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Aboriginal Rights Law, Year in Review: The 1995-96 Term

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INTRODUCTION
Aboriginal rights issues enjoy a significant degree of notoriety in contemporary Canadian jurisprudence. The various issues that aboriginal rights cases have raised traverse the range of legal matters that have come before Canadian courts. This situation has not always existed, or at least certainly not in this fashion. While aboriginal rights issues have been placed before Canadian courts for well over one hundred years, the frequency with which judges found themselves faced with questions of the nature, extent, and effect of aboriginal rights was much more limited. It was not until the mid-1960s that aboriginal rights issues truly began to achieve any significant national recognition in the judicial forum. From that time onward, there was a gradual increase in the number of aboriginal rights cases brought before Canadian courts.

Although the mid-1960s marked a turning point in the litigation of aboriginal rights matters, it did not result in the instantaneous creation of the situation that exists today. Indeed, the present status of aboriginal rights issues in Canadian law is markedly different than it had been as recently as fifteen years ago. With

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the promulgation of section 35(1) of the Constitution Act, 1982 and its protection of existing aboriginal and treaty rights, aboriginal rights issues have become increasingly more prevalent in Canadian judicial decision making. This phenomenon shows no signs of changing. One needs only look to the wealth of Supreme Court of Canada judgments released during the past year dealing with aboriginal rights matters to see the tangible effects of this occurrence.

The Supreme Court of Canada’s judgments in the aboriginal rights area over the past year are only the tip of the iceberg. Canadian aboriginal rights jurisprudence has recently been buoyed by a wealth of cases that have provided interesting insight into judicial understandings of a number of important aboriginal rights issues. These issues range in focus from the determination of band membership and Indian status to the incidents of aboriginal rights of self-government, the effects of the Crown’s fiduciary duty to aboriginal peoples, and judicial considerations of the nature and extent of treaty hunting rights and aboriginal fishing rights. This article will endeavour to provide a review and analysis of some of the more prominent of these recent judicial determinations that have potentially significant implications on aboriginal rights issues generally. The cases that will be reviewed herein include: Sawridge Band v. Canada,1 R. v. Pamajewon,2 R v. Van der Peet,3 R. v. Badger,4 and Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development).5

SAWRIDGE BAND v. CANADA

The central issue in the Sawridge case was the ability of three Alberta Indian bands, the Sawridge, Ermineskin, and Sarcee bands, to determine the composition of their band memberships in spite of the 1985 amendments to the federal Indian Act6 regarding band membership eligibility under Bill C-31.7 The plain-

2. (22 August 1996) No. 24596 (S.C.C.). This case is now reported as (1996) 199 N.R. 321 (S.C.C.). All references will be to the unreported version of the case.
3. (22 August 1996) No. 23803 (S.C.C.). This case is now reported as (1996) 200 N.R. 1 (S.C.C.). All references will be to the unreported version of the case.
7. An Act to amend the Indian Act, S.C. 1985, c. 27, s. 4. Bill C-31 provided for the re-enfranchisement of aboriginal persons who had become disenfranchised through the provisions of the Indian Act detailing who was and was not entitled to be registered as a status Indian for the purposes of the Act. For discussion of the effects of Bill C-31, see Manitoba Aboriginal Justice Inquiry, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, (Winnipeg: Queen’s Printer,
tiff bands sought a declaration that sections 8 to 14.3 of the Indian Act be declared of no force or effect, insofar as they infringed upon or denied the right of Indian bands to determine their own membership. The plaintiffs claimed that this right had been exercised from ancient times and was protected by section 35(1) of the Constitution Act, 1982.8 The plaintiffs also sought a declaration that the imposition of additional members resulting from the Bill C-31 amendments offended the bands' rights to freedom of association under section 2(d) of the Charter of Rights and Freedoms. In its defence, the federal government maintained that it possessed the power to regulate band membership under the Indian Act, which stemmed from the federal government's legislative jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the Constitution Act, 1867.9 It also contended that any rights that the plaintiff bands may have had regarding control over their membership was extinguished by federal legislation and Treaties 6, 7, and 8.

The plaintiffs sought to establish that their communities had always determined their membership on the basis of traditional customs, one of which was that women followed their men upon marriage. They relied heavily on oral evidence provided by various band members that, indeed, women followed men upon marriage with the result that if a woman from one of the plaintiff bands married a man who was not a member, the woman lost her band membership and became attached to her husband's band.

At trial, Muldoon J. determined that any rights that the plaintiffs could successfully establish had to satisfy three criteria. Initially, they had to have been asserted prior to 2 May 1670, the date upon which King Charles II of England granted a royal charter to the Hudson's Bay Company. Secondly, they must have remained unextinguished prior to the coming into force of section 35(1) of the Constitution Act, 1982. Finally, those rights must have been able to withstand the application of section 35(4) of the Act.10 Section 35(4) provides for the equal application of the rights guaranteed under section 35(1) to male and female persons.

In rejecting the plaintiffs' application, Muldoon J. held that the determination of band membership rightfully existed with the federal government; moreover, any rights that Indian bands had had in that regard had long ago been extinguished. Following the initial assertion of sovereignty by Britain in 1670,  

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10. Supra, note 1 at 147.
Muldoon J. explained that the Constitution Act, 1867 and the Rupert’s Land Act, 1868\textsuperscript{11} “complete[d] the story of the sovereignty claim” to all other lands in Canada.\textsuperscript{12} Insofar as aboriginal rights could be extinguished by the Crown by “clear and plain” intent prior to the existence of section 35(1), Muldoon J. held that any rights the plaintiffs may have had regarding their membership were extinguished by the promulgation of federal Indian legislation before the completion of Treaties 6, 7, and 8:

The plaintiffs’ asserted right to control their own membership of their “bands” (a wholly statutory term) was emphatically extinguished by the Indian Act, 1876. Complete control was taken by Parliament in the enactment of that statute and its predecessors. Even if control of hunting and social groups’ or encampments’ membership had been a real Aboriginal right it was extinguished by most clear and unambiguous legislation before Treaties 6, 7 and 8 ever came into being.\textsuperscript{13}

The treaties themselves, Muldoon J. insisted, further demonstrated that the plaintiffs had no right to control their membership:

It was quite obvious and well understood by the Indian parties to all three treaties that the Government of Canada was thereafter to control their band and reserve membership, because the government was committed to pay Indians forever as an eternal charge on taxpayers. Clearly the government was committed also to control who was to be paid individually, and who was not entitled to be paid individually. The Indians were neither simpletons nor crazy. They well understood that “money talks” and that “whoever pays the piper, calls the tune”:\textsuperscript{14}

Muldoon J. accepted the evidence provided by the Crown’s witness, Dr. von Gernet, as persuasive for the proposition that the plaintiffs’ ancestors had no custom of controlling their groups’ or chiefs’ peoples’ membership.\textsuperscript{15} Dr. von Gernet was found by the court to be a “more impressive witness ... more careful

\begin{itemize}
  \item \textsuperscript{11} 31-32 Vict., c. 105.
  \item \textsuperscript{12} Supra, note 1 at 143.
  \item \textsuperscript{13} Ibid., at 163-4.
  \item \textsuperscript{14} Ibid., at 188. See also ibid., at 224, 225:
    \begin{itemize}
      \item ... Parliament and the Government of Canada purposefully, clearly and plainly took by statute and by treaty all control of Indian bands’ membership including admission to membership and the veto of applied-for membership. Nothing could be clearer or plainer.
      \item ... Parliament has over the years enacted comprehensive statutory, codified provisions about Indian band membership to the exclusion of all else.
    \end{itemize}
  \item \textsuperscript{15} Ibid., at 220.
\end{itemize}
and organized professional, and the more resilient and reasoned in cross-examination"16 than the plaintiffs' witness, Professor Moore, whose report concluded that the plaintiffs' ancestors had, indeed, definite customs for controlling their membership. As for the practice of "woman follows man" argued by the plaintiffs, Muldoon J. held that if that practice had, in fact, existed, it was always subject to repeal and was repealed by statute.17 Even if this practice had not been eliminated, Muldoon J. held that it was entirely inconsistent with section 35(4) of the Constitution Act, 1982 and, therefore, could not exist as a part of any right to determine membership protected under section 35(1).18 As for the plaintiffs' freedom of association argument, the trial judge declared that it also failed for similar reasons:

Fairness is one of the foundations of the Charter and if the plaintiffs invoke it, they cannot choose only para. 2(d). They must also accept that Bill C-31 finds s.1 justification in ss.15 and especially 28, which carries within the Charter the very same thrust as does s-s.35(4) outside the Charter.

... The Court finds that if there be any infringement of the plaintiffs' freedom of association under para. 2(d) in Bill C-31, it is quite justified on the grounds of equality in s.15; and the assertion that the Charter's rights and freedoms are guaranteed equally to male and female persons, in s.28.19

In arriving at his conclusions, Muldoon J. made a number of obiter comments on other issues which derogate from the objectivity and authority of his judgment. Statements made in the course of his judgment about the origins of the Métis people,20 the honour of the Crown,21 the reliability of oral

16. Ibid., at 211.
17. Ibid., at 191.
18. See ibid., at 221:
   ... [T]here was and is no Aboriginal right to control membership which engages s-s.35(1) of the Constitution Act, 1982. If there were, of course, it would be subject to s-s.35(4) and would be of no force and effect to the extent it failed (as it did, if it existed) to guarantee membership and marital status equally to male and female persons.
19. Ibid., at 227, 228.
20. Ibid., at 147:
   It must be left to others at another time to explain how the revisionists who settled upon s-s.35(2) thought that they could honestly characterize Métis people as Aboriginal people, wielding Aboriginal rights. ... Only some determined revisionist would seek to regard Métis as being exemplars of only one of their inherently dual lines of ancestors. It will be seen, however, that conduct and lifestyle will be noted in terms of "half-breeds living the 'Indian way of Life'," in this dismally racist subject of litigation.
21. Ibid., at 174: "The so-called "honour of the Crown" is surely nothing more than a transparent semantic membrane for wrapping together Indian reserve apartheid and perpet-
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... and the use of "blood quantum" provisions in band membership codes reveal a profound lack of discretion on his part. Moreover, they are...

22. Ibid., at 195, 196:

... Without any means of keeping a written record the probabilities lead to the conclusion that myth or oral history would not yield any objectively reliable reason or knowledge ... That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that their ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.

In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity. ... So ancestor advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward-looking of all human characteristics, or religion, or what passes for thought. ... So saying, the Court is most emphatically not mocking or belittling those who assert that, because their ancestors never developed writing, oral history is their only means of keeping their history alive. It would always be best to put the stories into writing at the earliest possible time in order to avoid some of the embellishments which render oral history so unreliable. [Emphasis added]

In contrast to what Muldoon J. characterises as the inherent unreliability of oral history, see J. Borrows, "With or Without You: First Nations Law (in Canada)," (1996), 41 McGill L.J. 629, at 648:

First Nations stories ... can also be distinguished from Common law precedents in both form and content because of the way they are recorded and applied. First Nations use an oral tradition to chronicle important information. ... As such, the application of these memories and words is quite different from the application of Common law precedent. Non-ceremonial stories can change from one telling to another, but such changes do not mean that the story's truth is lost; rather, modification recognizes that context is always changing, requiring a constant reinterpretation of many of the account's elements. First Nations stories take this form because there is an attempt to convey contextual meaning relevant to the times and needs of the listeners.


In the tribal society, past and present are inseparable as the continuation of a story anchored in values enduring in contemporary life ... In the creation of American Indian common law, in the longstanding and emerging tribal courts, custom serves in conjunction with appropriate principles from federal and state law.

23. Ibid., at 225: "Blood quantum" is a highly fascist and racist notion, and puts its practitioners on the path of the Nazi Party led by the late, most unlauded Adolf Hitler. Interestingly, Muldoon J. uses blood quantum in rejecting the claim that the Mètis are aboriginal peoples under section 35(2) of the Constitution Act, 1982. See note 20, supra.
entirely unnecessary to the decision. Yet, even in the absence of the unfortunate, and unnecessary, obiter comments made by Muldoon J. in the course of his judgment in Sawridge, his decision provides ample fodder for further discussion and analysis.

The Sawridge case is significant for its discussion of Bill C-31 and that document's effects on those persons reinstated by it as well as the bands to which they belong. The Sawridge case may be viewed as an indication that in righting an historical wrong via Bill C-31, Parliament has created a new series of problems which could end up being resolved in the courts. The introduction of section 35(4) arguments in the case is significant as well, since section 35(4) has been discussed in few cases since it was added to section 35 by the Constitution Amendment Proclamation, 1983. In Sawridge, Muldoon J. treats it as a substantive part of the rights guaranteed by section 35(1). He equates the effect of section 35(4) on the constitutional guarantee of aboriginal and treaty rights with that of sections 15 and 28 of the Charter on Charter rights. While, technically, section 35(4) exists only as an interpretive aid to section 35(1), its effect upon section 35(1) rights is profound; it serves as a constitutional guarantee of equality of aboriginal and treaty rights between male and female aboriginal persons.

Muldoon J.'s treatment of other issues in Sawridge is, however, not quite as progressive as his analysis of the effect of section 35(4). His judgment adheres strictly to the notion that the British Crown's claims to sovereignty over Canada ought to be considered an absolute historical fact. In his appraisal, Muldoon J. views the rise of European power in North America as the result of "historical and economic processes which were unavoidable." Indeed, he states that "[t]he only question was whether the dominant Europeans would be the French, the British or the Spanish ..." His characterisation of the process of European colonisation in North America is a drastic oversimplification of a series of events and occurrences that transpired over the course of centuries. Rather than being an historical inevitability, the process whereby Britain gained its position of power in North America resulted from the stringing together of factors such as

24. Note the commentary by T. Isaac in "Self-Government, Indian Women and Their Rights of Reinstatement Under the Indian Act: A Comment on Sawridge Band v. Canada," [1995] 4 C.N.L.R. 1, at 7: "... [Muldoon J.'s] critique of the existing law, namely section 35(2) which includes Métis peoples, is out of place in a judicial decision and raises the question of what is, and what is not, appropriate for judges to comment on."

25. SI/84-102.

26. Supra, note 1 at 151.

27. Ibid.
the effects of disease, warfare, and aboriginal reliance on European manufactured goods that could not have been contemplated by the Europeans or the aboriginals. Furthermore, Muldoon J.'s determination that Britain had to have already asserted sovereignty in order to grant the Hudson's Bay Charter in 1670 flies in the face of the historical record, which demonstrates that the papal bulls and royal charters dating from the fifteenth century\textsuperscript{28} that purported to grant authority to particular nations or individuals to take control of North American lands were continuously ignored by rival European nations when it was in their interests to do so. As Slattery has argued:

Any balanced survey of European state practice reveals that although most imperial powers indulged on occasion in lofty claims based on discovery, symbolic acts, and occupation, these same powers often poured scorn on such claims when advanced by their European rivals. In short, they were not prepared to grant others the benefit of principles claimed on their own behalf. So, it may be doubted whether the supposed rules achieved true reciprocal acceptance, even among the nations that stood to benefit from them.\textsuperscript{29}

The Sawridge decision is also demonstrative of the Canadian judiciary's often-restrictive interpretation of treaties between the Crown and aboriginal peoples. Muldoon J. states that "[t]here is no doubt that, in entering into the treaties [the aboriginal peoples] sought the protection of — and perhaps ill-advisedly — the dependence on, the Crown ..."\textsuperscript{30} Such an interpretation fails to account for aboriginal understandings of the purpose of treaties, which view them as lasting compacts of peace and friendship that recognised and respected the independence and autonomy of the European and aboriginal nations that were parties to them.\textsuperscript{31} This understanding, furthermore, was shared in by Britain from the


\textsuperscript{30} \textit{Supra}, note 1 at 154.

time of initial contact between the groups until shortly after the cession of her hostilities with the United States through the Treaty of Ghent, 1814 and the Rush-Bagot Convention of 1817.32 This shared understanding of treaties as solemn and binding commitments between independent nations that are of a lasting quality is evidenced in the existence of the Covenant Chain alliance, a military, political, social, and economic alliance initially between the Dutch and River Indians of the Hudson River region, but later forged between Britain and Iroquois Confederacy and then expanded to encompass a host of other aboriginal nations.33

The Covenant Chain alliance is a prime example of Crown-Native treaties as solemn, binding, and continuous agreements that were understood and expected to be faithfully observed by all parties.34 The mutuality and solemnity of the
to an understanding of their meaning, since it represents an effort to elevate the treaties, and relations among peoples, beyond the vagaries of political opportunism and expediency. They are intended to develop through time to keep pace with events, while still preserving the original intentions and rights of the parties.

See also D. Opekokew and A. Pratt, "The Treaty Right to Education in Saskatchewan," (1992), 12 Windsor Y.B. Access Just. 3, at 8: "Generally, when the First Nations refer to treaty rights, they do not distinguish between the political and legal content of those rights. They have historically considered the treaties to be... political and legal agreements between sovereign government orders." See also Hon. A.C. Hamilton, A New Partnership, (Ottawa: Minister of Public Works and Government Services Canada, 1995), at 6: "For Aboriginal people, the historical significance and their understanding of treaties and of treaty making is that they represent an on-going relationship between two or more peoples bound by honour and trust."

32. As historian J.R. Miller has commented in Sweet Promises: A Reader in Indian-White Relations in Canada, (Toronto: University of Toronto Press, 1991), at xi:

The Rush-Bagot Convention of 1817, the real end of the War of 1812, demilitarized the Great Lakes and ushered in enduring peace between the United States and British North America (BNA), and the Indians were no longer needed as allies and military partners. The consequence was what one historian has referred to as the 'onset of irrelevance' of the Indians to Euro-Canadians.

See also the discussion in L.I. Rotman, Solemn Commitments: Fiduciary Obligations, Treaty Relationships and the Foundational Principles of Crown-Native Relations in Canada, unpublished S.J.D. dissertation, University of Toronto, 1996, especially in Chapters VI and VII.


Covenant Chain alliance is represented in the following exchange of promises between Sir William Johnson and the Six Nations on 20 February 1756:

Brethren

This animates me with fresh pleasure and affection, and at this important conjuncture of affairs to brighten and strengthen the Covenant Chain, that has so long linked us together in mutual friendship and brotherly affection which I hope will continue inviolable and sacred, as long as the Sun shines or the Rivers continue to water the earth, notwithstanding all the intrigues of our old and perfidious enemies, who have left no means untried, and especially at this time to weaken and divide us that so they may in the event root out the remembrance of your name, and Nations from the face of the earth.

A large Covenant Belt.

Brother Warraghiyagey

... We have now opened our minds with Freedom & sincerity and we understand each other clearly let us mutually remember our engagements which we have again so solemnly renewed and if at any time our enemy should attack us, prove by your readiness to support & assist us, that you really love us, and we assure you we shall not be wanting on our parts to give proofs of the like fidelity, & friendship.

A Belt.35

The Covenant Chain alliance demonstrates the reciprocity with which treaties were concluded. Treaties emerged as the result of negotiations between the parties, not out of unilateral action, paternalism, or the gratuitous benevolence of either side:

... [T]he aboriginal parties to treaties were considered to be distinct, self-governing nations, capable of making collective decisions, of establishing co-equal relationships ("alliances") and of controlling their own affairs.
They had the capacity to negotiate with the Crown, and to voluntarily agree or withhold consent. The Crown approached the aboriginal societies on the basis that problems were to be solved through co-operation, negotiation and *quid pro quo* bargaining, rather than unilateral imposition.36

By taking treaties out of the contexts in which they arose — 'the Indians ... wanted the dependent status into which they bargained themselves, seemingly "forever"'37 — and reducing them to simple financial exchanges whereby the aboriginal peoples were to be held subject to the oversimplified dictates of a marketplace in which "money talks" and "whoever pays the piper, calls the tune,"38 Muldoon J. provides a drastic and ahistorical mischaracterisation and misrepresentation of the basis of the treaties which fails to account for the history of Crown-aboriginal relations generally, and Crown-aboriginal treaty relations specifically.

The *Sawridge* case is a controversial one. Underlying the application by the plaintiffs is the question of whether aboriginal bands are obliged to share their resources with persons who have been reinstated by the Bill C-31 amendments to the *Indian Act*. Therefore, while the case is, essentially, one of self-government or self-determination, there is a considerable human element to the issues that goes beyond the matter of whether aboriginal bands have the authority to determine the composition of their membership. Should the bands be required to admit those persons reinstated by Bill C-31, that could disrupt the status quo on those reserves, in particular the administrative and financial structures that currently exist, through the expansion of band membership bases. If bands are found to have the power to determine membership, what then happens to those persons entitled to be registered under Bill C-31 who are denied membership? Band administrations across Canada will be watching the appeal of the *Sawridge* case with interest, as will those persons reinstated by Bill C-31. It remains to be seen whether the Federal Court of Appeal will attempt to contextualise its judgment by explicitly incorporating these related issues or whether they will remain on the periphery, as they did in the *Sawridge* case.

36. B.H. Wildsmith, "Treaty Responsibilities: A Co-Relational Model," (1992), U.B.C. L. Rev. Special Edition on Aboriginal Justice 324, at 331. See also Wildsmith, *ibid.*, at 330; M. Jackson, "The Articulation of Native Rights in Canadian Law," (1984), 18 U.B.C. L. Rev. 255, at 257: "It was through the process of consensual treaty-making, in which Indian tribes were recognized as independent nations, that the terms of European settlement and the tribes' continued occupation of their hunting territories were mutually agreed."

37. *Supra*, note 1 at 156.

38. *Ibid.*, at 188.
R. V. PamaJewon
Like the Sawridge case, PamaJewon was concerned with issues of aboriginal self-government and its associated powers. Rather than dealing with the issue of control over band membership, however, the PamaJewon case dealt with the ability of aboriginal groups to engage in and regulate gambling activities on reserves pursuant to and as an exercise of, their powers of self-government.

Howard PamaJewon and Roger Jones, members of the Shawanaga First Nation, were charged with keeping a common gaming house contrary to section 201(1) of the Criminal Code. They had been operating a high stakes bingo and other gambling activities on the band's reserve pursuant to the authority of the Shawanaga First Nation lottery law. That law was enacted by the band council in August 1987, but was not a by-law passed pursuant to section 81 of the Indian Act. The Shawanaga First Nation did not possess a provincial licence authorising the gambling activities occurring on the reserve. Furthermore, it had refused the Ontario Lottery Corporation's offer of a gambling licence on the basis that since it possessed an inherent right of self-government, obtaining such a licence was unnecessary.

Criminal charges had also been laid against Arnold Gardner, Jack Pitchenese, and Allan Gardner, members of the Eagle Lake First Nation, under section 206(1)(d) of the Criminal Code for conducting a scheme for the purpose of determining the winners of property. The Eagle Lake First Nation had been operating a bingo on its reserve and had been approached by the Ontario Ministry of Consumer and Commercial Relations about negotiating with the Ontario Lottery Commission for a provincial licence authorising its bingo. It did not negotiate for such a licence because it asserted that it had a right to be self-regulating in its economic activities.

The five accused were all convicted at trial and their convictions upheld on appeal. The issue brought before the Supreme Court of Canada was whether the ability to hold and regulate high stakes gambling by the Shawanaga and Eagle Lake First Nations fell within the scope of their aboriginal rights protected by section 35(1) of the Constitution Act, 1982, in particular their right to self-government.

The Supreme Court unanimously dismissed the appeal from the bench, with reasons to be provided later. In his judgment, Lamer C.J.C. held that the appellants had no constitutionally-protected right under section 35(1) to conduct the activities that gave rise to the criminal charges that were laid. As Lamer

C.J.C. explained, while the evidence led at the Pamajewon and Gardner trials demonstrated that the Ojibwa people did gamble informally and on a small-scale, it did not demonstrate that gambling or the regulation of gambling on the scale that took place was an integral part of the distinctive cultures of either the Shawanaga or Eagle Lake First Nations. The Chief Justice held that to characterise the appellants' activities as falling under a broad right to manage the use of their reserve lands "would be to cast the Court's inquiry at a level of excessive generality." L'Heureux-Dube J. agreed with the disposition of the case by Lamer C.J.C., but arrived at her conclusion by a different route. She concurred with the Chief Justice that the appellants' claim of authority to make decisions regarding the social, economic, and cultural well-being of their people was overly broad. However, she held that the right claimed by the appellants should not be characterised as the right to participate in and regulate gambling activities on their reserves, as suggested by Lamer C.J.C. Instead, she maintained that the scope of the rights asserted should be assessed by inquiring as to whether the appellants possessed an aboriginal right to gamble. In accordance with the evidence presented at trial, L'Heureux-Dube J. concluded that the appellants did not possess an aboriginal right to gamble that was capable of protection by section 35(1) of the Constitution Act, 1982. Consequently, she found it unnecessary to consider the question of the appellants' right to self-government.

The Pamajewon case has been criticised in various circles as an inappropriate vehicle upon which to assert the existence of aboriginal rights to self-government under section 35(1). Conversely, it has also been held up as an illustration that the aboriginal right to self-government involves the ability of First Nations to determine for themselves what is in their best interests and how they will conduct their activities. Thus, under this latter argument, if the Shawanaga and Eagle Lake First Nations determined that gambling on their reserves was in the best interests of those groups, they should be entitled to engage in such activity without having to seek authorisation from non-aboriginal governmental authorities.

In assessing the situation at hand, the Supreme Court focused on the more limited question of whether the gambling activities in question constituted rights

40. Supra, note 2, at para. 28.
41. Ibid., at para. 27.
42. Ibid., at para. 37.
43. Ibid., at para. 40.
protected by section 35(1) rather than whether the First Nations in question possessed rights of self-government existing under the auspices of section 35(1). Consequently, the scope of their inquiry was far more restricted than it would have been if the latter question was being considered. The Pamajewon decision thus did not provide any additional insight into the issues surrounding aboriginal self-government.

Aboriginal self-government is an umbrella term that encompasses a variety of issues which vary from First Nation to First Nation. What may be described as self-government powers in one situation may not be appropriate in another. It is also a politically-charged term. For these reasons, it is not easily dealt with, either in the courts or in other arenas. By finding that the bands in the Pamajewon case did not possess aboriginal rights to gamble or maintain gambling activities on their reserves, the Supreme Court was able to circumvent the issue of aboriginal self-government, thereby leaving it for another day. The basis of the Supreme Court's appraisal of the rights asserted in Pamajewon may be traced directly to that court's simultaneously-released decision in R. v. Van der Peet, an aboriginal fishing rights case, in which standards for the analysis of aboriginal rights were put forward by Lamer C.J.C., L'Heureux-Dube J., and McLachlin J. in their respective judgments in the case.

R. v. VAN DER PEET
In Van der Peet, the appellant, Mrs. Van der Peet, a member of the Sto:lo nation, was charged under section 27(5) of the British Columbia Fishery (General) Regulations with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence. Section 27(5) prohibited the sale or barter of fish caught under such a licence. The appellant contested the charges, arguing that she had an aboriginal right to sell the fish that was protected by section 35(1) of the Constitution Act, 1982.

Indeed, the question stated for the court, as reproduced at para. 20 of the judgment, read as follows:

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

Supra, note 3.

Issued pursuant to the federal Fisheries Act, R.S.C. 1970, c. F-14.
At trial, it was declared that aboriginal rights to fish for food and ceremonial purposes did not include the right to sell fish and the appellant was found guilty. The summary appeal judge found that an aboriginal right to sell fish did exist and remanded the appellant for a new trial. Upon further appeal to the British Columbia Court of Appeal, a majority judgment restored the guilty verdict imposed at trial. When the Van der Peet case and two other fishing rights cases, R. v. Gladstone and R. v. N.TC. Smokehouse, were heard by the Supreme Court of Canada, they were viewed as the conclusion of that court’s analysis of aboriginal fishing rights that had been initiated some six years previously in the case of R. v. Sparrow. As Lamer C.J.C. explained:

This appeal, along with the companion appeals in R. v. N.TC. Smokehouse and R. v. Gladstone, raises the issue left unresolved by this court in its judgment in R. v. Sparrow: how are the aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982 to be defined?

The Van der Peet case differed from Sparrow in one major respect, though; while the Sparrow case focused on the ability of an aboriginal person to fish for food, a fact that was not in dispute in that case, Van der Peet centred on the ability of an aboriginal person authorised to fish for food to sell or barter that fish without a licence to do so.

Lamer C.J.C.’s majority decision, concurred in by La Forest, Sopinka, Gonthier, Cory, Iacobucci, and Major JJ., held that while Mrs. Van der Peet had an aboriginal right to catch fish, she did not have an aboriginal right to sell or barter fish. However, in assessing the appellant’s actions and whether they were consistent with the exercise of her aboriginal rights under section 35(1), Lamer C.J.C. held that it was first necessary to articulate the purposes underpinning section 35(1). In particular, he attempted to explain the rationale behind section 35(1)’s recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Without first understanding why aboriginal rights exist and why they receive constitutional protection, Lamer C.J.C. declared that it was impossible to provide an adequate definition of those rights.

47. (21 August 1996) No. 23801 (S.C.C.). This case is now reported as (1996) 200 N.R. 189 (S.C.C.). All references will be to the unreported version of the case.
48. (21 August 1996) No. 23800 (S.C.C.). This case is now reported as (1996) 200 N.R. 321 (S.C.C.). All references will be to the unreported version of the case.
50. Supra, note 3 at para. 1.
51. Ibid., at para. 3.
Lamer C.J.C. determined that a purposive approach to section 35(1) was needed so that the interests that that section was intended to protect — what he described as the dual nature of aboriginal rights, or the "aboriginal and the rights in aboriginal rights" — could be identified. He held that adopting a purposive approach, a suggestion made by the Supreme Court in Sparrow, would ensure that what was encompassed within the term "aboriginal rights" would be related to the intended focus of section 35(1), specifically aboriginal people and their rights in relation to Canadian society as a whole. This purposive approach was to take place in accordance with giving section 35(1) a generous and liberal interpretation in favour of aboriginal peoples, a notion also suggested in Sparrow. As Lamer C.J.C. explained, this interpretive principle stemmed from the fiduciary nature of the relationship between the Crown and aboriginal peoples and must inform the court's analysis of the purposes underlying section 35(1), as well as that section's definition and scope.

In his examination of aboriginal rights, Lamer C.J.C. affirmed the principle established by the Supreme Court of Canada in Calder v. Attorney General of British Columbia and subsequently upheld in Guerin v. R. and Sparrow, that aboriginal rights were not created by section 35(1), but were only recognised and affirmed by it. This fact indicated to Lamer C.J.C. that the doctrine of aboriginal rights exists because of the fact that aboriginal peoples lived in North America prior to the first arrival of Europeans to her shores. On this basis, he determined that section 35(1) functions as a constitutional framework through which "the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."

In order to ascertain the scope of the aboriginal rights existing under section 35(1), Lamer C.J.C. developed a test for identifying those rights. That test, aimed at "identifying the crucial elements of those pre-existing distinctive societies," focused on those practices, traditions, and customs that were central to aboriginal societies prior to contact with Europeans. Practices that arose in

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52. Ibid., at para. 20-1.
53. Ibid., at para. 21.
54. Ibid., at para. 24.
57. Supra, note 3 at para. 31.
58. Ibid., at para. 44.
response to the European presence in North America were deemed not to qualify as aboriginal rights.\textsuperscript{59} While Lamer C.J.C. restricted the definition of aboriginal rights to pre-contact practices, he did not find that it was necessary for an applicant to demonstrate conclusive evidence of a right's existence dating from pre-contact times. Rather, post-contact evidence of particular practices could be used as long as it demonstrated a link with practices existing prior to contact:

Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).\textsuperscript{60}

Lamer C.J.C. held that requiring aboriginal peoples to provide conclusive, pre-contact evidence to demonstrate the existence of an aboriginal right contradicted the spirit and intent of section 35(1). He explained that such a requirement defined aboriginal rights so rigidly that successful claims of their existence would be precluded.\textsuperscript{61} As a result, he declared that a court faced with a claim of an aboriginal right should approach the rules of evidence "with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in."\textsuperscript{62} With this understanding in mind, he maintained that courts must not undervalue the evidence led by an aboriginal applicant "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."\textsuperscript{63}

Finally, to establish that an activity was an aboriginal right, Lamer C.J.C. determined that an applicant had to demonstrate that that activity was an element of a practice, tradition, or custom integral to the distinctive culture of the aboriginal group claiming the right, as had been put forward by the Supreme Court of Canada in \textit{Sparrow}.\textsuperscript{64} In assessing the applicant's claim, he held that

\begin{itemize}
  \item \textsuperscript{59} \textit{Ibid.}, at para. 73: "... [W]here the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right."
  \item \textsuperscript{60} \textit{Ibid.}, at para. 63.
  \item \textsuperscript{61} \textit{Ibid.}, at para. 62.
  \item \textsuperscript{62} \textit{Ibid.}, at para. 68.
  \item \textsuperscript{63} \textit{Ibid}..
  \item \textsuperscript{64} \textit{Ibid.}, at para. 46.
\end{itemize}
a court must account for the perspective of the aboriginal peoples claiming the right; however, that perspective must be "framed in terms cognizable to the Canadian legal and constitutional structure." Lamer C.J.C. further stated that even where aboriginal practices have evolved into modern forms, that evolution would not preclude a finding of a continuity with pre-contact practices as long as that continuity was demonstrated.

Lamer C.J.C. held that the majority decision in the British Columbia Court of Appeal's determination of the Van der Peet case had wrongfully characterised the appellant's claim as a commercial right to fish, rather than a right to sell fish. Meanwhile, he determined that the "social test" adopted by Lambert J.A. in dissent — which focused on the significance of the practices, traditions, or customs to the aboriginal culture in question for the identification of aboriginal rights — took into account too broad a spectrum of factors that "distracted" the court from what its true focus ought to be, namely "the nature of the aboriginal community's traditions, customs or practices themselves." While Lamer C.J.C. agreed that the significance of the practice, tradition, or custom to the aboriginal community is a factor for determining whether that activity was "integral to the distinctive culture," he held that "the significance of a practice, tradition or custom cannot, itself, constitute an aboriginal right." Instead, he insisted that:

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

In the matter before the Supreme Court, Lamer C.J.C.'s directive entailed that the court should consider the actions leading up to the appellant being charged, the fishery regulation under which she was charged, and the practices, traditions, and customs that she invoked to support her claim to an aboriginal right to engage in the activities that led to her being charged. He maintained that her activities must be considered at a general rather than specific level. For a practice, tradition, or custom to be described as an aboriginal right, it had to be

65. Ibid., at para. 49.
66. Supra, note 60.
67. Ibid., at para. 52.
68. Ibid.
69. Ibid., at para. 53.
demonstrated to be a "central and significant part of the society's distinctive culture."\textsuperscript{70} Despite his remonstrations against post-contact practices constituting aboriginal rights, Lamer C.J.C. held that a modernised form of a pre-contact practice, tradition, or custom could still constitute an aboriginal right.\textsuperscript{71}

Lamer C.J.C. found that the trial judge in \textit{Van der Peet} had correctly stated that while the Sto:lo did fish for food and ceremonial purposes as an integral part of their distinctive culture prior to contact, their sale or bartering of salmon at that time was "minimal, and opportunistic."\textsuperscript{72} The trial judge had concluded that the market and trade in salmon did not truly exist until after contact and the establishment of the Hudson's Bay Company's fort at Langley.\textsuperscript{73} Consequently, Lamer C.J.C. agreed with the trial judge that the exchange of salmon for money or other goods by the Sto:lo people did not form an integral part of their distinctive culture prior to contact and was not a "significant, integral or defining feature of that society."\textsuperscript{74}

Evidence presented at trial by the appellant linking the exchange of salmon to the maintenance of kinship and family relations was held not to support the claim to an aboriginal right to sell or barter fish.\textsuperscript{75} The absence of regularised trading systems among the Sto:lo was also held to indicate the lack of centralness of the salmon trade to Sto:lo culture.\textsuperscript{76} Finally, Lamer C.J.C. agreed with the trial judge's finding that the salmon trade between the Sto:lo and the Hudson's Bay Company was qualitatively different than what was typical of Sto:lo culture prior to contact and, therefore, could not constitute an aboriginal right.\textsuperscript{77} He held that the Sto:lo's trade with the Hudson's Bay Company did not have the requisite continuity with pre-contact Sto:lo practices to enable it to be characterised as an aboriginal right; instead, the centralness, or significance, of trade with the Hudson's Bay Company arose entirely in response to European influences.\textsuperscript{78} For these reasons, Lamer C.J.C. concluded that the appeal must fail.

\textsuperscript{70} \textit{Ibid.}, at para. 55.
\textsuperscript{71} \textit{Ibid.}, at para. 54.
\textsuperscript{72} \textit{Ibid.}, at para. 84.
\textsuperscript{73} \textit{Ibid.}
\textsuperscript{74} \textit{Ibid.}, at para. 85.
\textsuperscript{75} \textit{Ibid.}, at para. 87.
\textsuperscript{76} \textit{Ibid.}, at para. 89.
\textsuperscript{77} \textit{Ibid.}
\textsuperscript{78} \textit{Ibid.}
The standard for the determination of aboriginal rights established by Lamer C.J.C. in *Van der Peet* elaborates somewhat on the "integral to the distinctive culture" test set out in *Sparrow*. It does not require that a practice, tradition, or custom be distinct, or unique, to the aboriginal culture in question, only that it be distinctive. In other words, the practice need not be unique to a culture, but help make the culture what it is. Consequently, those practices that were aspects of an aboriginal society that are true of every human society, such as "eating to survive," or merely incidental or occasional to an aboriginal society, were not capable of being described as aboriginal rights. In determining which practices were integral to the aboriginal culture in question, Lamer C.J.C. advocated the use of Lambert J.A.'s "social test" whose use he had rejected in determining whether an aboriginal practice, tradition, or custom constituted an aboriginal right.

Despite the positive aspects of Lamer C.J.C.'s judgment in *Van der Peet* — he adopts the purposive determination of aboriginal rights suggested by *Sparrow*, distinguishes between aboriginal rights and rights originating at common law, and is sensitive to the problems aboriginal peoples face in adducing evidence in support of their aboriginal rights claims — he contradicts precedents established in a number of Supreme Court of Canada decisions which he cites in support of his judgment. His finding that aboriginal rights must be rooted in pre-contact practices adopts the "frozen rights" theory of aboriginal rights that was rejected by the Supreme Court of Canada in the *Sparrow* case and which Lamer C.J.C. himself argues against adopting in *Van der Peet*. While he determined that pre-contact aboriginal rights may be exercised in a modern form and still be recognised as aboriginal rights, arbitrarily limiting the definition of aboriginal rights to pre-contact practices embraces frozen rights theory by prohibiting the creation of new aboriginal rights arising from the necessity to maintain the viability of distinctive aboriginal cultures in the face of European interference with traditional aboriginal ways of life. It is circular reasoning to suggest, on one hand, that aboriginal rights must encompass only those practices that are not incidental or occasional to an aboriginal society.

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81. *Ibid.*, at para. 56. See also *ibid.*, at para. 70:

Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

See the further discussion of Lamer C.J.C.'s rejection of incidental rights, *infra*. 
integral to the distinctive cultures of aboriginal societies and then, when the presence of European settlement interferes with or renders those practices ineffective, prevent the recognition of new practices that arose in response to that European interference from being recognised as aboriginal rights.

It is suggested that, in spite of Lamer C.J.C.'s conclusions, judicial emphasis upon temporal considerations as the sole determinants of the nature of aboriginal and treaty rights are misguided. Time-based methods of inquiry are entirely incapable of recognising rights that are no less important than long-practiced rights, but which are of newer genesis. As Slattery has suggested, the notion of existing rights "suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour." This statement was approved by the Supreme Court of Canada in Sparrow. Both aboriginal and treaty rights are dynamic, evolving rights. Consequently, they ought not be restricted to their "primeval simplicity and vigour," but, rather, must be allowed to adapt to changing circumstances. If, as in Van der Peet, the fact of European settlement created the cultural and physical need for the Sto:lo people to engage in the sale or barter of fish, then that activity ought to be regarded as a protected aboriginal right regardless of whether it was induced and driven by European influences.

Other than stating that aboriginal practices arising after contact cannot be characterised as aboriginal rights, Lamer C.J.C. does not attempt to justify why it is that aboriginal rights cannot arise in response to European influences. Was he suggesting that aboriginal peoples who adopt European practices and habits cease to be aboriginal? As anthropologist Robin Ridington has explained, "aboriginal cultures do not disappear when they come into contact with modern technology. Aboriginal people do not cease to be aboriginal by eating pizza, or ... by driving motor vehicles, teaching school, or working at skilled wage labour." Meanwhile, there is nothing in section 35(1) of the Constitution Act, 1982 that supports the proposition that aboriginal rights must be rooted solely in pre-contact practices.

In addition to contradicting the rejection of frozen rights theory in Sparrow, Lamer C.J.C.'s rejection of constitutional protection for incidental practices that

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83. Supra, note 49 at 397: 'Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.'
"piggyback" on aboriginal rights appears to go against the thrust of the Supreme Court of Canada's unanimous judgment in Simon v. R.\(^85\) In that case, the court held that the right of an aboriginal person exercising a treaty right to hunt included the ability to engage in "those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."\(^86\) Meanwhile, in Saanichton Marina Ltd. v. Claxton, the British Columbia Court of Appeal held that the Tsawout band's 1852 treaty right to "carry on our fisheries as formerly," included the protection of the place where the band exercised that right. This entitled the band to receive a permanent injunction to prohibit a proposed marina from further development, since the marina would disrupt the band's fishery protected under treaty. As the court explained:

Construction of the marina will derogate from the right of the Indians to carry on their fisheries as formerly in the area of Saanichton Bay protected by the treaty. To begin with it will limit and impede their right of access to an important area of the bay. Further they will not be able to carry on the important stationary crab fishery as formerly. ... The development, while only a small area of the bay, will have a harmful impact on the right of fishery granted to the Indians by treaty.\(^87\)

While these "reasonably incidental" rights are not dealt with in the treaties in Simon and Saanichton Marina respectively, they are integral to the exercise of the rights that are protected under the treaties considered therein. A strict interpretation of the treaties, or of aboriginal rights generally, would ostensibly preclude reasonably incidental rights from receiving protection. However, the flexible interpretation of aboriginal treaties articulated by the Supreme Court of Canada in cases such as Simon, or, for that matter, the generous and liberal interpretation of aboriginal rights argued for by Lamer C.J.C. in Van der Peet, requires that they be protected because they are vital to the exercise of the rights that are explicitly protected. Where seemingly-extraneous matters are vital to the adequate exercise of aboriginal or treaty rights, they must be included as parts of those rights. These sentiments would appear to accord with Lamer C.J.C.'s professed adherence to giving section 35(1) a generous and liberal interpretation in favour of aboriginal peoples; nevertheless, he manages to depart from them without recognising this element of self-contradiction in his judgment.


\(^86\) Ibid., at 403.

In addition to Lamer C.J.C.'s majority judgment, there were two dissenting judgments rendered in Van der Peet. L'Heureux-Dube J. advocated defining the nature and extent of aboriginal rights in the "broader context of the historical aboriginal reality in Canada."88 One aspect of this broader reality, she explained, was the recognition that aboriginal rights must be construed in light of the special fiduciary relationship that exists between the Crown and aboriginal peoples in Canada.89 In defining aboriginal rights in this fashion, L'Heureux-Dube J. departed from the Chief Justice's focus on specific aboriginal practices, traditions, and customs, which she held looked only at discrete parts of aboriginal culture in a manner separate and apart from the general culture of the peoples in question. She maintained that the notion of "integral part of aboriginal peoples' distinctive cultures" referred not to individual aboriginal practices, but the distinctive cultures from which those practices arose.90 In light of this conclusion, L'Heureux-Dube J. agreed with the "social test" formulated by Lambert J.A. in finding that the courts' emphasis should be placed on the significance of the activities to the aboriginal peoples, not the activities themselves.91

In opposition to the majority's findings, L'Heureux-Dube J. determined that all practices, traditions, and customs connected to the self-identity and self-preservation of organised aboriginal societies are deserving of protection by section 35(1), regardless of the whether the aboriginal activities described were pre- or post-contact in origin.92 As she explained, "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live."93 To be recognised as an aboriginal right, L'Heureux-Dube J. determined that an aboriginal activity must have formed an integral part of a distinctive aboriginal culture for a substantial and continuous

88. Supra, note 3 at para. 105.
89. Ibid., at para. 144.
90. Ibid., at paras. 156-7.
91. Ibid., at para. 157.
92. Note L'Heureux-Dube J.'s comments, ibid., at para. 166: "Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization."
93. Ibid., at para. 172. Note also her comments at para. 179: "...[D]istinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society."
period of time. She further found that this period of time should be assessed on the following criteria: the type of aboriginal practices, traditions and customs; the particular aboriginal culture and society, and; a reference period of roughly twenty to fifty years. On this basis, she held that the appellant possessed an aboriginal right to sell salmon for money as a modern incarnation of a traditional Sto:lo practice of selling and bartering salmon for livelihood, support, and sustenance purposes.

McLachlin J.’s dissenting judgment differed from the other two judgments’ characterisations of what constituted an aboriginal right. She held that courts must look to “what the law has historically accepted as fundamental aboriginal rights.” In practical terms, this meant adopting an approach that: recognised that section 35(1) had dual purposes, namely to preclude extinguishment of rights and to provide a solid foundation for the settlement of aboriginal claims; was liberal and generous towards aboriginal interests; contextualised the aboriginal claim in light of the historic way of life of the people asserting the claim, and; was faithful to the position of the Crown as a fiduciary to aboriginal peoples throughout Canadian history.

In the course of her judgment, McLachlin J. distinguished between aboriginal rights and their exercise. While she characterised aboriginal rights as being understood in broad, general terms that remained constant over centuries, she stated that the exercise of those rights was capable of adopting many forms and variances in respect of time and place. What had to be determined in Van der Peer, in her analysis, was whether the appellant possessed an aboriginal right to sell or barter fish, and, if so, if the manner in which the appellant acted was an exercise of that right. McLachlin J. held that to ignore this fundamental distinction was “to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all people must, to the changes in the society in which they live.”

94. Ibid., at para. 178.
95. Ibid., at para. 202: “The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlach and the like; he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money.”
96. Ibid., at para. 227.
97. Ibid., at para. 232.
98. Ibid., at para. 238.
99. Ibid., at para. 240. See also her comments, ibid., at para. 250: “The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures,
McLachlin J. explicitly rejected the Chief Justice’s assertion that aboriginal rights were comprised only of those rights that existed prior to contact. All that was necessary under McLachlin J.’s characterisation of aboriginal rights was an established continuity between the practice at issue and the traditional right of the aboriginal group in question. She did agree, however, with the majority’s characterisation that incidental rights could not qualify as aboriginal rights since they were not central to aboriginal cultures or social organisations. From her analysis of the evidence led at trial, she determined that the appellant did possess an aboriginal right to sell or barter salmon in sufficient levels necessary to maintain traditional levels of sustenance, namely to provide basic housing, transportation, clothing, and amenities. She characterised this right as “the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form.”

The Van der Peet decision is significant for its discussion of the nature and extent of aboriginal rights and the various attempts by the three judgments in the case to provide parameters for such a definition. In this sense, it is of much wider influence and importance than either the Gladstone or N.T.C. Smokehouse decisions that were released along with it, or the earlier fishing cases of R. v. Nikal and R. v. Lewis. Its analysis of aboriginal rights and their existence transcends its application to fishing rights and extends to the entirety of the aboriginal rights that may be found to exist under section 35(1) of the Constitution Act, 1982. It is this aspect of Van der Peet that is most noteworthy, not its discussion of the particular fishing rights at issue before the court. As with the

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100. Ibid., at para. 247: “One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right.”

101. Ibid.


103. Ibid., at para. 279.

104. Ibid., at para. 278.

105. Supra, note 47.

106. Supra, note 48.

107. Supra, note 102.

108. Supra, note 102.
The significance of the *Van der Peet* case in ensuing years will be for its role as part of the Supreme Court of Canada's first attempts to grapple with the definition and articulation of aboriginal rights in section 35(1).

**R. v. Badger**
An equally noteworthy case dealing with section 35(1) rights decided by the Supreme Court of Canada this year was *R. v. Badger*. Unlike *Van der Peet*, the *Badger* case dealt with treaty rights, in particular the right to hunt.

In *Badger*, the appellants, Messrs. Badger, Kiyawasew, and Ominayak, were Treaty No. 8 Indians who had all been charged under the Alberta *Wildlife Act* while hunting moose on privately owned land within the boundaries of lands that had been surrendered under the treaty. The treaty, signed in 1899, provided the aboriginal parties to the treaty with the right to hunt over the territories surrendered, save for lands that had been taken up for settlement, mining, lumbering, trading, or other purposes. However, in 1930, the federal government promulgated the *Natural Resource Transfer Agreements* ("N.R.T.A.") whose terms overlapped with some of the issues that had been covered by Treaty No. 8. The N.R.T.A. significantly affected the terms of Treaty No. 8, and, in particular, the rights of the appellants in *Badger*.

The N.R.T.A. sought to rectify an imbalance caused by the terms creating the provinces of Manitoba, Saskatchewan, and Alberta. When those provinces were admitted into Confederation, they did so on less favourable terms than the other Canadian provinces. The other provinces had retained the beneficial interest in Crown lands existing within their boundaries, including mineral and resource rights, through the operation of section 109 of the *Constitution Act, 1867*. The statutes creating and admitting Manitoba, Saskatchewan, and Alberta into Confederation had pre-empted the operation of section 109 by providing that the interests in Crown lands, etc. within the new provincial boundaries would remain with the federal Crown. The N.R.T.A. was intended to place the provinces of Manitoba, Saskatchewan, and Alberta on an equal footing with the other Canadian provinces by giving them the same interest in Crown lands existing within their jurisdictional boundaries.

The transfer of lands and resources from the federal government to Manitoba, Saskatchewan, and Alberta through the N.R.T.A. was not unconditional. Each
province had to make land available to the federal Crown to fulfill the outstanding treaty land entitlements\(^\text{110}\) owed to the aboriginal peoples:

All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.\(^\text{111}\)

The N.R.T.A. also provided for the application of provincial game laws to the aboriginal peoples residing in those provinces:

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.\(^\text{112}\)

In addition, the N.R.T.A. allowed for the exercise of aboriginal hunting for food during all seasons on all unoccupied Crown lands and any other lands to which the aboriginal peoples had a right of access. The pivotal question before the Supreme Court of Canada in *Badger* was whether the appellants had a right of access to the private lands they were hunting on when they were charged.

The trials and appeals of the three men had been held together. All were convicted at trial. Their appeals of those convictions were unsuccessful before both the Alberta Court of Queen's Bench and the Alberta Court of Appeal. At the Supreme Court of Canada level, the appeals of Messrs. Badger and Kiyawasew

\(^{110}\) Treaty land entitlements are promises of land made to aboriginal groups in treaties, such as a grant of a designated amount of land (e.g. one half-acre) to each individual in a signatory band.

\(^{111}\) See S.C. 1930, c. 29, s. 11, S.C. 1930, c. 41, s. 10, and S.C. 1930, c. 3, s. 10, which were incorporated into the *Constitution Act, 1930* (U.K.), 20-21 Geo. V., c. 26.

\(^{112}\) S.C. 1930, c. 29, s. 13, S.C. 1930, c. 41, s. 12, and S.C. 1930, c. 3, s. 12.
were dismissed. The court found that the land they had been hunting on was visibly being used and thus constituted land to which they had no right of access either under Treaty No. 8 or the N.R.T.A. As for Mr. Ominayak, his appeal was allowed and a new trial directed.

The primary judgment in Badger was rendered by Cory J. It agreed with the precedent established by the Supreme Court of Canada's decision in R. v. Horsemanto that the hunting rights guaranteed under Treaty No. 8 had been "merged and consolidated" by the N.R.T.A. Cory J. found that this merger and consolidation eliminated the commercial aspect of those rights that had existed under Treaty No. 8 and expanded the scope of the territory over which the right to hunt for food could be pursued. Unlike the earlier decision in Horsemanto, however, he found that the N.R.T.A. did not extinguish or replace the hunting rights guaranteed under the treaty. Instead, it merely modified those rights where they came into conflict with the N.R.T.A. As he explained:

... [T]he existence of the NRTA has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended. ... [T]he Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. ... Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights.

Cory J. found that the rights guaranteed under Treaty No. 8 were not unlimited and were explicitly made subject to future regulation. Nevertheless, he explained that the N.R.T.A. language outlining the right to hunt for food must be understood in conjunction with the promises made to the aboriginal peoples in Treaty No. 8. Both Treaty No. 8 and the N.R.T.A. circumscribed the area within which the right to hunt for food could be exercised. The areas in which the appellants had been hunting had been lands included in the 1899 surrender, but were privately owned at the time of the appeal. As mentioned earlier, the treaty provided the aboriginal signatories with the right to hunt over the territo-

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113. The court found that the treaty right to hunt for food extended to private land, but only to private land where such hunting would not be incompatible with the use that the land was being put to. The test established by the Supreme Court in Badger to make this determination was what it referred to as the "visible, incompatible use" test. See ibid., at paras. 49-66.


115. Supra, note 4 at 342–3.

116. Ibid., at 343.
ries surrendered, save for lands that had been taken up for settlement, mining, lumbering, trading, or other purposes. Therefore, even if the lands hunted upon by the appellants were privately owned, they had to be “taken up” in the manner described in the treaty to prevent the appellants from being able to exercise treaty hunting rights over them.\textsuperscript{117}

Cory J. found that evidence led at trial indicated that in 1899, the Treaty No. 8 Indians would have understood that land was being “taken up” when it was put to a use incompatible with hunting. While they would not have understood the concept of private ownership, they would have understood that lands were “taken up” and not available for hunting when buildings or fences were erected, or the lands were visibly being used as farms. However, abandoned buildings would not necessarily signify that lands were “taken up” in a manner so as to prohibit the exercise of their treaty hunting rights.\textsuperscript{118} Thus, Cory J. concluded that interpreting the treaty according to the aboriginal peoples’ understanding of its terms meant that the geographical limitation to be imposed was one based on the concept of “visible, incompatible land use.”\textsuperscript{119} He found that the oral history of the Treaty No. 8 Indians revealed a similar understanding of the treaty and its promises.\textsuperscript{120} The question, then, in the case before him was whether the appellants were hunting on lands put to visible, incompatible use. If so, they could not rely on the protection of their treaty rights.

Mr. Badger, had been hunting a moose on brush land with willow regrowth and scrub when he was charged. There were no fences or signs posted on the land indicating that it was private property. There was, however, a farm house located a quarter of a mile from where Mr. Badger shot the moose. Moreover, the farm house did not appear to be abandoned. Mr. Kiyawasew had been charged while hunting on a snow-covered field without fences. He had testified that he had passed old and run-down barns and that signs were posted on the land, but he was unable to read them from the road. Evidence indicated that in the fall, a crop had been harvested from the field he was hunting on. Mr. Ominayak had been charged while hunting on uncleared muskeg, with no fences, signs, or buildings in the vicinity of where he had shot a moose. While the situations involving Messrs. Badger and Kiyawasew were held to have failed the “visible, incompatible land use” test, Mr. Ominayak’s situation was not as clear.

\textsuperscript{117.} \textit{Ibid.}, at 344.
\textsuperscript{118.} \textit{Ibid.}, at 345.
\textsuperscript{119.} \textit{Ibid.}
\textsuperscript{120.} \textit{Ibid.}, at 347-8.
In looking to the regulations imposed on Mr. Ominayak by the Alberta *Wildlife Act*, which applied by virtue of section 12 of the N.R.T.A.,\(^{121}\) Cory J. determined that the existence of conservationist legislation in effect at the time Treaty No. 8 was signed indicated that conservation was a legitimate basis for limiting treaty rights and was understood by the Indians as such.\(^{122}\) Cory J. determined that paragraph 12 of the Alberta N.R.T.A. explicitly contemplated the limiting of hunting through provincial legislation designed for conservation purposes.\(^{123}\) Consequently, he concluded that, by the terms of the treaty and the N.R.T.A., the provincial legislation would apply to Mr. Ominayak as long as it was aimed at the conservation of game.\(^{124}\) Cory J. found, however, that the licensing provisions of the *Wildlife Act* were only partially directed towards conservation issues. Therefore, he held that ascertaining whether the Act's requirement that Mr. Ominayak obtain a licence to hunt infringed upon his rights under Treaty No. 8, as modified by the N.R.T.A., should be determined by using the justificatory test created in *Sparrow*.\(^{125}\)

Cory J. determined that the licensing scheme for hunting established by the *Wildlife Act* and its regulations resulted in a prima facie infringement of the right to hunt established by Treaty No. 8, as modified by the N.R.T.A.\(^{126}\) The licensing scheme was held to have two objectives: public safety and conservation. The public safety aspect was found not to infringe the modified treaty right to hunt; however, the conservation goal was deemed to have had the effect of limiting the modified treaty right to hunt, thereby infringing that

\(^{121}\) In the absence of section 12 of the N.R.T.A., the *Wildlife Act* would not have applied to this situation. Aboriginal peoples fall under exclusive federal legislative jurisdiction by virtue of section 91(24) of the *Constitution Act, 1867*. While section 88 of the *Indian Act* allows provincial laws of general application to apply to status Indians by referential incorporation, the operation of section 88 would be precluded in the *Badger* situation since section 88 applies only where the subject matter is not covered by a treaty. Since the hunting rights in question were derived from Treaty No. 8, section 88 would not apply.

\(^{122}\) *Supra*, note 4 at 352. It is suggested that determining, on the one hand, that the aboriginal signatories understood that conservation was a legitimate basis for limiting treaty hunting rights and concluding, on the other, that implementing Crown legislation for that purpose would be understood as an instrument of conservationist purposes by the aboriginals is a more complicated link than Cory J. suggests in *Badger* and requires more evidence than that cited in his judgment.

\(^{123}\) *Ibid.*

\(^{124}\) *Ibid.*, at 353.

\(^{125}\) *Ibid.* See the discussion of Cory J.'s application of the *Sparrow* test to situations involving treaty rights, *infra*.

\(^{126}\) *Ibid.*, at 357.
right. While, on Cory J.'s application of the Sparrow justificatory test to treaty rights, provincial regulations aimed at conservation were held to be valid if they were not unreasonable in their infringement of those rights, he determined that the Wildlife Act's licensing requirements did constitute an unreasonable infringement. The Act purported to require Treaty No. 8 Indians to apply and pay for licences to exercise their treaty rights to hunt; moreover, it did not provide for aboriginals' preferential access to the limited number of licences available. Cory J. found that this effect clearly conflicted with the treaty and N.R.T.A. provisions. As he explained:

The present licensing system denies to holders of treaty rights as modified by the NRTA the very means of exercising those rights. Limitations of this nature are in direct conflict with the treaty right. Therefore, it must be concluded that s. 26(1) of the Wildlife Act conflicts with the hunting right set out in Treaty No. 8 as modified by the NRTA.

Having demonstrated the existence of a prima facie infringement of Mr. Ominayak's modified treaty right to hunt, Cory J. held that the provincial government had to justify that infringement according to the standard established in Sparrow. However, at trial, the provincial government had not led any evidence with respect to the justification of its infringement upon the modified treaty hunting rights. Cory J. determined that in the absence of such evidence, the Supreme Court could not supply its own justification; therefore, he ordered a new trial in order to deal with the justification question.

The additional reasons provided by Sopinka J. agreed with the disposition of the appeal and the reasons thereof provided by Cory J., with the exception of his handling of the relationship between Treaty No. 8, the N.R.T.A., and section 35(1) of the Constitution Act, 1982. Rather than viewing the N.R.T.A. as amending the rights contained in the treaty, as Cory J. had done, Sopinka J. regarded the N.R.T.A. as replacing the treaty rights entirely:

To characterize the NRTA as modifying the Treaty is to treat it as an amending document to the Treaty. This clearly was not the intent of the NRTA. ...

127. Ibid., at 358.
128. Ibid., at 359-60.
129. Ibid., at 360.
130. Cory J. held that, by virtue of section 12 of the N.R.T.A., the provincial government occupied the same position that the federal government had occupied in Sparrow, therefore it had to justify the imposition of its regulations in the manner established by the Sparrow test: see ibid.
131. Ibid., at 361.
If the NRTA merely modified the Treaty, an Indian hunting on Treaty lands could claim the right under the Treaty while an Indian hunting in other parts of the province could claim only under the NRTA. It might be suggested that the NRTA both amended the Treaty and, as an independent constitutional document, amended the Constitution. If this were the intent, it is difficult to understand why all the terms of the Treaty relating to the right to hunt for food were replicated in the NRTA.\footnote{132}

Consequently, Sopinka J. held that, after the passage of the N.R.T.A., it was the sole source of the right of aboriginal peoples to hunt for food that had been provided in Treaty No. 8:

... [T]he proper characterization of the relationship between the NRTA and the Treaty rights is that the sole source for a claim involving the right to hunt for food is the NRTA. The Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting in the interpretation of the NRTA, but it has no other legal significance.\footnote{133}

Since Sopinka J. found that the N.R.T.A. was the sole source of the aboriginal right to hunt for food, he determined that that right was not a treaty right protected by section 35(1). The right still received constitutional protection, but as a result of the fact that the N.R.T.A. was, itself, a constitutional document.\footnote{134} Although the rights asserted by the appellants were found by Sopinka J. not to be section 35(1) treaty rights, he held that the canons of treaty interpretation were nevertheless applicable since they arise "out of the nature of the relationship between the Crown and aboriginal peoples."\footnote{135} He found that the N.R.T.A.'s protection of aboriginal rights to hunt for food was not absolute, but was expressly subject to justifiable limitation, such as legislation premised on conservationist practices and principles.\footnote{136} Despite his disagreement over Cory

\footnote{132} Ibid., at 330.
\footnote{133} Ibid., at 331.
\footnote{134} Ibid.
\footnote{135} Ibid.
\footnote{136} Ibid., at 332:

These principles apply equally to the rights protected by the NRTA; the principles arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that, whatever document in which that relationship has been articulated, the principles should apply to the interpretation of that document. I find support for this reasoning in the prior decisions of this Court concerning the interpretation of the NRTA.

At the time the treaties that preceded the NRTA were signed, there was already in place legislation enacted for conservation purposes which affected the
J.'s characterisation of the rights in issue, Sopinka J. did agree with his finding that the determination of whether the constitutionally-protected rights of aboriginals to hunt for food under the N.R.T.A. could be limited by legislation was to be made by analogy to the Sparrow justificatory test:

Although the Sparrow test was developed in the context of s. 35(1), the basic thrust of the test, to protect aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para. 12 of the NRTA as to federal power to legislate in respect of Indians.\(^1\)\(^\_\)\(^3\)

The Badger decision is significant for its discussion of the important status of Indian treaties under Canadian law, as well as for its statements regarding the responsibilities of the Crown under the treaties and its emphasis on looking at treaties in light of aboriginal understandings. In fact, the Badger decision consolidates many of the principles of treaty interpretation that have been formulated over the years by the Supreme Court.\(^1\)\(^\_\)\(^3\)\(^8\) Despite its recognition of the solemnity of treaties and the necessity of upholding the honour of the Crown throughout its dealings with the aboriginal peoples,\(^1\)\(^\_\)\(^3\)\(^9\) the Badger decision marks the Supreme Court's acceptance of the Crown's ability to unilaterally extinguish, modify, or alter existing treaty rights, as was held to have been done by the N.R.T.A. Such a finding runs contrary to the Crown's general fiduciary

Indians' rights. Indeed, there existed total bans on the hunting of certain species. As a result, at the time the treaties were signed and, even more so, at the time the NRTA was agreed to by the provinces and the federal government, it would have been clearly understood that the rights of Indians pursuant to either document would be subject to governmental regulation for conservation purposes. The rights protected by the NRTA thus cannot be viewed as being constitutional rights of an absolute nature for which governmental regulation is prohibited.

137. Ibid., at 333-4.

138. Ibid., at 331, per Sopinka J.

139. Ibid., per Sopinka J.: "... [T]reaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples." See also ibid., at 340, per Cory J.:

... [A] treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. ... [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.
duty to act in the best interests of aboriginal peoples as well as its specific treaty obligations under the various treaties affected by the N.R.T.A. Maintaining the honour of the Crown and avoiding sharp practice in all dealings with aboriginal peoples, principles explicitly endorsed in Badger,140 are clearly offended by finding that the effects of the N.R.T.A. may, unilaterally and without consultation or consent, override or alter the nature of solemn, pre-existing agreements. This was recognised by the additional reasons provided by Kerans J.A. in the Alberta Court of Appeal's disposition of Badger:

My concern is that whatever happened in 1930 happened without the participation of one party to the Treaty. The aboriginal Canadians were not invited to participate in the negotiations leading to the 1930 agreement. I incline to the view that they did not believe they were changing any native rights. I fear the notion of "merger and consolidation" is the result of a patina applied by a later generation of judicial interpretation. That is the reason for my disquiet, and for these additional reasons.141

Another difficulty with the Badger decision is that Cory J. concluded that the justificatory test formulated in the Sparrow decision, a case dealing exclusively with aboriginal rights, applied equally to treaty rights "in most cases."142 This finding is problematic because of the significant distinctions that exist between aboriginal and treaty rights.143 Meanwhile, why the application of the Sparrow test to treaty rights in Badger was qualified to render it applicable only to "most cases" as opposed to all cases, was not discussed in Cory J.'s judgment.

In making the Sparrow test applicable to treaty rights, at least in the matter before the court in Badger, Cory J. expressly noted the distinction between aboriginal and treaty rights. As he explained:

There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in Calder ... they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to

140. Supra, note 139.
142. Supra, note 4 at 354. Note, however, the opposition to the imposition of the Sparrow test to the situation before the court by Sopinka J., ibid. Despite this opposition, Sopinka J. did find that the principles underlying the Sparrow test, though not the test itself, were applicable to the facts in Badger.
contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.\textsuperscript{144}

Cory J. also found that there were “significant aspects of similarity” between aboriginal rights and treaty rights. Specifically, he held that:

Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged. See \textit{Horseman, supra}, at p. 936; \textit{R. v. Sikyea}, [1964] 2 C.C.C. 325 (N.W.T.C.A.), at p. 330, aff’d [1964] S.C.R. 642; and \textit{Moosehunter, supra}, at p. 293. It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.

In addition, both aboriginal and treaty rights possess in common a unique, \textit{sui generis} nature. … In each case, the honour of the Crown is engaged through its relationship with the native peoples.\textsuperscript{145}

On the basis of these similarities, as well as the wording of section 35(1) — which he found “supports a common approach to infringements of aboriginal and treaty rights”\textsuperscript{146} — Cory J. found that the \textit{Sparrow} test was applicable to the situation in \textit{Badger}.

From Cory J.’s consideration of the similarities and differences between aboriginal and treaty rights in \textit{Badger}, it would appear that the basis for his decision rests simply upon the fact that aboriginal and treaty rights are grouped together in section 35(1) rather than because of any reasoned analysis of why aboriginal and treaty rights should be treated equally with respect to their limitation by governmental legislative initiatives. Despite offering a cursory discussion of the nature of aboriginal and treaty rights, Cory J. provides no additional reasoning on which to found his conclusion. It would appear, however, that he did not want his judgment in \textit{Badger} to be understood as an authoritative proposition for the notion that the \textit{Sparrow} test automatically applies to potential legislative infringement of both aboriginal and treaty rights. Just as he had stated earlier in his judgment that the \textit{Sparrow} test applies equally to treaty rights “in most cases,” he prefaced his conclusions by stating that, in justifying legislative infringements of treaty rights, “the recognized principles to be considered and applied in justification should generally

\begin{itemize}
  \item \textsuperscript{144} \textit{Supra}, note 4 at 354.
  \item \textsuperscript{145} \textit{Ibid}.
  \item \textsuperscript{146} \textit{Ibid.}, at 355.
\end{itemize}
be those set out in Sparrow..." While Cory J. found that the principles established in Sparrow were not exhaustive, he explained that they "may serve as a rough guide when considering the infringement of treaty rights." From the tone of his judgment, as well as its self-imposed qualifications, Cory J.'s decision in Badger can hardly be understood as a hearty endorsement of the mandatory application of the Sparrow test to treaty rights.

For the foregoing reasons, the judgments in Badger are offensive to the solemn and binding nature of Crown-Native treaties, the representations of the Crown therein, and in the negotiations leading up to their conclusion. The Supreme Court's acceptance of the Crown's actions in unilaterally extinguishing, modifying, or altering the terms of solemn and binding treaties that it had entered into with the aboriginal peoples is repugnant to the Crown's position as fiduciary and the concomitant responsibilities it owes to its beneficiaries. Finally, the constitutional affirmation and protection of aboriginal and treaty rights in section 35(1) of the Constitution Act, 1982, which incorporates the Crown's fiduciary duty to Native peoples, is, itself, offended by the Crown's powers as described in Badger. While Canadian courts have ruled that it was within the legislative ability of the Crown to extinguish, modify, or alter aboriginal or treaty rights prior to 17 April 1982, those courts have never answered whether taking such action offends the Crown's pre-existing fiduciary obligations to the aboriginal peoples.

147. Ibid., at 356 (Emphasis added).
148. Ibid., at 357.
149. Indeed, it is not possible to simultaneously act in the best interests of the aboriginal peoples and unilaterally eliminate rights that had been guaranteed to them in treaties.
150. Note, for example, Simon v. R. (1984), 24 D.L.R. (4th) 390 (S.C.C.), at 409, where it held that, subject to the limitation imposed by section 35(1), it is "within the exclusive power of Parliament under s. 91(24) of the Constitution Act, 1867, to derogate from rights recognized in a treaty agreement made with the Indians." See also R. v. Sikyea (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), at 154:

It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s.91 of the B.N.A. Act, from doing so.

These comments in Simon and Sikyea are representative of pre-section 35(1) jurisprudence, which held that aboriginal and treaty rights could be extinguished at will be the federal Crown pursuant to its section 91(24) powers.
BLUEBERRY RIVER INDIAN BAND v. CANADA (DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)

The Crown's fiduciary obligations to aboriginal peoples was the central issue in the Blueberry River case, also known as the Apsassin case, which concerned the surrender of land and mineral rights that had been obtained under an adhesion to Treaty No. 8 signed in 1900. The people represented in the Apsassin action were members of the Blueberry River and Doig River Bands. Prior to 1977, they had all been members of the same band, known from 1962 to 1977 as the Fort St. John Band and, prior to that, the Beaver Band of Fort St. John. Since all persons represented in the Apsassin action were either Dunne-Za or Cree by linguistic grouping, they will be collectively referred to herein as the "Dunne-Za Cree," as they were by the Federal Court of Appeal in its disposition of the Apsassin case.\(^{151}\)

Traditionally, the Dunne-Za Cree were hunting and trapping people who lived in and around the Peace River country in northeastern British Columbia. Until the latter part of the nineteenth century, they had remained relatively free of settler incursions into their territory. In 1899, spurred on by geological surveys that indicated that territories in the northwestern parts of Canada likely contained valuable mineral and oil deposits, the effects of the discovery of gold in the Klondike in 1896,\(^{152}\) and increased settler activity, the federal government commenced treaty negotiations with the aboriginal peoples occupying lands in the extreme northwest corner of Saskatchewan, most of northern Alberta, part of the Northwest Territories, and northeastern British Columbia lying to the east of the Rocky Mountains, including the Peace River country. While there had been reports prior to the treaty negotiations that the aboriginal peoples in these areas were suffering from

\(^{151}\) [1993] 2 C.N.L.R. 20 (F.C.A.) [hereinafter "Apsassin, FCA"].


From all appearance there will be a rush of miners and others to the Yukon and the mineral regions of the Peace, Liard and other rivers in Athabasca during the next year ... others intend to establish stopping places, trading posts, transportation companies and to take up ranches and homesteads in fertile lands of the Peace River. ... They (the Indians) will be more easily dealt with now than they would be when their country is overrun with prospectors and valuable mines be discovered.
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that fact appeared to have had little effect on the government’s desire to enter into treaty negotiations.

Upon surrendering their traditional lands to the Crown under Treaty No. 8, the Dunne-Za Cree were promised a reserve that would be set aside for them whenever the state of non-aboriginal settlement necessitated the establishment of a reserve. Until that time, the Dunne-Za Cree were to have their regular use of their traditional territory. A reserve was set aside for the Dunne-Za Cree by Order in Council in 1916 and designated as Indian Reserve No. 172 (‘‘IR 172’’). In 1940, a private individual applied for a permit to explore for oil on IR 172. Subsequently, the Crown obtained a surrender of the Dunne-Za Cree’s mineral rights to the reserve for the purposes of leasing them for the Dunne-Za Cree’s benefit. An exploration permit was then issued, with the money received being credited to the Dunne-Za Cree. In the latter stages of World War II, oil and gas exploration was conducted on and in the vicinity of IR 172. Around this same time, interest in IR 172 was peaked on another ground.

Near the end of World War II, the Minister of Mines and Resources, J. Allison Glen — whose portfolio included Indian Affairs as well as acquiring land for returning war veterans — expressed interest in obtaining the surrender of IR 172 so that land could be made available for the veterans and their families. Glen initiated a series of events which culminated in the surrender of the reserve in September, 1945. Although the reserve was appraised at $93,000, negotiations between the Department of Indian Affairs and Northern Development

153. There had been long periods of famine in the area in the nineteenth century which the Canadian government only became fully aware of after the surrender of Rupert’s Land by the Hudson’s Bay Company to Canada in 1870. For example, as Daniel, ibid., explained at 56-7: “During the winter of 1887-88, there were reports that Indians in Fort St. John were killing their horses for food, that one of the Hudson’s Bay Company’s cattle had been killed, and that more might be killed unless the government aided the Indians and also brought law to the area.”

154. Indeed, little aid had been provided to the aboriginal peoples residing in these areas prior to the signing of Treaty No. 8. Moreover, as Daniel indicates, ibid., at 58, “... [W]hen Treaty Eight was finally signed, it did not include the Isle _ la Crosse area from which there had been many reports of hardship and requests for a treaty, but did include most of the areas of known mineral wealth and agricultural value.”

155. Supra, note 151 at 35–6.

156. Glen’s actions contradicted the Department of Indian Affairs’ (“DIAND”) policy against the sale of surplus Indian reserve lands, as indicated in the Director’s Annual Reports of 1939 and 1945, as noted, ibid., at 32, per Stone J.A., and at 76, per Isaac C.J. This point was not discussed by the trial judge in his reasons for judgment despite its corroboration by expert evidence on governmental policies and administrative practices relating to Indian affairs in Canada.
("DIAND") and the Director, the *Veterans' Land Act*\(^{157}\) ("DVLA"), who had assumed the responsibility of acquiring lands for the returning veterans, resulted in only $70,000 being paid for the reserve.\(^{158}\) Title to IR 172 was then transferred to DVLA by *Letters Patent*,\(^{159}\) whereupon, between, 1948 and 1956, it was subdivided and all but four lots sold to veterans by way of agreements of sale. Some of the money paid for IR 172 was used by DIAND in 1950 to purchased other lands further north, nearer to the trap lines, which were to become the Dunne-Za Cree's new reserves. The four remaining lots, which were unsuitable for farming, were retained by DVLA until 1977, when they were sold to oil companies.

When the Fort St. John Band was divided into the Blueberry River and Doig River Bands in 1977, a concerned DIAND officer inquired into when the Dunne-Za Cree had lost the mineral rights to IR 172. He brought his discoveries to the attention of the Dunne-Za Cree and advised them to see a lawyer. In September, 1978, the Dunne-Za Cree commenced an action against the Crown alleging negligence, breach of fiduciary obligation, and fraud.

At trial,\(^{160}\) Addy J. found that the Crown had a fiduciary duty to the Dunne-Za Cree that arose upon their surrender of IR 172 in 1945. That duty did not arise upon the surrender of the mineral rights to IR 172 in 1940, though. The nature of the Crown's duty, according to Addy J., was to take all reasonable efforts to secure the best possible price for IR 172.\(^{161}\) This meant that DIAND, which had obtained the surrender, was charged with the onus of demonstrating that it had obtained a full and fair purchase price from DVLA. By failing to discharge that onus, DIAND was found to have breached its duty. DIAND was not held liable for the breach, however, due to the lapse of the applicable statutory limitation period for such a claim.

Under Addy J.'s formulation, the Crown's duty with respect to IR 172, which was administered by DIAND, ceased once the *Letters Patent* had been issued to

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\(^{157}\) The *Veterans' Land Act*, 1942, 6 Geo. VI, c. 33.

\(^{158}\) Note that when these negotiations began, DIAND and DVLA were both under the jurisdiction of the Minister of Mines and Resources.

\(^{159}\) An instrument issued by the Crown which grants or confirms the patentee's right to exclusive possession and enjoyment of land.


DVLA in 1948. The fiduciary duty that had been attached to the reserve was then transformed into a duty attached to the proceeds, which remained with DIAND; it did not follow the title to the reserve into DVLA's hands. In any event, Addy J. determined that DVLA was a corporation sole,\(^1\) in which capacity it obtained and held the land for the purposes set forth in \textit{The Veterans' Land Act, 1942}.\(^2\) As a result, he concluded that the sale from DIAND to DVLA was, in effect, a sale from the Crown to an independent third party, thereby removing any appearance of self-dealing on the part of the Crown. He also exonerated DIAND from having committed, or intending to commit, fraud or wilfully concealing its actions from the Dunne-Za Cree.

The Dunne-Za Cree appealed the trial court's decision, alleging that the Crown breached its fiduciary obligations arising both prior and subsequent to the 1945 surrender. They also claimed that the Crown's fiduciary obligations relating to IR 172 were not extinguished by the transfer of title to the reserve to DVLA, but remained outstanding until the divided parcels of the reserve were deeded to individual purchasers. Further, they insisted that their claims were not statute-barred or prohibited by laches. The Crown cross-appealed the trial judge's finding that it had breached its fiduciary duty by failing to obtain the highest possible price for the sale of IR 172. The majority judgment of the Federal Court of Appeal, Isaac C.J. dissenting, dismissed the appeal and the cross-appeal.\(^3\)

The majority determined that DIAND had a fiduciary obligation to advise the Dunne-Za Cree whether it was in their best interests to surrender their reserve for sale or lease. That duty stood ahead of the Crown's own desire to obtain IR 172 for distribution to the returning veterans. Nevertheless, on the basis of the evidence presented and the precedent established by the Supreme Court of Canada in \textit{Stein v. The Ship “Kathy K”}\(^4\) — which held that an appellate court should not reverse a trial judge's finding of fact absent "palpable and overriding error" which affected the judge's assessment of the factual evidence presented — the majority held that the Crown did not breach its duty to the Dunne-Za Cree prior to and including the 1945 surrender. The majority decision also agreed with the trial judgment in affirming that DIAND's fiduciary obligation attached

\(^{1}\) A corporation sole is a corporation consisting of only one person, whose successor becomes the corporation on the former's death or resignation.

\(^{2}\) Under section 5(1) of the Act.

\(^{3}\) \textit{Supra}, note 151.

to IR 172 ceased once the reserve was vested in DVLA in 1948. DVLA was found to be an agent of the Crown only for the purposes authorised by the Veteran's Land Act, which did not contemplate a transfer of any fiduciary responsibilities attached to IR 172.

In his dissenting judgment, Isaac C.J. determined that the mineral rights surrendered by the Dunne-Za Cree to DIAND in 1940 were not included in the surrender of IR 172 by DIAND to DVLA in 1945. Isaac C.J. insisted that the Crown breached its fiduciary duty relating to the mineral rights in either of two ways: by failing to inform the Dunne-Za Cree that the 1945 surrender was intended to include the mineral rights, if that was indeed the case, and; that it intended to sell rather than lease those rights, contrary to the terms of the 1940 surrender. Isaac C.J. also determined that the transfer of title to IR 172 by DIAND to DVLA was not a sale from the Crown to an independent third party, but an administrative transfer between Crown agencies pending the sale of the land to the returning war veterans. He disagreed with the trial and majority judgments in finding that the Crown's fiduciary obligations regarding the mineral and surface rights to IR 172 continued beyond 1948—when the Letters Patent had been issued to DVLA—and lasted until 1977, when the last parcels of IR 172 was sold by DVLA.

From these findings, Isaac C.J. held that the Crown had breached its fiduciary duty to the Dunne-Za Cree as of the date of conveyance and was liable for the damages flowing from the breach. He further held that the Dunne-Za Cree's action was not statute-barred. Citing the case of M.(K.) v. M.(H.), he favourably analogised the applicability of statutory limitation periods in the

166. As a result, Isaac C.J. found that the negotiations between DIAND and DVLA over I.R. 172 amounted to what he described as "a case of self-dealing in its most elementary form," Apsassin, FCA, supra, note 151 at 88. See also his reasoning, ibid., at 88–93, including the cases cited therein which stand for the proposition that, for the purposes of holding and acquiring land, DVLA was a representative of the Crown.

167. From his consideration of the circumstances, including the Dunne-Za Cree's reliance upon the Crown's advice as recently as 1978, Isaac C.J. fixed 1975 as the date for the commencement of the statutory limitation period. This date is based upon Isaac C.J.'s statement that this was when the Dunne-Za Cree were advised to seek legal counsel by their District Manager: see Apsassin, FCA, supra, note 151 at 96. Note, however, that at 78, Isaac C.J. indicated that the Dunne-Za Cree dated their first expression of their legal rights vis-à-vis I.R. 172 in 1977, which they maintained was when they were first advised to seek legal counsel by their District Manager.

168. (1992), 96 D.L.R. (4th) 289 (S.C.C.), where La Forest J. stressed the importance of using a broad, contextual view of the matters in issue and to consider the legislative intent behind statutes of limitation when determining whether parties ought to be precluded from commencing actions to enforce their rights by the passage of time.
Apsassin situation with their application to victims of childhood sexual abuse. Moreover, on the basis of Dickson J.'s judgment in Guerin v. R.,\textsuperscript{169} he determined that the Crown's actions constituted equitable fraud. In finding that the Crown had breached its fiduciary duty to the Dunne-Za Cree, Isaac C.J. dismissed the Crown's cross-appeal.

The Supreme Court of Canada's disposition of Apsassin departed largely from the rationales underlying the judgments rendered by the courts below.\textsuperscript{170} The court was divided over whether the 1940 surrender of mineral rights for lease was subsumed under the 1945 surrender of IR 172 for sale or lease. Gonthier J., for the majority, held that it was, while McLachlin J., with Cory and Major J.J. concurring, determined that the two surrenders were mutually exclusive. Despite the judges' disagreement, the court unanimously held — in contrast to Stone J.A.'s majority decision at the Federal Court of Appeal, but in agreement with Addy J.'s determination at trial — that the Crown did not hold any fiduciary duty to the Dunne-Za Cree prior to the surrenders.\textsuperscript{171} McLachlin J. found, instead, that the Crown only owes Indian bands a duty to prevent them from being exploited in the surrender of their lands.\textsuperscript{172} The court agreed, however, with the trial judge's assessment that the Crown did not breach any duty to the band by way of the 1945 surrender.\textsuperscript{173}

The Supreme Court found that the Crown was under a fiduciary obligation to deal with both the surface and mineral rights in the best interests of the Dunne-Za Cree once they had been surrendered. This duty encompassed both the monetary aspects of the transaction and whether the surrender was conducive to the Dunne-Za Cree's best interests at large.\textsuperscript{174} The court overturned the earlier decisions in Apsassin by finding that the Crown had not breached its duty with

\begin{itemize}
\item\textsuperscript{169} (1984), 13 D.L.R. (4th) 321 (S.C.C.), especially at 345.
\item\textsuperscript{170} Supra, note 5 (hereinafter “Apsassin, SCC”).
\item\textsuperscript{171} Ibid., at 204, per Gonthier J., and at 210, per McLachlin J.
\item\textsuperscript{172} Ibid., at 208. See the discussion of this point, below.
\item\textsuperscript{173} As McLachlin J. stated, ibid., at 214:

The interests and wishes of the Band were given utmost consideration throughout. The choice that was made — to sell the land — possessed the advantage of allowing the Band to get other lands nearer its trap lines. At the time, that was a defensible choice. Indeed, it can be argued that the sale of the surface rights was the only alternative that met the Band's apparent need to obtain land nearer its trap lines. In retrospect, with the decline of trapping and the discovery of oil and gas, the decision may be argued to have been unfortunate. But at the time, it may be defended as a reasonable solution to the problems the Band faced.

\item\textsuperscript{174} Ibid., at 212.
\end{itemize}
regard to the surface rights to IR 172. It found that the $70,000 price obtained for the reserve was not unreasonable in the circumstances. However, the court held that the Crown breached its fiduciary duty to the band when it transferred the mineral rights to IR 172 to DVLA for no consideration in 1948 since that action was inconsistent with the band’s best interests.

Although the court held that the transfer of mineral rights from DIAND to DVLA constituted a breach of fiduciary duty, it found that the transfer of rights to IR 172 was not accompanied by a transfer of the former’s fiduciary duty to the latter. Consequently, DVLA could not be held responsible for a breach of fiduciary duty to the Dunne-Za Cree since it never possessed such a duty. Meanwhile, because of the effects of the applicable provincial limitations legislation, the court held that DIAND could not be held liable for its breach of duty relating to the transfer of mineral rights to DVLA. The Supreme Court did find the Crown liable for a second breach of fiduciary duty, however, on grounds not considered by the lower courts. It determined that DIAND’s transfer of the mineral rights to DVLA was an error or mistake. Meanwhile, section 64 of the 1927 Indian Act allowed the Crown to revoke any sale or lease issued in error or mistake, even against bona fide purchasers. The court determined that DIAND was under a

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175. Ibid., at 214-15:

While the DIA received a higher appraisal, there were also appraisals giving lower value to the land. In fact, there appears to have been no alternate market for the land at the time, which might be expected to make accurate appraisal difficult. The evidence reveals the price was arrived at after a course of negotiations conducted at arm’s length between the DIA and the DVLA.

176. Ibid., at 230:

The matter comes down to this. The duty on the Crown as fiduciary was “that of a man of ordinary prudence in managing his own affairs”: Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302 at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

177. Ibid., at 231:

Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. ... In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the D.V.L.A. toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.
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fiduciary duty to use this statutory power to correct its error once the error and the potential value of the minerals that it had transferred were discovered. Since DIAND never used this statutory power, even after acquiring the requisite knowledge of the situation on 9 August 1949, it was held to be in breach of its fiduciary duty. The Supreme Court found that the Crown was not relieved of liability for this breach since the Dunne-Za Cree had filed their action on 18 September 1978, which was within the applicable statutory limitation period. However, while the Dunne-Za Cree were awarded damages for DIAND’s breach of duty, their recovery was limited to sales of mineral rights by DVLA occurring after 9 August 1949, or only 6.75 sections of the 31 that had been transferred by DIAND to DVLA in 1948.

For all of its attempts to clarify the problems and contradictions that had existed in the judgments at trial and upon appeal, the Supreme Court’s decision in Apsassin is, itself, shrouded with self-contradiction. For example, early in his judgment, Gonthier J. stressed that questions over the legal effects of Crown-Native dealings relating to reserve land ought to be considered in appreciation of the sui generis, or unique, nature of aboriginal title, which he said “requires the courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.” Yet, in stressing the need to consider the context of the surrenders, Gonthier J. ignored this same premise when he later explained that the band’s intention in the aftermath of the 1945 surrender was evidenced entirely by the terms of the surrender document and failed to account for aboriginal understandings of that document. As McLachlin J. pointed out in her judgment, “the finding of the trial judge that the Band intended to give up all rights in I.R. 172 forever is a legal finding based on his reading of the wording of the 1945 surrender rather than a finding of fact

178. Ibid., at 232:

Where a party is granted power over another’s interests, and where the other party is correspondingly deprived of power over them, or is “vulnerable”, then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other. Frame v. Smith, supra, per Wilson J.; and Hodgkinson v. Simms, supra. Section 64 gave to D.I.A. power to correct the error that had wrongly conveyed the Band’s minerals to the D.V.L.A. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.

179. Ibid., at 200.

180. Ibid., at 201. Note also his comments, ibid., at 202-3: “As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA during the negotiations ... and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement.”
based on the evidence presented at trial.”\textsuperscript{181} Gonthier J.’s conclusions were characterised by McLachlin J. as being based on a “weak evidentiary basis on which to establish and intention. ... In determining something as nebulous as intention over forty years later one must look to all available sources.”\textsuperscript{182}

The \textit{Apsassin} decision is also noteworthy for its characterisation of the Crown’s fiduciary duty to aboriginal peoples. On this point, one should consider Gonthier J.’s statement that “[a]s a fiduciary, the DIA was required to act with reasonable diligence.”\textsuperscript{183} It was accompanied by statements made by McLachlin J. that ‘the duty on the Crown as fiduciary was “that of a man of ordinary prudence in managing his own affairs”’\textsuperscript{184} and that “the Crown’s obligation was limited to preventing exploitive bargains.”\textsuperscript{185} These statements, taken on their own, are not entirely accurate appraisals of the nature of a fiduciary’s obligations. There is a significant difference between the nature and extent of a fiduciary’s duty to a beneficiary and the standard of expertise required of that same fiduciary.

A fiduciary’s duty to a beneficiary, especially in the context of Crown-Native relations, extends far beyond the characterisations provided by Gonthier and McLachlin JJ. in \textit{Apsassin}. The \textit{raison d’etre} of fiduciary doctrine demonstrates this point. As I explained in “Fiduciary Doctrine: A Concept in Need of Understanding,” the policy underlying fiduciary doctrine “is focused upon a desire to preserve and protect the integrity of socially valuable or necessary relationships which arise from human interdependency.”\textsuperscript{186} To accomplish this task, fiduciary doctrine imposes strict standards of conduct upon fiduciaries to enable beneficiaries to rely on the good faith observance of their fiduciaries’ duties. This strict standard of conduct requires that a fiduciary ascribe to high standards of morality and selflessness, as reflected in the concept of \textit{uberrima fides}, or the “utmost good faith.”\textsuperscript{187}

\textsuperscript{181} \textit{Ibid.}, at 224.
\textsuperscript{182} \textit{Ibid.}, at 224, 225.
\textsuperscript{183} \textit{Ibid.}, at 205.
\textsuperscript{184} \textit{Ibid.}, at 230.
\textsuperscript{185} \textit{Ibid.}, at 208.
\textsuperscript{186} L.I. Rotman, “Fiduciary Doctrine: A Concept in Need of Understanding,” (1996), 34 Alta. L. Rev. 821, at 826 (hereinafter “Fiduciary Doctrine”)
\textsuperscript{187} \textit{Ibid.}, at 833. Note also McLachlin J.’s statement, in \textit{Apsassin}, SCC, supra, note 5 at 209: “The person who had ceded power trusts the person to whom the power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.”
A fiduciary’s duty to a beneficiary is, therefore, a duty to act in the latter’s best interests, not merely to ensure that the beneficiary is not exploited.  

A fiduciary’s obligations to a beneficiary are thus much higher than the standard suggested in *Apsassin* and are held to a rigorous standard by the courts. Indeed, these notions were explicitly adopted by the Supreme Court in its discussion of the nature of the Crown’s fiduciary duty in the *Guerin* and *Sparrow* cases. While it may be the case that the courts will not hold a fiduciary to an unduly high standard of expertise in exercising his or her fiduciary office, the stringent nature of the fiduciary’s obligations would seem to indicate an obligation on the fiduciary to delegate certain powers or discretions to a more qualified or knowledgeable individual if such delegations are permissible in a given scenario. In the situations involving the surrender of aboriginal lands, it is not possible for the Crown to delegate its fiduciary obligations. However, the fact that the fiduciary obligations exist in such instances only because the Crown made itself a requisite intermediary in all transactions of aboriginal lands mitigates against reducing the magnitude of the Crown’s obligations from the fiduciary standard of *uberrima fides*.

**SUMMARY**

The foregoing decisions were among the most prominent of judicial decisions in Canadian aboriginal rights jurisprudence over the past year. They each raise important issues of law that transcend their application to the individual cases in which they were discussed. What may be discerned from them, collectively,

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188. This was explicitly recognised by McLachlin J. in *Apsassin*, SCC, *supra*, note 5 at 232.

189. *Supra*, note 186 at 826.

190. *Supra*, note 56.


is that the Canadian judiciary, particularly the Supreme Court of Canada, has developed a limited awareness of the need to place aboriginal rights issues in context prior to engaging in its deliberations. The cases also indicate the judiciary's growing awareness of the need to provide generous and liberal interpretations of aboriginal rights issues, including relaxing rules of evidence in some situations. What the cases also suggest, however, is that there is still a wide gulf between this recognition and its implementation. The judges do not yet have a complete map to navigate their way through aboriginal rights issues in a contextually- and culturally-appropriate manner, only bits and pieces. It remains to be seen whether they are able to acquire the rest of the pieces, assemble them together, and, most importantly, be able to interpret the map when they have finally constructed it.