Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?[1]

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Introduction

Canadian jurisprudence on Aboriginal rights enjoys a long and complex history, its roots reaching back nearly two centuries into the early post-Confederation era. Aboriginal rights encompass a wide variety of phenomena but the focus here is on the right to self-government; that is, the right of Aboriginal peoples[2] to be recognized as autonomous political communities with the authority and resources to decide the course of their individual and collective futures. Self-government is the most fundamental of all democratic rights, and is that which provides the framework within which most other rights derive their force and significance. These include the right to decide on forms of land ownership and tenure, to make economic and social policy, to design legal and political institutions, and to preserve and promote a distinctive language and culture. The Supreme Court of Canada has yet to rule directly on the question of Aboriginal self-government, but its decisions on other fundamental Aboriginal rights have undeniable

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2 The terms Aboriginal peoples, societies, nations, communities, national communities and First Nations are used here interchangeably.

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consequences for any future ruling in this regard, a fact to which the Court itself has made direct allusion.[3]

Aboriginal rights on the whole enjoyed scant recognition from Canada's highest Court until the ground-breaking *Calder* case in 1973.[4] The legal uncertainty created by this split decision ushered in a new federal policy of negotiating comprehensive claims to land and self-government and began an era of more expansive judicial recognition of Aboriginal rights. In the wake of the constitutional entrenchment of Aboriginal rights in 1982, decisions in *Sparrow* and *Sioui* in the early 1990s held significant promise that the Court was ready to recognize a broad and inherent right of self-government.[5] Granted, a close reading of these cases makes it abundantly clear that the Court was not prepared to challenge the assumptions of colonialism and the legitimacy of the Crown's unilateral assertion of sovereignty over Aboriginal peoples and territories. Nevertheless, Aboriginal rights were recognized as flexible rather than frozen, they were to be given a broad and liberal interpretation and Aboriginal peoples were acknowledged as occupants of a quasi-national sui generis legal status.

This promise was greatly dampened, if not extinguished, by the decisions in *Van der Peet* and *Pamajewon*.[6] Again, it should come as no surprise that the Court upheld the ultimate sovereignty of the Crown, but its characterization of constitutionally protected Aboriginal rights was a surprising and disappointing step back from its own prior jurisprudence.[7] The choice to anchor the legal recognition of Aboriginal rights in the distinctive character of Aboriginal cultures—in their Aboriginality—constitutes a serious diminishment of the legal and political status of Aboriginal peoples. The Court compounded this error by further tying the recognition of Aboriginal rights to an exceedingly narrow standard of cultural origins and authenticity. Despite its better intentions, the Court revived the doctrine of frozen rights, offered an impoverished view of the sui generis Crown-Aboriginal relationship and, as such, failed to deliver on its promise of a broad and liberal interpretation of Aboriginal rights. It threatened to restrict rather than expand the capacity of Aboriginal peoples to determine the character and direction of their communities and cultures. A truly generous and liberal framework of recognition would not have identified cultural

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3 *R. v. Pamajewon*, [1996] 4 C.N.L.R. 164, at 171.

4 *Calder v. AG for British Columbia*, [1973] S.C.R. 313.

5 *R. v. Sioui*, [1990] 70 D.L.R. 4th, 427; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

6 *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177.

7 Some would say it is a step back to the pre-Calder era. See Michael Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-96," in Paul Havemann, ed., *Indigenous People's Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999), 428-46.

Abstract. This article explores the implications of changes in Canadian Supreme Court jurisprudence on Aboriginal rights since the 1990s. While recognizing the Court's valuable contributions in the period from *Calder* to *Sparrow*, the author argues that the 1996 *Van der Peet* decision deals a serious blow to the legal status of Aboriginal rights, particularly the right to self-government. The standard of legal recognition established in *Van der Peet* constitutes a decided step back from the Court's prior jurisprudence, and is insufficient as a means of securing its stated ends: the survival and well-being of Aboriginal communities and cultures. The author concludes by arguing that the Court can repair the recent damage it has done to Aboriginal rights by revisiting the concept of the quasi-national status granted to Aboriginal peoples within the context of the sui generis Crown-Aboriginal relationship.

Résumé. Cet article examine les implications des changements de la jurisprudence de la Cour suprême du Canada relativement aux droits arborigènes, durant la décennie quatre-vingt-dix. Tout en reconnaissant la valeur de la contribution apportée par la Cour, au cours de la période délimitée par les causes *Calder* et *Sparrow*, l'auteur soutient que la décision rendue en 1996 dans la cause *Van der Peet* a porté un coup sévère aux statut légal des droits arborigènes en général, et à leur droit d'autonomie gouvernementale en particulièr. La norme de reconnaissance légale établie par l'arrêt *Van der Peet* est un pas en arrière indéniable par rapport à la jurisprudence antérieure de la Cour et elle constitue un moyen insuffisant de garantie de la survivance et du bien-être des communautés et des cultures arborigènes. En conclusion, l'auteur soutient que la Cour peut réparer les dommages qu'elle a récemment causés aux droits arborigènes en reconsidérant le concept d'un statut quasi national accordé aux peuples arborigènes dans le contexte des relations sui generis entre la Couronne et les autochtones.

distinctiveness as the ultimate justification of Aboriginal rights, but simply as one among a wide variety of choices which themselves derive their justification from the pre-existing sui generis status of autonomous self-governing Aboriginal communities. Within this framework, the Crown would still retain ultimate sovereignty, but Aboriginal peoples would enjoy a much broader legal basis from which to defend and negotiate the precise nature and limits of their self-governing authority.[8]

The following section of the article characterizes the claim to self-government, drawing both on Aboriginal perspectives and Will Kymlicka's discussion of national minorities living in multinational states. The next two sections analyze the legal support garnered by this view of Aboriginal authority in the historical development of the doctrine of Aboriginal rights:[9] The first covers the period up to and

8 This legal solution will not break entirely with Canada's colonial past but, as I explain below, it is likely the best that can be hoped for from the Court.

9 More comprehensive sources include Canada, Royal Commission on Aboriginal Peoples (hereafter RCAP), *Partners in Confederation* (Ottawa: Minister of Supply and Services, 1993); Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1992); Bradford Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis, and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1991); and Bryan Slattery, "Understanding Aboriginal Rights," *Canadian*

including *Sparrow*, and the next section covers the central changes in the Court's position between *Sparrow* and 1999, focusing in particular on *Van der Peet*. There follows a normative critique of the principles underlying the *Van der Peet* decision, and a concluding section that argues in favour of an alternative framework for recognizing Aboriginal rights based on the concept of the sui generis Crown-Aboriginal relationship.

The Right to Self-Government

Aboriginal peoples in Canada are marked by tremendous diversity in language and culture, economic and social well-being, geographical location, degree of integration with non-Aboriginal peoples and their level of commitment to traditional values and institutions. Without downplaying any of these numerous differences, a commanding consensus has emerged among Aboriginal leaders regarding the nature and source of their inherent right to self-government.[10] Before the arrival of the first European explorers and traders, North America was occupied by a diverse and thriving assortment of independent self-governing Aboriginal nations, with their own distinct cultures, languages

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Bar Review 66 (1987), 727-82.

10 What follows is just a small sample of the Aboriginal sources I consulted. For a glimpse of some grass-roots perspectives, see RCAP, Public Hearings Records (Ottawa: Libraxus, CD-ROM, 1995); Assembly of First Nations, *To the Source* (Ottawa: Assembly of First Nations Library, 1992). For a good cross-section of statements by Aboriginal leaders, academics and legal experts, see Gerald Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism in Canada* (Oxford: Oxford University Press, 1995); Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill, 1989); Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), section 1; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," in Richard Devlin, ed., *First Nations Issues* (Toronto: Emond Montgomery, 1991), 40-73; Grand Council of the Crees, *Status and Rights of the James Bay Crees in the Context of Quebec's Secession From Canada*, submitted by the Grand Council of the Crees (of Quebec), to the United Nations Commission on Human Rights, Forty-Eighth Session January 27-March 6, 1992; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada. Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997), 173-207; Ovide Mercredi, National Chief Assembly of First Nations, Submission to the Royal Commission on Aboriginal Peoples, Public Hearings. Round 1, Toronto (June 26, 1992); John Borrows, "Constitutional Law From A First Nation Perspective: Self-Government and the Royal Proclamation," *University of British Columbia Law Review* 28 (1994), 1-47; and Wendy Moss, "Inuit Perspectives on Treaty Rights and Governance Issues," in RCAP, *Aboriginal Self-Government. Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services, 1995), 55-141.

and systems of law and government. It is this status as the original occupants and the original sovereigns in their traditional territories which is most often cited by Aboriginal peoples as the primary source of their self-governing authority, and of all the various other rights, responsibilities and entitlements which flow from that authority. Self-government is described as a natural and inherent right which can and should be recognized by Canada's non-Aboriginal national communities, but it is neither constituted, nor can it be unilaterally extinguished by, their structures of legal and political authority.[11] It is not a separatist claim, nor is it a desire for absolute and unrestrained authority. The relationship with Canada's non-Aboriginal communities is viewed as one of complex interdependence. Hence negotiations must be joined so as to establish terms of co-operation and the distribution of territories, powers and jurisdictions among self-governing peoples. The desire is not for an archetypal political relationship in which powers, jurisdictions and institutions remain either undifferentiated across different groups or fixed and frozen in place. Instead, what is sought is a series of flexible relationships tailored to the specific needs and circumstances of the group or community in question, and subject to periodic review and renegotiation as these needs and circumstances change. Aboriginal peoples argue in favour of a form of co-ordinate authority which at times will limit, and at other times will be limited by, the authority of Canada's other national communities.

Kymlicka provides helpful insights into the claims of Aboriginal peoples in his more general theoretical discussion of the claims of national minorities living within the bounds of multinational states. These national communities, he tells us, demand more than the sort of limited rights or forbearance sometimes accorded to cultural minorities (recent immigrants, for example). Instead, they claim wide-ranging rights and powers of self-government grounded in their authority as separate and independent peoples forming their own political community.[12] Moreover, as they see things, this authority is equal to, and neither derivative of nor subordinate to, the self-governing author-

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11 For insights into the desirability and possibility of the explicit constitutional entrenchment of a right to self-government, see Alfred, *Heeding the Voices of Our Ancestors*, 100, 184-85; and Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change," in Kenneth McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993), 117-51.

12 Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), 182-83.

ity of the more powerful national communities with whom they share a state:

> In other words, the basic claim underlying self-government rights is not simply that some groups are disadvantaged within the political community . . . *or that the political community is culturally diverse*. . . . Instead, the claim is that there is more than one political community, and that the authority of the larger state cannot be assumed to take precedence over the authority of the constituent national communities. If democracy is the rule of "the people," national minorities claim that there is more than one people, each with the right to rule themselves.[13]

For Aboriginal peoples, the right to self-government is the means of reweaving the socio-economic, cultural and political fabric of their communities, tattered after decades of colonial disruption. It is within and through these re-invigorated Aboriginal communities that rights, responsibilities and entitlements are to enjoy their force and significance, that democratic institutions and processes are to be created and maintained and individual and collective goods both developed and promoted.[14]

Prominent commentators such as Alan Cairns feel that it is both misleading and counterproductive to speak of Aboriginal peoples as national communities on a level with examples such as Quebec.[15] There are important kernels of truth in this objection. One must acknowledge that terms like nation or national community apply in a more straightforward manner to larger groups of Aboriginal peoples living together on a land base, such as the Inuit in Nunavut, various Yukon First Nations and the Nisga'a in British Columbia, and that for a majority of Aboriginal peoples this is increasingly not the case.[16] Moreover, in many cases institutionalized forms of Aboriginal self-government likely will bear little resemblance to fully constituted territorially concentrated governments. A model of self-government might, for example, amount to the design, delivery and administration of selected services and institutions in an urban or rural setting, or to a process of gradual capacity building in specific sectors such as education, resource extraction or small business development. Nonetheless, what remains undifferentiated across all of these different cases and

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13 Ibid., 182; emphasis added.

14 This point is expanded below.

15 Alan Cairns, review of Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998), this JOURNAL 32 (1999), 369-71.

16 RCAP estimates that, by 2011, 50 per cent of the Aboriginal population will be urban, 23 per cent on reserves, and 27 per cent rural non-reserve. See *The First Peoples Urban Circle: Choices for Self-Determination* (Report prepared for the Native Council of Canada by Optima, 1993).

circumstances is Aboriginal peoples' normative claim that their authority to self-government, whatever its institutional form, has not been undermined by the massive changes and disruptions to their societies and ways of life.[17] This normative authority claim is one of the main features which distinguishes the claims of Aboriginal peoples from those of cultural minorities such as new immigrant groups, and provides them with a greater affinity to more standard examples of nationalist mobilization in Canada and abroad.[18]

Aboriginal Peoples and the Courts: The Long Road towards Recognition

To what extent have these Aboriginal claims been recognized in Canadian jurisprudence? As early as 1867, the foundations of a common law of Aboriginal rights were being laid in the decision of the Quebec Superior Court in *Connolly v. Woolrich.* Justice Monk, heavily influenced by the judgment of Chief Justice John Marshall of the United States Supreme Court in his landmark decision in the case of *Worcester v. Georgia*, recognized the rights of Indian[19] peoples as autonomous and self-governing nations living under protection of the Crown. Justice Monk accepted the assumption that French and British law was introduced into Indian territories when these nations began their interactions with the indigenous inhabitants, but he flatly rejected the argument that they automatically superseded or nullified existing Aboriginal laws and the rights flowing therefrom. In his judgment, existing Aboriginal laws were left in full force, and were in no way modified by the introduction of European law with regard to the civil rights of the natives.[20] In describing the political status of Indian peoples, Justice Monk quoted liberally from Marshall's characterization of the

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17 This point is given greater attention below. Cairns, I think, accepts this normative argument, but with the qualification that much more rigorous attention be devoted to the differences among competing forms of nationalism and the institutional solutions to which they are susceptible (review of Kymlicka, *Finding Our Way*, 370). I heartily concur with Cairns's qualification, and, together with Helena Catt, seek to address it in *Sub-state Nationalism: A Comparative Analysis of Institutional Design*, Routledge, forthcoming.

18 See, for example, Ferran Requejo, "Cultural Pluralism, Nationalism and Federalism: A revision of Democratic Citizenship in Plurinational states," *European Journal of Political Research* 35 (1999), 255-86.

19 I use the term "Indian" here because it is the term most often used in the historical sources to which I make reference.

20 RCAP, *Final Report*, Vol. 2, Part 1 (Ottawa: Minister of Supply and Services, 1995), 187; *Connolly v. Woolrich* [1867] *Lower Canada Jurist* 197, at 205. For an account of the decision in *Worcester v. Georgia* and in the other two cases making up the Marshall trilogy, see John Marshall, *The Writings of Chief Justice John Marshall on the Federal Constitution* (Boston: James Monroe, 1839).

principles (though certainly not always the practice) of the British Crown's Indian policy in North America as embodied in constitutional documents such as the Royal Proclamation of 1763.[21] For example:

> Certain it is, that our history furnishes no example, from the first settlement of our country, *of any attempt on the part of the crown to interfere with the internal affairs of the Indians*, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. *He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.*[22]

To reiterate, although they were observed at least as often in the breach, particularly as the balance of power in North America shifted decisively in favour of the British, certain unmistakable principles emerged which governed the relationship between the Crown and its Indian allies. Among the most central of these was their mutual recognition of each others' authority and interests as separate and self-governing nations.[23] Their relationship is best characterized not as one of strict dependence by one party on the other, but as one of complex interdependence, involving a flexible sharing of lands and resources based on principles of purchase and consent, and the principle of non-interference in each others' internal affairs. These nations developed a custom of engaging in negotiations to govern their alliances and partnerships, to settle their differences and to govern the bounds of their

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21 "The Royal Proclamation of 7 October 1763," in W. P. M. Kennedy, ed., *Documents of the Canadian Constitution* (Toronto: Oxford University Press, 1918), 18-21. Excellent discussions of the Royal Proclamation and its underlying principles can be found in John Borrows, "Constitutional Law From A First Nation Perspective: Self-Government and the Royal Proclamation," *University of British Columbia Law Review* 28 (1994), 1-47; and John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," in J. R. Miller, ed., *Sweet Promises. A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 127-41. For dissenting perspectives as to its meaning and impact, see Menno Boldt, *Surviving as Indians. The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), 3-4; and Robert A. Williams, *The American Indian in Western Legal Thought: The Discourse of Conquest* (Oxford: Oxford University Press, 1990).

22 *Connolly vs. Woolrich*, 206; emphasis in original.

23 The term used by Marshall, following the eminent nineteenth-century European jurist Emerich de Vattel, is "domestic dependent nations" (Marshall, *Writings of John Marshall*, 437, 446). For a discussion of this doctrine, see James Youngblood Henderson, "The Doctrine of Aboriginal Rights in the Western Legal Tradition" in Boldt and Long, *The Quest for Justice*, 185-220.

interests and jurisdictions, arrangements which often were codified in a variety of treaties or treaty-like agreements.[24]

Nevertheless, jurisprudence immediately subsequent to *Connolly v. Woolrich* articulated markedly different principles upon which Supreme Court decisions on Aboriginal rights would come to be based. Canadian courts chose the decision in the matter of *St. Catherine's Milling and Lumber Company v. The Queen* as the benchmark case in the matter of Aboriginal rights. In *St. Catherine's Milling*, the Privy Council ruled that Aboriginal rights derived their sole source not from the historical status of Aboriginal peoples as independent and self-governing nations, but from the Royal Proclamation of 1763—from British colonial law, predicated on absolute and exclusive Crown sovereignty. Regarding the specific question of territory, they concluded that the underlying title to Aboriginal land was held by the Crown, the Aboriginal right being merely personal and usufructuary in nature, held, like all other Indian rights, subject to the pleasure of the Crown, to be maintained or extinguished as it saw fit.[25] This decision clearly reflected both the temper of the times and official government policy in late-nineteenth-century Canada. By the mid- to late-1850s, Canada had virtually abandoned the principles which had governed the earlier Crown-First Nations relationship in favour of the twin goals of "civilizing" and assimilating the Aboriginal population, breaking up their communities and freeing up what land remained in their possession for the purposes of settlement and development.[26]

A major turning point in the legal and political recognition of Aboriginal rights came in 1973. In *Calder v. AG of British Columbia*, the Court split on the question of whether the rights of the Nisga'a nation to their ancestral lands had been extinguished by adverse government legislation. Although the Nisga'a lost the case on a technicality, six of the seven justices broke with the legacy of *St. Catherine's Milling* by ruling that the rights of the Nisga'a pre-dated the Royal Proclamation and, in fact, derived from their occupation of their lands from time immemorial.[27] This unprecedented ruling sent shockwaves to Ottawa,

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24 See Justice Monk's references to Marshall in *Connolly vs. Woolrich*, 204-07. These principles are described in greater detail in James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), chaps. 4-5; Clark, *Native Liberty*, 11-123; and RCAP, *Partners in Confederation*, 5-27.

25 *St. Catherine's Milling and Lumber Company v. The Queen*, [1888] 14 Appeal Cases 46.

26 The historical background to this period is covered in John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," in Miller, *Sweet Promises*, 145-54; and Tobias "Protection, Civilization, Assimilation," in Miller, *Sweet Promises*, 127-41.

27 *Calder v. AG for British Columbia*, [1973] S.C.R. 313.

which soon abandoned its stillborn White Paper in favour of a policy of negotiating comprehensive land and self-government agreements with selected Aboriginal peoples.[28] This implicit connection between legal recognition and government negotiation of Aboriginal rights later became an explicit and integral aspect of Court judgments in the 1990s. One of the signal achievements of the more generous post-*Calder* political climate was the entrenchment of Aboriginal rights in section 35 of the *Constitution Act, 1982*. There has since been an increasing consensus among academics, constitutional experts and even federal and provincial governments that section 35 constitutionalizes an inherent right of Aboriginal self-government,[29] but no similarly robust consensus has arisen regarding the precise nature and scope of this right, and its relation to the other existing orders of government in Canada.

The first major case in the wake of constitutional entrenchment did not deal explicitly with section 35 rights, but was, nevertheless, another significant breakthrough for Aboriginal rights. In a unanimous decision in *Guerin v. the Queen*, the Court ruled that Aboriginal rights find their source in the status of Aboriginal peoples as the original occupants of their territories, that these rights survived any European claim to absolute sovereignty in the Americas and that they can be extinguished solely by legislation explicitly designed to do so. Equally significant, the Court recognized a fiduciary responsibility on the part of the federal government both to protect the rights of First Nations to their lands, and to deal with any surrendered lands with the best interest of the particular Aboriginal people in mind.[30] By the early 1990s the Court was taking its first tentative steps towards articulating the precise meaning and significance of the newly minted constitutional provisions for Aboriginal rights. Without ruling directly on the precise scope or content of section 35, in *R v. Sioui* the Court continued along its earlier path of articulating a generous and progressive interpretation of Aboriginal rights. Making a number of positive references to Marshall's decision in *Worcester v. Georgia*, the Court acknowledged that

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28 Asch, "From *Calder* to *Van der Peet*," 432-3; and Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: University of British Columbia Press, 1996), 26-30.

29 The inherent right of self-government has received support in government circles in the 1983 *Report of the Special Parliamentary Committee on Indian Self-Government*, otherwise known as the Penner Report (Ottawa: Queen's Printer, 1983); in the consensus achieved among the first ministers and the prime minister at Charlottetown in 1992; and in the 1995 federal policy paper: "Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (Ottawa: Public Works and Government Services, 1995).

30 *Guerin v. R.* [1984] 2 S.C.R. 335.

first peoples were dealt with in their relations with the British and the French as independent nations capable of governing themselves, and that their autonomy over their internal affairs was interfered with as little as possible. The Court further conceptualized this relationship as sui generis or "of its own kind." It was unlike the relationship between a government and its citizens, but neither was it characteristic of the relations obtaining among independent states: it occupied a middle ground somewhere in between the two. Support for the notion of balancing the rights and interests of Aboriginal and non-Aboriginal communities also formed a central part of the Court's judgment.[31]

The watershed decision on Aboriginal rights was delivered in 1990 in the matter of *R. v. Sparrow*. The Court began by defining "existing rights" under section 35 as those rights which had existed prior to the assertion of Crown sovereignty and which had not been *explicitly* extinguished prior to the time that section came into force. These rights derive from the fact that Aboriginal peoples lived in organized societies prior to contact, and occupied their lands from time immemorial. Nevertheless, the justices rejected any interpretation of these rights as being fixed or frozen in the context of any particular historical period, and instead ruled that they are to be interpreted flexibly to allow for their evolution, such that they might serve the advancement and protection of contemporary Aboriginal ends and interests. The Court also declared that Aboriginal rights were to be given a generous and liberal interpretation. They are not absolute or unrestricted rights, but a strong burden is placed on the federal government to justify any legislation whose effect upon them is in any way adverse.[32] In summary, while recognizing federal legislative authority with reference to Aboriginal peoples under section 91(24) of the *Constitution Act, 1867*, the Court echoed *Guerin* in emphasizing that these powers must be read together with the federal government's fiduciary or trust-like obligation, under section 35 to deal with Aboriginal peoples with the best interest of those peoples in mind.[33] With an eye to the political realm, the Court finished by suggesting that section 35 provides a solid constitutional base upon which subsequent negotiations can take place.

Sparrow was not all good news for Aboriginal peoples, since it stopped well short of recognizing them as national communities on an

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31 *R. v. Sioui*, [1990] 70 D.L.R. 4th, 427, particularly 437, 441, 448, 450, 461-65.

32 *Sparrow*, 1076-80 and 1099-122. The Court established a test or standard which any such adverse government legislation must meet in order to justify a restriction of an Aboriginal right. For objections to the legitimacy of this test, see Kent McNeil, "The Constitution Act, 1982, Sections 25 and 35," [1988] 1 C.N.L.R. 1-13, at 12; and Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989), 255.

33 *Sparrow*, 1108-10.

equal level with the Canadian state. Instead, it upheld the legitimacy of the Crown's extinguishment of Aboriginal rights prior to 1982, and its authority to regulate, and possibly even to override these rights after 1982. Granted, the Crown cannot act with impunity in the post-1982 period—it must meet a "strict" constitutional test to justify its actions—but its ultimate sovereignty remains intact.[34] This was stated in the clearest of terms in *Sparrow*: "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."[35]

Recognition of Aboriginal peoples as political equals has been absent in varying degrees from Crown law, policy, and constitutionalism for the last two centuries, and it is highly unlikely that the Court will ever rule to the contrary. Even if one grants that the Court has the legal capacity to recognize limits to Crown sovereignty,[36] it is difficult to imagine it developing the political will to act upon this capacity, particularly given the climate of backlash against the perceived growth of a regime of judicial supremacy in Canada.[37] However, even though the evolving doctrine of Aboriginal rights failed to shed all its colonial trappings, there is no denying the progressive direction of the Court's jurisprudence from *Calder* onwards. Particularly promising was the rejection of the frozen rights doctrine and the determination that Aboriginal rights must be given a broad and liberal interpretation. More promising yet was the Court's recognition of the quasi-national sui generis legal status of Aboriginal peoples. In combination with the previous two principles, this status could easily have been translated by the Court into recognition of a broad and inherent right of autonomous self-government. This, indeed, would have provided a solid constitutional foundation upon which negotiations to co-ordinate

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34 The test is described in ibid., 1106-19.

35 *Sparrow*, 1103. In order to make this assertion, the Court must also affirm the underlying colonial principles of *terra nullius* and *discovery*. For a summary of these principles, see Olive Dickason, "Concepts of Sovereignty at the Time of First Contacts," in L. C. Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), 143-295.

36 For an exchange along these lines, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*," *Alberta Law Review* 29 (1991), 498-517; and Thomas Isaac, "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem," *Alberta Law Review* 30 (1992), 708-12.

37 Samples of this perspective include Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993); and F. L. Morton and Rainer Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights," *Supreme Court Law Review* 1 (1990), 531-44; *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

Aboriginal autonomy with Crown sovereignty could have been conducted, but this was not to be.

Van der Peet: A Change in Direction

Supreme Court judgments in the wake of *Sparrow* have been governed by a similar structure, with the unhappy difference that they have been even more restrictive in their recognition of Aboriginal rights. In the landmark 1996 *Van der Peet* decision, the Court for the first time defined the specific character of Aboriginal rights and the means by which they could acquire legal recognition under section 35. In so doing, it took a decided step back from its prior jurisprudence, dealing a potentially fatal blow to the hopes for any future recognition of a broad and liberal right of Aboriginal self-government. Chief Justice Lamer began by defining the purpose of section 35: it provides the constitutional framework within which the fact that Aboriginals lived on the land for centuries in organized societies is recognized as the source of Aboriginal rights, and then reconciled with the sovereignty of the Crown. The substantive rights covered by this provision must be defined in light of this purpose.[38] Section 35 Aboriginal rights are carefully distinguished from liberal enlightenment-type rights such as those guaranteed by the Canadian Charter of Rights and Freedoms. Charter rights are characterized as stemming from a general desire to recognize and uphold universal respect for the dignity of each individual in society, whereas Aboriginal rights are portrayed as different than those enjoyed by other Canadians: they are rights which attach to their distinctive character, to their aboriginality.[39]

From here, the Court proceeded to establish a test by means of which it would determine what constitutes a legitimate Aboriginal right under section 35: "In light of the suggestion of *Sparrow* . . . and the purposes underlying s.35(1), the following test should be used to identify whether an applicant has established an Aboriginal right protected by s.35(1): in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right."[40] This requires some elaboration. In the process of defining the scope and

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38 *Van der Peet*, 193. Subsequent Supreme Court judgments have not deviated from the structure of adjudication established in *Van der Peet*. See *Delgamuukw v. B.C.*, [1998] 1 C.N.L.R. 14; and *R v. Marshall* [1999], at http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0533.html.

39 *Van der Peet*, 190. As the following discussion illustrates, the Court chooses to define Aboriginal as "culturally distinctive" rather than "original and self-governing."

40 Ibid., 201.

purpose of section 35, the Court decided it was necessary to identify the crucial elements of pre-existing Aboriginal cultures, which is to say those practices, customs or traditions which had existed *prior to contact* with non-Aboriginal cultures, and which are thus *integral* to *distinctive* Aboriginal cultures. The Court allowed that these practices, customs and traditions need not be distinct, as in unique, but only distinctive in the sense that they are integral or central (as opposed to simply incidental) to making a particular culture what it is.[41] Following this criterion, the Court ruled that practices, customs and traditions which qualify as Aboriginal rights are those which have continuity with pre-contact versions of themselves. Conversely, where a practice, custom or tradition arose *solely* as a result of European arrival and influence it will not meet the standard for recognition of an Aboriginal right.[42] The Court built a degree of flexibility into this formula through its willingness to recognize the exercise in modern form of a traditional custom, practice or tradition, but it remains opposed to any of these which are either wholly contemporary or which simply break fundamentally with the cultural past, especially when this is a result of contact with a non-Aboriginal culture. So in the Court's view, Aboriginal cultures and Aboriginal rights are dependent for their legal legitimacy on their connection with an original and authentic Aboriginal past. Additional flexibility is incorporated in the provision in that the perspectives of Aboriginal peoples themselves are to be taken into account in this process of identifying Aboriginal cultures and Aboriginal rights, but this, too, is qualified with the provision that these perspectives must be rendered "cognizable to the Canadian legal and constitutional structure," again so as to achieve the "reconciliation of the pre-existence of distinctive Aboriginal societies with the assertion of Crown sovereignty."[43] This last point will be discussed in greater detail below.

In another decision released just one day in its wake, the Court served notice that *Van der Peet* would have direct consequences for any future ruling on the right to self-government. The Court has never ruled directly on whether a right to self-government is protected by section 35, but *R v. Pamajewon* laid out how it would approach such a right if indeed it were taken to be protected therein. Without deciding the question one way or the other, the Court declared its willingness to

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41 Ibid., 203-04.

42 Ibid., 201-10.

43 Ibid., 201-03. For a persuasive argument that this element of the *Van der Peet* test is a distortion of the Court's original use of the term "reconciliation" in *Sparrow*, see Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand," *McGill Law Journal* 42 (1997), 993-1009, at 998-99.

assume that a right to self-government was protected by section 35, but went on to state that such a right is no different than any other Aboriginal right, and as such must be tested and circumscribed by the legal standard laid out in *Van der Peet*.[44] I turn now to an analysis of this new direction in Aboriginal rights jurisprudence.

The Poverty of *Van der Peet*

Particularly disappointing was the Court's decision to tie the legal recognition of Aboriginal rights to the distinctiveness of Aboriginal cultures rather than their sui generis legal status as quasi-national political entities. The Court did acknowledge that Aboriginal rights derived from the fact that for centuries prior to contact Aboriginal peoples occupied their lands as organized societies, but in choosing cultural distinctiveness as the organizing principle for legal recognition it treated them more like cultural minorities than national minorities.[45] Cultural difference is undoubtedly one feature which distinguishes Aboriginal from non-Aboriginal communities. Furthermore, the preservation and promotion of their distinctive cultures is one of the most central ends of Aboriginal peoples, but it is only that: one end among many others, all of which derive their force and significance from the more fundamental principle of the pre-existing authority of self-governing Aboriginal communities. In this understanding, whether Aboriginal communities are to become more or less like their own forbears or more or less like other contemporary national communities, be they Aboriginal or non-Aboriginal, and whether this is a matter of cultural values and traditions or of socio-economic and political institutions, are choices which should have no bearing on their self-governing authority. For example, an Aboriginal community may choose to revive certain aspects of its traditional culture such as art forms, ceremonial feasts and forms of spirituality. Similarly, it may choose to adopt traditional political institutions such as decision by consensus, a system of hereditary chiefs or a confederacy of Aboriginal nations. Alternatively, it may choose to adopt some of the institutions and practices of another culture, Aboriginal or non-Aboriginal, or, alternatively again, it may choose some hybrid of the two. The point is that the freedom to make these choices is itself an integral part of its authority as a self-governing national community, and should remain so whatever the specific content or outcome of these choices may be—just as the authority of Canada to govern its choices in such matters should not be diminished when it is

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44 *Pamajewon*, 171.

45 Refer to the section on "The Right to Self-Government" for this distinction. A fuller account appears in Kymlicka, *Multicultural Citizenship*, chap. 2.

influenced by, or chooses to adopt, the institutions, values or practices of another national community, such as, for example, the United States.

What the Court does not seem to appreciate is that Aboriginal rights, in the same manner as the types of liberal enlightenment rights it describes in *Van der Peet*, are only effectively realized within and through self-governing political communities. The Court is not alone in its failure to appreciate the interdependent relationship which exists between a self-governing national community and the rights and goods of its members; indeed it has been one of the signal failings of historic liberalism. Theorists working on the political philosophy of group-differentiated citizenship have tried to rectify this failure, providing valuable insights to our present discussion. Liberal nationalists, for example, have demonstrated that political life in liberal states has an inescapable national dimension. Most liberal theories have been focused on *internal* issues of justice, consent, distribution and equality, but they have always quietly assumed the existence of bounded and continuous self-governing political communities living in a particular territory and partaking in a particular national culture. So although very few liberal theorists have directly or openly confronted this reality, most liberals are liberal nationalists in the sense that they see liberal states not simply as voluntary associations based on some form of social contract, but as national communities which are seen as valuable and worth preserving. There are several different dimensions of this liberal-national relationship. Yael Tamir illustrates how liberalism, unable itself to generate a theory of demarcating one human community from another, has adopted for this purpose the principle of national self-determination. A bounded and continuous political community rather than a casual association based on a fragile and temporary contract is essential to maintain the sense of solidarity, tolerance and mutual self-sacrifice necessary to orderly and successful democratic governance and the maintenance of liberal rights and freedoms.[46] Following Tamir, Kymlicka argues that liberal states play an essential, even unavoidable, role in preserving and promoting not only a bounded and continuous political community, but also a particular national culture.[47] As such, liberal states are designed and constituted so as to

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46 Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), 117-30. For a similar argument but with an openly colonial orientation, see John Stuart Mill, *Representative Government*, chap. 16 in *On Liberty and Other Essays*, edited with an introduction by John Gray (New York: Oxford University Press, 1991).

47 Kymlicka uses the term societal culture: "a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both

provide for and protect the rights and opportunities of individuals, but also the cultural membership of peoples.[48] National cultures provide a rich variety of meaningful and viable options from which their individual members can choose in the process of pursuing their own individual life plans. They function as cultural contexts of choice in the absence of which individual autonomy would be significantly impoverished if not meaningless.[49] In a similar vein, William Galston challenges the traditional conception of the comprehensively neutral liberal state, arguing that it is more accurately characterized as a community organized in pursuit of a distinctive ensemble of purposes. These purposes undergird its unity, structure its institutions, guide its policies and define its public virtues.[50] Charles Taylor adds a communitarian element to the discussion by noting that collective rights to self-government provide distinctive national communities with the means of reproducing themselves and thereby ensuring their survival.[51] Daniel Philpott adds a democratic dimension by illustrating how the right to self-government facilitates freedom and participation in terms which are acceptable and appropriate to a particular national group.[52]

The challenge for many of these theorists has been to extend the benefits flowing from the right to autonomous self-government to national minorities, like Aboriginal peoples, who are at present denied this right in multinational states. The Supreme Court of Canada expresses what can only be perceived as a similar desire to see Aboriginal peoples secure the integrity and well-being of their communities and to preserve and promote their distinctive cultures and ways of life, but the type of legal recognition it accords to Aboriginal rights is

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public and private spheres. These cultures tend to be territorially concentrated and based on a shared language" (*Multicultural Citizenship*, 76).

48 Ibid., 110-11, 124-25; and Tamir, *Liberal Nationalism*, 124-30, 139, 145-49.

49 Kymlicka, *Multicultural Citizenship*, chap. 5; and Tamir, *Liberal Nationalism*, 150. There are problems with attributing excessive normative weight to this autonomy-based defence of communal self-government. See Siobhan Harty, "The Nation as a Communal Good: A Nationalist Response to the Liberal Conception of Community," this JOURNAL 32 (1999), 665-89; and Alan Patten, "The Autonomy Argument for Liberal Nationalism," *Nations and Nationalism* 5 (1999), 1-17.

50 William Galston, "Two Concepts of Liberalism," *Ethics* 105 (1995), 516-34, at 524.

51 Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992); and Charles Taylor, "Can Liberalism be Communitarian?" *Critical Review* 8 (1994), 257-62.

52 Daniel Philpott, "In Defence of National Self-Determination," *Ethics* 105 (1995), 352-85. See also Tully, who argues that culture is an irreducible aspect of politics. In other words, everything from the means and modes of political participation to the way citizens speak, act and relate to one another is always to some extent an expression of their different cultures (*Strange Multiplicity*, 5-6).

insufficient to these purposes. This is more than simply a problem of description or the appropriate symbolic recognition of Aboriginal status. Aboriginal rights find their true home in self-governing Aboriginal communities. In granting an unnecessarily restrictive legal status to Aboriginal rights, the Court constructs a framework for recognizing the self-governing authority of autonomous Aboriginal communities that falls well short of the generous and liberal interpretation which their earlier jurisprudence promised, and as such is a failure on its own terms.

This impoverished recognition of Aboriginal status is compounded by the Court's increasingly narrow and restrictive understanding of the specific relationship between culture and Aboriginal rights, much more restrictive than the standard anticipated by *Sparrow*.[53] We are once again faced with the spectre of the frozen rights approach which the Court explicitly rejected in its earlier jurisprudence. As Bradford Morse concludes, despite protests to the contrary by the Court majority, by allowing only the method of an approved activity to evolve but not the activities themselves, the *Van der Peet* test creates a form of "permafrost rights."[54] It is difficult to imagine any national community meeting this standard of cultural authenticity,[55] but it is particularly pernicious in the case of Aboriginal peoples. Not only must they live with the fact that their communities and cultures were fundamentally disrupted by European colonialism, they must suffer the additional indignity rendered by the disqualification as Aboriginal rights of customs, values and practices arising from that disruption, whether or not they have come to be accepted by the communities themselves. It is difficult to see the justice in denying Aboriginal peoples the legal right to take advantage of changes to their societies and practices wrought by contact with Europeans. This restriction can affect any of a wide range of rights, including ownership and exploitation of non-renewable resources, the establishment of high-revenue business ventures,[56] the exploitation of traditional lands for eco-

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53 In a particularly bleak assessment of what the future holds for the recognition of section 35 rights, Barsh and Henderson conclude that the barriers established collectively by *Sparrow*, *Van der Peet* and a third case not considered here, *R. v. Gladstone*, [1996] 4 C.N.L.R. 65, amount to a present-day extinguishment of the rights asserted ("The Supreme Court's Van der Peet Trilogy," 1004).

54 Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*," *McGill Law Journal* 42 (1997), 1011-42, at 1035-36.

55 A wickedly humorous critique of *Van der Peet* in this vein appears in Barsh and Henderson, "The Supreme Court's Van der Peet Trilogy," 995-96.

56 In 1996, the Court upheld the conviction of members of the Shawanaga and Eagle Lake First Nations for operating a high-stakes bingo on the basis that they failed to demonstrate that gambling or the regulation of gambling was an integral part of their distinctive cultures (*Pamejewon*, 172-73).

nomic purposes[57] or the operation of large-scale commercial renewable resource enterprises. It is no small irony that the *Van der Peet* test, whose own application is supposed to incorporate Aboriginal perspectives on the nature and scope of their rights, is itself constructed in a manner that bears little resemblance to any of the more prominent Aboriginal perspectives. Again, one might argue that it is too much to expect the Court to endorse the Aboriginal view that they are self-governing nations equal in status and stature to the Crown but, as I will argue in the concluding section, the Court could have delivered much more than they did without thereby breaking with the overarching assumption of Crown sovereignty.

The Future of Aboriginal Rights

The alternative, as noted above, is for the Court to tie legal recognition of Aboriginal rights to the quasi-national status of Aboriginal peoples embodied in the sui generis Crown-Aboriginal relationship. In this alternative framework of recognition, Crown sovereignty would remain intact, providing Aboriginal peoples with the status, not of independent or sovereign states, but of national communities with a substantial degree of autonomous self-governing authority. Research conducted on behalf of the Royal Commission on Aboriginal Peoples, and by some of Canada's leading constitutional scholars has already demonstrated how such a relationship can be accommodated within the existing constitutional framework.[58] Indeed, such an approach to a certain extent already forms a part of official federal policy for the recognition and negotiation of Aboriginal self-government.[59] This is why I say that the legal recognition accorded to Aboriginal rights by *Van der Peet* is unnecessarily restrictive. Revival of the sui generis framework passed over by the Court would *not* require a radical act of judicial activism, first, because Aboriginal rights would still be rights exercised within the bounds of the existing constitution, and second, because its precedents already exist in both recent and historic jurisprudence, and in the spirit (if not always the practice) of historic

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57 See the qualifications to Aboriginal title in *Delgamuukw*, paras. 124-31.

58 RCAP, *Report*, Vol. 2, Part 1, 209-11; and Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues," *Canadian Bar Review* 74 (1995), 187-224.

59 See, for example, the discussion of Yukon First Nations Self-Government in Hogg and Turpel, "Implementing Aboriginal Self-Government"; and *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services, 1995).

Crown policy towards Aboriginal peoples.[60] By stipulating that Aboriginal perspectives on their rights must be cognizable to the Canadian legal and constitutional structure, the Court was clearly guarding against the perspective that Aboriginal nations are equal to and co-sovereign with the Canadian state. But in closing the door on this perspective it also shuts out the one alternative that can produce the results it desires and thereby genuinely fulfill its earlier promise of a more generous and liberal view of Aboriginal rights.

The most obvious disadvantage of this approach is that it does not break fundamentally with the colonial assumptions which undergird the legitimacy of the Crown's unilateral assertion of sovereignty over Aboriginal lands and peoples, but this is perhaps too much to expect from a Court that predicates its own legitimacy on that very same assumption of ultimate Crown sovereignty. A truly just settlement of Aboriginal claims in Canada requires that the colonial fact be confronted openly and honestly, but the lead in such an initiative must come not from the Supreme Court, but from the federal government. In the interim, the sui generis approach is likely the most that can be hoped for from the Court. In spite of its disadvantages, it is at least a step closer to the non-colonial relationship summarized in the Aboriginal consensus position in section one. It is also more in line with the view of the Royal Commission on Aboriginal Peoples, the nascent international consensus on the rights of Indigenous peoples[61] and, as the last section demonstrated, with key works in the political philosophy of group-differentiated citizenship and self-determination. Perhaps the most valuable contribution of this alternative approach will come not in the legal but the political sphere, for ultimately the process of working out the precise details of the nature and limits of Aboriginal self-governing authority and its relationship to the jurisdiction and authority of the Crown is most effectively accomplished through political negotiations among the chosen representatives of Aboriginal peoples and Canadian governments. This conclusion is intended neither to overemphasize the legitimacy enjoyed by the government's framework for the negotiation and implementation of Aboriginal self-government, among either Aboriginal or non-Aboriginal peoples, nor to exaggerate the degree of goodwill and understanding which non-Aboriginal governments manifest in their dealings with Aboriginal

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60 The germs of this alternative approach may in fact exist in the opinions of the dissenting justices in *Van der Peet*, at paras. 95-322. This possibility is discussed in Asch ("From *Calder* to *Van der Peet*," 442-43).

61 RCAP, *Final Report*, Vol. I: 675-97; United Nations, "The Draft Declaration on the Rights of Indigenous Peoples, August 1993," reprinted in [1994] 1 C.N.L.R. 40-47; and S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).

peoples.[62] Whatever the failings of the process of political negotiation, it remains the most promising means of mastering the complexity of the issues at hand, and of generating the requisite legitimacy in the eyes of the opposing parties and the wider publics they serve. From at least the time of *Sparrow* onward, the Court has cultivated this interdependence between the legal and political spheres on the question of Aboriginal rights, stating, for example, in *Delgamuukw v. R* that the Court plays a necessary role in reinforcing political negotiations.[63] By adopting the sui generis approach, the Court can more effectively fulfill this promise by lending the requisite legal weight which its alternative approach effectively denies to the Aboriginal parties.

During an interview in February 1999 with the *Globe and Mail*, then Chief Justice Lamer declared that Aboriginal rights may present the Court with its most difficult challenge in the years to come. Citing *Delgamuukw* as only an opening salvo, Lamer concluded: "Delgamuukw was not the end of the matter. I think Section 15 and Aboriginal rights are going to be the two main challenges the [C]ourt will have to deal with."[64] Its success in meeting this challenge is dependent on whether it will deny or eventually deliver on the promise of its earlier, more progressive jurisprudence.

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62 For criticisms of this framework for negotiating and implementing Aboriginal self-government see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999); RCAP, *Treaty Making in the Spirit of Coexistence*; Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton: Theytus Books, 1998); and James Tully, "Two Visions of Aboriginal Title and Reconciliation," in Frank Cassidy, ed., *Delgamuukw—One Year Later* (Victoria: University of Victoria Publications, 1999).

63 *Delgamuukw*, para. 186.

64 Kirk Makin, *The Globe and Mail* (Toronto), February 6, 1999, A1 and A4.