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Self-Government Agreements and Canadian Courts

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Introduction

Section 35(1) of the *Constitution Act, 1982* recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, including the inherent right of Aboriginal peoples to self-government.[1] The framers were silent as to the scope and content of these rights, relying on a series of constitutional conferences held between 1983 and 1987 designed to define these rights, but with little success.[2] This shifted the responsibility to the courts, which have understandably been reluctant to deal with what they perceive to be a political issue best settled through negotiations. In *R. v. Sparrow*, Dickson C.J. and La Forest J. stated, "Section 35(1) at the least, provides a constitutional base upon which subsequent negotiations can take place."[3] Seven years later, Chief Justice Lamer admonished the parties in *Delgamuukw v. The Queen* to consider negotiation as an alternative to re-litigating their dispute and warned that "the Crown is under a moral, if not a legal duty, to enter into and conduct those negotiations in good faith."[4] Thus, the Supreme Court has made its preference for negotiation in determining Aboriginal rights clear.

Viewed as a human right, self-determination may be considered the foundation upon which all other rights lie. Russel Barsh has described it as the most dynamic of all issues considered by international law and the right from which all other rights are said to flow.[5] While cited as a founding principle of the Charter of the United Nations and reflected in the International Human Rights Covenants, the term itself remains largely undefined. Despite a lack of consensus as to its parameters, certain characteristics have been identified as embodying the principles of self-determination, including the right to be free from discrimination, respect for cultural integrity, social and welfare development, control over lands and resources, and the right of a people to a government of their own making.[6]

General claims of self-determination bring with them more specific claims of political sovereignty and redress for historic episodes of discrimination that have marked the relationship between the group claiming the right and the dominant society in which they exist. For Aboriginal leaders in Canada, self-government (the political manifestation of self-determination) has emerged as pivotal in their quest to redefine their communities. Through models of self-government they seek to address important developmental issues concerning poverty, unemploy-

ment, lack of community infrastructure, and a widening socio-economic gap between Aboriginal and non-Aboriginal Canadians.

There is also mounting support for policies of self-government from non-Aboriginal governments, reflecting a sense of acknowledgement that historic policies of assimilation have failed. This support has at least in part been fuelled by overwhelming evidence that successful development within Aboriginal communities is linked to control over the decision-making process by Aboriginal community leaders.[7] Professors Cornell and Kalt have summarized the importance of self-determination to tribal success stating, "Not only does tribal sovereignty work, but the evidence indicates that a federal policy of supporting the freedom of Indian nations to govern their own affairs, control their own resources and determine their own future is the only policy that works. Everything else has failed."[8]

While complex matters related to the sharing or division of governing powers is undoubtedly better suited to negotiation than litigation without a clear message from the Court providing substance to the inherent right of self-government, Aboriginal negotiators come to the bargaining table in a weakened position. In this paper I will first examine different kinds of jurisdiction and the potential sources of Aboriginal peoples' self-government jurisdiction. I then examine the way in which the Supreme Court has articulated the right of self-government for Aboriginal communities and the ramifications that this has had on the negotiating process. Finally, I attempt to provide an alternative solution that may allow the Court to shift its focus away from the current test used to determine the existence of the right of self-government.

Source of Self-Government Jurisdiction

Jurisdiction refers to political power and the ability of a government to effectively make decisions. It can be exercised over territories or people and, in some cases, over a combination of the two.[9] Along with this, jurisdiction can be exercised either exclusively or concurrently and, finally, jurisdiction can be either delegated or inherent.

Territorial jurisdiction refers to a class of powers attached to a specific geographic territory, such as the traditional lands of an Aboriginal group, and allows for the management and regulation of activities related to the lands, including traditional activities such as hunting and fishing along with more modern activities such as the development of land codes. At the same time, territorial jurisdiction may also involve the regulation of the activities of people physically present within the geographic confines of the territory.

Personal jurisdiction refers to the ability of an Aboriginal government to enact laws that are applicable to its citizens, in some instances even when those citizens are physically located outside the governing territory of the community.[10] Personal jurisdiction can involve jurisdiction over a class of powers, including

education, health care, social and welfare services, the solemnization of marriage, and adoption.

Along with this, jurisdiction can be either exclusive or concurrent. Exclusive jurisdiction refers to authority being exercised by only one level of government. This could be either the federal or provincial government or, in some special cases, an Aboriginal government.[11] Concurrent jurisdiction involves shared authority between two or more levels of government and requires the development of rules for dealing with overlapping claims of jurisdictional authority and conflict between levels of government. For example, Section 95 of the *Constitution Act, 1867* recognizes that both the provinces and federal government may make laws pertaining to the regulation of agriculture and immigration, but provides that provincial law in either of these fields shall have effect only "as long and as far as it is not repugnant to any Act of Parliament of Canada."[12]

Finally, jurisdiction can be either delegated or inherent. Prior to 1982, the Government of Canada and the various provincial legislatures exercised jurisdictional authority delegated through the *Constitution Act, 1867*.[13] In Canada, municipal governments operate under authority delegated to them through provincial legislation and are often recognized as being "creatures of the province," while the territorial governments exercise authority delegated to them from the federal government. Similarly, Aboriginal band councils exercise authority delegated to them by the federal government through the *Indian Act*.[14] Such an approach views the existence or non-existence of Aboriginal rights, including the right of self-government, as contingent upon the exercise of state authority in the granting of such rights.[15]

Inherent jurisdiction, on the other hand, refers to jurisdictional authority of a first order, one not reliant on the actions or approval of a higher authority to bring it about. For Aboriginal peoples, this means that the right to govern is not reliant on treaties nor is it reliant on Canadian law for its existence. Thus, to Aboriginal peoples, while Section 35(1) may have acknowledged the existence of, and given constitutional protection to, Aboriginal rights (including the inherent right of self-government) it did not create them.

To Aboriginal peoples, the source of this inherent right to govern comes from the Creator who placed Aboriginal peoples on earth to serve as stewards of the land and all that it provides.[16] It was this relationship with the Creator that provided the framework for the political and other institutions and laws that allowed Aboriginal peoples to survive as nations.[17] Oren Lyons has stated,

> What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us on this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and other animals. We are the aboriginal people and we have a right to look after all life on this earth. We share land in common not only among ourselves

> but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfill its responsibility to the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfill that responsibility.[18]

The Royal Commission on Aboriginal Peoples noted that to Aboriginal peoples the term "sovereignty" referred to original powers conferred upon them by the Creator rather than from some temporal power. Thus, it can neither be given nor taken away.[19]

While not rejecting such spiritual claims, the Supreme Court has chosen to frame the inherent rights of Aboriginal peoples on more Eurocentric grounds, basing it on the common law principle of prior occupancy. For example, in *R. v. Van der Peet* Lamer C.J. recognized the prior occupancy of Aboriginal peoples, stating that Aboriginal rights exist because Aboriginal peoples were already living in distinct societies when Europeans came to North America.[20]

If the source of the Aboriginal right of self-government is the Creator, what is the scope of that right? Logically the spectrum of governing authority could range anywhere from complete authority over all potential issues that may fall within the scope of a governing body, including things that may have been outside the contemplated matters of government centuries ago, to a much lesser amount of power delegated to an Aboriginal government by the Creator.[21]

Leroy Little Bear has equated the relationship between Aboriginals and all other living things as similar to the social contracts designed by Locke and Rousseau.[22] The difference is that while these philosophers constructed their social contract theory to encompass only human beings, Professor Little Bear suggests that to Aboriginal peoples the social contract embraced all living things.[23] As a result of this contract, whatever jurisdiction Aboriginal peoples originally acquired from the Creator could not simply be transferred to another party. To do so would be to break the conditions under which authority had been granted from the Creator. Professor Kent McNeil has argued that any authority not given to an Aboriginal nation by the Creator would not necessarily create a jurisdictional vacuum that a colonial government could usurp. Such an action he suggests, would "interfere with the sacred relationship between the Aboriginal nation and the Creator and would violate Aboriginal understandings of the place of human beings in the natural world."[24]

The scope of Aboriginal authority can be further exemplified by using the common law approach of prior occupancy. When the Europeans arrived rather than finding lands that were *terra nullius* they found lands occupied by Aboriginal peoples. As George Erasmus and Joe Sanders have stated, "Our people decided their own citizenship. They had a wide variety and diversity of governmental systems, almost all of them regulating their activities and the relations among their members with a degree of formality."[25]

We can conclude from this that Aboriginal peoples perceive inherent rights, including the right of self-government as flowing from a spiritual source, one that created a partnership between the Aboriginal peoples and all other living things. Any limits placed on these rights are not man-made, but rather come in the form of limitations introduced by the Creator, which do not create voids from which other governments might claim sovereign authority. Alternatively, Aboriginal rights flow from their prior occupancy and the fact that they were living in organized societies long before the arrival of European colonists; therefore, they have a common law legal claim that was neither extinguished by clear legislative acts nor forfeited by the Aboriginal peoples. It is these issues that Canadian courts are currently attempting to grapple with.

Self-Government as a Free-Standing Right

(i) R. v. Sparrow

In *Sparrow*, the Supreme Court of Canada had its first opportunity to provide an interpretation as to the scope and content of the Aboriginal rights recognized and affirmed by Section 35(1). In this case Ronald Sparrow, a member of the Musqueam Indian Band, was charged under the federal *Fisheries Act* with fishing with a drift net that exceeded the length allowed under the band's food fishing licence.[26] Dickson C.J. and La Forest J. began by interpreting the term "existing" in Section 35(1) as referring to rights that were in existence when the *Constitution Act, 1982* came into effect. As a result, any rights which had previously been extinguished were not revived by the *Constitution Act, 1982*.[27]

The Court found that the right to fish existed in 1982, and that the right had never been extinguished, noting that the fact that the right was heavily regulated prior to 1982 did not necessarily equate to extinguishment.[28] Concluding that the right to fish had not been extinguished prior to 1982, the Aboriginal right must therefore have been in existence at that time and therefore came under the constitutional protection of Section 35.

The Court concluded that the terms "recognition and affirmation," as used in Section 35, create a fiduciary obligation on the Crown to import restraint on the exercise of sovereign power. The Court noted that rights protected by Section 35 were not absolute, despite the fact that they were not subject to the limitations of the Charter of Rights and Freedoms.[29]

The *Sparrow* Court did not deal with the issue of self-government, though it was given the opportunity. Counsel for Sparrow argued that the right to regulate was part of the right to use the resource at the band's discretion, and therefore the authority to regulate the fishing right lay with the Musqueam nation.[30] Federal authority, they argued, only existed when and if "measures were necessary to prevent the serious impairment of the aboriginal rights for present and future generations or where conservation could only be achieved by restricting the

right and not by restricting fishing by other users and where the aboriginal group concerned was unwilling to implement necessary conservation measures."[31]

In *Sparrow*, the Court connected Aboriginal rights to those activities that were an integral part of the Aboriginal group's distinctive culture. Specifically, the Court noted that the Musqueam had always fished for reasons connected to their culture and physical survival. Therefore, for the Musqueam the salmon fishery had always constituted an integral part of their distinctive culture.[32] In taking this approach, the Court warned against defining these rights in ways that incorporated methods in which they were regulated in the past. Rather, the Court stated, they should be interpreted in a flexible manner so as to permit their evolution over a period of time. The Court warned that such a flexible approach to the interpretation of Aboriginal rights was necessary to avoid the potential of creating a "frozen rights" approach to their interpretation.[33]

While a great deal of focus on the part of the Court in this case was the development of the justificatory test for the infringement of fishing rights, the Court did take the time to examine the purpose for the inclusion of Section 35(1). It was, they stated, "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."[34] The Court noted that after decades of ignoring Indian rights as a response to the Supreme Court decision in *Calder*, the federal government chose to recognize and accept "its continuing responsibility under the *British North America Act*, for Indians and lands reserved for Indians."[35] From this, the Court derived an approach for the interpretation of Section 35(1) rights. Drawing on general constitutional principles and previous case law, the Court concluded that, "When the purposes of the affirmation of aboriginal rights is considered, it is clear that a generous and liberal interpretation of the words in the constitutional provision is demanded."[36]

(ii) R. v. Van der Peet

On September 11, 1987, Dorothy Van der Peet, a member of the Sto:lo First Nation of British Columbia, was charged under the federal *Fisheries Act* with the offence of selling fish caught under the authority of an Indian food fish licence contrary to the *British Columbia Fishery* (General) *Regulations*.[37] Chief Justice Antonio Lamer (speaking for the majority) picked up where Dickson C.J. and La Forest J. left off in *Sparrow*, noting that the case before the Court would have to address what had been left unresolved in that previous case; namely, how Aboriginal rights recognized and affirmed in Section 35(1) were to be defined.

To Lamer C.J., the task of the Court was to define Aboriginal rights in such a way that they are recognized as rights, but that does not make the court lose focus on the fact that they are rights held only by Aboriginal peoples because they are Aboriginal peoples. To define the scope of Aboriginal rights the Chief Justice stated that it is necessary first to "articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada."[38] He went on to say:

> The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way that captures both the aboriginal and the rights in aboriginal rights.[39]

The chief justice affirmed that Aboriginal rights existed and were recognized by the common law prior to their constitutional entrenchment stating, "it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law."[40] The chief justice went on to articulate two factors that serve to ground a legal analysis of Aboriginal rights: prior occupancy and reconciliation. Drawing on the Court's earlier decision in *Calder*, Lamer C.J. stated,

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.[41]

As a result, s. 35(1) provides the constitutional framework for the reconciliation of pre-existing Aboriginal communities with the subsequent assertions of sovereignty by the Crown: "The aboriginal rights which fall within the provision must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[42]

To be an Aboriginal right, Lamer C.J. stated, the activity being claimed "must be a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[43] The Court then proceeded to refine the characterization of Aboriginal rights first articulated in *Sparrow.* The Court indicated that the nature of the action the applicant was claiming was done pursuant to an Aboriginal right, the government regulation, statute, or action being impugned, and the practice, custom, or tradition being relied on to establish the right all needed to be considered.[44] The chief justice concluded that the appellant in this case was using the practices, customs, and traditions to create what he characterized as a "social test," something he found insufficient to ground an Aboriginal right.

To the chief justice it was not sufficient that a claimed right be a practice, custom, or tradition that was an aspect of the Aboriginal community claiming the right. Rather the right must be integral to the distinctive culture of the group claiming the right. To satisfy this, the claimant must, according to the majority of the Court, show that the practice, custom, or tradition was a central and significant part of the society's distinctive culture: "He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive—that it was one of the things that truly made

the society what it was."[45] To Lamer C.J. it was not those aspects of an Aboriginal society that were common with other societies (such as eating to survive) that would satisfy the integral-to-the-distinctive-culture test, but rather "the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1)."[46]

Finally, the chief justice concluded that the test for establishing Aboriginal rights must be aimed at identifying those rights that were practices, traditions, and customs central to the Aboriginal societies that were in North America prior to contact with Europeans.[47] This makes sense based on Lamer C.J.'s early caution that Aboriginal rights should be defined in a manner that recognizes they are Aboriginal rights, but that does not "lose sight of the fact that they are rights held by aboriginal people because they are aboriginal."[48]

Sparrow and *Van der Peet* were foundational cases in the development of the scope and content of Aboriginal rights, but what do they tell us about these rights? In *Sparrow*, the Court accepted the notion that Canada held sovereign authority over the Aboriginal peoples and thus has the authority to legislate on issues concerning them.[49] The Court acknowledged that Aboriginal rights existed and were absorbed into the common law and that those rights, still existing in 1982, were raised to constitutionally protected status when they were recognized and affirmed in Section 35(1) of the *Constitution Act, 1982*. As a result of this, they were no longer subject to unilateral extinguishment, and the regulation of these rights needed to conform to the strict justification test outlined by the Court in *Sparrow*. This test called for adequate consultation of Aboriginal peoples prior to any infringement of their rights. The Court embraced an inherent theory of Aboriginal rights in *Sparrow* by recognizing that the Musqueam right to fish arose from the fact that it constituted an integral part of their distinctive culture and was a necessary condition of their historic self-preservation. As a result of this, Aboriginal rights were defined as those rights that were essential to the Aboriginal peoples claiming the rights. In reaching this conclusion, Dickson C.J. and La Forest J. warned that Aboriginal rights must be interpreted in a flexible manner to allow for their evolution over time, warning that to disregard this was to risk creating a frozen rights approach to the interpretation of these rights.

Critics warned that this decision ran the risk of undermining the larger goal of Aboriginal leaders, namely the achievement of self-government and the development of an independent economic base.[50] Prior to his appointment to the Supreme Court, W. I. C. Binnie warned that "the checks and balances of the Constitution, do not favour both a liberal and generous reading of the rights and a high level of immunity."[51] Michael Asch and Patrick Macklem noted that while the Court appears to initially embrace an inherent theory of Aboriginal rights in *Sparrow,* it attempts to avoid what it anticipated would be a major concern—the inherent right of Aboriginal peoples to self-government—by merely accepting the notion of Canadian sovereignty over the Aboriginal population. As a result of this sover-

eignty, any rights provided must be contingent upon the state for their distribution.[52]

Van der Peet attempted to pick up where Dickson C.J. and La Forest J. left off in *Sparrow*. In *Van der Peet*, it was argued that Aboriginal rights must be viewed differently than other rights because they inhere to one group, the Aboriginal peoples of Canada. This required that they be examined with a degree of necessary specificity. Lamer C.J. recognized the prior occupancy of Aboriginal peoples and concluded that this prior occupancy must be reconciled with the later assertions of sovereignty by the Crown. The Court then refined the test initially introduced in *Sparrow,* determining that an Aboriginal right must be a practice, custom, or tradition that was integral to the distinctive culture of the claimant group and providing a time frame for the claiming of such rights as a period prior to contact with Europeans.

Van der Peet raised several concerns relating to Aboriginal governance. First, while attempting to resolve questions left by *Sparrow*, the *Van der Peet* majority appears to have failed to adequately consider the Aboriginal perspective when examining Aboriginal rights. While concluding that a court must take into account the perspective of the Aboriginal group claiming the right, in the very next sentence Lamer C.J. indicated that these rights must be "framed in terms cognizable to the Canadian legal and constitutional structure."[53] As professors Kent McNeil and David Yarrow have noted in relation to this aspect of the *Van der Peet* decision, "Regarding characterization of the claim, it appears that while the perspective of the Aboriginal peoples making the claim has to be taken into account, it is not the governing factor."[54] Such an approach will have a tendency to weaken potential claims for Aboriginal peoples as they are forced to reshape and frame their claims to fit into a Western judicial framework, thus possibly leading to the diminishment of Aboriginal perspectives.[55]

The second major concern raised by the decision in *Van der Peet,* and foreshadowed by W. I. C. Binnie, is that claims to self-government will be limited to whatever authority an Aboriginal claimant group is able to make on a piece-by-piece basis. Thus, claims would be confined to those areas that can be proven to be integral to the distinctive culture of the specific claimant group and that were regulated by them prior to contact with Europeans, in some cases requiring a back-dating in excess of four hundred years.[56] This has led the *Van der Peet* decision to be seen as advocating a "frozen rights approach." McNeil has noted, "This might eliminate claims relating to many of the matters that have become the business of government in more recent times, effectively hampering the capacity of First Nations governments to function effectively in the modern world."[57]

Criticism of the majority test in *Van der Peet* was swift. In her dissenting opinion, Madame Justice L'Heureux-Dubé recommended the adoption of a "dynamic rights approach" over that of a "frozen rights approach" for several reasons. Firstly, she argued that relying on contact with Europeans as the cut-off for the development of Aboriginal practices, customs, and traditions

overemphasizes European influence on Aboriginal communities. Secondly, contact with Europeans is an arbitrary date for assessing all Aboriginal rights. She also argued that using this frozen rights approach "imposes a heavy and unfair burden on the natives" by embodying inappropriate assumptions about the Aboriginal group that, in the end, they may not be able to prove. Finally, she argued that the frozen rights approach to interpretation of Aboriginal rights was inconsistent with the position taken by the Court in *Sparrow*.[58]

McLachlin J. was just as critical. Noting that one must distinguish between an Aboriginal right and the exercise of that right (the former is generally cast in broad language while the latter may take many forms from time to time), she criticized the notion of examining these rights under a microscope of "necessary specificity" stating, "If a modern practice is treated as the right at issue, the analysis may be foreclosed before it begins." She then noted that a modern practice by which the more fundamental right is exercised may not find a counterpart in a historic Aboriginal culture. Sharing many of the concerns of her colleague Madame Justice L'Heureux-Dubé, McLachlin J. summarized by stating, "To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live."[59]

Criticism within the academic community was no less intense. Professor John Borrows stated, "The Chief Justice's test defines Aboriginal rights according to stereotypical perceptions of Aboriginal characteristics rather than by their nature and source. This approach freezes the development of certain Aboriginal practices in the distant past."[60] Russel Barsh and James Youngblood Henderson stated, "Taken to its logical extreme, the reconciliation test has the effect of extinguishing everything that had not already been judicially recognized in 1982. But this does not reflect accurately the aims of the Aboriginal constitutional negotiators, nor even those of their non-Aboriginal counterparts."[61] Finally Professor Bradford Morse has stated, "The *Van der Peet* test embroils the judiciary in a quagmire of subjective assessments of what is and what is not deserving of constitutional protection."[62]

(iii) R. v. Pamajewon

In *R. v. Pamajewon*, the Court had the opportunity for the first time to address the issue of self-government as a free-standing Aboriginal right.[63] The case itself stemmed from criminal charges against members of two Ontario First Nations communities (Shawanaga and Eagle Lake First Nations). The charges were for "keeping a common gaming house" contrary to Section 201(1) of the *Criminal Code*. Convicted in the lower court, at the Ontario Court of Appeal the appellants submitted that they had a constitutionally protected Aboriginal right of self-government that existed either as an incident of Aboriginal title or alternatively as an inherent Aboriginal right. The appellants argued that the issue of high-stakes

gambling before the court was part of a larger right to manage the economic affairs of the reserve as an incident of self-government. At the Ontario Court of Appeal these arguments were rejected out of hand. Osborne J.A. indicated that no evidence existed that gambling generally or high-stakes gambling particularly were part of the First Nations' historic cultures or traditions, an aspect of their use of the lands, or something that had been historically regulated. Along with this, Osborne J.A. held that *Sparrow* was the authority for the proposition that any claim to an inherent right of self-government was extinguished by assertions of British sovereignty.[64]

In rendering its judgment, the Supreme Court chose to assume that self-government was an Aboriginal right constitutionally protected by Section 35(1). Having acknowledged this, the Court concluded that the resolution of the appellant's claims rested on the proper application of the *Van der Peet* test (introduced only a day earlier) and as such, "claims of self-government are no different than other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard."[65]

Drawing on *Van der Peet*, Lamer C.J. stated that in characterizing an applicant's claim correctly a court must consider factors such as the nature of the action the applicant is claiming was done pursuant to an Aboriginal right; the nature of governing regulations, statutes, or actions being impugned; and the practice, custom, or tradition being relied upon to establish the right. Lamer C.J. concluded: "When these factors are considered in this case it can be seen that the correct characterization of the appellants' claim is that they are claiming the right to participate in, and regulate, high stakes gambling activities on the reservation."[66] Lamer C.J. rejected the appellant's claim that the activity represented the broad right to manage the use of their reserve lands, claiming that to do so would "cast the Court's inquiry at a level of excessive generality."[67] Lamer C.J. concluded that the evidence presented did not demonstrate that gambling or the regulation of gambling was integral to the distinctive cultures of either First Nation and as such, did not qualify as an Aboriginal right under the *Van der Peet* test.

By using the test created in *Van der Peet* for the determination of claims to self-government, the Court has run a tremendous risk of limiting the right of self-government to only those activities that were integral to the distinctive culture of the Aboriginal group claiming the right at a point prior to contact with Europeans; something that may very well result in a freezing of this right and a restriction on an Aboriginal government to operate effectively within the present-day state. As Catherine Bell has asked, "Did the application of the *Van der Peet* test to self-government mean that rights to government would only be recognized by the court if characterized in terms of specific pre-contact activities?"[68]

In *Pamajewon*, the Court viewed the right of self-government through the lens of what Professor Brian Slattery has identified as specific Aboriginal rights. These, he has convincingly argued, are rights that are unique to particular Aboriginal groups and are determined by the historic practices, customs, and traditions

of the group being examined. As such, these rights may differ from one group to the next.[69]

This approach to the development of self-government is difficult to accept. While some academic commentators have suggested that the outcome of *Pamajewon* may represent a blessing in disguise, for Aboriginal negotiators this does not seem to be the case.[70] As Kent McNeil has stated,

> With a decision like *Pamajewon* standing as the main Supreme Court precedent on the content of the right of self-government, negotiators for non-Aboriginal governments can always say, fine, if you don't like what we are offering then you can go to court and try to prove your right of self-government in the piecemeal fashion of *Pamajewon,* but don't expect to have jurisdiction over any matters that were not integral to your distinctive cultures and regulated by you prior to European contact.[71]

It seems that almost every segment of the *Van der Peet* test has been the subject of criticism, particularly as it relates to self-government. As indicated above, academic commentary has been strongly critical. Surprisingly, the Court chose to evaluate a right as important and as potentially broad as self-government by using the same test created to determine the constitutional legitimacy of a right to fish for food for ceremonial purposes. This appears to run contrary to Canadian constitutional law, which distinguishes between rights to resources and jurisdictional authority over those same resources.[72]

Limiting claims to self-government to matters that were integral to the distinctive culture of an Aboriginal claimant group prior to contact with Europeans seems to be arbitrary at best, and is likely to limit Aboriginal nations' abilities to govern themselves in the modern world in which they find themselves. Finally, by fragmenting the right of self-government, the Court has placed an almost insurmountable test upon First Nations hoping to make claims under this right. The burden of proof is overwhelming and the cost of potentially litigating claims of self-government could be enormous given the financial considerations. It would require extensive research and expert evidence from a variety of professional sources, including historians, anthropologists, and others, not to mention the time and cost of legal professionals themselves. This could result in a tremendous drain on economic resources that could be used for any number of more practical and beneficial needs such as housing, health care, and education, along with any other daily social issues that make up the fabric of a society.

However, despite these criticisms and the obvious shortcomings of the current test, *Pamajewon* as a decision of the Supreme Court of Canada is the law of the land and will remain so until it is either overturned or modified by some future judgement. In the next section of this paper I will examine alternative methods by which the Court might be able to approach the issue of self-government.

Self-Government through Regulation

(i) Introduction

The Supreme Court decision in *Pamajewon* supports an "empty box" theory of Aboriginal self-government.[73] Under such a theory, self-government represents nothing more than a bundle of rights. In order for an Aboriginal claimant group to acquire any one strand in the bundle as a feature of self-government, it is incumbent upon them to first claim the right and then prove that the right itself (not the right to govern in a manner they see fit) was an integral part of their culture and regulated by them at the time of European contact.

A second approach to assessing the right of self-government is to associate the right to other Aboriginal and treaty rights, particularly rights related to land, though this need not necessarily be the case. As noted earlier in this work, in *Sparrow* the Court concluded that, "the evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so today."[74] Further in their decision Dickson C.J. and La Forest J. noted, "The aboriginal peoples, with their history of conservation-consciousness and inter-dependence with natural resources, would surely be expected, at the least, to be informed regarding an appropriate scheme for the regulation of the fisheries."[75] In this case, the right to fish was determined to be an Aboriginal right because of the centrality it held to the Musqueam people. It follows from this that the Musqueam must have developed some method of regulating how the activity itself was to be carried out, both in relation to its own members and in conjunction with other Aboriginal nations.

(ii) Delgamuukw v. British Columbia

More recently, in *Delgamuukw*, the Supreme Court issued a long-awaited decision on the nature of Aboriginal title under Section 35.[76] The appellants in that case, Gitksan and Wet'suwet'en hereditary chiefs, both individually and on behalf of their "houses" claimed separate portions of some 58,000 square kilometres in British Columbia. They originally sought both ownership and jurisdiction over the lands, but at the Supreme Court the claim was amended to consider primarily issues of Aboriginal title over the lands in question.

Lamer C.J. acknowledged the claims to self-government made in the lower courts, but concluded that errors of fact made by the trial judge and the resultant decision of the Supreme Court to call for a new trial "make it impossible for this Court to determine whether claims to self-government have been made out."[77] While the Supreme Court chose not to deal with the issue of self-government, it did reiterate the position established in *Pamajewon* that claims to self-government, "if they existed, cannot be framed in excessively general terms … appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1)."[78] The trial court and the British Columbia

Court of Appeal had both concluded that any right to self-government had been extinguished with assertions of Crown sovereignty. In the Court of Appeal, MacFarlane J.A. (Taggart J.A. concurring) held that the entry of British Columbia into Confederation immediately brought the Aboriginal peoples under the control of the government of Canada.[79]

However, while not dealing directly with the issue of self-government, in prescribing the general features of Aboriginal title at common law Lamer C.J. inadvertently opened the door to self-government that was originally introduced in *Sparrow*. Lamer C.J. concluded that Aboriginal title is a collective or communal right and, as such, it is the community that must make decisions regarding the land: "A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by an individual aboriginal person; it is a collective right to land held by all member of an aboriginal nation. Decisions with respect to that land are also made by the community."[80] This passage appears to signify that decision-making authority is linked to Aboriginal title. The Court confirmed that Aboriginal title "encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples."[81] While invoking the British real property principle of equitable waste as a limitation, the chief justice acknowledged that choices must be made with regard to lands held under Aboriginal title and thus decision-making or governmental authority is at least implicitly recognized by this decision. With regard to the communal nature of Aboriginal title addressed in *Delgamuukw*, Professor Kent McNeil has stated,

> There must, for example, be rules and mechanisms for deciding which members of the community can use which lands, and for what purposes. The communal nature of Aboriginal title rights therefore, presupposes the existence of Aboriginal governments to distribute the benefits that flow from those rights with the community and regulate how they are exercised.[82]

(iii) R. v. Marshall

In *R. v. Marshall*, the accused, a member of the Mi'kmaq Indian nation, was charged with offences established by federal fisheries regulations: the selling of eels without a licence, fishing without a licence, and fishing during the closed season with illegal nets.[83] The accused admitted to all the charges, claiming he possessed a right under a treaty dating back to 1760–61 that exempted him from compliance to the regulations. The Supreme Court found in favour of the accused and overturned the findings of the lower courts. The West Nova Fisherman's Coalition applied for a re-hearing to address the regulatory authority of the government of Canada over the east coast fisheries, as well as to allow the Crown to justify its licensing and creating a closed season in terms of conservation. The Court concluded that Aboriginal treaties, like Aboriginal rights, are rights that are

not held personally by Aboriginal peoples but rather are "exercised by authority of the whole community," and that any limitation or restriction on Aboriginal treaty rights requires consultation with the Aboriginal community prior to such restriction.[84]

(iv) Campbell v. British Columbia

Campbell v. British Columbia rose out of a challenge to the self-government features of the Nisga'a treaty.[85] Chapter 11 of that agreement recognizes the Nisga'a Nation's right to self-government and the authority to make laws as outlined in the agreement. A constitutional challenge was raised by then-leader of the British Columbia opposition party, Gordon Campbell. He challenged the settlement legislation enacting the treaty, arguing that the treaty was inconsistent with the Canadian constitution and that rights granted under Chapter 11 of the agreement were inconsistent with the exhaustive division of powers granted to Parliament and the legislative assemblies respectively.

Citing passages from *Delgamuukw* that refer to the collective and communal nature of Aboriginal title, Williamson J. proceeded to examine whether, as the plaintiff suggested, a limited right of self-government could not be protected constitutionally by Section 35(1). His response was that Aboriginal title in its full form, including the right of a community to make decisions with respect to the use of lands, required a political structure to make those decisions and was constitutionally protected by Section 35(1). Williamson J. concluded:

> A right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division "internal" to the Crown.[86]

The *Constitution Act, 1867*, conferred upon Parliament and the legislative assemblies exclusive authority to govern under the classes of powers enumerated in Sections 91 and 92, but it did not extinguish what was left of the royal prerogative or Aboriginal and treaty rights, "including a diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982."[87] Citing Chief Justice Lamer's conclusion in *Delgamuukw* that Aboriginal title was held communally and that it is held by all members of an Aboriginal nation, Williamson J. stated,

> Can it be, as the plaintiffs' submission would hold, that a limited right to self-government cannot be protected constitutionally by Section 35(1)? I think not. The above passages from Delgamuukw suggesting the right for the community to decide to what uses the land encompassed by their aboriginal title can

> be put are determinative of the question. The right to aboriginal title "in its full form," including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35.[88]

(v) Haida Nation v. British Columbia

Haida Nation v. British Columbia began with the issuance of a tree farm licence to a forestry firm by the Province of British Columbia in 1961.[89] In 1999, the Minister of Forests transferred the licence to Weyerhaeuser, a large forest concern in the province. The Haida nation challenged the transfer, made without their consent, and asked that it be set aside. The British Columbia Supreme Court rejected the claim, but this decision was reversed at the British Columbia Court of Appeal, which declared that the government and Weyerhaeuser had a duty to consult and accommodate the Haida people. The Supreme Court upheld the decision of the Court of Appeal. Speaking for the Court, McLachlin C.J. concluded that both federal and provincial governments have a duty to consult, but third parties such as Weyerhaeuser did not. However, they could be held liable in instances where it was shown that they acted negligently where a duty of care existed, or they were in breach of a contract.[90]

What can we conclude as to the scope of self-government jurisdiction available to Aboriginal peoples through an approach of self-government by regulation? With regard to lands claimed under Aboriginal title, this should mean that Aboriginal communities have governmental rights over the management, regulation, and use of lands, including the resources that are situated either on or under these lands. In *Delgamuukw,* Chief Justice Lamer noted that Aboriginal title also encompassed natural resources both on and within title lands.[91]

The *Haida* case centred on unproven claims to Aboriginal title over traditional areas of the Queen Charlotte Islands and the surrounding waters. The obligation placed on the Province to consult with the Haida in relation to these lands suggests once more self-government by regulation. In accordance with *Delgamuukw*, it is the community that must make decisions with regard to the use and enjoyment of lands. This, I believe, must take place within the framework of a government.

(vi) Conclusion

Within the framework of a treaty agreement, such as the *Nisga'a Final Agreement*, the scope of inherent authority available to an Aboriginal nation would consist of those classes of powers outlined in the treaty. However, outside the treaty process, such an approach to the inherent right of self-government immediately eliminates the so-called "empty box" issues that potentially arise under the *Van der Peet* test. With regard to lands held under Aboriginal title, such an approach to self-government would immediately offer Aboriginal claimant groups the right to

manage and regulate the use of both lands and the resources contained on those lands. Finally, how such an approach to self-government might affect other free-standing rights, such as a right to fish or hunt, needs to be considered.

Looking back at the *Sparrow* decision, the Court concluded that the right to fish was integral to the Musqueam society. The Court further noted that as a result of their history of conservation-consciousness and interdependence with natural resources, they were likely to make decisions in the best interest of the future of the resource. This coincides with the stewardship notions of self-government discussed earlier in this work. Many Aboriginal peoples believe they have an intertwining relationship with all things and thus are responsible for ensuring that resources are preserved for future generations. I would argue that a free-standing Aboriginal right, once proven, would include a right to regulate and manage the right in question. Interestingly, in a decision rendered merely months prior to *Sparrow*, that same Supreme Court concluded that rights held pursuant to Section 23 of the Charter included the right to manage and control the facilities in question.[92] I am at a loss to understand why the regulation of a constitutionally protected Aboriginal right, once established, should be any different.

Self-Government as a Residual Right of Sovereignty

Introduction

A third approach is to presume that Aboriginal nations had full plenary powers given to them by the Creator prior to the arrival of Europeans. Any limitations to this authority would have been between the Aboriginal peoples and the Creator and would not affect any interaction between Aboriginal nations and European colonizers. Alternatively, one can accept the fact that Aboriginal nations were fully functioning independent peoples prior to the arrival of Europeans and acknowledge the common law doctrines of prior occupancy and prior sovereignty. As McLachlin C.J. noted in *Haida*, "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*."[93] In either case, prior to the arrival of Europeans, it is a historic fact that Aboriginal peoples were living here as nations, with their own set of rules and regulations that dictated the daily norms of their lives.

Under such an approach to self-government, rather than beginning with an empty box and placing the burden on Aboriginal peoples to fill it on a piece-by-piece basis as dictated by the *Van der Peet* test, one begins by assuming the box is full and that Aboriginal peoples have full jurisdictional authority within the confines of their nations. Removed from the box are any jurisdictional authorities that have been either ceded through treaties or extinguished through clear and plain legislative actions prior to 1982. Barring that, Aboriginal peoples retain full plenary powers within the framework of Canadian federalism.

Under such an approach the burden of proof would shift and the onus would be on the Crown to illustrate that the jurisdictional authority they are claiming has actually been diminished or extinguished in some fashion. This is compatible with the test for infringement of Aboriginal rights as outlined in *Sparrow*. In that case it was determined that once a prima facie infringement is proven by the Aboriginal group claiming the right, the onus shifts to the Crown to justify the infringement of the right. Similarly, once a prima facie case of self-government was shown by an Aboriginal claimant group, the onus could shift to the Crown to demonstrate that the right being claimed has been extinguished either by treaty or legislative enactment.[94]

American Jurisprudence

This view of self-government as a residual right of sovereignty is consistent with jurisprudence in the United States. In his authoritative work on federal Indian law in the United States, Felix Cohen noted, "Perhaps the most basic principles of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express Acts of Congress."[95] Rather, they are powers that are "inherent powers of a limited sovereignty which has never been extinguished."[96] In *Oliphant v. Squamish Indian Tribe*, the United States Supreme Court held that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[97]

Such an approach to self-government begins with the premise that prior to the arrival of Europeans, Aboriginal peoples were fully sovereign independent nations. Through the colonization process the sovereign authority of these nations was necessarily diminished, but they were never extinguished. In *Johnson v. M'Intosh*, the Court concluded that upon discovery, "the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily to a considerable extent impaired … their rights to complete sovereignty, as independent nations, were necessarily diminished."[98]

In *Cherokee Nation v. Georgia*, Marshall C.J. provided a more definitive description on the limitations on tribal sovereignty.[99] While acknowledging that Indians still had unquestioned rights to the lands they occupied until such rights were voluntarily extinguished by cession to the government, the chief justice suggested it was doubtful that these tribes still retained a status of foreign nations. Rather, the chief justice suggested, they may more accurately be classified as "domestic dependent nations."[100]

In another case involving the Cherokee, *Worcester v. Georgia*, missionaries had been arrested and sentenced to four years in prison by the State of Georgia for passing into Indian lands without first having obtained a permit from the state.[101] Marshall C.J. declared the relevant laws to be void as they violated treaties between the United States and the Cherokee Indians assuring the Indians' security. In rendering his decision the chief justice stated, "The Cherokee nation

is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves."[102]

In *United States v. Wheeler*, the Court concluded that "primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the federal government."[103] As a result, it was the conclusion of the Court in *Wheeler* that the powers of Indian tribes are inherent and while they no longer enjoy the full sovereignty of pre-contact periods, they retain all aspects of sovereignty not forfeited by treaty or extinguished by specific legislative enactments.

While American Indian tribes clearly have inherent limitations to their sovereign powers, the extent to which their powers are sovereign is also extensive and includes the power to determine the form of tribal government; the power to determine membership; the power to legislate and make substantive criminal and civil laws with regard to internal matters including taxation, except where limits have been expressly imposed by Congress; the power to legislate; the power to exclude persons from tribal territories and in limited circumstances; and authority over non-Indians on Indian lands.[104]

Canadian Jurisprudence

We have already seen how the notion of inherent self-government was supported in *Campbell*, in which the court found that the Nisga'a people's right to self-government as outlined in the Nisga'a Treaty did not violate the Canadian constitution. Concluding that the powers distributed through Sections 91 and 92 of the *Constitution Act, 1867* were not exhaustive, Williamson J. drew on American jurisprudence and suggested that this gap could be filled by a "diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982."[105] Williamson J. was careful to note that the Nisga'a treaty, as with all Aboriginal and treaty rights, was subject to justifiable infringement and as a result the Nisga'a people do not have "absolute or sovereign powers."[106]

Mitchell v. M.N.R. involved the question of whether a chief of the Mohawk nation had the right to bring goods into Canada from the United States without paying custom duties.[107] The federal government argued, *inter alia*, that such an action would be incompatible with Crown sovereignty. Having determined that the right claimed did not survive based on the evidence, she did, however, state that "any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under s. 35(1) as incompatible with the Crown's sovereign interest in regulating its borders."[108]

Unlike the chief justice, Binnie J. chose to address the issue of sovereign incompatibility directly, concluding that, "the international trading/mobility right

claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historic attributes of Canadian sovereignty."[109] If we see this decision in light of the residual sovereignty approach being suggested here, it seems clear that international trade would be one of bundles that would need to be removed from the previously full box when examining the Aboriginal right of self-government.[110] Despite this, Binnie noted that the principle of sovereign incompatibility had not stopped the United States from continuing to recognize forms of internal self-government that it considers expressions of the residual sovereignty held by American Indian nations.[111]

It is possible that this concurring opinion by Binnie J. may establish the framework for future decisions with regard to the sovereign nature of Aboriginal self-government, though it is not without its critics. Professor Gordon Christie has suggested that Binnie J.'s concurring judgment "stands as an illustration of so much of what is wrong in contemporary jurisprudence on Aboriginal rights."[112]

Generic versus Specific Rights—The Slattery Approach

The approach to self-government outlined above would also be consistent with the approach to Aboriginal rights suggested by Brian Slattery and referred to earlier in this work.[113] Professor Slattery divides Aboriginal rights into two groups. Generic rights are rights of a general nature and held by all Aboriginal groups that satisfy a certain criteria. The contours of the rights are determined by general principles of law. Specific rights, on the other hand, are distinct to Aboriginal groups and are based on the historic practices, customs, and traditions of the group in question. Specific rights fall into three categories: (1) site-specific rights attached to tracts of land, but do not equate to Aboriginal title such as historic hunting rights; (2) floating rights, which are land based but not attached to particular tracts of land such as the gathering of plants that may be of a restricted nature (Professor Slattery uses an example of plants that may be restricted by such things as the *Food and Drug Act*); and (3) cultural rights, which are grounded in historic practices but do not necessarily involve use of lands such as a right to traditional dancing.

Specific rights are determined based on a set of factors unique to the Aboriginal group claiming the right and they may be determined by use of the *Van der Peet* test. These rights consist of specific practices, customs, and traditions that are unique to the group claiming the right and can be proven as such. In *Van der Peet*, the Supreme Court concluded that Aboriginal rights could not be determined on a general basis. Rather, Lamer C.J. stated that the existence of an Aboriginal rights "will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right."[114]

However, in *Delgamuukw* the Court demonstrated a willingness to move away from this test, at least as it related to Aboriginal title. The appellant Gitksan and Wet'suwet'en Chiefs argued that Aboriginal title was tantamount to an inalienable fee simple and conferred upon the Aboriginal peoples the right to use the lands as they so choose. They further argued that this right was constitutionally protected

in Section 35. The Crown, on the other hand, argued that Aboriginal title represents nothing more than a bundle of rights to engage in activities that were, themselves, Aboriginal rights recognized and affirmed by Section 35. It was the rights themselves, and not the bundle that received constitutional protection according to this argument. A second option offered by the Crown was that Aboriginal title at best conferred upon the recipient a right to occupy and use the lands to engage in activities that were themselves Aboriginal rights.[115]

Seeking a middle ground, the Court concluded that Aboriginal title fell somewhere in between. While not the equivalent to fee simple, Aboriginal title, they concluded, was more than a bundle of rights or the right to engage in activities that were themselves Aboriginal rights. First, the Court concluded, Aboriginal title did encompass the right to exclusive use and occupation of the lands claimed under Aboriginal title. Second, the lands could be used for a variety of purposes, "which need not be aspects of those aboriginal practices, customs and traditions which are integral to the distinctive aboriginal culture." The restriction placed on this use of lands was that they could not be used in a manner that was irreconcilable with the nature of the group's attachment to the lands.[116]

Professor Slattery argues that this shift on the part of the Court represents the recognition of two different types of Aboriginal rights, specific and generic, and the recognition of Aboriginal title as a generic right. In examining the Supreme Court decision of *Delgamuukw*, Professor Slattery has stated:

> The crucial point to note here is that the Supreme Court treats aboriginal title as a uniform right, whose basic dimensions do not vary from group to group according to their traditional ways of life. All groups holding aboriginal title have fundamentally the same kind of right, subject only to minor variations stemming from the inherent limit. In effect the Supreme Court recognizes that aboriginal title is not a *specific right* of the kind envisioned in *Van der Peet*, or even a bundle of specific rights. Aboriginal title is what we may call a *generic right*—a right of a standardized character that is basically identical in all aboriginal groups where it occurs.[117]

Professor Slattery argues convincingly that once established, a generic right is determined by the principles laid down in Canadian common law and that the contours of the right do not vary from group to group.[118] As such, self-government, once established as a generic right, would include whatever specific governing powers (or Aboriginal rights) had not previously been either ceded through treaties or extinguished through clear and plain legislation.

Conclusion

While it is unquestionably more practical for Aboriginal and non-Aboriginal parties to seek resolution to questions of rights such as self-government through negotiated settlements, without the legitimacy provided by supporting decisions from the Court the parties are placed in a position of imbalance. As Professor Shin Imai has noted, "One function of the courts is to establish the broad legal parameters within which agreements can be made."[119] If one or other of the parties is able to play hardball at the negotiation table secure in the knowledge that the other is either not likely to seek judicial remedy or, alternatively, not likely to receive a practical judicial remedy, then the bargaining environment becomes more adversarial and less likely to culminate in agreements. The Supreme Court decision in *Pamajewon* exemplifies this principle. Aboriginal negotiators are not likely to risk litigation if they are going to be forced to prove each aspect of self-government on a piecemeal basis.

However, a second line of decisions associating the right of self-government to regulation may have rebalanced the playing field. Claiming a right to govern as a practical incident of the right to make communal decisions places Aboriginal governments in a much stronger bargaining position when it comes to negotiating agreements with provincial and federal governments. Finally, a deeper examination of the residual sovereignty argument might provide an even stronger bargaining position for Aboriginal peoples. An ability to come to the bargaining table with the knowledge that sovereign powers lie with rather than against Aboriginal negotiators places them in strong position for negotiating.

The right of self-government is essential if Aboriginal communities are to address important developmental issues such as poverty, unemployment, lack of community infrastructure, and a widening socio-economic gap between Aboriginal and non-Aboriginal Canadians. Professor Cornell and the people at the Harvard Project on American Indian Economic Development have clearly demonstrated the positive link between self-government and community success in the United States, and there is no reason why such success cannot be duplicated in Canada.

Endnotes

1 *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act, 1982* (U.K.), 1982 c. 11. Section 35(1) states, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." While the Supreme Court has yet to recognize an inherent right of self-government, this has been the position taken by academic commentators for close to twenty years. It was also the conclusion of the *Royal Commission on Aboriginal Peoples* in 1996 and the position held by the Government of Canada since at least 1995. See *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Minister of Supply and Services, 1996) Vol. 2, *Restructuring the Relationship*, Pt. 1, Ch. 3. See also *The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Indian and Northern Development, 1995).

2 Section 37 of the *Constitution Act, 1982* required that a constitutional conference composed of the prime minister and the first ministers of the provinces be convened within one year of the proclamation of the new constitution and included guaranteed representation by Aboriginal leaders at this meeting. See *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters* (Ottawa: March 15–16, 1983) online at Canadian Intergovernmental Conference Secretariat, <www.scics.gc.ca/pubs/fmp_e.pdf> (last visited December 1, 2008) at 76–77. At this conference it was decided that three more First Ministers Conferences should be held and was reflected by the addition of s. 35.1 to the *Constitution Act, 1982*. These conferences focused on the inherent right of self-government as a constitutionally protected Aboriginal right under s. 35(1) but no agreement was achieved. See *Federal Ministers on Aboriginal Constitutional Matters* (Ottawa: March 8–9, 1984) online at Canadian Intergovernmental Conference Secretariat, <www.scics.gc.ca/pubs/fmp_e.pdf> (last visited December 1, 2008) 78–79.

3 *R. v. Sparrow*, [1990] 1 S.C.R. 1075, para. 53, 70 D.L.R. (4th) 385, [1990] S.C.J. 49 [*Sparrow*].

4 *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010, para. 186, 153 D.L.R. (4th) 193, [1997] S.C.J. 108 [*Delgamuukw*].

5 Russel Barsh, "Aboriginal Peoples and the Right to Self-Determination in International Law." In *International Law and Aboriginal Human Rights,* ed. Barbara Hocking (Agincourt: Carswell Company Ltd., 1988) 68 at 69.

6 See James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) 97–112. More recently, in September 2007, the United Nations General Assembly adopted these characteristics in its *Declaration on the Rights of Indigenous Peoples,* GA Res. 61/295, U.N. Doc. A/Res/61/295 (September 13, 2007).

7 This has been a foundational principle of the Harvard Project on American Indian Economic Development, whose research over the past twenty years has concluded that there is an underlying link between self-government and economic prosperity among American Indian nations. For an examination of their impressive library of research online, go to <http://www.ksg.harvard.edu/hapied> (last visited November 1, 2008). See also the Harvard Project on American Indian Economic Development, *The State of Native Nations: Conditions under U.S. Policies of Self-Determination* (New York: Oxford University Press, 2008), especially 72–77.

8 Stephen Cornell and Joseph Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *A.I.C.J. R.* 22 (1998): 187 at 209.

9 For example, the *First Nations Land Management Act*, S.C. 1999 c. 24 allows for the transfer of lands and resources to a First Nation that is able to develop and manage the lands according to a land code created. This land code would affect both the lands themselves and individuals operating on those lands, in some cases non-Aboriginal individuals.

10 As Professors Peter Hogg and Mary Ellen Turpel have noted, "Personal jurisdiction will mean that Aboriginal citizens will take the law with them when they leave the Aboriginal territories. See Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues," *Can. Bar Rev.* 74 (1995): 187 at 199. The Tsawwassen First Nation Final Agreement, for example, provides that the Tsawwassen First Nation may enact laws with respect to the adoption of Tsawwassen Children in British Columbia. See Tsawwassen First Nation Final Agreement (Victoria: Minister of Aboriginal Relations and Reconciliation, 2006) Ch. 16, clause 55, online at <http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/

tfn_fa.pdf> (last visited November 1, 2008).

11 For example, the Kluane First Nation Self-Government Agreement provides that the Kluane First Nation will have exclusive authority to enact laws in relation to the administration of Kluane First Nation affairs and the internal management of the Kluane First Nation as well as the management and administration of rights or benefits realized pursuant to the Kluane First Nation Self-Government Agreement. See Kluane First Nation Self-Government Agreement, Section 13.1, online at <http://dsp-psd.pwgsc.gc.ca/Collection/R2-290-2003E.pdf> (last visited October 10, 2008).

12 *Constitution Act, 1867, supra* note 3. Similarly Section 94A provides that the Parliament of Canada may make laws in relation to old age pensions and supplementary benefits including survivors' and disability benefits so long as no such law "shall affect the operation of any law present or future of a provincial legislature in relation to any such matter. Similarly more recent land claim and self-government agreements such as the Nisga'a Final Agreement and the Tsawwassen First Nation Final Agreement provide that all powers are concurrent between the First Nation, Government of Canada, and the Government of British Columbia. The agreement determines which level of government has paramountcy over the others. See Nisga'a Final Agreement, initialled August 4, 1998.

13 In *Sparrow, supra* note 5, the Supreme Court assumed that the legislative authority of the Crown was taken for granted. Dickson C.J. and La Forest J. stated, "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." This was resolved in 1982 when the constitution was patriated to Canada and the British Parliament no longer held such legislative authority over Canada.

14 *Indian Act*, R.S.C. 1985, c. I-5. The *Indian Act* has served as the principle vehicle through which the Crown established its colonial regime, replacing traditional forms of governance with those managed and directed by the Canadian state.

15 See Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*," *Alta. L. Rev.* 29 (1991): 498 at 501.

16 See Lisa Chartrand, "Accommodating Aboriginal Legal Traditions," a paper prepared for the Aboriginal Bar Association of Canada, online at <http://www.Aboriginalbar.ca/pdf/Indigneous%20Legal%20Traditions.pdf> (last visited November 1, 2008) 7.

17 See Harold Cardinal and Walter Hildebrant, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), online at <http://site.ebrary.com/lib/ubc/Doc?id=10134881> (last visited October 28, 2008) 11.

18 Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights," in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, eds. Menno Boldt, J. Anthony Long, and Leroy Little Bear (Toronto: University of Toronto Press, 1985) 19–20.

19 See *Report of the Royal Commission on Aboriginal Peoples, supra* note 11, Vol. 2, *Restructuring the Relationship* Pt. 1. at 109 citing a submission from the Chiefs of Ontario.

20 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 30, 137 D.L.R. (4th) 289, 1996 S.C.J. 77 [*Van der Peet*]. As John Borrows among others has noted, the fact that Aboriginal peoples were organized in societies prior to the arrival of Europeans implies that Aboriginal governance was an important element of pre-contact societies. See John Borrows, "Tracking Trajectories: Aboriginal Governance As An Aboriginal Right," *U.B.C. L. Rev.* 38 (2005): 285 at 292. A variation of this claim is one based on prior sovereignty. Aboriginals should be entitled to exercise jurisdiction over their lands and peoples based on the fact that when Europeans arrived the Aboriginal peoples were self-governing entities and such sovereignty should be recognized in the form of self-government. See Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government," in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services, 1995).

21 This is a question recently suggested by Professor Kent McNeil. See Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments," a research paper for the National Centre for First Nations Governance (October 11, 2007), online at <http://www.fngovernance.org/research/kent_mcneil.pdf> (last visited November 1, 2008).

22 In essence, the social contract called for "each to put his person and all his power in common under the supreme direction of the general will." See Jean Jacques Rousseau, *The Social Contract*

or Principles of Political Right, translated by Henry J. Tozer (London: Allen & Unwin, 1948) Bk. 1, Ch. 6.

23 Leroy Little Bear, "Aboriginal Rights and the Canadian Grundnorm." In *Arduous Journey: Canadian Indians and De-Colonization*, ed. Rick Ponting (Toronto: McClelland & Stewart, 1986) 243 at 246.

24 McNeil, *The Jurisdiction of Inherent Right Aboriginal Governments, supra* note 16 at 10.

25 Georges Erasmus and Joe Sanders, "Canadian History: An Aboriginal Perspective," in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, eds. Diane Engelstad and John Bird (Concord: Anansi Press Ltd., 2002) 3.

26 *Fisheries Act*, R.S.C. 1985, c. F-14. Ronald Sparrow was charged on May 25, 1984, for fishing with a drift net that was 45 fathoms in length. The band's licence called for nets to be limited to 25 fathoms in length.

27 *Sparrow, supra* note 5, para. 23.

28 *Sparrow*, ibid., para. 36. The Court adopted the language of Hall J. from *Calder v. British Columbia*, [1973] S.C.R. 313, 404, 13 D.L.R. (3d) 64, [1973] S.C.J. 56 [*Calder*] noting that, "the onus of proving the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be clear and plain" (para. 37).

29 See paras. 61 and 62. Charter of Rights and Freedoms Part I of the *Constitution Act, 1982* enacted as Schedule B to the *Canada Act, 1982*, U.K. 1982, c. 11. The Charter makes up Part I only and consists of Articles 1–34. Article 1 provides a limit on rights protected under the Charter by stating, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See, *R. v. Oakes,* [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, [1986], S.C.J. 7 [*R. v. Oakes*]. In that case the Court articulated a test for determining when constitutionally protected Charter rights might be infringed. As it is not a part of the Charter, counsel for Sparrow argued that Aboriginal rights protected by s. 35(1) should be more securely protected than Charter rights (para. 61). Professor Kent McNeil in particular has been critical of this approach stating, "Since when can constitutional rights be overridden for the economic benefits of private persons who do not have equivalent rights? Isn't this turning the constitution on its head by allowing interests that are not constitutional to trump rights that are?" See Kent McNeil, *Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Gotten it Right?* (Toronto: Robarts Centre for Canadian Studies, 1998) 19.

30 *Sparrow, supra* note 5, para. 47.

31 *Sparrow*, ibid. As will be discussed later in this work, such an argument rests on the premise that the Musqueam nation had a right to govern itself, at least as it related to the regulation of fishing. This argument had been specifically rejected by the British Columbia Court of Appeal, which stated, "It cannot be defined as if the Musqueam band had continued to be a self-governing entity, or as if its members were not citizens of Canada or residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all its complexities and competing interests." The "existing right" in 1982 was one that had long been subject to regulation by the federal government. It must continue to be so because only one government can regulate with due regard to the interests of all. See *R. v. Sparrow* (1986), 36 D.L.R. (4th) 246, para. 74, [1987] 2 W.W.R. 577, [1986] B.C.J. 1662 (B.C.C.A.).

32 *Sparrow*, ibid., para. 40.

33 *Sparrow*, ibid., para. 27.

34 *Sparrow*, ibid., para. 53.

35 *Sparrow*, ibid., para. 51. The Court noted that this shift in 1973 constituted only an expression of policy and not the acceptance of any legal obligation on the part of the Crown (para. 52).

36 *Sparrow*, ibid., para. 56. See also, *Reference Re: Manitoba Language Rights,* [1985] 1 S.C.R. 721, para. 48, 19 D.L.R. (4th) 1, [1985] S.C.J. 36 [*Reference Re: Manitoba Language Rights*]; Also *R. v. Nowegijick,* [1983] 1 S.C.R. 29, p. 36, 144 D.L.R. (3d) 193, [1983] S.C.J. 5 (*Nowegijick*]

37 *British Columbia Fishery* (General) *Regulations,* SOR/84-248. Section 27(5) stated, "No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish

licence."

38 *Van der Peet, supra* note 22, para. 3.

39 *Van der Peet*, ibid., para. 20.

40 *Van der Peet*, ibid., para. 28. As the chief justice noted, as common law rights Aboriginal rights did not enjoy constitutional status and therefore were subject to regulation or extinguishment by the Crown at their pleasure. Thus the difference between Aboriginal rights recognized and affirmed by s. 35(1) was that while they were still subject to regulation in accordance with the justification test developed in *Sparrow,* they were no longer subject to extinguishment by the Crown.

41 *Van der Peet*, ibid., para. 30.

42 *Van der Peet*, ibid., para. 31.

43 *Van der Peet*, ibid., para. 46.

44 *Van der Peet*, ibid., para. 53. In the case before the Court this would consist of the Court considering the actions leading to the appellant being charged, the fishery regulation and the practices, customs and traditions the appellant used to support the claim. Using these factors Lamer C.J. characterized the claim of the appellant as an Aboriginal right to exchange fish for money or other goods (para. 77). In doing this, the Court rejected the appellant's assertion that the Aboriginal right claimed was one allowing "sufficient fish to provide a moderate livelihood" (para. 79). The Court rejected this claim determining as they had that the right claimed was merely one of exchanging fish for money or other goods thus rejecting any notion of a commercial fishery as an Aboriginal right.

45 *Van der Peet*, ibid., para. 55.

46 *Van der Peet*, ibid., para. 56.

47 *Van der Peet*, ibid., para. 44.

48 *Van der Peet*, ibid., para. 20.

49 Particularly in British Columbia, as this paper will explore later, I am not sure that this is necessarily the case.

50 W. I. C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" *Queen's L. J.* 15 (1990): 217.

51 Binnie, ibid., 218.

52 Asch and Macklem, *supra* note 17, 500–501.

53 *Van der Peet, supra* note 22, para. 49.

54 Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" *S.C. L. Rev.* 37(2007): 177 at 191.

55 For a discussion on this, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *Am. Indian L. Rev.* 22 (1998): 37 at 46.

56 For a detailed history of Canada's Aboriginal peoples, see generally Olive Dickson, *Canada's First Nations: A History of the Founding Peoples From Earliest Times* (Toronto: McClelland Stewart, 1992); also Margaret Conrad et al., *The History of the Canadian Peoples: Beginnings to 1867*,Vol. 1 (Toronto: Copp, Clark, Pitman Ltd., 1993).

57 Kent McNeil, "The Inherent Right of Self-Government: Emerging Directions for Legal Research," a report for the First Nations Governance Centre, online at <http://www.gngovernance.ord/pdf/KentMcNielInherent0105.pdf> (last visited September 25, 2008).

58 *Van der Peet, supra* note 22 paras. 164–169.

59 *Van der Peet*, ibid., para. 238–240. More recently in *R. v. Sappier; R. v. Gray,* [2006] 2 S.C.R. 686, 274 D.L.R. (4th) 75, [2006] S.C.J. 54 [*Sappier and Gray*] while affirming the *Van der Peet* approach to Section 35(1), including a re-affirmation of the underlying goals of reconciliation, the Court demonstrated a willingness to be flexible in its interpretation of Aboriginal rights, noting that if Aboriginal rights were not permitted to evolve and take modern forms they would become useless and the "notion of aboriginality would be reduced to a small number of outdated stereotypes" (para. 49). Citing the dissenting opinions of McLachlin J. and L'Heureux-Dubé in *Van der Peet,* Bastarache J. noted that "Culture, let alone distinctive culture, has proven a difficult

concept to grasp for Canadian courts" (para. 44).

60 Borrows, *supra* note 57 at 57.

61 Russel Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand," *McGill L. J.* 42 (1997): 993 at 999.

62 Bradford Morse, "Permafrost Rights: Aboriginal Rights: Self-Government and the Supreme Court in *R. v. Pamajewon*," *McGill L. J.* 42 (1997): 1011 at 1034.

63 *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204, [1996], S.C.J. 20 [*Pamajewon*].

64 *R. v. Pamajewon*, [1994], 120 D.L.R. (4th) 475, paras. 53-56, [1995] 2 C.N.L.R. 188, [1996] O.J. 3028.

65 *Pamajewon, supra* note 65, paras. 23–24.

66 *Pamajewon*, ibid., para. 26.

67 *Pamajewon*, ibid., para. 27.

68 Catherine Bell, "New Directions in the Law of Aboriginal Rights," *Can. Bar Rev.* 77 (1998): 36 at 55.

69 See Brian Slattery, "Making Sense of Aboriginal and Treaty Rights," *Can. Bar Rev.* 79 (2000): 196 at 211–213.

70 Bradford Morse, for example, noted that those that supported self-government were fortunate with the outcome of the case, as it could have been much worse. The Court rejected the claim in the case at bar, but not the notion of an inherent right of self-government. See Morse, *supra* note 64 at 1040.

71 Kent McNeil, ''Judicial Approaches To Self-Government since *Calder:* Searching for Doctrinal Coherence," in *Let Right Be Done: Aboriginal Title, The Calder Case, and the Future of Aboriginal Rights*, eds. Hamar Foster, Heather Raven, and Jeremy Webber (Vancouver: U.B.C. Press, 2007). Tim Raybould, chief negotiator for the Westbank First Nation has commented on this, suggesting that negotiations have not been negotiations for some time, and the notion of working together to develop a new relationship seems to have been forgotten. As he succinctly noted, "Treaty negotiations have not been 'negotiations' for many years. Governments come to the table with poorly thought out take-it-or-leave-it positions that serve neither the province nor Canada well, nor indeed, First Nations." See Tim Raybould, "Just Who Needs Treaties?" *Globe and Mail*, April 4, 2007. The British Columbia Treaty Process also demonstrates evidence of this. Established in 1995 on the basis of the report of the *British Columbia Claims Task Force,* the process has resulted in the signing of only one treaty despite having spent more than one billion dollars. See Canada, *Report of the Auditor General*, November 2006, Ch. 7, online at <http://www.oag-bvg.gc.ca/internet/docs/20061107ce.pdf> (last visited September 7, 2008) [*Report of the Auditor General*], 11. See also *Report of the Auditor General British Columbia #3*, online at <http://www.fns.bc.ca/pdf/BCAGTreatyNeg.Report3.pdf> (last visited on September 7, 2008) [*Report of Office of Auditor General, British Columbia*], 7. On June 26, 2008, the Tsawwassen First Nation was the first to have their land claim and self-government agreement completed as part of the British Columbia Treaty Process with the passing of the *Tsawwassen First Nation Final Agreement Act*, S.C. 2008, c. 32 [*Tsawwassen Final Agreement Act*]. A second treaty with the Maa-nulth First Nation has been ratified and is awaiting Royal Assent from the Government of Canada. A third agreement with the Nisga'a First Nation ratified in 2000 was negotiated outside of the treaty process. See Nisga'a Final Agreement, initialled August 4, 1998 [*Nisga'a Final Agreement*].

72 See *Attorney General for Canada v. Attorney General for Ontario [Fisheries Case]*, [1898] A.C. 700, para. 11, [1885-89] All E.R. 1251, [1898] J.C.J. 1. In that case Lord Herschell stated, "Their Lordships have already noticed a distinction which must be borne in mind between rights of property and legislative jurisdiction."

73 With the entrenchment of Aboriginal rights in the constitution in 1982, Aboriginal peoples argued that Section 35 recognized and protected a "full box" of Aboriginal rights, including rights that had not yet been recognized by law. On the contrary, the Government of Canada argued that the box was empty, and unless specific rights had been recognized in 1982 when Section 35 was enacted, they did not exist and could not be introduced. This was recognized as the "empty box" or frozen rights approach to Aboriginal rights. This approach was specifically rejected in

Sparrow, supra note 5, para. 27, in which Dickson C.J. and La Forest J. stated, "An approach to the constitutional guarantee embodied in Section 35(1) which would incorporate 'frozen rights' must be rejected." For commentary on this, see Dan Russel, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: U.B.C. Press, 2000) 149; also, Ardith Walkem and Halie Bruce eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003).

74 *Sparrow*, ibid., para. 29.

75 *Sparrow*, ibid., para. 82.

76 *Delgamuukw, supra* note 6.

77 *Delgamuukw*, ibid., para. 170.

78 *Delgamuukw*, ibid., para. 170. For a particularly scathing criticism of this approach, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," (1999) 37 Osgoode Hall L. J. 537 at 575. Professor Borrows states, "The contrast in the Court's treatment of Crown and Aboriginal sovereignty could not be more striking. The Court is willing to frame Crown rights to self-government in the most "excessive and general" of terms; simple utterances were enough to grant the Crown the widest possible range of entitlements to others' ancient rights. On the other hand, detailed evidence concerning Gitksan and Wet'suwet'en sovereignty over specific people and territory (Houses, clans, chiefs, Feasts, crests, poles, laws and so forth) was too broad "to lay down the legal principles to guide future litigation."

79 MacFarlane J.A. stated, "In 1871 two levels of government were established in British Columbia. The division of governmental powers between Canada and the Provinces left no room for a third order of government." *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 C.N.L.R. 1, [1993] B.C.J. 1395 (B.C.C.A.). It seems interesting that despite this clear-cut rejection of the issue of self-government by the lower courts the Supreme Court chose not to deal with the issue. It seems to make sense that if no such right existed the logical thing would have been to simply acknowledge agreement with the lower court's ruling.

80 *Delgamuukw, supra,* note 6, para. 115.

81 *Delgamuukw*, ibid., para. 166. Kent McNeil has noted that while this limitation on Aboriginal title may prevent the lands from being used for certain activities such as strip-mining or clear-cutting, this would not necessarily mean that an Aboriginal community could not engage in either mining or forestry activities so long as they were respectful of their stewardship role. See Kent McNeil, "Aboriginal Rights in Canada: From Title To Land To Territorial Sovereignty," *Tulsa J. Comp. & Int'l L.* 5 (1998): 253 at 271.

82 McNeil, ibid., at 286.

83 *R v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513, [1999] S.C.J. 55. [*Marshall*]. The accused in this case, Donald Marshall, had been wrongfully convicted of murder in 1971 and spent eleven years in prison prior to his exoneration.

84 *R. v. Marshall*, [1999] 3 S.C.R. 533, paras. 17 and 43, 179 D.L.R. (4th) 193[1999] S.C.J. 66. [*Marshall 2*].

85 *Campbell v. British Columbia*, [2000] 189 D.L.R. (4th) 333, [2000] 4 C.N.L.R. 1, [2000] B.C.J. 1524. [*Campbell*].

86 *Campbell*, ibid., para. 81.

87 *Campbell*, ibid., para. 180.

88 *Campbell*, ibid., para. 137.

89 *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33, [2004] S.C.J. 70 [*Haida*].

90 *Haida*, ibid., para. 56.

91 *Delgamuukw, supra* note 6, para. 122.

92 Section 23 of the Charter grants minority language education rights to parents so their children may be educated in that family's first language. In *Mahe v. Alberta,* [1990] 1 S.C.R. 342, para. 51, 68 D.L.R. (4th) 69, [1990] S.C.J. 19 the Court concluded "The purpose [of s. 23 of the *Charter*] is to preserve and promote minority language and culture throughout Canada. In my view, it is

essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the education facilities in which their children are taught."

93 *Haida, supra* note 91, para. 20.

94 See, *Sparrow, supra* note 5, paras. 67–82.

95 Felix Cohen, *Handbook of Federal Indian Law* (Charlottesville: Michie Bobbs-Merrill Publishing, 1982) at 231.

96 See, *United States v. Wheeler,* 435 U.S. 313 (1978) at 322–23; Also, *Ex Parte Crow Dog,* 109 U.S. 556 (1883).

97 *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978).

98 *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 574 (1823) [*Johnson v. M'Intosh*].

99 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1(1831) [*Cherokee Nation v. Georgia*].

100 *Cherokee Nation v. Georgia*, ibid., 17.

101 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester v. Georgia*].

102 *Worcester v Georgia*, ibid., 561.

103 *United States v. Wheeler, supra* note 98.

104 See Cohen, *Handbook of Federal Indian Law, supra* note 97, 246–57.

105 *Campbell, supra* note 87, para. 180.

106 *Campbell*, ibid., para. 183.

107 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, [2001] S.C.J. 33 [*Mitchell*].

108 *Mitchell*, ibid., para. 61.

109 *Mitchell*, ibid., para. 163.

110 Binnie J. also cited military capacity as a right that could not be supported by Section 35(1) and thus, this would be one more bundle that would be removed from the residual package. See, *Mitchell*, ibid., para. 153.

111 *Mitchell*, ibid., para. 165.

112 Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum," *Sup. Ct. L. Rev.* 16 (2002): 285 at 285. But also see Doug Moodie, "Thinking Outside the 20th Century Box: Revisiting Mitchell—Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government," *Ott. L. Rev.* 35 (2004): 1.

113 See Brian Slattery, *supra* note 71.

114 *Van der Peet, supra* note 22, para. 69.

115 *Delgamuukw, supra* note 6, para. 111.

116 *Delgamuukw*, ibid., para. 117.

117 Brian Slattery, "What Are Aboriginal Rights" (Feb. 2007) CLPE Research Paper No. 1/2007, available online at <http://ssrn.com/abstract=967493> (last visited, December 10, 2008).

118 Slattery, ibid., p. 21.

119 Shin Imai, "Sound Science, Careful Policy Analysis and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Land and Resource Disputes," *Osgoode Hall L. J.* 41 (2003): 587