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# Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*

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*R. v. Pamajewon* was the first occasion in which First Nations asserted an inherent right to self-government as the central ground of appeal to the Supreme Court of Canada. Instead of seizing the opportunity to articulate a clear statement on the right to self-government, the Court elaborated legal standards replete with subjective elements, lacking in enduring principles, and based upon a museum-diorama vision of aboriginal rights.

As *Pamajewon* concerned gambling on Indian reserves, the author surveys gambling practices and regulation in the United States and Canada. This sets the framework for an analysis of the Court's application of the *Van der Peet* test to determine the aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act*. The author argues that the Court has created "permafrost rights" as only the method or manner of exercise of an approved activity is permitted to evolve while the activities themselves are not. Furthermore, although Aboriginal perspectives on aboriginal rights are, according to the Court, equivalent in import to non-Aboriginal views, there was no investigation of the relevant substantive Ojibway laws in *Pamajewon*. The exploration has been diverted away from determining the law into a judicial assessment of historical, sociological and anthropological evidence of what constitutes a distinctive part of a culture; a role for which the judiciary is not well suited.

The author argues that the Supreme Court should have looked to the alternate vision of Chief Justice Marshall of the United States Supreme Court. Marshall C.J. acknowledged the independent political status of First Nations at the time of contact, as well as the continued existence of that political, not cultural, identity. In addition, an assessment of the federal government's position indicates that its policy is founded upon the recognition of the inherent right to self-government, which stands in stark contrast to the Court's decision in *Pamajewon*.

The Court has created a legal standard that is so hard to meet and has rendered litigation so expensive to pursue that it is thoroughly unattractive for First Nations and Métis to seek a judicial solution. The political route of pressuring for legislative change or negotiating agreements may now have become the only viable option.

Dans *R. c. Pamajewon*, les Premières nations ont eu, pour la première fois, l'occasion d'invoquer un droit inhérent à l'autonomie gouvernementale comme argument principal d'un appel devant la Cour suprême du Canada. Au lieu de saisir l'opportunité de se prononcer clairement sur l'autonomie gouvernementale, la Cour a articulé un test juridique truffé d'éléments subjectifs et basé sur une vision des droits ancestraux, si ce n'est sur une vision des Autochtones eux-mêmes, digne d'un diaporama ou d'un musée.

Étant donné que *Pamajewon* traite des casinos sur les réserves, l'auteur survole les pratiques et règlements concernant les jeux d'argent aux États-Unis et au Canada. Ceci pose les bases nécessaires à une analyse de l'application du test établi dans *Van der Peet* servant à déterminer quels sont les droits ancestraux reconnus et confirmés par l'article 35(1) de la *Loi constitutionnelle de 1982*. L'auteur argue que la Cour a créé des «droits-permafrost» car seuls les méthodes et manières d'exercer une activité approuvée peuvent évoluer, la dite activité étant interdite d'évolution. De plus, bien que les perspectives des Autochtones quant aux droits ancestraux sont, selon la Cour, d'importance égale aux vues des non Autochtones, il n'y eut aucune investigation des lois ojibways sur les questions abordées dans *Pamajewon*.

L'auteur soutient que la Cour suprême aurait dû considérer la vision alternative de Monsieur le juge en chef Marshall de la Cour suprême des États-Unis. Il a reconnu l'indépendance politique des Premières nations au temps des premiers contacts, comme il a reconnu la continuation de cette identité politique, et non culturelle. Aussi, une évaluation de la position du gouvernement fédéral indique qu'elle est fondée sur la reconnaissance d'un droit inhérent à l'autonomie gouvernementale, ce qui se démarque vivement de la décision rendue dans *Pamajewon*.

La Cour a créé un test juridique qui est si exigeant et qui a rendu les coûts reliés aux litiges si dispendieux qu'il est particulièrement désavantageux, pour les Autochtones et les Métis, de demander des solutions judiciaires. La voie politique, comprenant des accords négociés ou des pressions pour des changements législatifs, serait possiblement devenue la seule option viable.

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## Introduction

North American colonization began almost 400 years ago with the arrival of Europeans who intended to make a new life for themselves and their descendants. The early colonists encountered neither a garden of Eden nor *terra nullius*, to use biblical and legal frames of reference, but instead landed on the shores of an equally "old world" populated by millions<sup>1</sup> comprised of nations similar, in many ways, to what they had left behind. The nations with whom the Europeans made contact consisted of organized societies: diplomatic and trading relationships were widespread, knowledge of agriculture and pharmacology extensive, the harvest of natural resources was considerable yet sustainable, alliances were forged, wars fought, territories demarcated, significant geographic sites named.<sup>2</sup> While Aboriginal philosophies, governmental structures and world views differed in many ways from those practised in Europe, striking differences also existed between Aboriginal nations themselves. Aboriginal societies in North America were not "new" in any objective sense, merely unknown to Europeans.<sup>3</sup>

The French and British governments, most relevant from a Canadian perspective, recognized the Indian nations *qua* "nations"<sup>4</sup> and as "the rightful occupants of the

<sup>1</sup> For information on post-contact Aboriginal demography see R. Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman, Oklahoma: University of Oklahoma Press, 1987).

<sup>2</sup> For detailed historical information, see e.g.: O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992); P. Drucker, *Indians of the Northwest Coast* (New York: McGraw-Hill, 1955); J.M. Weatherford, *Indian Givers: How the Indians of the Americas Transformed the World*, 1st ed. (New York: Ballantine Books, 1988); G.E. Sioui, *Pour une auto-histoire amérindienne: essai sur les fondements d'une morale sociale* (Québec: Presses de l'Université Laval, 1989); R. Wright, *Stolen Continents: The Americas through Indian Eyes since 1492* (Boston: Houghton Mifflin Company, 1992); M. Conrad et al., *History of the Canadian Peoples: Beginnings to 1867* (Toronto: Copp Clark Pitman, 1993); and J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev. ed. (Toronto: University of Toronto Press, 1989).

<sup>3</sup> The legitimacy of the many Aboriginal nations with full ownership of their lands and waters could not be intelligently nor morally challenged, although such challenges were frequently made. The most famous of such challenges occurred in theological circles in Spain with the development of the *Requerimiento* in 1513, which was read aloud by representatives of the Spanish King as a request to permit Catholic missionaries to enter the lands of the Indian nation or have war declared. This culminated in vigorous debates in the 1530s, resulting in the treatises of Francisci de Victoria, *De Indis et de Jure Belli Relectiones*, ed. by E. Nys (Washington, D.C.: Carnegie Institute, 1917). These treaties acknowledged that the "Indians Lately Discovered" were free and rational people with souls who possessed rights under natural law just like Christians; that they were "true owners alike in public and in private law" of their lands and property such that the title of first discovery only applied to vacant and not to inhabited lands; and that the Law of Nations was universally binding on all, including the Indian nations, whereby its transgression could justify conquest and colonization. See also R. A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990); F.S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States" (1942) 31 Geo. L.J. 1; and papal bull *Sublimis Deus* issued by Pope Paul III in 1537.

<sup>4</sup> For early usages of this terminology, see e.g.: *Royal Proclamation, 1763* (U.K.), 3 Geo. 3, reprinted in R.S.C. 1985, App. II (Constitutional Acts and Documents); *Worcester v. Georgia*, 31 U.S.

soil".<sup>5</sup> While a doctrine of discovery was elaborated to justify assertions of underlying title and "to avoid conflicting settlements and consequent war"<sup>6</sup> among the European claimant states, this doctrine did not *per se* invalidate either the title or the sovereignty of the Indian nations; rather it "gave to the nation making the discovery the sole right of acquiring the soil from the natives".<sup>7</sup> In recent years, the Supreme Court of Canada has confirmed this recognition of both aboriginal title and original Indian nationhood. In *Calder v. British Columbia (A.G.)*,<sup>8</sup> both sides of the split decision acknowledged that aboriginal title was accepted by the common law. Hall J. supported the continued existence of the Nisga'a Nation's aboriginal title on the basis that their traditional territory had "been in their possession from time immemorial,"<sup>9</sup> while Judson J. phrased it as simply a function of historical fact:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".<sup>10</sup>

By 1990 a unanimous Court was comfortable describing the post-contact relationship between Great Britain and Indian nations in Canada as nation-to-nation relations with treaties forged as solemn agreements that "cannot be extinguished without the consent of the Indians concerned".<sup>11</sup>

Despite such lofty pronouncements, the rights and obligations of the parties to this Crown-Aboriginal relationship remain largely uncharted. The political and legal parameters of this relationship were, in many ways from an Aboriginal perspective, clearer during the first 200 years than they have been for the last two centuries.<sup>12</sup> The

(6 Pet.) 515 (1832) at 542, Marshall C.J. [hereinafter *Worcester*]; *Sioui v. Québec (A.G.)*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 [hereinafter *Sioui* cited to S.C.R.]; and *Treaty of Niagara of 1764*, discussed in J. Burrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: UBC Press, 1997) 155.

<sup>5</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 573, Marshall C.J. [hereinafter *M'Intosh*], frequently quoted with approval by Canadian and Australian courts and most recently by Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at 542 [hereinafter *Van der Peet* cited to S.C.R.].

<sup>6</sup> *M'Intosh*, *ibid.* at 573.

<sup>7</sup> *Ibid.*

<sup>8</sup> [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.].

<sup>9</sup> *Ibid.* at 375.

<sup>10</sup> *Ibid.* at 328.

<sup>11</sup> *Sioui*, *supra* note 4 at 1063, Lamer J. (as he then was).

<sup>12</sup> Relations confirmed by the early treaties of peace and friendship of the seventeenth and eighteenth centuries with the Mi'kmaq Nation of the Maritimes and the covenant chain with the Haudenoshonee (later re-affirmed by the Royal Proclamation of 1763, *supra* note 4, and the Niagara Treaty of 1764, *supra* note 4) were clearer in establishing military and trade ties while recognizing the internal autonomy or sovereignty of each party. See P.C. Willianus, *The Chain* (LL.M. thesis, York University, 1982).

Supreme Court of Canada has had a significant number of opportunities over the past twenty-five years to elucidate the guiding legal principles to this relationship. Nonetheless, the members of our highest court have failed to enunciate these principles or to restore some desperately needed balance to the Aboriginal-Crown relationship. At the end of the twentieth century, we have yet to see any increase in clarity or practical guidance beyond issues concerned with Aboriginal fishing and hunting rights. Principles described as fundamental by the Court, such as the fiduciary obligation of the Crown in right of Canada and of the provinces or "the honour of the Crown is always at stake",<sup>13</sup> are applied so haphazardly as to prompt one commentator (of *Badger*'s) to refer to the fiduciary concept as a "judicial jingle".<sup>15</sup>

Admittedly, the Court in *R. v. Sparrow*<sup>16</sup> did state that "there was from the outset never any doubt, that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown ..."<sup>17</sup> This quote can, however, be readily interpreted as following in the footsteps of Chief Justice Marshall's comments in the Cherokee Cases trilogy,<sup>18</sup> which have been regularly cited with approval in the context of aboriginal title and other aboriginal rights by the Supreme Court, including in *Sparrow* itself. Marshall C.J. also had declared that "their rights to complete sovereignty, as independent nations, were necessarily diminished"<sup>19</sup> yet he recognized that Indian nations retained their residual sovereignty as "domestic dependent nations".<sup>20</sup>

Nowhere is a missed opportunity more apparent than in *Pamajewon*.<sup>21</sup> The right of Aboriginal peoples to govern themselves has been a dominant theme in Canadian political discourse since patriation in 1982.<sup>22</sup> It has been the focal point of four First Min-

<sup>13</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 at 794 [hereinafter *Badger*].

<sup>14</sup> *Ibid.*

<sup>15</sup> C. Bell, "R. v. Badger: One Step Forward and Two Steps Back?" (1997) 8:2 *Constitutional Forum* 21.

<sup>16</sup> [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

<sup>17</sup> *Ibid.* at 1103.

<sup>18</sup> *M'Intosh*, *supra* note 5; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) [hereinafter *Cherokee Nation*]; and *Worcester*, *supra* note 4.

<sup>19</sup> *M'Intosh*, *ibid.* at 573.

<sup>20</sup> *Cherokee Nation*, *supra* note 17 at 16. Chief Justice Marshall regarded the Cherokee Nation as a political state as he noted: "So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful" (*ibid.* at 15). He subsequently decided that the Cherokee Nation was neither "a foreign state" (*ibid.* at 19) nor "a state of the union" (*ibid.* at 15) and he was, therefore, unable to invoke the original jurisdiction of the Court to restrain Georgia's attempt to impose its legislative power within Cherokee territory.

<sup>21</sup> *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204, 50 C.R. (4th) 216 [hereinafter *Pamajewon* cited to S.C.R.].

<sup>22</sup> "Patriation" occurred by virtue of the *Canada Act 1982* (U.K.), 1982, c. 11, which, *inter alia*, enacted the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, *ibid.* As a result of that enactment, the Canadian constitution is fully amendable within Canada and all vestiges of British legislative sovereignty over Canada have ended. For a brief description of patriation, see P.W. Hogg, *Constitutional Law of Canada*, 4th abr. stud. ed. (Toronto: Carswell, 1996) at 53-58.

isters' Conferences in the 1980s,<sup>23</sup> one special Parliamentary Committee inquiry,<sup>24</sup> many books,<sup>25</sup> conferences and scholarly papers too numerous to mention. In addition, it has been the subject of extensive media coverage, prolonged negotiations and was a central component of the Charlottetown Accord, rejected by Canadians through a national referendum in 1992.<sup>26</sup> In spite of this extraordinary level of attention,<sup>27</sup> the final court of appeal has yet to articulate a clear statement of the legal status of the right of self-government, let alone on the scope of the right and its relationship to federal and provincial laws.

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<sup>23</sup> Section 37 of the *Constitution Act, 1982*, *ibid.*, originally required a First Ministers' Conference [hereinafter referred to as FMC] prior to 17 April 1983. The FMC that was convened resulted in a political accord that mandated a further FMC within a year and a constitutional amendment resolution that was enacted requiring two further FMCs (held in 1985 and 1987).

<sup>24</sup> Canada, House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983), better known as the Penner Report.

<sup>25</sup> See e.g.: L. Little Bear *et al.*, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984); M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984); K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983); M. Boldt *et al.*, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985); B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990); Canada, Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: The Commission, 1992); Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993); and an extensive collection of publications on Aboriginal Self-Government of the Institute of Intergovernmental Relations at Queen's University.

<sup>26</sup> Constitutional-reform discussions were launched by the Government of Canada in September 1991 through the public release of proposals for discussion (Government of Canada, *Shaping Canada's Future Together* (Ottawa: Supply and Services Canada, 1991)). The federal minister for constitutional affairs, the Rt. Hon. Joe Clark, initiated intense negotiations in March 1992 among premiers and ministers from the provinces and territories, as well as the leaders of the four national Aboriginal political organisations. After protracted negotiations involving considerable compromise by all parties, an agreement on proposed constitutional amendments was reached by all 17 first ministers and Aboriginal leaders - the *Charlottetown Accord* (Canada, *Consensus Report on the Constitution: Charlottetown* (Final Text, 28 August 1992) (Ottawa: Minister of Supply and Services, 1992)). Among other constitutional amendments, the Accord confirmed an inherent right to self-government with a negotiating process concerning implementation details and established a treaty-clarification mechanism, but a national referendum on 25 October 1992 rejected the proposals.

<sup>27</sup> This recital omits a great deal, including several statutes and many bilateral and trilateral protocols germane to this topic. For examples of negotiated arrangements that authorize forms of self-government without fully recognizing the right of self-government as such, see *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c.18; *Sechelt Indian Band Self-Government Act*, S.C. 1986, c.27; and *Yukon First Nations Self-Government Act*, S.C. 1994, c.35. More recent approaches that reflect inherent-right language to a degree include: *Nisga'a Treaty Negotiations Agreement-in-Principle*, 22 March 1996, Nisga'a Tribal Council - Canada - British Columbia; and *Protocol Agreement to Establish a Common Table*, 30 October 1996, Federation of Saskatchewan Indian Nations - Canada - Saskatchewan.

Although far from an ideal test case (and perhaps the worst possible), *Pamajewon* presented a perfect opportunity<sup>28</sup> to proffer some degree of judicial illumination on this crucial topic. It represented the first occasion in which First Nations asserted an inherent right to self-government as the central ground for appeal.

At the time, the Supreme Court was fully immersed in Aboriginal legal issues: *Pamajewon* was one of a collection of nine cases before the Court, eight of which involved arguments concerning the scope of section 35(1) of the *Constitution Act, 1982*.<sup>29</sup> While the other appeals concerned hunting<sup>30</sup> or fishing<sup>31</sup> rights, the judges were nonetheless steeped in the debate over the meaning of aboriginal and treaty rights and over the significance of their constitutional recognition and affirmation in section 35(1).

The significance of this case is evidenced by the cast of intervenors. Five provincial attorneys general<sup>32</sup> and the Attorney General of Canada chose to intervene while the Attorney General of Ontario was the respondent in the case. The intervenors in support of the appellants were two regional associations of First Nations,<sup>33</sup> a First Nation which had previously been acquitted of charges in a similar situation,<sup>34</sup> and Delgamuukw, the appellant in a major aboriginal title and self-government case on appeal to the Supreme Court from the British Columbia Court of Appeal.<sup>35</sup> Given the national importance of the primary issue on appeal, the fact that this was the first instance that an inherent right to self-government had been argued before the highest court, and the depth of experience developed by the members of the bench in dealing with so many Aboriginal cases during the same term, the scant reasons and the weakness of the analysis are particularly disappointing.<sup>36</sup>

<sup>28</sup> An earlier opportunity had been sidestepped by the Supreme Court in *Isaac v. Davey*, [1977] 2 S.C.R. 897, 77 D.L.R. (3d) 481.

<sup>29</sup> *Supra* note 22.

<sup>30</sup> *Badger*, *supra* note 13.

<sup>31</sup> *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658; *R. v. Lewis*, [1996] 1 S.C.R. 921, 133 D.L.R. (4th) 700, 105 C.C.C. (3d) 523; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528, 109 C.C.C. (3d) 129; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [1996] 9 W.W.R. 149; *Van der Peet*, *supra* note 5; *R. v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657, 110 C.C.C. (3d) 122; and *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, 110 C.C.C. (3d) 122.

<sup>32</sup> The Attorneys General of Quebec, Manitoba, Saskatchewan, Alberta and British Columbia all filed facta and appeared through counsel at the hearing in support of the respondent's position. None of the other eight cases had attracted more than three attorneys general.

<sup>33</sup> The Assembly of Manitoba Chiefs and the Federation of Saskatchewan Indian Nations ("F.S.I.N.") intervened in support of the appellants' position, although with separate arguments.

<sup>34</sup> White Bear First Nation was represented by the same counsel as F.S.I.N. See *R. v. Bear Claw Casino Ltd.*, [1994] 4 C.N.L.R. 81 (Sask. Prov. Ct.).

<sup>35</sup> *Delgamuukw v. British Columbia (A.G.)*, [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470 (B.C.C.A.), leave to appeal to S.C.C. granted [hereinafter *Delgamuukw* cited to D.L.R.].

<sup>36</sup> The appellants must have been especially dissatisfied with the decision they received, since they had gone to great lengths to ensure that their interests were well protected when they intervened in the *Van der Peet* trilogy of cases (*Van der Peet*, *supra* note 5; *R. v. Gladstone*, *supra* note 31; and *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 31). *Pamajewon* was heard on 26 February 1996, after seven of the other eight cases had already been argued (of this group of cases only *R. v. Côté*, *supra* note 31,

One cannot truly appreciate the lost opportunity that this judgment represents without understanding more of the background to the case and the broader dimensions to the issues raised.

## I. Background

### A. Aboriginal Economic Realities

The poverty and despair that grips far too many First Nations in Canada, as well as too many Métis and Inuit communities, is blatant, tragic and depressingly well-documented.<sup>37</sup> The necessity to foster massive economic growth for Aboriginal communities is obvious, but the means to do so are often not clear. While increased federal and provincial funding is required, strategies to promote economic development for most Aboriginal communities often stumble as soon as they encounter practical realities. Most of the over 630 First Nations in Canada are situated in rural or remote regions of the country with extremely small land bases.<sup>38</sup> They possess 2,370 reserves, to which title is usually in the name of the Crown for their use and benefit, totalling 7.4 million acres — or less than one percent of Canada's land mass.<sup>39</sup> While usually situated within their traditional territory and surrounded by extensive holdings of Crown lands, First Nations rarely have recognized rights to harvest or to develop the surface and subsurface natural-resource wealth that is adjacent to their meagre landholdings. Distance from markets and population centres coupled with inadequate transportation systems<sup>40</sup> and

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had yet to be argued; it was heard on 17 June 1996). Voluminous facts had been filed, including an early copy of a report on Aboriginal justice of the Royal Commission on Aboriginal Peoples that was publicly released shortly after the hearing (Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Supply and Services, 1996)). Eighteen counsel appeared before the Court. Despite the foregoing, the appeal was dismissed from the bench, with written reasons following almost six months later — one day after the decisions in the *Van der Peet* trilogy.

<sup>37</sup> For detailed information in this regard, see Penner Report, *supra* note 24; Minister of Indian Affairs and Northern Affairs, *Indian Conditions: A Survey* (Ottawa: Minister of Indian Affairs and Northern Development, 1980); and Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Canada Communications Group, 1996) (Co-chairs: R. Dussault & G. Erasmus).

<sup>38</sup> At least in terms of the lands that are recognized by the Crown as set aside for their exclusive use pursuant to the *Indian Act*, R.S.C. 1985, c. I-5, or some other mechanism.

<sup>39</sup> Indian and Northern Affairs Canada, "Indians in Canada and the United States — Information Sheet" (Ottawa: Indian and Northern Affairs Canada, 1996) at 2; available at <http://www.inac.gc.ca/pubs/information/info37.html>. It should be noted that through ten comprehensive claims settlements reached in Northern Canada since 1975, a further 143 million acres are now set aside for exclusive use of the Aboriginal signatories to these ten settlements. Although titled these lands are not held by the Crown as reserves pursuant to the *Indian Act* nor do they benefit the vast majority of First Nations, *ibid.*

<sup>40</sup> Over 100 First Nations do have train lines running through their reserves, but almost none have freight or passenger stations; numerous First Nations are fly-in communities for at least part of the year.

sources of energy<sup>41</sup> leave the vast majority of First Nations in a position in which standard engines for economic self-sufficiency, such as manufacturing, service industries or natural-resource extraction, are simply not viable. It is similarly unlikely that high-technology industries will choose to locate in rural and remote First Nations communities even though the information highway has arrived.<sup>42</sup> In addition, the overwhelming majority of First Nations have populations under 1000 people, making it impossible to sustain many consumer-based businesses or to offer a labour force of sufficient size to be attractive to external investment. First Nations in this situation are compelled to seek economic opportunities outside the lands they control,<sup>43</sup> or else to find a niche market that will overcome their disadvantages.<sup>44</sup> To date there are too few of these opportunities to remedy the massive unemployment and underemployment that exist in almost all Aboriginal communities.

## B. Gaming

### 1. The American Experience

One industry that has gained the reputation of generating significant employment and wealth is gambling. Aboriginal people in Canada have heard about, and often visited, Indian tribal gaming facilities that have been flourishing in somewhat analogous circumstances in the United States for over a decade. The huge numbers of non-Indian gamblers attracted, jobs created and businesses started, and the massive profits generated for community development and further investment, have sparked considerable excitement over the prospect of pursuing the same approach on this side of the border. The attraction of gaming is especially evident to First Nations in Canada when the operators in the U.S. are members of the same language family, or even members of the same original nation, but just living on the south side of the medicine line.

Indian gaming has exploded in the United States since the Seminole tribe in Florida opened the first large commercial bingo hall in 1979. The litigation that immediately followed resulted in a clear victory for tribal governmental authority in most circumstances.<sup>45</sup> State-tribal conflict over gaming jurisdiction ensued in many parts of the country, with the tribes winning almost all of the court battles but to some degree los-

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<sup>41</sup> A surprising number of First Nations rely upon diesel generators or low voltage electrical transmission lines for basic energy needs, even though some have high voltage powerlines traversing their lands.

<sup>42</sup> Industry Canada, in conjunction with Indian and Northern Affairs Canada and most First Nations, is in the process of linking all First Nations schools to the Internet via "schoolnet". See generally "First nations schools go international" (1996) 14:1 *Windspeaker* 39.

<sup>43</sup> Such as forestry co-management agreements with the Crown, impact-benefit agreements with major mining companies, or employment-equity agreements with petroleum companies.

<sup>44</sup> For example, eco-tourism or big game hunting, for which remoteness can be an asset.

<sup>45</sup> *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020, (1982).

ing within the mainstream political arena.<sup>46</sup> In 1988, Congress intervened to restrain tribal autonomy by enacting the *Indian Gaming Regulatory Act* (I.G.R.A.).<sup>47</sup> The I.G.R.A. provided for tribal-state compacts concerning certain operations and established a National Indian Gaming Commission to regulate gaming within Indian country.

Over the years, Indian gaming in the United States has expanded to involve approximately 200 tribes, generating an estimated US\$2 billion in direct tribal revenues,<sup>48</sup> with other estimates of direct and indirect revenue climbing to US\$7.5 billion.<sup>49</sup> Some of these tribes, as well as a number of the major casino operators in the U.S., have regularly sallied forth across the border to explore opportunities for similar operations on Canadian reserves.

## 2. The Canadian Experience

During the same era, Canadian provinces became major players in the gambling industry. As a result of a federal-provincial agreement on lotteries in 1985,<sup>50</sup> the Government of Canada committed to vacate the field of administration of lotteries and gambling, to dismantle Lotto Canada, to forego the sizeable revenue from this activity and to amend the *Criminal Code*.<sup>51</sup> The changes to the *Code* have prohibited all forms of lotteries, bingos and other games of chance unless licensed by the province. Although the criminalization of many forms of gambling was not particularly new, the delegation to provincial governments of all regulatory matters represented a significant departure from the past.

The fiscal crises encountered by provincial governments in the 1980s that imploded in the 1990s have changed the very face of gambling in Canada.<sup>52</sup> It has evolved from small jackpot church bingos and modest lotteries, designed to provide funds for community improvement projects and amateur sport, to the point where every province

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<sup>46</sup> For a review of the American litigation on Indian gaming, see K. Kickingbird, "Indian Gaming: The Tribes Press for Regulatory Power" (1995) 12:4 *The Compleat Lawyer* 37; R.L. Barnes, "Indian Gaming: Congress Sends the Tribes into a Constitutional Fray, but did it Intend to?" (1995) 64 *Miss. L.J.* 591; M.D. Cox, "The Indian Gaming Regulatory Act: An Overview" (1995) 7 *St. Thomas L. Rev.* 769; N. Mezey, "The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming" (1996) 48 *Stan. L. Rev.* 711; and Practising Law Institute, *The Gaming Industry on American Indian Lands* (New York: Practising Law Institute, 1994).

<sup>47</sup> 25 U.S.C. §§. 2701-2721.

<sup>48</sup> Kickingbird, *supra* note 46 at 45.

<sup>49</sup> H.A. Monteau, "Indian Gambling Under the Indian Gaming Regulatory Act of 1988 and the Regulations of the National Indian Gaming Commission" in *21st Annual FBA Indian Law Conference* (Washington, D.C.: Federal Bar Association, 1996) 243 at 244.

<sup>50</sup> Referred to in *R. v. Furtney*, [1991] 3 S.C.R. 89 at 107, 66 C.C.C. (3d) 498, 8 C.R. (4th) 121.

<sup>51</sup> R.S.C. 1985, c. C-46.

<sup>52</sup> As an example of the transformation, gambling revenue has tripled since 1986. In fiscal year 1994-95, 3.8% of total revenue for the Ontario government was derived from lotteries, casinos and electronic games of chance. The provincial government is estimating over \$5 billion in net revenue for fiscal year 1997-98 (B. Evenson, "Provinces Cash In On Growing Industry" *Ottawa Citizen* (4 September 1996) A4).

has become a regulator of gaming to generate ever-increasing and desperately needed revenue. Provincially operated and sanctioned lotteries<sup>53</sup> have become multi-billion-dollar operations and have surpassed horseracing as the primary mode of gambling in Canada. More recently, some provinces have entered the casino business either directly, or through management contracts and licensing arrangements.<sup>54</sup> Most provincial governments have authorized the installation of Video Lottery Terminals (VLTs), as successors to the slot machines or infamous "one-armed bandits" of Las Vegas fame. Charity casinos and card-game establishments have also become popular in many urban areas across the country. No province has been fully able to resist the lure of easy money, despite concerns about addiction to gambling and the potentially disproportionate impact upon the poor. A recent study on gaming has estimated that Canadians spend in excess of \$20 billion annually on all forms of legal gambling.<sup>55</sup>

First Nations in Canada have witnessed the activity of provincial governments and the economic revitalization of many American Indian tribes, and have asked themselves, "Why not us?" Some First Nations ventured down this road around 1985 with the introduction of "monster bingos". These are regular bingo games played with standard rules but with significantly bigger jackpots of money. Eagle Lake First Nation in northwestern Ontario was one of the first in Canada to start holding monster bingos in 1985, and was extremely successful in attracting busloads of players from far away. Over the next few years, bingo and other gambling activities sprang up on other reserves, including Shawanaga First Nation (near Georgian Bay in Ontario), Six Nations (adjacent to Brantford, Ontario), Dakota Tipi First Nation (outside Winnipeg), Roseau River First Nation (southern Manitoba near the U.S. border), White Bear First Nation (south of Regina), in the American portion of the Akwesasne-St. Regis Mohawk community (near Cornwall, Ontario) and many others.

Monster bingos adversely affected smaller-stakes church bingos and the so-called full-time "charitable" bingo houses, which provoked lobbying pressure on the provinces to shut down the Indian bingo operations. It was the fear that First Nations would soon move into full-service casinos, and thereby into direct competition with the provinces, however, that sparked police intervention. Rumours that organized crime from the United States was infiltrating Indian gaming on certain reserves in Canada increased the level of attention devoted to the issue by the R.C.M.P. Anti-gambling views are strong among many Aboriginal people,<sup>56</sup> as they are in general society, and occasionally the conflict between pro- and anti-gambling factions has culminated in acts of

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<sup>53</sup> Only the provinces of Quebec and Ontario fully operate their own lottery schemes. The four western provinces and the four provinces of Atlantic Canada have established consortia to manage their respective regional lottery operations.

<sup>54</sup> The Government of Manitoba was the first in Canada to establish a casino, located in the Fort Gary Hotel in Winnipeg, which it continues to operate. The Governments of Quebec and, more recently, Saskatchewan, have entered the casino business while Ontario and Nova Scotia have licensed multinational casino corporations to build and to operate casinos with a profit-sharing arrangement.

<sup>55</sup> National Council of Welfare, *Gambling in Canada: A Report* (Ottawa: National Council of Welfare, 1996) at 1.

<sup>56</sup> See for example, the close vote on establishing a casino at Kahnawake ("Mohawks Turn Down Casino at Kahnawake" *The Toronto Star* (3 July 1994) A5).

violence and even in a death at Akwesasne in 1989. At the other end of the scale, some First Nations operated gaming activities without local dissent or unlawful conduct — other than the absence of a provincial license.

Negotiations were conducted between various First Nations and provincial authorities in different regions of the country. While many of these negotiations did not result in agreements, a number of precedent-setting compacts were concluded. The then N.D.P. government in Ontario conducted a lengthy process over several years to select a First Nation for a casino license. The Rama First Nation, near Orillia, was awarded a formal license in 1994 which permitted the construction of a massive casino resort in 1996. This casino has been phenomenally popular and profitable to date, far surpassing the attendance at Ontario's first casino in Windsor, and has been credited with spurring a major injection of investment capital into the area.<sup>57</sup> The casino has not, however, been without its troubles as the Conservative government elected in 1995 unilaterally changed the terms of the understanding between First Nations and the province regarding profit-sharing.<sup>58</sup> The percentage of profits that was to be allocated to a special fund to benefit other First Nations in Ontario was re-assigned to the provincial treasury, sparking significant public criticism of the province and litigation.<sup>59</sup>

The federal government has consistently refused requests from First Nations to become involved in this sphere. It has been repeatedly asked to amend the *Criminal Code*, to introduce new legislation on Indian gaming, to recognize exclusive First Nation control over gaming on reserves as an existing right, and to intervene in First Nation-provincial negotiations. The government of Canada has resisted these demands as

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<sup>57</sup> J. Rankin, "The Fast First Days of Casino Rama" *The Toronto Star* (13 October 1996) A1.

<sup>58</sup> This profit-sharing arrangement has been challenged by non-status Indians, Métis and unrecognized First Nations as they are excluded from benefiting under its terms. See *Lovelace v. Ontario* (1996), 38 C.R.R. (2d) 297. This decision, although rendered three weeks after the Supreme Court's decision in *Pamajewon*, does not refer to it.

<sup>59</sup> The government of Saskatchewan and the Federation of Saskatchewan Indian Nations (F.S.I.N.) pursued a different tack and reached an overall agreement on gaming in the province. Under this complex agreement, the provincial government and F.S.I.N. are equity partners in the casino in Regina while individual First Nations or a consortia of First Nations are authorized to open four casinos in other parts of the province. Employment guarantees are included in the package as is an allocation of some of the profits to the Métis, to gambling-addiction programs and to other charitable purposes. The Nova Scotia government sought an overall agreement with all thirteen Mi'kmaq First Nations in the province but was unsuccessful after protracted negotiations. The province has offered a profit-sharing arrangement to each First Nation individually in regards to the casino in Sydney, which has received a modicum of acceptance.

The government of New Brunswick has also engaged in negotiations with a number of First Nations and has concluded an arrangement with the Ft. Folly First Nation while gaming at Tobique First Nation continues without provincial approval. See *R. v. Bragdon* (1996), 112 C.C.C. (3d) 91 (N.B.C.A.), in which the acquittal of six accused was upheld solely on the basis that being employees of the Tobique High Stakes Bingo Hall did not constitute a sufficient degree of control required by the offence of keeping a common gaming house under s. 201(1) of the *Criminal Code*, *supra* note 51.

Efforts by several other First Nations to establish gambling houses have not yet been successful; tentative discussions have been held by some First Nations with the provincial governments of Quebec, Manitoba, Alberta and British Columbia, but no agreements have yet been reached.

it believes that the federal-provincial agreement concluded in 1985 prevents any changes to the existing legislative arrangement without the consent of all provinces. The federal government's announcement of its new inherent-right policy indicates that it is prepared to engage in negotiations on gambling as an aspect of Aboriginal governance where the Aboriginal groups and the province concerned are agreeable.<sup>60</sup>

## II. Circumstances of the Cases

The Eagle Lake First Nation is a small Ojibway community of approximately 225 members near Dryden, Ontario. They are descended from the signatories of Treaty 3 in 1873 and are part of the Grand Council of Treaty 3.<sup>61</sup> The chief and Council passed a resolution in 1985 to enact a lottery law authorizing and regulating gaming activities within the reserve. All profits from these enterprises were to be devoted to the benefit of the First Nation and its members. A gaming committee was subsequently established by the chief and Council in 1990 to review the gaming operation and its financial statements, and to account to the community.

The Eagle Lake First Nation conducted bingos on a small-scale basis five nights a week. These were directed primarily toward band members. Once a month a "monster bingo" was held which paid out up to \$90,000 and generated net profits of \$47,000 to \$50,000 per event. These events attracted crowds of up to 1000 people, many of whom came on chartered buses. Annual profits were estimated at \$1.2 million and the operation provided six full-time and fifteen part-time jobs to band members. The profits earned over the years were used to help the First Nation build a community arena, a resort, a lodge, a conference centre and a local school with a gymnasium. Profits were also allocated to subsidize the construction and renovation of homes for band members.

Officials of the Ontario Lotteries Commission and the Ministry of Consumer and Commercial Relations approached the First Nation to discuss the provincial requirements for a license. The First Nation adopted the position that it had the exclusive right to govern its own affairs, which included regulating all economic enterprises within the reserve. It was asserted that this right of self-government was protected by the terms of Treaty 3 and recognized by section 35(1) of the *Constitution Act, 1982*. The First Nation was aware of the Ontario government's position that operating bingos without a provincial license was a violation of the *Criminal Code*. The First Nation also knew that the province limited the size of prizes that could be awarded by licensed bingo

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<sup>60</sup> Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: Federal Policy Guide — The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995) at 6.

<sup>61</sup> Treaty 3 was negotiated between the government of Canada and Ojibway leaders in 1873 and covers a large portion of northwestern Ontario, from the Great Lakes to the Manitoba border. Treaty 3 and its legal effect was the basis for the landmark lawsuit of *St. Catherine's Milling and Lumber Co. v. R.* (1888), 14 A.C. 46 (J.C.P.C.).

halls, thereby eliminating the competitive edge that monster bingos provided and minimizing the attraction for off-reserve participants.

The Shawanaga First Nation Council passed its own lottery law in 1987 and established a lottery authority to regulate gambling activities at its newly constructed recreation complex. Before gambling began, officials of the Ontario Lotteries Commission and the Ontario Provincial Police met with the First Nation's representatives to discuss licensing. The Commission offered a license, but it was refused by the First Nation under the belief that accepting such a license could undermine its position regarding an inherent right to self-government. The First Nation intended to conduct high-stakes bingos on weekends, to attract off-reserve players and to maximize profits, although it knew that these were contrary to provincial restrictions on the size of payouts.

The Shawanaga First Nation commenced its gambling operations in September 1987 and continued them on most weekends until October 1990. The gambling consisted of regular and monster jackpots, as well as Nevada break-open tickets, blackjack and wheels of fortune. Advertisements were run in newspapers in Sudbury, North Bay, Toronto and Oshawa with regularly organized bus tours. As a result, the majority of participants came from outside the reserve.

#### **A. R. v. Jones and Pamajewon**

Howard Pamajewon and Roger Jones were both charged with the offence of keeping a common gaming house contrary to section 201(1) of the *Criminal Code*, which states:

201.(1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.<sup>62</sup>

Roger Jones was chief of the First Nation and Howard Pamajewon a councillor who subsequently became chief. Although not the only individuals involved in the enterprise, they were charged in their *de facto* representative capacity; it was a test case and they were bingo callers and therefore suited to assume legal responsibility on behalf of the Shawanaga First Nation.

#### **B. R. v. Gardner, Pitchenese and Gardner**

This case involved three members of the Eagle Lake First Nation who were similarly viewed as possessing the legal responsibility for the First Nation as a whole. Arnold Gardner was the chief and chair of the First Nation's bingo committee while Jack Pitchenese managed the bingo operations and Allan Gardner was the chief bingo caller when the alleged crime took place. They were charged with conducting a scheme for the purpose of determining the winners of property in violation of section 206(1)(d) of the *Criminal Code*, which reads:

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<sup>62</sup> *Supra* note 51, s. 201.(1).

206.(1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who

...

(d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of; ...<sup>63</sup>

### III. The Trials

#### A. R. v. Jones and Pamajewon

The accused appeared before Justice Carr of the Ontario Provincial Court in Sudbury in early 1993. They submitted three main arguments in their defence, namely:

- (i) that the Crown had not established all of the essential elements of the charge;
- (ii) that at all material times the defendants were in *de facto* possession of the sovereign power over their reserve in which the alleged crime took place and were, therefore, protected by section 15 of the *Criminal Code*;<sup>64</sup> and
- (iii) that the First Nation had the inherent right to govern itself such that the laws of Canada generally and section 201 of the *Criminal Code* in particular were inoperative in reference to them and their First Nation.

The defence submitted the Robinson Huron Treaty of 1850<sup>65</sup> as a demonstration of their nationhood status and its recognition as such by the other party to the treaty, the Imperial Crown. The Shawanaga First Nation lottery law was also presented to the court in support of the argument that the First Nation had exercised its sovereign authority in this field.

Carr J. convicted the accused and imposed a fine of \$1500 on each.<sup>66</sup> He rejected the first defence, concluding that the essential elements had been proven. He also rejected the sovereignty argument tied to section 15 of the *Criminal Code* on the basis that the Shawanaga lottery law did not require the accused to engage in gaming since it was merely permissive rather than obligatory. He went on to say:

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<sup>63</sup> *Ibid.*, s. 206.(1).

<sup>64</sup> *Ibid.*, s. 15:

No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

<sup>65</sup> Contained in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke, 1880; reprinted Toronto: Coles, 1971) at 305-09.

<sup>66</sup> *R. v. Jones and Pamajewon* [1993] 3 C.N.L.R. 209 (Ont. Prov. Div.).

Furthermore, the defendants have not shown that the band council which passed the Shawanaga lottery law possessed actual (or de facto) and independent and supreme (or sovereign power) in and over the place where the act occurred, or that the laws were enforced or even capable of being enforced by the band council.<sup>67</sup>

Carr J. relied upon the reasoning in *Sparrow*<sup>68</sup> to conclude that the Crown could unilaterally extinguish existing aboriginal rights prior to 1982, which would encompass the aboriginal right of self-government asserted by the defence. The test set out by *Sparrow* was that the Crown needed to demonstrate a clear and plain intent to extinguish, which the Court found evidenced through the Royal Proclamation of 1763,<sup>69</sup> the Robinson Huron Treaty and the grant of exclusive jurisdiction to Parliament over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*.<sup>70</sup>

### B. R. v. Gardner, Pitchenese and Gardner

The defendants in this case argued that section 206 of the *Criminal Code* violated the right of self-government constitutionally protected by section 35(1) and was of no force and effect in reference to them and the Eagle Lake First Nation. Justice Flaherty was sympathetic to the economic plight which confronted this First Nation. He concluded from the evidence that the bingos were professionally operated, caused no social problems, and generated profits which contributed significantly to the community's welfare. Nevertheless, he convicted all three accused and fined each of them \$1500.<sup>71</sup> He accepted the limited evidence introduced that gambling was part of Ojibway culture and heritage; however, he viewed the high-stakes bingo operation of Eagle Lake First Nation as a twentieth century phenomenon that was not an aboriginal right within the scope of section 35(1). He further declared that the *Criminal Code* applied throughout Canada, both on and off First Nations territory, and could not be struck down through assertion of a right of self-government.

## IV. The Ontario Court of Appeal Decision

All the convictions were appealed and joined before the Court of Appeal. The argument was recast and the central issue submitted by the appellants was whether the two First Nations had a constitutionally protected right to manage their own economic affairs on their reserve lands. It was argued that this general right to control their economies was an incident of their continuing aboriginal title to their reserves, which authorized them to make decisions affecting the economic viability of their communities, subject to their own laws as confirmed by their respective treaties with the Crown.

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<sup>67</sup> *Ibid.* at 211.

<sup>68</sup> *Sparrow*, *supra* note 16.

<sup>69</sup> *Supra* note 4.

<sup>70</sup> (U.K.), 30 & 31 Vict., c. 3.

<sup>71</sup> (19 November 1993), (Ont. Prov. Ct.) [unreported].

The appellants also submitted that this general economic right was a component of their overall right of self-government.

The common position then was not one based on absolute sovereignty, as it was characterized at the Pamajewon and Jones trial. Rather, the premise was concurrent governance rights, First Nations' lottery laws being analogous to the provincial licensing scheme authorized by section 207 of the *Criminal Code*.<sup>72</sup> The appellants argued that Parliament had erred in delegating the right to regulate gaming solely to the provinces and thereby violated their section 35(1) right of self-government. As such, they asked that Part VII of the *Criminal Code* — “Disorderly Houses, Gaming and Belting” — be declared unenforceable in reference to the two First Nations and to them individually.

Justice Osborne, for the Court,<sup>73</sup> reviewed the facts, trial decisions and the historical evolution of criminal law on gaming in Canada before addressing the two foundations for the right asserted. He emphasized, on several occasions, that the activity involved was “high stakes gambling” dependant largely upon the participation of non-Aboriginal patrons.

In dealing with the aboriginal title issue, he drew a parallel between the position of the Crown in right of Ontario in this appeal with the position of the province of British Columbia in the *Delgamuukw*<sup>74</sup> appeal; the existence of aboriginal title was not challenged but its scope at common law was far narrower than that proposed by the appellants in both cases. Osborne J.A. re-confirmed that aboriginal rights, including aboriginal title, exist at common law and are enforceable.<sup>75</sup> He defined aboriginal rights as communal in nature, although exercisable by individual members who have an historic and traditional basis within a territory.<sup>76</sup> He adopted the observations of Macfarlane J.A. (for the majority) in *Delgamuukw* on the essential nature of aboriginal title and rights, where he said:

*The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty ... Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of an aboriginal society. The nature and content of the right, and the area within which the right was exercised are questions of fact.*<sup>77</sup>

Osborne J.A. concluded that aboriginal title cannot give rise to the broad aboriginal right to manage the use of reserve land as asserted by the appellants because abo-

<sup>72</sup> *Supra* note 51.

<sup>73</sup> *R. v. Gardner, R. v. Jones* (1994), 21 O.R. (3d) 385, 120 D.L.R. (4th) 475 (Ont. C.A.) [hereinafter *Gardner and Jones* cited to D.L.R.]. Mr. Justice Blair retired on 31 August 1994 and took no part in the judgment delivered on 21 December 1994 by Chief Justice Dubin and Osborne J.A.

<sup>74</sup> *Supra* note 35.

<sup>75</sup> *Supra* note 73 at 488 (relying in particular upon *Calder*, *supra* note 8; *Sparrow*, *supra* note 16; *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321; and *Mabo v. Queensland [No. 2]* (1992), 107 A.L.R. 1, 175 C.L.R. 1, [1992] 5 C.N.L.R. 1 (Aust. H. Ct.) [hereinafter *Mabo*]).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.* at 489 [emphasis added by Osborne J.A.].

iginal title had to be more narrowly conceived as activity and site specific. This meant that the aboriginal right in issue was high-stakes gambling, and there was no evidence that it constituted a part of the First Nations' historic culture and traditions or an aspect of their traditional use of their land.

The aboriginal right of self-government argument received short shrift as Osborne J.A. relied upon the passing comments in *Sparrow* that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown"<sup>78</sup> as a full answer to the claim. While he was prepared to assume that some rights of self-government still existed in 1982 for these two First Nations, the specific aspects of the right had to be proven just like other claimed aboriginal rights — through the provision of evidence to show that the activity was a continuation of an historic practice. In his view there was no evidence of historic involvement in high-stakes gambling or in its regulation by the Aboriginal groups concerned.

Osborne J.A. elaborated that since Part VII of the *Criminal Code* had been upheld by the Supreme Court of Canada as valid criminal law,<sup>79</sup> then "any regulatory rights which the First Nations might have exercised in respect of gambling, have been extinguished by Parliament's exercise of its criminal law power."<sup>80</sup> In the absence of sufficient evidence to support the right within the confines determined by the Court, it was clearly unnecessary to declare that the asserted right had been extinguished.

Justice Osborne did express his awareness of the "precarious economic circumstances" of the two First Nations and the need to remedy their "economic plight", yet this was a matter for "political negotiations" and could not be used to justify constitutional protection for activities defined as criminal by valid legislative authority.

## V. The Supreme Court of Canada Decision

Leave to appeal was granted by the Supreme Court; the question before the Court was:

Are s.201, s.206 or s.207 of the *Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s.52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of section 35 of the *Constitution Act, 1982* invoked by the appellants?

The Court was of the view that the case turned on the proper application of the test laid out in *Van der Peet*,<sup>81</sup> a decision released by the Court only one day earlier and therefore not in existence when the appeal was dismissed orally. Chief Justice Lamer described *Van der Peet* as establishing the test "for determining the aboriginal rights

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<sup>78</sup> *Supra* note 16 at 1103.

<sup>79</sup> *See supra* note 50. *R. v. Furtney*, [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498, 8 C.R. (4th) 121.

<sup>80</sup> *Gardner and Jones*, *supra* note 73 at 492.

<sup>81</sup> *Van der Peet*, *supra* note 5.

recognized and affirmed by section 35(1)<sup>82</sup> which he rephrased as “the test for determining the practices, traditions or customs which fall within section 35(1).”<sup>83</sup> In his view, the same legal standard applies to all claims regarding aboriginal rights; the broad right of self-government or the narrower right of a First Nation to regulate gambling should be tested in the same way as the individual right to fish for food. The Chief Justice assumed that section 35(1) includes the right of self-government without deliberating on this point. He stated that “claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must as such be measured against the same standard.”<sup>84</sup> Thus, the claimed right must be considered in light of the purposes underlying section 35(1) and assessed against the new test in *Van der Peet* for identifying aboriginal rights:

in order to be an aboriginal right an activity must be an element of a practice, custom or tradition, integral to the distinctive culture of the aboriginal group claiming the right.<sup>85</sup>

Lamer C.J. further declared that in applying this test the first step is to “identify the exact nature of the activity claimed to be a right.”<sup>86</sup> The second step is to decide if the evidence submitted proves that the “activity could be said to be ‘a defining feature of the culture in question’ prior to contact with Europeans.”<sup>87</sup>

Implementing the first step was guided by the decision in *Van der Peet*, as Lamer C.J. again quoted it as definitive for the correct characterization of the claim, by considering: the nature of the action protected by the claimed right; “the nature of the governmental regulation, statute or action being impugned”;<sup>88</sup> and “the practice, custom or tradition being relied upon to establish the right.”<sup>89</sup>

He found that the appellants were involved in gambling, that the two First Nations sought to regulate gambling while the statutory provisions challenged criminalized gambling, and that the evidence relied upon to show the existence of the aboriginal

<sup>82</sup> *Pamejewon*, *supra* note 21 at 832.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 832-33.

<sup>85</sup> *Van der Peet*, *supra* note 5 at 549. This test was created through a significant rewriting of *Sparrow*, *supra* note 16. See J. Borrows, “The Trickster: Integral to a Distinctive Culture” (1997) 8:2 Constitutional Forum 27; L.I. Rotman, “Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*” (1997) 8:2 Constitutional Forum 40; and R.L. Barsh & J.Y. Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 McGill L.J. 993. The application of this test has been severely criticized by K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) 8:2 Constitutional Forum 33. Professor McNeil persuasively argues that the Court has improperly indicated that constitutionally protected aboriginal rights can be balanced against non-constitutional interests of other Canadians as an element of promoting an overall reconciliation.

<sup>86</sup> *Pamajewon*, *supra* note 21 at 833.

<sup>87</sup> *Ibid.* [reference omitted].

<sup>88</sup> *Ibid.* It is unclear from this wording if Aboriginal governmental laws would be included within this part of the test or if only non-Aboriginal governments were presumed to be relevant.

<sup>89</sup> *Ibid.*

right was historical evidence of Ojibway gaming. Thus, he characterized the right claimed as “the right to participate in, and to regulate, gambling activities on their respective reserve lands.”<sup>90</sup> Lamer C.J. therefore rejected the appellants’ framing of the claim as a right to manage their lands as excessively general.

Justice L’Heureux-Dubé disagreed in part on this issue, as she had in the *Van der Peet* trilogy. While she agreed that the claim submitted by the appellants was too broad, she declared that Lamer C.J. was incorrectly focusing on the specific manner in which the activity was conducted rather than on the activity itself. She stated that the proper characterization is whether the two First Nations “possess an existing *aboriginal right to gamble*.”<sup>91</sup>

The Court was unanimous in the view that the appellants had failed to meet the second step of the *Van der Peet* test, the “integral to the distinctive culture” component. The only evidence presented at either trial on this issue merely indicated that gaming was prevalent in Ojibway culture, but not that it was of central significance. Lamer C.J. contrasted the large-scale activities in the appeal with the informal, small-scale gaming of the past. He also stressed the lack of any evidence of the historic presence of community regulation of gaming.

L’Heureux-Dubé J. concurred in this assessment of the evidence. She declared that gambling had not been shown to be “connected enough to the self-identity and self-preservation of the appellants’ aboriginal societies to *deserve* the protection of section 35(1)”,<sup>92</sup> thereby adding a subjective element of worthiness to the appraisal.

As a result of the absence of necessary evidence, the Court did not need to determine whether section 35(1) encompasses an inherent right to self-government. Likewise, the court was not compelled to consider whether the *Criminal Code* had extinguished Aboriginal governmental control over gaming prior to 1982 or if the *Criminal Code*’s provisions constituted an unjustifiable infringement of section 35(1).

## VI. Commentary

Given the test for aboriginal rights that the Lamer Court has developed, the extraordinarily weak expert evidence and the lack of substantive documentary or oral evidence presented at trial to meet a test that was not yet in existence, the outcome is not surprising. The very nature of the activity involved in this case — high-stakes gaming — is not well suited to evoke a sympathetic reaction from the judiciary. The sympathy quotient present in test-case litigation is always an important factor, and it will be increasingly so in this sphere. The Court has articulated legal standards replete with subjective elements for judges to weigh, lacking in clear enduring principles to guide the effort, and based upon a museum-diorama vision of aboriginal rights, if not of Aboriginal peoples as well.

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* at 838 [italics in original].

<sup>92</sup> *Ibid.* at 839 [emphasis added].

The Court has taken some pains to state repeatedly that it has rejected the “frozen rights” approach to the interpretation of section 35(1). Instead it has opted for the purposive approach to allow for flexibility in order to ensure that “existing aboriginal rights” can evolve over time.<sup>93</sup> The courts have developed a collection of principles designed to aid in treaty and statutory interpretation as they relate to First Nations issues over the past two decades.<sup>94</sup> The Lamer Court has reiterated the importance of these principles, indicating that they must be considered in reaching a comprehensive, purposive analysis of section 35(1), but in developing the crucial elements of the *Van der Peet* test the Court has largely ignored these principles. Aboriginal perspectives on the meaning of aboriginal rights were defined as being equivalent in import to non-Aboriginal views,<sup>95</sup> yet they barely factor into the real equation. Relying upon the Australian High Court’s reasoning in *Mabo*,<sup>96</sup> traditional Aboriginal laws were said to provide the content for aboriginal rights and aboriginal title; however, there was no investigation of the relevant substantive Ojibway laws on the issue. Instead, the focus was on the historic record of the cultural practices of the “pre-existing societies of aboriginal peoples.”<sup>97</sup> This diverted the exploration away from the more familiar determination of what the legal rules are — albeit within the context of Aboriginal law as recognized by the common law<sup>98</sup> — into a judicial assessment of historical, sociological and anthropological evidence of what constitutes an integral, central, significant, defining or distinctive part of a culture that was freeze-dried at the time of contact with Europeans.

The courts and the legal profession in general are poorly trained for such an exploration. In addition, such an approach tells Aboriginal people that what is relevant about them is their past — not their present or their future. Although developments subsequent to the point of contact must be considered, as one must prove continuity of practice, custom or tradition for the activity to have a chance of being protected in its historic or modern manifestation, according to the Court, the bottom line is that the scope of aboriginal rights has been frozen since the time of contact. This is true regardless of how insignificant the first contact between Aboriginal peoples and Europeans may

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<sup>93</sup> See e.g. *Sparrow*, *supra* note 16 at 1093.

<sup>94</sup> One of the best descriptions of treaty interpretation principles is provided in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.). See also *R. v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390; *Sioui*, *supra* note 4; and *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.). On statutory interpretation principles, see *Nowegijick v. R.*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193; and *Donald George Mitchell and Milton Management Ltd. v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193.

<sup>95</sup> *Van der Peet*, *supra* note 5 at 550-51.

<sup>96</sup> *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1 (Aust. H. Ct.) at 58.

<sup>97</sup> *Van der Peet*, *supra* note 5 at 546.

<sup>98</sup> Canadian courts have had some experience in determining the content of customary laws of different Aboriginal nations from pre-confederation days to the present, although primarily in family-law contexts. See e.g. *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 1 C.N.L.R. 70 (Sup. Ct.), *aff'd* (*sub nom. Johnstone v. Connolly*) (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Q.B.); *R. v. Nan-e-quis-a-Ka* (1889), 1 Terr. L.R. 211 (C.A.); *Re Kitchoalik*, [1972] 5 W.W.R. 203, 28 D.L.R. (3d) 483 (N.W.T.C.A.); and B.W. Morse, “Indian and Inuit Family Law and the Canadian Legal System” (1980) 8 Am. Ind. L. Rev. 199.

have been to the cultural development of either party, or its relevance to the effective assertion of sovereignty subsequently by the Crown. This approach bears little resemblance to the way in which cultures in fact evolve, adapt and transform over time. It also excludes what may have later become, or what may become in the future, integral to the very survival of Aboriginal cultures.<sup>99</sup>

The Supreme Court was presented with a clear alternative vision, namely, the approach developed over one and a half centuries ago by Chief Justice Marshall of the United States Supreme Court.<sup>100</sup> He crafted a compromise that reflected the political realities of a newly independent nation and a legal theory that did not shake the very foundations of the American legal system. Despite severe and warranted criticism, particularly from the American Indian perspective,<sup>101</sup> Marshall C.J.'s approach has, nevertheless, stood the test of time in the U.S., and has regularly been quoted with favour by the Supreme Court of Canada. In *Van der Peet*, Lamer C.J. quoted from both *M'Intosh*<sup>102</sup> and *Worcester*<sup>103</sup> at length. He chose to emphasize the following excerpt from *Worcester*:

*The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessions of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discover [sic] of the coast of the particular region claimed.*<sup>104</sup>

Thereby, he acknowledged the independent political status of First Nations at the time of contact,<sup>105</sup> as well as the continued existence of that political, not cultural, identity, subject to the loss of complete sovereignty and the power to dispose freely of their land.

The Marshall doctrine of domestic dependent nationhood status for American Indian Nations or tribes gives rise to the following key principles in the U.S. context:

(1) Indian Nations are recognized as constituting governments. They are political entities and not merely groups, organizations or societies.

<sup>99</sup> See Borrows, *supra* note 85 at 28-30 for a devastating criticism.

<sup>100</sup> See *M'Intosh*, *supra* note 5; *Cherokee Nation v. Georgia*, *supra* note 18; and *Worcester*, *supra* note 4.

<sup>101</sup> For critiques of Marshall C.J. and his version of the discovery doctrine as generating too rough and unfair a compromise between Indian sovereignty and overriding Congressional power, see R.A. Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence" [1986] *Wis. L. Rev.* 219 and S. T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. M'Intosh* and Plenary Power" (1993) 20 *N.Y.U. Rev. L. & Soc. Change* 303.

<sup>102</sup> *Supra* note 5.

<sup>103</sup> *Supra* note 4.

<sup>104</sup> *Van der Peet*, *supra* note 5 at 544 [original emphasis by Lamer C.J.], quoting *Worcester*, *ibid.* at 559.

<sup>105</sup> As he had done in *Sioui* (*supra* note 4 at 1038) six years earlier.

(2) Tribes were accepted as sovereign, independent nations prior to contact and subsequent thereto until an externally derived sovereign authority exercised *effective* control over the territory.

(3) The interaction of the first and second principles results in the transformation of Indian tribes from independent nations to domestic dependent nations retaining residual sovereignty.

(4) The sovereignty of Indian Nations is inherent in the tribe itself as it pre-exists contact with Europeans and originates in the people rather than in any external source such as a constitution.

(5) The parameters of the residual sovereignty are subject to being reduced by the overriding authority of Congress (relying upon the express commerce power clause<sup>106</sup> and a judicially created plenary power doctrine<sup>107</sup>). This requires, however, the enactment of legislation demonstrating a “clear and plain intention” to infringe upon tribal sovereignty. In the absence of Congressional action, tribal sovereignty and jurisdiction remain intact.

(6) State governments have no direct authority or jurisdiction over Indian tribes or their territory.<sup>108</sup>

(7) The Federal Government has made itself a trustee in its relationship with Indian Nations and their assets.<sup>109</sup>

These principles provide overarching guidance or touchstones that can be relied upon and applied on a case-by-case basis in the United States to determine if a particular activity or head of jurisdiction remains within tribal control, in full or in part. A proper assessment would include an examination of such matters as: the territory in which the act occurred (is it Indian country or not?); the participants to the activity (are

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<sup>106</sup> U.S. Const. art. I, § 8, cl. 3, which states “to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”

<sup>107</sup> The authority of Congress to interfere with tribal sovereignty is unlimited and extends even to the point of the power to terminate the very identity and existence of a tribe. For further information on this power, and critiques of its existence, see F.S. Cohen, *Handbook of Federal Indian Law* (Charlottesville, Virginia: Michie, 1982); A.T. Skibine, “Reconciling Federal and State Power Inside Indian Reservations with the Rights of Tribal Self-Government and the Process of Self-Determination” [1995] *Utah L. Rev.* 1105; R.N. Clinton, “Redressing the Legacy of Conquest” (1993) 46 *Ark. L. Rev.* 77; C.F. Wilkinson & E.R. Biggs, “The Evolution of the Termination Policy” (1977) 5 *Am. Ind. L. Rev.* 139; and *supra* note 101.

<sup>108</sup> Congress can, however, explicitly delegate authority by legislation to states that allows them to infringe upon tribal sovereignty as it has done through *An Act to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes*, Pub. L. No. 280, 67 Stat. 588 (1953); 18 U.S.C. §§ 1162 (Supp. 1997); and 28 U.S.C. §§ 1360ff. (Supp. 1997). See C. E. Goldberg, “Public Law 280: The Limits of State Jurisdiction Over Reservation Indians” (1975) 22 *U.C.L.A. L. Rev.* 535.

<sup>109</sup> The trust relationship has evolved over time and was originally described less aptly by Chief Justice Marshall as a guardian-ward relationship in *M’Intosh*, *supra* note 5, reflecting the “dependent” segment of the “domestic dependent nation” concept.

they tribal members, members of other tribes, non-Indians or a combination?); the subject matter; the relevance of any treaty terms; and whether or not Congress has legislated on the subject in a manner that demonstrates a clear and plain intent to alter tribal sovereignty, and if so, the impact of that alteration.

The Supreme Court of Canada has chosen not to follow the well-developed American approach and instead has elected to treat the right of self-government as just another aboriginal-rights issue — the same as all other aboriginal-rights claims. This choice has been made even though all aboriginal-rights cases to date have either dealt with the narrower concept of aboriginal title to territory (with the invariable conflict of general federal or provincial legislation potentially affecting that territory) or an activity that is individually exercised with the entitlement to the right flowing from membership in the Aboriginal group (such as hunting and fishing). The influence of the prior jurisprudence has sparked a debate among the Supreme Court judges between the majority led by Lamer C.J. that focuses on the significance of the activity in question, and Justices L'Heureux-Dube and McLachlin who concentrate upon the activity in general. This debate misses the central point, which is the existence of Aboriginal governmental jurisdiction and its relationship to the legislation of other governments. The conflict should rather be envisaged as one between competing governments, each attempting to exercise its legislative jurisdiction, akin to the lengthy history of federal-provincial constitutional conflicts.

The implications of our Supreme Court's approach, in contrast to that of the United States Supreme Court, are unsatisfactory from both a substantive-law and an administration-of-justice viewpoint. The *Van der Peet* test embroils the judiciary in a quagmire of subjective assessments of what is and what is not "deserving"<sup>110</sup> of constitutional protection. Determining whether something is constitutionally worthy must be viewed as a philosophical or political exercise best left to the philosophers, legislators or the Canadian public at large, rather than to an unelected, unrepresentative and largely unregulated judiciary. The overwhelmingly non-Aboriginal composition of the bench already tests the faith of Aboriginal people that they will find justice through the courts, let alone that the judiciary will be able to decide which matters are deserving of protection by section 35(1). This is not to suggest that all legal issues can be decided on the basis of purely objective criteria. Subjective elements are inevitable, but the determinations required by the *Van der Peet* test are outside the proper sphere of the judiciary.

This shortcoming is compounded by the "integral to the distinctive culture" test. The legal profession has been poorly prepared to deal with such matters. Chief Justice Lamer identified a number of factors that must be considered in applying this test. These include a recognition of "the evidentiary difficulties inherent in adjudicating aboriginal claims"<sup>111</sup> that Lamer C.J. attributed to the problems "in proving a right which originates in times where there were no written records."<sup>112</sup> His solution called

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<sup>110</sup> *Van der Peet*, *supra* note 5 at 595. L'Heureux-Dubé J. used similar language in *Pamajewon*, *supra* note 21 at 839.

<sup>111</sup> *Van der Peet*, *ibid.* at 558.

<sup>112</sup> *Ibid.* at 559.

for sensitivity in addressing these problems by not undervaluing the evidence of the “aboriginal claimants simply because the evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.”<sup>113</sup> This sensitivity is well intended but thoroughly inadequate. The difficulty is not merely the absence of written records, but more importantly, the nature of the inquiry itself. One does not simply have to prove that a practice, custom or tradition existed, but that the activity was “integral” to the society as a central element of what made the culture distinctive.

When one realizes that the majority of the Court has expressly rejected both a contemporary assessment of the activities in question as well as the modest vintage of twenty to fifty years proposed by L’Heureux-Dubé J.<sup>114</sup> in favour of a requirement to fulfil the terms of the test as of an ancient date, the challenge becomes overwhelming. The historical evidence will inevitably consist of the recorded perceptions of outsiders to the culture — the colonizers — who would have been an unreliable source on any cultural matter, not to mention on the assessment of what was integral or essential to a culture with which they were unfamiliar. The Court had no expert evidence on which it could rely as to the viability of such a requirement. Perhaps the Court took the joke literally that every Indian family includes an anthropologist. Lamer C.J. provides little reasoning for the selection in *Van der Peet* of “the period prior to contact between aboriginal and European societies”<sup>115</sup> as the critical moment, even though the decision of Hutcheon J.A. in the B.C. Court of Appeal turned entirely on this issue<sup>116</sup> and L’Heureux-Dubé J. analyzed it in some detail in her dissent.<sup>117</sup> Many options existed, the most draconian and illogical of which, if truly intended, was the point of contact. One must now harken back to the days of the initial “explorers”, of Cabot and Cartier — if not back to the Vikings. Lamer C.J. insists that the test does not place Aboriginal claimants in a position where they “must accomplish the next to impossible task of producing conclusive evidence from pre-contact times”<sup>118</sup> as this “would be entirely contrary to the spirit and intent of s.35(1).”<sup>119</sup> In his view, one can use post-contact evidence as it “simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact.”<sup>120</sup> This is disingenuous as the test requires proof that the practice, tradition or custom is “integral to the distinctive culture” and not merely an aspect of the pre-contact society.

The search for what was integral to the distinctive culture of each Aboriginal group at a point in time prior to effective assertion of European sovereignty and colonization revives the worst aspects of the discovery doctrine. Despite protests to the contrary by

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 602. She adopts the view proposed by Brian Slattery in “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 758. It is unclear how workable this standard would be in practice.

<sup>115</sup> *Van der Peet*, *ibid.* at 555.

<sup>116</sup> *R. v. Vanderpeet* (1993), 80 B.C.L.R. (2d) 75, [1993] 5 W.W.R. 459, (C.A.).

<sup>117</sup> *Van der Peet*, *supra* note 5 at 596ff.

<sup>118</sup> *Ibid.* at 555.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

the majority, this aspect of the *Van der Peet* test does create a “frozen rights” approach as only the method or manner of exercise of an approved activity is permitted to evolve while the activities themselves are not. At best, this is a form of “permafrost rights”. The additional requirement of continuity between the modern exercise and the original pre-contact practice will be insurmountable for those Aboriginal groups that have had their governments and societies extensively disrupted by the impact of colonialism. To them, a “frozen rights” approach, without a requirement of continuity, would be more advantageous, although narrower in scope. Such an approach would at least provide constitutional protection for something of value.

One of the practical implications of the *Van der Peet* trilogy coupled with *Pamajewon* is the *de facto* judicial invitation to lengthy trials. Litigation will require extensive expert evidence from cultural anthropologists, historians and Aboriginal elders to demonstrate the nature of the individual Aboriginal culture concerned and to establish the significant components that made it distinctive. This evidence will not only be retrospective in nature; it will also have to contain proof that what was integral to the society at the point of contact continued to be practised over the intervening centuries (although occasional lapses in exercise of the activity may be permitted). This evidence will have to be martialled for every Aboriginal group that wishes to pursue litigation to enforce a right or to defend an activity that is challenged by another government or a third party. Such a gargantuan effort will have to be undertaken by each group in reference to each activity in question. As a result of the Court’s refusal in *Pamajewon* to address basic principles regarding a general inherent right to self-government, an Aboriginal government will likely have to engage in such an endeavour for each and every head of jurisdiction it wishes to exercise. When one considers the thousands of exhibits and hundreds of days of trial time involved in *Delgamuukw*<sup>121</sup> and *Bear Island*,<sup>122</sup> it appears that we have a recipe for the potential congestion of the courts, limited only by the meagre resources of most Aboriginal peoples to mount such litigation. Even this pragmatic restriction may not arise in circumstances where the economic incentive is of sufficient scale to attract non-Aboriginal financial support — as would be the situation regarding gambling or commercial resource extraction.

It is still unclear after *Van der Peet* and *Pamajewon* if traditional Aboriginal law is relevant to determining the content of aboriginal rights. While Lamer C.J. made a statement to this effect in *Van der Peet*<sup>123</sup> and quoted Brennan J. (as he then was) in *Mabo*<sup>124</sup> on this point, the principle is not in fact reflected in *Pamajewon* or *Van der Peet*. One can suggest, although without certainty, that this is due to the lack of evidence and argument on this point. The Court did not consider the Canadian case law

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<sup>121</sup> *Supra* note 35.

<sup>122</sup> *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

<sup>123</sup> *Supra* note 5 at 546.

<sup>124</sup> *Mabo*, *supra* note 75.

that has regularly sustained the common law's recognition of traditional or customary Aboriginal laws, albeit in limited spheres to date.<sup>125</sup>

It is surprising that the Court made no reference to the recognition of the inherent right to self-government in the policy pronouncements of several of the governments who participated in the *Pamajewon* appeal,<sup>126</sup> the interim reports of the Royal Commission on Aboriginal Peoples,<sup>127</sup> or the legal literature on the topic.<sup>128</sup> This provides room for consideration of the basic tenet that a general right of self-government does exist which would not require litigation and an exhaustive cultural explanation on each and every individual head of power.

An alternative approach to assessing the practical implications of *Pamajewon* is to conclude that the Supreme Court has elaborated the law on self-government in such a way as to close the door on future litigation on this subject for the foreseeable future. That is, the Court has created a legal standard that is so hard to meet and has rendered litigation so expensive to pursue that it is thoroughly unattractive for First Nations and the Metis to seek a judicial solution.<sup>129</sup> The political route of pressuring for legislative change, or seeking negotiated self-government agreements with constitutional protection to implement the inherent right, may now have become the only option. If this is accurate, then the negotiating leverage of Aboriginal communities has been diminished significantly.

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<sup>125</sup> See Morse, *supra* note 98. See also *Re Tucktoo* (1972), 27 D.L.R. (3d) 225, (*sub nom. Re Deborah EA-789*) [1972] 3 W.W.R. 194 (N.W.T. Terr. Ct.) aff'd [1972] 5 W.W.R. 203 (N.W.T.C.A.); *Re Tagomak* (1983), 50 A.R. 237 (N.W.T.S.C.); *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (B.C.C.A.); N.K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" [1984] 4 C.N.L.R. 1; and J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629.

<sup>126</sup> *Supra* note 60. See also Quebec, National Assembly *Journal of Debates*, (20 March 1985) at 2570 (resolution on Aboriginal self-determination); Statement of Political Relationships between the Government of Ontario and the First Nations of Ontario (August 1991); and public statements of the Governments of Saskatchewan and British Columbia.

<sup>127</sup> *Supra* note 31.

<sup>128</sup> See e.g. P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311; P. Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 Queen's L.J. 173; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; B. Ryder "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; J.J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291; J. Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; and K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queens L.J. 95.

<sup>129</sup> It is possible that the Inuit and some First Nations may benefit from a point-of-contact standard as opposed to any other if the jurisprudence will evolve in a manner that will accept actual contact as decisive, even if that contact occurs far after assertions of British or Canadian sovereignty. The remoteness of most Inuit communities outside of Labrador and some isolated First Nations would then mean that the critical date for application of this branch of the *Van der Peet* test to the evidence would be the late nineteenth or even the twentieth century.

## VII. The Federal Inherent-Right Policy

After consultation with Aboriginal groups across the country, including two federal-provincial-territorial ministers and Aboriginal leaders meetings, the federal government released its policy document on the inherent right to self-government in August 1995.<sup>130</sup> While the response from the Canadian media was overwhelmingly positive, the opinion of Aboriginal leaders was mixed and most provinces remained silent. Then National Chief of the Assembly of First Nations, Ovide Mercredi, condemned, in the strongest language, the federal position as merely offering a municipal form of government and the process used to develop this position as overly secretive. Other national leaders were more temperate in their criticisms and some regional leaders, especially in British Columbia, endorsed the policy overall. The federal government stressed that it was intended as an extension of an offer to negotiate the implementation of the inherent right with those Aboriginal groups and provinces or territories that were willing. The federal statement also served to describe in detail the negotiating position that federal representatives would take to the table, but as with any negotiating position, it was not carved in stone.

It is important to realize that the federal position is founded upon the recognition of the inherent right to self-government. Much of the discussion about the policy has concentrated upon the following: whether an inherent right to self-government encompasses sufficient breadth under the heads of legislative power which the federal government accepts as being included within the scope of Aboriginal governmental jurisdiction; the opinion that provincial government participation is required to extend section 35(1) protection to self-government agreements reached south of the 60th parallel; and the perception that negotiation is compulsory such that it is not truly a recognition of an inherent right but a return to a "contingent right" policy.<sup>131</sup> What has been too of-

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<sup>130</sup> *Supra* note 60. The author served as Executive Assistant to the Honourable Ronald A. Irwin, Minister of Indian Affairs and Northern Development, during 1994-96 and was directly involved in the development of this policy.

<sup>131</sup> The "contingent right" approach was the position of the Government of Canada and the majority of the provinces during the FMC process of 1982-87 and subsequently, *supra* note 23. During the Charlottetown Accord negotiations the federal, provincial and territorial governments all agreed to recognize an inherent right as part of the overall package. The stand-alone inherent right amendment was to be made expressly non-justiciable for five years after proclamation of the amendment package. The favouritism for negotiations as the means to seek to implement self-government was also apparent through proposed amendments that would obligate federal, provincial and territorial governments to negotiate on the request of an Aboriginal group. These provisions were elaborated upon further through a detailed non-constitutional protocol which was also negotiated at that time. The entire package collapsed with the failure to obtain a "yes" vote in all provinces in the national referendum, with most non-Aboriginal governments immediately returning to their former contingent-right position. This latter position basically means that a right of self-government does not currently exist within Canadian law and can only be created through negotiating self-government agreements. These agreements would then establish the general right of self-government and define its precise scope. As such, the right of self-government is contingent upon ever reaching agreements and is unenforceable at present through the Canadian courts. This contrasts with a right being recognized as freestanding and pre-existing the Canadian constitution such that the focus of negotiations is on resolving the interface among governments and implementing the right.

ten overlooked is that the federal position does expressly recognize the inherent right as being protected by section 35(1) and thereby immediately enforceable in the courts. However, the government of Canada has stated that its preference is for negotiations rather than litigation as the vehicle for implementing the right.

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 ... It recognizes, as well, that the inherent right may find expression in treaties ... The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict.<sup>132</sup>

While a detailed analysis of the content and the acceptability of the federal policy is beyond the scope of this article, this pronouncement stands in stark contrast to the Supreme Court's decision in *Pamajewon* over one year later.

The federal policy does bear a resemblance to the Supreme Court's new "integral to the distinctive culture" test. Indeed, some of the policy's language is a federal elaboration on a shared source — the language in *Sparrow*. The government of Canada has stated:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, *integral to their unique cultures*, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.<sup>133</sup>

It must be noted that the scope of the federal statement is significantly broader than the standard established by the Supreme Court in *Pamajewon*. Furthermore, it does not automatically require proof by each Aboriginal group that it possesses a right of self-government even in a general sense, let alone on a jurisdiction-by-jurisdiction basis. Instead, the government has said it is open for negotiations to establish principles which it believes are fundamental. The federal position also creates three lists of jurisdictions<sup>134</sup> which reflect the following heads of power: those that are "internal to the group, *integral to its distinct Aboriginal culture* and essential to its operation as a government or institution";<sup>135</sup> those that tend to have effects beyond individual communities such that federal or provincial law would prevail if conflicts with Aboriginal laws arose; and those viewed as essential to the national interest such that federal legislative jurisdiction would have to remain intact, although administrative arrangements would be negotiable.

The Royal Commission on Aboriginal Peoples, in its final report<sup>136</sup> released two months after the *Pamajewon* decision, proposes an approach that has much in common

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<sup>132</sup> *Supra* note 60 at 3.

<sup>133</sup> *Ibid.* [emphasis added].

<sup>134</sup> *Ibid.* at 5-8.

<sup>135</sup> *Ibid.* at 5 [emphasis added].

<sup>136</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996) (Co-chairs: R. Dussault & G. Erasmus).

with the federal policy, although there are some fundamental differences. The Commission divides inherent jurisdiction into two basic sectors: a core area vital to the particular Aboriginal people, its culture and identity while not having a major impact on adjacent jurisdictions nor being "the object of transcendent federal or provincial concern",<sup>137</sup> and a periphery consisting of all other inherent Aboriginal jurisdictions that can only be exercised after a self-government treaty has been concluded with the Crown.<sup>138</sup>

## Conclusion

The decision in *Pamajewon* may illustrate the principle of litigation that weak cases involving unsympathetic issues make bad law. There are few less attractive issues to select for the first test case on the inherent right to self-government than high-stakes gambling. It entails the invocation of criminal law by Parliament in order to confirm active provincial regulation of an industry generating revenues well in excess of \$20 billion annually.<sup>139</sup> First Nations gaming, at the high-stakes end, inevitably targets non-Aboriginal patrons as its primary clientele. As a result, there is direct competition with non-Aboriginal charities and provincial treasuries. Furthermore, the limited evidence submitted to demonstrate that gambling was an aspect of traditional Anishinabek society regulated by customary law was weak.

In many ways, Aboriginal peoples, as well as others who support the recognition and implementation of Aboriginal self-government as an inherent right, are fortunate with the outcome of *Pamajewon*; it could have been much worse. The Supreme Court did not sustain the Ontario Court of Appeal's view that any aboriginal right to regulate gambling, if it existed, had been extinguished by the *Criminal Code*. Such a ruling would have set a disastrous precedent, as many areas of governance are the subject of detailed federal and provincial legislation. At its narrowest, it would have implied that the exercise of federal criminal-law-making is sufficient to extinguish Aboriginal jurisdiction.

In addition, the Court did not decisively reject the existence of an inherent right, as it assumed for the purposes of argument that the right existed. The Court, having concluded that the evidence did not satisfy the elements of the *Van der Peet* test, did not need to treat the issues of section 35(1) protection, extinguishment, and justification for federal infringement.

Therefore, some room has been left for future reconsideration of the inherent right through litigation. It must be admitted, however, that the language of *Pamajewon* indicates that the Supreme Court, as it is currently constituted, is not readily inclined to accept the assertion of a general inherent right akin to the domestic dependent nationhood status doctrine of residual inherent sovereignty in the United States.

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<sup>137</sup> *Ibid.*, vol. 2, part 1, *Restructuring the Relationship* at 167.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Gambling in Canada*, *supra* note 55 at 1.

The *Pamajewon* decision has not yet affected the bilateral or trilateral self-government negotiations underway in many regions of Canada. The federal government has continued to sustain its political and legal position in support of inherent-right recognition. The governments of Saskatchewan, Nova Scotia and the Yukon have signed tripartite accords that contain recognition of Aboriginal governance since the decision's release. The government of British Columbia has continued to sign tripartite framework agreements in the language of recognition that commit to negotiations on the scope and implementation of Aboriginal jurisdiction. The governments of Newfoundland and Labrador, Quebec, Ontario and the Northwest Territories remain involved in tripartite comprehensive land-claims negotiations that include self-government issues, although only the Northwest Territories recognizes an inherent right as an existing aboriginal right. Nevertheless, the negligible impact of *Pamajewon* on negotiations has been a political decision of these governments and is always vulnerable to change at any time.<sup>140</sup>

Further litigation will inevitably occur. Recourse to the courts is particularly likely in those provinces where only limited acceptance of an inherent right is reflected in the tripartite negotiations. Both the Royal Commission and the government of Canada accept that recognition of the inherent right entails acceptance of the entitlement of Aboriginal communities to exercise law-making functions even without the Crown's agreement, although neither prefers this unilateral approach. Attempts by Aboriginal communities to exercise their powers unilaterally may give rise to civil disobedience or to conflicts of laws with other governments.<sup>141</sup>

It is hoped that the next time the Canadian courts are called upon to hear arguments on the vital issue of Aboriginal self-government, there will be a number of treaties or agreements in place that expressly confirm the existence of the inherent right as well as clarify the relationship between Aboriginal and non-Aboriginal governments. The presence of such treaties, coupled with the existence of fully functioning Aboriginal governments with constitutionally confirmed powers that can be seen as operating effectively, could drastically alter the judicial attitude and the atmosphere in which basic governance issues are canvassed. A more complete review of the Canadian and foreign jurisprudence that does recognize Aboriginal law and jurisdiction would be most welcome.

Proponents of the inherent right would be wise to develop an intelligent litigation strategy, if the courts are to be utilized at all. The lawsuit should be only one prong in an overall approach aimed at fostering reconciliation, rather than an "all or nothing" gamble. Developing a wise game plan involves carefully selecting the issue to test, so

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<sup>140</sup> A reference to "the inherent right of self-government" as among "existing aboriginal or treaty rights" was included in a federal bill for the first time in Bill C-79, *Indian Act Optional Modification Act*, 2d Sess., 35th Parl., 1996, cl. 4(3) (1st reading 12 December 1996) but it died on the Order Paper with the federal election.

<sup>141</sup> Conflicts are also envisioned between First Nations seeking to implement their lands, natural-resources, wildlife-harvesting and environmental-protection laws and corporate and other third-party interests that rely upon federal or provincial licenses or property interests to engage in the activity in dispute.

as to build incrementally upon existing non-Aboriginal jurisprudence.<sup>142</sup> It also requires having both the appropriate factual circumstances and the expert evidence in place. However, there are no guarantees, as is demonstrated by the *Van der Peet* case itself.<sup>143</sup>

Canadian courts have on numerous occasions expressly indicated that Aboriginal issues belong in the realm of political negotiations rather than in the judicial arena. Whether the members of the Supreme Court were thinking about this, yet chose not to comment on it expressly is, of course, unknown. The message to First Nations remains the same — do not go to court looking for confirmation of your legitimacy as governments.

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<sup>142</sup> One example might be to test a First Nation law that confirms the legitimacy of longhouse or other forms of customary marriages for some purpose. This would build upon existing common-law judgments that recognize traditional Aboriginal family law (see Morse, *supra* note 98) as well as provisions in the *Indian Act* (*supra* note 38, for example s. 2(1) definition of a “child”).

<sup>143</sup> In which a poor elderly Sto:lo woman selling ten salmon was unsuccessful and treated as if she were a major commercial operator.