Complaint Number:

Before The

HIGH COMMISSIONER FOR HUMAN RIGHTS

Tthowgwelth, Toanunck and Ro:ri:wi:io

vs

Supreme Court of Canada and Supreme Court of the United States

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IN THE MATTER OF an application for a recommendation by the High Commissioner for Human Rights to be made for the purpose of preventing genocide-in-progress, that the Commission for Human Rights, the Economic and Social Council, the incoming Human Rights Council and the General Assembly, or any of them, immediately should requisition an advisory opinion from the International Court of Justice on an emergency basis, on the constitutional question of jurisdictional law alone whether, by breaching the rule of law's constitutive principle of equal application in relation to the universal human right not to be made a victim of genocide, the several human rights organs and agencies of the United Nations inclusive of the International Criminal Court presumptively intend to commit complicity in the genocide of the indigenous national constitutional governments and their constituents within Canada and the United States, which genocide is being committed by the intentional judicial inactivity of the Supreme Court of Canada and the Supreme Court of the United States in relation to the addressing of Section 109 of the Canadian *Constitution Act, 1867,* and Article II, Section 2, Paragraph 2, Clause 1 of the United States' *Constitution, 1789*;

AND IN THE MATTER OF an application for a further recommendation by the High Commissioner for Human Rights and those other UN Organs and Agencies, that the said Supreme Courts should address the said constitutional legislation and the precedents settling their meaning, the ignoring of which existing law is the reasonably foreseeable, probable and actual cause of the alleged genocide-in-progress due to the negation both of the rule of law and of justice as the application of truth to affairs.

MOTION RECORD

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NOTICE OF MOTION

TAKE NOTICE Complainant Tthowgwelth, Toanunck and Ro:ri:wi:io hereby appeals to the United Nations High Commissioner for Human Rights Louise Arbour by way of motion for a reversal or amendment, as the case may be, of the Petition Unit's Administrative Order dated September 27, 2006, and received October 30, 2006, rejecting for filing the accompanying Complaint of Genocide-in-Progress Volumes I and II, or such further or other Order as the High Commissioner may deem appropriate upon conclusion of her Review.

THE GROUND is the Petition Unit erred as a matter of law alone.

THE ERROR consists in:

(1). The fact that the *International Covenant on Civil and Political Rights* and its *Optional Protocol,* relied upon by the Petitions Unit as the basis for its rejection for filing as against the United States of America, manifestly is irrelevant to this Complaint to Prevent Genocide-in Progress under Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948*; and,

(2). The accompanying Supplement to Complaint Volume II *Exhaustion of Domestic Remedies* in relation to Canada.

THE MATERIAL relied upon consists in the Complaint Volumes I and II plus the aforesaid Supplement to Complaint Volume II *Exhaustion of Domestic Remedies*.

DATED November 27, 2006.

Bruce Clark, LL.B., M.A., Ph.D.
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AND TO:
AG Canada
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Ottawa, ON K1A 0H8

DECISION UNDER REVIEW

UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

REFERENCE G/SO 215/51 USA/CAN (GEN) 27/09/06

Dear Mr. Clark:

After careful consideration of the contents of your petition of 22 August 2006, we sincerely regret having to inform you that the United Nations Office of the High Commissioner for Human Rights is not in a position to assist you in the matter you raise, for the reasons indicated below. Accordingly, your petition is being returned to you.

The Human Rights Committee cannot examine petitions alleging violations of the International Covenant on Civil and Political Rights (ICCPR) unless the State is also a party to the Optional Protocol. The United States of America is not a State party to the Optional Protocol. As to the part of the complaint which relates to Canada, domestic judicial/administrative remedies do not appear to have been exhausted, and it has not been substantiated that the application of domestic remedies would be unreasonably prolonged or that remedies would be otherwise available or ineffective.

Please accept our apologies for not replying in a more personal manner. You may understand that, while we appreciate your reasons for writing to us, the existing procedures require that it is ascertained whether certain preliminary criteria are satisfied before proceeding with the examination of a petition.

For information about the procedures for the examination of a individual petitions on human rights violations, please consult our website: www.ohchr.org. (direct link http://www.ohchr.org/english/about/publications/docs/fs7.htm). If you have difficulty accessing our website, please write to the UNHCHR, Information Office PW-RS-011, 1211 Geneva 10, and ask for Human Rights Fact Sheets Nos. 7, 12, 15 and 17.

Yours sincerely,
/s/
The Petitions Unit

FACTUM FOR MOTION FOR REVIEW

Part I: FACTS

(1). Complainant delivered a Complaint of Genocide-in-Progress dated August 22, 2006, against the Supreme Courts of the United States of America and Canada, pursuant to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in two Volumes, Volume I entitled *Complaint* and Volume II entitled *Exhaustion of Domestic Remedies.*

(2). The *International Covenant on Civil and Political Rights (ICCPR),* relied upon by the Petitions Unit as the ground for not processing the Complaint as against the United States of America, was not pleaded in the Complaint and therefore manifestly is irrelevant to the Complaint.

(3). As for Canada, Volume II *Exhaustion of Domestic Remedies* expressly and explicitly incorporated by reference further and better up-dates in relation to the cases documented in it, one of which was the Application-in-Progress in the Superior Court of Justice of Ontario in the matter of *Ro:ri:wi:io v. Attorney General of Canada and Attorney General of Ontario.*

(4). That Application-in-Progress was styled:

> APPLICATION UNDER Sections 97 and 109(1) of the *Courts of Justice Act* and Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure* for a declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

(5). Under letter dated September 27, 2006, received October 30, 2006, the Petitions Unit of the United Nations Office of the High Commissioner of Human Rights rejected the said Complaint for filing. Decision under Review, *supra,* p. 2.

(5). Appended hereto as Appendices "A" and "B" respectively are the Appeal Book and the Factum relative to appeal against the final decision of the said Superior Court of Justice in the said *Ro:ri:wi:io v. Attorneys General,* both dated October 30, 2006.

(6). As can be seen from the said Appendices "A" and "B" the Superior Court of Justice of Ontario did the same thing as all of the other cases in the Complaint Volume II *Exhaustion of Domestic Remedies.* It evaded the constitutional question of Section 109 of the *Constitution Act, 1867,* based upon the pretext of Canadian sovereignty. The Court perversely held Ro:ri:wi:io was impugning (rather than relying upon) the sovereign power of the United Kingdom at the behest of Canada to have enacted Section 109 of the *Constitution Act, 1867,* notwithstanding the affirmation of that Section and its *stare decisis* interpretive precedents by Sections 25(a) and 35(1) of the *Canada Act, 1982 [UK],* and the *Constitution Act, 1982 [Canada],* which Sections respectively recognize and affirm the continuity of the *Royal Proclamation of 1763* and "existing aboriginal rights."

(7). Even if Complaint Volume II *Exhaustion of Domestic Remedies* did not adequately demonstrate exhaustion of domestic "judicial" remedies, which is not admitted but expressly is denied, there can be no question of fact but that if and when the Court of Appeal of Ontario and the Supreme Court of Canada affirm the Judgment and Reasons of the Superior Court of Ontario, it will be undeniable no "judicial" remedy arguably exists in Canada.

(8). Judicial notice may be taken that the United Nations High Commissioner for Human Rights, Louise Arbour, until 2004 was an Associate Justice of the Supreme Court of Canada, the alleged perpetrator of the alleged genocide, in virtue of its persistent refusal to grant Leave to

Appeal in relation to the constitutional question of Section 109 of the *Constitution Act, 1867,* in favour of recently-inventing and substituting in its place an alternative definition for "existing aboriginal rights" based entirely upon judicial discretion, as confirmed by the Supreme Court of Canada in *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶48:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.

(9). Judicial notice may also be taken of the basic rule of evidence that if and when a judge has actual and certain personal knowledge of the truth or untruth of a material fact, he or she is under an obligation to declare that knowledge and the evidentiary basis for it. As a former Associate Justice of the Supreme Court of Canada during the era of that Court's complained of genocidally criminal suppression of Section 109 of the *Constitution Act, 1867,* she has actual and certain personal knowledge of the truth or untruth of a material fact of that Court's "intentional" judicial inactivity within the meaning of Article 2 of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948.*

(10). This Complaint of Genocide-in-Progress attributable to intentional judicial inactivity in relation to an arguably determinative constitutional question in relation to a specific section of the constitution, does not ask for "punishment" but only asks for "prevention" within the meaning of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948.* The obvious and indeed only way to achieve timely "prevention" attributable to the judicial inactivity of suppressing Section 109 of the *Constitution Act, 1867,* is for every Court before which the question is raised, to address the Section without procrastination or evasion. As soon as it has been addressed and resolved pursuant to the rule of law's constitutive principles of constitutional supremacy and *stare decisis,* the

basis for the allegation of the "serious bodily and mental harm" attributed to not addressing it no longer exists.

(11). At the present time the fact of the Genocide-in-Progress attributable to intentional judicial inactivity in relation to a critical constitutional question has been attested but not yet disputed, for which reason the fact must be taken as established.

(12). The Chief Judicial and Administrative Officer of High Commission for Human Rights, Louise Arbour, as such, has inherent and legislative jurisdiction to review decisions of the Petitions Unit based upon fundamental errors of law alone. The Decision under Review is absesd upon the assumption of that "judicial/administrative" remedies arguably exists. It is in the nature of constitutional questions going to judicial jurisdiction that there can not possibly be any "administrative" remedy. No administrator can possibly be vested with jurisdiction to order the judiciary to address Section 109 of the *Constitution Act, 1867,* and the point of the Complaint is the "serious bodily and mental harm" caused specifically by the unconstitutional "judicial" denial of the "judicial" remedy.

Part II: ISSUES

(13). Did the Petitions Unit err as a matter of law alone in relation to the burden of proof, the irrelevance of the *International Covenant for Civil and Political Rights*, and jurisdiction of the High Commissioner of Human Rights to prevent Genocide-in-Progress by timely intervention?

Part III: ARGUMENT

(14). Paradoxically, and unconscionably, the affidavit of Michael Burke on behalf of the Attorney General of Ontario in support of the Motion to Strike the Application (Appendix "A", p. 30) attests to the fact that domestic judicial remedies have been over-exhausted, whereas the

Decision under Review by the Petitions Unit of the United Nations High Commissioner of Human Rights, Louise Arbour, a former Associate Justice of the Supreme Court of Canada, occupies the diametrically-opposed position that such remedies have not been adequately-exhausted.

(15). All that the present Complaint asks Louise Arbour, the United High Commissioner of Human Rights actually to do to prevent genocide in a timely fashion is to refer to the *International Court of Justice* the Complaint's request for an advisory opinion on the jurisdiction and obligation of all United Nations Organs and Agencies non-selectively to apply the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* as the mighty Nations as well as to the weak Nations.

(16). The precondition to this judicial or quasi-judicial activity is, that for the above reasons and upon the above bases Louise Arbour, United Nations High Commissioner for Human Rights, forthwith overrule the Decision under Review by ordering the Petitions Unit to file the Complaint.

(17). Such requested relief can prevent genocide.

DATED November 22, 2006.

Bruce Clark, LL.B., M.A., Ph.D.
AGENT/COUNSEL

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APPENDIX "A"

FILE NO. C46047

COURT OF APPEAL FOR ONTARIO

BETWEEN:

Ro:ri:wi:io

Applicant
(Appellant)

- and –

Attorney General of Canada and Attorney General of Ontario

Respondents
(Respondents in appeal)

APPLICATION UNDER Sections 97 and 109(1) of the *Courts of Justice Act* and Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure* for a declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

APPELLANT'S FACTUM

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APPELLANT'S FACTUM

Part I

STATEMENT IDENTIFYING THE APPELLANT AND THE COURT APPEALED FROM AND STATING THE RESULT IN THAT COURT

(1). Appellant Ro:ri:wi:io is a person resident on arguably unceded Indian territory in northeastern Ontario, who delivered in the Superior Court of Justice of Ontario sitting at Cornwall an Application in Writing Alone, seeking a declaration of constitutional law alone interpreting and applying Section 109 of the *Constitution Act, 1867,* as a constitutional question within the meaning of Sections 97 and 109(1) of the *Courts of Justice Act,* on a urgent basis within the meaning of Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure.*

(2). Respondent Ontario moved the said Court peremptorily to strike the Application, which Motion Pelletier, J, of the Superior Court of Justice of Ontario granted with costs to the Respondents.

Part II

CONCISE OVERVIEW STATEMENT DESCRIBING THE NATURE OF THE CASE AND OF THE ISSUES

(3). The Application was in Writing Alone on the ground it was restricted to the constitutional question of Section 109 of the *Constitution Act, 1867,* and its precedents, for which reason the nature of the case is restricted to judicial analysis of Section 109, its express precedents, and any *in pari materia* constitutional legislation and precedents.

(4). By necessary implication of law alone the nature of the case involves the issue of the incidence of the burden of proof dictated by the said constitutional legislation and precedents, relative to the *prima facie* status of land, as either "land reserved for Indians" within the meaning of

Section 91(24) of the *Constitution Act, 1867,* or alternatively, "public lands" within the meaning of Section (1) of the *Public Lands Act*. APPEAL BOOK VOL. I, Application Table of Authorities, Tab 4 page 11 and page 18; APPEAL BOOK VOL. I, Reasons for Judgment, Tab 3, pages 4-5:

> [1] The Respondents to this application, the Attorneys General of Canada and Ontario, bring a motion to strike out the notice of application or in the alternative dismiss the application. The application is framed in the following terms:
>
> > "THE MATERIAL FACT IS THAT Ro:ri:wi:io either has an Indian occupancy interest under the *Royal Proclamation of 1763* or has or wishes to acquire an occupancy interest under the *Public Lands Act of Ontario*, and in either case needs to know who bears the burden of proof in relation to the constitutional status of the land: the Crown, or the Indians?"

(5). The said nature of the case and issue by operation of law alone determine entitlement, or not, to the specific relief claimed relative to the particular land in question. APPEAL BOOK VOL. I, Reasons for Judgment Paragraph [1], Tab 3, pages 4-5:

> "RO:RI:WI:IO ASKS THAT this Court interpret Section 109 of the *Constitution Act,* 1867, and declare that the triangular geographical region at the southeast limit of the Province of Ontario bounded by the St. Lawrence, Ottawa and Petite Nation Rivers is Hunting Grounds reserved for the Indians and will remain so until the Crown proves a cession or purchase pursuant to the *Royal Proclamation of 1763,* failing which federal or provincial legislation is not relevant to the region."

Part III

CONCISE SUMMARY OF THE FACTS RELEVANT TO THE ISSUE ON THE APPEAL

(6). The fact relevant to the issue on appeal is that Pelletier, J, did not interpret Section 109 of the *Constitution Act, 1867.* Instead, he converted the constitutional question into an attack upon the sovereign power to have enacted Section 109, and then held that the Superior Court of Justice of Ontario has no jurisdiction to entertain political arguments

disputing sovereignty. APPEAL BOOK VOL. I, Reasons for Judgment Paragraphs [2] and [9], Tab 3, pages 5 and 9:

> [2] The applicant seeks a declaration that the geographical region in question constitutes "hunting grounds" reserved for Indians unless the Crown is able to establish its sovereignty over the land in question. The applicant further seeks a determination as to whether the burden of proof concerning sovereignty over the land in question is upon the Crown or the Indians.
>
> [9] In my view, these findings are determinative on the issue of the Court's jurisdiction in this Application and to some extent on the merits of the Application itself. The Application is accordingly struck on the basis that this court does not have the authority to adjudicate upon challenges to the acquisition of sovereign jurisdiction by Canada.

Part IV

STATEMENT OF THE ISSUE RAISED ON THE APPEAL AND THE ARGUMENT REFERENCING THE LAW AND AUTHORITIES RELATING TO THAT ISSUE

(7). Since Pelletier, J, evaded the nature of the case and its issues by the "Pretence" within the meaning of the *Royal Proclamation of 1763* of an attack upon sovereignty, the appeal against his judgment is in the nature of a trial *de novo* of the Application and, therefore, the Appellant repeats and relies upon the Application's Table of Authorities, not one of which was addressed below. APPEAL BOOK VOL. I, Application Table of Authorities, Tab 4, pages 11 through 22 inclusive; APPEAL BOOK VOL. I, Reasons for Judgment Paragraphs [3] through [8] inclusive and [10], pages 4 through 9 inclusive.

(8). An *in pari materia* reading of the said Table of Authorities establishes the existence of a profound conflict of laws as between the constitutional law recognized and affirmed by Sections 25(a) and 35(1) of the *Constitution Act, 1982*, and the regime of federal Indian law inaugurated by the *Indian Act, 1876*.

(9). Correspondingly, although "public lands" available for disposition pursuant to Section 1 of the *Public Lands Act* are defined as

"Crown lands, school lands and clergy lands," as opposed to "lands reserved for Indians" within the meaning of Sections 91(24) and 109 of the *Constitution Act, 1867* read *in pari materia,* in actual practice the *Public Lands Act* universally is applied, including to "lands not ceded to or purchased by Us" within the meaning of the *Royal Proclamation of 1763.*

(10). Therefore the issue on appeal is the mode for constitutional modification and, correspondingly, the binding nature of the existing constitution law upon the judiciary pending modification pursuant to that mode.

(11). Pelletier, J., on behalf of the Superior Court of Justice of Ontario identified the mode as "constitutional metamorphosis." APPEAL BOOK VOL. I, Reasons for Judgment Paragraph [8], Tab 3, page 8:

> Cornwall Island is part of Canada. Whether any part of Canada came under British control by conquest, was ceded by treaty, or was simply annexed in a peaceful fashion, the whole country became a "settled colony" and through a constitutional metamorphosis capped by the enactment of the Canada Act, 1982 in the U.K. Parliament and The Constitution Act, 1982 in Canada's Parliament, Canada became a sovereign nation with plenary authority to exercise its legislative jurisdiction under its constitution and govern throughout its territory.

(12). In Canada, however, as in all constitutional democracies, the exclusive mode is legislative constitutional amendment, enacted pursuant to the amendment formula expressly and explicitly stipulated by the people in the written constitution by which they, the people, have consented to be governed. Sovereignty is in the people, not the courts.

(13). The concept of constitutional metamorphosis is a re-statement of the doctrine of obsolescence by desuetude identified by Chancellor Boyd in *St. Catherine's Milling & Lumber Co. v. R.,* (1885), 10 OR 196, 227-28 (ChD):

> The proclamation, no doubt remained operative as a declaration of sound principles which then and thereafter guided the Executive in disposing of

> Indian claims, but as indicating for this century the scope of the Indian reservations, or the intent with which they have been created under provincial rule, it may be regarded as obsolete. If the proclamation of 1763 and the Constitution Act of 1867 are to be read as ***in pari materia***, and all the intervening years of progress, material, legislative and political, overlooked, then the 40,000 square miles claimed by Ontario being part of what is covered by the North-West Angle Treaty is an "Indian Reserve." But in order to emphasize this ***reductio ad absurdum*** aspect of the case, let what little is known of the people of this remote region be recalled: when the treaty was made, the land it deals with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways, most of them presenting a more than usually degraded Indian type.…There is an essential difference in meaning between the "reservations" spoken of in the Royal Proclamation, and the like term in the B.N.A. Act [*Constitution Act, 1867*]. [Emphasis added]

(14). The constitutional impossibility of modification by judicial re-invention of the constitution, or judicial disregard of the constitution, as alternatives to legislative constitutional amendment, and the continuously constitutionally binding character of the *Royal Proclamation of 1763,* was explained by the Justices Strong and Gywnne of the Supreme Court of Canada on the appeal in *St. Catherines Milling and Lumber Co. v. R.,* (1887), 13 SCR 577, 6O8, 634, 661-64, 673-74:

> [The *Proclamation's* principles have been the constitutional law since] at least 1756, when Sir William Johnson was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible through one of the Secretaries of State, or the Lords of Trade and Plantation, thus superseding the Provincial Governments, down to the year 1867, when the confederation act constituting the Dominion of Canada was passed.…
>
> [That the *Royal Proclamation of 1763*] could have become legally obsolete was **impossible** since, if *Campbell v. Hall* [(1774), 98 ER 848 (JCPC)] is to be considered sound law, it was a legislative ordinance of equivalent force with a statute, and consequently could only have been repealed by an act emanating from competent legislative authority; but no such act has been referred to.…[Emphasis added]***
>
> Now, in 1837, an act, 7 Wm. 4 Ch. 118, was passed by the Legislature of the Province of Upper Canada, entitled "An Act to provide for the disposal of the Public lands in this Province and other purposes therein mentioned."
>
> This act was passed for regulating the issue of Letters Patent granting lands known as and designated "crown lands," "clergy reserves," and "school lands," all of which were placed under the control of an officer

> styled the commissioner of crown lands, and the proceeds arising from the sale thereof were to be accounted for by him to the Receiver General, as forming part of the public revenue of the Province. The act did not affect any lands for the cession of which to His Majesty no agreement had been made with the Indian Tribes occupying and claiming title to the same, nor any lands which, although surrendered by the Indians to the crown, were so surrendered for the purpose of being sold and the proceeds applied for the maintenance of the Indians themselves.…
>
> The term "public lands," as used in the act in relation to lands known as "crown lands," "clergy reserves," and "school lands," has been maintained in several acts of the legislature of the Province of Upper Canada, viz., 4 and 5 Vic. Ch. 100, 16 Vic. Ch. 159, Consolidated Statues of Canada ch. 22, 23 Vic. Ch. 2, and 23 Vic. Ch. 151.…
>
> —it cannot, in my opinion, admit of a doubt that at the time of the passing of the British North America Act the Indians in Upper Canada were acknowledged by the crown to have, and they had an estate, title and interest in all lands in that part of the Province of Canada formerly constituting Upper Canada for the cession of which to the crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, which estate, title and interest could be divested or extinguished in no other manner than by cession to the crown. These cessions were made sometimes upon purchases made by the crown for the use of the public, in which case the lands so acquired became "Public lands," because the revenue to be derived from their sale was appropriated for the benefit of the public and was paid into the Provincial Treasury.…
>
> Lands for the cession of which to her Majesty no agreement had been made with the tribes occupying and claiming title to the same, and which were sitting within the limits of Upper Canada, have always been, in my opinion, considered to come within the designation of "lands reserved for the Indians," or "Indian reserves," or "Indian lands."

(15). On the further appeal to the Judicial Committee of the Privy Council their Lordships held not merely that the *Royal Proclamation of 1763* must be read *in pari materia* with the *Constitution Act, 1867,* but that the legislative intent of Section 109 was to preserve the constitutional paramountcy of the indigenous territorial jurisdiction and possession, over the pretence of what the Chancellor had assumed was the "plenary" and universal territorial jurisdiction and possession of the federal and provincial governments of Canada.

> ***St. Catherines Milling & Lumber Co. v. R.,* (1888), 14 AC 46, 53-55, 60 (JCPC).** Whilst there have been changes in the administrative authority,

> there has been no change since the year 1763 in the character of the interest surrendered by the treaty. The ceded territory was at the time of the Union land vested in the Crown, subject to "an interest other than that of the Province in the same" within the meaning of sect. 109;…the [treaty's] legal consequences …opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit…there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* [plenary jurisdiction] whenever that title was surrendered or otherwise extinguished. [Emphasis added]

(16). The word "pretence" as used in the previous paragraph is a term of constitutional legal art legislatively defined by the *Royal Proclamation of 1763,* and sanctioned therein as the absolute criminal offences of "Misprisions of Treason and Fraud." "Misprision" was the quintessential legal concept by means of which the imperial authority sought to maintain control over the activities, in the colonies, of all officials acting in name and under the authority of the Crown. Mr Justice Sir William Blackstone, *Commentaries on the Laws of England: Book IV Of Public Wrongs,* 16th ed., London, Butterworths, 1825, explained (page 121) that misprision signified a high contempt by a servant of the Crown for the King's prerogative power, including the exercise thereof by public "proclamation." The contempt became treasonable and fraudulent if and when it was in abrogation of the highest of the prerogative powers, namely that of constituting colonial constitutional law for overseas dominions freshly "acquired" (as against other European nations and their successors, as to the preemptive right of purchase from the Indians) by discovery, conquest or cession. This is the legal context in which the significance of the precise wording of the punitive provisions of the *Royal Proclamation of 1763* needs be construed:

> And whereas it is just and reasonable, and essential to our Interest, 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 –
>
> We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief…do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands…do presume…to grant Warrants of Survey, or pass Patents for any Lands…upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them…
>
> And We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.…
>
> And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed, of which they stand accused, in order to take their Trial for the same. [Emphasis added]

(17). Pelletier, J, held that federal and provincial territorial jurisdiction is original and "plenary." In other words he held that the Indians are subject, not to the constitution, but rather to the unlimited power of the federal and provincial governments and courts constituted by the constitution. By this means he converted the constitutionally delimited jurisdictions of those entities, into the sovereign power to do whatever they may wish with the Indians and the lands constitutionally reserved for them. But the leading cases of *Campbell v. Hall* and *Cameron v. Kyte* stipulate that not even the King himself, and certainly no colonial Governor or lesser servant of the Crown, has plenary (*i.e.,* sovereign) power to modify or disregard the mandatory provisions of the *Royal Proclamation of 1763.*

> ***Campbell v. Hall,*** **(1774), 98 ER 848, 896, 898 (KB)**.…if the King has power (and when I say the King, I mean in this case to be understood "without the concurrence of the [UK] Parliament") to make new laws for a conquered country, this being a power subordinate to his own

> authority, as a part of the supreme Legislature in Parliament, he can make none which are contrary to fundamental principles…The first and material instrument is the proclamation of the 7th of October 1763.See what it is that the King says, and with what view he says it; how and to what extent he engages himself and pledges his word,…
>
> ***Cameron v. Kyte*, (1835), 12 ER 678, 682 (JCPC).** If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a Viceroy, and represented the King in the government of that Colony, there would be good reason to content that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself…But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect. We think the office of the Governor is of the latter description, for no authority or dictum has been cited before us to show that a Governor can be considered as having the delegation of the whole Royal power, in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to colonial governors conveys such an extensive authority…

(18). The principle that governments are not invested with plenary sovereign power, but are restricted to their expressly-delegated constitutional jurisdictions, "subject to" the constitutionally-recognized indigenous "Interest," applies with greater force to the judiciary, whose delegated jurisdiction is limited to applying existing constitutional law, as opposed to disregarding it, modifying or constituting it. This principle of the inherent limitation upon the judicial power was explained by E.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century,* London, Macmillan, 1920, 483.

> Judge-made law is subject to certain limitations. It can not openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the legal validity is admitted, or the application or interpretation of some statutory enactment. It can not override statutory law. The courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a statute, but they cannot set a statute aside. Nor have they in England ever adopted the doctrine which exists, one is told, in Scotland, that a statute may be obsolete by disuse. It can not from its very nature override any established principle of judge-made law.

(19). The said inherent limitation upon the judicial power, specifically in the context of the counterbalanced constitutional jurisdictions of the indigenous race and the non-indigenous governments of present day North America authoritatively was applied, and elaborated upon, in the emotionally hard, but nevertheless legally correct, leading case from the Supreme Court of the United States of America of *Scott v. Sandford,* 19 How. 393 (1857):

> [403] The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?…The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be [404] subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign Governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first immigrants to the English colonies to the present day, by the different Governments which succeeded to each other. Treaties have been negotiated with them, and these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under the subjection of the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over the territory they occupy. But they may, without doubt, like the subjects of any foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up abode among the white population, he would be entitled to all the rights and privileges which would belong to any emigrant from any other foreign people…[405] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed this sovereignty and framed the

Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.…[407] It is difficult at this day to realize the state of public opinion in relation to that unfortunate race [Africans], which prevailed in the civilized and enlightened portions or the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nations displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect:…[420] Congress might…have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they have recently committed, when they were allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even guarding themselves against the threatened renewal of Indian hostilities. No one would have supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word was not used with any particular reference to them. Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore no there was no necessity for using particular words to exclude them.…[426] No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [African slaves], in the civilized nations of Europe or in this country, should induce this court to give to the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called upon to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.…Any other rule would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.…And upon a careful consideration of the subject, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts;…[432] The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except for punishment for crime, shall be forever prohibited in all the part of the territory ceded by France, under the name Louisiana,…and the difficulty which meets us at the threshold of this part of the enquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority was not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is

held as a slave under any one of the United States…[435]…this Government was to be carefully limited in its powers, to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish;…[449] It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers, which the Constitution denied to it…[450]…and the Federal Government can exercise no right power over his person or property beyond what the instrument confers, nor lawfully deny any right which it has reserved…And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. [452] Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line mentioned, is not warranted by the Constitution, and is therefore void;…[460] Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it…And it is equally true, that no State or nation can affect or bind out of its territory, or persons not residing within it.…[480]…to change or to abolish a fundamental principle of the society, must be the act of the society itself—of the *sovereignty*; and that none other can admit to the participation of that high attribute. [483]…each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature…power or weakness does not make any difference. A small republic is no less sovereign than the most powerful kingdom…[484]and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. [485] Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and exemption from all claims of extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. [501] But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal policy, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated.…[506] This [the inflation of federal plenary jurisdiction] proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if not amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to grants of the Constitution. [508] In Pollard's Lessee v. Hagan, (3 How., 212,) the court say; "The United States have no constitutional capacity to exercise municipal [509] jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact."

> [513]…a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. [520] The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection and dominion, for the use of the Indians." This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783.

(20). The continuity of the principle of constitutional supremacy and its due application in the Indian context, was recalled by US Supreme Court Justice Clarence Thomas in his concurring opinion in *Lara v. United States,* 541 US 193, 214-27 (2004):

> In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.… In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, *e.g., United States v. Pink,* 315 US 203, 228-230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter. To be sure, this does not quite suffice to demonstrate that the tribes lost their sovereignty. …Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases. ((note 4)…this is precisely the confusion that I have identified and that I hope the Court begins to resolve.) …I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty.…I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty…and I would be willing to revisit the question.…The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty." The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the

> sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

(21). The equivalent counterpart in Canada, to the American constitutional legislation and the federal domestic legislation in breach of it, are Sections 91(24) and 109 of the *Constitution Act, 1867,* read in *pari materia,* and the regime of federal Indian law inaugurated by the *Indian Act, 1876*. The constitutional law says the Crown's "Interest" is "subject to" the indigenous "Interest" whereas the federal Indian law says the reverse.

(22). Section 109 of the *Constitution Act, 1867,* enacts:

> **All Lands**, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, **shall belong to** the several Provinces of **Ontario**, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, **subject to** any Trusts existing in respect thereof, and to **any Interest other than that of the Province in the same**. [Emphasis added]

(23). The original and authoritative precedent, for constitutional supremacy and *stare decisis* purposes, relative to the significance of the particular phrase "subject to" as used in Section 109 of the *Constitution Act, 1867,* is *Attorney General of Canada v. Attorney General of Ontario: In re Indian Claims,* [1897] AC 199, 210-11 (JCPC):

> The beneficial interest in the territories ceded by the Indians under the treaties became vested, by virtue of s. 109, in the Province of Ontario.…The effect of the treaties was, that, whilst the title to the lands continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province.
>
> "An interest other than that of the province in the same" appears to them [their Lordships] to denote some right or interest in a third-party, independent of and capable of being vindicated when in competition with the beneficial interest of the old province.

(24). The Attorney General and Minister of Justice of Canada reported to the Executive Branch in 1875 that Section 109 of the *Constitution Act, 1867,* precludes the provincial governments from purporting to legislate in relation to territory that "has not been ceded to or purchased by Us" within the meaning of the *Royal Proclamation of 1763.* The report was adopted by Order in Council (Canada) dated 23 January 1875. It recognized and affirmed:

> The [*Constitution Act, 1867*] Sec. 109, applicable to British Columbia…enacts that, all lands belonging to the Province shall, belong to the Province "subject to any trust existing in respect thereof, and to any interest other than the Province in the same."…***
>
> The Undersigned [Minister of Justice], therefore, feels it incumbent upon him to recommend that this [*Public Lands Act*] Act be disallowed [for purporting to apply to lands reserved under Section 109].

(25). For political reasons, rather than persist in the disallowance procedure, the following year the federal Parliament enacted the *Indian Act, 1876,* through which, unconstitutionally, the unceded territories were invaded, and thereafter provincial laws of general application have been applied to those territories, thus achieving, in virtue of manifestly unconstitutional federal law, the reversal of the legislative intent of the "subject to" phrase as used in Section 109 of the *Constitution Act, 1867.* Since that time the courts of Canada have given effect to the federal Indian law legislative intent in perverse willful blindness to the settled and admitted legislative intent of the conflicting constitutional law.

(26). The Respondent's Affidavit (APPEAL BOOK VOL. I, Tab 6, page 30) establishes that the constitutional question of Section 109 of the *Constitution Act, 1867,* repeatedly has been previously raised. It does not attest, and its Exhibits (APPEAL BOOK VOL. II) do not evidence that the question has been addressed on its merits. It is the very fact that it has been raised repeatedly, but never addressed on its merits, that is the basis for the

Application's allegation of the imposition of "serious bodily and mental harm" within the meaning of Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948*.

(27). Section 91(24) of the *Constitution Act, 1867,* delegates to the federal government the jurisdiction of the preemptive right of purchase, subject to the exercise of which the provincial government is vested with a "present proprietary interest," subject to the Indian "Interest" under Section 109 of the *Constitution Act, 1867.*

(28). By necessary implication of that constitutional law alone, the entirety of the federal law concerning Indians and the provincial law concerning land and any recently-invented judge-made decisions rendered contrary to the paramountcy of the Indian "Interest," is *ultra vires,* null and void. The point of *stare decisis,* in relation to constitutional law, is that the original and authoritative decisions interpreting specific constitutional enactments are binding upon subsequent courts. Only a legislative constitutional amendment can change established constitutional law.

(29). The judicial "constitutional metamorphosis" in lieu of a legislative constitutional legislative amendment culminated with the decision of the Supreme Court of Canada in *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶48:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.

(30). The impression of generosity denies justice as the application of truth to affairs and frustrates the rule of law that is supposed to be based upon constitutional supremacy and *stare decisis.* The "pre-sovereignty aboriginal practice" of the aboriginal race in North America was self determination, exclusive possession and sole jurisdiction.

(31). Inceptively and at all times since the European invasion of North America based upon the doctrine of discovery, the Crown's claim to sovereignty legislatively has never been modified. It was consolidated as opposed to being invented by the *Royal Proclamation of 1763.* The Crown constitutionally claimed nothing more than the preemptive right to purchase the land, if and when the indigenous government was willing to sell it.

(32). But that is not what is meant by the word "practice" as used by the Supreme Court of Canada. Instead it means the mode and manner of survival within the aboriginal economy, which no longer can exist because of the unconstitutional invasion and occupation of the yet-unsold Indian territories. The pressure of the massive increase in the non-indigenous population, the eradication of the old growth forests, the pollution of the waters, the decimation of the fishery resource, in sum, the universal replacement of the aboriginal conservationist economy with a modern resource-exploitive capitalist economy, absolutely precludes the "pre-sovereignty practice" in the Supreme Court's sense of the phrase from being anything more than a cruel "Pretence" within the meaning of the *Royal Proclamation of 1763*. The Indians capital—the lands and waters themselves—unconstitutionally is denied to them and they are pushed to the margins of society as impoverished observers, rather than empowered participants.

(33). Mr Justice Sedgwick of the Supreme Court of Canada *Attorney General of Ontario v. Attorney General of Canada: In re Indian Claims,* (1895), 25 SCR 434, 534 held:

> …in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity.

(34). Ro:ri:wi:io's Application to have Section 109 of the *Constitution Act, 1867,* respected seeks justice not generosity.

Part V

STATEMENT OF THE ORDER THE COURT WILL BE ASKED TO MAKE INCLUDING ANY ORDER FOR COSTS

(35). No order for costs is sought.

(36). On the merits the order sought on the appeal is identical to the order sought on the Application.

> THAT IT BE DECLARED:
>
> Section 109 of the *Constitution Act, 1867,* be and the same is hereby interpreted to signify the burden of proof in the first instance is upon the Crown to establish by evidence that land in Ontario has been ceded to or purchased by the Crown in compliance with the *Royal Proclamation of 1763,* failing which the land's constitutional status is Hunting Grounds reserved for the Indians, or any of them, and, correspondingly, is not Public Lands available for disposition or regulation by any Crown government, other than pursuant to a duly-enacted constitutional amendment.
>
> Upon this basis eastern Ontario bounded by the St. Lawrence, Petite Nation and Ottawa rivers be and the same is hereby declared to be Hunting Grounds, pending such proof by the Crown or constitutional amendment, as the case may be.

October 30, 2006

Ro:ri:wi:io, Applicant (Appellant)

CERTIFICATE RE ORIGINAL RECORD AND ESTIMATED TIME

I, Ro:ri:wi:io, the Appellant herein, hereby certify that:

(i). an order under subrule 69.09(2) relative to the original record and exhibits is not required; and,

(ii). no time will be required by me for oral argument.

October 30, 2006

Ro:ri:wi:io, Applicant (Appellant)

SCHEDULE "A": AUTHORITIES

SCHEDULE "B": TEXT OF STATUTES AND REGULATIONS

Royal Proclamation of 1763…… *passim*

> And whereas it is just and reasonable, and essential to our Interest, 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 –
>
> We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief…do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands…do presume…to grant Warrants of Survey, or pass Patents for any Lands…upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them…
>
> And We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.…
>
> And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the

> Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed, of which they stand accused, in order to take their Trial for the same.

Constitution Act, 1867, Section 109…… *passim*

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

FILE NO. C46047

COURT OF APPEAL FOR ONTARIO

BETWEEN:

Ro:ri:wi:io

Applicant
(Appellant)

- and –

Attorney General of Canada and Attorney General of Ontario

Respondents
(Respondents in appeal)

APPLICATION UNDER Sections 97 and 109(1) of the *Courts of Justice Act* and Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure* for a declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

APPEAL BOOK AND COMPENDIUM
VOLUME I: MAIN

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FILE NO. C46047

COURT OF APPEAL FOR ONTARIO

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NOTICE OF APPEAL

THE APPLICANT RO:RI:WI:IO APPEALS to the Court of Appeal from the judgment of Superior Court of Justice of Ontario Judge Pelletier dated September 19, 2006, made at Cornwall, striking the Application on the ground of lack of constitutional jurisdiction to entertain it.

THE APPELLANT ASKS that the judgment be set aside and a judgment be granted answering the constitutional question to which the Application was limited, namely the interpretation and declaration of Section 109 of the *Constitution Act, 1867,* as an exercise of the sovereign democratic power of the Canadian people, to respect the sovereign democratic power of the aboriginal peoples, to the continuity of their aboriginal rights of self determination, exclusive jurisdiction and sole possession of the land, pending their sale to Canada of their *prima facie* "Interest" within the meaning of Section 109, "subject to" which the Canadian people constitutionally claim their complementary and consequent "Interest" to jurisdiction over and possession of the country. *St. Catherines Milling & Lumber Co. v. R.,* (1888), 14 AC 46, 53-55, 60 (JCPC); *Attorney General of Ontario v. Attorney General of Canada: In re Indian Claims,* [1897] AC 199, 210-11 (JCPC).

THE GROUNDS OF APPEAL are Pelletier, J, erred as a matter of substantive law by misconstruing the said constitutional question which is based upon Canadian sovereignty, as a denial of Canadian sovereignty. Secondly, he erred as a matter of the law of evidence by basing his falsely-attributed attack upon Canadian sovereignty upon irrelevant and inadmissible opinion evidence, extracted from another case of a criminal nature. *Hollington v. Hewthorn & Co. Ltd.,* [1943] KB 587, [1943] 2 All ER 35; Topper, C., *Cross and Topper on Evidence,* 9th ed., Butterworths Canada Ltd., Markham, 1999, pp. 511-12.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS that the judgment under appeal is final within the meaning of Section 6(1)(b) of the *Courts of Justice Act*, secondly leave to appeal is not required and thirdly, this Court of Appeal shares the "universal jurisdiction" to prevent the "serious bodily and mental harm" within the meaning of Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* that is attested to be attributable to Canada's "judicial inactivity" in relation to the rule of law's constitutive doctrines of constitutional supremacy, *stare decisis,* third-party adjudication, non-selectivity and a right signifies a remedy. *Scott v. Sandford,* 19 How. 393, 403, 404, 405, 407, 420, 426, 432, 435, 449, 450, 452, 460, 483, 484, 485, 501, 506, 508, 509, 513, 520 (1857); *United States v. Lara,* 541 US 193, 214-17; *Menchu v. Montt,* September 26, 2005 (Constitutional Court of Spain).

October 10, 2006.

/s/

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COURT FILE NO. 06-630

SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. PELLETIER

Tuesday, September 19, 2006

BETWEEN:

Ro:ri:wi:io

Applicant

- and –

Attorney General of Canada and Attorney General of Ontario

Respondents

ORDER

~~THESE~~ THIS MOTIONS:

Made by the respondents, the Attorney General of Canada and Attorney General of Ontario, to strike the application made by the applicant, Ro:ri:wi:io and for costs, ~~were~~ was heard on August 22, 2006, at the Court House, 29 Second Street West, Cornwall, Ontario.

ON READING the materials filed by the applicant and the respondents, and on hearing the submissions of counsel for the respondents Canada and Ontario:

1. THIS COURT ORDERS that the respondents' motions to strike the application pursuant to the *Rules of Practice* are hereby granted and correspondingly the applicant's application is hereby dismissed.

2. THIS COURT ORDERS that unless the parties are able to agree upon the issue of costs, the parties shall exchange and file costs submissions no later than October 16, 2006.

/s/

ENTERED AT CORNWALL
OCT 4 2006
IN BOOK NO. 7374

LINDA RACINE
REGISTRAR
SUPERIOR COURT OF JUSTICE

COURT FILE NO.: 06-630
DATE: 19/09/2006

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
Ro:ri:wi:io	)	
	)	
Applicant	)	Self-represented
RESPONDING PARTY	)	
	)	
- and -	)	
	)	
	)	
Attorney General of Canada	)	
	)	
Respondent	)	Michael Beggs, Counsel for the
MOVING PARTY	)	Attorney General of Canada
	)	
- and -	)	
	)	
	)	
Attorney General of Ontario	)	
	)	
Respondent	)	Peter Lemmond and Mark Crow,
MOVING PARTY	)	Counsels of the Attorney General
	)	of Ontario
	)	Heard:

Pelletier, J.

REASONS FOR JUDGMENT

[1] The Respondents to this application, the Attorneys General of Canada and Ontario, bring a motion to strike out the notice of application or in the alternative dismiss the application. The application is framed in the following terms:

> "RO:RI:WI:IO ASKS THAT this Court interpret Section 109 of the *Constitution Act,* 1867, and declare that the triangular geographical region at the southeast limit of the Province of Ontario bounded by the St. Lawrence, Ottawa and Petite Nation Rivers is Hunting Grounds reserved for the Indians and will remain so until the Crown proves a cession or purchase pursuant to the *Royal Proclamation of 1763,* failing which federal or provincial legislation is not relevant to the region.
>
> THE MATERIAL FACT IS THAT Ro:ri:wi:io either has an Indian occupancy interest under the *Royal Proclamation of 1763* or has or wishes to acquire an occupancy interest under the *Public Lands Act of Ontario*, and in either case needs to know who bears the burden of proof in relation to the constitutional status of the land: the Crown, or the Indians?"

[2] The applicant seeks a declaration that the geographical region in question constitutes "hunting grounds" reserved for Indians unless the Crown is able to establish its sovereignty over the land in question. The applicant further seeks a determination as to whether the burden of proof concerning sovereignty over the land in question is upon the Crown or the Indians.

[3] The motion by the two respondents to strike out or dismiss the application is premised firstly upon an assertion that this Court's jurisdiction does not extend to adjudicating upon political questions or questions concerning the law of nations, asserting further that the territory within which the Parliament of Canada and the Legislative Assembly of Ontario exercise authority and jurisdiction are such questions.

[4] In addition to this general jurisdictional threshold issue, the respondents seek to strike or dismiss the application on the basis that it is frivolous, vexatious and an abuse of process of the Court, that the

application discloses no reasonable cause of action, and that the application should be dismissed on the basis that the applicant is without legal capacity to commence or continue the application.

[5] Clearly, before addressing the merits of the application and the submissions of the respondents concerning the merits, it is necessary to determine whether this Court in fact has jurisdiction to hear the application in the first place.

[6] This jurisdictional issue as well as the underlying sovereignty issues have been addressed by this Court in related proceedings. The applicant, under the name of Dwayne David has presented a similar application in the context of a prosecution under the *Customs Act and Excise Act.* See: *R. v. David* [2002] O.J. No.561 (SCJ).

[7] The applicant's submission in that case was framed as follows:

> "I understand that this court has criminal jurisdiction to try indictable offences such as the charges brought before this court today. I also understand that the court has jurisdiction to convict and sentence persons who are found guilty of committing offences such as these, but I would also like the court to understand that I as a Kanienkeha:ka or Mohawk have laws, the Keyanerekowa. The common English equivalent of Keyanerekowa is The Great Law and Path of Peace. It is the constitution and fundamental law of the Kanienkeha:ka and other Onkwehonwe or Turtle Island aboriginal peoples. My name is Roriwiio, aka: Howard Dwayne David of the clan known as Rotiskarewaka with the symbol of the bear. The Mohawk are of the Haundenosaunee people of the Longhouse, Keepers of the Eastern Door. The Longhouse, both physically and metaphorical, is the traditional seat of spiritual beliefs and values and of Legal principles of the Kanienkeha:ka. The lives of people of the Longhouse are governed in all matters of law, policy and spirit by their traditional law, Keyanerekowa. I make a motion to the court to be tried by the Kanienkeha:ka Nation, I believe this is a matter of sovereignty and jurisdiction. There are provisions and

> protocols that are established in the Albany Treaty of 1664, otherwise referred to as the Two Row Wampum and the Silver Covenant Chain Treaties, the Royal Proclamation of 1763, as further defined in the Northwest Territories Act of 1982, and subsequent legislation and common law, I would like to further state to the Court that I am not Indian in terms of the Indian Act, but am "others" as protected in the Constitution Act of 1982. Not to say that this is the basis of my argument, but to only use the Constitution Act of 1982 to help the Court to understand the definition of "Indian", and become aware of who I rightfully am, an Onkwehonwe. Further, that I am under the Keyanerekowa, The Great Law and Path of Peace which explicitly forbids our submission to any type of foreign law or authority. The terms of the Treaty of Albany, the Two Row Wampum calls for the extradition of "Indians" who may be charged before Canadian/British Law, to be extradited to his/her own people. With respect to my situation, with the subject of these proceedings in the Court. With all due respect to your Honour and the Court I am prepared and willing to resolve these issues under Keyanerekowa. If requested by my elders to subject myself to Mohawk legal process in respect to the conduct that is the subject of the complaints or charges presently before Ontario Court. I am willing to do so and would honour and abide by the determinations and instructions of my people. However, until such time as new nation to nation treaties are developed that bind the Kanienkeha:ka as Nation and People, I take the position that I cannot subject myself to foreign legal process, for to do so would be going against the very law by which I live by: The Great Law."

[8] In addressing both the jurisdictional issue as well as the merits of the application to some extent, Rutherford, J. commented as follows:

> "14. Mr. David's claim, essentially a claim for full aboriginal Mohawk sovereignty, is not a novel one. It is a proposition that has been considered by Canadian courts on numerous occasions. It has never been accepted and I am certainly bound to reject it as well. Canadian sovereignty is a legal reality recognized by the "law of nations". Claims such as has been advanced in this case by Mr. David do not make that reality less real. Perhaps the judicial pronouncements of this reality have not always been clear enough. Aboriginal rights judgments in recent years have more often than not been lengthy dissertations attempting to explain how Canada's constitutional legal framework endeavours to achieve an inter-societal accommodation of long-standing practices to create a

> bridge between dissimilar cultures, thus permitting their just co-existence. I shall try to keep this decision brief and clear. It is nothing new. It is a mere reflection, a reiteration of statements in courts of higher authority.

15. The certain reality of Canadian sovereignty, which has as its root the sovereignty of the British Crown, was confirmed by the Supreme Court of Canada in R. v. Sparrow, [1990] 1 S.C.R. 1075 at p. 1103, in these terms:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. [Emphasis added]
>
> The sovereignty of the Crown in right of Canada and the applicability of federal legislation throughout the country has been re-iterated as well by provincial Courts of Appeal. [see: Delgamuukw v,. British Columbia (1993), 104 D.L.R. (4th) 470 per Wallace J.A. at p. 565: and R. v. Pamajewon and Jones (1995), 120 D.L.R. (4th) 475 (Ont. C.A.)]

16. Through the Criminal Code, both for its substantive provisions as well as a procedural vehicle for the enforcement of other federal enactments, Parliament has asserted jurisdiction throughout Canada.

> **8.** (1) The provisions of this Act apply throughout [sic] Canada…

Cornwall Island is part of Canada. Whether any part of Canada came under British control by conquest, was ceded by treaty, or was simply annexed in a peaceful fashion, the whole country became a "settled colony" and through a constitutional metamorphosis capped by the enactment of the Canada Act, 1982 in the U.K. Parliament and The Constitution Act, 1982 in Canada's Parliament, Canada became a sovereign nation with plenary authority to exercise its legislative jurisdiction under its constitution and govern throughout its territory.

17. Even if there existed some basis on which to challenge the acquisition of sovereign jurisdiction by Canada, the domestic or "municipal" courts of Canada lack competence to question

> it. Wallace J.A. in Delgamuukw v. British Columbia [supra] makes that point, relying upon Sobhuza II v. Miller, [1926] A.C. 518 (P.C.) and Mabo v. Queensland (1922), 107 A.L.R. 1 (H.C.) Turned another way, this proposition is sometimes but positively saying by that the claim of the executive as a matter of territorial sovereignty, is binding and conclusive. See: Post Office v. Estuary Radio Ltd., [1967] 3 All E.R. 680.
>
> 18. While the laws of Canada must be shaped to recognize the rights and freedoms guaranteed in the Constitution Act, 1982, such shaping and moulding by the integrated actions of the legislative and judicial branches of government is, nonetheless, the exercise of Canada's sovereignty. It seems probable that some observers have misconstrued this shaping of certain laws to accord with treaty or other aboriginal rights, particularly where activity is governed by variable regulation, as deference on the part of the government of Canada to another sovereign authority. To construe the process that way is wholly erroneous and has been the root of much trouble and frustration."

[9] In my view, these findings are determinative on the issue of the Court's jurisdiction in this Application and to some extent on the merits of the Application itself. The Application is accordingly struck on the basis that this court does not have the authority to adjudicate upon challenges to the acquisition of sovereign jurisdiction by Canada.

[10] Unless the parties are able to agree upon the issue of costs, the parties shall exchange and file costs submissions no later than October 16th, 2006.

/s/
Justice Robert Pelletier

Released: September 19th, 2006

File No. 06-630

SUPERIOR COURT OF JUSTICE

Between:

Ro:ri:wi:io,

Applicant,

And:

Attorney General of Canada and Attorney General of Ontario,

Respondents,

APPLICATION IN WRITING pursuant to Sections 97 and 109(1) of the *Courts of Justice Act* and Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure* for a declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

APPLICATION RECORD

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Respondent:
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Respondent:
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TABLE OF AUTHORITIES

PART 1. SUBSTANTIVE LAW

Section 1. Constitutional Legislation

Royal Proclamation of 1763

[Preamble] And whereas it is just and reasonable, and essential to our Interest, 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 -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that…

[1] no Governor or Commander in Chief…do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents

[2] all Persons whatever who have either wilfully or inadvertently seated themselves…forthwith to remove themselves from such Settlements

[3] the Trade with the said Indians shall be free…provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade

[4] if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians

[5] we do further expressly conjoin and require all Officers whatever…to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed, of which they stand accused, in order to take their Trial for the same.

Constitution Act, 1867, Section 91(2) and (24)

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws…coming within the Classes of Subjects next hereinafter enumerated;…

(2) The Regulation of Trade and Commerce,

(24) Indians, and Lands reserved for the Indians, And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Constitution Act, 1867, Section 92(5) and (13)

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon,

(13) Property and Civil Rights in the Province.

Constitution Act, 1867, Section 109

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of

Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Constitution Act, 1982, Section 25(a)

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.

Constitution Act, 1982, Section 35(1)

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Constitution Act, 1982, Section 52(1)

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 2. Constitutional Precedents

AG Ont. v. AG Can.: In re Indian Claims, [1897] AC 199, 210-11 (JCPC)

The beneficial interest in the territories ceded by the Indians under the treaties became vested, by virtue of s. 109, in the Province of Ontario.…The effect of the treaties was, that, whilst the title to the lands continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province. "An interest other than that of the province in the same" appears to them [their Lordships] to denote some right or interest in a third-party, independent of and capable of being vindicated when in competition with the beneficial interest of the old province.

Bown v. West, (1846), 1 E&A 117 (UC)

The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants…we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as it has been made manifest from time to time by orders of council and proclamations, of which all people were expected and required to take notice.

Cameron v. Kyte, (1835), 12 ER 679, 682

[A]n order [by a governor of a colony] cannot be supported on the ground that the acquiescence of the Crown is equal to its express authority.…Then the question is reduced to the single point, whether or not such an authority can be *implied*. It is not pretended by the appellant, that the Governor had by his commission or instructions any authority of this nature *expressly* communicated to him…If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a Viceroy, and represented the King in the government of that Colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such an act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct…But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given him, would be

purely void, and the Courts of the Colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or dictum has been cited before us to show that a Governor can be considered as having the delegation of the whole Royal power, in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to colonial Governors conveys such an extensive authority…All that we decide is, that the simple Act of the Governor alone, unauthorized by his commission, and not proved to be an expressly or explicitly authorized by any instructions is not equivalent to such a Act done by the Crown itself.

Campbell v. Hall, (1774), 98 ER 848, 896, 898, 899

[I]f the King has power (and when I say the King, I mean to be understood "without the concurrence of Parliament") to make new laws for a conquered country…he can make none which are contrary to fundamental principles;…The first and material instrument is the proclamation of the 7th of October 1763. See what it is that the King says, and with what view he says it; how and to what he engages himself and pledges his word,…How proper soever the thing may be respecting the object of these letters patent, it can only now be done…by Act of Assembly of the island, or by the Parliament of Great Britain.

Connelly v. Woolrich, (1869), RLOS 356 (QCA)

Even the United States are careful to acquire the Indian title, either by purchase or by other conventional means, before occupancy can be allowed, or public grants made.

St. Catherines Milling v. R., (1887), 13 SCR 577, 635, 661-64, 673-74

[The *Royal Proclamation of 1763*] was a legislative ordinance of equivalent force with a statute, and consequently could only have been repealed by an act emanating from some competent legislative authority; but no such act can referred to.…Now, in 1837, an act, 7 Wm. 4 Ch. 118, was passed by the Legislature of the Province of Upper Canada, entitled "An Act to provide for the disposal of the Public lands in this Province and other purposes therein mentioned." This act was passed for regulating the issue of Letters Patent granting lands known as and designated "crown lands," "clergy reserves," and "school lands," all of which were placed under the control of an officer styled the commissioner of crown lands, and the proceeds arising from the sale thereof were to be accounted for by him to the Receiver General, as forming part of the public revenue of the Province. The act did not affect any lands for the cession of which to His Majesty no agreement had been made with the Indian Tribes occupying and claiming title to the same, nor any lands which, although surrendered by the Indians to the crown, were so surrendered for the purpose of being sold and the proceeds applied for the maintenance of the Indians themselves.… The term "public lands," as used in the act in relation to lands known as "crown lands," "clergy reserves," and 'school lands,' has been maintained in several acts of the legislature of the Province of Upper Canada, viz., 4 and 5 Vic. Ch. 100, 16 Vic. Ch. 159, Consolidated Statues of Canada ch. 22, 23 Vic. Ch. 2, and 23 Vic. Ch. 151.…—it cannot, in my opinion, admit of a doubt that at the time of the passing of the British North America Act the Indians in Upper Canada were acknowledged by the crown to have, and they had an estate, title and interest in all lands in that part of the Province of Canada formerly constituting Upper Canada for the cession of which to the crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, which estate, title and interest could be divested or extinguished in no other manner than by cession to the crown. These cessions were made sometimes upon purchases made by the crown for the use of the public, in which case the lands so acquired became "Public lands," because the revenue to be derived from their sale was appropriated for the benefit of the public and was paid into

the Provincial Treasury.… Lands for the cession of which to her Majesty no agreement had been made with the tribes occupying and claiming title to the same, and which were sitting within the limits of Upper Canada, have always been, in my opinion, considered to come within the designation of "lands reserved for the Indians," or "Indian reserves," or "Indian lands."

St. Catherines Milling v. R., (1888), 14 AC 46, 53-55, 60 (JCPC)

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest surrendered by the treaty. The ceded territory was at the time of the Union land vested in the Crown, subject to "an interest other than that of the Province in the same" within the meaning of sect. 109;…the [treaty's] legal consequences…opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit…there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.

Sheldon v. Ramsay, (1852), 9 UCR 105, 122, 123, 133, 136 (QB)

In the first place, the Six Nations of Indians took no legal estate under the instrument given by General Sir Fredrick Haldimand…It could amount to nothing more than what it was well understood and intended to be, a declaration by the government that it would abstain from granting those lands to others, and would reserve them to be occupied by the Indians of the Six Nations.…Nothing is shewn here to prove any authority delegated to Captain Brant to part with these lands on the Grand River, so that the Indians could be dispossessed by his act of their interest in it, whatever that might be…There is nothing here but the mere execution of a deed in a manner that could bind no one but himself, under the assertion of an authority from the Indians, which is in no manner proved.…It is quite clear from the instrument signed by Governor Haldimand, that the government never did more than through the governor of the province permit the Indians the occupation of the lands. This permissive occupation constituted them, as it were, mere tenants at will to the crown;…It is not proved or shown how or in what manner Brant had or could have had such authority mentioned; and, supposing the government intended the [Six Nations of the Grand River Tract] Indians to have something more in the lands than permissive occupation of them, it is difficult to conceive that any such authority as here pretended to be exercised amounts to a legal right of disposition.

Section 3. Federal Legislation

Order in Council (Canada) of 23 January 1875

The 40th article of the treaty of Capitulation of Montreal, dated 8th September 1760, is to the effect that: 'The Savages or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there.' The Proclamation of King George III 1763 [enacts] '…*such parts of our dominions and territories*, as not having been purchased by Us, are reserved to them, or any of them as their hunting grounds;…*or upon* any lands whatever, which not having been ceded to or purchased by us, as aforesaid, are reserved to the said Indians, or any of them…*And we do further strictly enjoin and require all persons whatsoever, who may have either wilfully or inadvertently seated themselves upon any lands within the Countries above described, or upon any other lands,* which not having been ceded to or purchased by us, are reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements…' The Undersigned would also refer to the BNA Act 1867 Sec. 109, applicable to British Columbia, which enacts that, all lands belonging to the Province shall, belong to the Province 'subject to any trust existing in respect thereof, and to any interest other than the Province in the same.' The Undersigned [Minister of Justice for Canada], therefore, feels

it incumbent upon him to recommend that this Act [the British Columbia *Public Lands Act*] be disallowed [as unconstitutional in virtue of purporting to apply to Hunting Grounds reserved for the Indians].

Indian Act of Canada, Section 2(1)

In this Act,

"band" means a body of Indians,

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951;

"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

"reserve"

(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

Indian Act of Canada, Section 18(1)

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Indian Act of Canada, Section 20(1)

No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Indian Act of Canada, Section 24

An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

Indian Act of Canada, Section 28(1)

Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

Indian Act of Canada, Section 30

A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.

Indian Act of Canada, Section 35(1)

Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

Indian Act of Canada, Section 39(1)(b)(ii)

An absolute surrender…is void unless

(b) is assented to by a majority of the electors of the band

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender….

Indian Act of Canada, Section 42(1)

Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

Indian Act of Canada, Section 73(1)

The Governor in Council may make regulations

(*a*) for the protection and preservation of fur-bearing animals, fish and other game on reserves;

(*b*) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(*c*) for the control of the speed, operation and parking of vehicles on roads within reserves;

(*d*) for the taxation, control and destruction of dogs and for the protection of sheep on reserves;

(*e*) for the operation, supervision and control of pool rooms, dance halls and other places of amusement on reserves;

(*f*) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(*g*) to provide medical treatment and health services for Indians;

(*h*) to provide compulsory hospitalization and treatment for infectious diseases among Indians;

(*i*) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(*j*) to prevent overcrowding of premises on reserves used as dwellings;

(*k*) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves;

(*l*) for the construction and maintenance of boundary fences; and

(*m*) for empowering and authorizing the council of a band to borrow money for band projects or housing purposes and providing for the making of loans out of moneys so borrowed to members of the band for housing purposes.

Indian Act of Canada, Section 73(2)

The Governor in Council may prescribe the punishment, not exceeding a fine of one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of a regulation made under subsection (1).

Indian Act of Canada, Section 73(3)

The Governor in Council may make orders and regulations to carry out the purposes and provisions of this Act.

Indian Act of Canada, Section 74(1)

Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of

a chief and councilors, shall be selected by elections to be held in accordance with this Act.

Indian Act of Canada, Section 76(1)

The Governor in Council may make orders and regulations with respect to band elections and, without restricting the generality of the foregoing, may make regulations with respect to

(*a*) meetings to nominate candidates;
(*b*) the appointment and duties of electoral officers;
(*c*) the manner in which voting is to be carried out;
(*d*) election appeals; and
(*e*) the definition of residence for the purpose of determining the eligibility of voters.

Indian Act of Canada, Section 81(1)

The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
(*b*) the regulation of traffic;
(*c*) the observance of law and order;
(*d*) the prevention of disorderly conduct and nuisances;
(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;
(*f*) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;
(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;
(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;
(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefore has been granted under section 60;
(*j*) the destruction and control of noxious weeds;
(*k*) the regulation of bee-keeping and poultry raising;
(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;
(*m*) the control or prohibition of public games, sports, races, athletic contests and other amusements;
(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;
(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;
(*p*) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;
(p.1) the residence of band members and other persons on the reserve;

(p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

Indian Act of Canada, Section 88

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

Indian Act of Canada, Section 115

The Minister may

(a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools;

(*b*) provide for the transportation of children to and from school;

(*c*) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations; and

(*d*) apply the whole or any part of moneys that would otherwise be payable to or on behalf of a child who is attending a residential school to the maintenance of that child at that school.

Indian Act of Canada, Section 116(1)

Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

Indian Act of Canada, Section 119(1)

The Minister may appoint persons, to be called truant officers, to enforce the attendance of Indian children at school, and for that purpose a truant officer has the powers of a peace officer.

Indian Act of Canada, Section 119(6)

A truant officer may take into custody a child whom he believes on reasonable grounds to be absent from school contrary to this Act and may convey the child to school, using as much force as the circumstances require.

Indian Act of Canada, Section 122

In sections 114 to 121,
"truant officer" includes

(a) a member of the Royal Canadian Mounted Police,

(b) a special constable appointed for police duty on a reserve, and
(c) a school teacher and a chief of the band, when authorized by the superintendent.

Section 4. Provincial Legislation

Public Lands Act of Ontario, Section 1
In this Act, "public lands" includes lands heretofore designated as Crown lands, school lands and clergy lands.

Public Lands Act of Ontario, Section 37(1)
In this section, 'Crown grant' means a grant of a freehold or leasehold interest in unpatented public lands or of an easement in or over unpatented public lands made under this or any other Act."

PART 2. PROCEDURAL LAW

Section 1. Statutes

Courts of Justice Act of Ontario, Section 97
The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

Courts of Justice Act of Ontario, Section 109(1)
Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

(1) The constitutional…applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

Section 2. Regulations

Rules of Civil Procedure, Rule 1.04(1)
These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits

Rules of Civil Procedure, Rule 1.04(2)
Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

Rules of Civil Procedure, Rule 2.01(1)(a) and (b) and (2)
A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

Rules of Civil Procedure, Rule 3.02(1)
Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Rules of Civil Procedure, Rule 14.05(3)(d) and (g)

A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(d) the determination of rights that depend on…the interpretation of a statute;

(g) a declaration…or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application.

Rules of Civil Procedure, Rule 16.02(1)(f), (g) and (h)

Where a document is to be served personally, the service shall be made,

(f) on Her Majesty the Queen in right of Canada, in accordance with subsection 23 (2) of the *Crown Liability and Proceedings Act* (Canada);

(g) on Her Majesty the Queen in right of Ontario, in accordance with section 10 of the *Proceedings Against the Crown Act*;

(h) on the Attorney General of Ontario, by leaving a copy of the document with a solicitor in the Crown Law Office (Civil Law) of the Ministry of the Attorney General.

Rules of Civil Procedure, Rule 21.01(1)(a) and (b), (2) and (3)

(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs;

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b).

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

(a) the court has no jurisdiction over the subject matter of the action;

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

Rules of Civil Procedure, Rule 21.02

A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

Rules of Civil Procedure, Rule 21.03(1)

On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

Rules of Civil Procedure, Rule 37.01

A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary.

Rules of Civil Procedure, Rule 37.02(2)(a) and (e)

A master has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

(a) where the power to grant the relief sought is conferred expressly on a judge by a…rule [*e.g.,* Rule 38.02, *infra* p. xvii lines 8-9];
(e) relating to the liberty of the subject.

Rules of Civil Procedure, Rule 37.04

A motion shall be made to the court if it is within the jurisdiction of a master or registrar and otherwise shall be made to a judge.

Rules of Civil Procedure, Rule 37.05(3)

An urgent motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions, even if counsel estimates that the hearing is likely to be more than two hours long.

Rules of Civil Procedure, Rule 37.10.1

A party who makes a motion on notice to another party shall,

(a) confer or attempt to confer with the other party;
(b) not later than 2 p.m. two days before the hearing date, give the registrar a confirmation of motion (Form 37B) by,
  (i) sending it by fax, or by e-mail if available in the court office, or
  (ii) leaving it at the court office; and
(c) send a copy of the confirmation of motion to the other party by fax or e-mail.

Rules of Civil Procedure, Rule 37.11(1)(a) and (b)

A motion may be heard in the absence of the public where,

(a) the motion is to be heard and determined without oral argument;
(b) because of urgency, it is impractical to have the motion heard in public.

Rules of Civil Procedure, Rule 37.12.1(4), (5) and (6)

(4). Where the issues of fact and law are not complex, the moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,

(a) the motion shall be made on at least fourteen days notice;
(b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;
(c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise.

(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,

(a) a consent to the motion;
(b) a notice that the responding party does not oppose the motion;
(c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or
(d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party.

(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum.

Rules of Civil Procedure, Rule 37.16

On motion by any party, a judge or master may by order prohibit another party from making further motions in the proceeding without leave, where the judge or master on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions.

Rules of Civil Procedure, Rule 38.02

An application shall be made to a judge.

Rules of Civil Procedure, Rule 38.03(3.1)

The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01, and the application shall be heard there.

Rules of Civil Procedure, Rule 38.06(3)

The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date.

Rules of Civil Procedure, Rule 38.07(1)

A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38A).

Rules of Civil Procedure, Rule 38.09(5)

Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material.

Rules of Civil Procedure, Rule 38.09.1(2)

If no confirmation is given, the application shall not be heard, except by order of the court.

Rules of Civil Procedure, Rule 38.10(1)(a) and (b)

On the hearing of an application the presiding judge may,

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just.

NOTICE OF APPLICATION IN WRITING

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED against you by the Applicant pursuant to Rule 14.05(3)(d)(g) of the *Rules of Civil Procedure*.

THE GROUND IS THE NOTICE OF CONSTITUTIONAL QUESTION raised on the following page.

THE APPLICATION IS MADE IN WRITING ALONE pursuant to Rule 37.12.1(4) and is returnable pursuant to Rules 38.02 and 38.06(3) before a Judge at the Courthouse in Cornwall, at the first Regular Sitting in excess of 14 days hence, Scheduled for June 30, 2006, at 10:00 a.m.

IF YOU WISH TO OPPOSE THE APPLICATION you must forthwith deliver a notice of appearance (Form 38A) pursuant to Rule 38.07(1).

IF YOU FAIL TO OPPOSE THE APPLICATION JUDGMENT MAY BE GIVEN IN YOUR ABSENCE.

Date: May 29, 20006 ISSUED BY

/s/

Local Registrar
29 Second Ave., W.
Cornwall, Ontario K6J 1G3
Tel. (613) 933-7500

NOTICE OF CONSTITUTIONAL QUESTION

RO:RI:WI:IO ASKS THAT this Court interpret Section 109 of the *Constitution Act, 1867,* and declare that the triangular geographical region at the southeast limit of the Province of Ontario bounded by the St. Lawrence, Ottawa and Petite Nation Rivers is Hunting Grounds reserved for the Indians and will remain so until the Crown proves a cession or purchase pursuant to the *Royal Proclamation of 1763,* failing which federal or provincial legislation is not relevant to the region.

THE MATERIAL FACT IS THAT Ro:ri:wi:io either has an Indian occupancy interest under the *Royal Proclamation of 1763* or has or wishes to acquire an occupancy interest under the *Public Lands Act of Ontario,* and in either case needs to know who bears the burden of proof in relation to the constitutional status of the land: the Crown, or the Indians?

THE LEGAL BASIS IS THAT the application of federal and provincial law to land not proven by the Crown to have been ceded or purchased by it, in compliance with the *Royal Proclamation of 1763,* is precluded by Sections 91(2) and (24), 92(5) and (13), and 109 of the *Constitution Act, 1867, Order in Council (Canada) of 23 January 1875*; and the precedents *Campbell v. Hall,* (1774) 98 ER 848; *Cameron v. Kyte,* (1835), 12 ER 679; *Bown v. West,* (1846), 1 E&A 117 (Upper Canada); *Sheldon v. Ramsay,* (1852), 9 UCR 105 (QB); *Connelly v. Woolrich,* (1869), RLOS 356-7 (Quebec CA); *St. Catherines Milling and Lumber Co. Ltd. v. The Queen,* (1887), 13 SCR 577, (1888), 14 AC 46 (JCPC); *Attorney General of Ontario v. Attorney General of Canada: In re Indian Claims,* [1897] AC 199, 210-11 (JCPC), on the ground the said proclamation restricts the Crown's original constitutional jurisdiction to:

(1). Not carrying out surveys or making land grants before cession or purchase.

(2). Evicting newcomers trespassing on unceded or unpurchased lands.

(3). Purchasing only from the indigenous national or tribal government(s) in occupation according to their communal procedure for treaties of land disposition.

(4). Licensing the Crown's own citizens to trade with the Indians in the region.

(5). Prosecuting its own officials' for the absolute offences of Misprisions of Treason and Fraud committed by enabling or condoning the Crown's own citizens' trespassing.

THE DOCUMENTARY EVIDENCE IS "Map of…the British Dominions in North America, 1792," in http://www.davidrumsey.com In*sight* Browser Search by Author Jediah Morse, Image #9; "Map of the Province of Upper Canada, 1838," in *ibid.* James Wyld, Image #2; "Map of the Province of Canada (Western Sheet), 1861," in *ibid.* Alexander Keith Johnston, Image #52; Elinor Kyte Senior, *From Royal Township to Industrial City: Cornwall 1784-1984,* Mika, Belleville, 1983, Chapter 1; Canada, *Indian Treaties and Surrenders,* Queen's Printer, 1891, Vol. 1, p. 136; *An Act concerning purchases of lands from the Indians*, Stat. Prov. NY 1684, c. 9; *Ogden v. Lee*, 6 Hill's 546 (NYSC 1844); *Fellows v. Denniston,* 23 NY 420 (NYCA 1861); Ro:ri:wi:io, Application for Leave to Appeal to the Supreme Court in the matter of *Ro:ri:wi:io v. The Queen*, May 10, 2006; and, Letter to Crown Land Agencies (Patterson and others), May 26, 2006.

DATED Cornwall May 29, 2006.

/s/
Ro:ri:wi:io, Applicant

Court File No. 06-630

SUPERIOR COURT OF JUSTICE

B E T W E E N :

Ro:ri:wi:io

Applicant
(Respondent on motion)

- and -

Attorney General of Canada and Attorney General of Ontario

Respondents
(Moving Party and Respondent)

NOTICE OF MOTION

THE Respondent, Attorney General of Ontario, will make a motion to the Court on August 22, 2006 at 10:00 a.m. or as soon after that time that the motion can be heard, at the Court House, 29 Second Street West, Cornwall, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR AN ORDER:

(1) Striking out the Notice of Application, without leave to amend;

(2) In the alternative, dismissing the application;

(3) Granting the moving party its costs of this application, including this motion; and

(4) Providing for such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. Rules 1.04(1), 14.09, 25.11, 37.13(1), 38.10(1)(a), and 57.03(1) and (2) of the *Rules of Civil Procedure.*

The Application is Frivolous and Vexatious

2. The application is frivolous and vexatious, as it is plain and obvious that it cannot succeed. This is because:

(a) This Court's jurisdiction does not extend to adjudicating upon political questions or questions concerning the law of nations. The territory within Canada over which the Parliament of Canada and the Legislative Assembly of Ontario exercise authority and jurisdiction are such questions.

(b) It is firmly established in Canadian law that the Aboriginal peoples of Canada exist within the Canadian constitutional and legal framework and are subject to the Crown's authority. The arguments raised by the applicant against this have no prospect of success, and have been dismissed consistently by numerous Canadian courts in the past.

(c) It is firmly established in Canadian law that the *Royal Proclamation* of 1763 did not reserve lands within settlement colonies, including the lands in issue, as permanent Indian "Hunting Grounds". Insofar as Aboriginal peoples enjoy exclusive interests in lands by virtue of holding Aboriginal title, the onus to establish Aboriginal title lies with the

Aboriginal claimants. The applicant has not advanced such a claim. Only when an Aboriginal claimant's onus has been successfully discharged does the burden shift to the Crown to prove extinguishment.

3. The Application is also frivolous, vexatious and an abuse of process for the reason that:

(a) The applicant has been convicted in criminal proceedings in which he raised issues very similar to those raised in this application. The use of a civil proceeding to initiate a collateral attack on final decisions of a criminal court of competent jurisdiction, in an attempt to re-litigate issues, is an abuse of process.

(b) The applicant's conduct of legal proceedings include grounds and issues rolled forward, repeated and supplemented into subsequent proceedings, and persistently taking unsuccessful appeals from judicial decisions.

(c) The arguments and allegations raised in this application have been raised without success in multifarious proceedings before many different courts and tribunals in Canada and elsewhere. This application appears to be directly connected to these other proceedings. The ongoing pursuit of these arguments in multifarious proceedings is a misuse of court process, including the process of this Court.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Application Record dated May 29, 2006;

2. Affidavit of Michel Burke dated August 3, 2006; and

3. Such further and other material as counsel may advise and this Honourable Court permit.

Dated: August 3, 2006

Owen Young (LSUC#17656Q)
Peter Lemmond (LSUC#41368K)
Mark Crow (LSUC#45624S)

Attorney General of Ontario
Crown Law Office-Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1
Tel: (416) 326-4008
Fax: (416) 326-4181

Counsel for the Respondent,
the Attorney General of Ontario

TO: Ro:ri:wi:io
18398 County Road 18
Martintown, Ontario
K0C 1S0

Tel: (613) 937-0467
Fax: (613) 937 0467

Applicant

AND TO: ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Ontario Regional Office
130 King Street West, Suite 3400
Toronto, Ontario
M5X 1K6

Michael Beggs

Tel: (416) 973-9241
Fax: (416) 973-2319

AND TO: LOCAL REGISTRAR
Superior Court of Justice
29 Second St. W.
Cornwall, Ontario
K6J 1G3

Fax: (613) 932-0507

Court File No. 06-630

SUPERIOR COURT OF JUSTICE

B E T W E E N :

Ro:ri:wi:io

Applicant

- and -

Attorney General of Canada and Attorney General of Ontario

Respondents

AFFIDAVIT OF MICHAEL BURKE

I, Michael Burke, of the City of Mississauga, in the Regional Municipality of Peel, MAKE OATH AND SAY:

1. I am employed by the Ontario Ministry of the Attorney General, Crown Law Office-Civil, as counsel, and have held this position since November, 2004. As such, I have personal knowledge of the facts set out below, except where I have indicated otherwise, in which case I have also indicated the source of my information. I believe that all the statements made in this affidavit are true.

2. I have reviewed and compared the contents of the application record filed by the applicant in this matter and materials filed in other proceedings. The materials I have reviewed are:

(a) *KAHENTINETHA AND IO KE RON ONH IN RIGHT OF KANION'KE:HAKA KAIANEREH'KO:WA KANON'SES:NEH v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ONTARIO AND QUEBEC*, Federal Court, Trial Division, Court File T-2154-04:

i. Statement of Claim dated December 2, 2004, attached as Exhibit A (1);

ii. Notice of Constitutional Question dated December 1, 2004, attached as Exhibit A(2);

iii. Application for leave to Appeal and Consequent Relief dated December 1, 2004, attached as Exhibit A(3);

(b) *KANION'KE:HAKA KAIANEREH'KO:WA KANON'SES:NEH v. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO*, Ontario Superior Court of Justice, Court File 05-CV-030785:

i. Statement of Claim dated February 8, 2005, attached as Exhibit B(1);

ii. Case Management Motion Form dated July 7, 2005, attached as Exhibit B(2);

iii. Case Management Motion Form, dated September 6, 2005, attached as Exhibit B(3);

iv. Letter dated December 22, 2005 including transcription of endorsement of Morin J. striking the statement of claim and dismissing the action, attached as Exhibit B(4);

(c) *KANION'KE:HAKA KAIANEREH'KO:WA KANON'SES:NEH v. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO*, Federal Court, Court File T-380-05:

i. Statement of Claim dated February 28, 2005, attached as Exhibit C (1);

ii. Motion Record dated May 27, 2005, attached as Exhibit C(2);

(d) *KANION'KE:HAKA KAIANEREH'KO:WA KANON'SES:NEH, THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS V. THE STATE OF NEW YORK*, Supreme Court of the United States, Court File 05-165:

i. Petition, apparent date of May 20, 2005, attached as Exhibit D(1)

(e) "*OBJECTION TO JURISDICTION, TO SIDNEY B. LINDEN, COMMISSIONER"*, IPPERWASH INQUIRY ROYAL

COMMISSION, Ipperwash Inquiry, Ontario Divisional Court, Court File 05-Dv-001117 and Supreme Court of Canada:

i. Objection to Jurisdiction dated June 21, 2005, attached as Exhibit E(1);

ii. Factum for Motion — Stated Case in Writing, Notice of Hearing Date, and Motion Record — For stated Case, dated June 28 and 29, 2005, for proceedings under the *Public Inquiries Act* in the Ontario Divisional Court, Court File 05-Dv-001117, attached as Exhibit E(2);

iii. Case Management Motion Form dated July 15, 2005, for proceedings under the *Public Inquiries Act* in the Ontario Divisional Court, Court File 05-Dv-001117, and action in Ontario Superior Court of Justice, Court File 05-CV-030785, attached to this my affidavit as Exhibit E(3);

iv. Motion Record dated August 23, 2005, for the Supreme Court of Canada, attached as Exhibit E(4);

v. Appeal Motion record dated August 10, 2005, for the Supreme Court of Canada, attached as Exhibit E(5);

(f) *KANION'KE:HAKA KAIANEREH'KO:WA KANON'SES:NEH, KAHENTINETHA, TOWENINO AND KATENIES v. HER MAJESTY THE QUEEN*, Federal Court of Appeal, Court File A-363-05;

i. Notice of Appeal dated August 12, 2005, attached as Exhibit F(1);

ii. Motion Record dated September 6, 2005, attached as Exhibit F(2);

(g) *TTOWGWELTH v. NATIONAL ENERGY BOARD*, Federal Court of Appeal, no Court File number:

i. Motion Record dated April 15, 2006, attached as Exhibit G (1);

(h) *RO:RI:WI:IO v. ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO*, Ontario Superior Court of Justice, Court File 06-630:

i. Application Record dated May 29, 2006, including materials from proceedings purportedly brought before: the United Nations High Commissioner for Human Rights, dated April 20, 2006, the Malta Constitutional Court dated March 1, 2006, the Supreme Court of New York, dated March 1, 2006, the National Energy Board, dated March 16, 2006, and the International Criminal Court, dated March 24, 2006;

ii. Notice of Appeal, Motion Record, and Requisition for Administrative Expediting dated June 26, 2006, for the Court of Appeal of Ontario, attached as Exhibit H(1)

iii. Appellant's Supplemental Factum dated June 30, 2006, for the Court of Appeal of Ontario, attached as Exhibit H(2);

iv. Motion Record and Requisition dated July 7, 2006, for the Court of Appeal of Ontario, attached as Exhibit H(3); and

v. Application for Leave to Appeal dated July 12, 2006, for the Supreme Court of Canada, with cover letter dated July 17, 2006, attached as exhibit H(4).

3. From my review and comparison of these materials, it is apparent that these proceedings are very similar in substance and form. They advance the same fundamental arguments:

- They allege that genocide is being committed against Aboriginal peoples in Canada, and that the legal system, especially the judiciary and the Attorney Generals, are instrumental in this;

- They challenge the application of federal, provincial or state laws to what are alleged to be unceded Indian lands or hunting grounds protected as such under the *Royal Proclamation* of 1763 ("the *Royal Proclamation*"); and

- They often accuse the responsible officials of committing " misprisions of Treason and Fraud" contrary to the *Royal Proclamation*.

4. They often follow a similar course:

- The proceedings are brought on an urgent basis, for a summary disposition of what is alleged to be a simple and clear question of law;

- The initiating parties seek for the proceedings to be determined in writing only;

- The materials filed by the initiating parties often directly include or cross-reference materials from other proceedings;

- Any adverse result typically triggers an immediate, improperly constituted appeal proceedings, which is pursued to senior appellate courts;

- The written legal submissions include very similar or identical summaries of case law, legislation and constitutional provisions; and

- Many of the proceedings relate to the Cornwall area and the Mohawks of Akwesasne/St. Regis.

5. These strong similarities suggest some degree of connection between these multifarious proceedings, including this application.

6. The applicant's letter dated July 17, 2006, included within Exhibit H(4) *supra*, expressly confirm the connection between this proceeding and the matter of *TTOWGWELTH v. NATIONAL ENERGY BOARD*, *supra* (Exhibit G).

SWORN before me at the City of Toronto
in the province of Ontario this 3rd day of
August, 2006.

/s/
Michael E. Burke

/s/
Commissioner for Taking Affidavits

FILE NO. C46047

COURT OF APPEAL FOR ONTARIO

BETWEEN:

Ro:ri:wi:io

Applicant
(Appellant)

- and –

Attorney General of Canada and Attorney General of Ontario

Respondents
(Respondents in appeal)

APPLICATION UNDER Sections 97 and 109(1) of the *Courts of Justice Act* and Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure* for a declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

APPELLANT'S CERTIFICATE RESPECTING EVIDENCE

The appellant certifies that the following evidence is required for the appeal, in the appellant's opinion:

1. Exhibits numbers: none.
2. The affidavit evidence of: nobody.
3. The oral evidence of: nobody.

October 10, 2006.

/s/

Ro:ri:wi:io, Applicant (Appellant)
RR#3 Island Road, Cornwall Island, ON
K6H 5R7 Tel/Fax: (613) 937-0467

TO: Michael Beggs, Counsel for Attorney General of Canada
Exchange Tower, 130 King West, Suite 3400, Box 36
Toronto, ON M5X 1K6 Tel: (416) 952-4758 Fax: (416) 973-2319

AND TO: Peter Lemmond, Counsel for Attorney General of Ontario
8th Floor, 720 Bay Street
Toronto, ON M5G 2K1 Tel: (416) 326-4008 Fax: (416) 326-4181

FILE NO. C46047

COURT OF APPEAL FOR ONTARIO

BETWEEN:

Ro:ri:wi:io

Applicant

- and –

Attorney General of Canada and Attorney General of Ontario

Respondents

APPLICATION UNDER Sections 97 and 109 (1) of the *Courts of Justice Act* and Rules 14.05 (3) (d) and (g) and 38.03 (3.1) of the *Rules of Civil Procedure* for declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

RESPONDENT'S CERTIFICATE RESPECTING EVIDENCE

The respondent confirms the appellant's certificate respecting evidence except for the following:

ADDITIONS

1. The affidavit evidence of Michael Burke is required for the appeal.

October 27, 2006 /s/

Owen Young (LSUC#17656Q)
Mark Crow (LSUC#45624S)
Peter Lemmond (LSUC#41368K)

Attorney General of Ontario
Crown Law Office-Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1
Tel: (416) 326-4008
Fax: (416) 326-4181

Counsel for the respondent Attorney General of Ontario

FILE NO. C46047

COURT OF APPEAL FOR ONTARIO

BETWEEN:

Ro:ri:wi:io

Applicant
(Appellant)

- and –

Attorney General of Canada and Attorney General of Ontario

Respondents
(Respondents in appeal)

APPLICATION UNDER Sections 97 and 109(1) of the *Courts of Justice Act* and Rules 14.05(3)(d) and (g) and 38.03(3.1) of the *Rules of Civil Procedure* for a declaration on an urgent basis interpreting Section 109 of the *Constitution Act, 1867*.

CERTIFICATE OF COMPLETENESS OF APPEAL BOOK AND COMPENDIUM

I, Ro:ri:wi:io, appellant, certify that the appeal book and compendium in this appeal is complete and legible.

October 30, 2006

/s/

Ro:ri:wi:io, Applicant (Appellant)
RR#3 Island Road, Cornwall Island, ON
K6H 5R7 Tel/Fax: (613) 937-0467

TO:
Michael Beggs, Counsel, AG Can.
Peter Lemmond, Counsel, AG Ont.

Bruce Clark, LL.B., M.A., Ph.D.
<mightisnotright@gmail.com>

August 22, 2006

Louise Arbour, UNHCHR
c/o Petitions Team
Office of the United Nations High Commissioner for Human Rights
UNOG-OHCHR
1211 Geneva 10, Switzerland

Re: *Tthowgwelth, Toanunck and Ro:ri:wi:io v. Supreme Court of Canada and Supreme Court of the United States.* Complaint No. (to be assigned)

Dear Louise Arbour:

Enclosed for filing and expedited action to prevent genocide-in-progress please find a complaint bound as Tthowgwelth and others, *Might Is Not Right: The prevention of genocide within Canada and the United States of America* (2006) including VOLUME II APPENDIX *Exhaustion of Domestic Remedies* and affirmation of service. Volume II will be up-dated and a revised Table of Contents supplied from time to time as factual events develop.

As a former Judge yourself of the Supreme Court that has been and is committing the genocide, you labour under a profound conflict of interest. Correspondingly if you are not ready and willing to act with expedited dispatch please advise whether you will consent, or would object, to an alternative or supplementary application to any other UN Organ with concurrent jurisdiction to requisition the advisory opinion from the International Court of Justice that is the complaint's prayer for relief.

Sincerely

/s/
Bruce Clark, LL.B., M.A., Ph.D.
Agent/Counsel

Encl.: Complaint and Affirmation of Service

VOLUME I
Complaint

MIGHT IS NOT RIGHT:
Preventing genocide within Canada and the United States of America

BY

Tthowgwelth and others

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Dedication

TO the generations of indigenous people who resisted conversion, abided in truth alone, and remained loyal to beloved creation, against unstoppable despoliation and unremitting genocide.

Dying Declaration and Preface

I, Tthowgwelth (Sound of Many Copper Shields), also known as Lavina White, of Haida Gwaii (also known as the Queen Charlotte Islands) in the Pacific Ocean, MAKE OATH AND SAY:

(1). I am dying and have no hope of recovery. I need to shift to a stronger back the burden my naming at birth assigned me. I am the sound of many copper shields, and they are massed against the genocide of my community, nation and race of people by the Supreme Court of Canada's cruel and intentional ignoring of the constitutional guarantee of the existing aboriginal rights of jurisdiction, possession and self-determination confirmed by Section 109 of the *Constitution Act, 1867*. At the time of my death there are legal proceedings in my name that need to be completed:—if not by me, then for me, and for the principle of the rule of law and the prevention of genocide in the service of which my life has been expended. For this purpose, with the consent of Ro:ri:wi:io ("he brings a good message") and Bruce Clark, PH.D., I assign to them my burden, one that Bruce has helped me to carry for many years. My dying wish is that they shall complete the task in which we are engaged together, and I give permission to my aboriginal colleague Ro:ri:wi:io to sign such legal documents as Bruce prepares and he considers just, "Tthowgwelth per Ro:ri:wi:io." My body dies. My spirit lives. The truth sets it free.

(2). I am a woman and as such have a dying request for Chief Justice of Canada Beverly McLaughlin and for former Associate Justice of the Supreme Court of Canada Louise Arbour, now the United Nations High Commissioner for Human Rights. To them I write woman-to-woman because our mother earth needs rescuing by her own kind, for all her own children, and we women know and understand how the death of a child of the womb ravages the soul of the mother that bore the child. The genocide that has laid low the indigenous people of the Americas was and is the ecocidal ravishment by the mighty of the great mother, in pursuit of unconstrained and unlimited profit. If the great law of respect that is bred in the bone of every human child, and which flourished here in the Americas before the European invasion, were itself to be respected, it is at least conceivable the great Mother may herself regenerate her strength, and flourish again. All the children of the great Mother are indigenous to the lands and waters she constitutes. And her great law of respect already subsumes the *Universal Declaration of Human Rights* and the *Convention for the Prevention and Punishment of the Crime of Genocide*, 1948. The female force is in you, surrounds you and will never stop nurturing you for so long as you shall live on the surface of the great mother. You are not alone. You alone can do this. You are loved. The great mother needs this reciprocation of your love as a mother yourself.

THEREFORE with all my heart and soul I swear, on August 2nd 2006, that the content of the litigation papers I have directed, authorized and signed in relation to Section 109 of the *Constitution Act, 1867*, and the above, is true.

/s/ "Sylvia S. Shelton"
BARRISTER & SOLICITOR
Vancouver, BC V5N 4E8

/s/ "Tthowgwelth"
Tthowgwelth also known as Lavina White

Introduction

The first of the British immigrants entered into a political compact with the indigenous North Americans they encountered, to share the land for mutual advantage and security, which permitted the newcomers first to survive the trauma of transplantation and then eventually to flourish. The two founding races of what is now Canada and the United States of America agreed to live side-by-side as adjacent nations, each master in its own land. The Indian practice of gift diplomacy and the British concept of the sale of land coalesced. The Indians remained in power in relation to lands not granted by them to the immigrants. The terms and conditions of this agreeable common law relationship in due course were consolidated and confirmed by an act of state known as the *Royal Proclamation of 1763,* the first written constitution of general application to all of British North America. The proclamation guaranteed the continuity of the Indians' previously existing aboriginal right of self determination, exclusive jurisdiction and sole possession pending a treaty of purchase, by which means the share of the land reserved for newcomer society might grow in size relative to the remainder reserved by the natives for themselves by the act of not granting to others. Under the constitutional legislation the Indian, Federal and Provincial or State governments each acquired a *stipulated constitutional jurisdiction* over its own territory.

The enactment of this constitutional legislation precludes acts of state as expressions of sovereign power, by either race of people over the other. The sovereign power to modify this constitutional balance of acknowledged jurisdictions henceforward was restricted to the sovereign peoples acting pursuant to the legislative amendment formula stipulated in the constitution.

Nevertheless, in the 1870s the federal governments of both the United States and Canada enacted domestic legislation (*Appropriations Act, 1871,* and *Indian Act, 1876*) upon the basis of a manifestly unconstitutional assumption of the oxymoron "*federal sovereignty"* over the Indian territory and the Indian persons thereon. That jurisdictional invasion is a legal impossibility under the rule of law under which constitutional law trumps domestic law, not the other way round. A code of legislation supplemented by federal common law decisions by the newcomers' courts completely occupied the jurisdictional field constitutionally guaranteed to Indians.

Genocide resulted and continues in consequence of this gross abrogation of the rule of law by the governments and courts of Canada and the United States of America.

This document is an attempt to stop it.

Complaint Number:

Before The

HIGH COMMISSIONER FOR HUMAN RIGHTS

Tthowgwelth, Toanunck and Ro:ri:wi:io

vs

Supreme Court of Canada and Supreme Court of the United States

IN THE MATTER OF an application for a recommendation by the High Commissioner for Human Rights to be made for the purpose of preventing genocide-in-progress, that the Commission for Human Rights, the Economic and Social Council, the incoming Human Rights Council and the General Assembly, or any of them, immediately should requisition an advisory opinion from the International Court of Justice on an emergency basis, on the constitutional question of jurisdictional law alone whether, by breaching the rule of law's constitutive principle of equal application in relation to the universal human right not to be made a victim of genocide, the several human rights organs and agencies of the United Nations inclusive of the International Criminal Court presumptively intend to commit complicity in the genocide of the indigenous national constitutional governments and their constituents within Canada and the United States, which genocide is being committed by the intentional judicial inactivity of the Supreme Court of Canada and the Supreme Court of the United States in relation to the addressing of Section 109 of the Canadian *Constitution Act, 1867,* and Article II, Section 2, Paragraph 2, Clause 1 of the United States' *Constitution, 1789*;

AND IN THE MATTER OF an application for a further recommendation by the High Commissioner for Human Rights and those other UN Organs and Agencies, that the said Supreme Courts should address the said constitutional legislation and the precedents settling their meaning, the ignoring of which existing law is the reasonably foreseeable, probable and actual cause of the alleged genocide-in-progress due to the negation both of the rule of law and of justice as the application of truth to affairs.

Complaint and Appointment of Agent and Counsel

We, Tthowgwelth and Toanunck, the complainants, respectively of Masset, BC, and North Granville, NY, COMPLAIN AND APPOINT:

(1) THE FACTS AND LAW attested in the appendices are true.

(2) ALTERNATIVE REMEDIES have been exhausted but nevertheless genocide remains real, global, inflicted by mighty nations' unconstitutional taking of the natural resources of the occupied territories of weak indigenous nations and, most importantly, is not prevented by the world's rule of law remedy-providers because they are not independent of and impartial to the mighty nations but rather are in their thrall.

(3) THE ERADICATION OF GENOCIDE must begin by establishing the law's rule over the mighty nations, to whose economically-motivated ecocide of the planet global genocide is culpable collateral damage.

(4) WE APPOINT Dr. Bruce Clark as our agent and counsel.

STATED AND CONFIRMED at Masset, British Columbia, April 20, 2006.

/s/ "Kim Mushynsky
Kim Mushynsky, NOTARY PUBLIC
PROVINCE OF BRITISH COLUMBIA

/s/ "Lavina White Tthowgwelth"
Applicant/Affiant Tthowgwelth

STATED AND CONFIRMED at North Granville, New York, May 23, 2006.

/s/ "Jenny Linda Martelle"
Jenny Linda Martelle – 01MA6068020
NOTARY PUBLIC, STATE OF NEW YORK

/s/ "Rick VanGuilder"
Complainant

And I, Ro:ri:wi:io, Akwesasne Onkwehonwe of the Upper St. Lawrence River drainage basin as more particularly described in Volume II of this UNHCHR Application AFFIRM:

(1) I am party to this attested complaint and application for the requisitioning of a jurisdictional advisory opinion and I affirm the truth of its content and the fact I am bound by my word and my interest to respect and implement the trust placed in me by Tthowgwelth's (annexed) declaration and preface dated August 2nd 2006.

(2) The said Volume II consists in the application of the principles herein in the politically-charged and historically-crucial Six Nations context, which itself presents a fresh opportunity to end the "judicial inactivity" in the genocide host country within the meaning of *Menchu v. Montt* (Tab D).

AFFIRMED at Cornwall, Ontario, August 11, 2006

/s/ "Aleshia Anne Maley"
Aleshia Anne Maley, Commissioner, etc.
United Counties of Stormont, Dundas &
Glengarry. Expires August 29, 2008.

/s/ "Ro:ri:wi:io"
Applicant/Affiant Ro:ri:wi:io

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Constitutional Question

Does the High Commissioner for Human Rights share[1] the universal extraterritorial jurisdiction to prevent genocide arguably being caused by the intentional judicial inactivity of foreign[2] national court systems and, if so, will she exercise such jurisdiction by respectfully and in comity recommending the obtaining of an advisory opinion from the International Court of Justice and, correspondingly, recommending the respondent Courts forthwith should address the constitutional law of North America inaugurated in equity by the papal bull *Sublimus Dei, 1537,* and confirmed at law by the *Constitution of Canada, 1867*, Section 109, as settled by *Attorney General of Ontario v. Attorney General of Canada,* [1897] AC 199, 205, 210-11 (JCPC), and by the *Constitution of the United States, 1789,* Article II, §2, ¶2, clause 1, Article V and Amendment X, as settled by *Fletcher v. Peck,* 6 Cranch's 87, 121 (SC 1810), in the light of *Lara v. US,* 541 US 197, 214-227 (2004)(Thomas, J) and *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶¶48, 107?

A Note Regarding Headings and Organization: for ease of intelligibility both to the respondents and to the international community of national courts, this document is formatted as for applications for *certiorari* in the USSC. The submission is, as settled by *Menchu v. Montt* the substantive issue of preventing and punishing genocide caused by intentional judicial inactivity supersedes the procedural issue of compliance in matters of form when such compliance defeats substance.

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[1] *Menchu v. Montt,* 2005, Constitutional Court of Spain, *infra,* page *27(mt)-42(mt).* Appendix A: *Tthowgwelth v. Supreme Courts,* Malta Constitutional Court.

[2] The adjective "foreign" *a fortiori* subsumes one's own domestic court system if and when it has placed itself outside the rule of law by committing genocide.

VOLUME I (The Complaint)

Table of Contents

VOLUME II (The Exhaustion of Domestic Remedies)

Separate Table of Contents, *q.v.*

Table of Authorities

Jurisdiction

(1) For the purpose of addressing the threshold constitutional question of jurisdiction to entertain a cause and the facts alleged to give rise to it, the cause and facts are presumed to be true as pleaded and attested.

(2) The legislation bearing upon the High Commissioner's jurisdiction to address the pleaded and attested cause of preventing genocide resulting from the fact of judicial willful blindness to existing constitutional law is:

> ***High Commissioner for the promotion and protection of all human rights, 1993,*** A/RES/48/141
>
> [Preamble]…Considering that the promotion and the protection of all human rights is one of the priorities of the international community,… Emphasizing the need for the promotion and protection of all human rights to be guided by the principles of impartiality, objectivity and non-selectivity, in the spirit of constructive international dialogue and cooperation,…Aware that all human rights are universal, indivisible, interdependent and interrelated and that as such they should be given the same emphasis,…Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order to strengthen the United Nations machinery in this field and to further the objectives of universal respect for observance of international human rights standards,…Reaffirming that the General Assembly, the Economic and Social Council and the Commission on Human Rights are the responsible organs for decision- and policy-making for the promotion and protection of all human rights,
>
> Article 4. Decides that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, the High Commissioner's responsibilities shall be:
>
> (a) To promote and protect the effective enjoyment by all of all civil…rights;
>
> (b) To…make recommendations to them [Secretary-General, General Assembly, Economic and Social Council, Commission on Human Rights] with a view to improving the promotion and protection of all human rights;

(f) To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world,…;

(i) To coordinate the human rights promotion and protection activities throughout the United Nations system;…

Article 5. Requests the High Commissioner for Human Rights to report annually on his/her activities, in accordance with his/her mandate, to the Commission on Human Rights and, through the Economic and Social Council, to the General Assembly.

Statute of the International Court of Justice

Article 65(1). The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

(2). Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66(1). The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

Article 67. The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Rules of Court

Article 103. When the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request.

Article 104. All requests for advisory opinions shall be transmitted to the Court by the Secretary-General of the United Nations or, as the case may be, the chief administrative officer of the body authorized to make the request. The documents referred to in Article 65, paragraph 2, of the Statute shall be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry.

(3) Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* precludes imposing "serious bodily or mental harm" upon groups such as the applicants' herein.

Statement of the Case

(4) The applicants have exhausted domestic and international legal remedies without either of the two constitutional enactments, upon which reliance has at all material times been based, ever being addressed.

(5) This willful blindness by the legal establishment of the world is causing the serious bodily and mental harm that is the subject matter of the complaint herein.

(6) In every case the domestic and international adjudicators fully have been informed of the genocidal consequence of ignoring the law.

(7) Toanunck's personal interest as applicant arises from occupancy of the Hudson River drainage basin of New York State, formerly the Mahican River prior to its discovery by Henry Hudson in 1610 on behalf of the Netherlands.

(8) The personal interest of Tthowgwelth derives from occupation of the Haida national territory, today called the Queen Charlotte Islands, which rest in the Pacific Ocean and are identified as part of the Province of British Columbia, Canada.

Argument

(9) Appendix A is the pleading commencing a recent set of cases, each separately and all collectively directed toward the single objective of persuading the Supreme Courts of Canada and the USA to address the constitutional law, their intentional ignoring of which enables ecogenocide in North America to occur outside the rule of law and, by extension of the principle of might is right, throughout the world.

(10) The constitutional law went into remission in North America in the 1870s when the Canadian and American national governments decided to back the local governments' unilateral occupation and disposition of the national territories formerly controlled by the indigenous governments, in spite of the constitutional legislation and precedents stipulating for indigenous consent as the precondition to such occupation and disposition.

(11) The first wave of unconstitutional occupiers was the legal establishment which prepared the way for an orderly and secure flood of the second wave: the land developers and settlers. The first buildings in the occupied territories were law offices, land registry offices, police stations and court houses. The lawyers drew up the land grants for signing by the local governments; the registry officers recorded the private titles; the police officers arrested the indigenous peoples who physically attempted to resist the unconstitutional invasion; the judges upheld the private titles and

imprisoned the constitutional objectors upon the basis of ignoring the constitutional question of the manifest conflict of laws between the constitutional law precluding the invasion and the local law under the auspices of which the invasion was occurring.

(12) Generation after generation of constitutional objectors went and continue to go to the grave in despair at the fraud pursuant to which the ostensible guardians of the rule of law—the lawyers, bureaucrats, police and judges—exceed their constitutional jurisdiction with the intention of exploiting the land with culpable indifference to the reasonably foreseeable, probable, open, notorious and visible genocide of the indigenous national governments and their constitutional constituents.

(13) As has been the norm in every imperial occupation since the beginning of recorded history the occupying power unconstitutionally constituted puppet governments of indigenous people who, for hope of advantage and fear of prejudice, collaborated and still do collaborate with the occupying power's lawyers, bureaucrats, police and judges in the genocide of the part of the indigenous nations that persists in resisting.

(14) The legacy of the collaboration is the multi-billion dollar network of what today euphemistically and misleadingly are termed "First Nations" in North America.

(15) These puppet-government agents of the genocide are the <u>only</u> "Indians" to whom the occupying power concedes legal standing.

(16) In summary the reason the constitutional law went into remission in the 1870s is, chicanery with intent unconstitutionally to steal the land, for profit, with indifference to the genocidal consequence.

(17) Even though in every generation since the 1870s the legal remedies systematically and systemically have been blocked by the complicity of the domestic legal establishment in North America, and by its influence in the framing of the terms of reference and thinking patterns of the international tribunals, two recent events signify a sea change. Their conjunction provides the basis for the renewed legal initiative to prevent the genocide that is recorded by Appendix A. In 2004 a Supreme Court Judge in *Lara v. US,* 541 US 193, 214-27, *infra* page *60(mt),* publicly told the truth about the judicial ignoring of the governing constitutional law. And in 2005 the Constitutional Court of Spain in *Menchu v. Montt* broke ranks with the conspiracy of silence heretofore seamlessly maintained by the world's legal establishment. The result has been the regeneration of the hope that as Ralph Waldo Emerson said in his *Essay on Character* (New York, Crowell Company, 1926, p. 329):

> Truth is the summit of being: justice is the application of it to affairs. All individual natures stand in a scale, according to the purity of this element in them. The will of the pure runs down from them into other natures, as water runs down from a higher into a lower vessel. This natural force is no more to be withstood, than any other natural force. We can drive a stone upward for a moment into the air, but it is yet true that all stones will forever fall; and whatever instances of can be quoted of unpunished theft, or of a lie which somebody has credited, justice must prevail, and it is the privilege of truth to make itself believed.

(18) Appendix A attempts to duplicate the precedent set by the Constitutional Court of Spain in *Menchu v. Montt* in 2005 in relation to the "universal extraterritorial jurisdiction" to prevent and punish genocide that is being enabled by "judicial inactivity" in the nation in which the genocide is taking place. The difference between Appendix A which hails from the Constitutional Court of Malta and *Menchu v. Montt* is the latter concerned genocide in the weak nation of Guatemala, whereas the case in Malta *Tthowgwelth and Toanunck v. Supreme Court of Canada and Supreme Court of the United States* concerns genocide within mighty nations. The principle of law and the reasoning, are identical to that of the Constitutional Court of Spain in relation to the imperative of ending the era when procedural law obstructionism and equivocation is employed by courts to evade the overriding jurisdiction to uphold the rule of law in relation to the substantive law preventing and punishing genocide.

(19) Appendix A identifies in the Maltese context the civil and criminal law, both substantive and procedural, that is common to all rule of law nations of the international community. It requires each judicially to act if and when the opportunity is presented to prevent genocide that demonstrably is occurring in consequence of the "judicial inactivity" in relation to it, in whatever nation it may arguably be occurring. Appendix A further identifies the universal sources of law that constitute the root of the North American constitutional law preventing genocide, which itself has

been reiterated severally by the constitutional law of all rule of law nations and collectively on behalf of all by the United Nations. Finally Appendix A identifies the particular expression of prohibition against genocide as manifested in the constitutional legislation of Canada and the United States and their original and authoritative precedents.

(20) The venue of Appendix B is the Supreme Court of New York. The parties are the same as in Appendix A. The facts and law identified in Appendix A have been repeated and relied upon by incorporation by reference. The purpose and utility of Appendix B is to give the court system of the United States another opportunity to stop ignoring the law, without having to be told to do so by any foreign court system. Based upon historical experience it is almost certain that the Supreme Court of New York will evade addressing the constitutional question upon one pretext or another or, if the question is addressed, will ignore the U.S. constitution's treaty clause and address only its commerce clause. The New York Court of Appeals equally certainly will ratify the chicanery below. The issue then will be whether the Supreme Court of the United States will grant *certiorari* to appeal.

(21) Since no power on earth is capable of forcing the United States to obey its own constitution, the only hope for the prevention of the genocide in question is that the Supreme Court of the United States will desist from its historical pattern of denying *certiorari* to applicants who ask

it to read the commerce clause *in pari materia* with the treaty clause, instead of blindsiding the latter in favour of dealing with the commerce clause in isolation.

(22) It is at this rapidly-approaching and crucial juncture that the recommendations of the set of courts involved in the set of Appendices, and of the High Commissioner of Human Rights, Secretary-General, Economic and Social Council, Human Rights Council, General Assembly, International Criminal Court and International Court of Justice urgently are needed. The present applicants Tthowgwelth and Toanunck need to include the recommendations in their application in the Supreme Court of the United States for *certiorari* to the New York Court of Appeals.

(23) In terms of content, purpose and utility Appendix C is identical to Appendix B, except for the substitution of British Columbia for New York as the originating venue and the Supreme Court of Canada for the Supreme Court of the United States as the destination tribunal.

(24) Appendix D is an application for a stay of proceedings in the National Energy Board of Canada upon the ground it *prima facie* has no jurisdiction in the unceded Indian territory to authorize the harvesting of oil and gas and its distribution throughout North America and abroad.

(25) Appendix E is before the International Criminal Court. Tthowgwelth and Toanunck have objected therein to the manifestly unequal application of the law represented by that court's first indictment.

Unless and until the structural flaw of indicting only the weak but never the mighty is addressed it can not be anything other than a fraudulent theater in which the mighty nations punish genocide and war crimes by the weak while reserving the right themselves to commit those crimes with impunity.

(26) Appendix F is Tthowgwelth's motion record for leave to appeal to Canada's Federal Court of Appeal from the arbitrary refusal of the National Energy Board to address the constitutional question (raised in Appendix D) of the genocide it is *prima facie* inflicting by proceeding with hearings without satisfying itself and justifying to the applicants that it has jurisdiction, with culpable indifference to the attested fact of the genocidal consequence of its assumption.

(27) More than any other single issue, the global extraction and distribution of the oil and gas resource required to continue the ecocide of the planet with indifference to the collateral damage of genocide, is the testing ground for proving the paramountcy of the rule of law in refutation of the abrogation by the present global reality that might is right. The method of evading the law that historically was perfected in the unconstitutional occupation of the indigenous national territories of North America is the mortal virus that is responsible for the pandemic of genocide that washes in waves upon every shore the interior of which has natural resources needed to fuel the holocaust engines of the global economy. Big oil runs the military-industrial complex that runs the governments that run

the courts that pervert the rule of law by exercising the jurisdiction to prevent and punish genocide when committed by the weak but not when committed by the mighty.

(28) The *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* further stipulates:

> Article 4. Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

(29) If in response to the requested recommendations by the High Commissioner of Human Rights the North American courts persist in ignoring the constitutional question and the consequent genocide, then the last presently available remedy to prevent the genocide will have been exhausted and the applicants may apply to the international community of the rule of law nations for criminal law sanctions to punish the judicial crime of genocide by the judicial chicanery of intentional inactivity.

(30) If the rule of law is to provide a remedy against genocide as an alternative to physical self-defense by violence, the rule of law itself must first be established. Its constitutive principles are constitutional supremacy, *stare decisis,* equal application, third-party adjudication and a correspondence between rights and remedies, not one of which currently exists in relation to the applicants' complaint of genocide.

(31) US Supreme Court Justice Clarence Thomas reportedly predicted he would go to his grave brokenhearted about the dishonesty on

race,[1] but the dishonesty that prevents the rule of law from preventing genocide, as culpable collateral damage to the ecocide of the planet, is by no means restricted to race. Racial dishonesty is but one avatar of the multi-headed beast that prevents the good and true law preventing ecogenocide from ruling. The heart is the opportunism of the subset of humankind that is charged with jurisdiction and duty of implementing the law. For this reason the world does not need and there is no point in the United Nations troubling itself to draft and promulgate any more human rights laws. The time spent crafting new lamps is time taken away from regulating human affairs in the perfectly adequate light of the existing lamps.

(32) The basket under which the old lamps shine must be lifted, and the only one who can lift it is the one who put it there and maintains it—the legal profession and the judiciary drawn from the legal profession—at the human rights pinnacle of which is the High Commissioner of Human Rights. The lie, allegiance to which in perpetuity postpones the triumph of truth on earth, is the intentional refusal of the guardians of the rule of law to permit the law to rule. *Justitia* and *Vertitas* are one and the same. When truth rules, justice will rule, through good and true law.

(33) Big oil is not *per se* the problem. The genocide-in-progress of which Tthowgwelth and Toanunck complain and that they seek hereby to

[1] *Infra,* Appendix A, page *15(mt).*

prevent from continuing began with European invasion, and the ensuing enforced substitution of the value of more is better instead of enough is enough. The fur and timber trade depopulated and despoiled the environment, and destroyed the aboriginal economy that formerly existed in sustainable harmony with it, long before big oil came into power. The smallpox blankets, the police terrorism, the imprisonments that broke the free spirits, the starvation induced by the damming of the rivers to interrupt the fish runs and by eradication of the plains bison food-resource by wanton slaughter, all preceded big oil, and all took place under the ostensibly benevolent gaze of the religious orders and the new priest class that emerged with the so-called age of reason and enlightenment—the legal profession—the administrator of that era's greatest boast though not its actual achievement: the rule of law. Big oil is merely the current champion for the big lie that the rule of law is real, the latest champion leading the charge for the so-called progress of civilization. Nevertheless, if the big lie that precludes justice as applied truth in modern times can be disarmed it can only be done by bringing its present champion big oil into the rule of law fold.

(34) The legislative intent of the enactment *High Commissioner for the promotion and protection of all human rights, 1993,* A/RES/48/141, was for "human rights to be guided by the principles of impartiality, objectivity and non-selectivity," formulated under the avowed awareness

"that all human rights are universal, indivisible, interdependent and interrelated and that as such they should be given the same emphasis."

(35) It was for the purpose of implementing the legislative intent of establishing the rule of law as equal application, and justice as the application of truth to affairs, without quarter given to the might is right abrogation of those high and true objectives, that the enactment *High Commissioner for the promotion and protection of all human rights, 1993,* A/RES/48/141, expressly and explicitly decided and stipulated:

> that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, the High Commissioner's responsibilities shall be:
>
> (a) To promote and protect the effective enjoyment by all of all civil…rights;
>
> (b) To…make recommendations to them [Secretary-General, General Assembly, Economic and Social Council, Commission on Human Rights] with a view to improving the promotion and protection of all human rights;
>
> (f) To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world,…;
>
> (i) To coordinate the human rights promotion and protection activities throughout the United Nations system;

(36) Precisely because the said legislative intent of *High Commissioner for the promotion and protection of all human rights, 1993,* A/RES/48/141, was not in fact historically implemented by the High Commissioner for Human Rights in the years 1993 through 2006, on March

15th the General Assembly of the United Nations enacted *Human Rights Council, 2006,* A/RES/60/251.

(37). Its preamble reiterates in the same words the aforesaid legislative intent proclaimed by its predecessor and then, citing as cause the need to "redress the shortcomings" of the Commission on Human Rights, enacts that the General Assembly:

> Article 1. *Decides* to establish the Human Rights Council…in replacement of the Commission on Human Rights, as a subsidiary of the General Assembly;…
>
> Article 2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;
>
> Article 3. *Decides also* that the Council should address situations of violations of human rights, including gross and systemic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;
>
> Article 4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity,…;
>
> Article 5. *Decides* that the Council shall, inter alia:
>
> (*c*) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
>
> (*d*) Promote the full implementation of human rights obligations undertaken by the States…;
>
> (*e*) Undertake a universal periodic review based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States…;
>
> (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
>
> (*g*) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner of Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;
>
> (*i*) Make recommendations with regard to the promotion and protection of human rights;…

Conclusion

(38). THEREFORE THE RELIEF SOUGHT should be granted. The High Commissioner for Human Rights should issue an emergency report pursuant to *High Commissioner for the promotion and protection of all human rights, 1993,* Article 5, A/RES/48/141, and *Human Rights Council, 2006,* A/RES/60/251, Articles 1-5. That report should recommend to the outgoing Commission on Human Rights and the incoming Human Rights Council, to the Economic and Social Council, and to the General Assembly, that they, or any of them, forthwith requisition an advisory opinion from the International Court of Justice pursuant to the *Statute of the International Court of Justice,* Article 65(1), accelerated pursuant to the *Rules of Court,* Article 103. The question is, whether the Organs and Agencies of the United Nations have jurisdiction to continue applying human rights law to weak nations while turning a blind eye to the genocide-in-progress caused by "judicial inactivity" within Canada and the United States. Secondly, the Supreme Courts of Canada and the United States should be asked to address Section 109 and Article II, §2, ¶2, clause 1, respectively.

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/s/

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