International Law and Aboriginal Domestic Litigation[294]

It is a delight to me that the Canadian Council on International Law is devoting this annual conference to the subject of aboriginal rights and international law. I am even more delighted to be part of it.

For the purposes of this panel, I would like to examine the question of international law and aboriginal domestic litigation under two heads:

I. Why international law in aboriginal domestic litigation;
II. How international law in aboriginal domestic litigation.

I. Why International Law

Let us start with a general reply as to "why international law" followed by some specifics on the matter of its application to questions relating to aboriginal title and Crown/First Nation treaties and treaty-making.

A. The "Parallel Streams" Approach

I have had the opportunity to peruse René Morin's paper prepared for this Panel. While realizing that we are here to engage in dispassionate and learned discussion on those issues and not to engage in advocacy, I nevertheless cannot resist commenting on René's analysis of what he refers to as the "types of defences put forward by Aboriginal Peoples" for the purpose, as he would have it, "to escape the application of federal/provincial law."

First, and with respect, the fact that First Nations legal positions grounded in international law are considered as 'defenses' points to the problem – the assumption that federal and provincial laws are presumed applicable unless otherwise established, the burden being on aboriginal

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litigants. As was argued in *Delgamuukw*[295] by the Assembly of First Nations, it is the Crown, the party alleging change, alleging extinguishment of First Nation title and jurisdiction, that should have the burden of proof as to the change in circumstances.

Although there are those First Nations advocating the positions identified by René, the usefulness and use of international law in aboriginal domestic litigation can be seen in a much more subtle light. In the words of the Privy Council in *Re Piracy Jure Gentium* (1934),[296] ". . . their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law."

Bluntly put, it is not necessary to establish state sovereignty, or international treaty status of Crown/First Nation treaties in order to marshal international law in support of the legal positions being argued by First Nations in domestic courts.

We are all aware of the monist/dualist dialectic on the issue of the relationship of domestic and international law. Practitioners of each remain in their respective canoes and paddle along parallel but separate streams. If we are to be honest, during most of this voyage, those in the domestic law canoe consider themselves to be the real practitioners, paddling with a purpose and navigating by means of authoritative charts. The group in the international law canoe are seen as a rather loopy lot, out for a recreational paddle and navigating by the stars.

There are encouraging signs that the Supreme Court of Canada is prepared to glance heavenward when struggling with the complexities of aboriginal litigation. In *Simon v. The Queen*,[297] a case examining the 1752

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[295] *Delgamuukw v. The Queen*, Factum of the Intervenor Assembly of First Nations/National Indian Brotherhood, at 12, hereinafter "AFN Factum in Delgamuukw". The full factum is online at <http://www.usask.ca/nativelaw/factums/view.php?id=434>

[296] 1934 AC 586. The appeal to the Privy Council related to charges against a number of armed Chinese men, cruising in two junks, who had pursued and attacked a cargo junk on the high seas. Before the pursuers were able to overcome their prey, they were stopped and taken into custody, brought to Hong Kong, and there charged with piracy. They were acquitted when the court found that an actual robbery was an essential element of the crime. In overturning the acquittal, Viscount Sankey said, "A little common sense . . ." since the lower court interpretation would mean only "successful" pirates could be prosecuted.

[297] [1985] 2 S.C.R. 387, hereinafter "*Simon v. The Queen*".

Treaty of Peace and Friendship between the Micmacs and the British, Chief Justice Dickson for the Court did two significant things: first, he dissociated the Court and contemporary jurisprudence from earlier lower courts' Eurocentric analysis of the Law of Nations and, second, he broke the judicial ice on the possible application of international law in aboriginal domestic litigation.

On the first point, in 1929, Mr. Justice Patterson of the County Court of Nova Scotia held that the treaties with the Indians of that province were not international treaties because "Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as independent powers . . . The savages' rights of sovereignty even of ownership were never recognized."[298] Since only what Mr. Justice Patterson called "constituted authorities of nations" had authority to make treaties, he concluded that the Treaty of 1752 between the Micmacs and Governor Hobson was not a treaty. Chief Justice Dickson reacted as follows:

> "It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing."[299]

On the second point, the Chief Justice stated:

> "In considering the impact of subsequent hostilities on the peace Treaty of 1752, the parties looked to international law on treaty termination. While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[300]

This statement by Chief Justice Dickson has been taken to mean that Indian treaties are not international treaties and that international law does not apply to them. However, when one looks at the criteria applied by Chief Justice Dickson after he said that the treaty was neither

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[298] *R. v. Syliboy* (1929) 1 D.:.R. 307, at 313

[299] *Simon v. The Queen,* above, at 399

[300] *Ibid., at 404*

created nor extinguished according to international law, one discovers that the principles he applied are identical to those that prevail under international law.

In my opinion, we cannot infer from Chief Justice Dickson's statement that he rejected an application of international law. We should rather take it to mean that Canadian Courts should not limit themselves to the strict application of one set of principles or another, but that they should look to any source which might be pertinent, including international law in some instances.

The High Court of Australia in *Mabo v. Queensland*[301] has given such direction for Australian domestic law, suggesting that a little stargazing would be helpful. Speaking in *Mabo*, Mr. Justice Brennan stated,

> Whatever the jurisdiction advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.
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> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[302] [our emphasis]

It should be noted that *Mabo* has already found its way into Canadian case law through the decision of the British Columbia Court of Appeal in *Delgamuukw v. The Queen*.[303] The Court of Appeal specifically solicited oral and written submissions from all counsel on the significance of *Mabo*. Mr. Justice McFarlane and Mr. Justice Lambert in their Reasons quote extensively from the judgment.

I would suggest, with the Supreme Court of Canada and the High Court of Australia, that international law can appropriately and usefully

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[301] [1992] 107 A.L.R. 1.

[302] *Ibid.*, at 29.

[303] 1993 CanLII 4516 (BC C.A.)

be applied by analogy[304] and be considered "an important influence".[305]

B. International Law as part of the law applicable to Aboriginal Rights and Aboriginal issues

i) Aboriginal rights and title and inherent jurisdiction

The Crown has had little reluctance invoking the Law of Nations or international law before the courts in aboriginal domestic litigation.

In *R. v. Sioui,*[306] for example, the Attorney General for Quebec relied upon the rules of international law applicable at the time of conquest and cession of New France to argue before the Supreme Court of Canada that on September 5, 1760, the British Crown did not have the capacity to enter into a treaty with the Hurons because it had not yet acquired sovereignty over the territory.[307]

In *Delgamuukw v. The Queen* in the B.C. Court of Appeal, the

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[304] *Simon v. The Queen,* above, at 404.

[305] *Mabo,* above, at 29.

[306] [1990] 1 S.C.R. 1025. The Court decided, "The appellant argued that the British Crown could not validly enter into a treaty with the Hurons as it was not sovereign in Canada in 1760. The appellant based this argument on the rules of international law, as stated by certain eighteenth and nineteenth century writers, which required that a state should be sovereign in a territory before it could alienate that territory. (See E. de Vattel, *The Law of Nations or Principles of the Law of Nature* (1760), vol. II, book III, para. 197; E. Ortolan, *Des moyens d'acquérir le domaine international ou propriété d'État entre les nations* (1851), para. 167.)

> "Without deciding what the international law on this point was, I note that the writers to whom the appellant referred the Court studied the rules governing international relations and did not comment on the rules which at that time governed the conclusion of treaties between European nations and native peoples. In any case, the rules of international law do not preclude the document being characterized as a treaty within the meaning of s. 88 of the Indian Act. At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens. The Simon decision, supra, is clear in this regard: an Indian treaty is an agreement sui generis which is neither created nor terminated according to the rules of international law (p. 404)."

[307] *Mémoire de l'appellant, le Procureur général du Québec, (l'argumentation: vol. 10, C.S.C. 20628, par. 15-20, at pp. 6-8.*

Attorney General for British Columbia in its factum quoted Vattel's *Law of Nations*[308] as a relevant guide to the law applicable. Vattel was relied upon in support of the argument that in mid-nineteenth-century Britain, one of the recognized concepts was that a nation could not possess more territory than it was capable of settling and cultivating, and therefore the lands that the Indians had not "settled" and "cultivated" were considered unoccupied lands that could be appropriated by the Crown.[309]

The rules applicable, according to the Crown, were the rules applying as between European nations ("the Law of Nations"). These rules conveniently postulated two methods of acquisition of title and sovereignty: either the territory of indigenous peoples was deemed to be *terrae nullius* and summarily appropriated for the purposes of title and sovereignty, or, in the slightly-less fictional approach of Chief Justice John Marshall of the United States Supreme Court, the European discoverer established rights as against all other European powers including the exclusive right to deal with the indigenous population – a principle "acknowledged by all Europeans, because it was the interest of all to acknowledge it . . . "[310]

What was at work here was the Crown asserting title and sovereignty as against competing European claims through the intermediary of aboriginal people. In the *Delgamuukw* appeal before the British Columbia Court of Appeal, the Assembly of First Nations submitted an interesting contemporary example of this phenomenon, a speech of former Prime Minister Joe Clark (and then Minister of External Relations) in the House of Commons in September 1985. Speaking of Canada's claims to the Arctic, Mr. Clark stated,

> Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. From time immemorial, Canada's Inuit people have used and occupied

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[308] *The Law of Nations or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns (1763),* from the French of Monsieur de Vattel, from the new edition by Joseph Chitty, Esq., Barrister at Law. Philadelphia: T. & J.W. Johnson & Co., Law Booksellers, 1883. Also: London: Whieldon and Butterworth, 1973), hereinafter cited as "Vattel".

[309] *Factum of the Respondent Her Majesty the Queen in Right of the Province of B.C.,* No. CA103770 Vancouver Registry (B.C.C.A.), at para. 71-72, pp. IV-41/IV-42.

[310] *Worcester v. The State of Georgia* (1832) 31 U.S. 350, 6 Pet. 515 at 544

the ice as they have used and occupied the land.[311]

It is of interest that the scores of documents used by Intervenor AFN in that appeal, the Joe Clark speech was one of the two that the Federal Crown objected to strenuously. Sensibilities run high when it is suggested that an 18th-Century doctrine of claiming sovereignty through indigenous populations still has relevance in Ottawa.

ii) Treaties

Crown/First Nation treaties were the instruments used to establish, again vis-à-vis competing Europeans, rights of access to territory and resources, military alliances, commercial relationships. The language of these instruments was not the language of domestic contracts between the crown and its citizens, but treaties between independent peoples,

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[311] AFN Factum in *Degalamuukw*. The factum also submitted that "the appropriate test to be required of aboriginal people is the establishment of a *prima facie* case as to the location of their historic homeland at the time of 'European Contact'. Thereafter, the burden shifts to the Crown to establish any change or diminution of that aboriginal nation's title or jurisdiction over its homeland." This was, as the factum noted, the position taken by Mr. Justice Hall in *Calder:* "In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie,* therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial. ... The Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership and indigenous to their culture and capable of articulation under the common law ..." . . .

> "We say that the burden of proof of establishing a change in the legal position of aboriginal peoples, as well as the legal basis and justification for such change, lies on the Crown, and that this burden has not been met in this case. For the visitor to maintain that he has replaced the host, that as a result of his arrival and extended stay the host is stripped of property and political rights, is not in accord with the Rule of Law prevailing among 'civilized nations'.
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> "In the past, First Nations have been asked to prove the 'survival' of their title or jurisdiction. Intervenor NIB/AFN submits that this is not an appropriate, just, or legal approach. It is the Crown, the party alleging change, alleging extinguishment of title and jurisdiction, that has the burden of proof as to change of circumstance. The Supreme Court of Canada has so held...
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> "Intervener NIB/AFN submits that the proper inquiry in these matters is not the 'intention of the Crown' or 'the acts of the Crown', but rather whether there existed a legal foundation for such intention, for such acts. We say that the legal presumption favours continuing rights of Appellants and is against deprivation or abrogation by the Crown."

albeit of uneven strength.[312] As Chief Justice Marshall stated in *Worcester v. State of Georgia:*

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[313]

The Law of Nations was specifically invoked by the Chief Justice in describing the treaty relationship:

> The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence, its rights to self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state . . . At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.[314]

Mr. Justice McLean in *Worcester v. State of Georgia* acknowledged that application of the Law of Nations or international law did not require the presence of equal parties. In the context of treaty relationship he stated:

> What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.
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> Is it essential that each party shall possess the same attributes of sovereignty, to give force to the treaty? This will not be pretended: for on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.[315]

The Law of Nations in the period 1750 to 1850 embraced a wide

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[312] In Western Canada in the 1870s, however, in many instances, the strength of the First Nations was far superior to that of the British or Canadian government at the time the treaty was entered into. It was, in fact, the entering into the treaty relationship which allowed the relative strength to tip toward the settler government.

[313] *Worcester v. State of Georgia,* above, at p. 559

[314] *Ibid., at p. 560.*

[315] *Ibid.,* at 581.

variety of entities. There was no emphasis placed on formal attributes of statehood. The British pattern of treaty-making was representative.

> It is apparent from the chronicles of British treaty-making in the century beginning in 1750 that the British Crown was willing to make formal arrangements with a great variety of political formations in widely differing contexts. In practical terms the question of delimiting the types of entity which counted was not faced – or rather it was faced only in political practice and not as a question of principle.
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> In the period up to the middle of the nineteenth century the practice reveals two characteristics. First, there was no regional or cultural limitation on recognition of personality in international relations. Secondly, there was no emphasis placed upon the formal criteria of "statehood'. The legal doctrine of the time reflected this state of affairs. It followed that the existence, the sovereignty, of a state did not depend upon the recognition of other powers.[316]

Almost 160 years after, Mr. Justice Lamer, speaking for a unanimous Supreme Court of Canada in *R. v. Sioui,* echoed his 19th Century U.S. counterpart, John Marshall:

> I consider, that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.[317]

All this establishes that the Crown has not been in the least reluctant to use in its defence the rules of 17th and 18th Century law of nations and the 19th and 20th Century international law. Why, it must be asked, are the aboriginal peoples of Canada and the First Nations of Canada precluded from doing the same?

The fact is that the relationship between European and aboriginal peoples should be examined not through the looking glass of the common law or the civil law exclusively but rather through a legal prism of a number of legal systems – domestic, civil and common law, First Nation customary law and, not the least, international law. As Professor Slattery

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[316] I. Brownlie, "The Expansion of Industrial Society; The Consequences for the Law of Nations", in H. Bull and A. Watson, (eds., *The Expansion of International Society,* 1984. Oxford: Claredon Press, at 361. The quotation also appeared in the AFN Factum in the Court of Appeal in *Delgamuukw.*

[317] *Delgamuukw,* above, at 1052-1053

has argued in this context:

> . . . any approach which purports to rely exclusively on a body of positive or conventional law is necessarily afflicted by arbitrariness or circularity.

II. How International Law Has Been Argued

Here I wish to address the very pragmatic question as to how international law has been argued in cases in which I have been involved. Suggestions are being made to the courts as to how international law may well provide useful analogies, influence or corollaries.

A. What is a Treaty?

The issue in *R. v. Sioui* was whether the instrument concluded between General Murray and the Huron Nation on September 5, 1760, three days before the fall of Montreal, was to be construed as a treaty.

In support of this position, the Assembly of First Nations argued that the diplomatic and military context in which that instrument was executed and the Law of Nations at the time supported the holding that a treaty between the Huron Nation and the British was concluded in September 1760. AFN emphasized the well-established international law principle that an instrument must be construed in the light of the law and facts contemporary to the instruments (the intertemporal law) as held by Max Huber in the *Island of Palmas* case in 1928.[318]

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[318] (Scott, *Hague Court Reports* 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829), was a case involving a territorial dispute over the Island of Palmas (or Miangas) between the Netherlands and the United States which was heard by the Permanent Court of Arbitration, available at <http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20+%20TOC.pdf>. Quoted in *R. v. Sioui,* para 6, p. 3 of the *Factum of the Intervenor National Indian Brotherhood/Assembly of First Nations (NIB/AFN),* no. 20628 (S.C.C.), hereinafter *"Factum of the Intervenor NIB/AFN, Sioui"*

Palmas (also referred to as Miangas) is an island about two miles long by three fourths of a mile wide which at the time of this case had a population of about 750 and was of little strategic or economic value except, perhaps, to those who lived there. It is located about halfway between the islands of Mindanao in the Philippines and Nanusa in what was then the Netherlands Indies. It was, however, within the boundaries of the Philippines as defined by Spain and thus ceded to the United States in 1898. In 1906 an American General, Leonard Wood, visited Palmas and discovered that the Netherlands also claimed sovereignty over the island. An agreement was signed on January 23, 1925, between the United States and the Netherlands to submit the dispute to binding arbitration.

Without relying upon any international authority, the Court nonetheless acknowledged "the importance of the historical context, including the interpersonal relations of those involved at the time, in trying to determine whether a document falls into the category of a treaty under s. 88 of the *Indian Act*."[319] The Court quoted Mr Justice Norris in *R. v. White and Bob*,[320] thereby confirming that the principle that instruments must be construed in the light of the law and facts contemporary to them is part of the law of Canada.

The AFN specifically referred the Court to the use of the Law of

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The Swiss jurist, Max Huber, was the selected arbitrator acting for the Permanent Court of Arbitration. Huber was charged to determine "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory." [Note from that of Kurt Taylor Gaubatz] Huber decided the island belonged in its entirety to the Netherlands.

On the issue of intertemporal law, Huber ruled, "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

"International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of states members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other states and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a state, nor without a master, but which are reserved for the exclusive influence of one state, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty.

For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one state in order that the sovereignty of another may take its place does not arise."

[319] per Justice Lamer at 1045.

[320] (1964) 50 D.L.R. (2d) 613, at 649 (B.C.C.A.) affirmed in the Supreme Court of Canada 1965 52 D.L.R. (2d) 481

Nations by the European protagonists. We argued that, during the years leading up to the Seven Years War, the English explicitly invoked and applied to their alliances with the Indian Nations the 18th Century Law of Nations and the Rules of War. This can be seen from a speech by Sir William Johnson, responsible for Indian affairs in British North America and later one of the British Generals who marched on Montreal. The Court was given the following extract:

> Brethern of the five Nations in the next place I must tell you I am sent here by Order of your Brother the Governour as also the Governour of Boston to stop your going to Canada, they having heard (to their great concern) that you were determined soon to go that way again which is quite contrary to your Engagements and Contrary to the Custom of all Nations in the world in Time of War.[321] [emphasis added]

The Attorneys General attempted to equate the Murray/Huron treaty with the laying down of arms by Canadians as the British army advanced on Montreal. The AFN argued that, consistent with the 18th Century laws of war, a clear distinction was made between militia and populace required to lay down arms and take individual oaths of allegiance, on the one hand, and, on the other, belligerent Indian nations negotiating peace collectively and to their satisfaction through their leaders and not required to lay down arms.[322]

The Attorneys General argued that the Murray instrument was, in fact, a capitulation, AFN argued this was incorrect. Under the 18th Century laws of war, capitulations were considered to be one of the conversions made during the course of war. They did not terminate the state of war. In fact, they supposed the war to continue. The Court was directed to Halleck's 1861 *International Law.*[323]

> "Whatever similarities between instruments recording the laying down of arms by French soldiers or Canadians and the document at issue, the analogy does not go so far as to preclude the conclusion that the document was nonetheless a treaty.

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[321] Speech to the Five Nations at "A Conference at Onondaga", 25 April 1748, *W. Johnson Papers* (1921), vol. I, p. 155 at 159. *See R. v. Sioui,* par. 10, p. 5, *Factum of the Intervenor NIB/AFN,* above.

[322] See par. 16-17, pp. 7-8, of the *Factum of the Intervenor NIB/AFN,* above, in *Sioui.*

[323] H.W. Halleck, *International Law* (New York: Van Nostrand, 18610. See par. 19, p. 9 of the *Factum of the intervenor NIB/AFN, Sioui.*

> "Such a document could not be regarded as a treaty so far as the French and Canadians were concerned because under international law they had no authority to sign Such a document . . . The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory."[324]

i. Pact Sunt Servanda[325]

Finally, in *Sioui,* the Attorneys General argued that there had been unilateral or implicit extinguishment of the treaty signed with Murray.[326] The AFN, invoking international law principles, argued that unilateral or implicit extinguishment of treaty rights, is not to be presumed, invoking the doctrine of *pacta sunt servanda.* The AFN argued that the consent of both parties to a treaty must be obtained in order to affect a legal extinguishment. Only in certain exceptional circumstances may an aggrieved party terminate a treaty. The Court was referred to the *Vienna Convention on the Law of Treaties,*[327] as well as the International Court of

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[324] *R. v. Sioui,* above, at 1056.

[325] *Pact sunt servanda* is the principle that promises should be kept. It is an assumed principle of treaty law. Without first accepting this notion, any particular treaty would have no binding force. This is underlying assumption that is a separate source of international law, because they qre philosophically prior to norms of custom. One cannot, for example, establish through treaty the principle that treaties should be obeyed. [Note from *internaitonal Law and the use of Force*, by Anthony C. Arend, Robert J Beck, Routledge, 1993.

[326] *Mémoire de l'appellant, le Procureur général du Canada, No. 20628 C.S.C. 20628, para. 22, p. 11; Mémoire de l'appellant, le Procureur général du Québec,* above, para. 89, p. 29.

[327] Can. T.S. 1980, no. 37, Articles 54 and 60.

Article 54: "The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (bo at any time by consent of all the parties after consultation with the other contracting States.

Article 60: "1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. . . 3. A material breach of a treaty, for the purposes of this article, consists in (a) a repudiation of the treaty not sanctioned by the present Convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty. . .

Justice Advisory Opinion on *Nambia*.[328]

The Court was also referred to Vattel's *The Law of Nations* 1763 for the proposition that the doctrine applying in the 18th Century was that a treaty right was not easily severable form the treaty instrument.[329]

To avoid having to meet the threshold test of international treaty status, AFN argued that the Law of Nations applying during the 18th Century recognized the sanctity of conventions made by the sovereign but falling short of public treaties. The rules governing public treaties applied by analogy. The Court was referred to Vattel.[330]

The Court was also referred to sources[331] dealing with capitulations holding that they were inviolable and binding on successor states.

The Court agreed with AFN that there could not have been a unilateral extinguishment of the treaty on the part of the British Crown on the basis of the general principles of law;

> "It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred . . . The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."[332]

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[328] *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Adrisory Opinion, I.C.J. Reports 1971,* p. *16.*[1971] I.C.J. Rep. 16, see para. 28-30, pp. 12-13 of the *Factum of NIB/AFN, Sioui,* above.

[329] *Vattel* above.

[330] *Factum of the Intervenor NIB/AFN, Sioui,* above, para. 31, p. 13

[331] E. De Vattel, above; L. Oppenheim, *International Law,* vol. II, *War and Neutrality,* 2d ed. (London: Longmans, Green & Co., 1912); D.P. O'Connell, *International Law* (London: Stevens & Sons, 1965.) See also *Factum of the Intervenor NIB/AFN, above,* para. 32, p. 13.

[332] *R. v. Sioui,* above, at 1063

ii) *Rebus Sic Stantibus*[333]

While the principle of *pacta sunt servanda* is relevant and useful in seeking court-ordered respect for Crown/First Nation treaties, it has been necessary to flip the coin and invoke *rebus sic stantibus*.

In *R. v. Flett,*[334] the Crown attempted to appeal to the Manitoba Court of Appeal concurring acquittals of Henry Flett, a member of a First Nation signatory to Treaty No. 5 from charges under the *Migratory Birds Convention Act*.

The AFN, intervening in support of Henry Flett, had the opportunity to raise the doctrine of *rebus sic stantibus.* Here the job was to counter Crown arguments that the *Migratory Birds Convention* was still binding on Canada and that the Government of Canada was obliged to enforce its closed season against Aboriginal Peoples harvesting migratory birds.

AFN argued that in this case, Canada was entitled to request termination or revision of the Convention by reason of fundamental change of circumstances. The conservation rationale of the convention, perhaps valid in 1916, was no longer necessary or valid. The Court was given as authority Article 62 of the *Vienna Convention on the Law of Treaties.*[335]

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[333] *Clausula rebus sic stantibus* translated from the Latin means, "things thus standing".

[334] [1991] 1 C.N.L.R. 140 (Man. C.A.)

[335] The doctrine of *rebus sic stantibus* codified in the Vienna Convention on the Law of Treaties under article 62: Fundamental Change of Circumstance:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (a) if the treaty establishes a boundary; or
>
> (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
>
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of

The AFN, while acknowledging that there is a reluctance to condone unilateral abrogation of treaty provisions, pointed out to the Court that the doctrine of *rebus sic stantibus* would cause a treaty or treaty provision to lapse if the change of circumstances had been acknowledged by the states party through an authoritative act. The Reports of the International Law Commission as well as the decision of the Permanent Court of International Justice in the *Free Zones* case were invoked.[336]

In the *Flett* case, the authoritative act was a Protocol amending the Convention signed on January 30, 1979, by the two governments acknowledging the rights of each party to dispense with the closed season provided in the Convention as it applied to indigenous peoples.

The Crown was refused leave to appeal.[337]

iii) Fundamental Breach – Crown/First Nation Treaty

We have had further occasion to invoke the principle of fundamental

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circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

[336] *Free zones of Upper Savoy and the District of Gex* (19320 p.C.I.J. Rep., Ser A/B no. 46. (See *R. v. Flett, Factum of the Intervenor National Indian Brotherhood/Assembly of First Nations,* File No. 396/89 (Man. C.A.), par 100, p. 52.

In this case, the French Government invoked the principle of *rebus sic stantibus,* although it stressed that the principle does not allow unilateral denunciation of a treaty claimed to be out of date. Switzerland argued on the other hand that there was a difference of opinion as to regards this doctrine, and disputed the existence in international law of a right that could be enforced through the decisions of a competent tribunal to the termination of a treaty because of changed circumstances. The Court found that the facts did not justify the application of the *rebus sic stantibus* principle. [Quoted from Malgosia Fitzmaurice, Olufemi Elias, *Contemporary Issues in the Law of Treaties*, Eleven International Publishing, 2005, pp. 178-179.

[337] There had been a previous decision written by Justice Pigeon in *Daniels v. White* [1968] S.C.R. 517, also involving the *Migratory Birds Convention,* in which it was stated, "This was a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law." Justice Pigeon went on to reason, however, that "neither comity nor rule of international law can be invoked to prevent a sovereign state (Canada) from taking what steps it thinks fit to protect its own aboriginal population (Indians) from being deprived of their ancient rights to hunt and to fish for food assured to them in Treaties 5 and 6 made with them."

breach under international law, this time in the case of a Crown/First Nation treaty – the *James Bay and Northern Quebec Agreement*.

In proceedings before the Quebec Superior Court,[338] the Crees were invoking Crown breaches to the Agreement, and seeking among other relief, the suspension of their alleged surrender under the treaty, at least pending Crown compliance with its treaty obligations.

Hydro-Quebec and Quebec brought Motions to Strike the allegations in the action dealing with breaches to the Agreement, arguing that the allegation could not lead to the relief sought. The argument was that the Crees had surrendered their rights, albeit in return for benefits. Parliament had extinguished those rights. That was the end of the matter. Crown delinquency was irrelevant.

We argued that, in the context of this Motion, international treaty law could be applied by analogy as directed by the Supreme Court in *Simon* and that reciprocity is an important principle in international law.

The question for domestic courts is the following – are these instruments, Crown/First Nation treaties, subject to the pleasure of the Crown while irrevocably binding on First Nations or is the underlying premise reciprocal and binding rights and duties. We again invoked the *Vienna Convention* and the *Nambia* case on the question of material or continuing breach of a treaty.

The allegation was not struck.[339]

B. International Law as External Constraint

In the Appeal before the Supreme Court of Canada in the *Bear Island* case [340] and before the British Columbia Court of Appeal in *Delgamuukw,* the Assembly of First Nations, as intervenor, again invoked the Law of Nations and international law.

The purpose this time was to argue that there exist external constraints on the Crown in respect of its dealings with First Nations.

The Court in both appeals was reminded that the British did not

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[338] *Grand Chief Matthew Coon Come et al v. Hydro-Quebec et al.,* District of Montreal, No. 500-05-004330-906.

[339] The case went on for years, and then was settled.

[340] *AG. Ontario v. Bear Island* [1991] 2 S.C.R. 570,

claim North America through the doctrine of *terra nullius.*[341] This is supported by the facts and the Law of Nations invoked by the Europeans.

D.P. O'Connell[342] was invoked with respect to his analysis of the French, British, and American vision of North America. Sovereignty had to be acquired or perfected through *conquest* or *cession.*

The *Western Sahara Advisory Opinion*[343]of the I.C.J. was also invoked as authority for the proposition that European powers, in this case Spain, supported their claim to sovereignty not on the basis of establishing sovereignty over *terrae nullius* but rather through agreements entered into with Chiefs of the local tribes.[344]

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[341] In the *Western Sahara* case cited below, the International Court of Justice said (p. 38), "The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* – a territory belonging to no one – at the time of the act alleged to constitute the ;occupation'. . . In the view of the Court, therefore, a determination that Western Sahara was a '*terra nullius*' at the time of colonization by Spain would be possible only if it were established that at the time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation".

[342] *International Law* (London: Stevens & Sons, 1965) at p. 469

[343] I.C.J. Rep. 1975, p. 39. The International Court of Justice stated in para. 80 of its opinion, "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected through 'occupation' of *terra nullius* by original title, but through agreements concluded with local rulers.

On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a '*terra nullius*' in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*."

The common law doctrine of the Crown's underlying title to lands occupied by Indigenous Peoples conveniently steps over thie aspect of international law. See *Sparrow*..

[344] *Factum of the Intervenor NIB/AFN, above, par. 92-94, pp. 21-22.*

In North America, constant representations were made to First Nations that a treaty process was required. AFN brought to the attention of the Courts in both appeals the words of Lord Dorchester to the Confederated Indian Nations in 1791:

> Brothers: You have told me, there were people who say that the King your Father when he made peace with the United States gave away your lands to them. I cannot think the Government of the United States would hold that language. It must come from ill-informed individuals. You will know, that no man can give what is not his own . . . The Kings rights with respect to your territory were against the Nations of Europe; these he resigned, to the States. But the King never had any rights against you but to such parts of the Country as had been fairly ceded by yourselves with your own free consent by Public convention and sale. How then can it be said that he gave away your lands?[345]

In *Delgamuukw,* where one of the many issues was the effect of competing European claims to the Northwest Pacific Coast, the Court of Appeal was referred to official correspondence and statements. On the basis of its consistent representations, Britain was of the opinion that a claim to title under international law in the area now known as British

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[345] *Ibid., p. 99, p. 23.* Original source Archives of Ontario, Simcoe Papers, Letterbook at 17-1791. Actually, the statement was a planned deception of Joseph Brant. Both Governor General Lord Dorchester [Guy Carleton] and Sir John Johnson had told Brant that they wished to effect a peace between the western Indians and the United States, but both men also persisted in deliberately deceiving him concerning the boundaries established by Great Britain and the United States in 1783. They assured Brant that the King had not really given away the Indian lands in the west to the Americans and that the boundary set at the Treaty of Fort Stanwix in 1768 was still in effect.

The deception helped provide the British in Canada with an Indian buffer on their frontier and laid the blame for white expansion into the west solely on the Americans. Brant had gone into the Indian country south of the Great Lakes in the spring of 1791 to continue his consultation with the Western Nations. In a council held at Detroit and attended by deputy Indian agent Alexander McKee and representatives of the Six Nations Confederacy, the Indians agreed that the Muskingum River should be their eastern boundary and sent Brant and 12 other deputies to Quebec to inform the government of their decision. Brant wanted to learn if the British would back the Indians in obtaining recognition of their boundary.

That is when Dorchester assured the deputies that the King had not transferred their country to the Americans but he also emphasized that the government could not involve itself in any hostilities. The reluctance of Dorchester to commit the government militarily was a disappointment to Brant. [excerpt from *Dictionary of Canadian Biography,* Barbara Greymont's biography of Joseph Thayendanegea Brant.]

Columbia was of dubious validity unless accompanied by purchase of territory or the receipt of sovereignty from the indigenous people and Britain relied upon this in its claim against the United States for the territory.

C. *Res inter adios acta & stipulations pour autrui*

A less-successful foray into international law before the domestic courts was an intervention on behalf of the Chiefs of Ontario in *Her Majesty the Queens' v. Elizabeth Vincent*[346] before the Ontario Court of Appeal. This

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[346] [1993] 2 C.N.L.R. 165

In *Mitchell v. M.N.R. (T.D.)*, 1993 CanLII 2957 (F.C.), in a motion of the federal solicitors to strike evidence, the Court ruled: "In the instant case, the defendant [Crown] relies heavily on the decision of the Ontario Court of Appeal in *Vincent*, to justify striking the impugned pleadings. As such, I believe it is important to briefly outline the facts of that case and the decision rendered by the Court . . . The plaintiff in the first instance and appellant before the Court of Appeal was Elizabeth Vincent, a Huron Indian who re-entered Canada at the Cornwall International Bridge with several cartons of cigarettes.

The Ontario (Provincial Court) found her liable to pay the necessary duties and taxes on the imported goods. On appeal, the plaintiff and an intervenor, the Chiefs of Ontario, argued that she was, as an Indian, entitled to bring goods into Canada of a commercial nature without having to pay the duties and taxes. The issue before the Court of Appeal hinged upon the determination of whether this historical right existed and, if so, whether this right was entrenched in the *Constitution Act, 1982*.

In rendering its decision, the Court of Appeal found that: (1) the international law relied upon was not binding upon the Sovereign, Canada; (2) the Jay Treaty did entitle Indians to bring into Canada goods and effects for personal or community use; but (3) even if the Jay Treaty was entrenched under subsection 35(1) of the Constitution Act, 1982, in light of several Supreme Court of Canada decisions, this did not confer upon the appellant the right to import goods for commercial use without paying duty and taxes on them.

> "I am satisfied from having read the decision in the *Vincent* case that the treaty rights issue has been determined. I am not satisfied that the aboriginal rights issue was determined or even considered by the Justices of the Court of Appeal in handing down their decision in the *Vincent* case.
>
> "Counsel for defendant [Crown] submits that this issue, aboriginal rights, was considered and determined by the Justices of the Court of Appeal. After reading the material filed by the defendant, I am not satisfied that I can conclude that the Ontario Court of Appeal in the *Vincent* case gave consideration concerning aboriginal rights. . ."

The Court also said, 'Mitchell: It is entirely appropriate for the plaintiff to have pleaded references to the various undertakings and international law conventions, and

case examined whether, under Article 3 of the *Jay Treaty* and under Article 9 of the Treaty of Ghent, First Nations had a right to pass and re-pass across the Canada/U.S. border without paying customs duties.

International law was, of course, applicable as certainly the Jay Treaty and the Treaty of Ghent are international treaties.

The Crown argued that international treaties cannot confer benefits on citizens and that treaty rights in international law belonged exclusively to sovereign state's party to a treaty (*Res inter alios acta*).[347]

The intervenor, Chiefs of Ontario, argued the contrary – that states are not the only entities capable of entering into international treaties and that numerous international treaties create obligations incumbent upon the state parties and rights in favour of individuals and non-state entities.[348]

In particular, the Intervenor argued on the basis of the doctrine of *stipulation pour autrui*.[349] International law recognizes that treaty stipulations in favour of a third party creates rights for that party if such is the intent of the party. The court was given as authority the case of the *Free Zones of Upper Savoy and the District of Gex*.[350]

The Court accepted the application of *res inter alios acta* as precluding First Nations recourse to the *Jay Treaty*, stating,

> "It has long been established by the Courts that the rights created or recognized by an international treaty belong exclusively to the

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the anticipated legal results flowing therefrom."

[347] *Factum of the Attorney General for Canada,* C.A. No. C8006 *(C.A. of Ont.), paras. 24-26, p. 11. *Res inter allos acta* provides that the rights of a party cannot be prejudiced by an act, declaration, or omission of another party; a person may agree to bind himself, but it would be unjust it it were held that a person can bind another person.

[348] *Factum of the intervenor Chiefs of Ontario,* C.A. No. C8006, para. 32, p. 8 (C.A. of Ont.)

[349] Literally, "a stipulation for another", i.e., a contract or provision in a contract that confers a benefit on a third-party beneficiary.

[350] *Factum of the Intervenor Chiefs of Ontario,* above, para. 33, p. 8. Also see discussion in a prior footnote about the *Free Zones* case.

sovereign states which concluded it . . . "[351]

The Crown also argued extinguishment of any treaty benefit. Here, arguments raised in *Sioui* were again put to the Court: the validity of a treaty, its continuance in force and consent to be bound are presumed. The *Vienna Convention on the Law of Treaties*[352] and the *Namibia* case[353] were invoked.[354]

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[351] *R. v. Vincent, above, at 174.*

[352] *Factum of the Intervenor Chiefs of Ontario*, above, at p. 10.

[353] *Factum of NIB/AFN* in *Sioui,* above, especially at paras. 91-101.

[354] Another example of the unsuccessful application of international law in Canadian courts go back to *St. Catharines Milling and Lumber Co. v. R.,* 13 S.C.R. 577, in 1887 in the Supreme Court of Canada, affirming the judgment of Boyd C. In the Chancery Division of the High Court of Justice of Ontario, with Justices Strong and Gwynne dissenting.

The case for the Milling and Lumber Company was set out by barristers McCarthy and Creelman. Before discussing the case on the basis of the *British North America Act,* the Company argued the Indians had a title to the land which never passed to the Province: [P.580]

> "All this country was once occupied by Indian tribes. . . In Canada, from the earliest times, it has been recognized that the title to the soil was in the Indians, and the title from them has been acquired, not by conquest, but by purchase. In 1763 a royal proclamation was issued dividing the British possessions in America into separate governments and defining the powers of each. The rights of the Indians are conserved therein as the following extract will show:
>
> "and whereas it is Just and Reasonable and Essential to Our Interests and the Security of Our Colonies that the several Nations or Tribes of Indians with whom we are connected and who live under Our protection should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds. . . and we do hereby strictly forbid, on plain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved, without our especial leave or license for that purpose first obtained . . . " . . .
>
> ". . . In all the treaties mentioned the word 'cede' is used; this is a term usually employed in cases of transfers of land between different States. The Indians are dealt with as quasi-independent nations. The reason for this is pointed out in the case of the *Cherokee Nation v. Georgia;* see also *Turner v. American Baptist Union* [5 McLean 344]."

The Province of Ontario also employed international law in its arguments. It cited *Fletcher v. Peck* [1810], *Meigs v. McClung* [1815], *Johnson v. McIntosh,* all holding that the

The Crown relied on international law in arguing abrogation of any treaty right through the War of 1812 and through fundamental change in circumstances. [355]

The Intervenors invoked the *Free Zones*[356] case in arguing that there was No "foreseeable radical changes in circumstances."[357] They also invoked the *Case Concerning the Right of Passage Over Indian Territory,*[358] where the International Court of justice concluded that Portugal had a right of passage at international law notwithstanding that there had been a complete change of sovereignty over the territory in question. The exercise of a constant and uniform practice over a long period of time had given rise to a right and a correlative obligation.

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title to the soil was in the state, the right existing in the Indians being one merely of occupancy. They quoted American history: in 1635 Roger Williams was banished from Massachusetts for maintaining that the title to Indian lands was not in the King but in the natives. It cited the *Royal Proclamation 1763* as being the "starting point" of Indian title, a right acquired from the Crown by virtue of the Proclamation.

As further proof the Indians could hold no title, they pointed to the common law of Europe and Vattel's *Lawof Nations.* The said, "At the time of the discovery of America and long after, it was an accepted rule that heathen and infidel nations were perpetual enemies, and tht the Christian prince or people first discovering and taking possession of the country became its absolute proprietor and could deal with the lands as such. They quoted Wheaton's *International Law* for the principle that the right of title would have to assume that the Indians had a regular form of government, "whereas nothing is more clear that they have no government and no organization and cannot be regarded as a nation capable of holding lands."

Justice Strong, in dissent, quoted extensively from U.S. law and *Kent's Commentories,* written by Chancellor Kent. He said, "To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this [Page 616] usage had either ripened into a rule of the common law as applicable to the American Colonies, *or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations* [emphasis added].

[355] *Factum of the Attorney General for Canada,* above, para. 35, p. 17

[356] *Free Zones,* above, at paras. 91-101.

[357] *Factum of the Intervenor Chiefs of Ontario,* above.

[358] *Portugal v. India,* p1960] 1 C.J. Rep. 6 at 40, *ibid.*

The Court of Appeal did address some of the international law questions, although, in our respectful view, not entirely correctly.[359]

The lower court in *Vincent* had accepted the argument that the Jay Treaty was a treaty within the meaning of S. 35 of the *Constitution Act, 1982*. The Court of Appeal disagreed. The Attorney General for Canada argued that an international treaty could not possibly give rise to "treaty rights" within the meaning of S. 35(1) of the *Constitution Act, 1982* because, among other things, "every time Canada signs an international treaty which might affect the Indians and their bands; a) Canada would lose its sovereign right to modify, suspend, terminate or denounce a treaty without the consent of the Indians and their respective bands . . ."[360]

The Court accepted this argument in spite of the fact that the *Jay Treaty* is not merely a "treaty which might affect the Indians", such as the *International Covenant on Civil and Political Rights*, but rather a treaty which contains express provisions to their benefit. In my respectful opinion, the Court did not fully appreciate the nature and the legal consequences of a *stipulation pour autrui* in these circumstances. It merely declared:

> We agree with the Attorney General that the provisions of the *Jay Treaty* do not confer any justiciable right on the appellant or on any other North American Indian, or nationals of Canada or the United States. As far as the "stipulation pour autriui" is concerned, we read the text of the treaties and historical documents in light of the expert analysis presented by Graves and McLeod.[361]

While awaiting evolving understanding in these matters, the rule established by the Courts to date is that no rights under an international treaty can be enforced by Canadian courts unless they have been implemented by way of legislation. A number of international treaties,

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[359] For example, on occasion the Court misunderstood the Intervenor's arguments. It quoted the Intervenor as saying that: "According to the Intervenor's argument, the radical changes in circumstances did not extinguish the treaty" (at 1750). In fact, we argued that the changes in military, diplomatic and commercial circumstances invoked by the respondent were not fundamental changes of circumstances within the meaning of international law. See also para. 53, p. 13, *Factum of the Intervenor Chiefs of Ontario,* above.

[360] *Factum of A.G. for Canada,* p. 16, quoted by the Court in *R. v. Vincent,* above, at 173.

[361] *Ibid.,* at 174. Graves and McLeod were expert witnesses in the case.

such as the human rights treaties, confer rights upon individuals. They are held simply not to be justiciable until they are introduced into Canadian domestic law.[362]

The Attorney General of Canada's Reply Factum in *Vincent* contains an interesting example of the Two Row Wampum approach to domestic and international law.

> c) In any event, given the two distinctly different legal regimes which govern the creation, interpretation, enforcement and termination of rights and obligations flowing from international treaties and from *sui generis* Indian treaties respectively, the intervenor is precluded from asserting that the alleged right[s] flow from a treaty which is both international and *sui generis* and can be adjudicated simultaneously within the frameworks of both legal regimes.[363] [emphasis added]

While I might take issue with the way the Court applied international law in *Vincent,* perhaps the point is is that international law was argued by both parties and addressed by the Court in this Appeal.

Conclusion

In *Eastern Extension, Australasia and China Telegraph Co.,*[364] the international arbitration tribunal recognized that neither domestic law nor international law provide all the answers. The Court said it this way:

> International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interest by applying, in default of any specific provision of law, the corollaries of general principles, and so to find – exactly as in the mathematical sciences – the solution of the problem. This is the method by which the law has been

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[362] In the Supreme Court of Canada's 1956 *Francis* case, the court found it could not support the right of free border passage pursuant to the Jay Treaty because no legislation had been passed by Parliament to implement the Treaty, but that it would be willing to consider an action for damages caused by the failure of the government to introduce such legislation.

[363] *Reply Factum of the Attorney General of Canada and the Intervenor*, C.A. File No. 844/91 (Ont. C.A.), para. 3, p. 4.

[364] (1923) 6 U.N.R.I.A.A. 112, at 114. The statement paraphrases the decision of the British-United States Claim Arbitral Tribunal of 1910: ". . . domestic law may not contain, express rules decisive of a particular case; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, corollaries of general principles, and so to find ... the solution of the problem."

> gradually evolved in every country, resulting in the definition and settlement of legal relations as well between states as between private individuals.

I suggest that the matter of the use of international law in aboriginal domestic litigation may be divided into three periods; (1) the 19th Century cases in the U.S. and in Canada which stood for the survival of aboriginal rights and aboriginal jurisdiction after the so-called discovery of North America by European powers; (2) the positivist period of the early 20th Century which was characterized by the denial in international law of aboriginal sovereignty for lack of all the attributes of statehood.

Canadian courts followed this trend for some time until the contemporary period (3) which started with what we might call the "Dickson era" and the creation of a *sui generis* category for aboriginal rights and aboriginal treaties. At the same time, aboriginal issues began to receive international attention.

It is my hope that in domestic aboriginal litigation we continue the move from a positivist period toward a more principled period and that Courts may feel increasingly at ease in looking to international law for applicable principles.[2, 2] [365]

[365] Examples of this abound: Mr. Justice Malouf in *Kanetawat*, Chief Justice Dickson in *Simon*; and with Mr. Justice LaForest in *Sparrow* (1990) [1990] 1 S.C.R. 1075; then-Justice Lamer in *Sioui* and as Chief Justice in *Van der Peet;* the Court of Appeal of Ontario in *R. v. Taylor & Williams* (1981) O.R. (2d) 360 (Ont. C.A.); Mr. Justice Lambert in *Delgamuukw;* and the High Court of Australia in *Mabo.*

End Notes

1. *Mabo* was also quoted by the Supreme Court of Canada in *Delgamuukw v. British Columbia,* 1997 CanLII 302 (S.C.C.) Prior to *Delgamuukw, Mabo* had been initially quoted in *R. c. Côté,* 1993 CanLII 3913 (QC C.A.) and at appeal 1996 CanLII 170 (S.C.C.). Subsequently, *Mabo* was also quoted in *Regina v. N.T.C. Smokehouse Ltd.,* 1993 CanLII 4521 (BC C.A.); *R. v. Williams,* 1993 CanLII 2593 (BC S.C.) and then in appeal 1994 CanLII 3301 (BC C.A.); *R. v. Pamajewon,* 1994 CanLII 2716 (ON C.A.); then in *R. v. Van der Peet,* 1996 CanLII 216 (S.C.C.); *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band (C.A.),* 1996 CanLII 3885 (F.C.A.)

After *Delgamuukw,* in the Supreme Court of Canada, *Mabo* was cited in *Mitchell v. M.N.R.,* 2001 SCC 33 (CanLII); *R. v. Marshall (S.F.),* 2002 NSSC 57 (CanLII); *Queen v. Drew et al*, 2003 NLSCTD 105 (CanLII); *R. v. Marshall*, 2003 NSCA 105 (CanLII); *R. v. Moody,* 2004 MBQB 247 (CanLII); *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700 (CanLII); *R. v. Francis,* 2007 CanLII 8009 (ON S.C.)

2. More recently there has been Mr. Justice Vickers in *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700 (CanLII).