NEW DIRECTIONS IN THE LAW OF ABORIGINAL RIGHTS

Catherine Bell*
Edmonton

The author reviews recent decisions of our final court as they affect aboriginal rights litigation and political negotiation for the recognition of broad powers of self-government. She believes that the judgements reviewed have generated a climate of legal uncertainty and that recourse to the courts may not be the most efficient means for the advancement of aboriginal interests. She concludes that the most recent cases will spur political negotation within specific jurisdictional areas which are deemed vital to the survival of the aboriginal peoples of Canada.

L'auteur dans cet article pose deux questions très importantes concernant les droits des autochtones. Est-ce possible que la cour suprême du Canada ne soit pas le meilleur organisme à avancer leur causes? Sera-t-il préférable à entamer des négociations politiques et éviter l'incertitude tel les jugements récents de la cour? En conclusion, elle affirme que les négociations politiques sont vitales à la route de la survie des autochtones au Canada.

I. *Introduction*

Decisions rendered by the Supreme Court of Canada during the 1996 and 1997 terms have signalled a new direction for Canadian law on Aboriginal

* Catherine Bell, of the Faculty of Law, University of Alberta, Edmonton, Alberta. The author wishes to thank D. Schneiderman and L. Rotman for their helpful comments on this paper.

rights. Together these decisions have a profound impact on the scope of Aboriginal rights receiving constitutional protection, positions assumed at negotiating tables and ultimately, the lives of Aboriginal people in Canada.[1] Since the recognition and affirmation of Aboriginal rights in the Canadian Constitution, the opinion of the Supreme Court in *R.* v. *Sparrow* has been the primary source of legal principles for the identification and definition of "Aboriginal constitutional rights."[2] For lawyers representing Aboriginal peoples, *Sparrow* provided the foundation for a "liberal" and "generous" vision of rights which blended perceptions of legal rights both English and Aboriginal in origin.[3] However, those concerned with the potential impact of *Sparrow* on national, regional and private interests raised ambiguities in the reasoning of the Supreme Court and sought to clarify the potential impact of Aboriginal constitutional rights on non-Aboriginal interests.

The legal importance of the 1996/97 term lies in the elaboration of the concept of Aboriginal rights introduced in the *Sparrow* case. Of particular importance is the distinction drawn between Aboriginal title and rights which exist independent of title (hereinafter referred to as free standing rights) and the introduction of the *Van der Peet* test for identification and definition of free standing Aboriginal rights. Other significant developments following *Van der Peet* are the expansion of legitimate justifications for interference with Aboriginal constitutional rights by non-Aboriginal governments and the suggestion that characterization of a right as Aboriginal or Treaty is legally insignificant in identifying the legal test for extinguishment of those rights. Each of these developments affect the future interpretation of s.35(1) of the *Constitution Act, 1982.* In order to demonstrate their significance, this paper begins with a review of *Sparrow* and some of the important issues it allegedly left unresolved. A discussion of the *Van der Peet* trilogy follows.[4] The paper concludes with a selective

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[1] *R.* v. *Adams,* [1996] 4 C.N.L.R. 1; *R.* v. *Badger,* [1996] 2 C.N.L.R. 77; *R.* v. *Côté,* [1996] 4 C.N.L.R. 26; *R.* v. *Gladstone,* [1996] 4 C.N.L.R. 65; *R.* v. *Pamajewon,* [1996] 4 C.N.L.R. 164; *R* v. *N.T.C. Smokehouse Ltd.,* [1996] 4 C.N.L.R. 130; *R.* v. *Van der Peet,* [1996] 4 C.N.L.R. 177; *Delgamuukw v. B.C.,* [1998] 1 C.N.L.R. 14.

[2] *R.* v. *Sparrow,* [1990] 3 C.N.L.R. 160. I first encountered the use of this phrase in K. McNeil, "How can the Infringements of the Constitutional Rights of Aboriginal People be Justified?" (1997) 8(2) Const'l. For. 33. I adopt it because it emphasizes both the "Aboriginal" and "constitutional" nature of the right. It is used here to refer to those existing Aboriginal rights invoking protection of s.35(1) of the *Constitution Act, 1982,* being Schedule B of the *Constitution Act, 1982* (U.K.), 1982 c.11 which reads as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[3] *Ibid.* at 179.

[4] The other two decisions which form what is now called the *Van der Peet* trilogy also concerned the Aboriginal right to fish in British Columbia and were issued by the Supreme Court on the same day are *R.* v. *Gladstone* and *R.* v. *N.T.C. Smokehouse, supra* footnote 1.

overview of the 1996/97 term and speculates about the potential impact of current trends in judicial reasoning on the Supreme Court's future recognition of the inherent right of Aboriginal self-government.[5]

Post s.35 jurisprudence suggests that judicial constructions of the right to Aboriginal self-government will be confined within the existing constitutional framework. Inherent in this framework are two key assumptions: (1) Aboriginal governments must co-exist with federal, provincial and territorial governments, and (2) absent constitutional amendment, the scope of Aboriginal governmental powers will be circumscribed by the existing division of powers between federal and provincial governments. However, in attempts to reconcile alleged powers of Aboriginal and non-Aboriginal governments within this structure, various options are available to the court. One option is to use s.35 of the *Constitution Act, 1982* and *Sparrow* as catalysts for constitutional change: a change anticipated, but not clearly negotiated, in the national political forum.[6] Adopting liberal principles of constitutional interpretation found in *Sparrow*, a court could read into s.35 the existence of fundamental Aboriginal governmental powers. These powers could be characterized in terms of broad spheres of jurisdiction requiring the generation of new, or adaptation of old rules of constitutional law, which elevate and subordinate competing constitutional rights.[7] This paper argues that *Van der Peet,* and subsequent decisions of the Supreme Court, indicate that this option will not be endorsed by the present Supreme Court. Rather, the majority will likely define Aboriginal governmental powers more narrowly, thus avoiding significant jurisdictional conflict. The recent *Delgamuukw* decision, which points to *Van der Peet* for guidelines to define the "contours" of a s.35 "right to self-government," supports this conclusion.[8]

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[5] The term "inherent" is used here to describe the Aboriginal right to self-government as originating from sources within Aboriginal Nations which existed prior to European contact. The term "self-government" is used to describe a bundle of governmental institutions and powers which co-exist with federal and provincial governmental powers. The scope of these rights has yet to be determined by Canadian Courts. For further discussion of the potential contemporary scope of Aboriginal governmental powers. *See* Royal Commission on Aboriginal Peoples (R.C.A.P.), *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa; Canada Communication Group, 1983) and R.C.A.P., *Report of the Royal Commission on Aboriginal Peoples* vol.2, ch.3 (Ottawa: Canada Communication Group, 1996).

[6] *See eg.* The Charlottetown Accord, signed August 28, 1992 but not implemented. References here are to the draft legal text published October 9, 1992.

[7] This is the approach adopted in the Final Report of the Royal Commission on Aboriginal Peoples, *supra* footnote 1.

[8] *Supra* footnote 1 at paras. 170 and 171. I emphasize the word "present" because the scope of interpretive discussion of the court is wide and the approach to definition will vary depending on its membership. The composition of the court when *Sparrow*, *supra* footnote 2, was decided is very different than it is today.

II. *R. v. Sparrow*

Sparrow is one of two landmark decisions rendered since the confirmation of common law Aboriginal title in the *Calder* case.[9] In the 1980s *Guerin* affirmed the ruling in *Calder* that Aboriginal title is a unique (*sui generis)* inherent legal right that arises independent of government acts of creation and recognition.[10] It also introduced the concept of fiduciary obligation as a means to limit the power of non-Aboriginal governments over the lives of Aboriginal people. While the full extent of this obligation has yet to be judicially considered, its existence prevents both federal and provincial governments from ignoring the effects of their actions on constitutionally protected Aboriginal and treaty rights. Indeed, the concept of fiduciary duty compels specific and honourable objectives and conduct in Crown dealings with Aboriginal people.[11] This concept of duty is central in *Sparrow's* analysis of s.35.

Mr. Sparrow, a member of the Musqueam First Nation, was charged under the *Fisheries Act* for fishing with a drift net longer than that permitted by his band's fishing license.[12] The issue before the Supreme Court was whether Parliament's power to regulate Aboriginal fishing was limited by s.35(1). In order to address this issue, the Court had to determine the existence of an Aboriginal right and the significance of its inclusion in s.35. In doing so it provided a framework for the analysis of constitutionally protected Aboriginal rights which is often articulated in terms as a four part process:

(1) identification of the nature and characteristics of the Aboriginal right;

(2) determination of whether that right is still "existing" (or whether it has been legally extinguished prior to the enactment of s.35);

(3) determination of whether there has been government interference with its exercise; and

(4) analysis of the legitimacy of government justifications for interference.

Adopting this framework, the onus for establishing an Aboriginal right and *prima facie* interference with that right, is on the Aboriginal litigant. Legislation that "has the effect of interfering with an existing Aboriginal right", in purpose or effect, represents a *prima facie* infringement.[13] Although this suggests that any meaningful limitation on the right will constitute a *prima facie* extinguishment, questions raised later in the decision create the possibility of a more difficult burden of proof: unreasonableness, undue hardship and denial of

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[9] *Calder* v. *British Columbia*, [1973] S.C.R. 313.

[10] *Guerin* v. *R.*, [1984] 2 S.C.R. 335.

[11] For further discussion *see eg.* M. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 UBC L.R. 19 and L. Rotman, *Parallel Paths* (Toronto: University of Toronto Press, 1996).

[12] R.S.C. 1985, ch. F-1.

[13] *Supra* footnote 2 at 182.

the preferred means of exercising the right.[14] The onus of proving extinguishment and justifying interference rests on the Crown. This onus is met by meeting a two part justification test. First, Parliament (or the province), must prove that infringement occurred in furtherance of a valid legislative objective. In *Sparrow*, the objective of conservation and resource management was accepted as valid. Second the offending government must, in the course of implementing its objective, act in accordance with its fiduciary duty to Aboriginal peoples. In assessing whether or not the Crown has fulfilled its fiduciary obligations, various questions may be asked including: Has there been as little infringement as possible? If a right has been expropriated, has fair compensation been offered? Have the Aboriginal people affected been consulted?[15]

In addition to this analytical framework, *Sparrow* identifies the test for determining the survival and constitutional protection of s.35 rights. Legislative intent to extinguish Aboriginal rights by legislation prior to their constitutional protection in 1982, must be clear and plain to be effective.[16] Incompatibility between legislative restrictions and the exercise of an Aboriginal right is not enough. However, despite this ruling, lower courts have been reluctant to accept that Aboriginal rights are not extinguished by practical restrictions resulting from the implementation of federal and provincial legislation. The need to clarify this extinguishment test is also evident in jurisprudence which questions whether the Crown's intent to extinguish must be express or necessarily implied from their actions."[17] Legal scholars also question whether the Crown needs to acknowledge the existence of an Aboriginal right, or at least address its mind to the potential impact of its legislative action on the exercise of potential right, to effectively extinguish it.[18]

Sparrow is also precedent for the principle that "existing" rights protected by s.35 are those rights not extinguished before 1982. In situations where legislation limits or regulates the exercise of rights, but does not meet the clear and plain test for extinguishment, Aboriginal rights are protected by the Constitution in their original, unregulated form. The legitimacy of continued regulation lies in the application of the justification test. However, within the analysis of justification, *Sparrow* leaves the door open for judges to validate government objectives, in addition to conservation, "that could cause harm to the general populace or Aboriginal peoples themselves, or other objectives

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[14] *Ibid.*

[15] *Ibid.* at 187.

[16] *Ibid.* at 175.

[17] It has been argued that the intent to extinguish can be implied from the *purpose* of legislation, or a series of legislative acts, which *practically* cannot be realized with the continuance of an Aboriginal right.

[18] See eg *Gladstone, supra* footnote 1 at 22. *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025. Further, as discussed below, *Sioui* also raises the issue of whether the clear and plain test for extinguishment and justification test, for measuring the legitimacy of measuring government interference or different tests, are appropriately applied to assess the legal termination of treaty rights.

found to be compelling and substantial",[19] *Sparrow* also suggests that priority must be given to the exercise of an Aboriginal right in order for the Crown to comply with its fiduciary obligation. Emphasizing that s.35 acts as a "strong check on government power,"[20] some argue the proper interpretation of *Sparrow* is one that limits the range of potential valid government objectives to conservation, public safety and perhaps objectives compatible with ensuring the future exercise of Aboriginal rights.[21] Others narrow *Sparrow's* comments on justification to the facts of the case. The latter approach allows them to accept a broader range of "compelling and substantial" objectives such as "the pursuit of economic and regional fairness."[22]

Another question not directly addressed in *Sparrow* is whether the province has the ability to extinguish Aboriginal rights. Arguably, the requirement of clear and plain intent to extinguish renders provincial laws which attempt to extinguish s.35 rights *ultra vires.* Section 91(24) of the *Constitution Act, 1867* provides that the federal government has jurisdiction over "Indians, and lands reserved for the Indians."[23] The core of federal jurisdiction protected by s.91(24) includes matters affecting Indians in their "Indianess".[24] Arguably rights under s.35 go to the "core of Indianess."[25] Provincial laws which have a sufficiently clear and plain intention to extinguish these rights may be characterized as laws in relation to "Indians, and lands reserved for Indians" and thus an invasion of federal jurisdiction. On the other hand, the Supreme Court has held that provincial laws of general application which affect " the core of Indianess" will apply to Indian lands through referential incorporation by way of s.88 of the *Indian Act.* Does section 88 allow these general laws to extinguish Aboriginal rights or does federal jurisdiction under 91(24) necessarily restrict provincial laws to limiting, or regulating, the contemporary exercise of Aboriginal rights? If the provinces can regulate the exercise of a right, and such regulation amounts to an infringement of s.35 rights, must a province meet the same justification test set out in the *Sparrow* test for federal law? These questions are central in the resolution of the *Delgamuukw* case discussed later in this paper.

Sparrow also maintains that existing Aboriginal rights should be interpreted "flexibly so as to permit their evolution over time."[26] Indeed, the majority adopts Professor Slattery's position that existing Aboriginal rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."[27]

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[19] *Supra* footnote 2 at 183.

[20] *Ibid.* at 181.

[21] *See eg* dissenting opinion of McLachlin J. in *Gladstone, supra* footnote 1 and K. McNeil, "How Can the Infringements of the Constitutional Rights of Aboriginal Peoples be Justified" (1997) 8 Const'l For. 33.

[22] *R.* v. *Gladstone, supra* footnote 1 at 97 and 98.

[23] *Constitution Act,* 1867 (U.K.) 30 & 31 Vict., c.3.

[24] *Dick* v. *R.* (1986), 23 D.L.R. (4th) 33 (S.C.C.)..

[25] *Ibid.*

[26] *Supra* footnote 2 at 171.

[27] *Ibid.*

This call for flexibility, combined with the direction to apply a "generous and liberal interpretation"[28] to s.35(1) with sensitivity to the Aboriginal "perspective itself on the meaning of the rights at stake,"[29] is perceived by many as rejection of the frozen rights theory of Aboriginal rights. The frozen rights theory emerged in the context of Aboriginal title litigation. According to this theory, Aboriginal title is dependant on proof of occupation prior to the assertion of sovereignty over the territories of the First Nation claiming title. The content of title is also limited by historical land use practises of the ancestral First Nation which occupied the lands claimed at that date.[30] *Sparrow* appears to reject the frozen rights theory in favour of an approach that allows for the exercise of ancestral rights in a contemporary form that is not qualified by references to historical and customary uses of lands.

In generating what is now known as the integral test to identify Aboriginal rights, *Sparrow* also promotes an expansive vision of rights which traces Aboriginal rights to ancestral indigenous social order. According to this test, Aboriginal rights are rights which were, and continue to be, an integral part of the distinct culture of a claimant group. Although "integral" is not defined, the analysis in *Sparrow* suggests that the significance of the right is measured in the context of the society as a whole and the relationship of the right to the cultural and physical survival of the claimant group. However, the failure of the Supreme Court to specify standards to measure the integral nature of an alleged Aboriginal right generates debate on a number of issues. For example, the reference to continuity in the integral test has been used to argue that Aboriginal rights receiving s.35 protection must be integral throughout the period starting from the date of pre-sovereign occupation to the present. The logical consequence of this argument is discontinuance and subsequent revival of a practice interrupts the continuity necessary to support a contemporary right. A more liberal construction of the sufficient continuity requirement suggests the reference to continuity in *Sparrow* is to the unextinguished status of the Aboriginal rights in Canadian law. Most legal commentary falls between these two interpretive extremes in an attempt to accommodate the difficult burdens of proof placed on Aboriginal people and the cessation and revival of ancestral practices.[31] Noted

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[28] *Ibid.* at 179.

[29] *Ibid.* at 182.

[30] Other proofs of title include proof that the plaintiffs and their ancestors were members of an organized society, that the organized society occupied the specific territory over which they assert title, and that occupation was to the exclusion of other organized societies. *Delgamuukw, supra* footnote 1 at 73-75 has now clearly stated that the concept of exclusivity does not preclude findings of joint or shared title among Aboriginal peoples. Also, inability to prove exclusivity may cast the claim into the category of free standing rights. This frozen rights theory also compliments a popular position assumed by those attempting to restrict the scope of Aboriginal constitutional rights; that is, the argument that Aboriginal rights cannot exist independent of proof of Aboriginal title.

[31] For a discussion on the difficulty establishing title see M. Asch and C. Bell, "Definition and Interpretation of Fact in Aboriginal Title Litigation" (1994) 19 Queen's L.J. 503.

legal scholars, and some members of the court, suggest that the assertion of British sovereignty should be rejected as the starting date to measure continuity of a right. Even before *Sparrow*, it was argued that a more appropriate date is the date that a First Nation was actually dispossessed of its traditional lands. This may be some time before or after the assertion of British sovereignty, depending on the historical circumstances of the particular First Nation asserting the claim.[32] Others maintain the requirement of continuity should be interpreted even more flexibly. Despite the historical origins of the right, they maintain it should be sufficient for a First Nation to demonstrate that an Aboriginal practice or, in the case of title claims, Aboriginal land, has been integral to that Nation "for a substantial and continuous period of time."[33]

Failure to elaborate on the integral test also raised questions about the relationship between Aboriginal title and other Aboriginal rights. Is it possible for Aboriginal rights to exist independent of claims to title if it can be established that the rights claimed are integral to the distinctive culture of a claimant group? By concluding that Aboriginal rights are inherent *sui generis* rights integral to Aboriginal cultures, is the Supreme Court opening the door for recognition of other rights arising from historical institutions of distinct Aboriginal peoples? Does the direction to be "sensitive to the Aboriginal perspective of the meaning of the right at stake" mean that the court must draw on both the laws of First Nations and the common law in the definition of Aboriginal rights? [34] If the court is promoting an expansive vision of rights which extends beyond Aboriginal claims to land or land use rights, are the same standards of definition, proof and extinguishment to be applied to all Aboriginal rights? If not, to what extent are the perceptions of contemporary Aboriginal peoples relevant in assessing the proper categorization of the right as part of their Aboriginal title or some other category of s.35 rights? All of these questions are addressed in the 1996 and 1997 terms.

This brief review of *Sparrow* reveals how perceived ambiguities and unanswered questions provide various routes for judicial refinement of the general interpretive guidelines *Sparrow* offers. In summary, some key issues considered unresolved were:

(1) What factors are to be considered in assessing the scope of the right at issue and whether it is integral to the distinctive society of an Aboriginal group? Does the combination of the words "integral" and "distinctive" mean the right must be one that is vital and unique to a particular Aboriginal culture?

(2) Is *Sparrow* a precedent for rejecting the process of freezing Aboriginal rights; that is, does *Sparrow* reject limiting contemporary Aboriginal rights to the exercise

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[32] *See eg.* B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 728.

[33] L'Heureux-Dubé J. dissenting in *Van der Peet, supra* footnote 1 at 238. Also see *Delgamuukw* v. *B.C.* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) at 646-647, Lambert J.A. dissenting.

[34] *Supra* footnote 29.

of practices existing at the date sovereignty was asserted, or does adoption of the interpretive principles in *Sparrow* call for recognition of more abstract fundamental rights which can be exercised in modern ways? Alternatively, does *Sparrow* simply endorse the employment of modern technology in the exercise of traditional practices?[35]

(3) What is the potential range of valid legislative objectives available to non-Aboriginal governments to assess the legitimacy of their interference with Aboriginal constitutional rights? Must government objectives relate to public safety, conservation or preserving the future ability of an Aboriginal Nation to exercise existing Aboriginal rights? In the event of conflicting interests, must government objectives be implemented in a way that *always* allocates priority to the Aboriginal right?

(4) Is Aboriginal title one rights cluster in a broader concept of Aboriginal rights or are all Aboriginal rights dependent on proof of Aboriginal title? Are the same tests for identification, definition, proof and extinguishment to be applied to all s.35 rights?

(5) What factors should determine the existence of a clear and plain intent to extinguish an Aboriginal right? Absent express language, must the offending government have acknowledged, or at least addressed its mind to, the impact of its actions on potential Aboriginal rights? Does the province have the ability to extinguish s.35 rights?

(6) Should the *Sparrow* tests for extinguishment of Aboriginal rights and justification for government interference be applied to treaty rights or do decisions concerning treaty rights suggest the application of different standards?

Each of these issues is complex and generates more difficult legal questions. This commentary addresses each of these questions, but focuses on the first four.

III. *Van Der Peet Trilogy*

(a) *R.* v. *Van der Peet*

Dorothy Van der Peet, a member of the Sto:lo Nation, was charged with selling 10 sockeye salmon for $50.00 contrary to s.27(5) of the *British Columbia Fishery (General) Regulations* which prohibited the sale and barter of fish under the authority of an Indian food fish licence.[36] The fish had been caught by her common law spouse under a valid Indian food licence and were sold by her to a non-Aboriginal person. Dorothy Van der Peet alleged that the restrictions imposed by the regulation unjustifiably infringed her Aboriginal right to sell fish and therefore violated s.35 of the *Constitution Act, 1982*. The rejection of Dorothy Van der Peet's defence at trial was reversed on appeal to the Supreme Court of British Columbia. Justice Selbie held that the provincial court judge erred when he ruled that evidence must support a finding of fact that the Sto:lo traditionally participated in a market system of exchange consistent with

[35] *Supra* footnote 2 at 172. For example, could it be argued that the current activity of gambling is a modern manifestation of the more fundamental traditional right to "manage the use" of Aboriginal land or was *Sparrow* properly interpreted as allowing the use of modern equipment, like rifles and skidoos, in the exercise of specific traditional activities, such as the right to hunt for food?

[36] SOR/84-248 pursuant to s.61(1) *Fisheries Act*, R.S.C. 1970, c.F-14.

"contemporary tests for marketing."[37] In his opinion the evidence supported a conclusion that Aboriginal societies had no "stricture or prohibition against the sale of fish" and therefore the right to sell was property understood as part of the traditional Aboriginal right to fish.[38]

Justice Selbie's ruling was overturned on appeal to the British Columbia Court of Appeal on the ground that a practice alleged to be an Aboriginal right cannot have become "prevalent merely as a result of European influences."[39] Speaking for the majority of the Court of Appeal, McFarlane J.A. held that trade of surplus fish on a casual basis at the time of contact was a separate and distinct practice from a contemporary right to sell fish on a commercial basis. In his opinion the proper characterization of the right to be considered was the right to "sell fish allocated for food purposes on a commercial basis."[40] In his dissent, Lambert J.A. argued that the majority improperly characterized the Sto:lo right as a commercial right to profit from the sale and exploitation of fish. The original right was properly characterized as a broad and fundamental right to fish for a livelihood. The fact that the Sto:lo began trading with Europeans as soon as they arrived suggested "they were not breaking with their past" but were merely responding "to a new circumstance in the carrying out of the existing practice."[41] Also dissenting, Hutcheon J.A. maintained that there was no "authority for the proposition that the relevant point for identifying Aboriginal rights is prior to contact with Europeans and European culture."[42] Rather, previous Supreme Court of Canada rulings identify the assertion of sovereignty as the relevant date. In his opinion, it was indisputable that the Sto:lo were trading commercially in salmon at that time.

On appeal to the Supreme Court of Canada, counsel for the Sto:lo argued that the emphasis on pre-contact practices resulted in the conversion of a s.35 "[r]ight into a [r]elic."[43] The proper approach to the definition of rights was to be found in *R. v. Sparrow* which promoted a generous, liberal and contemporary definition of Aboriginal rights, through the identification of "pre-existing legal rights" not "pre-contact activities."[44] Rejecting this approach, the majority supports Chief Justice Lamer's conclusion that the "liberal enlightenment view" inherent in generalized principles of constitutional interpretation apply only to rights "general and universal" in nature.[45] In his opinion, these interpretive principles should be applied to the "special" constitutional rights of "one part of Canadian society."[46] Rather, specificity is required to ensure that

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[37] Cited in *Van der Peet, supra* footnote 1 at 186.

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.* at 187.

[41] *Ibid.* at 188.

[42] *Ibid.*

[43] *Ibid.* at 189.

[44] *Ibid.*

[45] *Ibid.* at 190.

[46] *Ibid.* at 190.

the scope of s.35(1) is confined in a way that captures "*both* the Aboriginal and the rights in Aboriginal rights."[47] The result of this reasoning is the application of two standards of constitutional interpretation, a standard for Canadians in general and Aboriginal peoples in particular.[48]

Writing for the majority, Lamer C.J. sets out what is now known as the *Van der Peet* test for the characterization and identification of Aboriginal rights. The first part of the test involves identifying the precise nature of the claim being made. In his words:

> To characterize [the]... claim correctly, a court should consider such factors as the nature of the action done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right.[49]

Applying this part of the test he concludes that the proper characterization of Dorothy Van der Peet's Aboriginal right is not the right to sell fish, to sell fish on a commercial basis, or to fish for her livelihood. Rather, the proper characterization of the potential Aboriginal right is best expressed in terms of the actions which led to her being charged: the "exchange of fish for money or for other goods."[50] The question that must be asked is whether this activity was, and continues to be, integral to the Sto:lo Nation in that it was "one of the things that made the [Sto:lo] society what it was."[51]

The second part of the *Van der Peet* test provides standards to measure whether the activity claimed to be an Aboriginal right is a custom, practice or tradition that was integral to the Sto:lo culture. Only those practices, customs and traditions which have continuity with traditions, customs and practices that existed prior to contact can be transformed into enforceable constitutional rights. If the activity seeking rights protection has become integral due to European influence, regardless of the centrality of the activity to the contemporary Sto:lo Nation or the exercise of that activity for a substantial and continuous period of time, it is not Aboriginal in the eyes of the majority of the Supreme Court. The integral test is further refined by defining "integral" as "central" to

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[47] *Ibid.*

[48] K. McNeil emphasizes this result in his discussion of the justification test in *Gladstone, supra* footnote 2. He persuasively argues that the emphasis given by the Supreme Court on majoritarian interests significantly dilutes the constitutional nature of Aboriginal rights. *Supra* footnote 17. This approach does not, in the abstract, require a narrow construction of Aboriginal rights that excludes Aboriginal legal perspectives. However, it has been persuasively argued by Aboriginal scholars that this is the ultimate consequence of his reasoning. *See eg* J. Borrows, "The Trickster; Integral to a Distinctive Culture" (1997) 8(2) Const'l. For. 27 and R. Barsch and Sakej Youngblood — Henderson "The Supreme Court's *Van der Peet* Trilogy; Native Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993.

[49] *Supra* footnote 1 at 203.

[50] *Ibid.* at 210.

[51] *Ibid.* at 204.

an Aboriginal society or that which makes Aboriginal societies distinctive.[52] A "practical" way to measure centrality is to ask "whether without this practice ... the culture in question would be fundamentally altered or other than what it was."[53] These aspects of Aboriginal society can be contrasted to "aspects of Aboriginal society that are true to every human society (e.g. eating to survive)" and those which are "only incidental or occasional."[54] Incidental customs, practices and traditions, such as selling fish for money, can not become Aboriginal rights by "piggybacking on integral practices," such as the right to fish for food.[55]

Focus on the centrality of pre-contact activities is one of the most controversial aspects of Chief Justice Lamer's decision. Not only is it viewed as a significant departure from the generous spirit of *Sparrow*, but scholars have also repeatedly challenged the ability of a non-Aboriginal Court to objectively measure what is central to Aboriginal culture. As Barsh and Henderson argue, an inherent problem in *Van der Peet* is that "the search for centrality presumes the independence of cultural elements"[56] a concept incompatible with Aboriginal understandings which tend "to regard all human activity (and indeed all of existence) as inextricably *inter*—dependent."[57] The search also presumes that a living culture can be accurately described by a shopping list of static characteristics, a presumption abandoned by contemporary anthropological theory.[58] These criticisms arise even though Chief Justice Lamer acknowledges the inappropriateness of relying only on non-Aboriginal concepts of centrality. Adopting the reasoning of Professor Slattery, he suggests that Aboriginal rights originate in "intersocietal law that evolved from long-standing practices linking various communities".[59] However, little attention is given to the Sto:lo perspective on what is of central significance to them. Indeed, as John Borrows persuasively argues, the standards Lamer C.J. adopts are not sourced in either legal system. Commenting on *Van der Peet* and subsequent decisions Borrows observes:

> ...[N]owhere in these cases does the Chief Justice use the laws of the people charged, or the laws of any other aboriginal people, to arrive at the standards through which he will define these rights.[60]

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[52] *Ibid.* at 205.

[53] *Ibid.* at 206.

[54] *Ibid.* at 208.

[55] *Ibid.* at 208.

[56] *Supra* footnote 48 at 13.

[57] *Ibid.* at 14.

[58] *See* M. Asch, C. Bell, supra footnote 31 and C. Bell, M. Asch, "Challenging Assumptions: The Impact of Precedent on Aboriginal Title Litigation" in M. Asch ed. *Aboriginal and Treaty Rights in Canada* (U.B.C. Press in Association with the Centre for Constitutional Studies, University of Alberta, 1997).

[59] *Supra* footnote 1 at 199.

[60] *Supra* footnote 48 at 31.

Agreeing with concerns raised in the dissenting opinion of Hutcheon J. A. of the British Columbia Supreme Court and Justice McLachlin of the Supreme Court, Borrows also argues that the common law does not identify "European contact as the definitive all-or-nothing time for establishing a right."[61] Imagine, he muses, what it would be like if the rights of other Canadians depended on "whether they were important to them two or three hundred years ago."[62]

The rationale informing Chief Justice Lamer's restrictive approach to the interpretation of Aboriginal rights lies in what he identifies as a purposive analysis of s.35(1) and, what is later revealed in the *Pamagewon* decision, as legal pragmatism.[63] In his opinion, the Court in *Sparrow* "did not have the opportunity to articulate the purposes behind s.35(1) as they relate to the scope of the rights the provision is intended to protect."[64] Acknowledging the general principles of liberal construction and the existence of the Crown's fiduciary obligation, he emphasizes that the purpose of s.35 is to reconcile the fact that "Aboriginals lived on this land in distinctive societies [and] with the sovereignty of the Crown."[65] A "fair reconciliation" is one which "takes into account the Aboriginal perspective, yet [does] so in terms that are cognizable to the non-Aboriginal legal system."[66]

In *Sparrow* reconciliation was also relevant in the Supreme Court's analysis. However, in *Sparrow* reconciliation meant legislative powers of the Crown "must be reconciled with federal duty" through application of the justification test.[67] The concept of reconciliation is not used in *Sparrow* to narrow the scope of Aboriginal rights. In contrast, *Van der Peet* requires that reconciliation be considered in identifying the scope of Aboriginal rights and that those rights be defined narrowly as specific, pre-contact integral practices.[68] In short, the purpose of reconciliation is read into the definition of s.35 in a manner that restricts the scope of Aboriginal rights and shifts the balance of reconciliation in favour of the more universal obligations of the Crown rather than its specific duty toward Aboriginal people.

In what other ways does Chief Justice Lamer's analysis in *Van der Peet* differ from that offered by the *Sparrow* court? Several differences are identified in the dissenting opinions of Justices McLachlin and L'Heureux-Dubé. In their opinions, *Sparrow* stands for the principle that the constitutional rights of

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[61] *Supra* footnote 1 at 261, per Justice McLachlin dissenting.

[62] *Supra* footnote 48 at 30.

[63] *Supra* footnote 1.

[64] *Van der Peet, supra* footnote 2 at 191.

[65] In fact the court in *Sparrow* did discuss the purpose of s.35 but in more general terms. In light of its purpose of recognition and affirmation *Sparrow* held that the power of the Crown to terminate rights must be reconciled with its fiduciary duty. See, *supra* footnote 2 at 179-81.

[66] *Van der Peet, supra* footnote 1 at 193.

[67] *Supra* footnote 2 at 181.

[68] *Supra* footnote 1.

Aboriginal peoples are to be given "generous, liberal interpretation."[69] For Justice McLachlin this means that the nature and extent of Aboriginal rights must be viewed from a "certain level of abstraction and generality."[70] Aboriginal rights are to be cast in broad, general terms that remain constant over time. Applied to Dorothy Van Der Peet's actions, this means the sale of fish for sustenance is properly characterized as a different manifestation, or modern exercise, of a broader original right to "use the fishery resources for the purpose of providing food, clothing or other needs.....[71]"

Adopting a similar approach, Justice L'Heureux-Dubé argues that:

> ...s.35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the 'distinctive culture' of which the Aboriginal activities are manifestations. Simply put, the emphasis should be put on the *significance* of these activities to Natives rather than on the activities themselves.[72]

In her opinion the "overly majoritarian" approach to Aboriginal constitutional rights adopted by Chief Justice Lamer does exactly what *Sparrow* said the courts should not do.[73] Drawing distinctions between activities that are purely Aboriginal and those which are undertaken by non-Aboriginals fails to place appropriate significance on the importance of the activity to the Aboriginal peoples themselves. The proper focus of inquiry is not whether the activity is distinct to Aboriginal cultures, but whether it is "significant and fundamental" to a particular Aboriginal group.[74] Further, she argues, *Sparrow's* rejection of the frozen rights theory means that it is not imperative that the alleged right be an activity that was central to a First Nation prior to European contact or even before sovereignty was asserted. Rather, "the determining factor should be that the Aboriginal activity has formed an integral part of a distinctive Aboriginal culture for a substantial continuous period of time."[75]

The majority offers some relief to Aboriginal litigants by acknowledging that emphasis on pre-contact activity creates an impossible burden of proof in absence of a written record. In the words of Chief Justice Lamer:

> That [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

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[69] *Supra* footnote 2 at 179.

[70] *Van der Peet, supra* footnote 1 at 232 dissenting.

[71] *Ibid.* at 259.

[72] *Ibid.* at 233.

[73] *Ibid.* at 231.

[74] *Ibid.* at 233.

[75] *Ibid.* at 238.

> simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.[76]

Later he also emphasizes that

> [t]he concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, traditions and customs, and those which existed prior to contact. It may be that for a period of time an Aboriginal group ceased to engage in a practice...but then resumed the practice... at a later date. Such interuption will not preclude the establishment of an Aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity...to establish prior to contact practices.[77]

In summary, the reasoning in *Van der Peet* indicates that the majority of the Supreme Court is adopting a position of cautious judicial restraint in the identification of Aboriginal constitutional rights. The scope and flexibility of the right in that case is severely restricted by:

> (1) characterizing Aboriginal rights claims in terms of the specific activity in conflict with government legislative action; and
>
> (2) narrowing potential rights to practices, traditions, or customs which, prior to contact, were and continue to be, central and defining features of the culture of the Aboriginal people in question.

(b) *Gladstone* and *Smokehouse*

Two other cases that form part of what is now called the *Van der Peet* trilogy are *Gladstone* and *Smokehouse*.[78] These decisions also concern the reconciliation of Aboriginal rights with the British Columbia commercial fishery. In this comment, emphasis is placed on the *Gladstone* case because of the impact it has on future applications of the *Sparrow* justification test.[79] Donald and William Gladstone, members of the Heiltsuk First Nation, were charged with selling 4,200 pounds of herring spawn on kelp without a license contrary to the *Fisheries Act* and *Pacific Herring Fishing Regulations*.[80] Tailoring the inquiry to the actions with which the appellants were charged, Lamer C.J. concludes that the most appropriate characterization of the Aboriginal rights at issue are "the exchange of herring spawn on kelp for money or other goods" and the right to "sell herring spawn on kelp to the commercial market."[81] Again speaking for the majority he decides that written historical records support a conclusion that the exchange of herring spawn on kelp for money or other goods was a "central,

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[76] *Ibid.* at 205.

[77] *Ibid.* at 206-207.

[78] *Supra* footnote 1.

[79] For an excellent review of the impact of *Gladstone* on this test see K. McNeil, *supra* footnote 2.

[80] R.S.C. 1970, c.F-14 and SOR/84-324.

[81] *Supra* footnote 1 at 76. In his dissenting opinion at 68 Justice La Forest disagrees and limits the traditional right to "sharing..

significant and defining feature of the culture of the Heiltsuk at the time of contact."[82] Citing *Van der Peet* as the authority that an Aboriginal claimant need not provide direct evidence of pre-contact activities, he is satisfied that the diary of Alexander Mackenzie provides the necessary link between the contemporary "notion of commerce" and early trading activities required by the second branch of the *Van der Peet* test.[83]

A review of the legislation in issue further convinces Chief Justice Lamer that fishing regulations do not demonstrate a consistent, clear and plain intent to extinguish the Aboriginal fishing rights of the Heiltsuk. Considering regulations individually and as a whole, he concludes that the imposition of various terms and limitations on Aboriginal peoples does not extinguish their Aboriginal rights to fish. He agrees with Crown counsel that language which refers expressly to extinguishment is not required. He also maintains that governments need not acknowledge the existence of an Aboriginal right and consider the impact of legislation on that right at the time of enactment to effectively extinguish a right. What is required is consideration of all purposes of the legislative scheme in which alleged restrictions on the right are found. The purposes in this case were to ensure conservation goals were met and to protect the Indian food fishery. In his opinion, the latter objective is evidenced by preferences given to the Aboriginal fishery at various times throughout the history of the regulatory regime. These dual purposes make it difficult to conclude that the intent of the fishing regulations was to eliminate Aboriginal rights to commercial fishing. The fact that government failed to expressly "recognize an Aboriginal right", and "fail[ed] to grant special protection to it", is not sufficient evidence to support the conclusion that an Aboriginal right has been extinguished.[84]

As in the *Van der Peet* and *Smokehouse* decisions, the recognition of a commercial right to fish in *Gladstone* could have had significant social and economic impact on non-Aboriginal Canadians participating in the commercial fishery. In the former cases, this hypothetical problem did not translate into a practical one as the creation of a new and narrower test for Aboriginal rights effectively excluded the Sto:lo, Sheshaht and Opetchesaht Nations from participating in the commercial fishery as an Aboriginal right. However, the appellants in *Gladstone* met the *Van der Peet* characterization test. Further, the Crown failed to prove extinguishment. Therefore, it is not surprising that another means is found in *Gladstone* to address the potential impact of Aboriginal rights on the B.C. fishery. Of particular concern to the majority in *Gladstone* was the fact that the right asserted by the Heiltsuk had no internal limitations. This, reasons Chief Justice Lamer, differs "significantly from the

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[82] *Ibid.* at 78. Also at 78 he distinguishes *Van der Peet* and *N.T.C. Smokehouse, supra* footnote 1 on the basis that "whatever trade in fish had taken place prior to contact was purely incidental to the social and ceremonial activities of the Aboriginal societies making the claim."

[83] *Ibid.*

[84] *Ibid.* at 82.

right recognized and affirmed in *Sparrow* — the right to fish for food, social and ceremonial purposes."[85] The very definition of the right in *Sparrow* limits the right of the Musqueam to sufficient fish to meet those needs. In contrast, the only limits on the Heiltsuk's alleged right to herring spawn on kelp is "the external constraints of the market and the availability of the resource."[86]

The absence of inherent limitations results in an expansion of the range of legislative objectives considered to be valid for infringing Aboriginal rights and the failure of the Supreme Court to assign priority to Aboriginal constitutional rights. Noting a legislative objective must be "compelling and substantial," Chief Justice Lamer expands the range of valid legislative objectives in *Gladstone* to include interests of the "broader political community of which Aboriginal societies are a part."[87] This approach enables him to acknowledge that "the pursuit of economic and regional fairness, and the recognition of historical reliance upon, and participation in, the fishery by non-Aboriginal groups are valid reasons for regulating the exercise of an Aboriginal right."[88] As Kent McNeil argues, the effect of this reasoning is to allow constitutionally protected Aboriginal rights to be diluted by interests which are not constitutional, or even legal, in their nature. Drawing on the reasoning of the majority in *Sparrow* and the dissenting judgment of Justice McLachlin in *Van der Peet*, he argues that Chief Justice Lamer's analysis of justification evidences yet another retreat from *Sparrow:*

> While it is clear from the *Sparrow* decision that aboriginal rights are not absolute, the examples the Court gave there of compelling and substantial objectives which justify infringement of those rights involved objectives that either maintain the rights by conserving the resources on which the rights depend or ensure that the rights are not exercised in a dangerous way. Other compelling objectives might involve balancing the *constitutional* rights of the aboriginal peoples with the *constitutional* rights of non-aboriginal Canadians in circumstances of potential conflict. But, Lamer C.J. went much further than that in *Gladstone*. For him, it appears that objectives of sufficient importance to Canadians generally can be compelling and substantial, even where no conflicting constitutional rights are involved. This looks very much like the 'public interest' justification rejected in *Sparrow*.[89]

Equally significant is the impact of Chief Justice Lamer's reasoning on the assessment of the Crown's compliance with its fiduciary obligation when legislation is found to be an infringement of an Aboriginal right. "Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available, to give priority to that right...would be to give the right holder exclusivity."[90] Therefore, where there is no internal limitation, it is sufficient that the Crown "demonstrate that, in

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[85] *Ibid.* at 90.

[86] *Ibid.*

[87] *Ibid.* at 95 and 97.

[88] *Ibid.* at 98.

[89] McNeil, *supra* footnote 2 at 35.

[90] *Gladstone, supra* footnote 1 at 91.

allocating the resource, it has taken into account the existence of the Aboriginal rights."[91] As Justice McLachlin points out in her dissent, this new approach could render the priority scheme set out in *Sparrow* meaningless.

Gladstone is more favourable to Aboriginal litigants on the question of what constitutes *prima facie* infringement of an Aboriginal right. Noting that the facts in *Gladstone* require an analysis of interference based on the entire regulatory scheme, not a single regulation, Lamer C.J. elaborates on the standard for measuring *prima facie* infringement. Although the court in *Sparrow* asked whether the regulation at issue in that case was unreasonable, imposed undue hardship or denied the preferred means of exercising the right, Chief Justice Lamer concludes that these questions

> ...[d]o not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been *prima facie* infringement.[92]

The result is that proof of *prima facie* extinguishment lies somewhere on a spectrum between a positive response to all three questions and a significantly lower burden to demonstrate that "on its face, the legislation comes into conflict with an Aboriginal right, because of its objects or effects."[93]

IV. *The Application of Van Der Peet To Self-Government*

The decision in *R.* v. *Pamajewon* was released one day after the *Van der Peet* trilogy. There were many intervenors in the *Pamajewon* case as it was the first case considered by the Supreme Court which directly raises the question of whether an inherent right to self-government is recognized by s.35 of the *Constitution Act, 1982*. It was also the first time that the Supreme Court addressed the right to regulate gambling on reserve lands, an issue currently the subject of political negotiations. Characterizing the right to gamble in the broad terms asserted by the Aboriginal appellants, and finding in their favour, could have had significant practical effects on a province's ability to raise revenue and the federal and provincial power to regulate gambling.

Asserting an inherent right to self-government, the Shawanaga First Nation passed a by-law dealing with lotteries on reserve lands. The Eagle Lake First Nation did the same asserting the right to "be self-regulating in its economic activities."[94] Both also characterized their right more specifically as the "right to manage the use of their lands."[95] The by-laws were not approved under s.81

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[91] *Ibid.* at 92.

[92] *Ibid.* at 85.

[93] *Ibid.* at 123, per L'Heureux-Dubé J. dissenting.

[94] *Supra* footnote 1 at 168.

[95] *Ibid.* at 172.

of the *Indian Act* and neither First Nation had a license to operate gambling facilities under provincial legislation. As a result, criminal charges were laid against two of the appellants for keeping a common gaming house in breach of the gambling provisions of the *Criminal Code.* The three other appellants were charged with "conducting a scheme for purpose of determining the winners of property" also contrary to the *Criminal Code.*[96] The charges arose from the operation of high stakes bingo and other gambling activities on the reserves. Both Nations refused to apply for provincial licenses or to negotiate with the province.

The Ontario Court of Appeal held that there was no Aboriginal right to high stakes gambling and that "any broad inherent right to self-government held by the appellants was extinguished by the assertion of sovereignty."[97] Further, there was no evidence that the activity of gambling was ever subject to Aboriginal regulation. Even if there was such a right, in the opinion of the Court, it was extinguished by prohibitions against gambling in the *Criminal Code.* This decision was appealed on the basis that the Court of Appeal erred in "restricting Aboriginal title to rights that are activity and site specific and in concluding that self-government only extends to those matters that were governed by ancient laws or customs."[98] On appeal to the Supreme Court, Chief Justice Lamer held that "even if" s.35 includes a right to self-government, the appropriate legal standard to assess the right before the court is set out in *Van der Peet.* Therefore, the correct characterization of the right claimed is limited to the activity giving rise to the charge: "the right to participate in, and to regulate, high stakes gambling activities on the reservation."[99] In his opinion, the characterization of the right as a "right to manage land" would "cast the Court's inquiry at a level of excessive generality".[100] Narrowing the scope of the right in this fashion, he agrees with the conclusion of the Court of Appeal that there was no evidence at trial to support a finding that regulation of high stakes gambling was an integral part of the culture of the Shawanaga or Eagle Lake First Nations prior to European contact.

Madame Justice L'Heureux Dubé is the sole dissenting voice on the issue of proper characterization of the right. Accepting that *Van der Peet* is now the standard for defining s.35 rights, she argues that Lamer C.J.'s approach is even narrower because he focuses on the specific manner in which the right to gamble has been manifested (ie. high stakes bingo) rather than on the activity of gambling itself. Characterizing the right as the Aboriginal right to gamble, she asserts the proper question to ask is whether gambling is sufficiently connected to the "self-identity and self-preservation of the appellant's" Aboriginal societies to deserve protection under s 35.[101]

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[96] *Ibid.*

[97] *Ibid.* at 170.

[98] *Ibid.*

[99] *Ibid.* at 172.

[100] *Ibid.*

[101] *Ibid.* at 174.

Looking only to the reasoning in *Pamajewon,* it is difficult to assess its precedential value. On the one hand, the facts in *Pamajewon* are not sympathetic to the Aboriginal litigants. The activity of high stakes gambling does not engender public sympathy. Viewed from this perspective, First Nations benefited from the Supreme Court's rejection of the general characterization of the right as a right to manage use of reserve lands. Loathe to permit high stakes gambling by Aboriginal governments, the Supreme Court might have concluded that the more fundamental right to manage land use was extinguished. At least the finding of extinguishment in *Pamajewon* can be narrowed to the specific activity of high stakes gambling. On the other hand, the broader implications of *Pamajewon* can not be ignored. Did the application of the *Van der Peet* test to self-government mean that rights to government would only be recognized by the court if characterized in terms of specific pre-contact activities? As discussed later in this paper, the answer to this question is still uncertain.

V. *The Separation of Free Standing Rights from Title*

Van der Peet created uncertainty in a number of other areas. Would *Van der Peet* be applied to Aboriginal title claims? Must Aboriginal people now prove occupancy prior to European contact? Would the content of Aboriginal title be limited to those specific activities that were integral to Aboriginal societies prior to contact? Would *Van der Peet* be applied in the *Delgamuukw* appeal? Would the majority of the Supreme Court take a second look at the *Van der Peet* test in light of the criticisms their reasoning invoked? Not surprisingly, subsequent decisions reveal that the Supreme Court of Canada has reached a compromise position on these title issues by generating a new concept of rights which differentiates between claims to Aboriginal title and free standing rights.

(a) *R.* v. *Adams and R.* v. *Côté*

Although these cases involve treaty rights and are discussed in that context below, they are relevant to consider in the context of Aboriginal rights claims because they are the first Supreme Court of Canada decisions which clearly state that s.35 Aboriginal rights may exist independent of claims to Aboriginal title. George Weldon Adams, a Mohawk Indian, was charged with fishing without a license contrary to Quebec Conservation and Fishing Regulations.[102] In *Côté* the accused, Algonquin Indians, were charged for teaching traditional fishing techniques without a license and for fishing in areas to which they did not have a right of access. Both cases raised an Aboriginal right to fish. In *Côté*, the accused also alleged a concurrent treaty right to fish on ancestral lands. In both

[102] *Regulation Respecting Controlled Zones*, R.R.Q. 1981, Supp. at 370, O.C. 426-82 (24102/82) as amended by O.C. 1283-84 (06/06/84) and *Quebec Fishery Regulations*, C.R.C., c.852.

cases, the question of whether Aboriginal rights could exist independent of a claim to Aboriginal title became crucial as the impact of French colonial law on Aboriginal title in Quebec had yet to be fully addressed by the Supreme Court. In both cases it was argued that the French colonial regime never recognized Aboriginal title or rights. The majority agreed with Council for Quebec that the British received and continued French colonial law after the transition to British sovereignty in 1763. However, they also concluded that it is not clear whether "British sovereignty continued the French system of law governing relations between the Crown and Aboriginal societies."[103] Elaborating on this reasoning in *Côté*, Lamer C.J. argues that the proper understanding of the reception of French Colonial law is that it accommodates Aboriginal title as a "necessary incident of British sovereignty."[104] Also in *Côté*, he notes that French law may not explicitly recognize Aboriginal rights, but it also does not evidence a clear and plain intention to extinguish them. However, in both cases he avoids the issue by separating rights from title. The separation of rights from title does not mean that the connection of some rights to the land is insignificant, such as in the case of a site specific hunting right. What it does mean is that a claim to an Aboriginal right is not necessarily dependant on a successful claim to title. In *Adams* and *Côté* viewing Aboriginal title as part of a broader concept of rights operates in favour of the Aboriginal litigants enables the Supreme Court to recognize the existence of a free standing Aboriginal right to fish, without deciding on the broader, and more controversial issue: the existence of Aboriginal title in Quebec.

In the context of claims to self-government, the recognition of free standing rights protected by s.35 may mean rights to self-government can be asserted independent of claims to title. Although the concept of Aboriginal self-government has largely been conceptualized in terms of territorial limits, freeing rights from the land could push self-government beyond territorial boundaries. For example, jurisdiction over Aboriginal peoples by Aboriginal governments could be based on membership in a Nation, rather than residence within designated territorial boundaries.[105] This development is particularly important for some Metis peoples who have a difficult time meeting the existing tests for proving Aboriginal title and other Aboriginal peoples who have had their title extinguished prior to 1982. Extinguishment, lack of proof to support title and the failure of a colonizing government to recognize Aboriginal title will not automatically support a conclusion that other free standing Aboriginal rights do not exist.

(b) *Delgamuukw* v. *B.C.*

The most recent case rendered by the Supreme Court on Aboriginal title, *Delgamuukw* v. *B.C.* attempts to clarify the impact of the 1996 term on future

[103] Côté, *supra* footnote 1 at 47; see also Adams, *supra* footnote 1 at 14.

[104] Côté, *ibid.*

[105] Indeed this is suggested by R.C.A.P. in its Final Report, *supra* footnote 5, vol.2, part 1, ch.3.

claims to Aboriginal title and free standing Aboriginal rights. In *Delgamuukw*, the original claim of the Gitskan and Wet'suwet'en peoples was for ownership of, and jurisdiction over, 22,000 square miles of land in northwest British Columbia. Throughout the trial and appeal process the claim was reformulated by the court in terms of a right to self-government or self-regulation. However much less weight is given to arguments supporting claims to government than title claims on appeal to the Supreme Court. Chief Justice Lamer notes that this is the case because the "errors of fact made by the trial judge, and the resultant need for a new trial, [made] it impossible for [the] Court to determine whether a claim to self-government had been made out" and because the appellants did not have the benefit at trial of the *Pamajewon* decision which applied the *Van der Peet* test to rights to self-government.[106] He concludes it is therefore not surprising, and conceded to by counsel, that they "advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35."[107]

At trial, McEachern C.J. characterized the plaintiffs' claim to jurisdiction as a claim to sovereignty and held that *Sparrow* was conclusive authority against Aboriginal claims to sovereignty. Nevertheless he engaged in a factual analysis of the plaintiffs' assertion of sovereignty and the issue of whether Aboriginal jurisdiction survived. The onus was on the plaintiffs to prove the nature of their governmental institutions historically and the continuance of those institutions today. Considering the existence of a legislative institution as essential in the existence and exercise of Aboriginal jurisdiction, Chief Justice McEachern was not persuaded by the evidence that the pre-contact traditional feasting system of the Gitskan and Wet'suwet'en performed a function similar to that of a legislative institution.[108] Rather, he held that "a legal and jurisdictional vacuum" existed prior to the assertion of British sovereignty.[109] Indeed, he characterized the Gitskan and Wet'suwet'en legal system as a "most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves."[110] Further Chief Justice McEachern argued, if he was wrong on this point, "the Aboriginal system to the extent that it constituted Aboriginal jurisdiction or sovereignty, or ownership apart from occupation for residence or use, gave way to a new form of colonial government which the law recognizes to the exclusion of other systems."[111] In the alternative, he added the division of powers in the *Constitution Act, 1867* was exhaustive and effectively extinguished any residual Aboriginal jurisdiction that might have survived Aboriginal sovereignty.

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[106] *Supra* footnote 1 at 80.

[107] *Ibid.*

[108] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) at 374.

[109] *Ibid.* at 452.

[110] *Supra* footnote 108. For a critique of Justice McEachern's analysis see *supra* footnote 31 and F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Colichan Books and The Institute for Research on Public Policy, 1992).

[111] *Ibid.* at 453.

On appeal at the British Columbia Court of Appeal, the court divided on the question of whether Aboriginal jurisdiction survived the assertion of British sovereignty. Justice Wallace, reluctant to embrace the concept of Aboriginal jurisdiction, said that the plaintiffs only had jurisdiction in the territory "to the extent made possible by their social organization" prior to the assertion of sovereignty and these governmental rights, whatever they are, did not survive the assertion of British sovereignty.[112] Agreeing that the Gitskan and Wet'suwet'en had some form of jurisdiction, Justices McFarlane and Taggart also concluded that it was extinguished. In his dissenting opinion, Lambert J. A. applied the doctrine of continuity and concluded that broad jurisdictional powers of Aboriginal government survived sovereignty.[113] In his opinion, the feasting system performed certain legislative and judicial functions which he characterized as "self-government and self-regulation relating to their organized society, its institutions and its interests."[114] Without analyzing the specific factual circumstances and all potential legislation that might affect specific practices or aspects of contemporary self-government, he and Hutcheon J.A. agreed at least some rights of "self-regulation" survived.[115]

Although the appeal to the Supreme Court of Canada was transformed primarily into an Aboriginal title claim, the findings of the court are still important in assessing future recognition of rights to government because of the direction the court gives on the following subjects:

(a) the relationship between Aboriginal rights and Aboriginal title;
(b) the weight to be given to oral history in the proof of Aboriginal claims;
(c) the importance of continuity from historical times to the present;
(d) the endorsement of *Gladstone* and elaboration on legitimate justifications for interfering with Aboriginal rights;
(e) the power of the province to extinguish Aboriginal rights; and
(f) the application of the *Van der Peet/ Pamajewon* analysis to self-government claims.[116]

As discussed above, *Van der Peet* raised questions about whether occupation sufficient to support Aboriginal title must be established prior to European contact, rather than prior to the assertion of sovereignty, and whether all land

[112] *Delgamuukw* v. *B.C.* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.).

[113] The doctrine of continuity accepts that the Crown in some way acquired sovereignty. However, it also maintains that rights to land and to the continuance of social institutions survive sovereignty unless they are "inconsistent with the concept of sovereignty itself, or inconsistent with laws clearly made applicable tot he whole territory and all of its inhabitants, or with principles of fundamental justice." Otherwise termination requires clear and plain intent. *Ibid.* at 641.

[114] *Ibid.* at 240.

[115] Hutcheon J. rejects the term "self-government" as "self-regulation" seems to better capture the territorial and circumscribed nature of the type of governmental powers he has in mind. For more detailed analysis see *supra* footnote 31.

[116] *Delgamuukw* speaks to many other issues such as the ability of the Supreme Court to interfere with factual findings at trial and proof of Aboriginal title. However, it is beyond the scope of this comment to explore all aspects of the decision..

uses alleged to form part of that title had to be proved independently using the *Van der Peet* test. *Delgamuukw* makes it clear that the answer to these questions is "no." In addressing the relationship of Aboriginal title to free standing Aboriginal rights, Chief Justice Lamer reiterates his position in *Adams* that Aboriginal title is properly conceived as "one manifestation of a broader based conception of Aboriginal rights."[117] Writing on behalf of the majority, he elaborates on this vision of rights as follows:

> The picture which emerges from *Adams* is that aboriginal rights which are recognized and affirmed by s.35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive group claiming the right. ... In the middle, there are activities which, out of necessity, take place on the land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity.... At the other end of the spectrum is aboriginal title itself.[118]

Drawing a distinction between Aboriginal title and free standing rights enables the court to apply more flexible criteria to proof of title claims. It offers a middle ground between the broad interpretive principles in *Sparrow* and the narrow approach applied to free standing rights in *Van der Peet*. In the case of Aboriginal title, occupation must be proved prior to the assertion of sovereignty. However, rights falling elsewhere on the spectrum are traced to pre-contact activities, customs or practices and must not be integral to a First Nation as a result of European influence. Such rights can not be articulated in "excessively general terms."[119] Further, as discussed earlier, free standing rights are also limited to their historical dimensions. In contrast, the existence and content of Aboriginal title is not ascertained through a strict application of the *Van der Peet* test. Rather, Justice Lamer describes the content of Aboriginal title as:

> the right to exclusive use and occupation of the land held pursuant to title for various purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second that those protected uses [that are not] irreconcilable with the nature of the group's attachment to the land.[120]

Drawing this distinction between Aboriginal title and free standing rights is a compromise that works to the benefit of the Gitskan and Wet'suwet'en who faced the possibility of having to prove independently all land uses forming part of their title claim because of the earlier ruling of the court in *Van der Peet*. Referring to *Guerin*, Chief Justice Lamer describes Aboriginal title in broad and flexible terms as "the right to occupy and possess" —a right not qualified by the "traditional and customary uses of those lands"[121] However, the scope of

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[117] *Supra* footnote at para. 137.

[118] *Ibid.* at para. 138.

[119] *Ibid.* at para. 170.

[120] *Ibid.* at para. 117.

[121] *Ibid.* at para. 119.

potential uses remains unclear. Implicit in the description of Aboriginal title is the protection of "historic patterns of occupation: and recognition of continuity of relationship of an Aboriginal community to its land over time."[122] Uses which are irreconcilable with this protection and recognition are excluded from Aboriginal title. This includes uses aimed at contemporary economic development which are not compatible with uses integral to the claimant First Nation at the date sovereignty was asserted. An example given by Lamer C.J. is the inability to strip mine lands over which occupation was established through use of the land as a hunting ground. However, the "non-economic or inherent value" of Aboriginal title land is not to be taken "to detract from the possibility of surrender to the Crown in exchange for valuable consideration."[123] Rather, if "aboriginal peoples wish to use their lands in a way aboriginal title does not permit, then they must surrender those lands and convert them to non-title lands to do so."[124]

The creation of a spectrum of Aboriginal rights makes it difficult to predict how the court will address claims to Aboriginal self-government. On the one hand, rights to govern can be viewed as territorial rights inextricably linked to the land itself. Concepts of property law, the common law doctrine of Aboriginal rights and Aboriginal perspectives of their relationship with the land support an understanding of Aboriginal title that includes a right to control the land, its uses and events connected to the land. This concept of Aboriginal title has been reflected in American jurisprudence through the concept of territorial sovereignty and recognition that First Nations have powers of governance within their territories.[125] On the other hand, *obiter* comments in *Delgamuukw* suggest that a claim to self-government may be treated as a distinct rights claim falling within the category of integral practises, traditions and customs or a site specific right.[126] Categorized this way, claims to self-government would have to conform to the *Van der Peet* criteria for definition and self- government could, without further modification of *Van der Peet*, be reduced to its historical dimensions.

Chief Justice Lamer's reference to *Pamajewon*, his comments that a claim to rights of self-government cannot be articulated in "excessively general terms", and his conclusion that future claims must consider the direction of *Pamajewon*, suggest *Van der Peet* is relevant in assessing the existence and scope of rights to government.[127] At the same time, Chief Justice Lamer states that the court will take into consideration the *Report of the Royal Commission on Aboriginal Peoples* which offers a much broader and liberal understanding of self-government. In particular he states that a court considering a claim to

[122] *Ibid.* at para. 126.
[123] *Ibid.* at para. 131.
[124] *Ibid.*
[125] *Worcester* v. *Georgia* 6 Pet. (U.S.S.C.) 515 (1832).
[126] *Supra* footnote 2 at paras. 170-71.
[127] *Ibid.*

self-government would benefit from submissions relating to the concepts of "territory, citizenship, jurisdiction and internal government organization...."[128] This reference to institutions of government, rather than specific government activities creates confusion regarding the appropriate placement of government on the Aboriginal rights spectrum. Chief Justice Lamer's comments may mean that a court will entertain self-government claims independently from title and that a new place on the spectrum, falling somewhere between the specific articulation of activities required by *Van der Peet* and the broad assertion of inherent rights to self-government and self-regulation asserted in *Pamajewon*, will be created.

Chief Justice Lamer's findings on oral history, continuity, justification and extinguishment are also relevant to future considerations of an Aboriginal right to self-government. In his opinion, the *sui generis* nature of Aboriginal rights demands "unique treatment of evidence which accords due weight to the perspectives of Aboriginal peoples."[129] Adopting this principle he re-states his position in *Van der Peet* that post- contact evidence directed at demonstrating integral pre-contact practices (or in the case of Aboriginal title pre-sovereign occupation) is admissible as it "would be exceedingly difficult" to require Aboriginal litigants to produce "'conclusive evidence from pre-contact times about the practices, conditions and traditions of their communities."[130] This complements his later conclusion that Aboriginal peoples do not have to prove an unbroken chain of occupation from the date sovereignty was asserted to the present to establish a title claim. He also asserts that Canadian courts must come to "terms with oral histories of Aboriginal societies, which, for many Aboriginal nations, is the only record of their past."[131] In Lamer C.J.'s opinion, Chief Justice McEachern erred at trial by giving oral histories no independent weight because of "general concerns with the use of oral histories as evidence in Aboriginal rights cases."[132] The specific concerns raised by McEachern C. J. about the accuracy of an oral histories, insufficient detail and potential community bias are characterized by Lamer C.J. as concerns that relate to all oral histories. The logical consequence of this reasoning, he concludes, is oral histories would never be given independent weight and "would be consistently and systematically undervalued by the Canadian legal system, in contradiction to the express instruction to the contrary in *Van der Peet* ..."[133] The perceived effect of this approach on Chief Justice McEachern's findings of fact results in Chief Justice Lamer's ultimate conclusion that a new trial is warranted.

Delgamuukw adopts a less flexible approach to the analysis of infringement. The majority upholds rulings of lower courts that Aboriginal rights may be

[128] *Ibid.* at para. 171.

[129] *Ibid.* at para. 81, quoting himself in *Van der Peet.*

[130] *Ibid.* at para. 23 quoting *Van der Peet.*

[131] *Ibid.* at para. 84.

[132] *Ibid.* at para. 98.

[133] *Ibid.*

infringed by both provincial and federal governments and affirms that the *Sparrow* justification test applies to both governments.[134] Further, they embrace the expanded grounds for justification set out in *Gladstone* and re-emphasize that fiduciary duty does not require that Aboriginal rights always be given priority. Rather, fiduciary duty varies in form and the degree of scrutiny depending on the nature of the Aboriginal right at issue. Subsequent reasoning also implies that government actions which interfere with rights that have internal limitations, such as the right to fish for food in *Sparrow*, should be subjected to stricter standards of care than rights without internal limitations. However, all justifications must have the broad legislative objective of "*reconciliation* of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty."[135] Specific objectives within this broader category include "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims."[136] Each of these objectives may justify infringement of Aboriginal title. The fact that many of these objectives fall within provincial jurisdiction suggests that "how" not "whether" rights have been infringed, is the proper focus of future discussions between the parties.

Chief Justice Lamer also elaborates on the degree to which the infringing government action must be scrutinized under the second branch of the *Sparrow* justification test. Even if government has a valid legislative objective, this objective must be carried out in a manner consistent with the its fiduciary relationship with Aboriginal people. For Chief Justice Lamer this means that process and allocation of the resource at issue must "reflect the prior interest."[137] This may be evidenced by the accommodation of Aboriginal participation in resource development, reduction of economic barriers on Aboriginal lands and issuance of individual fee simple titles, leases and licenses in a way that reflects prior Aboriginal occupation. In his opinion, involvement in decision making through consultation is always required, but "the nature and scope will vary with the circumstances" from minimal good faith consultation to a requirement of full consent.[138] Compensation may also be required.

Perhaps one of the most important findings in *Delgamuukw*, and ironically the most obvious in law, is the conclusion that provincial laws can not extinguish Aboriginal rights, but they may infringe on existing rights if they can be justified. Chief Justice Lamer does not accept the argument that provinces can extinguish Aboriginal rights with laws of general application or that they may have an ability to extinguish land and land use rights by virtue of ownership

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[134] *Ibid.* at paras. 160-61.

[135] *Ibid.* at para. 165.

[136] *Ibid.*

[137] *Ibid.* at para. 167.

[138] *Ibid.* at para. 168.

of lands within their provincial boundaries. Rather, he upholds the view that "a law of general application cannot, by definition, meet the standard which has been set by the court for the extinguishment of Aboriginal rights without being *ultra vires* the province" as provincial laws which have the clear and plain intent to extinguish are properly classified as laws that "single out Indians for special treatment."[139] Further, he argues, s.88 of the *Indian Act* which renders general provincial laws valid even though they infringe on "Indianess", does not have the clear and plain intent of providing provinces with the power to extinguish Aboriginal rights. On the question of provincial powers to extinguish derived from Crown ownership, he states that provincial ownership is subject to Aboriginal title and that ownership is held separate from jurisdiction.

(c) *Implications of the Pamajewon Approach to Defining Self-Government*

The approach to defining Aboriginal governmental powers suggested by *Delgammuukw* could have the practical effect of promoting judicial interpretations of s.35 which avoid significant jurisdictional overlap. Taken to the extreme, rights to government may be articulated in terms of specific activities exercised within a broader institution of government. Consider, for example, an alleged Aboriginal right "to control Aboriginal education." Acceptance of this broad characterization of the right by an Aboriginal people generates issues of jurisdictional overlap. In the event of conflict, a Court might consider whether Aboriginal governments are sovereign within their own sphere of jurisdiction over education, and if not, in what circumstances Aboriginal jurisdiction prevails. A ruling of this nature has significant implications for the validity, and continued operation, of existing federal and provincial laws concerning Aboriginal education. Rather than promote fundamental changes to the existing division of powers, a Court could also adopt *Van der Peet* and recharacterize the asserted right "to control Aboriginal education" in terms of the activity giving rise to this broader legal issue. For example, if the activity at issue is truancy, the proper question may be "was there an equivalent concept to truancy in the ancestral society of the youth prior to European contact and was the practise of controlling truancy integral to the society of the claimant First Nation then and now?"

However, if this narrow approach defining Aboriginal governmental powers is adopted, it will be in direct contrast to the construction of rights recommended by the Royal Commission on Aboriginal Peoples (R.C.A.P.). Following the broad guidelines set out in *Sparrow*, RCAP looks to the broad concept of self-government, rather than particular institutions or specific activities exercised within those institutions, to support an argument that an abstract right to self-government is a fundamental right which receives constitutional protection. For RCAP, the key issue is whether a broad fundamental right to self-government was extinguished by legislation prior to 1982. Rejecting the

[139] *Ibid.* at paras.180 and 181.

argument that the distribution of governmental powers under the *Constitution Act, 1867* "clearly and plainly" extinguishes all Aboriginal rights to self-government, RCAP notes that the latter argument "confuses the question of the *scope* of federal and provincial powers with the question of the *exclusiveness* of those powers."[140] In their opinion the *Constitution Act, 1867* is one of several instruments which anticipates the existence of more than one government which hold concurrent powers.[141] Looking to the cumulative purpose and effect of federal Indian legislation, they also conclude that although the federal government "purported to alter the existing governmental powers of Indian groups," those alterations assumed the existence of Indian political organization and, viewed cumulatively, "severely disrupted and distorted their political structures" but did not effectively extinguish them.[142] Consequently, the broad and abstract constitutional right to self-government survives as an "existing" Aboriginal right protected by s.35(1). The appropriate legal question then is "to what extent have these powers been circumscribed through subsequent federal and provincial regulation?"

Unlike the Supreme Court in *Pamajewon*, RCAP argues s.35 and *Sparrow* provide the legal foundation to generate a broad outline of federal, provincial and Aboriginal governmental powers. In its final recommendations to the federal government, RCAP identifies broad spheres of Aboriginal jurisdiction and suggests that *sui generis* conflicts rules be developed to reconcile jurisdictional overlap.[143] The Aboriginal sphere of jurisdiction is concurrent with federal jurisdiction over matters "relating to the good government and welfare of Aboriginal peoples and their territories."[144] This sphere includes core areas in which "an Aboriginal people is free to implement its inherent right of self-government by self-starting initiatives" and periphery areas in which federal and provincial powers are paramount and Aboriginal self-government can only be exercised by agreement.[145] Also concerned with the practical implications of Aboriginal governance, RCAP suggests potential legal entitlements be tempered by considering whether there is "major impact" on adjacent jurisdictions and whether the governmental power at issue is of transcendent federal or provincial concern.[146] These limits are interpreted in a flexible manner as is evident in the following "partial list' of core areas suggested by RCAP:

> [I]t seems likely that an aboriginal nation with exclusive territory would be entitled as a matter of its core jurisdiction to draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services, deal with family matters, regulate

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[140] R.C.A.P., *Partners in Confederation*, *supra* footnote 5.

[141] *Ibid.* at 32. Other instruments include the Royal Proclamation of 1763, and the *Constitution Act*, 1791 (U.K.) 31 Geo. III, c.31, s.2.

[142] *Supra* footnote 5 at 35.

[143] *RCAP, Final Report, supra* footnote 5.

[144] *Ibid.* at 215.

[145] *Ibid.*

[146] *Ibid.*

> many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory. In particular, the regulation of *many substantive aboriginal and treaty rights protected under s.35(1)* would probably fall within the core of aboriginal jurisdiction.[147]

Because federal power under s.91(24) over "Indians and lands reserved for Indians" is, in the opinion of RCAP, subject to the terms of s.35(1) which protects the inherent right to self-government, RCAP suggests that Aboriginal law in core areas takes priority over federal law in the event of conflict.[148] An exception to this rule of paramountcy is contained in *Sparrow*. Adopting the *Sparrow* standard RCAP suggests federal laws only prevail if federal action is shown to be "compelling and substantial and the legislation is consistent with the Crown's basic trust responsibilities to Aboriginal people"[149] RCAP also suggest that conflicts between Aboriginal and provincial jurisdiction be resolved applying rules "similar to those regulating the interaction of federal and provincial jurisdictions" except that in the event of conflicting Aboriginal laws and provincial laws of general application, Aboriginal laws prevail. For example, under this model "Aboriginal labour laws will usually displace any conflicting provincial labour laws within Aboriginal territories".[150]

Although it is true that a Royal Commission has more flexibility and a broader mandate than the judiciary, it is also true that RCAP's reasoning draws on both a precedential and constitutional foundation to support its analysis. A similar structure could have been promoted by a Supreme Court interested in empowering Aboriginal governments and promoting constitutional change. This court likely views such fundamental change as beyond its institutional competence. However, by promoting judicial constraint, it adds little, and arguably has detracted from, the substantive evolution of Aboriginal rights law. As in the case with the Charter of Rights and Freedoms, s.35 imposes on the judiciary "the demanding task of putting legal flesh" on the skeletal frame of constitutional Aboriginal and treaty rights.[151] The Dickson court in *Sparrow* suggests that this be accomplished adopting the same liberal approach given to the interpretation of rights in the *Charter*. The Lamer court disagrees.

The question left to be asked is why has the Lamer court heralded a retreat from the generous and abstract formulation of rights promoted by the *Sparrow* case? The answer may be legal pragmatism. The large number of intervenors and the significant economic dimensions of the 1996 decisions are a clear indication to the court that they must be constantly aware of the practical and political consequences of their decisions in this area. Decisions which are

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[147] *Ibid.* at 219. Emphasis added.

[148] *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c.3.

[149] *Supra* footnote 5 at 25. Laws of general application are provincial laws that do not single out s.91(24) Indians for specific treatment or affect Indian status or "aboriginality." *See Dick* v. *R.*, *supra* footnote 24.

[150] *Ibid.* at 217.

[151] D. Gibson, "Judges as Legislators: Not whether But How" (1987) 25 Alta. L.R. 249 at 252.

detrimental to existing non-Aboriginal government and economic interests are bound to result in increased public criticism as Canadian citizens feel the impact of Supreme Court decisions in their daily lives. From a practical perspective it is therefore not surprising that the Supreme Court has pushed the resolution of issues that could result in significant political and economic impact on all Canadian citizens back into the political arena: consensual resolution is preferred to the imposition of perceived chaos.

Unfortunately, the history of Aboriginal peoples in this country has demonstrated the need for a judicial hammer to effectively realize rights at negotiation tables. The Lamer court may have not given the sledge hammer desired, but at least it has avoided broad pronunciations on the lack of rights to govern and that some attention will be paid to the RCAP report. It may be that Chief Justice Lamer's reference to the different "models of government' outlined in the RCAP report and conceptions of "territory, citizenship, jurisdiction [and] internal government organization" will mean claims to self-government must be framed in terms narrower than those core areas recommended by RCAP, but broader than a strict application of *Van der Peet* and *Pamajewon* would allow. Rather, a characterization of rights falling somewhere between specific activities on one end of the spectrum and broad core areas of jurisdiction recommended by RCAP on the other, may be endorsed. Taking again the example of a claim to control Aboriginal education, the Supreme Court may endorse another compromise. Rather than focussing on the narrow activity of truancy, the court may be willing to entertain a claim to control education of Aboriginal youth. This approach would avoid jurisdictional overlap in all areas of education that would be created by too general a characterization of the right. Further, it would not create significant invasion of federal and provincial jurisdiction given the contemporary reality of First Nations assuming greater control over education through self-government agreements. This approach would be in keeping with the spectrum analysis adopted throughout *Delgamuukw* and judicial concern about the potential impact of their decisions on the political, economic and legal rights of non-Aboriginal governments and citizens.

VI. *Treaty Rights to Aboriginal Government*

The question remains, will First Nations asserting treaty rights to self-government also face a narrow construction of treaty rights and a broad interpretation of justifications for interference with these rights? Although the Supreme Court has not specifically addressed treaty rights to self-government, recent decisions suggest judicial pragmatism and compromise will also be influential in the development of this area of law. As treaties represent "a solemn exchange of promises," one could argue that the Court should be less willing to impose a restrictive approach to Aboriginal understandings of the rights at stake, and more willing to impose tougher standards on non-Aboriginal government.[152]

[152] *Badger, supra* footnote 1 at 104.

However, *Badger* and *Côté* illustrate this is not the current approach. Indeed, these cases suggest "the characterization of a right [to govern] as an Aboriginal right or as a treaty right will not be of any consequence once it is established."[153] Inherent in judicial analysis is the assumption that the federal government could unilaterally terminate treaty rights before 1982 and can continue to regulate treaty rights after 1982 if limits on their exercise can be justified under the *Sparrow* test. It may be that the unilateral termination of an express or implied treaty right to self-government, or a self-government activity, is a breach of fiduciary obligation giving rise to an action in damages, but this will be determined on a case by case basis.

(a) *R.* v. *Badger*

In *Badger* the accused were charged with hunting without a license in areas to which they asserted a right of access. The appellants, treaty 8 Indians, were hunting on privately owned land and were charged with various offences under the *Alberta Wildlife Act*.[154] All three had been hunting on lands that had been surrendered to the Crown under Treaty. The issue before the court was whether these privately owned lands were lands to which the appellants had a right of access under the Alberta Natural Resources Transfer Agreement. Speaking for the majority, Cory J. held that the appellants were entitled to hunt on unoccupied, privately owned lands if the lands were not put to visible incompatible use. An analysis of the physical characteristics of the land at issue resulted in the finding that only Mr. Ominayak had the right of access to hunt for food. The convictions of Mr. Kiyawasew and Mr. Badger were upheld.[155]

In a sense *Badger* represents a victory for Treaty Indians as evidence in the case suggests that the visible, incompatible use test reflects how signatories of Treaty 8 understood their right to hunt on private land. However, the threshold for the Crown to establish incompatible use is very low.[156] A more significant victory is the rejection of a theory generated by the *Horseman* decision that all treaty rights to hunt within the geographical scope of the Natural Resource Transfer Agreements (NRTA) were extinguished and replaced by the terms of the NRTA(s).[157] In reaching this conclusion in *Badger*, Justice Cory examined

[153] Côté, *supra* footnote 1 at 40.

[154] S.A. 1984, c.w-9.

[155] For a more detailed discussion of the *Badger* case and different treatment of Aboriginal and treaty rights see C. Bell "*R.* v. *Badger:* One Step forward and Two Steps Back?" (1997) 8 (2) Const'l. For. 29.

[156] *See* discussion *ibid.* at 22.

[157] Paragraph 12 of Natural Resources Transfer Agreement provides that provincial laws respecting game apply to the Indians within the boundaries of the province provided that the Indians shall have the right of "hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and other lands to which the said Indians may have a right of access." The same provision is contained in paragraph 12 of the Saskatchewan agreement and paragraph 13 of the Manitoba agreement.

the effect that the NRTA had on the Treaty 8 right to hunt. Adopting a style in keeping with the 1996 trend, he does not view commercial hunting as a contemporary manifestation of a broader treaty right to hunt for one's "vocation"[158] Rather, commercial hunting is considered a separate and functionally distinct right in a divisible bundle of treaty rights(s) to hunt. Adopting this vision of rights, paragraph 12 of the NRTA is not found to regulate the exercise of a broad right to hunt. Rather, it operates as a clear and plain extinguishment of a separate and distinct commercial right to hunt. Other modes of hunting anticipated in treaty 8, but not clearly and plainly terminated by the NRTA, continue to receive s.35 protection as "existing" treaty rights.

Given the interpretive principles applicable to treaties, one might argue that treaties should invoke a broader and more flexible characterization of rights because case law requires that greater emphasis be placed on the Aboriginal understandings of the meaning of the right at stake.[159] Further, "restrictions on treaty rights are to be narrowly construed;" and "it is always assumed that the Crown intends to fulfill their treaty obligations".[160] Finally, ambiguities are also supposed to be resolved in favour of the Aboriginal understanding.[161] However, *Badger* suggests these principles are not enough to take treaty rights into a more general and less specific framework for analysis. Placed in a practical context, this outcome is not surprising. If the NRTA was viewed as limiting the exercise of a more fundamental treaty right to hunt for one's livelihood, rather than extinguishing one aspect of that rights, the commercial right to hunt, the court would have substantially interfered with provincial powers to regulate commercial hunting.

Badger also clearly rejects the consensual thesis generated by the *Sioui* decision.[162] In *Sioui*, Justice Lamer declared that treaties between the English Crown and First Nations were similar to Nation to Nation relationships. He also stated that a "treaty could not be extinguished without the consent of the Indian signatories involved."[163] This comment led to speculation about whether consent is required to terminate treaty rights, a theory in keeping with contemporary standards of international law and Aboriginal perceptions of their

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[158] Treaty 8 reads "the said Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing..."

[159] *See* e.g. *Simon* v. *R.*, [1986] 1 C.N.L.R. 153 (S.C.C.) and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; P. Macklem, "First Nations, Self-Government and the Borders of Canadian Legal Imagination." (1991) 36 McGill L.J. 425.

[160] *Supra* footnote 1 at 92.

[161] *Ibid.* Also note in *Gladstone, supra* footnote 1 at 83 Lamer C.J. suggests that the NRTA cannot be interpreted as regulating or limiting the exercise of the commercial hunt because it was "aimed at achieving a permanent clarification of the province's legislative jurisdiction and of the legal rights of Aboriginal peoples within the province." Thus, while the language in the NRTA may not be clearer than that in the fishing regulatory regime in B.C., it is sufficient to support a clear and plain intention to extinguish because the intention in enacting the NRTA is different.

[162] *Supra* footnote 18.

[163] *Supra* footnote 18 at 1063.

treaty rights. However, Justice Cory refuses to question the federal government's power to unilaterally terminate treaty rights prior to their protection in s.35. Applying *Sparrow* to the question of extinguishment, he focuses on the question of clear and plain intention. In his opinion, if a treaty right is not effectively extinguished, the continued application of legislation that infringes a treaty right depends on whether or not that legislation can meet the *Sparrow* justification test.

The presumed application of *Sparrow* to treaty rights highlights the need for further exploration of the meaning and effect of the Crown's fiduciary duty. One could argue that a stricter standard of fiduciary obligation arises in the treaty context.[164] Treaties may provide dual protection to what might otherwise be characterized as Aboriginal rights.[165] It is therefore plausible that they give rise to a stricter duty of adherence by the Crown because of a dual fiduciary obligation: one sourced in the general relationship between Aboriginal peoples and the Crown and a more specific obligation sources in an exchange of "solemn promises."[166] It is beyond the scope of this review to develop arguments based in fiduciary law. The point is that one could argue that termination and regulation of treaty rights to self-government should be measured by a stricter justification test. For example, the Court might consider whether the Crown properly acknowledged the treaty right and exhausted the possibility of less intrusive measures.[167] The Supreme Court does not close the door to these arguments in *Badger*. Indeed, the subsequent decision of *Delgamuukw* suggests the duty and what it entails will vary according to the nature and circumstances of the right claimed. However, lower courts may be reluctant to create stricter standards of justification for interference with treaty rights without clearer direction from above.

(b) *R.* v. *Adams* and *R.* v. *Côté*

R. v. *Adams* and *R. v. Côté*, discussed earlier, also raise questions about the continued immunity of treaty rights from the exercise of provincial jurisdiction. The infringement and justification analysis in these cases may also be relevant to determine the continued existence of a treaty right to govern, or to exercise a particular government practice. In *Adams*, the province of Quebec failed to adduce evidence sufficient to justify its interference with a treaty right. The majority held that regulating sport fishing was not a valid "compelling and

[164] For further discussion see L. Rotman, "Defining Parameters: Aboriginal Rights and the *Sparrow* Justification Test" (1997) 36 Alta. L.R. 149.

[165] For further discussion of fiduciary obligation in this context see Bell, *supra* footnote 115 at 25.

[166] *Badger, supra* footnote 1 at 107.

[167] See e.g. M.E. Turpel "Working Principles For Reform: Full Compliance with Crown Fiduciary Duties" in Indian Claims Commission Proceedings, Special Issue on Land Claims Reform (Ottawa: Canada Communications Group, 1995) at 28.

substantial objective to interfere with a treaty right."[168] In *Côté* the justification analysis is more complex. Two regulations were at issue, one which required a license to fish and the other which required a fee to be paid to fish in controlled zones. The former was held to be a *prima facie* infringement of the appellants' rights. It could not be justified for the same reasons given in *Adams*. However, the regulation respecting controlled zones for fishing was found not to infringe the appellants' Aboriginal right to fish for food. Focussing on the fact that the regulation did not prevent entry, but rather required payment of a fee, Lamer C.J. maintains that the key issue is whether the payment of a user fee to the state is an infringement on the Aboriginal right. Emphasizing that revenues collected were directed towards development and maintenance of the fishing area, he concludes that the creation of the controlled zone is not a *prima facie* infringement of the right to fish for food. In his opinion, it *facilitates*, rather than *restricts*, the Aboriginal right.

The significance of Chief Justice Lamer's infringement analysis on the recognition of potential treaty rights to govern becomes clearer when placed in the context of his comments on s.88 of the *Indian Act*.[169] Section 88 provides that "subject to the terms of any Treaty and any other Act of Parliament all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province...."[170] As mentioned earlier, the appellants in *Côté* also challenged the offending laws on the basis of a treaty right to fish for food. They argued that even if the controlled zones regulation was not a *prima facie* infringement of their Aboriginal right to fish for food, the regulation should not affect them because s.88 gave their treaty right to fish for food paramountcy over provincial laws. Chief Justice Lamer held that it was not necessary to rule on the accuracy of this argument because the regulation requiring a license was clearly invalid and because the controlled zone regulation does restrict the treaty right to fish. Rather, its effect is to facilitate the right. In his opinion, s.88 is properly interpreted as a conflicts section. A provincial law which does not "restrict or infringe" a treaty right is not "inconsistent" with s.88 and therefore does not invoke its application.[171]

This analysis of s.88 is troublesome because it opens up yet another door to dilute Aboriginal autonomy. Judicial, rather than Aboriginal, perceptions of the effect of provincial law as beneficial, or as a law that enhances or facilitates a treaty right, could result in the application of more provincial laws to First Nations than might otherwise apply. Even more alarming is the suggestion that the Supreme Court may read a justification test into the violation of paramountcy provisions in s.88. In the words of Chief Justice Lamer:

> The statutory provision does not *expressly* incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework. But the

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[168] *Supra* footnote 1 at 22-23.

[169] R.S.C. 1985, c.I-6.

[170] *Ibid.*

[171] Côté, *supra* footnote 1 at 61.

precise boundaries of the protection of s.88 remains a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an *implicit* justification stage under s.88. In the near future, Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these uncertainties and in light of the parallel constitutionalization of treaty rights under s.35(1).[172]

Conclusion

The above decisions will have a profound impact on the future direction of Aboriginal rights litigation and negotiation. This paper has attempted to outline some of the fundamental trends in the reasoning of the Supreme Court and to raise questions about what these trends might mean for future judicial recognition of broad jurisdictional powers of Aboriginal government. Each of these decisions expands existing jurisprudence in some way and liberates the present Court from the generous interpretive principles and justification standards given in the *Sparrow* case. Although some advances are made by First Nations in the area of treaty rights and Aboriginal title, it is clear that the characterization of a right as Aboriginal or treaty is not significant in determining issues of extinguishment and justification. In particular, the notion that consent must be obtained to amend or terminate treaty rights is rejected and the *Sparrow* test for justification is applied. It is possible, however, that stricter standards to justify infringement of treaty rights could be adopted if raised before the Court. Indeed, the discussion of the requirement of consultation, and the implication that some actions may require consent of First Nations to meet the justification test, supports this possibility.

The Supreme Court has not expressly denied the survival and contemporary existence of broad, fundamental powers of Aboriginal government. The reasoning evidenced in *Pamajewon* suggests that the present Court may only confirm the existence or termination of specific aspects or practices which form part of broader, more fundamental rights asserted by First Nations. References to the *Report of the Royal Commission on Aboriginal Peoples* in the *Delgamuukw* decision further suggest that the Supreme Court may adopt a spectrum approach to determine whether claims to government must be articulated specifically or whether they can be conceptualized in broader terms. *Delgamuukw* is not clear on whether rights to self-government will be incorporated into a broad understanding of the content of Aboriginal title or whether they will fall elsewhere on the spectrum.

For lawyers negotiating in the field of Aboriginal Law, the present climate of legal uncertainty may mean that the Supreme Court is not the place to seek rulings on principles of law to help define the outer limits of Aboriginal jurisdiction. The worst case for Aboriginal litigants is that the court will only be of assistance if the inability to reach political agreement rests on the determination of a continued right to exercise specific historical activities. On the other hand, judicial consideration of rights of governance integral to Aboriginal culture and *obiter* comments in *Delgamuukw* suggests that Canadian

law is not operating on the assumption that all Aboriginal rights to govern have been terminated or superseded by federal and provincial powers. Even if a narrow construction of rights is adopted, the resulting narrow construction of alleged termination of those rights will leave all parties to government negotiations questioning the potential scope of Aboriginal governmental power. The immediate result may be a renewed focus on political negotiation within specific jurisdictional sectors currently viewed as vital to the survival of contemporary Aboriginal communities.