules of evidence are concerned with issues of admissibility and the means by which facts may be proved. As J. Sopinka and S. N. Lederman observe, "[t]he value to be given to such facts does not . . . lend itself as readily to precise rules. Accordingly, there are no absolute principles which govern the assessment of evidence by the trial judge" (*The Law of Evidence in Civil Cases* (1974),

at p. 524). This Court has not attempted to set out "precise rules" or "absolute principles" governing the interpretation or weighing of evidence in aboriginal claims. This reticence is appropriate, as this process is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard. Moreover, weighing evidence is an exercise inherently specific to the case at hand.

[37] Nonetheless, the present case requires us to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts" (para. 84).

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

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

[39] There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency o evidence adduced in support of an aboriginal claim. Evidence advanced

> in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.
>
> ***Mitchell v. MNR***, *supra*, at paras. 36-39

Expert Witnesses

87. It must be kept in mind that historians, anthropologists, archaeologists and genealogists are generally called to testify as expert witnesses. A preliminary inquiry into their qualifications is appropriate and is always undertaken by counsel or the Court. As noted, elders or other knowledgeable people that relate oral history and oral tradition evidence are not called at trial as an expert witness. He or she is called to testify as an ordinary witness. Like any ordinary witness, the hearsay component of their evidence must meet the threshold test of necessity and reliability on the issue of whether it is to be admitted as evidence at trial.

88. The courts have held that the evidence of an expert must be "necessary in the sense that it provide information which is likely to be outside the experience or knowledge of a judge or jury." (This description also applies to oral tradition and oral history evidence).

> ***Sopinka***, *supra*, at 620
> ***R. v. Mohan***, [1994] 2 S.C.R. 9

89. Before a court may receive the testimony of any expert on matters at issue, it must be demonstrated that the witness possesses special knowledge and experience going beyond the trier of fact that is relevant to a matter at issue.

> ***Sopinka et al, supra,*** **at 623 and Cudmore,** ***Civil Evidence*** **Handbook,** (Toronto: Carswell, 2003 loose-leaf updates), at 14-16 to 14-16.7

90. An expert is a person who by experience has acquired special or particular knowledge of the subject of which he undertakes to testify. It does not matter whether such knowledge has been acquired by study, scientific work, or by practical observation. There are no restrictions as to the particular classes of persons who may qualify as an expert. Once a witness has been properly qualified as an expert, any deficiencies in that witness' expertise will affect the weight, not the admissibility of his or her testimony.

Cudmore, *supra*, at 14-16.1 and 14-16.7

91. Testing a witness' expertise includes inquiries about the witness' skill, how those skills were acquired (however this is not determinative on the issue of admissibility) and the witness' level of experience.

Sopinka et al, *supra*, at 623; and *Cudmore* at 14-16.1

92. Challenges to the admission of an expert's testimony should be made immediately following testimony on the expert's qualifications and prior to the witness testifying on the matter in issue. If such questions are raised, the issue becomes a preliminary question for the judge alone to determine and opposing counsel may then cross-examine the witness as to his or her qualifications; a *voir dire* on the witness' qualifications is held. In other words, often once the evidence is in, it is too late to challenge it. If no objections are raised prior to the expert's testimony on the matters in issue, any cross-examination of the expert's qualifications goes to the weight not the admissibility of the testimony.

Sopinka et al, *supra*, at 623

93. If a witness is not shown to possess the expertise to testify to the issues in the action, the failure to object is not fatal, the evidence must be disregarded. However, technical failure to qualify a witness, who clearly has expertise, doesn't mean the evidence will or should be ignored.

Ibid, at 624

Conclusion

94. The s. 35 rights claimed by the applicant must be assessed using the test(s) enunciated by the Supreme Court of Canada as described above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of June 2025.

MacKay, Leonard

Digitally signed by MacKay, Leonard
DN: C=CA, O=GC, OU=PPSC-SPPC, CN="MacKay, Leonard"
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LEONARD MacKAY
Crown Counsel

LIST OF AUTHORITIES