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Aboriginal Rights in Canada in 1996: An Overview of the Decision of the Supreme Court of Canada

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Aboriginal Rights in Canada in 1996: An Overview of the Decisions of the Supreme Court OF Canada

By Kent McNeil

Measured by judicial decisions, 1996 was by far the most significant year for Aboriginal rights in Canada since 1990, when the Supreme Court of Canada, in *R v Sparrow*,[1] first examined the effect of recognition and affirmation of Aboriginal and treaty rights in section 35(1) of the *Constitution Act 1982*.[2] The *Sparrow* decision acknowledged that section 35(1) provides unextinguished Aboriginal rights with constitutional protection against legislative infringement, unless the infringement can be justified by a strict test, outlined below, which the Supreme Court created. However, that decision did not address the vital question of how Aboriginal rights are to be identified and defined. In 1996, the Court was confronted with that question, and answered it in a way that has very serious consequences for Aboriginal rights.

The Supreme Court actually handed down nine decisions in 1996 involving Aboriginal and treaty rights.[3] All but two of these involved Aboriginal fishing rights and the circumstances in which those rights can be limited by Federal legislation.[4] The most important of these decisions is *R v Van der Peet*,[5] where Lamer CJ, in his majority judgment, laid down this test for determining the existence of an Aboriginal right:

`[I]n order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right'.[6]

Moreover, in order for an activity to qualify as an Aboriginal right, the practice, custom or tradition it relates to must have continuity with a practice, custom or tradition that existed prior to contact with Europeans.[7]

Lamer CJ explained that this requirement of continuity with pre-contact Aboriginal societies has to be flexible enough to prevent `the rights from being frozen in pre-contact times'.[8] However, as L'Heureux-Dubé J pointed out in her dissent, the Chief Justice's approach does in fact freeze Aboriginal rights in the past by implying that `Aboriginal culture was crystallized in some sort of "Aboriginal time" prior to the arrival of Europeans'.[9] While the flexibility Lamer CJ endorsed does allow for evolution of pre-contact activities into modern forms, it does not permit activities which arose as a result of European influences to be protected as Aboriginal rights. His approach therefore entails a static conception of culture, and the misguided and somewhat absurd task of trying to separate the present-day activities of Aboriginal peoples into what he regards as Aboriginal and non-Aboriginal elements on the basis of historical considerations.

Lamer CJ's approach to identification and definition of Aboriginal rights contains another aspect which will limit those rights ever further. In *Van der Peet*, he said that their scope and content must be determined on a specific rather than a general basis. The degree of specificity involved here can be seen *R v Gladstone*,[1][0] one of the other fishing cases the Supreme Court decided last year. In *Gladstone*, the Aboriginal right involved was not a general right to fish, or even a narrower right to fish for some species, but a very particularised right to take herring spawn on kelp for commercial purposes. This narrow approach to Aboriginal rights was rejected by both L'Heureux-Dubé and McLachlin JJ in their dissenting opinions in *Van der Peet*. McLachlin J put it this way:

`[I]f we ask whether there is an Aboriginal *right* to a particular kind of trade in fish, ie, large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an Aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer might be quite different ... I share the concern of L'Heureux-Dubé J that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no Aboriginal right where a different analysis might find one'.[1][1]

The effect of Lamer CJ's particularised approach can be seen in *R v Pamajewon*,[1][2] the only Supreme Court decision in 1996 involving an Aboriginal right of self-government.[1][3] The appellants in that case claimed that their First Nations had a general right of self-government which encompassed the establishment and regulation of high-stakes gambling operations on their reserves. In his judgment, which was concurred in by seven other members of the Court, Lamer CJ assumed (without deciding) that the First Nations in question had an Aboriginal right of self-government which was recognised and affirmed by section 35(1) of the *Constitution Act 1982*. He nonetheless dismissed the appellants' claim because they had failed to meet the *Van der Peet* test by showing that the specific activity of gambling and the regulation of gambling were integral to the distinctive cultures of their peoples prior to contact with Europeans. In so doing, Lamer CJ expressly rejected their claim to a broad general right to govern activities, including gambling, on their reserves. To accept that claim, he said, would `cast the Court's inquiry at an excessive level of generality',[1][4] contrary to the *Van der Peet* approach. The consequences of this decision for the Aboriginal right of self-government are devastating, as the content of that right will have to be established item-by-item by each Aboriginal group proving the existence and regulation prior to European contact of each specific activity over which a right is claimed. Any possibility of claiming broadly-based Aboriginal jurisdiction over a range of activities in a modern-day context appears to be foreclosed by the application in *Pamajewon* of the particularised approach to Aboriginal rights taken in *Van der Peet.*

In addition to limiting Aboriginal rights by the application of this narrow, historically-rooted test, the Supreme Court made it easier last year for rights that do meet the test to be over-ridden by legislation. The *Sparrow* decision had created a test for justification of federal legislative infringements of Aboriginal rights, by placing the burden on the Crown of proving that the government had a valid legislative objective, and that it had respected the fiduciary duty that the Crown owes to Aboriginal peoples. According to *Sparrow*, the constitutional protection accorded to Aboriginal rights by section 35(1) of the *Constitution Act 1982* obliges the government to give those rights priority over rights of non-Aboriginal Canadians which are not constitutionally protected. However, in his majority judgment in *Gladstone*, Lamer CJ retreated from this

position and decided that, in the context of an Aboriginal right to fish commercially, that right could be limited by taking into account such objectives as `the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups'.[1][5] As McLachlin J pointed out in her dissenting judgment in *Van der Peet*, Lamer CJ's approach to justification is `indeterminate and ultimately more political than legal', and involves an unconstitutional `judicially authorized transfer of the Aboriginal right to non-Aboriginals without the consent of the Aboriginal people, without treaty, and without compensation'.[1][6]

So on the issues of identification and definition of Aboriginal rights, and justification of infringements of those rights, the Supreme Court has adopted a restrictive approach which in my view violates the spirit of *Sparrow*.[1][7] There are, however, some positive elements in the Court's Aboriginal rights decisions last year. In *Gladstone*, the Court did accept an Aboriginal right (albeit narrow) to fish commercially. In *R v Nikal*,[1][8] another British Columbia case, the Court exempted the appellant from a requirement to obtain a fishing licence because the conditions of the licence infringed his Aboriginal right to fish, and the infringement had not been shown to be justified.[1][9] In *R v Adams*[2][0] and *R v Coté*,[2][1] both involving Aboriginal fishing rights in Quebec, the Court finally put to rest the old argument that no Aboriginal rights exist in the areas of Canada originally colonised by France. In *R v Badger*,[2][2] a case from Alberta which has significance for Manitoba and Saskatchewan as well, the Court decided that the Natural Resources Transfer Agreement (1930) did not extinguish and replace treaty rights to hunt;[2][3] but consistently with the restrictive trend outlined above, the Court made it possible for provincial legislatures to infringe constitutionally-protected hunting rights by application of the *Sparrow* test for justification.[2][4]

A major issue left open by last year's decisions is the nature of Aboriginal title. In *Van der Peet*, Lamer CJ stated that `Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land'.[2][5] In *Adams* and *Coté*, the Court held that specific Aboriginal rights such as a right to fish can exist independently of Aboriginal title. However, as none of the cases the Court decided last year involved a claim to Aboriginal title, the extent to which the *Van der Peet* test will be applied to such a claim remains uncertain. My view on this issue is that the particularised approach to Aboriginal rights taken in *Van der Peet* is inappropriate where a claim to Aboriginal title is concerned. Where, for example, an Aboriginal people is able to establish that they were in exclusive possession of lands at the time of European colonisation, then, as Brennan J (as he then was) said in *Mabo v Queensland [No. 2]*,[2][6] the ownership of those lands must be vested in that people. Ownership in this context means that the people, as the High Court held to be the case for the Meriam people of the Murray Islands, are `entitled as against the whole world to possession, occupation, use and enjoyment of the lands'.[2][7] In *Mabo [No. 2]*, that entitlement to exclusive use and enjoyment was not limited to activities that were integral to the distinctive culture of the Meriam people prior to contact with Europeans. [2][8] To apply the *Van der Peet* test to Aboriginal title would reduce that title to a collection of particular Aboriginal rights, each of which would have to be established independently. That would render Aboriginal title meaningless as a distinct concept, and run counter to the common law principle that title to land flowing from possession automatically entails a bundle of rights without the necessity of proof of an independent basis for each of those rights.[2][9]

This important issue of the nature of Aboriginal title will come before the Supreme Court of Canada in June of this year, when the appeal in *Delgamuukw v British Columbia*[3][0] is argued. In that case, the Gitksan and Wet'suwet'en peoples are contending that they have unextinguished Aboriginal title and rights of self-government over their traditional territories in British Columbia. One can only hope that the Court will recognise that the *Van der Peet* approach to identifying and defining specific Aboriginal rights, such as a right to fish, cannot be applied to Aboriginal title.

[Previous related issues of the *Aboriginal Law Bulletin* include:

R v Sparrow: Issue 48 p 7 (Daniel Lavery and Brad Morse); Issue 48 p 12 (Garth Nettheim).

R v Van der Peet: Issue 88 p11 (Alex Castles and Jon Gill).

Delgamuukw v British Columbia: Issue 64 p 13 (Brad Morse); Issue 53 p 7 (Richard Bartlett); Issue 52 p 26 (Peter R Grant); Issue 29 p 15 (Greg McIntyre). Eds]

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[1] [1990] 3 CNLR 160.

[2] Schedule B to the *Canada Act 1982* (UK) 1982, c11. Section 35(1) provides: `The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'

[3] *R v Badger* [1996] 2 CNLR 77; *R v Lewis* [1996] 3 CNLR 131; *R v Nikal* [1996] 3 CNLR 178; *R v Van der Peet* [1996] 4 CNLR 177; *R v Gladstone* [1996] 4 CNLR 65; *R v NTC Smokehouse Ltd* [1996] 4 CNLR 130; *R v Pamajewon* [1996] 4 CNLR 164; *R v Adams* [1996] 4 CNLR 1; *R v Coté* [1996] 4 CNLR 26.

[4] The two decisions which did not involve fishing rights are *R v Badger* [1996] 2 CNLR 77 (hunting rights), and *R v Pamajewon* [1996] 4 CNLR 164 (gambling and the right of self-government).

[5] [1996] 4 CNLR 177.

[6] Ibid at 199.

[7] For commentary on the *Van der Peet* test for establishing an Aboriginal right, see John Borrows, `The Trickster: Integral to a Distinctive Culture' (1997) 8:2 *Constitutional Forum* 27; Leonard I Rotman, `Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*' (1997) 8:2 *Constitutional Forum* 40.

[8] [1996] 4 CNLR 177 at 206

[9] Ibid at 234.

[10] [1996] 4 CNLR 65

[11] [1996] 4 CNLR 177 at 259.

[12] [1996] 4 CNLR 164

[13] Two other decisions, *R v Lewis* [1996] 3 CNLR 131 and *R v Nikal* [1996] 3 CNLR 178, involved, among other things, by-laws made under authority delegated to band councils by the Canadian Parliament in the *Indian Act*, RSC 1985, cl 5. This *delegated* authority is distinct from the inherent authority that Aboriginal peoples have by virtue of their Aboriginal right of self-government: on this distinction, see Kent McNeil, `Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*' (1996) 34 *Osgoode Hall Law Journal* 61.

[14] [1996] 4 CNLR 164 at 172.

[15] [1996] 4 CNLR 65 at 98

[16] [1996] 4 CNLR 177 at 278, 282. For further discussion of the justification test, see Kent McNeil, `How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?' (1997) 8:2 *Constitutional Forum* 33.

[17] In her dissenting opinion in *Van der Peet*, McLachlin J also expressed the opinion that Lamer CJ's approach to justification ran counter to the authority of *Sparrow*: [1996] 4 CNLR 177 at 278-85.

[18] [1996] 3 CNLR 178.

[19] Note, however, that in *Nikal* and *R v Lewis* [1996] 3 CNLR 131, the Court made negative rulings on the issue of inclusion of navigable waters in reserves.

[20] [1996] 4 CNLR 1

[21] [1996] 4 CNLR 26.

[22] [1996] 2 CNLR 77. For commentary on Badger, see Catherine Bell, `*R v Badger*: One Step Forward and Two Steps Back?' (1997) 8:2 *Constitutional Forum* 21, and Rotman, supra n7.

[23] The Alberta Natural Resources Transfer Agreement, which was made part of the Canadian Constitution by the *Constitution Act, 1930*, contains the following provision in paragraph 12: `In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.' The

Manitoba and Saskatchewan Natural Resources Transfer Agreements, which were constitutionalised at the same time, contain an identical provision.

[24] The *Sparrow* decision created the justification test in the context of Federal legislation, leaving open its application to provincial legislation. For a convincing argument, which the Supreme Court ignored in *Badger*, that provincial legislatures cannot avail themselves of the *Sparrow* test to justify infringements of the constitutional rights of the Aboriginal peoples, see Brian Slattery, `First Nations and the Constitution: A Question of Trust' (1992) 71 *Canadian Bar Review* 261, pp 284-5.

[25] [1996] 4 CNLR 177 at 194.

[26] (1992) 175 CLR 1 at 51

[27] Ibid at 217.

[28] In *Mabo [No. 2]* (1992) 175 CLR 1 at 58 Brennan J did say that: `[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.' While this may be taken to limit native title to uses governed by traditional laws and customs, the actual order of the High Court contains no such limitations. This apparent contradiction is resolved by Brennan J's explanation at 51-2 that, where the indigenous inhabitants were in exclusive possession of their lands, the fact that the rights held within their community by virtue of their laws and customs are non-proprietary usufructuary rights is no impediment to the existence of an over-arching proprietary title held by the whole community as a result of that exclusive possession. In that situation, it appears that the communal proprietary title is not limited by the internal laws and customs.

[29] For further discussion, see Kent McNeil, `The Meaning of Aboriginal Title', in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada*, University of British Columbia Press, Vancouver, 1997.

[30] [1993] 5 CNLR 1 (BCCA).