REDUCTION BY DEFINITION: THE SUPREME COURT'S TREATMENT OF ABORIGINAL RIGHTS IN 1996

BY KENT MCNEIL

Measured by judicial decisions, 1996 was by far the most significant year for Aboriginal rights since 1990, when the Supreme Court of Canada in *R.* v. *Sparrow*, [1990] 3 C.N.L.R. 160, first examined the effect of recognition and affirmation of Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*.

[T]he Sparrow *decision did not address the vital question of how Aboriginal rights are to be identified and defined. In 1996, the Court was confronted with that question, and answered it in a way that has very serious consequences for Aboriginal rights.*

That decision acknowledged that section 35(1) provides unextinguished Aboriginal rights with constitutional protection against legislative infringement, unless the infringement can be justified by a strict test which the Supreme Court created. However, the *Sparrow* decision did not address the vital question of how Aboriginal rights are to be identified and defined. In 1996, the Court was confronted with that question, and answered it in a way that has very serious consequences for Aboriginal rights.

The Supreme Court actually handed down ten decisions in 1996 involving Aboriginal and treaty rights. All but two of these involved Aboriginal fishing rights and the circumstances in which those rights can be limited by federal legislation. The most important of these decisions is *R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177, where Lamer C.J., in his majority judgment, laid down this test for determining the existence of an Aboriginal right:

"[I]n order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right." (at 199)

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

Lamer C.J. explained that this requirement of continuity with pre-contact Aboriginal societies has to be flexible enough to prevent "the rights from being frozen in pre-contact times" (at 206). However, as L'Heureux-Dubé J. pointed out in her dissent, the Chief Justice's approach does in fact freeze Aboriginal rights in the past by implying that "Aboriginal culture was crystallized in some sort of 'Aboriginal time' prior to the arrival of Europeans" (at 234). While the flexibility Lamer C.J. endorsed does allow for evolution of pre-contact activities into modern forms, it does not permit activities which arose as a result of European influences to be protected as Aboriginal rights. His approach therefore entails a static conception of culture and the misguided and somewhat absurd task of trying to separate the present-day activities of Aboriginal peoples into what he regards as Aboriginal and non-Aboriginal elements on the basis of historical considerations.

The consequences of Pamajewon *for the Aboriginal right of self-government are devastating, as the content of that right will have to be established item-by-item by each Aboriginal group, proving the existence and regulation prior to European contact of each specific activity over which the right is claimed.*

Lamer C.J.'s approach to identification and definition of Aboriginal rights contains another aspect which will limit those rights ever further. In *Van der Peet*, he said that their scope and content must be determined on a specific rather than a general basis. The degree of specificity involved here can be seen *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65, one of the other fishing cases the Supreme Court decided last year. In *Gladstone*, the Aboriginal right involved was not a general right to fish, or even a narrower right to fish for some species, but a very particularized right to take herring spawn on kelp for commercial purposes. This narrow approach to Aboriginal rights was rejected by both L'Heureux-Dubé and McLachlin JJ. in their dissenting opinions in *Van der Peet*. McLachlin J. put it this way:

"[I]f we ask whether there is an Aboriginal *right* to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an Aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer might be quite different ... I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no Aboriginal right where a different analysis might find one." (at 259)

The effect of Lamer C.J.'s particularized approach can be seen in *R.* v. *Pamajewon*, [1996] 4 C.N.L.R. 164, the only Supreme Court decision in 1996 involving an Aboriginal right of self-government. The appellants in that case claimed that their First Nations had a general right of self-government which encompassed the establishment and regulation of high-stakes gambling operations on their reserves. In his judgment, which was concurred in by seven other members of the Court, Lamer C.J. assumed (without deciding) that the First Nations in question had an Aboriginal right of self-government which was recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. He nonetheless dismissed the appellants' claim because they had failed to meet the *Van der Peet* test by

showing that the specific activity of gambling and the regulation of gambling were integral to the distinctive cultures of their peoples prior to contact with Europeans. In so doing, Lamer C.J. expressly rejected the appellants' claim to a broad general right to govern activities, including gambling, on their reserves. To accept that claim, he said, would "cast the Court's inquiry at an excessive level of generality" (at 172), contrary to the *Van der Peet* approach.

As McLachlin J. pointed out in her dissenting judgment in Van der Peet, *Lamer C.J.'s approach to justification is "indeterminate and ultimately more political than legal" ..., and involves "a judicially authorized transfer of the Aboriginal right to non-Aboriginals without the consent of the Aboriginal people, without treaty, and without compensation".*

The consequences of this decision for the Aboriginal right of self-government are devastating, as the content of that right will have to be established item-by-item by each Aboriginal group, proving the existence and regulation prior to European contact of each specific activity over which the right is claimed. Any possibility of claiming broadly based Aboriginal jurisdiction over a range of activities in a modern-day context appears to be foreclosed by the application in *Pamajewon* of the particularized approach to Aboriginal rights taken in *Van der Peet*.

In addition to limiting Aboriginal rights by the application of this narrow, historically rooted test, the Supreme Court made it easier last year for rights that do meet the test to be overridden by legislation. The *Sparrow* decision placed the burden of justifying any infringement of Aboriginal rights on the Crown, through proof of a valid legislative objective and respect for the fiduciary duty which the Crown owes to the Aboriginal peoples. According to *Sparrow*, the constitutional protection accorded to Aboriginal rights by section 35(1) of the *Constitution Act, 1982* obliged the Crown to give those rights priority over rights of non-Aboriginal Canadians which are not constitutionally protected. However, in his majority judgment in *Gladstone*, Lamer C.J. retreated from this position and decided that, in the context of an Aboriginal right to fish commercially, that right could be limited by taking into account such objectives as "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups" (at 98). As McLachlin J. pointed out in her dissenting judgment in *Van der Peet*, Lamer C.J.'s approach to justification is "indeterminate and ultimately more political than legal" (at 278), and involves "a judicially authorized transfer of the Aboriginal right to non-Aboriginals without the consent of the Aboriginal people, without treaty, and without compensation" (at 282).

So on the issues of identification and definition of Aboriginal rights, and justification of infringements of those rights, the Supreme Court has adopted a restrictive approach which, in my view, violates the spirit of *Sparrow*. There

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are, however, some positive elements in the Court's Aboriginal rights decisions last year. In *Gladstone*, the Court did accept an Aboriginal right (albeit narrow) to fish commercially. In *R.* v. *Nikal*, [1996] 3 C.N.L.R. 178, another case from British Columbia, the Court exempted the appellant from a requirement to obtain a fishing licence because the conditions of the licence infringed his Aboriginal right to fish, and the infringement had not been shown to be justified (note, however, that in *Nikal* and *R.* v. *Lewis*, [1996] 3 C.N.L.R. 131, the Court made negative rulings on the issue of inclusion of navigable waters in reserves). In *R.* v. *Adams*, [1996] 4 C.N.L.R. 1, and *R.* v. *Coté*, [1996] 4 C.N.L.R. 26, both involving Aboriginal fishing rights in Quebec, the Court finally put to rest the old argument that no Aboriginal rights exist in the areas of Canada originally colonized by France. In *R.* v. *Badger*, [1996] 2 C.N.L.R. 77, a case from Alberta which has significance for the three prairie provinces, the Court decided that the Natural Resources Transfer Agreements did not extinguish and replace treaty rights to hunt but, consistently with the restrictive trend outlined above, the Court made it possible for provincial legislatures to infringe constitutionally protected hunting rights by application of the *Sparrow* test for justification.

A major issue left open by last year's decisions is the nature of Aboriginal title. In *Van der Peet*, Lamer C.J. stated that "Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land" (at 194). In *Adams* and *Coté*, the Court held that Aboriginal rights such as fishing rights can exist independently of Aboriginal title. However, as none of the cases the Court decided last year involved a claim to Aboriginal title, the extent to which the *Van der Peet* test will be applied to such a claim remains uncertain. This important issue will come before the Court in June of this year when *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), is argued. One can only hope the Court will recognize that the particularized approach to Aboriginal rights taken in *Van der Peet* is inappropriate where a claim to Aboriginal title is concerned, and adopt a broader perspective which is more in keeping with the Aboriginal peoples' own understanding of their rights.

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