Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Public Service Alliance of Canada,

applicant,

and

Six Nations of the Grand River,

employer.

Board File: 035799-C
Neutral Citation: 2025 CIRB **1173**
January 21, 2025

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Sylvie M.D. Guilbert, Vice-Chairperson, and Messrs. Richard Brabander and Daniel Thimineur, Members. A hearing was held on August 10, 11 and 15, 2023.

These reasons for decision were written by Ms. Sylvie M.D. Guilbert, Vice-Chairperson.

Appearances

Mr. Raymond Seelen and Ms. Tanya Ferguson, for the Public Service Alliance of Canada;
Messrs. Frank J. Cesario and Sean M. Sells and Mesdames Jessica M. Toldo and Jamie M. Burns, for the Six Nations of the Grand River.

I. Nature of the Application

[1] On June 14, 2022, the Public Service Alliance of Canada (the union) filed with the Board an application for certification pursuant to section 24(1) of the *Canada Labour Code* (the *Code*) seeking certification as bargaining agent for a bargaining unit comprising certain firefighters and fire captains working for the Six Nations of the Grand River (the Six Nations or the employer).

[2] Specifically, the union is seeking to represent a bargaining unit comprising:

> All employees employed as Firefighters and Fire Captains by Six Nations of the Grand River, save and except for volunteer firefighters.

[3] The Six Nations is a First Nation recognized pursuant to the provisions of the *Indian Act*, as amended. It occupies land reserved for it pursuant to the *Indian Act* along the banks of the Grand River, just south of Brantford, Ontario. The Six Nations include all six Haudenosaunee nations—Seneca, Cayuga, Onondaga, Oneida, Mohawk and Tuscarora.

[4] As one of the largest First Nations in Canada, the employer provides extensive public services to its members, including professional fire and emergency services. The employer's fire and emergency services are provided to the community through mitigation, prevention, preparedness, response and recovery using safe, recognized and measurable practices for fire services.

[5] The Board wishes to clarify that when it uses the term "Haudenosaunee" in this decision, it is referring to the historically known collective Iroquois polity. When describing the Six Nations, it is referring to the modern-day First Nation recognized under the *Indian Act*. When the Board uses the term "employer," it is as defined in section 3(1) of the *Code*. The Board also notes that the employer is a First Nation.

[6] In response to the application for certification, the employer raised a jurisdictional objection regarding the applicability of Part I (Industrial Relations) of the *Code* to its fire and emergency services due to its incompatibility with the employer's right of self-government as a First Nation.

[7] The employer claims that, as a First Nation, it has the constitutionally enshrined right to self-governance, including with respect to the labour relations of its fire services and other emergency responses on Aboriginal lands pursuant to section 35(1) of the *Constitution Act, 1982* (the *Constitution Act*).

[8] In short, because it is a First Nation, the employer submits that being subject to Part I of the *Code*—including by having a bargaining unit certified under the *Code*—would infringe on its Aboriginal right recognized and affirmed by section 35(1) of the *Constitution Act*. For the employer, the *Code* improperly takes jurisdiction, sovereignty, regulation and decision-making out of its

hands. Accordingly, the employer submits that the Board is without jurisdiction in the present matter and that the certification application should therefore be dismissed.

[9] The union disputes the employer's preliminary objection and states that the Board has jurisdiction to determine the application since Part I of the *Code* applies to the employer in this matter.

[10] As part of its adjudication of the application, the Board invited the parties to provide written submissions on the employer's jurisdictional objection. The parties availed themselves of this opportunity and submitted extensive written submissions and documents to the Board. After receiving these submissions, the Board advised the parties that it would also hold a hearing on the employer's jurisdictional objection. As part of this process, the employer served on the attorney general of each province and territory the Notice of Constitutional Question required by section 57 of the *Federal Courts Act*. The Board also provided such notice to the attorneys general and provided them with an opportunity to participate in the present application. None of the attorneys general filed submissions or participated in the hearing.

[11] In preparation for the hearing, the Board held a case management conference with the parties on February 1, 2023.

[12] The Board held three days of hearing on August 10, 11 and 15, 2023, to hear the parties' evidence regarding the jurisdictional objection. During the hearing, the following individuals testified for the employer and were subject to cross-examination and redirect:

a. Mr. Darrin Jamieson, Chief Executive Officer for the employer, who testified on August 10, 2023;
b. Chief Mark Hill, Elected Chief of the Six Nations, who testified on August 15, 2023; and
c. Professor Jon Parmenter of Cornell University in Ithaca, New York, United States, who testified on August 11, 2023. Professor Parmenter was recognized by the Board as an expert witness on the history of the Haudenosaunee people for the period pre-contact to Colonial North America (circa 1500–1800). The Board declared him an expert witness based on the factors set out in *Oceanex Inc.*, 2021 CIRB 988, namely the relevance of his evidence to the issues before the Board in this case, the necessity of his evidence to

help the Board deal with the issues in this case, the absence of an exclusionary rule, his proper qualifications and his impartiality and independence. Of note, on consent of the parties, the examination-in-chief of Professor Parmenter was done through the filing before the Board of an expert report he had prepared and an affidavit he had sworn. Professor Parmenter was then subject to cross-examination and examination on redirect.

[13] After these three days of hearing, the Board invited the employer and the union to present their closing arguments in writing, which they did on September 18 and October 16, 2023, respectively. Finally, on October 30, 2023, the employer submitted its closing arguments in reply.

[14] The Board's decision was rendered based on both the extensive submissions of the parties on file and the evidence and arguments presented by the parties at the hearing on the jurisdictional objection.

[15] The Board notes that, while it has reviewed all of the parties' submissions, arguments and documents filed in the present matter, it is not required to explicitly address or include each issue or argument advanced by a party in its reasons (see *Garda Security Screening Inc.* v. *General Teamsters, Local Union 979*, 2018 FCA 71; *Newfoundland and Labrador Nurses' Union* v. *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; and *Construction Labour Relations* v. *Driver Iron Inc.*, 2012 SCC 65). Therefore, the Board will only set out the details that are relevant to its determination of the present jurisdictional objection and will only address the arguments and material facts that are directly linked to it.

[16] The Board wishes to thank the parties and their legal counsel for their very helpful submissions, their thorough preparedness for the hearing, their judicious use of hearing time and their overall assistance in this matter.

[17] For the reasons that follow, the Board dismisses the employer's jurisdictional objection, declares that Part I of the *Code* applies to the employer and declares that it has jurisdiction to determine the present application for certification, which it will adjudicate in a separate decision.

II. The Issues

[18] The present matter is an application for certification filed with the Board pursuant to section 24(1) of the *Code*. However, before the Board can determine the issues in the application, it must rule on the employer's preliminary objection to its jurisdiction. The Board must determine whether it is prevented from determining the application because doing so would infringe on the employer's Aboriginal right recognized by section 35(1) of the *Constitution Act*.

[19] The employer is claiming an Aboriginal right and considers that it has an inherent right of self-government for the purpose of managing its internal relations. It maintains that this right extends to managing its relations with its workforce, including its firefighters and emergency services, be it in terms of hiring standards and employment conditions or the settlement of disputes on the reserve of the Six Nations. The employer accordingly submits that the Board lacks jurisdiction to entertain the union's application for certification given that, pursuant to section 35(1) of the *Constitution Act*, Part I of the *Code* does not apply to the employer.

[20] The union argues that the Board has jurisdiction to deal with the application since the employer cannot establish, based on the evidence presented, that it has an Aboriginal right pursuant to section 35(1) of the *Constitution Act*.

III. The Applicable Law

A. Section 35(1) of the *Constitution Act*

[21] Section 35(1) of the *Constitution Act* is at the centre of the present application since it guarantees two types of Aboriginal rights: (1) existing Aboriginal rights; and (2) treaty rights. It reads as follows:

> **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> **(2)** In this Act, ***aboriginal peoples of Canada*** includes the Indian, Inuit and Métis peoples of Canada.
>
> **(3)** For greater certainty, in subsection (1) ***treaty rights*** includes rights that now exist by way of land claims agreements or may be so acquired.

> **(4)** Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[22] In the present application, the employer is asserting the existence of an Aboriginal right. The employer clarified that it is not making a claim based upon a treaty right.

[23] This is a significant distinction since the recognition of each type of right carries with it a different legal analysis that must be undertaken by the Board as the trier of fact and law in this matter. The distinction was set out in *Mitchell* v. *M.N.R.*, 2001 SCC 33 (*Mitchell*), by Justice William Ian Corneil Binnie in his concurring reasons. Justice Binnie described treaty rights at paragraph 138 as constituting "an affirmative promise by the Crown which will be interpreted generously and enforced in a way that upholds the honour of the Crown." At paragraph 139, he confirmed that a treaty right is itself an expression of the Crown's sovereignty. He then described an Aboriginal right as follows:

> 140 In the case of aboriginal rights, there is no historical event comparable to the treaty-making process in which the Crown negotiated the right or obligation sought to be enforced. The respondent's claim is rooted in practices which he says long preceded the Mohawks' first contact with Europeans in 1609.

[24] In short, a treaty right is created by the actions of the Crown in its own exercise of sovereignty. Litigation with respect to treaty rights deals with holding the Crown to its promise.

[25] By contrast, a claim based on the existence of an Aboriginal right is established in the first instance by the fact of Aboriginal practices that predate the arrival of Europeans. As such, the starting point of analysis for rights of this nature is not the agreements between Europeans and First Nations, but rather what those First Nations did before they were contacted by Europeans.

[26] The nature and historical development of Aboriginal rights was set out in *Mitchell* by Chief Justice Beverley McLachlin, as she then was, when she stated the following:

> 9 Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the [English] who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1, and *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and

> ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335.
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> 10 Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo* v. *Queensland* (1992), 175 C.L.R. 1, at p. 57 (*per* Brennan J.), pp. 81–82 (*per* Deane and Gaudron JJ.), and pp. 182–83 (*per* Toohey J.).
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> 11 The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: *Constitution Act, 1982*, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw*, *supra*.

[27] When considering Aboriginal rights protected by section 35(1) of the *Constitution Act*, the courts have mandated a purposive approach to the rights. The Supreme Court of Canada (SCC) has identified two facts that underly the section 35(1) rights. The first is the sovereignty of the Crown, and the second is the fact that when European settlers first arrived in Canada, Aboriginal peoples were already living here. As the SCC stated in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 (*Van der Peet*):

> 31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

B. The Legal Test Pursuant to Section 35(1) of the *Constitution Act*

[28] Incorporating all these principles described above, the SCC has set out a multi-step test that the Board must use to analyze a claim asserting an Aboriginal right under section 35(1) of the *Constitution Act*.

1. Step 1

[29] The first step to establishing a right under section 35(1) of the *Constitution Act* requires the claimant, such as the employer in this case, to demonstrate that "he or she was acting pursuant to an aboriginal right" (*Van der Peet*, at paragraph 2). To establish that an Aboriginal right exists in this first step, a three-part test must be met, as articulated by the SCC in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 (*Sparrow*), in *Van der Peet* and in *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*, 2011 SCC 56:

a. Identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. Three factors shape the characterization of the right claimed:
    - the nature of the action that is claimed to have been carried out pursuant to an Aboriginal right;
    - the nature of the government regulation, statute or action being impugned; and
    - the practice, custom or tradition relied upon to establish the right.
b. Once the claimed right is characterized, it is for the claimant to establish that an Aboriginal right exists by proving:
    - the existence of the Aboriginal pre-contact practice, tradition or custom that supports the claimed right; and
    - that this practice was integral to the distinctive pre-contact Aboriginal society.
c. It must then be determined whether the claimed Aboriginal right has a reasonable degree of continuity with the "integral" pre-contact practice.

[30] It is important to note a few key legal considerations about this first step of the test.

[31] First, the SCC has made it clear that the test set out above should not be interpreted to make satisfying its elements practically impossible. The SCC stated this in various ways in *Van der Peet*, including in the following passages:

> 62 That this [i.e., pre-contact] is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.
>
> …
>
> 68 In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that [the] activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[32] The evidence adduced in claims under section 35(1) of the *Constitution Act* is unique in that evidence of pre-contact practices of Aboriginal societies is essentially impossible to procure. There are obviously no living firsthand witnesses, and most (if not all) surviving written records of such practices were created by Europeans following contact. In *Van der Peet*, the SCC held that the rules of evidence should be applied flexibly and in a manner commensurate with the difficulties posed by claims of this nature. However, this does not mean that all evidence proffered by the party asserting a claim should be accepted or accorded substantial weight.

[33] This issue was also examined at length in *Mitchell*, in which the SCC stated the following:

> 39 There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R.* v. *Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of

> probabilities. Placing “due weight” on the aboriginal perspective, or ensuring its supporting evidence an “equal footing” with more familiar forms of evidence, means precisely what these phrases suggest: **equal** and **due** treatment. While the evidence presented by aboriginal claimants should not be undervalued “simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case” (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.

[34] Furthermore, the arrival of Europeans and its influence cannot be used to deprive an Aboriginal group of an otherwise valid claim to an Aboriginal right (see *Van der Peet*, at paragraph 71). At the same time, Aboriginal rights must not be “frozen in pre-contact times.” Instead, the law must be careful to allow the “evolution of practices, customs and traditions into modern forms,” and that evolution will not prevent their protection as Aboriginal rights (*Van der Peet*, at paragraph 64).

[35] In addition, when interpreting section 35(1) of the *Constitution Act*, any doubt or ambiguity should be resolved in favour of Aboriginal peoples (see *R.* v. *Desautel*, 2021 SCC 17, at paragraph 45; and *Van der Peet*, at paragraph 25).

2. Step 2

[36] If an Aboriginal right is established under the first step of the analysis, then the second step turns to infringement and, if asserted, justification. Specifically, as outlined in *Sparrow*, once the Aboriginal right has been established, the Board must then determine:

a. whether the right has been infringed; and
b. if the right has been infringed, whether the infringement is justified.

[37] Again, this step of the test is fact-specific, context-driven and subject to a few key legal considerations.

[38] As discussed in *Sparrow*, the SCC suggested that the following three factors will aid in determining whether such an infringement has occurred:

1) Whether the limitation imposed by the legislation is unreasonable;
2) Whether the legislation imposes undue hardship; and

3) Whether the legislation denies the holders of the right their preferred means of exercising the right.

IV. Analysis

A. Step 1(a)

[39] In step 1(a) of its analysis, the Board must identify the precise nature of the employer's claim to an Aboriginal right. To do so, it will look at three factors:

1) The nature of the action that is claimed to have been carried out pursuant to an Aboriginal right;
2) The nature of the government regulation, statute or action being impugned; and
3) The practice, custom or tradition relied upon to establish the right.

1. The Position of the Employer

[40] The employer submits that the Six Nations have, and their historical predecessors and ancestors had, the inherent right to self-government and that the Haudenosaunee's right to self-govern appears continually throughout history. Therefore, the employer claims that it has the Aboriginal right to self-govern and regulate labour relations within fire services and other emergency responses on Aboriginal lands.

[41] The employer argues that it had the right to govern itself pre-contact with Europeans. Upon contact with Europeans, the Aboriginal right to govern itself continued to be of central importance to the Haudenosaunee. For the employer, this included the particular aspect of self-governance that is at issue in this case.

[42] In support of its argument, the employer relies on the existence of the Covenant Chain and on the Haudenosaunee's organization of labour in three areas of activity:

1) The provision and storage of surplus food;
2) The construction of palisades for community defence; and
3) The development of techniques of fire protection for high-value physical installations in their territorial homelands.

a. Self-Governance Evidenced by the Covenant Chain

[43] Firstly, the employer argues that the nature of the Aboriginal right it claims is one of self-governance. The employer submits that it had self-governance pre-contact. This is evidenced through the creation of the Six Nations themselves since the Haudenosaunee originated as a league of five constituent nations prior to contact and added a sixth nation after contact, hence "Six" Nations. It states the following:

> 54. As noted by Professor Parmenter, "The Haudenosaunee developed an internal self-governance structure, known today as the League, or Confederacy, prior to the arrival of Europeans in North America." Governance by the ancestors of [the employer], including with respect to what is now referred to as "labour relations," was central, vital, integral, distinctive, essential and significant to the practices, traditions and customs of such ancestors pre-contact.

[44] The employer argues that there is no question that the Six Nations have, and that their historical predecessors and ancestors had, the inherent right to self-government.

[45] The employer also submits that this right to self-govern its own affairs appears continually throughout history and that this right continued upon contact with Europeans.

[46] The employer argues that the Aboriginal right to govern itself continued to be of central importance to the Haudenosaunee and was recognized by the English Crown through the Covenant Chain. In this respect, the employer relies on the evidence of Professor Parmenter, who explained the following in his report:

> ● The "Covenant Chain" alliance between the Haudenosaunee and the English Crown originated in the seventeenth century and served as an over-arching "meta-treaty" that provided the rhetorical foundation and scaffolding for specific treaty negotiations between the Haudenosaunee and the English Crown from the late seventeenth century to the mid-nineteenth century.
>
> ● Haudenosaunee oral tradition describes the original terms of their relationship with the English Crown as encompassing acknowledgment of mutual benefits (trade), mutual respect, and a mutual engagement to coexist in peace without interference in one another's affairs. The relationship has been represented historically by a "Two Row" wampum belt.
>
> ● The nature of the relationship between the Haudenosaunee and the [English] Crown recognized the inherent right of the Haudenosaunee to govern their internal affairs, which would include labour relations.
>
> (page 8)

[47] The employer notes that Professor Parmenter explained in his report that, by way of the Covenant Chain, the Haudenosaunee incorporated their practices, traditions and customs within their relationship with the English Crown, while preserving them within their own internal affairs:

> **Principal Features, Characteristics, and Terms of the Covenant Chain Relationship**
>
> KEY TAKEAWAY POINTS
>
> ● The Haudenosaunee, in Covenant Chain diplomacy with the English Crown, emphasized process and the observance of key protocols rather than the product of diplomacy because the constitutive procedures of the Covenant Chain relationship involved frequent face-to-face renewals that provided opportunities for adjusting its specific terms.
>
> ● The Haudenosaunee modeled Covenant Chain diplomacy with the English Crown on their Condolence Ceremony, an internal mechanism for promoting conflict resolution and orderly political succession that originated prior to Europeans' arrival in North America.
>
> (page 18)

[48] As Professor Parmenter expressed in his oral testimony, in the circumstance of trade between the Haudenosaunee and the Europeans in the seventeenth and eighteenth centuries, "from the Haudenosaunee perspective—commitment to good understanding, frequent meetings—those are as important to them as the end result," and such was part of the Covenant Chain.

[49] Professor Parmenter explained in his report that the English Crown acknowledged and respected the Haudenosaunee's right to self-governance:

> In conclusion, it is vital to note that the Anglo-Haudenosaunee Covenant Chain alliance embodied a relationship in which the Crown and the Haudenosaunee each respected the other party's inherent right to self-governance and upheld the ideals of the "Two Row Wampum" concerning mutual pledges of non-interference in the other party's affairs. Of course, this did not mean that either side agreed to coexist in effective isolation from the other—i.e., an arm's length relationship. Rather, Covenant Chain diplomacy articulated specific areas of shared concerns and mutual obligations—signified by the symbolism of arms linked together—that were resolved over time by mutual consent between representatives of the Crown and the Haudenosaunee. The terms of the Covenant Chain prevented unwanted interference by one party in the other's internal affairs. The record of the Covenant Chain alliance discussed above supports the conclusion that the [English] Crown recognized the sovereign nationhood of the Haudenosaunee League, that the Crown conducted diplomacy and concluded treaties with the Haudenosaunee League on a nation-to-nation basis, and that by agreeing to specific, limited terms of respective and mutual obligations in those treaties, the Crown demonstrated its respect for the inherent right of the Haudenosaunee to self-government in areas **not** explicitly negotiated in the treaty process—among which are the right to self-govern its Labour Relations within fire services and/or other emergency responses (i.e. protection like police).

(pages 66–67)

[50] For the employer, the Covenant Chain is an acknowledgment of its self-governance and, therefore, clearly supports the purpose of section 35(1) of the *Constitution Act*—reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. The employer argues that the Covenant Chain is also part of the promise made by Canada to the First Nations peoples of this country, as reflected in the Constitution. For the employer, it is a promise that must be capable of fulfillment; otherwise, it is an empty promise.

[51] Given the above, the employer submits that the proper iteration of the Aboriginal right at issue in this matter is the right to self-govern and regulate labour relations within fire services and other emergency responses on Aboriginal lands. It also submits that this definition of the claimed Aboriginal right is not overly broad.

[52] The employer submits that the Board should adopt its definition of the Aboriginal right since it is not claiming a broad and general right of self-government at large. Rather, it is claiming the right to self-govern labour relations within fire and other emergency services and submits that it has the right to determine how labour relations will be governed within its fire and other emergency services as it deems appropriate. As such, the employer submits that the Board should not read down the claimed Aboriginal right by removing from its definition the concept of "self-governance."

[53] The employer further submits that this right of self-government has been repeatedly recognized and affirmed by the Government of Canada. For example, the Government of Canada's "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" clearly states the following:

> 01 The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
>
> (Department of Justice Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (2018), online at the Department of Justice Canada, page 5)

b. The Haudenosaunee's Organization of Labour in Three Areas of Activity

[54] Based on the submissions and arguments presented to it, the Board notes that the employer also claims that it has the Aboriginal right to self-govern and regulate labour relations within fire services and other emergency responses on Aboriginal lands based on the Haudenosaunee's organization of labour for the purposes of three areas of activity. These three primary practices, customs and traditions are the provision and storage of surplus food, the construction of palisades for community defence and the development of techniques of fire protection for high-value physical installations in their territorial homelands.

2. The Position of the Union

[55] The union submits that the employer has framed the claimed Aboriginal right in an overly broad manner and suggests that the right should be read down to be defined with the required degree of specificity as the right to regulate labour relations in the area of emergency services.

[56] At the outset, the union submits that no authority in Canada has ever recognized an inherent right of self-governance under section 35(1) of the *Constitution Act* that would exempt First Nations from engaging in collective bargaining with their employees. For the union, the evidence provided by the employer is not meaningfully different from the evidence proffered in any other attempt by a First Nation to render itself exempt from collective bargaining. Therefore, the union submits that in the present matter, as was the result in those other cases, the employer should not be exempt from the application of the *Code*.

[57] The union argues that the decisions in *Van der Peet*, *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821 (*Pamajewon*), *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 (*Delgamuukw*), *Mississaugas of Scugog Island First Nation* v. *National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814 (*Mississaugas of Scugog Island*), and the 2010 and 2012 decisions of the Board in *Conseil des Innus de Pessamit*, 2010 CIRB 523, and *Conseil des Innus de Pessamit*, 2012 CIRB 653, cannot be clearer. A right under section 35(1) of the *Constitution Act* must be defined with specificity. It cannot be a right that is so broad as to be true of every society.

[58] In each of the *Pamajewon*, *Mississaugas of Scugog Island*, *Conseil des Innus de Pessamit (523)* and *Conseil des Innus de Pessamit (653)* cases, the claimants argued that they had the right of self-governance and that this created an Aboriginal right that would exempt them from the application of a particular statute. In each of these cases, a broad claim to the right to self-government was read down to a specific claim related to the issue in dispute.

[59] In *Mississaugas of Scugog Island*, *Conseil des Innus de Pessamit (523)* and *Conseil des Innus de Pessamit (653)*—each of which dealt with applications for certification—this meant that the decision maker in question ultimately considered a narrow claim about regulating labour relations rather than a broad claim about self-government. The union submits that the Board should take the same approach in the present case.

[60] Applying the factors found in *Van der Peet*, the union submits that the nature of the action taken by the employer pursuant to the Aboriginal right claimed is not broad self-governance but more precisely regulation of labour relations. The union states that the present matter before the Board is an application for certification concerning the firefighters employed by the employer who wish to bargain collectively. What the employer asserts, in essence, is that the relationship between it and its employees should not be governed by the *Code* but should instead be governed in accordance with what it asserts are its traditional Aboriginal practices. The union submits that the dispute is therefore entirely and exclusively concerned with the regulation of labour relations. Consequently, it submits that the precise nature of the right claimed is to regulate labour relations in the area of emergency services.

[61] The union notes that the provisions of the *Code* that the employer seeks to impugn, namely Part I of the *Code*, are concerned only with the regulation of labour relations. Therefore, for the union, the Aboriginal right claimed should be defined as the right to regulate labour relations in the area of emergency services.

[62] On the issue of the custom, practice or tradition relied upon to establish the existence of the Aboriginal right, the union notes that the employer relies upon two broad categories of practice in its evidence: a claim of self-governance that is enshrined in the Covenant Chain discussions with the English Crown, and the organization of labour in the three areas of activity.

a. Self-Governance Evidenced by the Covenant Chain

[63] For the union, the Covenant Chain discussions are examples of post-contact practice and, as such, cannot be relied upon to establish an Aboriginal right. In its view, all that the Covenant Chain evidence establishes is that the English Crown and the Haudenosaunee engaged in negotiations within a particular framework around those items negotiated. A review of the documents cited by Professor Parmenter shows that the regulation of labour in even the broadest sense was not a matter raised in the Covenant Chain meetings. The Covenant Chain deals with the relationship between the English Crown and the Haudenosaunee with a focus on trade and warfare issues. For the union, it is not possible to rely on this evidence to establish a pre-contact practice of regulating labour relations. The union submits that nothing in the Covenant Chain documents deals with the relationship between employers and their employees.

[64] The union argues that Professor Parmenter's assertion that the Covenant Chain constitutes recognition by the English Crown of a right to mutual non-interference is inconsistent with the source documents on which he relies. In any event, the union submits that the Covenant Chain was considered in *Mississaugas of Scugog Island* in the same manner that the employer suggests Professor Parmenter's evidence should be interpreted. However, the Ontario Court of Appeal in *Mississaugas of Scugog Island* rejected the employer's assertion, stating that accepting the Covenant Chain as a treaty would require it "to accept an aboriginal right of self-government on reserve lands of virtually unlimited brea[d]th and amplitude and exceeding anything seen to date in the jurisprudence of aboriginal treaty rights" (paragraph 52).

b. The Haudenosaunee's Organization of Labour in Three Areas of Activity

[65] The union notes that the employer also relies upon the fact that it has the self-governance right to organize collective labour for the purposes of community security and/or emergency response based on three primary categories of pre-contact activities, namely the provision and storage of surplus food, the construction of palisades for community defence and the development of techniques of fire protection for high-value physical installations in its territorial homelands.

[66] The union argues that none of these three areas of activity relate to a right to self-govern labour relations. Taken at their very broadest, they are related to the performance of work.

Therefore, looking at the underlying practice relied upon to establish the existence of an Aboriginal right also supports reading down the right claimed and limiting it to the right to regulate labour relations in the area of emergency services.

[67] For the union, the proper scope of the right claimed is the right to self-govern in the area of labour relations and not the broader formulation proposed by the employer. In support of its argument, the union points to the decision of the Ontario Labour Relations Board (OLRB) in *National Automobile, Aerospace, Transportation and General Workers Union of Canada Local 444* v. *Great Blue Heron Gaming Co*., 2004 CanLII 47303 (ON LRB) (*Great Blue Heron Gaming*), at paragraph 79, where the OLRB defined "labour relations" as meaning the "regulation of relationships between what we might think of as employers, employees and groups of employees." The OLRB also rejected an alleged right to "organize" labour as too broadly framed given that all societies have organized labour in specific and particular ways. The right in question here is whether there is a right to regulate labour relations, the relationship between employers and employees.

3. The Decision of the Board

a. What is the nature of the action that the employer claims was done pursuant to an Aboriginal right?

[68] As part of its analysis, the Board must first characterize or define the Aboriginal right that is being claimed by the employer that would prohibit the application of Part I of the *Code* and oust its jurisdiction to hear this application for certification.

[69] The SCC in *Van der Peet* explained that the nature of the Aboriginal right claimed has to be "precisely" identified:

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

...

> 53 To characterize an applicant's claim correctly, **a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right**. ...
>
> (emphasis added)

[70] In this matter, the employer defines the nature of the Aboriginal right claimed as the right to self-govern and regulate labour relations within fire services and other emergency responses on Aboriginal lands.

[71] The union submits that the proper nature of the claimed Aboriginal right cannot be so broadly defined to include self-governance and should be specifically defined as the regulation of labour relations in the area of emergency services.

[72] As the SCC explained in *Van der Peet* and *Delgamuukw*, the burden of proof in cases of Aboriginal rights claims rests with the party claiming such rights, in the present case, the employer. However, the Board is also mindful that it should approach the rules of evidence and interpret the existing evidence while being conscious of the special nature of Aboriginal rights claims and the evidentiary difficulties in proving a right that originates from a time when there were no written records of the practices, customs and traditions engaged in (see *Van der Peet*, at paragraph 68).

[73] At the outset, the Board notes that a very large portion of the employer's submissions on the nature of the claimed Aboriginal right relies heavily on its claim of a general overarching right of self-governance, evidenced by pre-contact practices and the Covenant Chain; for the employer, this then translates into a claim of an Aboriginal right of self-governance and regulation over labour relations within fire services and other emergency responses on Aboriginal lands.

[74] The Board is very mindful that on numerous occasions, the courts have addressed a claim to a broad right of self-governance and have repeatedly redefined the claimed Aboriginal right with much specificity. This is because a claim of an Aboriginal right cannot be for a right that is so broad as to be true of every society (see *Van der Peet*; *Pamajewon*; *Delgamuuku*; *Mississaugas of Scugog Island*, leave to appeal denied in *Mississaugas of Scugog Island First Nation* v. *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*

and its Local 444, Great Blue Heron Gaming Company, Ontario Labour Relations Board, Attorney General of Canada and Attorney General of Ontario, no. 32452, April 24, 2008 (J.S.C.C.); *Conseil des Innus de Pessamit (523)*; and *Conseil des Innus de Pessamit (653)*).

[75] The Board notes that in *Pamajewon*, two members of the Shawanaga First Nation and two members of the Eagle Lake First Nation were charged with various offences related to operating high stakes bingo and other gambling activities. Each of the accused pleaded that they were operating pursuant to a bylaw passed by their respective nations and that such bylaws were protected pursuant to section 35(1) of the *Constitution Act* based on a right to self-govern, which included a right to regulate gambling on their lands. They claimed that they had a general Aboriginal right to self-government under section 35(1) of the *Constitution Act* and that this right included the right to regulate gambling activities on the reservation. The SCC held that claims to self-government are "no different from other claims to the enjoyment of Aboriginal rights and must, as such, be measured against the same standard," which is the application of the *Van der Peet* test requiring precision (paragraph 24). The SCC therefore chose to precisely describe the nature of the claimed right as the right of the two First Nations involved in this case "to participate in, and to regulate, gambling activities on their respective reserve lands" (paragraph 26). The SCC rejected the attempt to characterize the nature of the claimed right based on "a broad right [of a First Nation] to manage the use of their reserve lands," since this would "cast the Court's inquiry at a level of excessive generality" (paragraph 27). The SCC added the following:

> 27 … Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

[76] In *Mississaugas of Scugog Island*, the employer First Nation had passed its own labour relations code, which it asserted it was entitled to do based on an Aboriginal right to regulate work activities and to control access to Aboriginal lands. It challenged the OLRB's jurisdiction in an application for certification, much like the present case. At paragraphs 31 and 32, the Ontario Court of Appeal described the characterization as "virtually identical" to the claim in *Pamajewon* and rejected it on that basis. In that case, the Ontario Court of Appeal held that the appropriate

characterization of the right claimed was the right to regulate labour relations and not the broad right of self-governance.

[77] In *Conseil des Innus de Pessamit (523)*, the employer asserted that an application for certification made regarding police officers was incompatible with its right to self-govern over the maintenance of law and order and public safety on reserve. The Board considered the decisions in both *Pamajewon* and *Mississaugas of Scugog Island* as part of its analysis and noted that the employer was not challenging the *Police Act*, R.S.Q., c. P-13.1 (which dealt with the provision of public safety generally) but was only challenging the *Code*. Having noted this, the Board read down the responding party's broad claim of self-governance over law and order on the reserve and found that the Aboriginal right in question was the right to regulate labour relations in the field of public safety.

[78] This decision was confirmed on judicial review by the Federal Court of Appeal (FCA) in *Conseil des Innus de Pessamit* v. *Association des policiers et policières de Pessamit*, 2010 FCA 306. Significantly, the FCA considered whether the Board had erred in relying upon the decision of the Ontario Court of Appeal in *Mississaugas of Scugog Island.* The following comments by the FCA are instructive:

> [29] In my opinion, the [Board] did not err in relying on the decision of the Court of Appeal for Ontario to justify its conclusion. At the very least, that decision establishes that the right surrounding labour relations is sufficiently well defined to be claimed and that, whenever a claim has been delineated in a certain manner according to the applicable factors, it should be characterized as such.

[79] Then, in *Conseil des Innus de Pessamit (653)*, the employer also claimed a broad right of self-government. Applying *Van der Peet*, the Board held that the case involved the labour relations between the respondent and its teaching workforce and that the framing of the right claimed as a generic right of self-government was too broad.

[80] With these elements in mind, it is the Board's duty to characterize the Aboriginal right claimed, and it must do so with specificity and in context.

[81] The present matter is an application for certification filed under the *Code* regarding the employer's firefighters. The employer claims that it is not subject to the *Code* based on its

Aboriginal right to establish, maintain and manage the workforce of the fire and emergency services and set employment conditions through a policy or similar measures.

[82] In summary, what the employer asserts is the right to regulate its labour relations in accordance with its Aboriginal culture and tradition and its own Aboriginal rules. It is challenging the application of Part I of the *Code* by claiming that, as a First Nation, it alone should be defining its relationship with its employees in the fire and emergency services. The employer relies on the existence of its pre-contact self-governance and the recognition of such through the Covenant Chain and on three areas of activity that it claims establish the practice, custom or tradition of self-governance and regulation of labour relations within fire services and other emergency responses on Aboriginal lands.

[83] Essentially, the employer claims that it has the Aboriginal right to determine its employees' terms and conditions of employment, whether individually or collectively in collective bargaining. Therefore, to the extent that there is an action taken pursuant to the Aboriginal right claimed by the employer, the Board is of the view that it is the power to operate as an employer without the restrictions of the *Code*.

[84] Therefore, and as was the case in *Mississaugas of Scugog Island*, *Conseil des Innus de Pessamit (523)* and *Conseil des Innus de Pessamit (653)*, the Board finds that the nature of the action that is claimed to have been carried out pursuant to an Aboriginal right is the regulation of labour relations. In short, the employer claims to have the Aboriginal right to regulate its own labour relations.

b. What is the nature of the government regulation, statute or action being impugned?

[85] There is no debate that the statute impugned by the employer's preliminary objection to the union's certification application is Part I of the *Code*. As indicated in its Preamble, Part I is designed to recognize free collective bargaining and freedom of association and to foster the constructive settlement of disputes.

[86] Part I of the *Code* sets out a collective bargaining scheme aimed at establishing sound labour-management relations. Its Preamble states as follows:

> WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;
>
> AND WHEREAS the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;
>
> AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all.

[87] The Board is of the view that Part I of the *Code* is not intended to regulate the self-governance of a First Nation. It is also not intended to regulate the internal relations of an employer or impose a prescriptive dispute resolution method. As the Preamble to Part I of the *Code* states, the emphasis is on free collective bargaining and the constructive settlement of disputes, thus leaving freedom to employers and unions to organize their relationships and their settlement of disputes through negotiations.

[88] Part I of the *Code* is not concerned with the organization of work or the innerworkings of a workplace or of the employer-employee relationship. For example, it does not dictate how the employer needs to make a decision about how the work is to be performed, the scheduling of work or the number of firefighters required by the fire hall for example. Nor is it concerned with how the employer responds to fires or other emergencies. Part I of the *Code* does not impose on the employer a way in which it needs to direct its workforce. It establishes a labour relations regime whereby terms and conditions of employment are to be negotiated with the union, which is the sole representative of the employees in the bargaining unit. Part I of the *Code* does not dictate the content of the collective agreement, though it does require that the parties establish a dispute resolution mechanism, without dictating the form this must take.

[89] Part I of the *Code* establishes a detailed regulatory framework to govern labour relations and to resolve disputes arising between employers and workers in relation to the collective bargaining process. It does not regulate the work activities themselves since that is left for the union and the employer to negotiate and agree upon during the collective bargaining process. Furthermore, it

does not deal with or regulate the fire or other emergency services of the employer and certainly does not regulate the provision and storage of surplus food. Nor does it deal with the construction of palisades or other fortifications for community defence. Finally, it does not deal with or regulate the techniques of fire protection for high-value physical installations.

[90] Therefore, the Board finds that the *Code* is meant to establish a scheme that incorporates collective bargaining into the determination of employment conditions applicable to a group of employees represented by a union. Under such a scheme, the parties develop their own labour relations and engage in the dialogue required for the constructive settlement of disputes (see *Conseil des Innus de Pessamit (653)*).

c. What is the custom, practice or tradition relied upon to establish the existence of the Aboriginal right?

[91] The Aboriginal right claimed by the employer is one of control over the regulation of its relationship with its employees outside the regulatory framework of the *Code*, which establishes a collective bargaining regime and constructive dispute resolution.

[92] The employer relies on two categories of customs, practices or traditions to establish the existence of the Aboriginal right:

i. Self-governance evidenced by the Covenant Chain; and
ii. Three main pre-contact areas of activity, namely the provision and storage of surplus food, the construction of palisades for community defence and the development of techniques of fire protection for high-value physical installations in its territorial homelands.

i. Self-Governance Evidenced by the Covenant Chain

[93] In its submissions on the nature of the right claimed, the employer argues that it has a general right of self-governance that predates contact with Europeans and that this right continues to exist today.

[94] The employer argues that the English Crown has recognized this right of self-governance based on the existence of the Covenant Chain. For the employer, the Covenant Chain establishes its Aboriginal right to self-govern, which translates into its right to self-govern and regulate labour relations within fire services and other emergency responses on Aboriginal lands.

[95] The Board notes that the Covenant Chain was created post-contact and as result of contact with Europeans, specifically the English. Professor Parmenter dates its establishment to the seventeenth century. As the union notes and the Board agrees, the Covenant Chain and Professor Parmenter's comments provide examples of post-contact practices, customs and traditions and, as such, cannot be relied upon to establish or define the Aboriginal right claimed.

[96] However, since it is central to and the majority of the argument presented by the employer in support of its definition of the nature of the claimed Aboriginal right, the Board analyzed the content of the employer's evidence and arguments regarding the Covenant Chain.

[97] Having carefully reviewed the evidence presented on the Covenant Chain, for the Board, even if this evidence could be relied upon to define the nature of the Aboriginal right that existed pre-contact, the Covenant Chain is evidence that the Haudenosaunee and the English Crown engaged in negotiations with a precise and important form of diplomacy based on mutual respect and on a nation-to-nation basis. In describing the Covenant Chain, Professor Parmenter states that it is a representation of the Haudenosaunee's protocols and mechanisms of diplomacy, which are based on process rather than product. He also explains that the Covenant Chain contains certain mutual pledges between the Haudenosaunee and the English Crown, namely the offering of condolences for the dead, promotion of the concept of unity, the cultivation of good understanding, the maintenance of clear channels of communication, the sharing of intelligence in a timely manner, the obligation to reconcile any breach of the Covenant Chain, "tough talk" between allies, the provision of mutual defence and protection and the extension of the chain to other nations. The Covenant Chain also contains various obligations of the English Crown, such as the provision of a reliable supply of inexpensive trade goods, rendering justice in a benevolent fashion and providing protection from fraudulent land transaction. Finally, it contains obligations for the Haudenosaunee, such as assisting the English Crown in extending the Covenant Chain to other Indigenous nations, preventing French travel, trade or settlement south of the Great Lakes and restraining their young male warriors from assaults on other English-allied Indigenous nations.

[98] However, for the Board, upon close analysis, these are concepts, principles, undertakings and pledges that are related to those contained in treaties.

[99] Through its argument on the Covenant Chain, the employer is essentially asking the Board to treat the Covenant Chain as a treaty that sets out the employer as sovereign and self-governing and recognized as such by the English Crown. Based on this English Crown recognition of self-governance, the employer then asks the Board to also recognize its self-governance and therefore not subject it to the jurisdiction of the *Code*. At page 67 of his report, Professor Parmenter states that through the Covenant Chain and its process, the English "Crown demonstrated its respect for the inherent right of the Haudenosaunee to self-government in areas **not** explicitly negotiated in the treaty process—among which are the right to self-govern its Labour Relations within fire services and/or other emergency responses (i.e. protection like police)."

[100] However, the present matter is not a claim of treaty rights pursuant to section 35(1) of the *Constitution Act*. It is a claim of an Aboriginal right.

[101] As stated at paragraph 140 of *Mitchell*, cited above, a claim of an Aboriginal right is rooted in practices that long preceded first contact. It is not rooted in treaty rights that are attempts to hold the Crown to its promise.

[102] Even if the Board were to accept that the Covenant Chain captures practices that preceded first contact that could be likened to an existing Aboriginal right, it only captures the fact that prior to contact, the Haudenosaunee were a sovereign nation and that upon contact with the English Crown, they engaged in a precise form of diplomacy or relationship between nations with various engagements, rights and obligations. It may be said, however, that it supports the employer's position that the Haudenosaunee sought mutual benefit in their negotiations, mutual respect and mutual engagement to coexist in peace without interference in the other party's affairs. It also supports the existence of these important political and cultural values that the Haudenosaunee had at the time of contact and after contact. The Board recognizes that Chief Hill testified that these values are still very present in the Haudenosaunee and support the employer's work.

[103] However, while this evidence may establish how the employer engaged in negotiations pre-contact, it does not establish that pre-contact or even at the time of contact the Haudenosaunee

regulated labour relations or organized their labour in any way or engaged in any negotiations akin to collective bargaining. It does not define a precise Aboriginal right other than the general right of self-governance claimed by the employer. It provides no insight into the framework used by the Haudenosaunee to govern labour relations and to resolve disputes arising between those commanding the work and those performing the work.

[104] The Board notes that in *Mississaugas of Scugog Island*, the employer had relied on the Covenant Chain to claim a treaty right. Similarly to Professor Parmenter, the Ontario Court of Appeal, in reviewing the original OLRB decision, described the Covenant Chain as follows:

> [49] … The appellant asserts treaty rights under the Covenant Chain relationship, confirmed by the Treaty of Niagara of 1764. Neither the Covenant Chain nor the Treaty of Niagara is the subject of a specific instrument or agreement. The Covenant Chain, in the words of the appellant's expert, Prof. Walters, consists of various "oral engagements and rituals at 'council fires' that were modeled upon Aboriginal legal forms and customs" and came "to embrace an entire set of constitutional assumptions about the relationship between the Crown and Indian nations". The Covenant Chain "secured peace, friendship, and military alliance between the parties; it also provided a 'council fire' at which issues of common concern could be discussed and resolved". Professor Walters describes the records of the Treaty of Niagara as being "relatively brief" and consisting of "speeches…given in the style and tradition of Covenant Chain protocol". The OLRB characterized the Covenant Chain, at para. 90, as "a set of documents and corresponding related historical events… [that] illustrates the development of the relationship between First Nations parties and European powers".

[105] The Ontario Court of Appeal found that the Covenant Chain was general in nature. The Court stated:

> [50] For the purposes of this appeal, I do not find it necessary to delve into the history of the Covenant Chain and the Treaty of Niagara or to determine their precise legal nature and status. Put at its highest, the appellant's treaty claim, like its aboriginal rights claim, is general in nature and amounts to this: the aboriginal people were promised that they could live as they had lived before contact and that their customs and customary law would be protected. There is no evidence arising from the records and conversations that comprise the Covenant Chain and the Treaty of Niagara of any specific term or promise that goes beyond a general understanding that, in the words of Prof. Walters, "provided the foundational terms for the Crown's claims to sovereignty over Canada–and those terms were understood by native and non-native delegates alike to include the right of self- determination within native communities and lands".

[106] The Ontario Court of Appeal then adopted the OLRB's assessment, stating the following:

> [51] I agree with and adopt the OLRB's assessment of the treaty claim, at paras. 92-93:
>
> > It is undisputed that the Covenant Chain does not touch in any way upon the organization of the performance of labour. Rather, the First Nation argues that the

> Covenant Chain continues the aboriginal right of self-government that predated first European contact and has, since then, not been surrendered.
>
> The practices which are protected under the Covenant Chain, according to the First Nation, are cast at the same level of generality as those asserted as… inherent rights. It is clear even from the evidence relied upon by the First Nation that rights which might have been continued from this 'treaty' have nothing to do with and do not speak in any way to the regulation of activity as between employers and employees.

[107] For the Board, the same can be said in the present case. Therefore, the Board finds that the Covenant Chain may serve to confirm the general nature of the relationship between the Haudenosaunee and the English Crown. However, the Board also adopts the finding of the Ontario Court of Appeal in *Mississaugas of Scugog Island.* It finds that the Covenant Chain does not establish an inherent right of the Haudenosaunee to govern all their internal affairs, which would include the governance of their labour relations as Professor Parmenter opines it should. This is because the practices, customs or traditions that the employer claims are protected under the Covenant Chain are cast at too high a level of generality. It is clear even from the evidence relied upon by the employer and presented by Professor Parmenter that rights that might have been continued from the Covenant Chain have nothing to do with and do not speak in any way to the regulation of labour relations activities or activities as between employers and employees.

[108] The Board is of the view that to interpret the Covenant Chain as providing for a general Aboriginal right of self-government on reserve lands—which, due to its broad nature and scope also means that the Aboriginal right extends to labour relations—would mean that the Covenant Chain grants the employer virtually unlimited breadth and amplitude exceeding anything seen to date in the jurisprudence on Aboriginal treaty rights.

[109] Therefore, the Board agrees with the union that a more specific description of the nature of the Aboriginal right is required than the employer's general claim of self-governance and regulation of labour relations within fire services and other emergency responses on Aboriginal lands.

ii. The Haudenosaunee's Organization of Labour in Three Areas of Activity

[110] In support of its claim regarding the existence of an Aboriginal right, the employer relies on the claim that, pre-contact, it organized collective labour in three primary areas of activity, namely the provision and storage of surplus food, the construction of palisades for community defence

and the development of techniques of fire protection for high-value physical installations in its territorial homelands.

[111] The union argues and the Board agrees that none of these three areas of activity relate to a broad right to self-governance over labour relations. The Board also agrees with the union that, taken at their very broadest, they are related to the organization of work in the community or to the performance of work and do not relate to the regulation of labour relations as Part I of the *Code* does.

[112] The Board reviewed the evidence provided by Professor Parmenter on the Haudenosaunee's organization of work pre-contact. He explained that pre-contact, the work was organized communally by the Chief or the most senior women in the community, using non-coercive means such as negotiation, consultation and the involvement of other members of the community. Professor Parmenter testified that wage labour among the Haudenosaunee started mainly with their participation in military service in the 1800s. He confirmed that the practice of selling labour in a marketplace for exchange of wages was only after contact and that this was an eighteenth-century phenomenon.

[113] The Board also reviewed closely the OLRB's decision in *Great Blue Heron Gaming*, in which the OLRB stated the following:

> 63. … There can be little doubt that all human societies at any given historical point have universally but in some particular fashion, organized the way in which labour within the society is performed. It is only through the expenditure of labour that the necessaries of life may be obtained. There is also little doubt that the way in which labour is organized has often been quite specific to the historical and political circumstances of a particular society. But the First Nation is not proposing to govern labour organizations in a way that is consistent with a particular historical tradition or practice.
>
> 64. What is being suggested here is that the mere fact that labour was organized within the society of the First Nation, in some way (or any way) with no greater degree of specificity, is the basis for asserting that this (the right to organize labour) is a particular aboriginal right. Following *Pamajewon*, I find that this assertion is also cast at an excessive level of generality and cannot be accepted as an appropriate characterization of the rights asserted in this case.
>
> 65. Having regard to the three factors described in *Van der Peet* and discussed further by the Court in *Mitchell*, and more particularly the discussion in *Pamajewon*, what then is the appropriate characterization of the asserted rights in this case? The "action" which is the expression of the right is the passage and enforcement of a labour relations code as we understand that term in contemporary Canadian society. The governmental action is the enforcement of the Act (a labour relations code). The underlying right must be something more specific than self-government and/or

> the ability to organize labour. In these circumstances the proper characterization of the rights asserted here is the right of the First Nation to regulate labour relations on their reserve lands.

[114] For the Board, in the present case, the employer relies on the very broad concept of the existence of pre-contact organization of work and performance of work in three main areas of activity to support its claim that it has an Aboriginal right that excludes it from the application of Part I of the *Code*. The Board is of the view that these three areas of activity may establish that work was done pre-contact in some form of organized fashion and, according to Professor Parmenter, this was done on a communal and non-coercive basis. However, as will be explained below, they do not provide insight into the framework used by the Haudenosaunee to govern labour relations and to resolve disputes arising between employers and workers in relation to the collective bargaining process, for example. Furthermore, the Board also finds, as was the case in *Great Blue Heron Gaming*, that an Aboriginal right cannot be established simply based on the fact that the employer organized its labour pre-contact since "all human societies at any given historical point have universally but in some particular fashion, organized the way in which labour within the society is performed" (paragraph 63). Therefore, and again as was found in *Great Blue Heron Gaming*, and as the union argues, the description of the underlying Aboriginal right must be something more specific than self-government and the ability to organize or perform labour.

[115] However, the Board notes that the employer is relying on these three areas of activity, because they, in the employer's view, relate to work and its method of organization in fire and other emergency services. In short, the employer is relying on these to establish and argue that it should not be subject to Part I of the *Code* because, pre-contact, it had self-governance over fire services and other emergency services and could organize the work of these services.

d. The Board's Decision on Step 1(a)

[116] Therefore, upon review of the three factors found in *Van der Peet* to be considered to properly characterize the nature of the Aboriginal right, the Board finds that the Aboriginal right should be characterized as **the employer's right to regulate labour relations in the area of fire services**.

[117] The Board came to this conclusion by determining that the precise nature of the action that is claimed to have been carried out pursuant to an Aboriginal right is the specific regulation of labour relations, and not the broad right to self-governance.

[118] For the Board, this also reflects the nature of the *Code*, the impugned legislation that the employer claims infringes on its Aboriginal right. The *Code* regulates labour relations and establishes a scheme that incorporates collective bargaining into the determination of employment conditions applicable to a group of employees represented by a union and where, under such a scheme, the parties develop their own labour relations and engage in the dialogue required for the constructive settlement of disputes.

[119] The Board is also of the view that this description of the nature of the Aboriginal right is sufficiently precise and appropriate in light of the practices, customs or traditions relied upon by the employer to establish the right. The employer links the practices, customs or traditions to the organization or performance of work.

[120] Finally, this description of the nature of the First Nation's claim to an Aboriginal right is specific enough to reflect the precise department and group of employees that is the subject of the application for certification and that is to be subject to the application of Part I of the *Code*, which is being challenged. For the Board, this definition of the nature of the right claimed is not overly broad.

[121] The Board found that the general claim of self-governance presented by the employer based on self-governance evidenced by the Covenant Chain was overly broad. Therefore, it proceeded with removing the concept of broad self-governance from the employer's definition of the claimed Aboriginal right, and the employer's definition of the nature of the Aboriginal right was left to read as follows:

> The Aboriginal right to regulate labour relations within fire services and other emergency responses on aboriginal lands.

[122] The Board then noted that the union's proposed definition of the claimed Aboriginal right reads as follows:

> The right to regulate labour relations in the area of emergency services.

[123] The Board recognizes that the employer relied on three practices, customs or traditions and that two of those had more to do with emergency services than fire services, namely the provision and storage of surplus food and the construction of palisades for community defence. The third practice, custom or tradition relied upon by the employer was the development of techniques of fire protection for high-value physical installations in its territorial homelands, which, for the Board, related to fire services. The Board also recognizes that the union suggests that the right should be described as existing in the area of emergency services.

[124] To resolve the differences in the description of the precise nature of the Aboriginal right, and to ensure a specific and accurate description of the Aboriginal right, the Board reviewed various corporate documents submitted into evidence by the employer that purport to deal with the present fire and other emergency services. The Board notes from these documents that the employer has a Corporate and Emergency Services Committee that deals with various issues, including but not limited to the fire services. Other documents, such as public notices, use the terminology “Six Nations Fire Department” and describe a group called “Six Nations Emergency Control group.” The department that is the subject of the application for certification is called at times the “Fire Services” and other times the “Fire and Emergency Services” and comprises full-time, part-time and/or volunteer firefighters, captains and a fire chief. The Board was also presented with confidential documents that state that certain individuals were hired as district chiefs with the “Six Nations Fire & Emergency Services.”

[125] The Board also reviewed the testimony of Mr. Jamieson in which he described the various services offered to the community and explained that there existed, among other things, a “Fire and Emergency Services” and described separate services of “Paramedics” and “Police Services.” He also explained that there are many departments and therefore, departments are grouped together in committees. He explained that the fire services are discussed at the twice-monthly meetings of Corporate and Emergency Services. He further explained that the Fire Department operates under the fire chief who in turn reports to him as the Chief Executive Officer for the employer. He added that the paramedic services report through the health services but that the employer was “looking at putting all such services through a department of Emergency Services.” He also explained that the employer had an Emergency Response Committee that was a broad committee made up of the police, paramedics, members of the Elected Council, the business

community and the employer's administration. This committee is responsible for the Emergency Response Plan.

[126] Based on those facts, the Board determined that the employer's fire services are different from the broader emergency services, which encompass in some documents or committees, other groups of employees such as members of the police or paramedics services, other managerial hierarchies and other activities than those of the fire services. Furthermore, the Board finds that the group of employees subject to the application for certification in the present case are clearly and specifically members of the fire services and all report to the fire chief. Moreover, it is for that specific and specialized group of fire services employees that the employer is arguing the existence of an Aboriginal right. In short, the employer is asking that Part I of the *Code* not apply to the employees in the fire services based on the existence of an Aboriginal right to regulate the labour relations of these individuals. Therefore, for the Board, the nature of the claimed Aboriginal right should be precisely described to cover only the area of fire services.

[127] As such, the Board finds that the claimed Aboriginal right should be characterized as the employer's right to regulate labour relations in the area of fire services.

B. Step 1(b)

[128] In step 1(b) of its analysis, the Board must determine whether the employer has established, based on the evidence adduced: (i) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and (ii) that this practice was integral to the distinctive pre-contact Aboriginal society.

1. The Position of the Employer

[129] The employer submits that governance by its ancestors, including with respect to what is now referred to as "labour relations," was central, vital, integral, distinctive, essential and significant to the practices, traditions and customs of such ancestors pre-contact. The employer submits that this is evidenced in two main areas of practices, traditions or customs:

1) Self-governance evidenced by the Covenant Chain; and
2) The Haudenosaunee's organization of labour in three areas of activity.

a. Self-Governance Evidenced by the Covenant Chain

[130] The employer submits that the Six Nations have, and their historical predecessors and ancestors pre-contact had, the inherent right to self-government. As Professor Parmenter explained in his testimony and his report, prior to European contact, "the Haudenosaunee practiced a non-coercive form of internal governance that included distinctive practices and traditions concerning labour relations" (page 68). The ethos of living for other people was central. The Traditional Chiefs would use non-coercive skills such as communication, negotiation, diplomacy and leverage to convince individuals to do what was in their interest. They also organized themselves into the League or Confederacy.

[131] The employer argues that this right to self-governance included the right to govern itself, which significantly, was recognized by the Covenant Chain between the Haudenosaunee and the English Crown.

[132] The employer relies on the testimony of Professor Parmenter, who explained that the terms of the Covenant Chain prevented "unwanted interference by one party in the other's internal affairs." He then concluded that the record of the Covenant Chain "supports the conclusion that the [English] Crown recognized the sovereign nationhood of the Haudenosaunee League, that the Crown conducted diplomacy and concluded treaties with the Haudenosaunee League on a nation-to-nation basis." Professor Parmenter then added the following:

> … by agreeing to specific, limited terms of respective and mutual obligations in those treaties, the Crown demonstrated its respect for the inherent right of the Haudenosaunee to self-government in areas not explicitly negotiated in the treaty process—among which are the right to self-govern its Labour Relations within fire services and/or other emergency responses.
>
> (pages 66–67)

[133] The employer submits that this acknowledgement and recognition by the English Crown of a central, vital, integral, distinctive, essential and significant right of the Haudenosaunee to govern their affairs through the Covenant Chain must be respected and continued.

[134] The employer argues that the evidence also reveals that the pre-contact Haudenosaunee had a Condolence Ceremony, which Professor Parmenter describes in his report as being "an

internal mechanism for promoting conflict resolution and orderly political succession" (page 18). He further states that the Haudenosaunee modelled their Covenant Chain diplomacy with the English Crown post-contact on this Condolence Ceremony.

[135] The employer argues that the Haudenosaunee approach to trade and diplomacy was based on a commitment to good understanding and frequent meetings, elements that were as important to them as the end result. As Professor Parmenter stated, the Haudenosaunee practiced a non-coercive form of internal governance, such as the ethos of living for other people, communication, diplomacy and leverage to convince people to do what was in their interest.

[136] Based on this evidence, the employer submits that pre-contact, it had the inherent right of self-governance that supports its claimed Aboriginal right to regulate labour relations in the area of fire services.

b. The Haudenosaunee's Organization of Labour in Three Areas of Activity

[137] The employer argues that the practices and traditions of the Haudenosaunee regarding the collective organization of labour and direction of fire prevention and other emergency services were integral and distinctive to the Haudenosaunee society prior to contact.

[138] In his report, Professor Parmenter explains the importance of organizing the labour of community for the purposes of emergency response, including fire prevention and protection, as follows:

> Haudenosaunee cultural development prior to the arrival of Europeans in North America occurred in a context "in which hostile encounters with individuals of other groups were common." To account for these conditions, the Haudenosaunee organized their collective labour for the purposes of community security and/or emergency response in three interrelated ways: 1) the production and storage of surplus food, 2) the use of defensive palisades to protect community members (and their stored food surplus) from enemy attack, and 3) the articulation of sophisticated techniques of fire protection at particularly important sites of economic value to the community.
>
> …
>
> ● The evidence cited in this report is derived entirely from a Haudenosaunee historical context and therefore substantiates the claim that the practices, customs, and traditions described herein are integral to the Six Nations' distinctive culture prior to European contact.
>
> ● Haudenosaunee practices concerning the organization of collective labour for the purposes of community security and/or emergency response are by their very nature integral to their distinctive

> culture prior to contact insofar as those practices helped ensure the survival of that culture to the present day.
>
> (pages 86–87)

[139] The employer argues that this last point by Professor Parmenter bears emphasizing: it is difficult to imagine a practice that is more integral to a community than a practice that "helped ensure the survival of that culture to the present day" (page 87).

[140] The employer argues that, as described in detail above, Professor Parmenter also testified that the labour of people in the community was organized in a way that supported the broader community objectives, including survival. In its view, this reinforces the distinctive and integral nature of this practice.

[141] The employer submits that Professor Parmenter testified and stated in his report that the Haudenosaunee's organization of collective labour for the purposes of community security and/or emergency response was evident in three primary spheres of activity:

> ● … 1) the provision and storage of surplus food, 2) the construction of palisades for community defense, and 3) the development of techniques of fire protection for high-value physical installations in their territorial homelands.
>
> (page 68)

[142] The employer notes that Professor Parmenter came back to this key point about "the organization of collective labour for the purposes of community security and/or emergency response" repeatedly in his evidence. For example, he discussed how French explorer Samuel de Champlain initiated an attack on an Onondaga fishing site on October 11, 1615, and it was iterated in Champlain's account of the incident that the Onondaga people built a structure to put out fires and were able to manage their people and resources in this emergency. Additionally, Professor Parmenter discussed how the labour of people was organized in a way to support the broader community. Professor Parmenter used the example of food security. Not only were the Haudenosaunee providing for their immediate family needs, but they were also providing a resource for the community. This assisted the Haudenosaunee in avoiding starvation and surviving to the present day.

[143] The employer submits that the significance of organizing collective labour to address and maintain fire prevention and other emergency response services dates back, at least, to 1615. Professor Parmenter notes the importance of these services in his report:

> On October 11, 1615, French explorer Samuel de Champlain, accompanied by Wendat and Algonquin allied warriors, initiated a siege of "Kaneenda," a fortified Onondaga fishing station…
>
> To facilitate his attack on this heavily-defended Onondaga installation, Champlain arranged for the construction of an elevated platform (or "cavalier") of greater height than the palisade to enable three of his firearm-bearing French "arquebusiers" to shoot their guns down into the structure while his Indigenous allies attempted to set fire to exterior of the palisade in hopes of forcing the Onondaga defenders out of the structure for hand-to-hand combat. The confusion caused by the noise and smoke of the siege hindered the coordination of the attackers, permitting the Onondagas to take:
>
> > advantage of our confusion to go for water and poured it out so plentifully that one would have said streams were falling from their spouts, so much so that in no time they completely put out the fire and this without on that account ceasing to shoot their arrows, which fell upon us like hail.
>
> …
>
> The successful Onondaga defense of their palisaded fishing station in October 1615 demonstrates that Haudenosaunee people at the time of European contact possessed the capacity to organize collective labour for the purposes of community security and/or emergency response. In this case, the Onondagas employed techniques of fire prevention to protect their access to a valued source of food (fish, particularly salmon) for their community. The textual description of Kaneenda's palisade and "water-spouts" provided by Champlain represents crucial evidence of the elaborate fire protection techniques employed by the Onondagas, as well as the great deal of labour they invested in those techniques…
>
> (pages 83–86)

[144] During his oral testimony, Professor Parmenter commented on the significance of this incident and of the unusually good evidence in relation to it. He stated as follows:

> When archeologists dig sites of pre-contact area, they don't have evidence above the ground. Can map out the post moulds, where the soil looks different because the posts existed. We can speak to the organization of these structures from the ground level. The Champlain document describes the architecture above the ground. There are other examples where people describe native people in palisades putting out a fire. This is the only one describing the architectural elements put in. This is a valuable fishing site. Many people of the Onondaga community were engaged in fishing and harvesting. A lot of people were exposed away from the home settlement. This one had the apparatus that Champlain described to put out the fire. Champlain's account is an account of a failure. Unable to storm the settlement; they lose. Champlain takes two arrows. Here he said this is what they had, what they did and could not overcome. Also, says never seen anything like this. People will say that is one example, yeah that is right, but it is an amazing example. This is a contact moment. The Onondaga people built a structure and had the ability to manage people in an

> emergency attack. Yes, at a certain level can call it exceptional, but also look at it another way that we have this window looking into pre-contact evidence that is so rare. Talk about qualitative and quantitative evidence. This is quality. What does emergency management look like at the time of contact? When I was asked that question, I remembered this stunning incident. You expect Europeans to win, and they don't. They lose in part because the technology the native people developed and the way they organized their community response. This speaks volumes to the question at stake here. We don't have a manual of fire regulations in Onondaga's fishing station. We have an account from a widely recognized source that speaks to the incident at hand. This is very instructive and helpful in how these communities organized labour in emergency response. This would include stopping an invader, food storage—that is what emergency management was in these communities in 1615.

[145] The employer submits that it has procured this rare evidence through the first-hand account of the incident documented by Champlain dating back over 400 years. This incident was documented as part of Professor Parmenter's expert evidence. The employer suggests that the union was unable to marshal any evidence or witnesses to contradict or diminish the detailed and authoritative expert evidence tendered by the employer. For the employer, that expert evidence unequivocally supports its claim to the particular right to self-govern with respect to certain labour relations.

[146] The employer argues that, instead of calling its own evidence, the union attempted to lessen the significance of Champlain's account by arguing an unduly narrow interpretation of the evidence, asserting that the incident was "insufficient to establish a distinctive and integral practice with respect to the regulation of labour in the area of emergency services."

[147] The employer submits that the union's interpretation of the evidence required to claim an Aboriginal right is indeed impossible to meet and sets an unrealistic and unattainable standard that would, practically speaking, make it impossible for any First Nation to successfully claim such a right. The employer argues that that cannot have been, and was not, the intention behind recognizing Aboriginal rights to self-government in section 35(1) of the *Constitution Act*. Nor is it consistent with the test established by the SCC in *Van der Peet* and elaborated in the case law. That case law makes clear that evidence in these types of cases must be given a general and liberal interpretation (see *Van der Peet*, at paragraph 24).

[148] The employer submits that although the union seeks to diminish the Champlain incident by saying it is but one example, the fact that such a detailed account is documented at all is

extraordinary. It would be an error to let the lack of quantity of the evidence overshadow its quality. As the SCC stated in *Van der Peet*:

> 68 … a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. …

[149] Moreover, the extent to which Champlain documented these techniques and structures speaks to how unique and distinctive the particular architecture was at that time. His reflections demonstrate the importance of the techniques and structures. In the employer's view, this evidence should be accorded considerable weight and not be disregarded, as the union argues.

[150] For the employer, the union misapplies the law when it argues that the development of techniques of fire prevention is true of every human society. The law requires the activity to be an element of a practice, custom or tradition integral to the group claiming the right, but the test does not require the practice, custom or tradition to be "distinct" (i.e., unique). Rather, it must be "distinctive" (i.e., characteristic of the community). This is an important difference. The requirement is for a practice, custom or tradition that is "distinctive" in the sense of **being central and significant to the culture and part of what made the culture what it was, but not "distinct" in the sense of being unique or different from other societies**.

[151] For the employer, as Professor Parmenter's evidence established, these techniques are truly distinctive because they are part of why the Haudenosaunee have survived as a society to this day.

[152] Moreover, the union claims that contact with Europeans was the catalyst for the Haudenosaunee entering into the wage labour market. The employer argues that, as the SCC stated in *Van der Peet*, practices arising solely as a response to contact with Europeans are not subject to protection under section 35(1) of the *Constitution Act.* However, the union's insinuation that all labour must be wage labour is, in addition to being historically inaccurate, Western-centric and insulting. Wage labour is, generally speaking, a European practice. The SCC has been clear that Aboriginal rights are not frozen in time and do not require that the society not evolve its practices to the modern day. For example, in *Van der Peet*, the SCC stated the following:

> 64 The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow*, *supra*, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time." The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

[153] Therefore, according to the employer, even if pre-contact labour evolves to wage labour, this does not extinguish the Aboriginal right. Such an evidentiary limit would punish Aboriginal peoples for contact with Europeans, which was forced upon them.

[154] Finally, the union asserts that the "activities of the [Band] Council itself cannot be said to be a continuity of precontact self-governance because the Elected Council itself [as opposed to the Traditional Council] was the creation of the Canadian government." The employer submits that the union's argument cannot be accepted. The union's argument would have the effect of permitting the colonialist structures and actions that created elected band councils, and which were designed to subjugate Aboriginal culture and leadership structures and were forced upon First Nations against their will, to extinguish fundamental rights and make reconciliation impossible. This would be perverse and wrong.

[155] For the employer, to accept this position would make it impossible for any pre-contact constitutional right to ever be recognized or enforced. These submissions therefore cannot be accepted.

[156] Consequently, the employer submits that it has established the existence of a pre-contact practice, tradition or custom, which was supported by practices and traditions of the Haudenosaunee, specifically the collective organization of labour for the purposes of community security and/or emergency response.

[157] Based on the above, the employer submits that all these practices, customs and traditions of the Haudenosaunee regarding the collective organization of labour and direction of fire prevention and other emergency services were integral and distinctive to the Haudenosaunee society prior to contact.

2. The Position of the Union

[158] The union submits that the employer has failed to establish the existence of a distinctive pre-contact right that supports the right to regulate labour relations in the area of fire services.

[159] The union argues that the SCC and other courts and tribunals have set out on numerous occasions that not all Aboriginal practices are subject to the protection of section 35(1) of the *Constitution Act.* Where the courts have been asked to undertake a section 35(1) analysis, they have done so with a view towards reconciling the fact of Indigenous sovereignty that predates the Crown with the sovereignty of the Crown.

[160] Bearing this in mind and advancing an approach that is consistent with this purpose, the union argues that the test for identifying the Aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act* in *Van der Peet* must be directed at identifying the crucial elements of pre-existing distinctive First Nation societies. It must, in other words, aim to identify the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans. Ultimately, the union notes that the SCC held in *Van der Peet* that a protected activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Indigenous group claiming the right.

[161] The union submits that the SCC went on to provide specific guidance in identifying which activities are protected by section 35(1) of the *Constitution Act*. In *Van der Peet*, it provided the following comments:

> 55 To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, **that the practice, custom or tradition was one of the things which made the culture of the society distinctive—that it was one of the things that truly made the society what it was**.
>
> 56 This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. **The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the**

> **aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).**
>
> (emphasis added)

[162] The union notes that the employer relies upon the Covenant Chain and on three specific practices of the Haudenosaunee in support of its claimed right: (1) the provision and storage of surplus food; (2) the construction of palisades for community defence; and (3) the development of techniques of fire prevention for high-value physical installations in its territorial homelands.

[163] For the union, the evidence, including the central report of Professor Parmenter, provides no basis on which these can be found to meet the test set out in *Van der Peet*.

a. Self-Governance Evidenced by the Covenant Chain

[164] As argued above, for the union, the Covenant Chain discussions are examples of post-contact practice and, as such, cannot be relied upon to establish an Aboriginal right. It argues that it is not possible to rely on this evidence to establish a pre-contact practice of regulating labour relations.

[165] In the union's view, all the Covenant Chain document establishes is that the English Crown and the Haudenosaunee engaged in negotiations within a particular framework around those items negotiated. A review of the documents cited by Professor Parmenter shows that the regulation of labour in even the broadest sense was not a matter raised in the Covenant Chain meetings. The Covenant Chain deals with the relationship between the English Crown and the Haudenosaunee with a focus on trade and warfare issues. It is not possible to rely on this evidence to establish a pre-contact practice of regulating labour relations. For the union, nothing in the Covenant Chain documents deals with the relationship between employers and their employees.

[166] Furthermore, the union submits that the assertion by Professor Parmenter that the Covenant Chain constitutes recognition by the English Crown of a right to mutual non-interference is inconsistent with the source documents on which he relies for the reasons set out above. In any event, for the union, the Covenant Chain was considered in *Mississaugas of Scugog Island* in the same manner that the employer suggests Professor Parmenter's evidence should be interpreted. However, the Ontario Court of Appeal rejected the assertion, stating that accepting the Covenant

Chain as a treaty would require it “to accept an aboriginal right of self-government on reserve lands of virtually unlimited brea[d]th and amplitude and exceeding anything seen to date in the jurisprudence of aboriginal treaty rights” (paragraph 52).

b. The Haudenosaunee’s Organization of Labour for the Purposes of the Three Areas of Activity

[167] The union notes that the employer relies upon the fact that it has the self-governance right to the organization of collective labour for the purposes of community security and/or emergency response based on three primary areas of activity, namely the provision and storage of surplus food, the construction of palisades for community defence and the development of techniques of fire protection for high-value physical installations in its territorial homelands.

[168] The union notes that the OLRB in *Great Blue Heron Gaming* rejected an alleged right to “organize” labour as too broadly framed given that all societies have organized labour in specific and particular ways. The right in question here is whether there is a right to regulate labour relations, that is, the relationship between employers and employees.

[169] For the union, the evidence from Professor Parmenter is crystal clear. There was no practice of employment among the pre-contact Haudenosaunee. The key element of employment—that is, the exchange of wages for service—was totally absent. Instead, work was organized communally. The key organizer was either the Chief or the most senior women, and they accomplished their task principally by using non-coercive means such as negotiation, consultation and the involvement of other members of the community. By Professor Parmenter’s reckoning, wage labour among the Haudenosaunee started mainly with their participation in military service in the 1800s. For the union, there was quite simply no practice of regulating labour relations among the Haudenosaunee pre-contact because there were no labour relations among the Haudenosaunee pre-contact.

[170] The union argues that the first two practices that the employer relies upon are not related to the provision of fire or emergency services. The central concept in Professor Parmenter’s report appears to be that the storage of surplus food and the construction of wooden palisades are “emergency services” in the sense that they both relate to military conflict. The palisades provided

defence to Haudenosaunee villages that were frequently under attack from enemies and needed protection, and the surplus food was necessary because the destruction of fields and food stores was a common tactic in pre-contact warfare.

[171] The union argues that this concept casts that dispute at too high a level of generality. Put simply, the modern day firefighters working for the employer are not engaged in warfare, nor are they engaged in harvesting food.

[172] Moreover, the union submits that the employer has failed to lead any evidence regarding the establishment of wage labour with respect to constructing palisades or harvesting foods and that this fact is fatal to its claim.

[173] The union submits that in *Mississaugas of Scugog Island*, the employer similarly attempted to rely on extremely broad practices to justify its alleged right to regulate labour relations. In that case, the evidence showed that the Anishinaabe used a village council consisting of the chiefs and elders of each family to determine which families would have access to which fields, fisheries, hunting areas or trade routes and that these councils were also involved in the organization of planting and hunting. In considering whether this evidence demonstrated a distinctive Aboriginal right to regulate labour relations, the Ontario Court of Appeal in *Mississaugas of Scugog Island* agreed with the OLRB's reasoning in *Great Blue Heron Gaming*, stating the following:

> [38] I entirely agree with and adopt the OLRB's conclusion on this aspect of the case:
>
> > The evidence also established conclusively, that the regulation and management of labour relations as we understand that term, was in no way part of the traditional culture or practices of the First Nation. There can be no doubt… that there were no employees or employers and certainly no groups or organizations analogous to trade unions that purported to represent the interests of either employers or employees within the society. There was no labour market, nor anything resembling a wage-labour relationship where labour would be sold in exchange for some form of compensation. There is no evidence at all to suggest that the First Nation had a traditional practice whereby a decision making council (like the Dbaaknigewin) dealt in a hierarchical and coercive (terms used in the evidence) way with the regulation of relationships between what we might think of as employers, employees and groups of employees.
> >
> > Even if one were to recast the notion of "labour relations" at a much higher level of generality, there is nothing in the evidence and information provided by the First Nation to suggest that there was a practice of organized relationships delineating responsibilities and obligations as between those who would perform labour, and those who would have labour performed. Moreover, (and this goes to the second

> branch of the test) it can certainly not be said that any such relationships formed an integral or defining part of First Nation's society.

[174] The Ontario Court of Appeal elaborated on these comments in its decision:

> [39] … even if we were to accept the appellant's characterization of the right as an aboriginal practice to regulate work activities and access to aboriginal lands, such a practice could not be said to be integral to the distinctive culture of the appellant. In *Van der Peet*, at para. 56, the Supreme Court rejected "aspects of the aboriginal society that are true of every human society (e.g., eating to survive)" as practices capable of supporting an aboriginal right and insisted that the focus be "on the aspects of the aboriginal society that make that society distinctive." The evidence led as to the traditional regulation of work activity bears no relation to modern collective bargaining. The appellant cannot escape this deficiency by relying on the fact that the aboriginal society organized the work activities of its members: the organization of work at that level of generality is a feature of every human society.

[175] For the union, the same reasoning should apply to the present matter. The employer has presented no evidence demonstrating any practice of employment or labour relations in the harvesting of food or the construction of palisades. Without such evidence, the employer's claim is little more than a claim that it had a pre-contact practice of organizing work generally—something that is true of all societies.

[176] The employer also relies upon the development of techniques of fire prevention for high-value physical installations. In support of this claim, the only factual assertion that it relies upon is the Champlain incident that occurred on October 11, 1615, described in Professor Parmenter's report.

[177] The union explains that the incident in question involves Champlain and his Wendat and Algonquin allies laying siege to an Onondaga fishing station. The station was protected by wooden palisades, each of which were equipped with gutters or waterspouts. When Champlain's allies lit fire to the palisades, the Onondaga responded by pouring water into the gutters, which caused the water to be poured on the fire. In the footnotes of his report at page 84, Professor Parmenter provides further comments and notes that at least one author believes that the Onondaga, one of the Six Nations, used bark holding tanks to transport the water.

[178] For the union, this incident alone is insufficient to establish a distinctive and integral practice with respect to the regulation of labour in the area of emergency services. The evidence establishes the techniques used to extinguish a fire in one instance at one location by one of the

six nations making up the Haudenosaunee Confederacy. For the union, that is the limit of this evidence.

[179] Nothing in the report speaks to how the group extinguishing the fire was organized—that is, who actually extinguished the fire and how they were directed. This is entirely unsurprising given that the account of the incident came from the invaders and not from the community itself.

[180] The union argues that the evidence contained in the report from Professor Parmenter only establishes that the Onondaga developed techniques for fire prevention, specifically the extinguishment of fires on wooden palisades by using water poured into gutters. It provides no evidence about how the labour of the firefighters was directed. The development of techniques of fire prevention is something that is true of every human society and cannot ground a protected right under section 35(1) of the *Constitution Act*.

[181] Finally, the union notes that the only evidence provided regarding techniques of fire prevention employed by the Haudenosaunee is Champlain's account. For the union, this evidence is therefore a post-contact account. As per *Van der Peet*, at paragraph 60, only practices that existed prior to contact with Europeans can ground a right under section 35(1) of the *Constitution Act*. For the union, the employer has provided no evidence with respect to pre-contact techniques of fire prevention.

[182] For these reasons, the union submits that the employer has failed to establish distinctive and integral practices that support the exercise of a right to regulate labour relations in the area of emergency services.

3. The Decision of the Board

[183] In *Conseil des Innus de Pessamit (523)*, the Board explained the principles with which it should analyze the evidence to determine the existence of the Aboriginal pre-contact practice, tradition or custom that supports the claimed right and whether it was integral to the distinctive pre-contact Aboriginal society:

> [97] With regard to recognition of an Aboriginal right, the Supreme Court of Canada stated the following in *Mitchell*, which reiterated the test set out in *Van der Peet*:

> 27. Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet*, *supra*, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).
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> 28. This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, *supra*; *Delgamuukw*, at para. 82).

a. The Existence of the Aboriginal Practice, Custom or Tradition Advanced as Supporting the Claimed Right

[184] At this stage of the analysis, the question to be determined by the Board is whether the employer has proven, based on the evidence adduced, the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the right to regulate labour relations in the area of fire services and whether this practice was integral to the distinctiveness of the pre-contact Aboriginal society.

[185] On this element, the employer's evidence rests in large part on the expert report and testimony of Professor Parmenter and the testimony of Chief Hill and Mr. Jamieson. In their candid testimony and in the detailed expert report, these individuals provided evidence on their views on the existence of various pre-contact practices on the employer's claim of an Aboriginal right to regulate labour relations in the area of fire services. The union challenges the employer's interpretation of this report and testimony as well as the view expressed on the various practices, especially regarding whether they establish the existence of an Aboriginal right to regulate labour relations in the area of fire services.

i. Self-Governance Evidenced by the Covenant Chain

[186] The Board carefully reviewed the arguments and evidence related to self-governance and the Covenant Chain presented by the employer in support of the existence of the Aboriginal pre-contact practice, custom or tradition that supports the claimed Aboriginal right.

[187] Firstly, as the Board already found above, the Covenant Chain itself emerged post-contact and is an example of post-contact practice between the Haudenosaunee and the English Crown. As such, it cannot be relied upon to establish a pre-contact practice, custom or tradition.

[188] Secondly, the Board has also found above that the Covenant Chain is akin to a treaty, has adopted the Ontario Court of Appeal's interpretation of the Covenant Chain in *Mississaugas of Scugog Island* and has found that the Covenant Chain does not establish an inherent right of the Haudenosaunee to govern all their internal affairs, which would include the governance of their labour relations.

[189] However, and as the Board also indicated above, it is aware that the employer has heavily relied on the Covenant Chain not only to support its definition of the nature of the claimed Aboriginal right but also to explain its argument of the existence of its right of self-governance pre-contact. Therefore, the Board analyzed the employer's claim of a pre-contact practice, custom or tradition of self-governance evidenced by the Covenant Chain.

[190] In reviewing this evidence, the Board finds that the evidence presented by the employer of self-governance pre-contact and on the Covenant Chain was not distinctive to the pre-contact Haudenosaunee society or is too broad and general in nature to establish the existence of the Aboriginal practice, custom or tradition advanced as supporting the claimed right.

[191] For the Board, the evidence reveals that pre-contact, the Haudenosaunee could organize themselves politically, as they did when they created the League or Confederacy before the arrival of Europeans in North America. They practiced a non-coercive form of internal governance and promoted conflict resolution and orderly political succession, such as through the Condolence Ceremony. The Haudenosaunee held specific societal values. They conducted their diplomacy on a nation-to-nation basis.

[192] In short, the employer argues that pre-contact, it had the general right of self-governance, which was recognized by the Covenant Chain between the Haudenosaunee and the English Crown. Based on this evidence, the employer submits that pre-contact, it had the inherent right of self-governance, which supports its claimed Aboriginal right to regulate labour relations in the area of fire services.

[193] For the Board, all this evidence is an indicator of how, in general, the Haudenosaunee conducted their political affairs, their diplomacy and the societal values that they held, such as non-coercive dispute resolution. However, these practices, traditions or customs are not distinctive to the employer. They are common to all societies and nations pre-contact, which all had political systems and methods of ruling or organizing themselves. For the Board, the element of self-governance based on the Covenant Chain in general is not distinctive to the Haudenosaunee people. To establish the existence of the Aboriginal pre-contact practice, tradition or custom, it is insufficient for the employer to simply claim that it was self-governing prior to contact with Europeans and that its society generally functioned based on certain important values and an ethos.

[194] Furthermore, all this evidence does not deal with the regulation of labour relations in the area of fire services. In fact, this evidence bears no resemblance to modern labour relations, even with a generous and broad interpretation of the evidence and of the components of labour relations as contained in the *Code* and described above. For the Board, the evidence of the Haudenosaunee's method of political organization or diplomacy and their societal values and ethos does not establish a traditional practice, tradition or custom of regulating labour relations—that is, in the sense of establishing and governing a regime of free collective bargaining and the constructive settlement of disputes between what we might think of as today's equivalent to employers, employees and groups of employees. It is not evidence of a practice of organized relationships delineating responsibilities and obligations between those who would perform labour, and those who would have labour performed.

[195] For the Board, and as the Ontario Court of Appeal found in *Mississaugas of Scugog Island*, the Haudenosaunee's method of political organization or diplomacy and their societal values and ethos, even if the Board was to deem the evidence in this case as establishing a certain general approach to the organization of work, are more features of every human society. As such, the Board finds that the evidence does not establish the existence of an Aboriginal practice, custom or tradition advanced as supporting the claimed Aboriginal right.

ii. The Haudenosaunee's Organization of Labour for the Purposes of the Three Areas of Activity

[196] As mentioned, the employer relies on three primary areas of activity to establish an Aboriginal right to regulate labour relations in the area of fire services, namely the provision and storage of surplus food, the construction of palisades for community defence and the development of techniques of fire protection for high-value physical installations in its territorial homelands.

[197] In its submissions, the employer clarified that it was not claiming a broad and general right of self-government at large but was instead claiming the right to self-govern labour relations within its fire and emergency services as it deems appropriate.

[198] In support of the existence of this right pre-contact, the employer submits the evidence of Professor Parmenter, who describes the pre-contact leadership structures of the Haudenosaunee as "segmentation" or reciprocity that begins at the family level and extends to the levels of clans, village, nation and ultimately the League of allied nations. This leadership was fundamentally non-coercive in nature, yet it had the functional ability to "organize and mobilize the behavior of Haudenosaunee people for particular economic, military, and political objectives." He explains that the Haudenosaunee were largely an "egalitarian society [with] a variety of mechanisms to distribute goods of economic value relatively evenly within a given community." Possessions were in common, and economic activities were pursued cooperatively. Professor Parmenter describes what he calls "cooperative labour practices among Haudenosaunee" at the time of contact as comprising lives "filled with scheduled activities, rounds, and routines occurring daily and on an annual cycle keyed to seasonal ceremonial events" (pages 70–72). He also states that the hunting, fishing and agriculture did not allow permanent appropriation by any one individual of the source of supply to the detriment of any others who were willing to work. According to Professor Parmenter, the above elements formed the structure of the organized collective labour of the Haudenosaunee.

[199] Professor Parmenter then describes what he considers to be "how, in a context where leaders lacked coercive means to enforce decisions, the Haudenosaunee organized collective labour" to achieve broader goals such as those "related to community security and emergency response" (pages 72–73). He describes that the Haudenosaunee lived in villages at least partially

enclosed by wooden palisades surrounded by fields used for farming. The villages were composed internally of longhouses, which were communal residency structures, organized by matrilineal decent. He explains that there was a division of labour along gender lines and that women organized their labour in a collective fashion for agriculture. He explains that the women:

> … organized themselves into communal work parties under the direction of senior matrons to accomplish the labour associated with the planting, cultivation, and harvesting of crops. Coresidency of women related to one another through their mothers facilitated the organization of these work parties.
>
> …
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> … The oversight of the "chief matron" ensured that the "mutual aid society" of women within a particular clan had access to adequate planting space for their needs and that communal labour of the whole could be directed towards fields reserved for their collective purposes of the village, such as feasts associated with particular ceremonies. Communal labour by Haudenosaunee women governed the entire process of maize farming from spring planting to the "husking bees" at harvest time. …
>
> (pages 75–76)

[200] Professor Parmenter then describes that pre-contact, the Haudenosaunee commonly had hostile encounters with other individuals or groups. He concludes, based on the existence of hostile encounters with other individuals or groups, that the Haudenosaunee therefore "organized their collective labour" for the purpose of community security or emergency response, namely the provision and storage of surplus food, the construction of palisades for community defence and the development of techniques of fire protection for high-value physical installations in their territorial homelands.

[201] The employer submits that these practices made its Haudenosaunee culture distinct and integral to its pre-contact society.

[202] Professor Parmenter states, and the employer emphasized in its written closing arguments to the Board, that these practices were so integral to the Haudenosaunee because they ensured their survival and the survival of their culture to this day. Professor Parmenter also states that the work or labour of Haudenosaunee people "was organized in a way that supported the broader community objectives, including survival." In his report, he describes the circumstances of the

Haudenosaunee as being under the “ever-present prospect of ‘[i]nvasion and destruction of property’ by enemy Indigenous populations” (page 74).

[203] Professor Parmenter testified that wage labour among the Haudenosaunee started mainly with their participation in military service in the 1800s. He confirmed that the practice of selling labour in a marketplace for exchange of wages was only after contact and that this was an eighteenth-century phenomenon.

[204] For the Board, this evidence reveals that there was no practice of regulating labour relations among the Haudenosaunee prior to contact with Europeans because there were no labour relations among the Haudenosaunee prior to said contact.

[205] The Board notes that the premise of Professor Parmenter’s conclusion that collective labour was organized by the Haudenosaunee in the three areas of activity was because the Haudenosaunee were faced with hostile encounters that jeopardized the safety of the community; in other words, they needed to defend themselves from enemy attacks (by building palisades to securely house the Haudenosaunee in times of attack or using fire management techniques should the attacks be carried out by setting fire to the palisades) or from the consequences of enemy attacks (by securing and storing food supplies in case of crop destruction).

[206] The Board finds that these are a far cry from the activities of the modern fire services provided by the employer. These modern services are not ensuring the survival of the Haudenosaunee by providing and storing food, nor are they building or erecting any infrastructure or using firefighting techniques to defend the community from hostile enemies. The three areas of pre-contact activity relied upon by the employer are not related to the type of work done by the fire services today. The employer’s fire services do not harvest or store food and do not engage in national defence with the construction of defence structures or mechanisms. They do, however, provide specialized services when there is a fire or an emergency where the fire services employees and equipment can be of help. While fundamentally important to the community for their modern firefighting and emergency response capabilities as described by Chief Hill and Mr. Jamieson, they are not tasked with defending the Six Nations in warfare.

[207] For the Board, all these activities presented by the employer in evidence amount to survival of the community and national defence for survival when under common situations of attack. Even with a generous interpretation, the Board agrees with the union that taken at their broadest, these three areas of activity could indicate some kind of general organization of the performance of tasks that needed to be done in the community and that could constitute the organization of work in the community, even in times of peace. Professor Parmenter describes what he calls the "cooperative labour practices among the Haudenosaunee" as comprising lives "filled with scheduled activities, rounds, and routines occurring daily and on an annual cycle keyed to seasonal ceremonial events" (page 72), and a communal distribution of the fruits of the collective tasks of hunting, fishing and agriculture. For the Board, these are methods of organizing the work done in a society and the cultural values and ethos for the distribution of the fruit of the communal labour. They do not establish that pre-contact, the employer engaged in the regulation of labour relations in general, let alone in the area of fire services. At best, this is evidence that the community organized itself for individuals to engage in hunting, fishing and agriculture with a view to supporting itself. This has to do with the general organization of work, not the regulation of labour relations, which the OLRB defined in paragraph 79 of *Great Blue Heron Gaming* as meaning the "regulation of relationships between what we might think of as employers, employees and groups of employees" (also see *Mississaugas of Scugog Island*, at paragraph 38). The Board has adopted this definition.

[208] The Board is also reminded that Professor Parmenter was clear in that there was no practice of employment in the Haudenosaunee culture pre-contact. There was no exchange of wages for services until the Haudenosaunee began participating in military service in the 1800s. Work was organized on a communal basis, by the Chief or the most senior women of the community. The performance of work was completed through non-coercive means such as negotiation, consultation and the involvement of other members of the community. However, what Professor Parmenter describes is a general concept of communal work for the good of the community. For the Board, these elements do not amount to the regulation of labour relations.

[209] In *Great Blue Heron Gaming*, the OLRB evaluated the evidence presented in support of a claimed Aboriginal right over labour relations and found as follows:

> 80. Even if one were to recast the notion of "labour relations" at a much higher level of generality, there is nothing in the evidence and information provided by the First Nation to suggest that there

> was a practice of organized relationships delineating responsibilities and obligations as between those who would perform labour, and those who would have labour performed. Moreover, (and this goes to the second branch of the test) it can certainly not be said that any such relationships formed an integral or defining part of First Nation's society.
>
> 81. It would be difficult on any rational understanding of the evidence before the Board to conclude that the first branch of the test has been met. There is no basis for concluding that there is an ancestral practice, custom or tradition which could support the claimed right—that being the regulation of labour relations on the territory of the First Nation.
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> 82. This conclusion reached on the first point is really dispositive of the second and third branches of the test. As there is no ancestral practice of regulating labour relations, there can be no practice or custom which was integral to and distinctive of the pre-contact society and there can be no continuity between the pre-contact practice and the contemporary claim.
>
> 83. The real difficulty in this case is similar to that dealt with by the Supreme Court in *Pamajewon*—that there is nothing about the right being asserted which is in any way distinctive to the First Nations society historically unless the right itself is cast as broadly as the general right of "self-government." Even if one took a broader notion of the characterization of aboriginal rights as reflected in the dissent by Madame Justice L'Heureux-Dubé in *Pamajewon*, there is nothing in the record upon which one could find that there were ancestral practices that managed labour in any particular distinct way.
>
> 84. The rights being advanced here by the First Nation—the right to self-government and the right to organize and direct labour are really universal and are in no way characteristic of the particular culture of the First Nation. In *Van der Peet* the Court rejected the idea that this formulation of aboriginal rights was consistent with section 35(1). At paragraph 56, the Court stated:
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> > The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

[210] Just like in *Great Blue Heron Gaming*, in the present case, there is no evidence of labour relations being regulated in the sense of a practice of organized relationships delineating responsibilities and obligations as between those who would perform labour, and those who would have the labour performed. With respect to surplus food, there is only very general evidence that the surplus food and its storage was the result of agricultural work, and that the Chief or most senior women generally organized, distributed and managed this agricultural work in consultation with the community. With respect to the evidence for the construction of palisades for community defence, the only evidence is that the Haudenosaunee men were involved in their building. Professor Parmenter's evidence on this issue, citing Mr. Joseph-François Lafitau, is that for

Haudenosaunee men, “the hardest work they have to do is the creation of the palisades of their forts, [and] the building or repairing of their houses” (page 81). He also notes that:

> Palisade construction by Haudenosaunee men represented an investment of community labour towards collective security and/or emergency response insofar as the exterior defensive structure provided shelter and protection for community residents (and their stored food resources) in the event of an enemy attack. …
>
> (page 82)

[211] The evidence is that stores were filled with surplus food that was planted, cultivated and harvested by women and that palisades built by men were erected and existed. It could be deduced from the evidence before the Board that work was performed by the Haudenosaunee people to gather and stock the provisions and stores of food or to build the palisades or the fire prevention techniques. However, this would only be evidence of the existence of some work that was organized in some way to result in the existence of food surplus and storage, of palisades and of fire technology on the palisades. At best, the existence of some work performed by members of a community leading to a built environment would be true of all societies. As explained above, for the Board, such broad evidence cannot form the basis of the existence of a specific pre-contact practice, custom or tradition that establishes the existence of a defined Aboriginal right over labour relations.

[212] On the last area of pre-contact activity submitted by the employer, and the most relevant to this file, namely the development of techniques of fire protection for high-value physical installations in the Haudenosaunee’s territorial homelands, Professor Parmenter presented in his report and testimony the incident of October 11, 1615, described by Champlain in his contemporaneous notations and drawings. On cross-examination, Professor Parmenter agreed that, for this incident and his conclusions about this incident, in his report and in his testimony, he drew inferences from what Champlain had reported about his first-hand account of the attack the French and their allies launched against the Haudenosaunee on October 11, 1615, which ended with the French retreating.

[213] Professor Parmenter presents this incident as evidence that the pre-contact Haudenosaunee organized labour by developing techniques of fire prevention for high-value physical assets. The union invites the Board to focus on the fact that there was only one incident

in evidence and that this evidence is that the Haudenosaunee had techniques used to extinguish a fire in one of the Six Nations, in one location, in one instance. It further invites the Board to note that the evidence from Professor Parmenter does not explain who used these techniques, how they were used or how they were directed.

[214] The Board is mindful of the SCC's comments in *Van der Peet* that it should be aware of the evidentiary difficulty in proving a right from times and in cultures where there were no written practices, customs and traditions. In the present case, there exists the one written record from Champlain, and it is the contemporaneous evidence of his encounter with the Onondaga's palisades and techniques for extinguishing fire. For the Board, the fact that there is only one record and that the employer relies on it to support its claim should not be held against the employer. The Board is also mindful that the SCC in *Van der Peet* stated that the employer's task in cases of this nature is to demonstrate, through evidence of practices, customs and traditions, that the right to regulate its labour relations in emergency services can be rooted in its pre-contact society (see *Van der Peet*, at paragraphs 27–39).

[215] Therefore, the Board carefully reviewed the evidence presented by Professor Parmenter on this incident. The Board notes that Professor Parmenter's evidence contains details of what Champlain himself saw and described in his own words about this incident. In describing the incident, Professor Parmenter explains that Champlain himself described that the Onondagas took "advantage of [the] confusion to go for water," poured it from spouts which put out the fire, "and this without on that account ceasing to shoot their arrows, which fell upon [the French and their allies] like hail" (page 84). What Professor Parmenter is describing here is the use, by members of the Onondaga Nation, of the spouts set in or on the palisades to pour water to extinguish fires set by the attacking French and their allies. The Onondagas did this while continuing to engage in warfare by shooting arrows at the French. Champlain explains that he took two lower-body arrow wounds and he called off the French siege of the palisades after three hours. For the Board, the activity of extinguishing the fire was clearly part of the greater activity of warfare and defence and done in combination with using the specific warfare weaponry of arrows. For the Board, these activities are a far cry from the current activities of the employer's fire services.

[216] Professor Parmenter claims that this incident of October 11, 1615, is evidence of the organization of labour for the purpose of community security or emergency response since the

Onondaga Nation could defend itself and its palisaded fishing station. He also states that the spouts are evidence of the elaborate fire protection techniques employed by the members of the Onondaga Nation as well as the great deal of labour they invested in those techniques. However, in his testimony, he clarified that the evidence was of the architecture used by the Onondaga people that was resistant to the French attack. He stated that Champlain and the French lost that day because of the technology the Onondaga people had developed and how they had organized their community to respond to the attack.

[217] The employer argues that the evidence from Champlain and that of Professor Parmenter on this incident constitutes a sufficient basis for the Board to find that the Haudenosaunee regulated fire services. The Board disagrees.

[218] While the evidence shows that the physical, built environment contained palisades equipped with bark holding tanks to transport water and water spouts and gutters that could be activated to pour water on offensive fires set at the palisades by enemies of the Haudenosaunee, the evidence, even when interpreted with largesse, is limited to the built environment and the effect of the use of the water in these spouts. The Board finds that the evidence establishes that the Haudenosaunee, through the Onondaga Nation, had a distinct defence architecture pre-contact with specific water-system technology to deal with fires outside the palisades.

[219] However, while these are descriptions of the built environment and the architectural prowess and technological advancement of the Haudenosaunee, they do not provide evidence on how the work, if work it was, was regulated to activate, manoeuvre or operate this built environment. There is no evidence that there was a practice of organized relationships delineating responsibilities and obligations as between those who would perform the labour, and those who would have labour performed. This does not describe how work was regulated, who regulated these activities and which activities were done in times of warfare and attack by enemies. It does not describe the regulation of relationships between what we might think of as employers, employees and groups of employees.

[220] For the Board, while the evidence does well to explain the advanced technology, it provides no insight into the organization of labour, of work or even of the community of the Onondaga Nation. It further provides no insight into the actual activities of fire protection performed by the

members of the Onondaga Nation, other than to establish that this technology was used and, in the case of the incident with Champlain, contributed, along with the use of arrows, to the retreat of the French attackers and their allies. In short, the extent of the evidence is that the technology was used by the Onondagas and that it was successful in preventing the palisades from being burned down and was used in conjunction with other infrastructure, such as the palisades themselves, and with other activities, such as the use of arrows as weapons. The Board notes that Champlain clearly explains that the technology was used by the Onondaga Nation in addition to its hail of arrows shot onto the French with the goal of stopping the hostile war-like attack. As evidenced by Professor Parmenter, the palisades were large and well-defended installations. To attack the palisades, the French had to build elevated platforms, described by Champlain as "cavaliers," higher than the palisades to shoot arrows into the structure of the palisades at the Onondaga Nation massed inside, while allies of the French were setting fires at the bottom of the palisades.

[221] However, for the Board, it cannot be said that using spout technology is evidence of the regulation of labour relations in the area of fire services pre-contact.

[222] While the Board acknowledges that the evidence supports a conclusion that advanced technology was used, the fact remains that Professor Parmenter's evidence about Champlain provides no insight into the organization, regulation and management of the relationships between the requestors and the purveyors of labour for the tasks required to perform the various defence activities, including the use of the technology, during a hostile attack. It certainly is not evidence that, pre-contact, the Haudenosaunee regulated their labour relations with those who used this technology, however it may be that its use was organized.

[223] The Board finds that this evidence establishes that the Haudenosaunee had a technical built environment to extinguish fires that Champlain had not encountered in the past. This says a lot about the sophistication of the Haudenosaunee's built environments but not how they were used and by whom, and in which situations other than during warfare. There is no information on how the Haudenosaunee functioned and organized the labour to use the technology or even on how the tasks were done. There is no evidence on how the activities of using the technology were directed and by whom. For the Board, this is not evidence of regulating labour relations, even in situations such as warfare.

[224] The Board finds that in the present case, there is no persuasive evidence of a pre-contact practice, tradition or custom of regulating labour relations in the area of fire services. There is no evidence of organized relationships delineating responsibilities and obligations as between those who would perform labour and those who would have labour performed. For the Board, there is no evidence that reveals the existence of labour relations pre-contact, even with a generous interpretation of all that the employer has presented. Furthermore, there is no evidence that the labour used in fire services was regulated in any way.

b. The Fact That This Practice, Custom or Tradition Was an "Integral Part" of the Society Prior to Contact With Europeans

[225] When the Board analyzes this element of the test, it must be mindful that the activity that is the subject matter of the claimed Aboriginal right must be an element of a practice, custom or tradition integral to the First Nation claiming the right (see *Van der Peet*, at paragraphs 44 and 55–56). However, it is important to note that the test requires that the practice, custom or tradition be "distinctive," but not that it be "distinct." This is an important difference. As mentioned, the requirement is for a practice, custom or tradition that is "distinctive" in the sense of being central and significant to the culture and part of what made the culture what it was, but not "distinct" in the sense of being unique or different from other First Nations (see *Van der Peet*, at paragraphs 71–72). Claims of Aboriginal rights are fact-specific. As the SCC explained in *Van der Peet*:

> 69 … Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

[226] For the Board, even if there had been evidence of the pre-contact existence of the practice, tradition or custom of regulating labour relations in the area of fire services, there is no evidence that it formed an integral or defining part of the Haudenosaunee society.

[227] The Board recognizes the evidence of Professor Parmenter, Chief Hill and Mr. Jamieson, who all described that from pre-contact to the present, the Haudenosaunee have maintained a culture based on a non-coercive form of internal governance, an ethos of living for other people that is central, the concept of the Good Mind and the use of communication, negotiation, diplomacy

and leverage to convince individuals to do what is in their interest, and looking out for the next seven generations. This evidence can establish that the Haudenosaunee have a distinctive culture and approach to the management of their community. However, for the Board, this evidence does not establish that, pre-contact, the Haudenosaunee regulated their labour relations in the area of fire services in a distinctive way. Nor does it establish that these practices were distinctive to the pre-contact Haudenosaunee society.

[228] The Board is of the view that the employer is attempting to assert a general right of self-government based on the Covenant Chain and the three areas of activity and to therefore be solely responsible for managing its labour relations. However, as the OLRB noted in *Great Blue Heron Gaming*, the right of self-government and the right to organize and direct labour are really universal. Therefore, they are in no way characteristic of the particular culture of the Haudenosaunee. Therefore, the activity of organizing labour or of having a culture, core values and a certain ethos at this level of generality cannot be "integral" to this particular employer, nor can it be said that the Haudenosaunee culture would have been "fundamentally altered" without the employer's ability to govern the organizing of labour. In short, the ability to regulate labour relations, or even to organize work, could not make the Haudenosaunee culture what it was.

[229] For the Board, the evidence presented does not demonstrate that the regulation of labour relations was an integral part of the distinctive culture of the Haudenosaunee. In fact, the Board finds that having a distinctive culture and approach to the management of the community, collecting surplus food and constructing palisades or ramparts of some form to protect a population against an enemy can be said to be found broadly in many cultures. Furthermore, the Board finds that there is no evidence that the fire protection techniques described by Champlain were central to the Haudenosaunee culture.

c. The Board's Decision on Step 1(b)

[230] These findings by the Board mean that the employer has failed in this matter to establish one of the essential components of the test for establishing an Aboriginal right, namely the existence of a pre-contact practice, tradition or custom of regulating labour relations in fire services. Since there is no such practice, tradition or custom, and based on the evidence adduced,

the Board also finds that there is no such practice, tradition or custom that was integral to and distinctive to the pre-contact society.

[231] Furthermore, since the employer has not established this essential component of the test, the Board does not need to determine the remaining questions of the legal test under section 35(1) of the *Constitution Act*, which are:

- Step 1(c): whether the claimed Aboriginal right has a reasonable degree of continuity with the "integral" pre-contact practice;
- Step 2(a): whether the claimed Aboriginal right has been infringed; and
- Step 2(b): if the claimed Aboriginal right has been infringed, whether the infringement is justified.

[232] Finally, the Board simply notes that on September 18, 2023, as part of the proceedings in this matter and in support of its arguments at step 2 of the legal test under section 35(1) of the *Constitution Act*, the employer made submissions based on the Court of Appeal of Yukon's decision in *Dickson* v. *Vuntut Gwitchin First Nation*, 2021 YKCA 5. On April 16, 2024, the employer advised the Board and the union that the SCC had rendered its decision on the appeal of this decision by the Court of Appeal of Yukon in *Dickson* v. *Vuntut Gwitchin First Nation*, 2024 SCC 10. On April 30, 2024, the Board wrote to the parties and requested their submissions on this new SCC decision. The parties availed themselves of this opportunity and filed written submissions with the Board. However, and again due to the Board's finding that the employer failed to meet a prior component of step 1 of the legal test under section 35(1) of the *Constitution Act*, the Board need not comment on the parties' submissions on this issue.

[233] Therefore, based on all the reasons above, the Board dismisses the employer's preliminary objection, declares that the employer has not established the existence of an Aboriginal right pursuant to section 35(1) of the *Constitution Act* and declares that it has jurisdiction to determine the present application for certification.

V. Conclusion

[234] Based on the above reasons, the Board finds that the employer has failed to demonstrate that it has the Aboriginal right, pursuant to section 35(1) of the *Constitution Act*, to regulate labour relations in the area of fire services. The Board concludes that there is no Aboriginal right pursuant to section 35(1) of the *Constitution Act* that is incompatible with the application of the *Code*.

[235] The Board therefore concludes that it must dismiss the employer's preliminary objection and accordingly finds that it has the jurisdiction to deal with the application for certification, which it will adjudicate in a separate decision.

[236] This is a unanimous decision of the Board.

Sylvie M.D. Guilbert
Vice-Chairperson

Richard Brabander
Member

Daniel Thimineur
Member