Aboriginal and Treaty Rights in the Canadian Supreme Court

R. v. *Badger*: One Step Forward and Two Steps Back?
Catherine Bell

The Trickster: Integral to a Distinctive Culture
John Borrows

How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?
Kent McNeil

Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*
Leonard I. Rotman

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R. v. *Badger*: One Step Forward And Two Steps Back?

Catherine Bell

R. v. *Badger*[1] is the most recent statement by the Supreme Court of Canada on the scope of the Indian right to hunt for food recognized in paragraph 12 of the Alberta Natural Resources Transfer Agreement (NRTA).[2] The appellants, Treaty 8 Indians, were hunting on privately-owned land and were charged with various offences under the *Alberta Wildlife Act*.[3] All three were hunting in areas that had been surrendered to the Crown under Treaty 8. The issue before the Court was whether these privately-owned lands were lands to which the appellants had a "right of access" to hunt for food. The majority held that the appellants were entitled to hunt on unoccupied, privately-owned lands if the lands were not put to a visible, incompatible use. An analysis of the physical characteristics of the lands and the effect of the NRTA on the scope of Treaty 8 hunting rights led to the conclusion that only Mr. Ominayak had a right of access to hunt for food. The convictions of Mr. Kiyawasew and Mr. Badger were upheld. A new trial was ordered for Mr. Ominayak on the issue of whether section 26(1) of the *Wildlife Act*, and any regulations passed pursuant to that section, constitute an unjustifiable infringement of Mr. Ominayak's constitutionally protected right to hunt.[4]

On first hearing of this decision, one might question why the Supreme Court considered the ability of Treaty 8 Indians to hunt on unoccupied, privately-owned land an issue of national significance. The answer lies not only in the interpretation of a paragraph of the NRTA common to three provinces, but also in the Court's broader analysis of the interpretation, termination, and constitutional protection of treaty rights. In *Horseman* the Supreme Court accepted the government of Alberta's argument that hunting rights "granted" to Indians under Treaty 8 were "merged and consolidated" in paragraph 12 of the NRTA.[5] Subsequent judicial interpretation of *Horseman* maintained that this was "merely a polite way to describe extinction and replacement," rendering the NRTA the sole source of Indian hunting rights in three prairie provinces.[6] Perhaps the most significant aspect of *Badger* is the rejection of the extinction and replacement interpretation of the NRTAs. This aspect of the decision, combined with the majority's decision to read the Indian understanding of rights of access under Treaty 8 into the interpretation of the NRTA, renders *Badger* a significant step forward for Treaty Nations which continually experience judicial reluctance to give substantive meaning to treaty promises.[7]

At the same time, *Badger* is a disappointing decision. Considered in the broader context of whether, as a matter of law, treaty rights can be extinguished without consent of the First Nation signatories, *Badger* may be taking treaty jurisprudence two steps back. Comments by the Supreme Court in decisions rendered before and after *Horseman* led to speculation about the development of a new judicial framework for assessing the legal force of treaty guarantees.[8] *Horseman* was decided three weeks before the *Sioui* decision in which Lamer C.J. stated that "a treaty cannot be extinguished without the consent of the Indians involved."[9] This

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1. [1996] 2 C.N.L.R. 77 (S.C.C.)
2. Paragraph 12 of Natural Resources Transfer Agreement provides that provincial laws respecting game apply to the Indians within the boundaries of the province provided that the Indians shall have the right of "hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and other lands to which the said Indians may have a right of access." The same provision is contained in paragraph 12 of the Saskatchewan agreement and paragraph 13 of the Manitoba agreement.
3. S.A. 1984, c. W-9.1.
4. The action by the Crown against Mr. Ominayak has been stayed.
5. [1990] 3 C.N.L.R. 95 at 102-104.
6. Per Kerans J.A. in *R.* v. *Badger* (1993) 3 C.N.L.R. 143 at 1487 (Alta. C.A.).
7. See, for example, P. Macklem, "First nations, Self-Government and the Borders of Canadian Legal Imagination" (1991) 36 McGill Law Journal 425-455.
8. *Simon* v. *R.*, [1986] 1 C.N.L.R. 153 (S.C.C.) and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.)
9. *Ibid.* at 1063.

statement combined with the narrow division of the Court in *Horseman* (a 4:3 majority), judicial recognition of the unique legal nature of Indian treaties, and the fiduciary obligation owed by the Crown to First Nations provided an opening to challenge the theory of unilateral extinguishment. The reasoning of the majority, and Lamer C.J.'s support for the dissent in *Badger*, suggests that the Supreme Court is closing this avenue of argument.

The Supreme Court concedes that governmental power is not absolute now that treaty rights have constitutional protection in section 35 of the *Constitution Act, 1982*. Rather, some limits are placed on the power to extinguish treaty rights through the application of the *Sparrow* test. By adopting this test, the Court maintains that it is appropriate to balance treaty rights with non-Aboriginal government interests in order to assess the constitutional validity of legislation that interferes with the exercise of contemporary treaty rights. This is a process common to judicial determinations of the constitutionality of legislation that interferes with the contemporary exercise of Aboriginal rights. Although the majority recognizes that *Sparrow* does not provide an exhaustive list of factors to be considered in the balance, their failure to articulate stricter standards of justification for the extinguishment of treaty rights suggests that a higher standard of protection for treaty rights will not be assumed by Canadian courts.[10]

A STEP FORWARD?

The first issue addressed in *Badger* is whether "Indians who have status under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty?"[11] In answering this question, the majority gives substantive meaning to the interpretive principle that treaties "must be interpreted in the sense that they would naturally have been understood by the Indians at the time of signing."[12] Recognizing that this principle involves consideration of the context within which Treaty 8 was negotiated (including oral agreements not necessarily reflected in the written text of the Treaty), Cory J. considers the evidence of historians, elders, and reports of treaty commissioners to interpret the Treaty 8 right to hunt "throughout the tract surrendered... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[13] In his opinion, Indian signatories of Treaty 8 would have understood that land had been " required or taken up" if the visible use of the land was incompatible with the exercise of their right to hunt. Consequently, the determination of whether a Treaty 8 Indian has access to hunt on private lands requires a factual analysis of the particular land use in each case. Following this line of reasoning, he concludes that only Mr. Ominayak can establish a land use compatible with the treaty right to hunt as he was hunting on uncleared muskeg and there were no fences, signs or buildings "near the site of the kill."[14]

Although the endorsement of the visible, incompatible-use test reflects the understanding of Indian signatories to Treaty 8, the benefit to them seems to diminish in its application. The threshold for establishing incompatible use is very low and the test does not expressly take into consideration the subjective knowledge of the Indian hunter or the reasonableness of his belief that he has a right of access. The result is an analysis which is balanced in favour of the paper-title holder. For example, there were no fences or signs posted on the land where Mr. Badger was hunting. There was a farmhouse about a quarter of a mile away that "did not appear to have been abandoned."[15] Although this would be relevant in an assessment of the reasonableness of Mr. Badger's belief that he had a right of access, this is not stated as a relevant factor in the analysis of visible use. Further, Justice Cory's reasoning suggests that the Court will interpret the geographical limits of the land at issue liberally in its search for fences, signs and buildings. Regardless of the current use of the farmhouse, it was a quarter mile away. The section on which Mr. Badger was hunting was not put to a visibly incompatible use such as growing crops. Rather, it was unposted brush land with willow regrowth and scrub.

Despite these problems, the *Badger* decision represents a limited victory by supporting the principle that Treaty Indians in the prairie provinces may, in certain circumstances, have the right to hunt on privately-owned lands without the consent of the land owner. It is also a significant victory because the majority rejects the notion that all treaty rights to hunt are extinguished and replaced by the NRTA. Prior to *Sparrow*, a debate existed in Canadian jurisprudence regarding the expression of legislative intention required to extinguish an Aboriginal right. *Sparrow* clarified that if the sovereign's intention to extinguish is

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10 The dissent (Sopinka J. and Lamer C.J.) agrees that the principles in *Sparrow* can be applied by analogy. Unlike the majority, they do not support the conclusion that hunting rights in the NRTA(s) are rights that are also constitutionally protected in s.35 of the *Constitution Act, 1982*.

11 *Supra* note 1 at 86.

12 *Ibid.* at 96.

13 Quoted in *ibid.* at 95.

14 *Ibid.* at 102.

15 *Ibid.* Cory J. may be assuming that Badger would know this because he is from the area he was hunting in but this presumption is not stated.

not "clear and plain,"[16] then an Aboriginal right survives and receives section 35 constitutional protection. *Sparrow* was not argued or considered by the Supreme Court in *Horseman* when it held that the NRTA extinguished the commercial right to hunt. As a result, the issue of whether the treaty right to hunt was extinguished, in whole or part, was addressed again in *Badger.*

In *Badger*, the majority decided that paragraph 12 of the NRTA evinced a clear and plain intention to extinguish the treaty right to hunt commercially and that *Horseman* supported this conclusion. However, paragraph 12 did not extinguish the treaty right to hunt for food. Rather, in the words of Justice Cory, the "NRTA did, to the extent that its intent is clear, modify and alter the right to hunt for food provided in Treaty No. 8."[17] Consequently the hunting right in Treaty 8, as modified by the NRTA, receives constitutional protection. Alleged interference with the treaty right to hunt for food on unoccupied land must be read in "light of the fact that this aspect of the treaty right continues in force and effect" and is protected as an existing treaty right by section 35 of the *Constitution Act, 1982.*[18] Adopting this analysis, Cory J. further argues that the constitutional validity of provincial regulation that limits the right to hunt on private land must be determined by adopting the *Sparrow* test. In his opinion, the manner in which the licensing scheme is set up results in "a *prima facie* infringement of the Treaty 8 right to hunt as modified by the NRTA."[19] As a result, a new trial is ordered on the issue of whether the province can justify infringement of Mr. Ominayak's right to hunt.

Various interpretative principles outlined in *Badger* and the *Sparrow* test were identified by Cory J. Justice Cory recites the following principles before his analysis of the NRTA:

(a) a treaty represents a solemn exchange of promises which are "sacred" in nature;

(b) it is always assumed that the Crown intends to fulfill treaty obligations;

(c) ambiguities in the treaty are to be resolved in favour of the Indians;

(d) restriction of treaty rights are to be narrowly construed; and

(e) the onus on the Crown is "strict proof" of extinguishment.[20]

Contrary to these principles of interpretation, Cory J. adopts a rigid and segmented approach to the definition of treaty rights. It is an approach which equates the exercise of a treaty right with the right itself. Adopting this approach, the right to hunt commercially is not a method of exercising the more fundamental right to hunt for one's livelihood or "vocation" as promised in Treaty 8.[21] Rather, it is a separate and divisible right in a bundle of rights that constitute the treaty right(s) to hunt. The termination of the right to hunt commercially is not a limit on the exercise of a broader right to hunt, but the clear and plain extinguishment of an independent hunting right in the bundle. Unless a clear and plain intention is found to the contrary, the remaining modes of exercise (what Cory J. calls "rights") survive the NRTA and receive section 35 protection.

This divisible concept of the right to hunt does not reflect the understanding of Indian signatories to the treaties and is superimposed on the interpretation and delineation of the promises exchanged.[22] Strong arguments by dissenting members of the Supreme Court reject this approach to the definition of Aboriginal and treaty rights. They suggest that the appropriate conceptualization of the right is a broad one which rejects the notion of dividing the right to pursue the "vocation" of hunting into separate and distinct rights. At the very least, disagreement at this level suggests that the scope of the right is ambiguous. Moreover, treaty principles articulated above require that such ambiguities be resolved in favour of the Indian signatories.

A related issue is whether the NRTA can have the effect of bifurcating and extinguishing rights which are not regarded as divisible by the Indian Nation affected. Where *Badger* suggests this is a possible effect, *Sparrow* suggests it is not, leaving one wondering if the Supreme Court is retreating from the spirit of its earlier decision. The conclusion that the right protected by section 35 is the "hunting right set out in Treaty 8 *as modified* by the NRTA" runs contrary to the *Sparrow* proposition that rights which have been regulated but not extinguished are protected in section 35 in their original unmodified form. It also contradicts the direc-

[16] Prior to this decision, two theories of extinguishment could be applied. One was that the exercise of sovereignty inconsistent with the survival of an Aboriginal right was sufficient to terminate. The other, stated first by Hall J. in the *Calder* case, was that the intention to extinguish must be clear and plain. See *Calder* v. *A.G. of B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.).

[17] *Supra* note 1 at 94.

[18] *Ibid.*

[19] *Ibid.* at 108.

[20] *Ibid.* at 92.

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

[22] See, for example, R. Price, *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987) at 82-84, and references to the testimony of elders on the concept of the right in *Horseman*, *supra* note 5 and *Badger*, *supra* note 1.

tion in *Sparrow* that these rights are to be interpreted flexibly and in a manner "sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[23] Applying the logic of *Badger* to the facts in *Sparrow* would have resulted in the separation of the Musqueum right to fish into three separate and distinct rights: the right to fish for food, the right to fish for ceremonial purposes, and the right to fish for social purposes. This approach was rejected by Dickson C.J. who was unwilling to equate an aspect, or mode of exercise of a right, with the more fundamental right itself. One might distinguish *Sparrow* on the basis that the intent of the federal government to extinguish aspects of the right to fish was not clear and plain. Consequently, splitting the right to fish into separate and distinct rights was not a necessary outcome. On the other hand, the necessary effect of the NRTA, which extinguishes the commercial right to hunt, is the bifurcation of Treaty 8 hunting rights. This distinction loses ground when one considers the disagreement by former members of the Supreme Court as to the necessary effect of the NRTA. The purpose of the NRTA was to transfer resources to the provinces and, in that context, to ensure that promises made to Indians under the treaties were fulfilled. In this way, adopting interpretive principles endorsed in *Badger*, paragraph 12 is properly interpreted as an attempt to respect *solemn* promises and to *fulfill* treaty obligations. The fact that the province is given power to regulate the right, that the right is modified by the wording of the NRTA and is substantially regulated at the day of trial does not necessarily suggest commercial aspects of the right are extinguished. It is equally plausible to interpret paragraph 12 as limiting the exercise of a broader treaty right rather than extinguishing aspects of a right. Again, such reasonable ambiguities ought to be resolved in a way that benefits the Indians.[24]

Viewing the NRTA as an amending document on the one hand, and treaty rights as divisible by expression of clear legislative intent on the other, allows Justice Cory to uphold *Horseman* on the question of extinguishment and apply *Sparrow* to surviving rights to hunt for food. Through simpler intellectual gymnastics, he could have easily accepted a broader interpretation of *Horseman* and agreed with the dissent in *Badger* that the treaty right to hunt was merged, consolidated and "subsumed in a document of higher order."[25] Adopting this approach, the *Sparrow* test can only be applied by analogy to temper the provincial regulatory powers recognized in paragraph 12.

[23] *Supra* note 1 at 111 and note 12 at 411.

[24] See, for example, Wilson J. (Dickson C.J. and L'Heureux-Dube J. concurring) in *Horseman, supra* note 5 and Kerans J.A., *Badger* (Alta C.A.) 3 [1993] C.N.L.R. at 148-154

[25] Per Sopinka J. (Lamer C.J. concurring) *supra* note 1 at 82

So why does Justice Cory opt for the compromise position? One can only speculate. It is hard to imagine that the presence of seven interveners representing the assembly of First Nations and other Treaty Nations from across Canada did not impress upon the court the importance of this issue to First Nations. A finding that treaty rights to hunt were extinguished in the prairie provinces by the NRTA(s) would have disregarded the importance of their survival to First Nations and rendered the promise of protection in section 35 meaningless in relation to an integral part of Aboriginal life. Further, it could have led to litigation against the federal Crown for breach of fiduciary obligation arising from the extinction and replacement of all hunting, trapping and fishing rights promised by treaty and the transfer of legislative power over these rights to the provinces.[26] On the other hand, a finding that the NRTA simply regulated the exercise of treaty rights to hunt would allow First Nations to demand justification for interference with the commercial right to hunt, a process which *Horseman* supposedly put to rest. Rather than face the embarrassment of concluding that *Horseman* was implicitly overruled by a decision rendered 3 weeks later in *Sioui*, or require that the issue of commercial rights come before the court again for justification analysis, it was simpler for the majority in *Badger* to allow bifurcation of the right — a compromise that saved face, allowed some application of *Sparrow,* and recognized the importance to Treaty Nations of treaty rights in general and the right to hunt in particular.

Two Steps Back?

Whether one accepts the reasoning of the majority or the dissent in *Badger*, it is clear the current Supreme Court is not willing to question the power of the federal government to unilaterally abrogate treaty rights. This presumption of power flows through both opinions without meaningful consideration of limitations that could have been placed on its exercise by the consensual thesis articulated in *Sioui* or the less controversial concept of fiduciary obligation. The 1984 ruling of the Supreme Court in *Guerin*[27] recognized the legal duty of the Crown to act as a fiduciary in its dealings with First Nations. The lack of attention paid to this principle in *Badger* is somewhat shocking as it is the main instrument through which the court can "police the power imbalances in the relationship [between the Crown and First Nations] and ensure that the conduct of the Crown

[26] *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 3 C.N.L.R. 79 (S.C.C.) This action could still be made based on unilateral termination of an aspect of the right but it may be more difficult as the court in *Horseman* suggested compensation has already been given through the increase in the areas of land to which Indians have a right of access to hunt.

[27] [1984] 2 S.C.R. 335.

conforms to a standard of fairness and honour."[28] In *Badger,* consideration of the fiduciary concept is reduced to the judicial jingle that "the honour of the Crown is always at stake" and "it is always assumed that the Crown intended to fulfill its treaty obligations."[29] However, as discussed above, the logical outcome of applying these principles to paragraph 12 in a way that promotes fulfilment, rather than termination of treaty rights, is not forthcoming. Further, there is no discussion of the acceptability of federal conduct, assuming the effect of the NRTA is to extinguish a hunting right, apart from the statement that it is "unlikely that [the government] would proceed in that [unilateral] manner today."[30] This lack of discussion is also disturbing as intervening counsel in *Badger* argued breach of fiduciary obligation. Further, in a recent decision, the Supreme Court suggested failure to comply with treaty obligations could be a breach of fiduciary obligation.[31]

The failure to give substantive meaning to the fiduciary principle is equally evident in the majority's mechanical application of the *Sparrow* test to treaty rights without considering stricter obligations that might arise if one accepts that treaties provide dual protection to what might otherwise be characterized as Aboriginal rights.[32] It is plausible that treaty promises give rise to a stricter duty of adherence by the Crown because of a dual fiduciary obligation: the general obligation of the Crown to act in the interests of Aboriginal peoples over whom they exercise significant control and the specific obligation of the Crown to fulfill express promises in the treaty.[33] *Sparrow* maintains that these obligations are of an ongoing nature and must be considered in the justification of actions that interfere with the exercise of existing Aboriginal rights. Alternatively, a stricter standard of conduct could also arise if treaties are viewed as terminating Aboriginal rights, because the treaty becomes the sole source of what was formerly a common law right. The exercise of the right becomes dependant on the willingness of the Crown to respect promises in the treaty. Regardless of their effect on Aboriginal rights, treaty rights represent "an exchange of solemn promises" which should also exact a higher standard of care for assessing the honourableness of government conduct.

The mechanistic application of the *Sparrow* criteria in *Badger* shows a lack of appreciation for the variation of levels of fiduciary obligation that may arise in different contexts. In this way it seems to take Aboriginal and treaty rights jurisprudence a significant step backward. Rather than recognizing the uniqueness of government obligations associated with the fulfilment of treaty guarantees, Cory J. suggests that the criteria for assessing the honour of the Crown applies equally to the infringement of Aboriginal and treaty rights. Drawing on aspects of similarity between the two types of rights, he argues that their inclusion in section 35 supports a common approach to infringement and that the "recognized principles to be considered and applied in justification should generally be those set out in *Sparrow*."[34]

A more favourable interpretation of the enforceability of treaty rights that gives meaning to the fiduciary principle would apply a strict duty of adherence to section 35 treaty rights. The question should not be whether there has been the least possible infringement of a right to effect a particular government objective, but whether or not infringement is necessary at all. A more relevant criteria when assessing treaty breaches is whether or not the Crown properly considered and exhausted the possibility of less intrusive measures. Similarly, when the breach of a treaty right is at stake, the process of consultation requires stricter scrutiny. The standard of making reasonable attempts to inform and consult is not enough.[35] Rather, it may be more appropriate to acquire consent to termination unless such consent is unreasonably withheld. Although the Supreme Court does not close the door on these types of arguments, its failure to recognize the significant differences in the legal nature of Aboriginal and treaty rights and the obligations flowing from them does little to encourage a more progressive analysis by a lower court.

The concept of fiduciary obligation combined with the characterization of treaties as *sui generis* created legal space to argue against the legal presumption that the Crown can unilaterally extinguish treaty rights. This argument is clearly rejected by Cory J. when he states that "treaty rights are the result of mutual agreement, [but] they, like Aboriginal rights, may be unilaterally abridged."[36] Particularly disappointing is the union of Lamer C.J. with the dissenting opinion of Sopinka J. on this point. In *Sioui*, Lamer C.J. described the historical

[28] M.E. Turpel, "Working Principles for Reform: Full Compliance With Crown Fiduciary Duties" in *Indian Claims Commission Proceedings*, Special Issue on Land Claims Reform (Ottawa: Canada Communications Group, 1995) at 84.

[29] *Supra* note 1 at 92.

[30] *Ibid.* at 107.

[31] *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 3 C.N.L.R. 79 at 81.

[32] See *Simon* v. *R.*, *supra* note 8 for articulation of the theory that treaties protect existing Aboriginal rights.

[33] M.E. Turpel raises the question of a stricter duty of adherence but does not elaborate further on the content of the duty in her work cited at *supra* note 28.

[34] *Supra* note 1 at 107.

[35] *R v. Nikal* [1996] 3 C.N.L.R. 178.

[36] *Supra* note 1 at 105.

relations between Great Britain and First Nations in Canada as nation-to-nation relations. Recognizing that the treaties were solemn agreements he stated that the Indian-Crown relationship fell somewhere between the "kind of relations conducted with sovereign states and relations that such states had with their own citizens."[37] These notions of sovereignty and solemnity seemed to impact on Chief Justice Lamer's interpretation of the Crown's ability to terminate treaty rights when he held that the English could not extinguish a treaty with the Huron by entering into an agreement with the French. Emphasizing the sacredness of the treaties, he argued that the consent of the Huron was required. In his words, "the very definition of a treaty ... [made] it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."[38]

It was hoped by counsel for the appellants and the intervenors in *Badger* that the effect of the NRTA would be reconsidered in this light. Instead, Lamer C.J. supports Sopinka J.'s conclusion that treaty rights were merged and consolidated in the NRTA despite the lack of participation of the Treaty Nations affected and the absence of any reference in Sopinka J.'s reasoning to the *Sioui* case. It is hard to avoid the conclusion that Lamer C. J. is not supportive of the more liberal treaty jurisprudence that his *obiter* comments in *Sioui* helped generate. This leaves one asking what Chief Justice Lamer had in mind when he made those comments. Perhaps he draws a distinction between pre- and post-confederation treaties. The treaty at issue in *Sioui* was between Great Britain and the English. The issue of the federal government's power to unilaterally abrogate treaty rights under 91(24) was not in issue. Regardless of Lamer C.J.'s intent, it is clear that he supports the demise of a more progressive treaty jurisprudence, as does the rest of the Court in *Badger*.

CONCLUSION

The recent categorization of treaty rights as *sui generis* has not resulted in significant change in an area of law that really counts to First Nations — the survival of treaty rights. Doctrines of unilateral extinguishment coupled with the exclusion of meaningful fiduciary analysis and selective substantive application of interpretive rules leaves First Nations seeking the legal enforcement of treaty rights against the Crown in a precarious position. Although *Badger* encourages the incorporation of Aboriginal understandings into the analysis of Treaty rights, judicial reluctance to significantly disempower the Crown in the area of extinguishment leaves treaty rights in a vulnerable position. Despite strong arguments supporting the theory that treaty rights cannot be terminated without the consent of those affected, *Badger* makes it clear that this is not the current theory adopted by the Supreme Court of Canada. It is possible that lower courts will apply stricter standards of justification to temper legislated interference with existing treaty rights than those suggested in *Badger* — the Supreme Court does not preclude this approach. At a minimum, one can hope that judicial recognition of the "duty and honour of the Crown to carry out the promises contained in ... treaties with the exactness which honour and good conscience dictate" will act as a catalyst for the infusion of standards such as necessity, rather than reasonableness and consent, or mere consultation, in assessing the legitimacy of legislation infringing upon the exercise of constitutionally-protected treaty rights. However, the tendency of lower courts to be more conservative in their analysis suggests that this movement may not occur without more explicit direction from the Supreme Court.❑

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[37] *Supra* note 8 at 1038.
[38] *Ibid. at 1063.*

THE TRICKSTER: INTEGRAL TO A DISTINCTIVE CULTURE

John Borrows

The trickster is alive and well. The Supreme Court of Canada illustrated this in the cases of *R.* v. *Van der Peet*,[1] *R.* v. *Gladstone*,[2] *R.* v. *N.T.C. Smokehouse Ltd.*[3] and *R.* v. *Pamajewon*.[4] First Nations have an intellectual tradition that teaches people about ideas, principles and behaviours that are partial and incomplete. These traditions are taught through a character known as the trickster. S/he has various persona in different cultures. The Anishinabe (Ojibway) of Central Canada call the trickster Nanaboozhoo; the First Nations people of Coastal British Columbia know him as Raven; s/he is known as Glooscap by the MicMac of the Maritimes; and as Coyote, Crow, Wakajesig, Badger, or Old Man among other First Nations people in Canada. The trickster offers insights through encounters which are simultaneously altruistic and self-interested. In her adventures the trickster roams from place to place and fulfils her goals by using ostensibly contradictory behaviours such as charm and cunning, honesty and deception, kindness and mean tricks. Lessons are learned as the trickster engages in actions which in some particulars are representative of the listener's behaviour, and on other points uncharacteristic of their comportment. The trickster encourages an awakening of understanding because listeners are compelled to interpret and reconcile the notion that their ideas may be partial. As such, the trickster assists people in conceiving of the limited viewpoint they possess. The trickster is able to kindle these understandings because her actions take place in a perplexing realm that partially escapes the structures of society and the order of cultural things.[5] The trickster's interaction with the Supreme Court of Canada demonstrates these insights.

SEEGWUN

Seegwun — spring. Nanaboozhoo is walking up a stream. Around his ankles the water breaks free and flows to the Nottawasaga River. Imprisoned as ice for too long it hurries its escape towards Georgian Bay and Lake Huron. He notices the water's rush is met by travellers going the opposite direction. Fish run into and through the water's swollen charge. In the midst of the collision there are periods of rest. In a shallow pool Nanaboozhoo spots a solitary rainbow trout. He breaks the walls of a downstream beaver dam. He waits.

1 S.C.C. No. 23803, [1996] S.C.J. No. 77. In *Van der Peet* the accused was charged under s. 61(1) of the Fisheries Act with selling salmon caught under the authority of an Indian food fishing license, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, which prohibited the sale or barter of fish caught under such a licence.

2 S.C.C. No. 23801, [1996] S.C.J. No. 79. In *Gladstone* the accused was charged under s. 61(1) of the Fisheries Act with attempting to sell herring spawn on kelp caught under the authority of an Indian food fish license, contrary to the same regulations used to charge Van der Peet, and of attempting to sell herring spawn on kelp caught without a license, contrary to s. 20(3) of the Pacific Herring Fishery Regulations.

3 S.C.C. No. 23800, [1996] S.C.J. No. 78. In *Smokehouse* the accused was an incorporated company which owns and operates a food processing plant. They were charged under s. 61(1) of the Fisheries Act with selling and purchasing fish not caught under the authority of a commercial fishing license, contrary to s. 4(5) of the British Columbia (General) Regulations, and of selling and purchasing fish contrary to s. 27(5) of these same regulations.

4 S.C.C. No. 24596, [1996] S.C.J. No. 20. In *Pamajewon* the accused were charged under sections 201(1) and 206(1) of the Criminal Code with the offence of keeping a common gaming house and conducting a scheme for the purposes of determining the winners of property.

5 See B. Babcock Adams, "A Tolerated Margin of Mess: The Trickster and His Tales Reconsidered" (1975) 11 Journal of Folklore Institute 147; A Wiget, *Critical Essays on Native American Literature* (Boston: G.K. Hill & Co., 1985) at 21; J. Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 1 U.B.C. Law Review 6-10; G. Vizener, *The Trickster of Liberty: Tribal Heirs to a Wild Baronage* (Minneapolis: University of Minnesota, 1988).

Within a few minutes the water in the pool goes down. Trapped, the fish has nowhere to go. Another prisoner caught on life's precarious road. He walks towards it, slowly puts his fingers under its belly, and feels the weight of life within. Nanaboozhoo lifts the fish into the next pool and watches it swim away.

NEEBIN

Neebin — summer. Chief Justice Antonio Lamer is asked to consider the meaning of Aboriginal rights in the context of criminal charges laid against Aboriginal people for exchanging fish for money. He steps into court. He notices that Aboriginal rights are "held by aboriginal people because they are aboriginal."[6] With this as his starting point, in order to define Aboriginal rights he is going to have to tell us what Aboriginal means. How is he going to do this? Maybe he knows what it means to be Aboriginal. He writes:[7]

> The Court must define the scope of section 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

He will define Aboriginal by "capturing" the Aboriginal and the right? How is he going to do this? What will he do once he captures it? He searches for a purpose that might help him. In the jurisprudential stream behind him, he sees a purposive rationale and a foundation to explain "the special status that aboriginal peoples have within Canadian society."[8] He pulls the sticks of this structure, a deluge ensues. Aboriginal rights in section 35(1) exist "because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[9]

The Chief Justice is nearly washed away by this flood. When he pulled the sticks, he was standing on the wrong side of the weir and could have been knocked over. If Aboriginal peoples have prior rights to land and participatory governance, how did the Crown and Court gain their right to adjudicate here? He has to stem the flow. He has to regain his footing. He plants a flag: "Aboriginal rights recognized and affirmed by section 35(1) must be directed towards their reconciliation with the sovereignty of the Crown."[10] He now has a purpose with which to capture both the Aboriginal and the right — "the reconciliation of pre-existing claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory."[11] The assertion of British sovereignty provides familiar ground from which to define Aboriginal.[12]

Now comes the clairvoyant moment when he will tell us what Aboriginal means. He reaches his fingers into the cold stream of past decisions, but there is only one judgment he relies on to define Aboriginal. At his feet, in a shallow pool of reasoning, the Chief Justice finds the *Sparrow* Court's acknowledgement that the Aboriginal right to fish for food was considered to "have always constituted an integral part of their distinctive culture."[13] From this solitary line, where the Aboriginal right to fish for food was never in doubt, the Chief Justice tells us what Aboriginal means, and by extension what Aboriginal rights are. Aboriginals, at least those who have Aboriginal rights, are those whose activities are "integral to the distinctive culture of the aboriginal group claiming the right."[14] But what is integral to being Aboriginal, and claiming rights? He takes another step, and sets out to explain what is integral to Aboriginal people.[15]

> [T]he test for identifying the aboriginal rights recognized and affirmed by section 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with Europeans.

Integral thus means central, significant, distinctive, defining; "a practical way of thinking about this problem is to ask whether, without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it ***was***" [emphasis mine].[16]

As promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospec-

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6 *Van der Peet, supra* note 1 at para 19, per Lamer C.J.
7 *Ibid.* at para. 20.
8 *Ibid.* at para. 27.
9 *Ibid.* at para. 30.
10 *Ibid.* at para. 31.
11 *Ibid.* at para. 36.
12 See *Johnson* v. *M"Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 572-574 and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 542-43 & 559 in *ibid.* paras. 35-37. See also *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 at 404: "there was from the outset, never any doubt, that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown."
13 *Sparrow, ibid.* at 398.
14 *Van der Peet, supra* note 1 at para. 46, per Lamer C.J.
15 *Ibid.* at para. 44.
16 *Ibid.* at paras. 55-59.

tive. It is about what was, "once upon a time," central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today. His test invites stories about the past. [17]

These stories will be about whether a protected Aboriginal right has its "origins pre-contact,"[18] "prior to the arrival of Europeans."[19] This is because:[20]

> it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by section 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

Aboriginal means a long time ago; pre-contact. Aboriginal rights protect only those customs which have continuity with practices existing before the arrival of Europeans. Aboriginal rights do not sustain central and significant Aboriginal practices which developed solely as a result of their contact with European cultures.[21] The jurisprudential dam is now back in place. What will become a stagnant pool is again filling in behind it. With this judgment Chief Justice Lamer lifts the Aboriginal right and gently places it back in this pool, behind some of its centuries long, common law encumbrances. As he set out to do, he has captured both the Aboriginal and the right.

TAHWAHGI

Tahwahgi — Fall. The Couchiching Narrows, Orillia, Ontario. Nanaboozhoo has recently presided over the opening of the casino on the Chippewas of the Rama reservation. Confined for over a century, Anishinabe self-government has escaped federalism's cells and now spills into the surrounding communities. Over one-hundred thousand people travel to Rama and drop quarters in the Casino's well. The Woodland art of its outer walls encloses the interaction of mean tricks and kindness, help and neglect, charm and cunning. The rush to get into self-government's outward flow has its periods of rest too. Nanaboozhoo takes the three minute walk to the Lake. On the water the boat's sails hang loosely. For 4000 years an Aboriginal weir raked these Narrows to trap fish behind its wooden bars. Now behind the Lake's shores the fingers of a new presence reach out. Nanaboozhoo looks back towards it; thinks about how he placed it perfectly. Buses disgorge their contents. Cars and trains arrive every few minutes; the people of the reserve are also swept into this flow — its grasp is extensive.

North of Rama, Chief Justice Antonio Lamer presides over the fate of two casinos on the Shawanaga and Eagle Lake reservations. It is the *Pamajewon* case. The communities have risked asking the Court to rule that Aboriginal rights to self-government include high-stakes gambling. The outward rush into these communities is just beginning to build. The land is cleared for a new gaming hall and hotel, and signs on the highway announce the arrival of monster bingo. The Chief Justice takes a thirty-two paragraph stroll around the place. With *Van der Peet* as a companion — a "legal standard against which the appellants' claim must be measured"[22] — he will tell us the character of Aboriginal rights. Once again he gets to decide character traits. He will define not just the character of an Aboriginal, he will define the character of an entire Aboriginal community. How is he going to do this? Can he identify the character of another culture? He consults his companion. *Van der Peet* has some words of advice: change the characterization of what the Aboriginal people are claiming. The Chief Justice agrees; that should make it easier. He confides:[23]

> 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 that right.

The Chief Justice has provided three factors to consider in developing the correct characterization of a claim, but there is no mention of standards by which these factors should be judged. What principles will guide judgments about the characterization of these factors? Should Aboriginal claims be characterized in a "large,

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[17] This test has the potential to reinforce stereotypes about Indians. In order to claim an Aboriginal right, these determinations of Aboriginal will become more important than what it means to be Aboriginal today. The notion of what was integral to Aboriginal societies is steeped in questionable North American cultural images. See D. Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992).

[18] *Van der Peet, supra* note 1 at para. 62, per Lamer C.J.

[19] *Ibid.* at para. 61.

[20] *Ibid.* at para. 60.

[21] *Ibid.* at para. 73.

[22] *Pamajewon, supra* note 4 at para. 23, per Lamer C.J.

[23] *Ibid.* at para. 26.

liberal and generous manner,"[24] with sensitivity to the "aboriginal perspective on the meaning of the rights at stake."[25] Nope. No mention of that here. With that out of the way, the Chief Justice can provide his own characterization of what is being claimed.

He walks on. The people want him to see how the band participates in deciding who lives where on the reserve, and under what conditions. He is invited to tour the band council office, read their governing by-laws, see how the people depend on them. He declines. He stays out near the road. The Chief Justice turns his attention to the empty casino land, sees the monster being advertised. In the next breath he states: "when these factors are considered in this case it can be seen that the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activity."[26] His short promenade side-steps claims about Aboriginal rights to self-government.[27]

> The appellants themselves would have this Court characterize their claim as a broad right to manage the use of their respective reserve lands. To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality.

This is a comfortable pace. One needs to get a little exercise, but no use over-extending yourself. "The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants' would not allow the Court to do so."[28] It is too high a level of generality to think that Aboriginal people would actually have a broad right to manage the use of their own lands.

The Chief Justice is almost through with his visit. It is getting dark. He just has something to dispose of before he leaves — whether Shawanaga and Eagle Lake's "participation in, and regulation of, gambling on reserve lands was an integral part of their distinctive culture." The evidence "does not demonstrate that gambling was of central significance to the Ojibway people." Prior to contact informal gambling activities took place on a "small scale." The Chief Justice refers to a prior visitor:[29]

> I agree with the observation made by Flaherty Prov. Ct. J ... commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which these societies were traditionally sustained or socialized.

Done. End of the trail. The claim is defeated since Anishinabe gambling, prior to contact, was not done on a twentieth-century scale. Hardly surprising that this standard of evidence could not be met. Not many activities in any society, prior to this century, took place on a twentieth-century scale. It is a good thing the rights of other Canadians do not depend on whether they were important to them two to three hundred years ago. What would it be like for Canadians to have their fundamental rights defined by what *was* integral to European peoples' distinctive culture prior to their arrival in North America?[30]

The door slams. The Chief Justice drives away. Self-government will serve more time in isolation, locked within federalism's cells. Very few people will visit Shawanaga and Eagle Lake, even fewer will leave their money behind. The people of Shawanaga and Eagle Lake will not spend the rest of their lives, and that of their children's children, caught inside a casino. The fresh October wind is brisk. Clear. Orange and yellow leaves dance in this breeze, and mimic the setting autumn sun. A walk to shore reveals Indian fishers pulling in their nets. Whitefish and trout will be served tonight. Lake Huron has witnessed this activity for centuries. No buses, trains or cars crowding the life out of the community. No new presence — no grasping; quiet settles back into the familiar rhythms of activity.

PEEBON

Peebon — Winter. Frozen rights. Peebon's return always brings hardship, decay and dissolution. His perpetual defeat of Neebin withers the plants, hardens the ground and sends white beings through the skys. With his approach the animals sleep, and fish return to deep lakes escaping the rivers' congealing arteries. To the north, the ancient grandfathers retreat to their lodges. Their fires reflect on the sky — blue, white and

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24 *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 at 453.

25 *Sparrow, supra* note 12 at 404.

26 *Pamajewon, supra* note 4 at para. 26.

27 *Ibid.* at para. 27.

28 *Ibid.*

29 *Ibid.* at para. 29.

30 Unfortunately, some Canadians may know exactly what it is like to have fundamental rights defined by what was integral to European culture prior to its arrival in North America. People disadvantaged on the basis of sex, class or race, etc., may well feel their rights depend on what was defining European culture 200-300 years ago.

cold red, and illuminate the path of souls for those travelling to the land of the dead. It will be some time before the grandfather's voices again accompany the clouds and let their fire fall across the earth. For now, they remain in their lodges, protect their fires, and await the return of Neebin. Peebon and Neebin's perpetual quest for supremacy continually enforces this cycle on the Anishinabe. While Peebon is in the ascendancy, Nanaboozhoo looks for ways to steal fire from the grandfathers, to bring it back to the Anishinabe and keep them warm.

Peebon's frigid sovereignty has wide dominion. Aboriginal practices that developed solely as a response to European culture are now frozen, courtesy of the "integral test." How can this be reconciled with the Chief Justice Antonio Lamer's own observation that Aboriginal rights developed from the "peculiar meeting of two vastly different legal cultures."[31] Nanaboozhoo stalks the land and looks for ways to steal fire. He approaches the common law warily. With suspicion that comes from experience, he knows the danger of trying to take something of value from that which can harm him so greatly. Yet he is both brave and foolish, so he tries.

Nanaboozhoo reasons that if Aboriginal rights emerged through the meeting of two legal cultures, then Aboriginal rights must be litigated by reference to both societies' laws. The Chief Justice would appear to agree:[32]

> [T]he law of aboriginal rights is neither English or aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.

Yet, despite this endorsement of Aboriginal law, in developing the "integral to a distinctive culture" test Nanaboozhoo observes that the Chief Justice did not consult or apply Sto:lo, Nu-Chah-Nulth, Heiltsuk or Ojibway law in defining Aboriginal rights under section 35(1) of the Constitution.[33] While the Court asserted that Aboriginal rights are based on "traditional laws and customs ... passed down and arising from the pre-existing culture and customs of aboriginal peoples,"[34] nowhere in these cases does the Chief Justice use the laws of the people charged, or the laws of any other Aboriginal people, to arrive at the standards through which he will define these rights. As such, the Court does not use "intersocietal" law in developing its test for Aboriginal rights. In so observing, Nanaboozhoo has peered into the fire and found a branch sufficiently dense in its grain to keep a flame burning while he brings it back home to his people.

Nanaboozhoo reaches in through the smoke and observes that the Chief Justice engaged in a very abstract and theoretical approach to define Aboriginal rights. He did not fully reference the "long-standing practices linking the various communities" in defining Aboriginal rights. Vacuous reasons about section 35 (1) reconciling Crown assertions of sovereignty with the fact that Aboriginal peoples were here first, may at the most elementary level qualify as an application of intersocietal law. However, the idea that this reconciliation should take place *upon contact* finds no support in either Aboriginal or non-Aboriginal law. It is the Chief Justice's invention. Nanaboozhoo has firmly grasped the branch and taken it from the fire. The smoke is clearing. Nanaboozhoo then finds a confederate, quoting from Justice McLachlin's dissent in *Van der Peet*, he states:[35]

> Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question.... One finds no mention in the text of section 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right.

Nanaboozhoo finds in this statement a more substantial basis upon which to define Aboriginal rights. A "morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives."[36] The development of the "integral to a distinctive culture" test does not incorporate either legal perspective because neither the common law nor Aboriginal laws held that the "moment of European contact" was the "definitive" time for establishing an Aboriginal right.

It is now time for Nanaboozhoo to run for home. The fires of his people are almost extinguished. What

31 *Van der Peet, supra* note 1 at para. 42, per Lamer C.J.
32 *Ibid.*
33 These communities have laws relating to selling fish and gambling that the Court could receive and consider in developing its *sui generis* Aboriginal rights jurisprudence. The laws "may be helpful by way of analogy" in defining and interpreting aboriginal rights. See *R.* v. *Simon* (1985), 24 D.L.R. (4th) 390 at 404.

34 *Ibid.* at para. 40.
35 *Ibid.* at para. 247, per McLachlin J.
36 *Ibid.* at para. 42, per Lamer C.J.

he has found may rekindle them. The common law's recognition of Aboriginal ancestral laws and customs, and their continual evolution and interaction with the Crown, is to be preferred as a basis for defining Aboriginal rights because it is more in line with the existing case law and the "time honoured methodology of the common law."[37] This methodology follows a "golden thread" of case law which defines the nature and incidents of Aboriginal rights by reference to the laws and customs of indigenous people.[38] This methodology also fans the embers of Aboriginal law and encourages its development as a greater source of authority for Aboriginal and non-Aboriginal Canadians.[39] With this basis for defining Aboriginal rights the purpose of section 35(1) becomes truly "intersocietal." It also strengthens the continued interaction of these laws because constitutional protection of the existing customary laws and rights of Aboriginal peoples ensures that such customs and rights remain in the Aboriginal people until extinguished or surrendered by treaty. Since Aboriginal rights rest on Aboriginal laws, section 35(1) must define these rights by reference to these pre-existing laws.[40]

While Nanaboozhoo steals fire, Peebon's chilling pervasiveness is felt all around. Nanaboozhoo's solitary actions may not be enough to help the thaw. The "integral to a distinctive culture" test freezes the protection of practices which may have developed solely as response to European cultures. Yet, the adoption of new practices, traditions and laws in response to new influences is always integral to the survival of any community in its relations with another. Reconciliation should not require Aboriginal peoples to concede those practices which allow them to survive as a contemporary community. However, the Court's new test threatens Aboriginal cultures precisely on this point, since in adapting to new situations they do not have protection for the practices devised in meeting challenges solely as a result of European influence.[41] Such a restriction is contrary to the Chief Justice's assertion that "equal weight" be placed on Aboriginal law by rendering it in terms "cognizable to Canadian law."[42] The "integral to a distinctive culture" test does not place equal weight on traditional Aboriginal law,[43] and denies legal equality to Aboriginal peoples in their relationship with Canada.[44]

The trickster has played his role. Peebon remains ascendant. His icy embrace chills. Dissolution and decay continue. Throughout the land Aboriginal practices are coldly suspended. Have to wait for the thaw again. It may be a long winter.❑

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37 *Ibid.* at para. 261, per McLachlin J.

38 *Ibid.* at para. 265.

39 For supporting argument see J. Borrows, "With or Without You: First Nations Law in Canada" (1996) 41 McGill L.J. 629.

40 Justice McLachlin further stated that the integral test was too broad a characterization of the rights, too indeterminate and too categorical (*ibid.* at paras. 256-260). She first criticized the test as being too broad because "integral is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did." Furthermore, the integral test may be found to be too indeterminate because "one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision maker." Finally, the integral to a distinctive culture test may be too categorical because "whether something is integral is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the grounds of justification."

41 If reconciliation is to be used to define Aboriginal rights at all, a better approach to reconciliation would have made 1982 the effective date for the definition of rights. The *Constitution Act* recognized and affirmed those rights which were existing in 1982, NOT at the date when Europeans asserted sovereignty in what is now Canada.

42 *Ibid.* at para. 59-60.

43 The downgrading of Aboriginal rights is even more apparent in the greater power given to Canadian governments to infringe Aboriginal rights in these cases. For further comment see K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified" (1997) 8 Constitutional Forum 33.

44 For an argument which develops the equality of peoples as central to reconciling Crown/aboriginal relationships see Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government (1995) 21 Queen's L.J. 173; Patrick Macklem, "Distributing Sovereignty: Indian Nations and the Equality of Peoples" (1993) 45 Stanford Law Review 1311.

How Can Infringements of The Constitutional Rights of Aboriginal Peoples Be Justified?

Kent McNeil

On August 21, 1996, the Supreme Court of Canada handed down three decisions on Aboriginal fishing rights in British Columbia: *R.* v. *Van der Peet*,[1] *R.* v. *N.T.C. Smokehouse*,[2] and *R.* v. *Gladstone*.[3] These decisions, already known as the *Van der Peet* trilogy, were followed by a decision on Aboriginal self-government in relation to high-stakes gambling in Ontario, *R.* v. *Pamajewon*,[4] released the next day. Then on October 3, 1996, the Court handed down two more decisions, this time involving Aboriginal fishing rights in Quebec: *R.* v. *Adams*[5] and *R.* v. *Coté*.[6] All these decisions deal with section 35(1) of the *Constitution Act, 1982*,[7] and the nature of the Aboriginal rights which that section recognizes and affirms. Together, these six decisions are probably the most important pronouncements on Aboriginal rights the Supreme Court has made so far. They are going to have a profound impact on the Aboriginal peoples, and will influence not only future judicial decisions but negotiations for the resolution of Aboriginal claims as well.

While these decisions raise a variety of vital issues in relation to Aboriginal rights and section 35(1), my commentary will focus on the test the Supreme Court used for justification of federal legislative infringements of these rights. The Supreme Court created that test in R. v. *Sparrow*,[8] and it has now been elaborated in *Gladstone*, in particular.

The *Sparrow* test for justification places a two-part burden of proof on the Crown. Once an infringement of an existing Aboriginal right has been shown, the Crown has to prove, first, that there was a "valid legislative objective" for the infringement.[9] The Court explained:[10]

> An objective aimed at preserving section 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of section 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court decided that conservation and management of fish stocks were sufficiently compelling and substantial legislative objectives to justify infringement of constitutionally-protected Aboriginal fishing rights if that was necessary to preserve the resource. Infringement of those rights could not, however, be justified on the basis of the "public interest." The Court found "the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[11] Nor would it be sufficient for the Crown to prove that its objective was "reasonable." According to the Court, "the fact that the objective is of a 'reasonable' nature cannot suffice as

1 S.C.C. No. 23803, [1996] S.C.J. No. 77.
2 S.C.C. No. 23800, [1996] S.C.J. No. 78.
3 S.C.C. No. 23801, [1996] S.C.J. No. 79.
4 S.C.C. No. 24596, [1996] S.C.J. No. 20.
5 S.C.C. No. 23615, [1996] S.C.J. No. 87.
6 S.C.C. No. 23707, [1996] S.C.J. No. 93.
7 Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11. Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
8 [1990] 1 S.C.R. 1075.

9 *Ibid.* at 1113.
10 *Ibid.*
11 *Ibid.*

constitutional recognition and affirmation of aboriginal rights."[12]

If the Crown is able to point to a valid legislative objective, the analysis moves to the second part of the justification test which requires the Crown to prove that the measures taken to meet that objective are consistent with its fiduciary duty towards the Aboriginal peoples. In the Court's words, the "special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[13] Fulfillment of the fiduciary duty in this context requires that certain considerations be taken into account. Specifically, the Court said that "[t]hese include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented."[14] More concretely, where utilization of a resource must be limited to meet the valid objective of conservation, the impact of the conservation measures must limit non-Aboriginal use of the resource first. The reason for this is that Aboriginal rights to the resource are constitutionally protected, and therefore must be given priority over the rights of other users which are not constitutionally protected. The Court put it this way:[15]

> The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.... If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish left after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

The reason the priority was limited to the Musqueam food fishery was that the Aboriginal right relied on in *Sparrow* was limited to a right to fish for food, which was taken to include fishing for social and ceremonial purposes. For the Crown's fiduciary duty to be met in a way that respects the constitutional recognition and affirmation of this right, the food fishery had to be given top priority. Any limitation, even for the valid legislative objective of conservation, that did not give the right priority could not be justified, and therefore would be unconstitutional.

The issue of justification arose in the *Gladstone* decision. In *Gladstone* the appellants, who are members of the Heiltsuk Band in British Columbia, were able to prove to the satisfaction of the majority of the Court that they have an existing Aboriginal right to sell herring spawn on kelp commercially, and that the right had been infringed by federal fishery regulations made pursuant to the *Fisheries Act*.[16] The next question for the majority was whether the infringement could be justified on the basis of the *Sparrow* test for justification. On this question, the majority took an approach that, in my view, is significantly different from the approach taken in *Sparrow*.

As we have seen, the first part of the justification test requires proof by the Crown of a valid legislative objective. While the validity of the legislative objective of conservation was described by the Court in *Sparrow* as "uncontroversial,"[17] the regulations being challenged in *Gladstone* went beyond conservation. The regulatory scheme involved initial determinations of how much herring stock could be harvested in a given year and how that stock was to be allocated to the different herring fisheries (of which herring spawn on kelp was one), but it also involved allocation of the resource among various user groups. As allocation among the user groups has little or nothing to do with conservation, Chief Justice Lamer, in his majority judgment, found it necessary "to consider what, if any,

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12 *Ibid.* at 1118. Compare *R.* v. *Badger* (1996), 195 N.R. 1 (S.C.C.) esp. 38; *R.* v. *Nikal* (1996), 196 N.R. 1 (S.C.C.), at 61-7.

13 *R.* v. *Sparrow, supra* note 8 at 1114. As an aside, I have never understood how the Crown can justify its own infringements of the rights of the Aboriginal peoples when, as a fiduciary, it is duty-bound to uphold and protect those rights. For me, this is a central contradiction of the whole justification test.

14 *Ibid.* at 1119.

15 *Ibid.* at 1116.

16 R.S.C. 1970, c. F-14, now R.S.C. 1985, c. F-14. Note that La Forest J. dissented on the issues of the nature of the Aboriginal right and whether it had been extinguished. L'Heureux-Dubé J. took a different position from the majority on the test for establishing an Aboriginal right, and McLachlin J. took a different position on the infringement issue.

17 *R.* v. *Sparrow, supra* note 8 at 1113.

objectives the government may pursue, other than conservation, which will be sufficient to satisfy the first branch of the *Sparrow* justification standard."[18] Ultimately, Lamer C.J. was unable to determine whether the objectives behind the allocation were valid because no evidence regarding objectives had been led, so the case was sent back to trial to resolve that issue. He did, nonetheless, make some general observations on what kind of objectives might meet the test.

Chief Justice Lamer affirmed the *Sparrow* requirement that the objectives would have to be "compelling and substantial."[19] He went on to say that the purposes underlying the recognition and affirmation of Aboriginal rights in section 35(1) "must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable."[20] Those purposes were stated by Lamer C.J. in the *Van der Peet* decision as:[21]

> ... first, the means by which the constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

Applying this statement of the purposes of section 35(1) in *Gladstone*, Lamer C.J. said that:[22]

> ... the import of these purposes is that the objectives which can be said to be compelling and substantive will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of aboriginal prior occupation with the assertion of sovereignty by the Crown.

One may wonder how any law *infringing* Aboriginal rights could ever have as its purpose "the recognition of the prior occupation of North America by aboriginal peoples." Leaving that apparent contradiction aside we will focus, as did Lamer C.J., on objectives aimed at reconciling that occupation with the Crown's sovereignty. In this context, he said:[23]

> Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

While it is clear from the *Sparrow* decision that Aboriginal rights are not absolute,[24] the examples the Court gave there of compelling and substantial objectives which justify infringement of those rights involved objectives that either maintain the rights by conserving the resources on which the rights depend or ensure that the rights are not exercised in a dangerous way. Other compelling and substantial objectives might involve balancing the *constitutional* rights of the Aboriginal peoples against the *constitutional* rights of non-Aboriginal Canadians in circumstances of potential conflict. But Lamer C.J. went much further than that in *Gladstone*. For him, it appears that objectives of sufficient importance to Canadians generally can be compelling and substantial, even where no conflicting constitutional rights are involved. This looks very much like the "public interest" justification that the Court rejected in *Sparrow*.

More specifically, in the context of the Aboriginal fishing rights at issue in *Gladstone*, Lamer C.J. said this:[25]

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18 *R.* v. *Gladstone*, *supra* note 3 at para. 69.

19 *Ibid.* at para. 70.

20 *Ibid.* at para. 71.

21 *Ibid.* at para. 72, quoting from *R.* v. *Van der Peet*, *supra* note 1 at para. 43.

22 *R.* v. *Gladstone*, *supra* note 3 at para. 72.

23 *Ibid.* at para. 73.

24 For a critical discussion of why the Court took that position in *Sparrow*, see K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95.

25 *R.* v.*Gladstone*, *supra* note 3 at para. 75. See also *R.* v. *Adams*, *supra* note 5, and *R.* v. *Coté*, *supra* note 6, where in each case the Crown failed to prove a valid legislative objective.

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

We need to be clear that what Lamer C.J. was referring to here was not reconciliation through agreements negotiated with Aboriginal peoples, but rather reconciliation through unilaterally imposed legislative infringements of their constitutional rights.[26] This sounds less like an approach designed to achieve real reconciliation through mutual respect and negotiated settlements and more like a continuation of the historical treatment of the Aboriginal peoples, whereby, in the words of Dickson C.J. and La Forest J. in *Sparrow*, their rights "were often honoured in the breach."[27] While one can appreciate that the interests of non-Aboriginal groups in the fishery are also involved, the fact is that if those interests are in conflict with Aboriginal fishing rights today, then the historical reliance upon and participation in the fishery by those groups in the past was probably in violation of Aboriginal rights as well. Can reconciliation really be achieved by judicially-authorized perpetuation of past injustices rather than sitting down and working out mutually-acceptable solutions to these conflicts?

More broadly, in the passage quoted above Lamer C.J. suggested that "objectives such as the pursuit of economic and regional fairness" might, "in the right circumstances," satisfy the "compelling and substantial" standard laid down in *Sparrow*. Here Lamer C.J. was not concerned with conservation, or public safety, or conflicting constitutional or even legal rights — he was referring to economic interests. But of what value are the constitutional rights of the Aboriginal peoples if they can be over-ridden to meet economic considerations in the distribution of resources? Should economic and regional fairness serve to justify infringement of constitutional rights, especially the rights of the Aboriginal peoples which are not subject to section 1 of the Charter?[28] And how can this be fair to Aboriginal peoples, when their lands have been taken from them and their economies and ways of life have been devastated by European colonization, with the result that they are at the bottom of the scale in Canada on virtually every economic and social indicator?

Justice McLachlin did point out some of the problems with Lamer C.J.'s approach to the justification issue. While she did not deal with this issue herself in *Gladstone*,[29] she was very critical of Lamer C.J.'s approach in her dissenting judgment in *Van der Peet*. She thought his approach was inconsistent with earlier authorities, in particular the *Sparrow* decision, because his interpretation of the *Sparrow* test for justification extended the meaning of "compelling and substantial" purpose, in her words, "to any goal which can be justified for the good of the community as a whole, aboriginal and non-aboriginal."[30] After citing the above-quoted passage from his judgment referring to economic and regional fairness, she said this:[31]

> Leaving aside the undefined limit of "proper circumstances," the historical reliance of the participation of non-aboriginal fishers in the fishery seems quite different from the compelling and substantial objectives the Court described in *Sparrow* — conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves. These are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights.

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[26] The Crown's fiduciary duty requires consultation with affected Aboriginal groups, but their agreement is not necessary for their rights to be infringed: see *Sparrow*, *supra* note 8, esp. the passage at 1119 quoted *supra* in text accompanying note 14.

[27] *R.* v. *Sparrow*, *supra* note 8 at 1103.

[28] Aboriginal rights are not subject to section 1 because the section recognizing and affirming those rights, viz. s.35, is outside the Charter.

[29] This was because her opinion on the nature of the Aboriginal right and whether it had been infringed or not made it unnecessary for her to consider justification.

[30] *R.* v. *Van der Peet*, *supra* note 1 at para. 304.

[31] *Ibid.* at para. 305-306.

> [T]he range of permitted limitation of an established aboriginal right is confined [in *Sparrow*] to the exercise of the right rather than to the diminution, extinguishment or transfer of the right to others.... The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is a limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

Justice McLachlin also attacked Lamer C.J.'s use of reconciliation as a justification for infringing Aboriginal rights. While recognizing that reconciliation is "a goal of fundamental importance,"[32] she pointed out that:[33]

> [t]he question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

Justice McLachlin emphasized that the traditional method for achieving reconciliation between Aboriginal and non-Aboriginal peoples in Canada is through negotiations that lead to treaties. In the case of the Sto:lo Nation, whose rights were at issue in the *Van der Peet* case, no treaty had ever been signed with them. She remarked that "[u]ntil we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously."[34]

Justice McLachlin also regarded Lamer C.J.'s approach to the justification issue as "indeterminate and ultimately more political than legal."[35] We will return to this aspect of her critique after examining Lamer C.J.'s approach to the second part of the justification test.

As discussed above, the second part of the test requires proof that the measures taken to meet a legislative objective which has been shown to be valid are consistent with the Crown's fiduciary duty to the Aboriginal peoples. In his majority judgment in *Gladstone*, Lamer C.J. watered down this branch of the justification test as well. It will be recalled that the Court in *Sparrow* decided that, where conservation measures are necessary to preserve a resource such as the fishery, the impact of the measures must fall on non-Aboriginal users of the resource first. In the context of that case, this meant that the Aboriginal right in question, namely the right to fish for food, social and ceremonial purposes, had to be given top priority because it took precedence over non-Aboriginal commercial and sport fishing.[36] While purporting to maintain this requirement of priority, Lamer C.J. decided that it could not operate in the same way in the circumstances of the *Gladstone* case. The distinction he saw was that in *Sparrow* the right was internally limited by the fact that the Musqueam only needed so much fish for food, social and ceremonial purposes, whereas the right of the Heiltsuk to sell herring spawn commercially in *Gladstone* was not subject to any internal limitation — the only limitations in that context were external, namely the availability of the resource and the demands of the market. The problem Lamer C.J. found with giving top priority to a right that has no internal limitations was that it would make the right an exclusive one. He put it this way:[37]

> Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in *Sparrow* would be to give the right-holder exclusivity over any person not having an

[32] *Ibid.* at para. 310.
[33] *Ibid.*

[34] *Ibid.* at para. 313.
[35] *Ibid.* at para. 302.
[36] In *R.* v. *Adams*, *supra* note 5 at para. 59, the Supreme Court affirmed that the Aboriginal right to fish for food "should be given first priority after conservation concerns are met." See also *R.* v. *Coté*, *supra* note 6 at para. 82.
[37] *R.* v. *Gladstone*, *supra* note 3 at para. 59.

aboriginal right to participate in the herring spawn on kelp fishery.

I fail to understand why this right would be exclusive except in circumstances where the Heiltsuk were capable of taking all the herring spawn on kelp available after conservation requirements had been met. But leaving that aside, the main problem with Lamer C.J.'s approach is that it ignores the *Sparrow* rationale for giving top priority to Aboriginal fishing rights, namely that those rights are constitutionally protected while the rights of non-Aboriginal users of the resource are not. It is the constitutional status of the Aboriginal right which determines its priority, not the nature of the specific Aboriginal right in question. But Lamer C.J. down-played the significance of this constitutional status by saying that constitutionalization of Aboriginal fishing rights, while resulting in priority for those rights, cannot have been intended to extinguish the right of the public generally to fish.

So what *did* Lamer C.J. mean when he said that an Aboriginal right to fish commercially has priority over non-Aboriginal fishing, but not the kind of priority contemplated in *Sparrow*? It is at this point that the analysis becomes vague. Here is Lamer C.J.'s explanation:[38]

> Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires the government to demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

[38] *Ibid.* at para. 62.

Chief Justice Lamer admitted that the "content of this priority — something less than exclusivity but which nonetheless gives priority to the aboriginal right — must remain somewhat vague pending consideration of the government's actions in specific cases."[39] He analogized with the approach under section 1 of the Charter, "requiring the courts to scrutinize government action for reasonableness on a case-by-case basis."[40] But we have seen that in *Sparrow* the Court specifically rejected reasonableness as a standard for deciding the validity of a legislative objective because reasonableness was not a sufficient justification for infringing constitutional rights. If the vague standard of reasonableness cannot justify a legislative objective, how can it meet the second part of the justification test which requires the government action to be consistent with the fiduciary duty owed to the aboriginal peoples?

In her dissenting opinion in *Van der Peet*, McLachlin J. was just as critical of Lamer C.J.'s position on the second part of the justification test as she was of his position on the first part. She began by pointing out that:[41]

> [t]he duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him.... The Chief Justice's test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony and reconciliation of aboriginal and non-aboriginal interests.

She also thought that his approach might "render meaningless" the priority scheme set out in *Sparrow*.[42] She said this:[43]

> On his test, once conservation is satisfied, a variety of other interests, including the historical participation of non-native fishers, may justify a variety of regulations governing distribution of the resource. The only

[39] *Ibid.* at para. 63.

[40] *Ibid.*

[41] *R.* v. *Van der Peet, supra* note 1 at para. 307.

[42] *Ibid.*

[43] *Ibid.* Note that McLachlin J. avoided Lamer C.J.'s exclusivity concern by limiting the Aboriginal right in question "to supplying what the aboriginal people traditionally took from the fishery" (*ibid.* at para. 311).

requirement is that the distribution scheme 'take into account' the aboriginal right.

Moreover, in her view Lamer C.J.'s approach inappropriately applies to section 35(1) a section 1 Charter analysis, whereby an infringement of an individual right "may be justified if this is in the interest of Canadian society as a whole."[44] While such an analysis is specifically authorized by section 1, she observed that:[45]

> the framers of section 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of society as a whole.... To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of section 1 into section 35(1), contrary to the intention of the framers of the constitution.

As mentioned above, McLachlin J. also regarded Lamer C.J.'s approach to the justification issue as "indeterminate and ultimately more political than legal."[46] She found evidence of imprecision in the suggestion that, " '[i]n the right circumstances', themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations."[47] She continued:[48]

> While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed.

Justice McLachlin's final salvo was levelled at Lamer C.J.'s suggestion that, in her words, "aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests."[49] For her, this is unconstitutional. She put it this way:[50]

> How, without amending the constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by section 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals would be to diminish the substance of the right that section 35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.

Coming from a colleague, this is incisive criticism of Lamer C.J.'s approach to the justification test. Moreover, it is criticism that went largely unanswered in his judgment in *Gladstone*, even though *Van der Peet* was released the same day. In my view, what Lamer C.J. has done on behalf of the majority is virtually to abdicate the Supreme Court's responsibility for upholding what are supposed to be the constitutional rights of the Aboriginal peoples. On his approach, those rights can now be overridden on broad policy grounds relating to economic and regional fairness, and even to support the economic interests of particular groups such as commercial fishers whose historic use of the fishery may well have been a violation of Aboriginal rights all along. The extent to which the Supreme Court will scrutinize government actions to protect Aboriginal rights against infringement remains unclear. One can only hope that in specific situations the Court will hold the federal government to a high fiduciary standard before sanctioning infringements of Aboriginal rights, but the deferential attitude to government policy which I detect in *Gladstone* is disappointing, to say the least, and does not augur well for the future.❑

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44 *Ibid.* at para. 308.
45 *Ibid.* McLachlin J. was implicitly relying on the fact that s.35(1) is outside the Charter, and therefore is not subject to s.1.
46 *Ibid.* at para. 302.
47 *Ibid.* at para. 309.
48 *Ibid.*
49 *Ibid.* at para. 315.
50 *Ibid.*

Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*

Leonard I. Rotman

The Crown's fiduciary duty to the Aboriginal peoples of Canada is a fundamental part of the special, *sui generis* Crown-Native relationship. It requires that the Crown act selflessly, with honesty, integrity and the utmost good faith towards its Aboriginal beneficiaries' interests. This duty, which is binding upon both federal and provincial levels of government,[1] also entails that the Crown must avoid placing itself or being placed in situations that would compromise the Aboriginal peoples' interests. While the extent of the Crown's fiduciary duty has not yet been judicially considered, it arguably permeates virtually every aspect of Crown-Native relations.[2]

The Crown's fiduciary duty to Aboriginal peoples has been a judicially-recognised element of Crown-Native relations for little more than a decade. In that brief period of time, it has become a firmly entrenched, vital aspect of Canadian Aboriginal rights jurisprudence. Indeed, since the fiduciary nature of Crown-Native relations was first articulated by the Supreme Court of Canada in *Guerin* v. *R.*,[3] fiduciary doctrine has been present in a substantial number of that court's Aboriginal rights decisions — the most notable being *R.* v. *Sparrow* in 1990.[4] The *Sparrow* decision made clear that the Crown's fiduciary duty to Aboriginal peoples applies to Crown-Native relations generally; that it exists as a guiding principle in the consideration of the Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*; and that the duty is, itself, an entrenched element of section 35(1).[5]

As a result of its decision in *Sparrow*, the Supreme Court effectively dictated that all future judicial considerations of the Aboriginal and treaty rights encompassed within section 35(1) had to take into account the existence of the Crown's fiduciary obligations. The majority of post-*Sparrow* Aboriginal rights cases have incorporated fiduciary rhetoric into their discussions of Aboriginal and treaty rights.[6] The limited discussion of fiduciary doctrine and its application to the points in dispute in those cases suggest, however, that post-*Sparrow* judicial references to the Crown's fiduciary duty demonstrate a profound reluctance to apply and enforce the Crown's obligations. While Canadian courts may feel obliged to make use of fiduciary rhetoric, their sense of obligation appears to begin and end at recognising the Crown's duty and its incorporation in section 35(1). The recent Supreme Court of Canada decisions in *R.* v. *Badger*[7] and *R.* v. *Van der Peet*[8] are clear examples of this phenomenon.

The Supreme Court's discussion of the Crown's fiduciary duty in *Badger* and *Van der Peet* was limited to its recognition as an interpretive principle to guide the Court's analysis of the facts and issues arising in each case. In neither of these cases did the Supreme

1 For greater discussion of this point, see L.I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.J. 735; Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) [hereinafter "*Parallel Paths*"].

2 It should be noted that the Crown's duty is comprised of both general and specific duties, as discussed *infra*.

3 (1984), 13 D.L.R. (4th) 321 (S.C.C.).

4 (1990), 70 D.L.R. (4th) 385 (S.C.C.). Note also *Paul* v. *Canadian Pacific Ltd.* (1989), 53 D.L.R. (4th) 487 (S.C.C.); *Roberts* v. *Canada* (1989), 57 D.L.R. (4th) 197 (S.C.C.).

5 On these points, see *ibid.* at 406-8. See also Rotman, *Parallel Paths*, *supra* note 1.

6 See, for example, *Ontario (A.G.)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 (S.C.C.); *Quebec (A.G.)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 (S.C.C.).

7 (1996), 133 D.L.R. (4th) 324 (S.C.C.).

8 S.C.C. No. 23803, [1996] S.C.J. No. 77.

Court canvass the existence of the Crown's fiduciary obligations as they pertain directly to the respective points in issue. In *Badger*, for example, the Court failed to consider the effect of the Crown's actions on its existing fiduciary obligations under Treaty No. 8. Meanwhile, in *Van der Peet*, the Court did not consider the impact of its conclusions on the Crown's fiduciary obligations to Aboriginal peoples generally. A closer analysis of the manner in which fiduciary doctrine was used in these decisions strongly indicates that the Supreme Court's invocation of fiduciary rhetoric was more symbolic than real.

R. v. *Badger*

In *Badger*, three Treaty No. 8 Indians were charged under the Alberta *Wildlife Act*[9] while hunting on privately-owned land within the boundaries of tracts surrendered under the treaty. All three claimed a treaty right to hunt.[10] In the course of its judgment, the Supreme Court held that the federal government possessed the ability to override or alter treaty rights guaranteed to Aboriginal peoples by way of unilateral enactments. Specifically, the Court held that the Alberta *Natural Resource Transfer Agreement, 1930* (hereinafter "NRTA"),[11] an amendment to the Canadian Constitution, could override existing treaty rights guaranteed to the Aboriginal signatories to Treaty No. 8 where the treaty's terms were inconsistent or incompatible with the NRTA. This occurred via the "merger and consolidation" of the rights existing within both Treaty No. 8 and the NRTA.

Treaty No. 8, signed in 1899, guaranteed the Aboriginal signatories the right to continue their hunting practices "as usual" over the entirety of the tracts surrendered in the treaty. In *R.* v. *Horseman*, the Supreme Court had determined that those rights included the right to hunt for commercial purposes.[12] The terms of the treaty provided, however, that such rights were subject to future, unspecified regulation; the exercise of those rights was also excepted from those tracts that were deemed to be "taken up" by the Crown for other purposes. The NRTA, meanwhile, broadened and expanded Aboriginal hunting rights beyond the scope of the territories encompassed within the treaties signed in Alberta, but contemplated hunting over those expanded territories only for food. When these "competing" considerations were merged and consolidated, the commercial hunting rights in Treaty No. 8 were deemed to be eliminated because they conflicted with the NRTA.[13]

The *Badger* case clearly indicates that treaty rights are considered by the Supreme Court of Canada to be inferior to unilateral constitutional enactments, such as the NRTA. Justice Cory, departing from his majority judgment in *Horseman*, held that the NRTA modified treaty rights where they came into conflict with the NRTA, but did not supplant those rights.[14] In a separate, concurring judgment — and consistent with Cory J.'s majority judgment in *Horseman* — Sopinka J. determined that the NRTA entirely replaced Treaty No. 8 rights:[15]

> 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.... 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

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9 S.A. 1984, c. W-9.1.

10 For a more complete discussion of the *Badger* decision, see C. Bell, "*R.*v. *Badger*: One Step Forward and Two Steps Back?" (1996) 8 Constitutional Forum 21; L.I. Rotman, "Aboriginal Rights Law Year in Review: The 1995-96 Term" (1997) 12 J.L. & Social Pol'y (forthcoming).

11 S.C. 1930, c. 3.

12 [1990] 1 S.C.R. 901.

13 While the discussion of the Aboriginal right to hunt for food or commercial purposes was an integral element of the *Horseman* decision, the *Horseman* precedent on this point was expressly upheld in *Badger*. See the judgments of Sopinka J., *supra* note 7 at 330, and Cory J., *ibid.* at 342.

14 As he explained in *Badger*, *supra* note 7 at 342-3:

> [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.

15 *Ibid.* at 330. Indeed, as Sopinka J. explained, *ibid.* at 331, "the Treaty rights have been subsumed in a document of a higher order."

the right to hunt for food were replicated in the NRTA.

Whether adopting the conclusions of Cory or Sopinka JJ., the Supreme Court's analysis in *Badger* explicitly approves the notion that the Crown may enact legislation that infringes upon or eliminates treaty rights without the need to consult or negotiate with Aboriginal peoples or, more importantly, to obtain their consent. What is troubling about this conclusion is that the Court came to it without first considering the effects of the Crown's fiduciary obligations to the Treaty No. 8 signatories. While Canadian courts have held that it was within the Crown's legislative ability to extinguish, modify, or alter 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.

In its decision in *Guerin*, the Supreme Court found that the Crown's fiduciary obligations to Aboriginal peoples were rooted in the *Royal Proclamation of 1763*.[16] Consequently, it cannot presently be questioned whether the Crown possessed fiduciary obligations to the Aboriginal peoples when it promulgated the NRTA. Even if the Crown was unaware of the fiduciary nature of its obligations in 1930 — given the fact that those duties were only described as fiduciary in 1984 — it should have recognised that the solemn nature of Aboriginal treaties carried with them legally binding obligations. These treaty obligations ought to have prevented the Crown from unilaterally altering its historical treaty commitments. It should be noted, though, that the Canadian judiciary generally did not recognise treaty obligations as binding in law at that time.[17]

By virtue of the *Guerin* and *Sparrow* decisions, contemporary courts are obliged to render the application of the NRTA subject to the Crown's fiduciary obligations even though the Crown may not have been aware of the fiduciary nature of its duties at that time. While this may appear to be a historical anachronism created by the common law, what is important to consider in this context is not the precise name given to the Crown-Native relationship, but the ramifications of the parties' interaction and whether that gave rise to legally enforceable obligations. This notion is consistent with the theoretical underpinnings of fiduciary doctrine. A relationship's dynamics are what truly causes it to be described as fiduciary, not whether it fits into already-established categories of fiduciary relations.[18] On this basis, it is legitimate to hold the Crown to fiduciary obligations relating to the NRTA's effect on treaties in the present day since the Crown ought to have been aware in 1930 that it could not depart from its treaty promises without being legally bound to account for such a breach.

By upholding the Crown's ability to unilaterally eliminate or override existing treaty rights, the Supreme Court in *Badger* effectively sanctioned the Crown's breach of its general fiduciary duty to act in the best interests of Aboriginal peoples as well as its specific obligations under Treaty No. 8.[19] It is simply not possible for the Crown to have maintained fidelity to its fiduciary duty to act in the best interests of the Aboriginal peoples while it was unilaterally eliminating rights guaranteed to them in treaties. Maintaining the honour of the Crown and avoiding sharp practice in all dealings with the Aboriginal peoples, principles explicitly endorsed in *Badger*,[20] are clearly offended by

16 R.S.C. 1985, App. II, No. 1. On this point, see *Guerin*, *supra* note 3 at 340.

17 See, for example, the commentary by Lord Watson in *Attorney-General of Ontario* v. *Attorney-General of Canada: Re Indian Claims* (the *Robinson Treaties Annuities* case), [1897] A.C. 199 at 133 (P.C.): "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor ..." Lord Watson's characterisation was expressly adopted around the time of the NRTA's promulgation in *R.* v. *Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.): "In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can.* v. *A.-G. Ont.* (Indian Annuities case), [1897] A.C. 199 at 213."

18 See L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta L. Rev. 821 at 829-31.

19 Briefly put, the Crown owes fiduciary obligations of a general nature pursuant to its historical relationship with the Aboriginal peoples in Canada while it owes specific fiduciary obligations stemming from individual events or occurrences, such as the signing of individual treaties. These ideas are discussed more fully in Rotman, *Parallel Paths*, *supra* note 1.

20 See *Badger*, *supra* note 7 at 331, 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

finding that the NRTA may, without consultation or consent, override or alter the nature of solemn, pre-existing agreements.[21] The Crown's actions in this regard contradict the solemn and binding nature of Crown-Native treaties, as well as the representations of the Crown therein and in the negotiations leading up to their conclusion. Equally important, the constitutional affirmation and protection of Aboriginal and treaty rights in section 35(1), which incorporates the Crown's fiduciary duty to Native peoples, is itself offended by the Crown's powers as described in *Badger*.

R. v. *Van der Peet*

More recently, the Supreme Court made reference to the Crown's fiduciary obligations in *Van der Peet*, an Aboriginal fishing rights case, where a member of the Sto:lo nation had been charged with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence. In the course of determining whether the appellant possessed an Aboriginal right to sell fish, Lamer C.J.'s majority judgment held that an activity could only be considered an Aboriginal right if it was an element of a practice, tradition or custom integral to the distinctive culture of the Aboriginal group claiming the right; moreover, that right had to be traceable to pre-contact practices. Under this formulation of Aboriginal rights, any activity arising after contact with Europeans was incapable of being classified as a constitutionally-protected Aboriginal right under section 35(1).[22]

In establishing the framework for his analysis of the right claimed by the appellant, Lamer C.J. emphasised the importance of adopting a purposive approach to section 35(1), as suggested by the Supreme Court in *Sparrow*.[23] He found that this purposive approach, which entailed giving section 35(1) a generous and liberal interpretation in favour of the Aboriginal peoples, stemmed from the fiduciary nature of the relationship between the Crown and Aboriginal peoples. Additionally, he stated that this approach was intended to inform the court's analysis of the purposes underlying section 35(1), as well as that section's definition and scope.[24] Chief Justice Lamer held that the Crown's fiduciary relationship with the Aboriginal peoples required that any doubt or ambiguity as to what ought to properly fall within the scope and definition of section 35(1) was to be resolved in favour of the Aboriginal peoples.[25] Above all, he determined that the fiduciary nature of Crown-Native relations meant that the honour of the Crown was at stake in its dealings with Aboriginal peoples.

Chief Justice Lamer's finding that the appellant did not possess an Aboriginal right to sell fish because that practice was initiated entirely in response to non-Aboriginal settlement contradicts his own statements regarding the fiduciary nature of Crown-Native relations. Arbitrarily limiting the definition of Aboriginal rights to pre-contact practices prohibits 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. This is inconsistent with maintaining the honour of the Crown.

It is circular reasoning to suggest that Aboriginal rights must encompass only those practices that are 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 as Aboriginal rights those new practices arising in response to that European settlement. Insofar as Aboriginal rights are dynamic and evolving, they ought not be restricted to their "primeval simplicity and vigour."[26] Rather, they must be allowed

"sharp dealing" will be sanctioned.

21 This concern was expressed by the additional reasons provided by Kerans J.A. in the Alberta Court of Appeal's disposition of *Badger* (1993), 8 Alta. L.R. (3d) 354 at 361 (C.A.):

> 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.

22 *Van der Peet*, *supra* note 8 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." See discussion in J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1996) 8 Constitutional Forum 27.

23 *Ibid.* at para. 20-1.

24 *Ibid.* at para. 24.

25 *Ibid.* at para. 25.

26 See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 782, where he explained that the notion of "existing" aboriginal rights "suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour." This statement was quoted with approval by the Supreme Court of Canada in *Sparrow*, *supra* note 4 at 397.

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. To hold otherwise would be to deny the purposive application of the interpretive principles derived from the Crown's fiduciary obligations to Aboriginal peoples.

Chief Justice Lamer's determination in *Van der Peet* that "incidental" Aboriginal practices that "piggyback" on Aboriginal rights are not deserving of constitutional protection also has the potential of allowing the Crown to escape its fiduciary obligations to protect fundamental Aboriginal rights.[27] It presents the possibility that Aboriginal rights that are dependent on conditions precedent may be indirectly denied simply by refusing to protect those prior conditions. Where an Aboriginal group has a recognised right to fish, protecting that right necessitates protecting the means necessary for the realisation of that right. Such a requirement would prevent, for example, allowing a marina to be built upstream from where those fishing rights are exercised that destroys the fishing stock.[28] To hold otherwise would render any protection of the right meaningless.

Chief Justice Lamer's analysis of incidental rights in *Van der Peet* appears to contradict the Supreme Court's unanimous judgment in *Simon* v. *R.*,[29] where 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."[30] The flexible interpretation of Aboriginal treaties articulated by the Supreme Court of Canada in cases such as *Simon* or, for that matter, the language of generous and liberal interpretation of Aboriginal rights invoked by Lamer C.J. in *Van der Peet*, requires that so-called "incidental" rights 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.'s professed adherence to giving section 35(1) a generous and liberal interpretation in favour of Aboriginal peoples.

The dissenting judgments of L'Heureux-Dubé and McLachlin JJ. in *Van der Peet* are more faithful to the recognition and enforcement of the Crown's fiduciary obligations than the majority judgment of Lamer C.J. Justice L'Heureux-Dubé recognised that the definition of Aboriginal rights must take place within "the broader context of the historical aboriginal reality in Canada,"[31] one aspect of which entails that Aboriginal rights must be construed in light of the special fiduciary relationship that exists between the Crown and Aboriginal peoples in Canada.[32] Justice McLachlin emphasised that the determination of whether a practice constituted an Aboriginal right had to "remain true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country."[33] In paying heed to the fiduciary nature of Crown-Native relations, both dissenting judgments found that the existence of Aboriginal rights could not be arbitrarily limited to practices arising prior to contact.

CONCLUSION

The *Badger* and *Van der Peet* cases illustrate that simple judicial recognition of or professed adherence to the Crown's fiduciary obligations to Aboriginal peoples is not identical to the courts' enforcement of those obligations. Effecting the latter necessitates scrutinising the Crown's actions in light of its fiduciary responsibilities. The use of fiduciary rhetoric by the judiciary is rendered meaningless without a commitment to enforce its application in practice.

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27 It should be noted that the judiciary's compartmentalisation of Aboriginal practices into "integral" rights and "incidental" rights demonstrates a profound inability or reluctance to recognise that aboriginal rights ought to be understood as broad, theoretical constructs. This notion is recognised in L'Heureux-Dubé J.'s dissenting judgment in *Van der Peet*, *supra* note 8 at para. 156, where she states that aboriginal rights are notionally incapable of being encapsulated by particular practices, traditions, or customs, but are more abstract and profound concepts from which specific practices, traditions, or customs are derived. The compartmentalisation of aboriginal rights in the manner exhibited by the majority judgment in *Van der Peet* deflects attention from what ought to be the true issue at hand, namely the ability of aboriginal peoples to determine the precise methods by which they will make use of or implement their larger, abstract rights.

28 See *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 (C.A.).

29 (1985), 24 D.L.R. (4th) 390 (S.C.C.).

30 *Ibid.* at 403.

31 *Van der Peet*, *supra* note 8 at para. 105.

32 *Ibid.* at para. 144.

33 *Ibid.* at para. 232.

Sanctioning the NRTA's effect on existing treaty rights, as in *Badger*, or the ability of the Crown to circumvent the recognition of legitimate Aboriginal rights, as in *Van der Peet*, is inconsistent with the Crown's historical undertakings towards Aboriginal peoples and their rights. It also trivialises the Crown's fiduciary duty to the point where it appears as nothing more than empty rhetoric.

The judicial treatment of fiduciary doctrine as a mandatory, yet peripheral element of Aboriginal rights jurisprudence is an affront to the centrality of fiduciary doctrine in Canadian law and derogates from the dictates of the *Sparrow* decision. The fiduciary nature of Crown-Aboriginal relations exists at the very heart of Crown-Native interaction. It may be traced to the formative period of relations between Britain and the Aboriginal peoples from the time of their initial contact until shortly after the signing of the *Treaty of Niagara* in 1764. While the precise nature of Crown-Aboriginal relations may have changed since that time, the fiduciary nature of those relations remains rooted in the notions of reciprocity and mutuality that were characteristic of pre-colonial relationships between the Crown's representatives and the Aboriginal peoples.[34]

The existence of the Crown's fiduciary duty in section 35(1) of the *Constitution Act, 1982* is a constitutional imperative to ensure that the Crown lives up to the historical obligations it owes to the Aboriginal peoples. It prescribes onerous obligations on the part of the Crown in its dealings with the Aboriginal peoples. It also provides the Aboriginal peoples with legally enforceable means to ensure either that the Crown lives up to its obligations or furnishes them with remedies where the Crown is found to have breached those obligations. Since the Crown's duty is entrenched within section 35(1), the Canadian judiciary is bound to enforce the Crown's obligations. This constitutional imperative requires more of the courts, rather, than the proliferation of empty rhetoric offered by the Supreme Court of Canada in *Badger* and *Van der Peet*.❑

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[34] For more detailed discussion of this argument, see 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 (forthcoming).

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In this interdisciplinary collection, the authors state that although Canadian law has historically served to impose the values and institutions of the dominant cultures upon indigenous peoples, legal venues have also facilitated successful challenges to those institutions. Aboriginal treaty rights were acknowledged and affirmed in the Constitution Act of 1982, but courts and legislatures are increasingly relying on a mode of understanding that is grounded in the legacy of the British colonial system.

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Aboriginal and Treaty Rights in Canada shows that, although the constitution has recognized existing aboriginal and treaty rights, changes to the way these rights are interpreted are urgently needed.

Michael Asch is a professor in the Department of Anthropology at the University of Alberta and the author of *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

CONTENTS:

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