# NOTE TO USERS

# University of Alberta

Of Self-Government: Aboriginal Rights, Privileges, Powers, and Immunities

by

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**Abstract**

This thesis considers the concrete manifestations of the abstract Aboriginal right of self-government under s. 35 of the *Constitution Act, 1982.* It synthesizes five theories on the sources underlying the right, reviews argument on how the right exists under s. 35, and, in the context of Hohfeldian theory, argues that the *Van der Peet* test is incapable of fully recognizing concrete manifestations of the abstract right. It then analyzes three approaches towards identifying the concrete rights including; the core and peripheral areas of jurisdiction, the choice of law or law of place, and the higher order principle approaches. It finally concludes that the best method of identifying the concrete rights is to presume the existence of these rights as a dimension of other abstract rights included under s. 35, such as Aboriginal title and the duty to consult.

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## Chapter One: Introduction

This thesis argues that an Aboriginal right to self-government[1] exists as an abstract legal right forming part of Canadian common law and constitutional law and that the specific content of this right applicable to a particular Aboriginal people and protected under s. 35 of the *Constitution Act, 1982*,[2] is not fully understood, or properly identified, through application of the *Van der Peet*[3] test. This test has two parts. First, the Court characterizes the claim as a right to exercise a specific activity. Second, the Court considers whether the activity is an element of a historic custom, practice, or tradition that is integral to the distinctive culture of the Aboriginal group claiming the right.

I begin with a discussion of five theories that support the existence of a general right of self-government that do not source the historical foundation of the right in the continuity of exercise of specific governmental practices and activities. These theories are: (1) relative internal independence and the doctrine of continuity; (2) inter-societal law and the common law doctrine of Aboriginal rights; (3) social organization and British customary law; (4) Aboriginal self-government and the Rule of Law; and (5) normative justifications: prior occupation, prior sovereignty, treaties, and self-determination. This is followed by a discussion of the *Van der Peet* test, how

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[1] The term "self-government" can have different meanings in different contexts. In legal academic literature the term largely refers to the ability of a First Nation to exercise law making, executive, and dispute resolution powers over its people, territory, and sphere of jurisdiction. The Royal Commission on Aboriginal Peoples, *infra* note 59 explains that self-government, "in its most basic sense, it is the ability to assess and satisfy needs without outside influence, permission or restriction." This thesis considers theories of rights that support recognition of this broad notion of self-government. It explores how this abstract right can be manifested in concrete forms with predominant emphasis on First Nation legal orders and structures or processes for decision making and articulating and transmitting knowledge about laws and legal orders within a community.

[2] *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 s. 35(1). Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

[3] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

subsequent decisions have erroneously modified the test in its application to rights of self-government, and how more recent decisions emphasize the importance of a more liberal approach in identifying historical practices, customs, and traditions necessary to ground contemporary Aboriginal rights.

In the next part of the paper Hohfeldian theory on the concept of legal rights is used to demonstrate that even liberal interpretations of the *Van der Peet* test are problematic in their application to rights of self-government. That is, if we understand rights as legal relationships, Aboriginal rights in s. 35 are best defined in terms of privileges, negative claim-rights, powers, and immunities. This is an approach to understanding rights inherent in the common law and Canadian constitutional law and should apply equally to Aboriginal rights of self-government. When considering self-government rights and rights as legal relationship there is an important issue surrounding the identification of the political collectivity where the right to self-government remains. This is a complex question and is beyond the scope of my thesis.

How then do we articulate concrete elements flowing from the more abstract right of self-government? Hohfeldian theory supports an approach emphasizing general principles that govern relations between governments drawing, for example, from principles of Canadian constitutional law and international law. Three examples are given: the identification of core and peripheral areas advocated by the Royal Commission on Aboriginal peoples, the "law of the place" or choice of law approach, and the development of new inter-societal laws sourced in general principles of recognition and reconciliation. While there are a number of alternative approaches to

*Van der Peet* for identifying rights of self–government I conclude the best way for establishing the existence and content of these rights consistent with Hohfeldian theory may be through a presumption that they exist as a dimension of other constitutionally protected Aboriginal rights such as Aboriginal title and the duty to consult. This method is preferred because it inherits the benefits of the three examples above while avoiding their shortfalls.

## Chapter Two: The Aboriginal Right of Self-Government

### A. Introduction

Through an analysis of sources and theories underlying judicial and political recognition of Aboriginal rights, this part of the thesis will argue that an abstract Aboriginal right of self-government is an existing Aboriginal right under s. 35. It will also argue that the right survives the assertion of Crown sovereignty and is unaffected by the division of powers in the *Constitution Act, 1867*[4] and federal Indian legislation.

Since this part of the thesis discusses a right of self-government generally rather than its more specific forms, the distinction between abstract and concrete rights needs to be explained. According to Ronald Dworkin the distinction is one of degree. An abstract right "is a general political aim the statement of which does not indicate how that general aim are to be weighed or compromised in particular circumstances against other political aims."[5] Concrete rights, on the other hand, "are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions."[6] He uses the right to free speech and "the right to publish defense plans classified as secret provided this publication will not create an immediate physical danger to troops"[7] as examples of abstract and concrete rights respectively.

The relationship between abstract and concrete rights is such that abstract rights "provide arguments for concrete rights, but the claim of a concrete right is

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[4] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3.
[5] Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth and Co. Ltd., 1977) at 93 [Dworkin, *Taking Rights Seriously*].
[6] *Ibid.*
[7] *Ibid.*

more definitive than any claim of abstract right that supports it."[8] This is illustrated by Brian Slattery in the context of Aboriginal constitutional rights in his recent article "The Generative Structure of Aboriginal Rights."[9] He argues for the existence of fundamental generic rights, "of a standardized character that takes the same basic form wherever it occurs,"[10] applicable to all Aboriginal people of Canada that give birth to specific rights whose "nature and scope are determined by the particular circumstances of the Aboriginal group."[11] An example of a generic (abstract) right is a "*right of Aboriginal peoples to maintain and develop the central and significant elements of their ancestral cultures.*"[12] He calls this a right of cultural integrity. Since what is central and significant will vary according to variances in the circumstances of different societies, "at the concrete level the abstract right blossoms into a range of distinctive rights."[13] Proposing Aboriginal title, the right of cultural integrity, the right to conclude treaties, the right to customary law, the right to honourable treatment by the Crown, and the right of self-government as examples of generic rights,[14] he explains that the "precise nature of the relationship between generic and specific rights varies with the generic right in question."[15] For example, the generic right to conclude treaties gives rise to specific rights to the performance of the treaty. Also, the generic Aboriginal right to customary law spawns specific rights to possess a legal system in accordance with the generic right. Generic rights are uniform in

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[8] *Ibid.* at 93-94.
[9] Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Sup. Ct. L. Rev. 595.
[10] *Ibid.* at 599.
[11] *Ibid.* at 598.
[12] *Ibid.* at 600.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.* at 606.

character, applicable to all Aboriginal peoples, and "[j]ust as all generic rights give birth to specific rights, all specific rights are the offspring of generic rights."[16]

Applying this distinction to Aboriginal rights of self-government is helpful for at least two reasons. First, it permits analysis of the broader theoretical sources underlying the fundamental abstract Aboriginal right of self-government apart from the specific anthropological or historical contexts of specific Aboriginal groups. Second, framing an Aboriginal right of self-government in abstract terms provides a theoretical context and more appropriate foundation from which to evaluate general arguments against the existence of the right.

## B. Sources and Theories of Aboriginal Rights

### i. Relative Internal Independence and the Doctrine of Continuity

As a starting point, when identifying a source of an abstract Aboriginal right of self-government, it is helpful to consider the United States Supreme Court decision in *Worcester v. Georgia.*[17] This case is relevant in Canada and has been referred to by Canadian courts because we share a similar British colonial legal system. In *Worcester,* Chief Justice Marshall explained the legal effect of European settlement in North America, holding that European discovery and occupation of colonized lands did not give right of dominion over Aboriginal people any more than it gave Aboriginal people dominion over Europe. When the United States succeeded the claim of Great Britain, the sovereign jurisdiction of the United States was not

[16] *Ibid.*
[17] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester*].

automatically enlarged.[18] According to Chief Justice Marshall, the settlement of North America did not justify a right to govern internal affairs of Aboriginal occupants under British colonial or International law, and there was no attempt "on the part of the crown to interfere with internal affairs of the Indians, farther to keep out the agents of foreign powers."[19] Also, although the King did sometimes purchase Aboriginal lands, he "never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only."[20] Great Britain considered Aboriginal peoples as nations "capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged."[21] However, the external sovereignty of an Aboriginal nation was necessarily diminished in the sense that it was prevented from exercising powers or rights that were legally incompatible with Crown sovereignty. This included, for example, a restriction "from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed."[22] Nevertheless, Aboriginal and colonial governments had a level of relative independence from each other described in *Worcester* as a form of domestic dependent nationhood. Thus, under the protection of Great Britain, the relationship "was that of a nation claiming and receiving protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the

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[18] *Infra.* note 59 and accompanying text. Sovereignty could be subsequently enlarged through enactment of federal United States and Canadian law through the doctrine of parliamentary sovereignty.
[19] *Ibid.* at 207.
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*

laws of a master."[23] This case, and the reasoning underlying it, found its way into Canadian law through its adoption by Monk J. in the Quebec case of *Connolly v. Woolrich*.[24] Here, the issue was whether the Court could recognize a marriage, for the purpose of disposing property upon death that was performed and recognized under Cree customary law. The Court, recognizing the legal effect of the Cree customary marriage, held that the laws of the Indian tribes were not abrogated, abolished, or modified in regard to the civil rights of the Indians when Europeans began trading with the Indians.[25] The Quebec Court of Appeal dismissed the appeal of this decision. However, Justice Badgley curiously assumed the Crown conquest of the Cree and held that "the relations of the people to their ancient sovereign or government are dissolved, but their relations to each other, and their customs and usages remain undisturbed."[26]

With respect, while the Quebec Court of Appeal seemed to have correctly found that internal Aboriginal relationships and customs and usages were undisturbed, it stretched reason to hold that the Aboriginal relationship with their ancient sovereign or government was dissolved. First, unlike in the United States, there are limited instances of conquest of Aboriginal peoples in Canada. Second, through the doctrine of continuity elaborated below, what are identified by the courts as Aboriginal customary laws governing internal relations have been received into Canadian law.

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[23] *Ibid.*
[24] *Connolly v. Woolrich* (1867), 17 R.J.R.Q 75 (Que. S.C.).
[25] *Ibid.* at 207.
[26] *Connolly v. Woolrich* (1869), 1 R.L.O.S. (Que. C.A.) at 357-358.

Aboriginal relationships, customs, and usages are defined according to the relationship with Aboriginal institutions of governance. This serves to legitimize laws regulating Aboriginal relationships with each other. John Borrows explains, for example, that "First Nations law originates in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. These principles are enunciated in the rich stories, ceremonies and traditions of the First Nations."[27] These principles are interpreted by "knowledgeable keepers of wisdom" [28] and are considered authoritative for their listeners. Thus, the internal First Nations relationships, customs, and usages, as expressed and defined through laws, affirms the Aboriginal relationship with their ancient sovereign or government in the form of a collective decision making authority. Third, recognition of internal Aboriginal legal orders necessarily implies the existence of a law making or interpreting authority and a process for the emergence and identification of law. This is another example of an expression of Aboriginal self-government. In *Campbell*,[29] Justice Williamson observed that "Aboriginal laws did not emanate from a central print oriented law-making authority similar to a legislative assembly, but took unwritten form."[30] Based on an understanding that law is any rule that the courts will enforce, Judge Williamson held as follows:

> The most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced

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[27] John Borrows, "With or Without You: First Nations Law (in Canada)," (1996) 41 McGill L.J. 629 at 646 [Borrows, "First Nations Law"].
[28] *Ibid.* at 647.
[29] *Campbell v. British Columbia (A.G.)*, [2000] B.C.J. No. 1524 (B.C.S.C.) [*Campbell*].
[30] *Ibid.* at para. 85.

> laws made by aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense.[31]

Essentially, the existence of laws governing the internal relationships, customs, and usages necessarily implies the existence of Aboriginal self-government that is relatively independent from the Crown.

The persistence of internal legal systems and relative political independence within a broader framework of Canadian sovereignty is also demonstrated in the language of the *Royal Proclamation of 1763*[32] and the understanding of the two row wampum belt within the Mohawk tradition. In part, the Royal Proclamation provides:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominion and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[33]

John Borrows writes that the Royal Proclamation, considered as part of a treaty between the Crown and an alliance of First Nations,[34] can not be properly interpreted by relying on the written words alone because it would unfairly ignore the First Nation's perspective.[35] At Niagra, a year after the Royal Proclamation, with more

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[31] *Ibid.* at para. 86.
[32] R.S.C. 1985, App. II, No. 1.
[33] *Royal Proclamation, 1763* reprinted in John J. Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Butterworths, Toronto and Vancouver: 1998) at 26.
[34] See John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L. Rev. 1 where he writes that "[t]he Royal Proclamation became a treaty at Niagara [in 1764] because it was presented by the colonialists for affirmation, and was accepted by the First Nations" at para. 31 [John Borrows "Constitutional Law"].
[35] *Ibid.* at para. 19.

than two thousand Chiefs assembled for negotiations, William Johnson, Superintendent of Indian Affairs, "read the terms of the Royal Proclamation to representatives of the nations and a promise of peace was given by Aboriginal representatives and a state of mutual non-interference established. Presents were exchanged to certify the binding nature of the promises being exchanged."[36] This is a First Nation understanding of the meaning of the Royal Proclamation.[37] After an agreement was reached, Johnson presented the two row wampum belts, which "reflects a diplomatic convention that recognizes interaction and separation of settler and First Nation societies."[38]

The two row wampum evidences treaties of peace and friendship entered between some First Nations and European Nations.[39] The two parallel rows of coloured beads of the wampum, fortified a relationship symbolized by two vessels. One vessel is a wood canoe for the Aboriginal people and the other vessel is an iron ship for the Crown. Both are sailing alongside another affirming the principle of the relative internal independence of Aboriginal people.[40] Justice Binnie recognized this perspective in *Mitchell* when he explained that the belt has changed into a single sovereign composed of Aboriginal and non-Aboriginal Canadians and "the

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[36] *Ibid.* at para. 35.
[37] *Ibid.* The Royal Proclamation "read in conjunction with the two row wampum, demonstrate that the connection between the Nations spoken of in the Proclamation is one that mandates colonial non-interference in the land use and governments of First Nations" at para. 37. See also Catherine Bell, "Comment on Partners of Confederation: A Report on Self-Government by the Royal Commission on Aboriginal Peoples" (1993) 27 U.B.C. L. Rev. 361 citing, for example, "A Message to All Canadians From First Nations on Treaty 6 and 7" The Globe and Mail (24 September 1992) A5 and A.F.N., First Nations Circle on the Constitution (21 November 1991) Provincial government infringement of Aboriginal rights is "viewed by many Aboriginal peoples as a violation of the principle of non-interference reflected in the treaties and the Royal Proclamation of 1763" at para. 25 [Bell, "Comment on Partners of Confederation"].
[38] *Ibid.* at para. 36.
[39] *Mitchell v. Canada (Minister of National Revenue)*, [2001] S.C.J. No. 33 at para. 127.
[40] *Ibid.* at paras. 127, 128.

components pull together as a harmonious whole, but the wood remains wood, the iron remains iron, and the canvas remains canvas."[41] The modern embodiment of this concept is a merged or shared sovereignty.[42] This means that Aboriginal people are "not wholly subordinated to non-aboriginal sovereignty but over time became merger partners."[43] Aboriginal people and non-Aboriginal people form a sovereign entity together with a common purpose.

It seems then, the wood, symbolizing the internal Aboriginal governing laws and corresponding relative independence from the Crown, continued in full force after the assertion of Crown sovereignty. The legal theory upon which this conclusion is grounded is known as the doctrine of continuity and through application of this doctrine internal Aboriginal legal and political systems were received into British and then Canadian legal and political system. Barsh and Henderson explain that the doctrine of continuity "stands for the proposition that the common law absorbs (or "receives") the *lex loci* of a territory at the moment of its conquest or annexation to the Crown. Local law remains intact unless and until it is clearly altered by the Crown in the exercise of its prerogative jurisdiction or, today, by Parliament."[44] It was first expressed by Lord Coke in 1608[45] and informs a conception of rights based on pre-existing Aboriginal legal system adopted in *Mabo*, an Australian High Court decision

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[41] *Ibid,* at para. 130.
[42] *Ibid.* at para. 129.
[43] *Ibid.*
[44] Russell Lawrence Barsh & Sakej Henderson, "The Supreme Court of Van der Peet Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1007 [Barsh & Henderson "Van der Peet Trilogy"] citing *Re Southern Rhodesia,* [1919] A.C. 211 at 233, affirmed and interpreted in *Amodu Tijani v. Secretary, Southern Nigeria,* [1921] 2 A.C. 399 at 407, 90 L.J.P.C. 236, and *Oyekan v. Adele,* [1957] 2 All E.R. 785 at 788.
[45] *Ibid.* at 1007 citing *Calvin's Case* (1608), 7 Co. Rep. 1a at 17b, 77 E.R. 377 at 398 (K.B.).

on Aboriginal title.[46] Further, the doctrine of continuity, they maintain, is also a logical requisite of Chief Justice Dickson's early Canadian decisions on Aboriginal title[47] and rights other than title,[48] because of his implicit recognition of pre-existing Aboriginal laws as one source of Aboriginal title and rights other than title. As elaborated later in this thesis, the notion of Aboriginal law forming part of title and rights other than title is affirmed in the more recent Supreme Court of Canada decisions.

The doctrine of continuity is perhaps best articulated by Lambert J.A. of the British Columbia Court of Appeal. Quoting Lord Mansfield of the Kings Court as holding, "the laws of a conquered country continue in force, until they are altered by the conqueror,"[49] Lambert J.A. reasoned in *Delgamuuwk*, "[i]f the laws of a conquered territory remain in force following the conquest, ... laws of an occupied, organized but unconquered territory [also] remain in force when Sovereignty is asserted over the organized society already present in the territory."[50] He applied the doctrine of continuity to conclude that Aboriginal laws respecting Aboriginal rights of self-government survived the assertion of Crown sovereignty.[51] However, the issue

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[46] *Ibid.* citing *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1 at 58; [1992] 5 C.N.L.R. 1 They note "[w]e take it that Brennan J. referred to indigenous law as a "question of fact" in the same sense that any issue of the content of foreign law is ordinarily regarded as a question of fact to be adduced through the testimony of legal scholars who qualify as experts within those legal systems" at 49.
[47] *Ibid.* at 1008 citing *Guerin v. The Queen,* [1984] 2 S.C.R. 335 at 382; *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R. 654 at 678; Brian Slattery, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) at 117.
[48] *Ibid.* citing *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1111-1112 [*Sparrow*]
[49] *Delgamuukw v. British Columbia,* (1993) 104 D.L.R. 4(th) 470 (B.C.C.A.) at 584 [*Delgamuukw B.C.C.A.*].
[50] *Ibid.* at 585.
[51] *Ibid.* at 963-964. See also Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. B. Rev. 36 at 58 She notes that "[t]he doctrine of continuity accepts that the Crown in some way acquired sovereignty. However, it also maintains that rights to land and to the continuance of social institutions survive sovereignty unless they are "inconsistent with the concept of sovereignty

of self-government was dropped on appeal to the Supreme Court of Canada arising in part from concern about uncertainty about how *Van der Peet*, released shortly after the appellate decision, applied to self-government claims.

More recently, the Supreme Court of Canada in *Mitchell* affirmed the doctrine of continuity and its relationship with Aboriginal rights. Although the court did not support the conclusion that Chief Mitchell enjoyed an Aboriginal right that precluded the imposition of federal duty on imported goods, it affirmed that "English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation."[52]

**ii. Inter-societal law and the Common Law Doctrine of Aboriginal Rights**

Brian Slattery argues that the historic Crown and Aboriginal relationship formed an "inter-societal law" which coalesced into the common law doctrine of Aboriginal rights.[53] This law is inter-societal "in the sense that it regulates the relations between aboriginal communities and other communities that make up Canada."[54] It is also inter-societal in the sense that it draws from indigenous legal orders and systems of English and French law. He argues that this inter-societal law has two broad original sources: (1) ancient custom and (2) basic principles of justice. Further, "[t]hese two sources...operate in tandem...are not completely distinct...

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itself, or inconsistent with laws clearly made applicable to the whole territory and all of its inhabitants, or with principles of fundamental justice." Otherwise termination requires clear and plain intent." quoting *Delgamuukw B.C.C.A., supra* note 25 per Lambert J.A. at 655 [Bell, "New Directions"].

[52] *Mitchell, supra* note 39 at para. 9.

[53] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. B. Rev. 196 at 198 [Slattery, "Making Sense"].

[54] *Ibid.*

[and] interact in myriad and complex ways: correcting, complementing and reinforcing each other."[55]

The customary relationship between the British Crown and Aboriginal people coalesced into a system of inter-societal laws during pre-confederation and applied automatically to a British colony when it was acquired. The principles that governed the relationship formed part of a larger body of British imperial law, furnishing "the presumptive legal structure governing the position of the indigenous people throughout British territories in North America."[56] Among these is the doctrine of continuity explaining "the continuance of indigenous customary law in Canada."[57]

As discussed earlier, although the principles underlying the historic customary relationship are, in part, reflected in the *Royal Proclamation, 1763*, these are common law principles applicable throughout Canada affecting matters such as Aboriginal title, customary rights, powers of self-government, the fiduciary role of the Crown, and the status and effect of treaties.[58] However, also among the original principles is the doctrine of parliamentary sovereignty. The British doctrine of parliamentary sovereignty means that under the English constitution Parliament has the right to make or unmake any law whatsoever and no person, or body of persons, can make a law that contravenes, overrides, or derogates from an Act of Parliament.[59]

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[55] *Ibid.* at 199.
[56] *Ibid.* at 201.
[57] *Ibid.*
[58] *Ibid.* at 203-204.
[59] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 206, 207 citing Dicey, *Law of Constitution* (London: MacMillan & Co., 1959), at 39-40 [*Restructuring the Relationship*].

Basic principles of justice as a source of Aboriginal rights are expressed in the distinctive fiduciary role of the Crown and are encapsulated with the phrase, "the honour of the Crown."[60] For Slattery, "the influence of this source has been enhanced by the enactment of s. 35(1) of the *Constitution Act, 1982*"[61] which limits the power of the federal and provincial Crowns to infringe rights and limits the exercise of constitutionally protected Aboriginal rights. Aboriginal rights exist independent of historic Crown recognition but may have been extinguished prior to 1982 with a clear and plain legislative intention.[62] Moreover, extensive regulation of the right or a Crown failure to recognize the right does not provide the requisite intention to extinguish the right.[63]

**iii. Social Organization and British Customary Law**

Albert Peeling and Paul Chartrand offer a different theoretical source for Aboriginal rights of self-government. They write, in the context of the Metis, that Aboriginal rights of self-government flow from liberty of peoples and a minimalist state.[64] Minimalism means that all exercises of sovereign power are not to be given greater effect than required to reach its purpose. They analyze Metis Aboriginal rights of self-government in the following two hypothetical historical contexts: (1) the Crown did not acquire sovereignty over the Metis, and (2) the Crown did acquire sovereignty over the Metis. In the first context, after the fall of New France, the Metis could choose to fall under the King's protection, which would result in owing a duty

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[60] *Ibid.*
[61] *Ibid.* at 205.
[62] *Sparrow, supra* note 48 at para. 37.
[63] *Ibid.* at para. 36.
[64] Albert Peeling & Paul Chartrand, "Sovereignty, Liberty, and the Legal Order of the "Freemen" (Otipahemsu'uk): Towards a Constitutional Theory of Metis Self-Government." (2004) 67 Sask. L. Rev. 339 at paras. 3-4 [Peeling & Chartrand, "Sovereignty, Liberty"].

of allegiance to the King. Also the Metis could "instead of being received into the King's protection, [head] out to the hinterland in order to remain free."[65] Consequently,

> the people who left in order to preserve their liberty did not necessarily become subjects of the British Crown. They settled in the hinterland, beyond the protection of the King, and were therefore not his subjects. They were free to establish their own legal order, their own laws and customs these freemen were at liberty to organize themselves into whatever political and social systems best suited their needs.[66]

These political and social systems were forms of Aboriginal self-government.

In the second historical context, they write that if the Crown acquired sovereignty over the Metis, there was a period of time when the Metis in the hinterland[67] were outside the protection of the King's laws. These societies of Metis people, they argue, were at liberty[68] to create and enforce legal orders in the nature of self-government.[69] In fact, the Metis were "bound by human nature to do so if the Aristotelian principle is true that we are all political animals."[70]

Peeling and Chartrand further argue that these Aboriginal legal orders, under either scenario, gain the force of customary law and ground an Aboriginal right of self-government.[71] The modern test for legal proof of a customary law is, "[a] custom must be certain, reasonable in itself, commencing from time immemorial, and

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[65] *Ibid.* at para. 6.
[66] *Ibid.*
[67] *Ibid.* The hinterland is the territory controlled by Prince Rupert and the Hudson's Bay Company which did "nothing to create or impose a legal order over the territory of Rupert's Land."
[68] *Ibid.* Quoting *Lord Ellenborough in Rex v. Cobbett* (1804), 29 St. Tr. 1 at 49 Peeling and Chartrand write that "[t]he common law is a "law of liberty" .... The subject is free to do whatever is not forbidden by law" at para. 17.
[69] *Ibid.* at paras. 17-18.
[70] *Ibid.* at para. 16.
[71] *Ibid.* at para. 18.

continued without interruption."[72] Explaining that the first two criteria (certain and reasonable) are questions addressed in part through historical fact, they concentrate on demonstrating how the latter two criteria can be proved through reason.

With respect to the fourth criterion, they explain that once a custom is continued for a time period without interruption, no amount of future discontinuity can rob the custom of its legal force.[73] This is because if there is a long period of time where a custom was followed without interruption and there is a subsequent acquiescence of disruption of the custom, then there is a strong presumption that there was no custom to begin with.[74] Once established, only an act of Parliament can abolish a custom.[75] For Metis customs, the time period without interruption is the time when customary laws were followed in the hinterland, however long that may have been.

For the third criterion, time immemorial in British customary law is the time before legal or living memory.[76] According to Peeling and Chartrand, the third criterion is also satisfied, since something commencing from time immemorial is simply, as the Metis customs that were followed for a period of time beyond living memory, "the way things were done."[77]

Complementing Peeling and Chartrand's theory of Aboriginal self-government is the fact that, as Sir William Blackstone explains, "when civil society is

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[72] *Ibid.* at para. 7 quoting *Mercer v. Denne* [1904] 2 Ch. 534 at 551-552.
[73] *Ibid.* at para. 9 citing *Hammerton v. Honey,* (1876), 24 W.R. 603.
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.* at paras. 11, 12.
[77] *Ibid.* at para. 13 citing Sir John Davies "Preface Dedicatory" *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516, English translation in Sir John Davies, A Report of Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland (Dublin: 1762) 78 quoted in part by Lambert J.A. in *Delgamuukw v. B.C.*, (1993) 104 D.L.R. (4th) 470 at 651.

once formed, government at the same time results of course, as necessary to preserve and to keep that society in order."[78] After explaining that governments wield a supreme power, Blackstone writes further that "as to the right of the supreme power to make laws" it is likewise "its duty."[79] By analogy one can also argue that Aboriginal societies formed governments with a responsibility and power, if not a duty, to make laws prior to the Crown's reach of government and laws across the land. However, as Henderson explains, the notion of "supreme power" may be inconsistent with traditional forms of Aboriginal governance. He writes that

> Treaties created shared responsibility rather than supreme powers. Indeed, a total transfer of Aboriginal authority over the members of First Nations is inconsistent with Aboriginal political thought. Such a concept requires a centralized ruler or king, a European tradition that is generally absent among Aboriginal peoples.[80]

**iv. Aboriginal Self-Government and the Rule of Law**

Mark Walters supplements the continuity and customary theories when he explains that the Rule of Law, as a justification for the principle of continuity, demands that "the common law simply could not contemplate a legal vacuum."[81] He writes that the Rule of Law involves ensuring that governing power is exercised according to "clear, prospective, stable legal rules that are capable of observance and of guiding human behaviour."[82] Since the operation of English law was not viable or

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[78] William Blackstone, *Commentaries on the Laws of England*, vol. 1 (London: 1826) at 44.
[79] *Ibid.* at 48.
[80] James Sakej Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 250 at 251 [Henderson, 'Empowering Treaty Federalism"].
[81] Mark D. Walters, "The Golden Thread of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711- 752 at para. 23.
[82] *Ibid.* at para. 22. See also F. C. DeCoste "Smoked: Tradition and the Rule of Law in British Columbia v. Imperial Tobacco Canada Ltd." (2006) 24 Windsor Y.B. Access Just. 327 He writes "in the Western Legal Tradition, law has forever been about *the constraint of the power of the state* to claim sovereignty over the lives of its subjects. And it is just that assertion that provides conceptual content and stability to the Rule of Law" at 341 [DeCoste, "Smoked"].

exercised before the Crown's assertion of sovereignty, or in certain areas of the hinterland after the assertion of sovereignty, the Aboriginal governments and laws served to uphold the Rule of Law by preventing a legal vacuum.

In addition to upholding the Rule of Law, Aboriginal governments, and importantly Aboriginal legal traditions and understandings of the Rule of Law, informed the early relationship between Aboriginal peoples and the Crown. For example, Mark Walters, after documenting the oral tradition relating to how Deganawidah and Hiawatha formulated the Great Law for the Iroquois Confederacy,[83] writes that the subsequent treaties between the Crown and Iroquois are impossible to understand without "some prior appreciation of aboriginal legal traditions, for it was to those traditions that the Crown, through its representatives, submitted when treating with aboriginal people."[84]

**v. Normative Justifications: Prior Occupation, Prior Sovereignty, and Treaties**

Patrick Macklem offers an alternative understanding of sources of Aboriginal self-government by emphasizing normative justifications. Justifications for recognition of Aboriginal self-government include: (1) prior occupancy, (2) prior sovereignty, (3) treaties, (4) self-determination, and (5) preservation of minority culture. The first four justifications are discussed further.[85]

Prior occupancy, as a justification of Aboriginal self-government, "corresponds to a relatively straightforward conception of fairness suggesting that, all

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[83] *Ibid.* at paras. 24-28.
[84] *Ibid.* at para. 36. See John Borrows "Constitutional Law" *supra* note 34.
[85] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government." (1995), 21 Queens L.J. 173. I avoid the discussion of the preservation of minority culture as a normative justification of Aboriginal self-government to avoid "the risk of reducing Aboriginal claims to those of minority claims" and because "[t]he discourse of collective cultural rights of minorities does not fully capture the constitutional, institutional and jurisdictional dimensions of the right [of self-government]" at 213, 215-216 [Macklem, "Normative Dimensions].

other things being equal, a prior occupant of land possesses a stronger claim to the land than subsequent arrivals."[86] This concept of fairness extends to issues of Aboriginal self-government in the sense that governance is connected with title. However, as elaborated later in this paper[87] and as Macklem argues, prior occupancy and title justify "only some types of Aboriginal jurisdictional authority."[88] In his words,

> Prior occupancy of land may justify recognizing some degree of jurisdictional control over how land is to be used and by whom – control that could be viewed as instances of a right of self-government. It is less clear why or how prior occupancy of land justifies, for example, Aboriginal authority to regulate assault against the person.[89]

According to Macklem, prior sovereignty, as a justification for Aboriginal self-government, gains its persuasiveness by analogy to the persistence of distinct Quebec laws and institutions, in other words "Quebec self-government." After conquest of the French, Quebec's civil laws and institutions continued in force until expressly overruled by Parliament. He argues that since Aboriginal people were not conquered and Crown sovereignty was thought to have resulted from European settlement, prior Aboriginal sovereignty to support continuity of some form of internal Aboriginal self-government is normatively more compelling.[90] However, Macklem also argues that emphasizing prior Aboriginal sovereignty as a justification for continuity of internal Aboriginal self-government is problematic because of the

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[86] *Ibid.* at 180.
[87] Chapter six discusses how governance is connected to title.
[88] Macklem, "Normative Dimensions" *supra* note 85 at 185.
[89] *Ibid.*
[90] *Ibid.* at 188.

length of time that has passed since the Crown asserted sovereignty, and an international tendency to maintain the *status quo* of nation states such as Canada.[91]

The existence of treaties between the Crown and Aboriginal peoples also justifies recognition of rights of Aboriginal self-government because "the relationship between Aboriginal nations and Canada ought to be modeled after the historic treaty-making process between Aboriginal nations and the Crown."[92] Macklem writes further that the "treaty-making process signals that Aboriginal nations enjoy a right of self-government and that the Crown has long recognized this fact."[93]

The above consideration of treaties is consistent with Canadian First Nation understandings of the treaty relationship. James (Sakej) Henderson writes that treaties evidence a nation to nation relationship and do not constitute a surrender of "rights reserved to the people or families, such as the rights of self-determination."[94] This is

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[91] Without engaging the complexities of the sovereignty debate here, there are a number of thoughts on whether sovereignty is an appropriate term for describing pre-contact Aboriginal legal/political organization. See for example, Taiaiake Alfred, *Peace, Power, Righteousness* (Ontario: Oxford University Press, 1999) at 53-60 where he argues that sovereignty has no relevance to indigenous values, is rooted in a foreign understanding of state with an absolute authority, a coercive enforcement of decisions, and a hierarchically based separate ruling entity. He goes further to argue that framing claims of Aboriginal self-government rights in terms of Crown sovereignty is to implicitly accept the fiction of Crown sovereignty and to embody the culmination of western societies efforts to assimilate indigenous peoples. He also explains at 57, that within the sovereignty framework, "any progress made towards justice will be marginal; in fact, it will be tolerated by the state only to the extent that it serves, or at least does not oppose, the interests of the state itself." See also for example, Tom Flanagan, *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000) at 52-61 where he argues that sovereignty is a political attribute of civilized societies with organized states. He further argues at 33-36 that all pre-contact Aboriginal societies did not cross the threshold of civilization because those societies did not acquire the requisite combination of intensive agriculture, urbanization, division of labour, intellectual advances, technology, and state form of government. He argues without civilization and state form of government, pre-contact Aboriginal societies could not be attributed with sovereignty. A discussion on indigenous sovereignty is also provided in Angela Pratt, "Treaties vs. Terrra Nullius: Reconciliation, Treaty-Making and Indigenous Sovereignty in Australia and Canada" (2004) 3 Indigenous L. J. 43-60 at 1-9, where she introduces a conception of sovereignty defined as any people's ability and authority to govern themselves. To frame her comparative analysis, she also writes that indigenous sovereignty and western state conceptions of sovereignty are two equal derivations of the same concept of sovereignty.

[92] Macklem, "Normative Dimensions" *supra* note 85 at 191.

[93] *Ibid.* at 197.

[94] Henderson, "Empowering Treaty Federalism" *supra* note 80 at 257.

because treaty delegates did not have a supreme authority over the Aboriginal people, and "the source of authority was and remains the consent of the people through federated governments or councils of extended families."[95] Further, treaties result with a shared jurisdiction and "did not alter the exercise of Aboriginal self-determination in a specific geographical area."[96]

As a normative justification for Aboriginal self-government, self-determination has its roots in international law and posits that "all peoples, or nations, ought to be able to determine their own political future or destiny free of external interference."[97] The right of self-determination, the right to choose to be self-governing, is supported by international documents such as "Article 55 of the UN Charter...[and] the International Covenant on Civil and Political Rights...."[98] Macklem argues that despite lack of international recognition in 1995, "[a]n Aboriginal right of self-government is easily conceptualized as a domestic, constitutional expression of the right of Aboriginal peoples to self-determination."[99]

The Macklem normative justifications for self-government are consistent with the relative internal independence, doctrine of continuity, inter-societal law, and British customary law and Rule of Law theories on the sources of Aboriginal rights in general and Aboriginal rights of self-government in particular. Without prior occupation, or prior sovereignty, there would be no pre-existing society relatively independent from the Crown. Also, the doctrine of continuity would be unable to incorporate Aboriginal laws into Canada's legal system without a pre-existing

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[95] *Ibid.*
[96] *Ibid.* at 258.
[97] Macklem, "Normative Dimensions" *supra* note 85 at 197.
[98] *Ibid.* at 198.
[99] *Ibid.*

Aboriginal society. The prior occupation also provides the opportunity for social organization, which inevitably gives rise to governing systems and laws. Prior occupation in a territory outside the reach of Crown laws allows customary law to form and gain the force of law. Further, the pre-existing Aboriginal legal traditions affected the early Crown and Aboriginal relationships, which would have affected the content of the inter-societal law. Each of these sources of Aboriginal rights of self-government compliments each other and is reinforced, if not shaped and defined, by the existence of treaties.[100]

### C. Arguments Against the Abstract Right of Self-Government

There are three main arguments raised in Canadian courts against the existence of an abstract Aboriginal right of self-government. First, it has been argued that the division of powers in the *Constitution Act, 1867* exhausts all governance authority in Canada, leaving no space for an inherent Aboriginal right self-government. Second, it had been argued that an Aboriginal right of self-government did not survive the assertion of Crown sovereignty. Third, it has also been argued that extensive regulation of Aboriginal life and powers of government under federal Indian legislation clearly and plainly terminated the rights of First Nations.

While considering the constitutional validity of the Nisga'a legislative powers provided by a modern treaty, the first of these arguments against Aboriginal rights of self-government was considered, and rejected, by the British Columbia Supreme Court in *Campbell.*[101] The Treaty provided that the Nisga'a Government has powers to make laws with respect to two broad categories. For the first category, Nisga'a

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[100]For a detailed argument see Henderson, "Empowering Treaty Federalism" *supra* note 80.
[101] *Campbell, supra* note 29 at para. 95.

Government laws are paramount over provincial and federal laws and deal with matters including education, the preservation of culture, and the use of Nisga'a land and resources.[102] Other areas, such as the regulation of the use and development of land are under Nisga'a jurisdiction, with rights of ways of the Crown being subject to special provisions. The regulation of businesses, professions, and trades on Nisga'a land are under Nisga'a jurisdiction but is "subject to provincial laws concerning accreditation, certification and regulation of the conduct of professions and trades."[103]

With respect to the second category of Nisga'a laws, provincial and federal laws are paramount. For example, the Nisga'a may establish police services but the Attorney General can reorganize the police service if he or she is of the opinion that provincial standards are not in place. The Nisga'a may establish a court subject to the approval of the provincial cabinet and an appeal of a decision of the Nisga'a court lies with the Supreme Court of Canada. Also subject to federal and provincial law, are areas such as the labour law, the harvest of fish and aquatic plants, the sale and consumption of alcohol, and the regulation of gambling.[104]

The Court was asked to strike down all Nisga'a legislative powers contained in the treaty as unconstitutional based on the argument that after confederation, "[a]ll legislative power was divided between Parliament and the legislative assemblies, [and] legislative bodies may not give up or abdicate that authority."[105] However, this argument was rejected for two reasons. First, the preamble to the *Constitution Act, 1867* incorporates the United Kingdom's unwritten constitutional principles, which

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[102] *Ibid.* at paras. 45-47.
[103] *Ibid.* at para. 47.
[104] *Ibid.* at paras. 48-57.
[105] *Ibid.* at para. 59.

include recognizing "a continued form, albeit diminished, of Aboriginal self-government after the assertion of sovereignty of the Crown."[106] Second, the powers that were distributed in s. 91 and s. 92 are limited to governmental jurisdictions that had belonged to the colonies[107] and do not include the Aboriginal right of self-government that survived "as one of the unwritten "underlying values" of the Constitution...."[108]

The argument that an Aboriginal right of self-government did not survive the assertion of Crown sovereignty was rejected by the Supreme Court of Canada in *Mitchell.* Speaking for the majority Chief Justice McLachlin held:

> Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them.[109]

In his concurring opinion, Justice Binnie further explained that "it has been almost 30 years since this Court emphatically rejected the argument that the mere assertion of sovereignty by the European powers of North America was necessarily incompatible with the survival and continuation of Aboriginal rights."[110] Using the hypothetical example of a Mohawk Aboriginal right to engage in military adventures throughout Canada, which would apparently otherwise exist but for Canada's monopoly over the lawful use of military force,[111] he held; "sovereign incompatibility continues to be an

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[106] *Ibid.* at para. 68.
[107] *Ibid.* at para. 76.
[108] *Ibid.* at para. 81.
[109] *Mitchell, supra* note 39 at para. 10.
[110] *Campbell, supra* note 29 at para. 67.
[111] *Ibid.* at paras. 152-153.

element in the s. 35(1) analysis, [and it is] a limitation that will be sparingly applied."[112]

The argument that extensive regulation of Aboriginal life and government extinguished inherent Aboriginal rights of self-government and introduced a delegated form of self-government[113] was considered in the Report of the Royal Commission on Aboriginal Peoples (RCAP).[114] RCAP rejects this argument because although federal legislation disrupted the political structures of Aboriginal peoples, by recognizing a limited form of historical governance structures it did not evidence the requisite clear and plain legislative intention necessary to extinguish an inherent Aboriginal right of self-government.[115]

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[112] *Ibid.* at para. 154.
[113] This argument does not apply to Metis or Inuit because they do not fall within the scope of federal Indian legislation.
[114] *Restructuring the Relationship, supra* note 59 at 211, 212.
[115] *Ibid.* See *Sparrow, supra* note 48 at para. 37.

## Chapter Three: The *Van der Peet* Test and Rights of Self-Government

### A. Introduction

The above arguments suggest that an abstract Aboriginal right of self-government exists, is sourced in pre-existing Aboriginal societies, became incorporated into Canada's common law, survived the assertion of Crown sovereignty, and is unaffected by the division of powers. The existence of more specific, concrete rights of self-government included within the abstract Aboriginal right of self-government will depend on whether, as *Mitchell* explains, they are surrendered (e.g. through historic or modern treaties and land claims), extinguished by clear and plain federal legislation, or, in limited circumstances, are incompatible with Crown sovereignty. As elaborated earlier, they will also vary among Aboriginal groups. However, the issue of how concrete Aboriginal constitutional rights of self-government are identified under s. 35 is still open. Here I argue that the *Van der Peet* test, as it has been used to date to identify concrete rights of self-government, is not an appropriate method.

This part of the paper is organized into two sections. First, I analyze the *Van der Peet* test and its development in Canadian law. Second, I critically examine how this test has been applied to the identification of concrete Aboriginal rights of self-government.

### B. The *Van der Peet* Test

In *Van der Peet*, the Supreme Court of Canada developed a two part test used to determine the existence of Aboriginal rights under s. 35. The test first characterizes the right based on "the nature of the action which the applicant is claiming was done

pursuant to an Aboriginal right, the nature of governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right."[116] In the second part of the test, an Aboriginal right is defined as an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the group claiming the right (this is known as the integral to distinctive culture test). This part of the test is derived from the *Sparrow*[117] decision. In that case, the existence of the Musqueam Aboriginal right to fish for food was not an issue. Chief Justice Dickson and La Forest J., commenting in *obiter* on the existence of the Aboriginal right, observed that "the taking of salmon was an integral part of their lives and remains so to this day,"[118] and "that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture."[119] The *Van der Peet* court used these passages to ground the formulation of the integral to the distinctive culture test.

In the English language, integral, as an adjective, means "[b]elonging to or making up a whole: constituent, component; necessary to the completeness or integrity of the whole, not merely attached."[120] As a noun, integral means "[a]n integral part or element; a constituent, a component."[121] However, with respect to issues on Aboriginal rights, Courts have changed the meaning of 'integral' over time.[122] Contrary to Justice McLachlin's (as she was then) dissenting judgment,[123]

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[116] *Van der Peet, supra* note 3 at 53.
[117] *Sparrow, supra* note 48.
[118] *Ibid.* at para. 29.
[119] *Ibid.* at para. 40.
[120] *The New Shorter Oxford English Dictionary, s.v.* "integral".
[121] *Ibid.*
[122] This is not the only liberty previous Courts have taken with the language in the *Sparrow* decision. See Barsh & Henderson "The Van der Peet Trilogy" *supra* note 44. The authors explain that "the

integral, for the majority of *Van der Peet* Court, meant the practice, custom, or tradition is a "central and significant part of the society's distinctive culture,"[124] or a "defining feature of the culture in question."[125] The majority also concluded that when identifying integral practices, customs, and traditions, "the Court cannot look at those aspects of the aboriginal society that are true of every human society (eg. eating to survive)."[126]

The Supreme Court of Canada later adopted a more restrictive interpretation of integral in *Mitchell* when it held to be integral, a practice, custom, or tradition must lie "at the core of the peoples' identity."[127] It also stated that the *Van der Peet* test "emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question."[128] However, this interpretation of the word integral has been recently overturned and explained in the *Sappier*[129] decision in 2006. In identifying Aboriginal rights, the Supreme Court of Canada held:

> [t]he purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. .... Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a "core identity" may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice

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Dickson Court used "reconciliation" to refer to a limitation on federal power, while the Lamer Court uses the same term to limit further the scope of Aboriginal rights" at 999.

[123] *Van der Peet, supra* note 3 at para. 256.

[124] *Ibid.* at para. 55.

[125] *Ibid.* at para. 59.

[126] *Ibid.* at para. 56.

[127] *Mitchell, supra* note 39 at para. 12.

[128] *Ibid.*

[129] *R. v. Sappier; R. v. Gray*, [2006] S.C.J. No. 54 [*Sappier*].

> was integral to the aboriginal society's pre-contact distinctive culture.[130]

The *Sappier* decision also explains what is meant by "the Court can not look at those aspects that are true of every human society." Justice Bastarache, for a unanimous Court, held that the Provincial Court Judge incorrectly concluded that this passage meant that a practice undertaken merely for survival purpose can not found an Aboriginal right.[131] Rather, he found, "the jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community."[132] He further agreed with Robertson J.A. of the New Brunswick Court of Appeal that "courts should be cautious" when considering whether a culture will be fundamentally altered without the practice, custom, or tradition.[133] The *Sappier* Court was also willing to recognize "an aboriginal right based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people."[134]

The *Sappier* decision upholds the ordinary meaning of the word integral and otherwise respects the *Sparrow* decision from which the term originates in Aboriginal rights jurisprudence. In *Sparrow,* Chief Justice Dickson held that "[w]hen the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."[135] By limiting the scope of s. 35 to recognize rights derived from practices, customs, and traditions that are "central to" and "lay at the core of"

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[130] *Ibid.* at para. 40.
[131] *Ibid.* at para. 35-38.
[132] *Ibid,* at para. 38.
[133] *Ibid.* at para. 41.
[134] *Ibid.* at para. 27 citing *R. v. Adams*, [1996] 3 S.C.R. 101[*Adams*].
[135] *Sparrow, supra* note 48 at para. 67.

Aboriginal identity, as opposed to those practices, customs, and traditions that are simply integral, a Court distorts the meaning of words,[136] and endorses a narrow interpretation of Aboriginal rights.[137]

Nevertheless, in order to ground an Aboriginal right, the custom, practice, or tradition must have been integral to the distinctive culture of the Aboriginal group prior to contact with Europeans[138] and must have been exercised with a degree of continuity throughout history.[139] However,

> [w]here an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).[140]

This suggests that a modern practice, custom, or tradition that exists with the requisite continuity may ground an Aboriginal right. As the Court reasoned in *Van Der Peet*, today it would be difficult, if not impossible, to prove the 'integrallness' of an historic Aboriginal practice, custom or tradition given the span of time and absence of written records relating to that time.[141] For this reason, the concept of

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[136] Here, the idea that Courts improperly used the word "integral" when applying the *Van der Peet* test came from, Informal Conversation with Albert Peeling (15-17 October 2003) at Indigenous Bar Association 15th Annual Fall Conference in Vancouver, British Columbia.

[137] Barsh & Henderson, "The Van der Peet Trilogy" *supra* note 44 The focus on the "centrality" of practices, customs or traditions "jettisons principles in favour of an evidence-driven approach to resolving Crown-Aboriginal disputes" at 1006.

[138] *Van der Peet, supra* note 3 at para. 63. The Court held that "the time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies."

[139] *Ibid.* The Court held "[i]t is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1)." at para. 63.

[140] *Ibid.*

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

continuity does not require Aboriginal groups to prove an "unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact."[142] Also, the transformation of the practice, custom, and tradition into modern forms will not preclude the right's recognition under s. 35.[143]

### C. Application to Self-Government

Applying the *Van der Peet* approach, Canadian courts have dismissed claims to Aboriginal rights of self-government. Two examples are discussed here: the 1996 decision of the Supreme Court of Canada *R. v. Pamajewon*[144] and the 2005 decision of the Federal Court Trial Division *Samson Indian Nation and Band v. Canada.*[145]

In *Pamajewon*, the Shawanaga First Nation and the Eagle Lake First Nation both passed band council lottery laws outside the scope of federal by-law making powers provided under the *Indian Act.*[146] The Supreme Court of Canada heard argument on how a right of self-government is not restricted to ancient laws or customs, and how the regulation of gambling falls within the scope of the inherent right of self-government.[147] Chief Justice Lamer held "claims to self-government are no different from other claims to the enjoyment of Aboriginal rights and must, as such, be measured against the same standard."[148] He rejected the argument that the right should be characterized as a broad right to manage the use of reserve lands, instead characterizing the claim as a right to "participate in, and to regulate high

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[142] *Ibid.* at para. 65
[143] *Ibid.*
[144] *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*Pamajewon*].
[145] *Samson Indian Nation and Band v. Canada*, [2005] F.C.J. No. 1991 (T.D.) [*Samson*].
[146] *Indian Act*, R.S.C. 1985 c. I-5 s. 83.
[147] *Pamajewon, supra* note 144 at para. 21.
[148] *Ibid.* at para. 24.

stakes gambling."[149] Although there was evidence showing that gaming is important and prevalent in Ojibwa culture, the Court dismissed the claim because the evidence "does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, [the] evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community."[150]

In *Samson*, the Samson Cree Nation argued, among other things, that their Aboriginal right of self-government includes a right to manage oil and gas revenues derived from their reserve. In particular, Judge Teitelbaum of the Federal Court Trial Division considered whether: "The Samson Cree Nation possessed and continues to possess aboriginal or inherent rights and powers in respect of governance, citizenship, taxation, trade and management of its resources and revenues."[151] To answer this question he applied the *Van der Peet* test through the reasoning of *Pamajewon.*

Judge Tietelbaum first considered the result of characterizing the claim as a right to trade. He held that although the Plains Cree engaged in trading activities prior to European contact, since "trade did not become a distinctive Cree practice until they came to dominate the European fur trade"[152] no Aboriginal right to trade their oil and gas resources existed. He then considered the result of characterizing the claim as a right "in managing and controlling the fruits of the trade – ie., money"[153] and held that the pre-contact Plains Cree "were not familiar with money – and by that [he meant] the concept, not just the physical manifestation of it in terms of paper &

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[149] *Ibid.* at para. 26. But see the concurrent judgment where L'Heureux-Dube J. avoids the claim to self-government by characterizing the right according a particular activity; as a right to gamble. *Ibid.* at para. 38.
[150] *Ibid.* at para. 28.
[151] *Samson, supra* note 145 at para. 727.
[152] *Ibid.* at para. 746.
[153] *Ibid.* at para. 747.

coins."[154] He dismissed the self-government claim to an Aboriginal right to manage money since managing money was not a "defining characteristic of the Plains Cree."[155]

The *Van der Peet* and *Pamajewon* approach has been applied in a number of cases involving issues of Aboriginal rights of self-government.[156] However, it can be argued that this approach to identifying concrete rights of self-government is wrong because it has been interpreted and applied incorrectly. In the context of Aboriginal rights in general and Aboriginal rights of self-government in particular, it is wrong to ground powers of government in specific historical activities and practices of community members separate from consideration of the broader powers of government and practices, customs, and traditions of which they may form a part. The proper focus for determining the existence of concrete constitutionally protected rights using *Van der Peet* is on general practices, customs and traditions of the Aboriginal group that evidence its way of life; not on the disembodied activities. As the court explains in *Van der Peet*, "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

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[154] *Ibid.* at para. 754.
[155] *Ibid.* at para. 747.
[156] See *Great Blue Heron Gaming Co.*, [2004] O.L.R.D. No. 4907 affd' *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada), Local 444* [2006] O.J. No. 2159 (Ont. Sup. Ct.). The Ontario Labour Relations Board applied *Pamajewon* to find that the Mississaugas of Scugog Island First Nation had no Aboriginal right to regulate labour relations on reserve land; See *Ermineskin Cree Nation v. Canada (Canadian Human Rights Tribunal)*, [2005] A.J. No. 105 (Q.B.). Though not considering the merits of the case for self-government, the court held "[t]o the extent that [Ermineskin Cree First Nation] is claiming an aboriginal right to self-government, its pleadings must conform to Pamajewon" at para. 40; See *Gauthier v. Canada*, [2006] T.C.J. No. 218 The tax Court of Canada held rights of "[s]elf-government must still pass the *Van der Peet* tests -- practices, customs or traditions need be proven to establish what really constitutes the right of self-government" at para. 25. See especially *Muswachees Ambulance Authority Ltd. Re* [2006] Alta. L.R.B.R. No. 243 at paras. 40-50.

the aboriginal group claiming the right."[157] Considered in isolation an activity may not appear to be integral to a distinctive Aboriginal culture, yet it may still be an Aboriginal right if it is an element of a broader integral practice, custom or tradition.

By focusing on a specific activities (e.g. high stakes gambling and managing money) rather than a broader concept of community practice or custom (e.g. gaming and internal control over community resources), Courts have also conflated the concept of practices with activities. Robert Post, quoting the philosopher Alasdair MacInntyre, defines a practice as:

> [A]ny coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and particularly definitive, of that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended. Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is.[158]

Adopting this understanding of practices, fishing and hunting may be both Aboriginal activities and practices. They are community practices because they "involve standards of excellence and obedience to rules" and "subsist because of ongoing and shared standards about what is appropriate for the practice."[159] Regulating high stakes bingo is an activity but may not be an Aboriginal practice. Cree trading is likely an activity and a practice. However, like throwing a football with skill may be an element of the broader practice of the game of football, gambling may constitute an element of the broader practice or custom of gaming.

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[157] *Van der Peet, supra* note 3 at para. 46.
[158] Robert Post, "Legal Scholarship and the Practice of Law" (1992) v. 63 University of Colorado L. Rev. 615 at 616 quoting A. MacIntyre, (1981) *After Virtue* 175.
[159] *Ibid.*

When a Court conflates concepts of activities and practices it makes an analytical leap which serves to further narrow the rights protected under s. 35. It seems, however, that the Supreme Court of Canada is retreating from this misapplication of the *Van der Peet* test. For example, Catherine Bell argues that *obiter* comments in *Delgamuukw*[160] indicate that the *Pamajewon* reasoning is an anomaly and not representative of the direction the Court is heading. She writes:

> It may be that Chief Justice Lamer's reference to the different "models of government" outlined in the RCAP report and conceptions of "territory, citizenship, jurisdiction [and] internal government organization" will mean claims to self-government must be framed in terms narrower than those core areas recommended by RCAP, but broader than a strict application of *Van der Peet* and *Pamajewon* would allow.[161]

She continues to explain "a characterization of rights falling somewhere between specific activities on one end of the spectrum and broad core areas of jurisdiction recommended by RCAP on the other, may be endorsed."[162] Indeed, four years later in *Mitchell*, the Supreme Court held that *Pamajewon* simply stands for the idea that Aboriginal right inquiries can not be cast overly broad or excessively general terms.[163]

The *Van der Peet* test must also be interpreted in light of its purpose of protecting the Aboriginal way of life. In *Sappier*, instead of focusing on the specific activity of logging to found the Aboriginal right, the Supreme Court considers the broader issue of how the practice of harvesting wood relates to the traditional "way of life" of the Maliseet and Mi'kmaq. It provides a further illustration of the difference

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[160] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].
[161] Bell, "New Directions" *supra* note 51 at para. 66.
[162] *Ibid.*
[163] *Mitchell, supra* note 39 at para. 15 per McLachlin C.J. and at para. 126 per Binnie J.

between characterizing rights based on specific activities and on characterizing rights based on the broader community practices, customs and traditions of which the activities form a part. The way of life of the Maliseet and Mi'kmaq was that of a "migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation."[164] Thus the Court held:

> [T]he practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community.[165]

The Court, reiterating the Crown concession that basket weaving and birch bark canoe making is integral to the Maliseet and Mi'kmaq culture, found that reducing the Aboriginal culture to these particular activities would reduce the rights to "anthropological curiosities, and, potentially racialized aboriginal stereotypes."[166] Rather, the Court continued, the proper focus is on how the practice relates to the "way of life" of the Aboriginal group. And, as the Court found, in the context of the traditional Aboriginal way of life, "harvesting wood for domestic uses including shelter, transportation, fuel and tools"[167] is directly related and integral to the distinctive culture of the Maliseet and Mi'kmaq.

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[164] *Sappier, supra* note 129 at para. 2.
[165] *Ibid.* at para. 24.
[166] *Ibid.* at para. 46.
[167] *Ibid.* at paras. 46-47.

## Chapter Four: Arguments Against Application of *Van der Peet*

### A. Introduction

Despite the potential use of this more liberal approach to rights identification, a test based on continuity of activities that are elements of pre-contact practices, customs and traditions is still arguably incapable of fully articulating in concrete terms the nature of rights of self-government that survived the assertion of sovereignty and are protected under s. 35. To prove each element of governance on this basis would be an enormous task and impossible evidentiary burden. It is for this reason, for example, that *Delgamuukw* held it is not necessary to prove all of the specific elements that constitute Aboriginal title. Rather once the pre-requisites for proving the existence of title are established, many aspects of its content manifested through concrete rights, such as the ability to develop resources in a manner consistent with traditional land holding uses, are presumed. As will be argued later, the reasons for abandoning the *Van der Peet* test for questions on Aboriginal title are equally applicable to questions concerning an Aboriginal right of self-government. The inappropriateness of applying *Van der Peet* to delineate concrete elements of self-government is even more compelling when considered within the context of Hohfeld's theory of rights as legal relationships. The following part develops this latter point before I return to the comparison to title.

### B. Hohfeld's Theory on the Concept of Rights

The concept of rights informing Canadian common law (of which Aboriginal rights form a part) and the interpretation of constitutional rights is broader and more sophisticated than a mere identification of rights and activities. As will be discussed

later, Hohfeld's fundamental legal relationships provide for a more specific and comprehensive account of the relationship between Aboriginal people and the Crown in terms of rights under s.35. According to Hohfeld, it is more accurate to explain legal rights in terms of four fundamental relationships between people.[168] Jeremy Waldron describes the four fundamental relationships identified by Hohfeld in a discussion of the ambiguities inherent in the phrase "P has a right to X":

> [Hohfeld] noted that the phrase may be used to convey any (combination) of the following ideas:
>
> (1) It may mean 'P has no duty (to a particular person Q or to people in general) not to do W'. [A privilege or liberty].
> (2) Talk of P's right to do X may be meant to indicate that Q (or everyone) has a duty to let P do X. [A claim- right].
> (3) The third sense of 'right' which Hohfeld distinguished involves the ability or *power* of an individual to alter existing legal arrangements. [A power or entitlement].
> (4) Oddly, we sometimes use the term 'right' to describe not only a power but also the correlate lack of a power – an *immunity* from legal change. [An immunity].[169]

Each conception of right (or legal relationship) has an opposite, or negation, and correlate, or definition of relationship, concept.[170] Privilege is opposite of duty; claim-right is opposite no-right; power is opposite of disability; and immunity is opposite of

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[168] Wesley H. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16; (1917) 26 Yale Law Journal 710 [Hohfeld "Fundamental Legal Conceptions"]. I rely on Hohfeld's analysis because his classification provides a more detailed and accurate explanation of the concept of rights. As will be discussed later, through the lens of Hohfeld, Aboriginal rights, as have been recognized by the courts, can be categorized into one of four broad groups. Hohfeld's analysis can also explain the intricacies of Aboriginal title and the distinct self-governing elements connected with title.

[169] Jeremy Waldron, "Introduction" in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford, 1984 1at 6-7 [Waldron "Introduction"] [emphasis in original].

[170] At the outset, Hohfeld's analysis is not universally accepted nor is it without its problems. See generally D.T. O'Reilly "Are There Any Fundamental Legal Conceptions?" (Spring, 1999) 49 Univ. of Toronto L.J. 271. But see S.Coyle "Are There Any Necessary Truths About Rights?" (2002) 15 Can. J.L. & Juris. 21-50 He writes that Hohfeld's analysis "should be taken as an embodiment of necessary truths about the concept of a legal right as it has evolved in our legal culture" at para. 5. See also J. Stone, *The Province and Function of the Law; Law as Logic, Justice and Social Control: A Study in Jurisprudence* (Sydney: Associated General Publications, 1946) at paras. 131-4.

liability. Privilege correlates with another's no-right; claim-right with another's duty; power with another's liability; and immunity with another's disability or no-power.[171] Although Waldron and others refer to each of the above relations in the language of rights, Hohfeld considers the second conception of legal relationships (claim-right and duty) as, strictly speaking, the only conception of a right. In his words, "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense."[172]

Simmonds also describes and analyzes the legal relationships contained within the phrase "P has a right to X." He explains that when P has no duty to people in general, Hohfeld "chooses to use the term 'privilege'...but it is worth noting that many commentators prefer to substitute the term 'liberty'."[173] For example, if an individual has a privilege or liberty to wear a hat this "does not entail a correlate duty for someone to avoid interfering with the individual's Hohfeldian privilege of wearing hats. P's privilege or liberty correlates with Q's no right to impede P."[174] A privilege or liberty, defined without reference to its correlate no right, is simply an absence of duty. An individual with unlimited privilege would owe no duty whatsoever. An individual with no privilege would owe unlimited duty. It is

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[171] Hohfeld "Fundamental Legal Conceptions" *supra* note 168 at 12.

[172] *Ibid.* at 12. He also writes "the word 'right' is used generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity. In its narrowest sense, however, the term is used as the correlative of duty" at 53.

[173] Nigel E. Simmonds, "Introduction" in David Campbell & Philip Thomas, eds., *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcombe Hohfeld* (England: Dartmouth, 2001) at xiii [Simmonds, "Introduction"].

[174] Waldron "Introduction" *supra* note 169. He explains how H.L.A Hart outlined the contrary impression, which is a consequence of "the existence of very general claim-rights/duties that have the effect of providing a perimeter of protection for Hohfeldian privileges." This seems to happen when a duty of non-interference with an individual's privilege of wearing hats is sourced in a different claim-right of the hat wearer. For example suppose P has a contractual duty to allow Q to wear hats. Q would have a claim-right to wear a hat against P and also have a privilege, against everyone else, to wear a hat.

important to remember that the privilege conception of "right" is defined according to the relationship, not according to the exercise of activity.

Claim-rights correlate to duties in others. Simmonds provides an example: "[If] I have a claim-right that you should not assault me, you have a duty not to assault me."[175] However, because 'P has a right to do X' is a loose phrase that can involve anything from a negative duty not to impede P, and a positive requirement to do what is required to make it possible for P to do X, Waldron further observes that the concept of claim-rights "includes rights to active assistance as well as negative freedom."[176]

The legal relationship of power, and conception of rights as powers, involves the power to alter legal relationships. In discussing powers, Waldren gives the example of a right to sell a typewriter. As a power this right is concerned, for classification purposes, "not so much with the immediate act...as with the effect of those actions."[177] The effect of exercising the power through engaging the action of selling a typewriter, is to change, from one person to another, the privileges, claim-rights, and powers that ownership involves.[178] The correlate of a power in P (the seller of the typewriter) is liability in Q (the buyer). Liability means "the liability to have one's legal relations altered by the act of another."[179] In Hohfeld's words it "is a liability to have a duty created."[180] Applying this to the context of the typewriter, the seller of the typewriter, in exercising the power to sell, creates a duty in the buyer to

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[175] Simmonds, "Introduction" *supra* note 173.
[176] Waldron, "Introduction" *supra* note 169 at 6.
[177] Waldron, "Introduction" *supra* note 169 at 7.
[178] Simmonds, "Introduction" *supra* note 173 at xv.
[179] *Ibid.*
[180] Hohfeld, "Fundamental Legal Conceptions" *supra* note 168 at 26.

pay for the typewriter. The potential buyer would have no-power to purchase the typewriter without an exercise of power by the seller.

Hohfeld's remaining conception of legal relationships or "rights" is immunity from a power to change a legal relationship. P's immunity correlates with Q's disability or no power. The opposite of immunity is liability. With the example of the typewriter, suppose that a degree of immunity attached to the ownership rights of the typewriter. If P owns the typewriter, Q would have no power to interfere with P's relationship of ownership to the typewriter.

Waldron writes that "Constitutionally guaranteed privileges and claim-rights [often] also involve an immunity: not only do I have no duty not to do X or not only do others have a duty to let me do X, but also no one – not even the legislature – has a power to alter that situation."[181] For example, s. 35 limits the powers of federal and provincial governments to terminate and regulate Aboriginal rights falling within its jurisdiction. As Aboriginal rights are collective rights, the immunities imbedded within the Aboriginal claim-right to fish for food in a particular lake free from government regulation would, perhaps, relate to how Aboriginal peoples regulate the allocation of the fishery amongst themselves. Moreover, when the federal and provincial government disregards these potential immunities with justification under *Sparrow*, the test does not abolish these immunities; it simply enables interference with them.

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[181] Waldron, "Introduction" *supra* note 169 at 7. See also Simmonds, "Introduction" supra note 173 at xvi. He writes "Constitutional Bills of Rights frequently confer extensive and very important immunities, in so far as they disable the legislature from enacting certain types of law." Using the example of the right to vote, he questions whether this provides an immunity or a combination of an immunity from legislative restrictions, a power to cast a vote, and a claim-right against election officials to accept the vote.

Waldron's conceptualization of constitutional rights as including not only claim-rights, but also privileges, powers, and immunities is supported in the context of s. 35 with reference to principles of constitutional interpretation applied prior to the *Van der Peet* test. With respect to s. 35, it is worth reiterating that in *Sparrow,* Chief Justice Dickson and Justice LaForest held: "[w]hen the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."[182] This is contrasted with Hohfeld's strict, narrow interpretation that rights only correlate to duty.

### C. Application of Hohfeldian Rights to *Van der Peet* in the Context of s. 35

The following analysis explains further why the *Van der Peet* test for Aboriginal rights is not consistent with a Hohfeldian approach to conceptualizing rights as a range of legal relationships. In particular, the *Van der Peet* test does not include negative claim-rights, privileges unconnected to positive claim-rights, powers, and immunities.

However, in a modified form, the Hohfeldian claim-right and correlate duty relationship does fall within the contours of the *Van der Peet* test when considered in conjunction with the *Sparrow* analytical framework and justification test. Although a claim-right is not understood by Hohfeld as necessarily arising from activities of the claim-right holder (such as the claim-right not to be assaulted), claim-rights are reduced to activities in the context of s. 35. For example, in *Adams*, Chief Justice Lamer applied the *Van der Peet* test and found that a Mohawk Aboriginal right to exercise the activity of fishing for food existed.[183] Essentially, the Court found a

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[182] *Sparrow, supra* note 48.
[183] *Adams, supra* note 134 at para. 46.

Mohawk claim-right to fish for food. The Mohawk maintained the claim-right against the Crown and the duty side rested with the Quebec government. Quebec failed to perform its duty when it purported to infringe the exercise of the claim-right. The definition of what constitutes infringement is found in *Sparrow*. The Court held that in determining whether an Aboriginal right has been infringed, the proper considerations are: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right."[184] Applying this reasoning Lamer C.J. (as he then was) held in *Adams* that because limits to the exercise of the Mohawk claim-right of fishing for food is left to the discretion of the Minister, the regulatory scheme infringed the Aboriginal right to fish for food.[185]

However, Aboriginal rights are not absolute. The Crown may infringe the exercise of an Aboriginal right if the Crown meets the *Sparrow* justification test. This test captures the duty element of the Hohfeldian claim-right relationship. Though the test must be defined in "the specific factual context of each case,"[186] there are two broad stages of analysis under the *Sparrow* justification test. The first issue is whether there is a valid legislative objective for infringing the right claimed.[187] Some valid legislative objectives include resource conservation, safety regulations, and other compelling and substantial objectives.[188] Further, the objective must not be so vague or broad that it fails to provide meaningful guidance and is unworkable as a test for

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[184] *Sparrow, supra* note 48 at para. 70.
[185] *Adams, supra* note 134 at para. 46.
[186] *Sparrow, supra* note 48 at para 66.
[187] *Ibid.* at para. 71.
[188] *Ibid.*

justifying limitations of Aboriginal constitutional rights.[189] The second issue is whether the compelling and substantial legislative objective is furthered in accordance with the honour of the Crown. When the right relates to scarce and valued resources such as the fishery, after conservation measures are met, priority is given to the Aboriginal fishery over the non-Aboriginal commercial and sport fishery.[190] Some other considerations include:

> 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.[191]

The honour of the Crown requirement of the *Sparrow* justification test ensures that when the Crown infringes an Aboriginal claim-right it does so in cognizance with its correlate duty. Though the content of the duty will be discussed later, the point here is that *Van der Peet* test identifies activity based Aboriginal claim-rights while the *Sparrow* analytical framework and justification analysis identifies and emphasizes the correlate Crown duty as implied by the honour of the Crown.

Section 35 also includes some negative claim-rights. For the purposes of this analysis, a negative claim-right is understood as a right that imposes a correlate positive duty on others to act. This is contrasted with the positive claim-right that imposes a correlate negative duty to avoid acting in a manner that impedes the exercise of the right. Examples of a negative claim-right, in the context of s. 35, is found in cases related to the duty to consult Aboriginal people outside the application of this duty within part two of the *Sparrow* justification test. As will be discussed

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[189] *Ibid.*
[190] *Ibid.* at para. 77.
[191] *Ibid.* at para. 82.

further in Chapter five in the context of self-government, in *Haida Nation* and *Taku River*,[192] the Supreme Court of Canada found that a Crown duty to consult Aboriginal people, or, in other words, an Aboriginal negative claim-right to be consulted, is triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[193] Though not expressly concerned with Aboriginal rights,[194] the *Mikisew Cree*[195] case provides another example of a negative claim-right under s. 35. Here, the Supreme Court of Canada applied *Haida Nation* and *Taku River* and found a Crown duty to consult the Cree was triggered, when the government contemplated taking up land, pursuant to Treaty No. 8 because that taking may have adversely affected the Treaty 8 rights to trap and hunt.

While the duty to consult may be fulfilled through an activity, the negative claim-right to be consulted defines a relationship. Though the duty to consult is recognized and affirmed under s. 35, there was no issue, as there could not be, about whether the Court should apply the *Van der Peet* test in determining the existence of these negative claim-rights. To do so would be to absurdly ask whether the Haida or

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[192] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*]; *Taku River Tlingit First Nation v. British Columbia,* [2004] 3 S.C.R. 550 [*Taku River*].
[193] *Ibid.* at para. 35.
[194] The *Mikisew* case could have concerned a treaty protected Aboriginal right to trap and hunt. See *Van der Peet* supra note 3 at 379. Justice L'hereaux-Dube held that "[a] piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land" at para. 123. See also *Guerin v. Canada* [1984] 2 S.C.R. 335. Justice Dickson held "[i]t does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401, at pp. 410-11 (the Star Chrome case)."
[195] *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage) [2005] 3 S.C.R. 388 [*Mikisew Cree*].

Cree were consulted by the Crown to the extent that it was integral to their culture prior to European contact.

A privilege is an absence of a duty and correlates to the other's no-right. Privileges are protected by s. 35 only in the very restrictive form of the privilege to undertake a specific physical activity without state interference unless such interference meets the justification test raised earlier. An example of an Aboriginal privilege under Hohfeldian theory might be a privilege to use a tract of land in any fashion (contrasted with an Aboriginal claim-right to engage in specific activities on that tract of land). The reader will recall a privilege may be defined as an absence of duty. To be a privilege the right to use the land must not be limited by a corresponding Aboriginal duty owed to the Crown or anyone else. Further, to be a privilege, there must be a correlate absence of right, such as the Crown's no-right to infringe or "impede" the privilege. Absence of an Aboriginal duty owed to the Crown and a Crown's no-right to impede or infringe is inconsistent with the *Van der Peet* test because an absence of duty is not identified with the exercise of activities. Albeit, the absence of duty (a privilege) may support the exercise of certain activities, such as farming the land, but it conceptually different from the privilege itself.

The power or entitlement class of right is also inconsistent with rights conceptualized as activities. As Hohfeld provides, "it is necessary to distinguish carefully between the *legal* power, [and] the *physical* power to do the things necessary for the 'exercise' of the legal power, and, finally, the *privilege* of doing these things – that is, if such privilege does really exist."[196] Hohfeld explains his

[196] *Hohfeld,* "Fundamental Legal Conceptions" *supra* note 168 at 26 [emphasis in original]. A privilege means an absence of duty.

conception of power through various examples of legal powers such as the property owner's power to extinguish or transfer his own legal interest, the power to create contractual obligations, and the power of a sheriff to sell property under a writ of execution.[197] Here, the important distinction is in the exercise of the right and the conceptualization of the right.[198] Power is control over legal relations. Waldron notes that powers "are concerned not so much with the immediate acts I perform (e.g. handing you the typewriter) as with the effect of those actions" and, further, "powers may exist independently of other sorts of rights."[199]

An example is the Aboriginal power, or right, to create treaty rights and alter Aboriginal rights (legal relations) through treaties. In *Simon,*[200] Chief Justice Dickson rejected the argument that Indians do not have the capacity, or in Hohfeldian terms, power,[201] to enter into treaties, holding "[t]he Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac."[202] In *Sioui,*[203] Justice Lamer (as he was then) elaborated on the *Simon* holding that the power to enter into treaties does not depend on a territorial claim, holding that "[t]here is no reason why an agreement concerning something other than a territory, such as an

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[197] *Ibid.* at 22.
[198] *Van der Peet,* supra note 3 at para. 238. A distinction between the exercise of and the conception of rights was also recognized by McLachlin J.'s (as the was then). See her dissenting judgment where she held "[i]t is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right."
[199] Waldron "Introduction" *supra* note 169 at 7.
[200] *R. v. Simon* (1985), 24 D.L.R. (4th) 390 (S.C.C.) [*Simon.*].
[201] Hohfeld, "Fundamental Legal Conceptions" *supra* note 168 at 22. When discussing the various terms used to describe the power conception of right, writes "The term 'capacity' is equally unfortunate; for, as we have already seen, when used with discrimination, this word denotes a particular group of operative facts, and not a legal relation of any kind."
[202] *Simon, supra* note 200 at para. 24.
[203] *R. v. Sioui,* [1990] 1 S.C.R. 1025 [*Sioui*].

agreement about political or social rights, cannot be a treaty".[204] In *Mitchell,* Chief Justice McLachlin articulated an Aboriginal power, when she held that the "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless ... they were surrendered voluntarily via the treaty process."[205]

All powers, whether it is the individual power to dispose property and to create contractual obligations, or the collective Aboriginal power to create and alter rights through treaties with the Crown, can not be understood in terms of activities. To say Aboriginal people have a right to engage in the activity of treaty making simply explains the method of exercising the power to enter and change legal and political relations. Again we see the problem with *Van der Peet* test's approach to rights definition and its inconsistency not only with Hohfeld, but also other Aboriginal rights jurisprudence

Finally, immunities also can not be understood fully in terms of activities, or duties to avoid infringing the exercise of particular activities. Immunities are the opposite of liability and correlate to disability or no-power; that is no power to create legal relations. In Hohfeld's words "a power is one's affirmative 'control' over a given legal relation [a right] as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation [a right]."[206] Like power, the immunity concept of right is defined according to a legal relationship. When an individual maintains an immunity towards another with respect

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[204] *Ibid.* at para. 40.
[205] *Mitchell,* supra note 39 at para. 10.
[206] Hohfeld, "Fundamental Legal Conceptions" *supra* note 168 at 28.

to a particular matter, the other has no-power to create a legal relation with respect to that particular matter.

Aboriginal freedoms from legal power or control by the Crown (Aboriginal immunity) have been litigated before Canadian courts.[207] However, they are transformed to a different understanding of right when the *Van der Peet* approach is applied. For another example, in *Mitchell* the Mohawk of Akwesasne claimed a right to bring goods across the border "without having to pay any duty or taxes whatsoever to any Canadian government or authority."[208] Essentially, the Mohawk claimed an immunity from Canadian imposed duties and taxes with respect to their trade goods moved across the border.[209] Chief Justice McLachlin re-characterized the right when she held:

> [O]nce an existing right is established, any restriction on that right through the imposition of duties or taxes should be considered at the infringement stage. The right claimed in those cases was not the right "to fish (or hunt) without restriction". Similarly, here the right is not "to bring trade goods without having to pay duty"; properly defined, the right claimed is to bring trade goods simpliciter.[210]

The above analysis demonstrates that negative claim-rights, privileges, powers, and immunities are all conceptions of legal relationships [rights] have been raised or recognized to some extent in Aboriginal rights jurisprudence but not through application of the *Van der Peet* test. The negative claim-right to be consulted, the privilege to put Aboriginal title land to use, the power to create and terminate

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[207] But see how the immunity conception of Aboriginal right is recognized by the common law, and is described in *Worcester, supra* note 17-23 and the accompanying text.
[208] *Mitchell, supra* note 39 at para. 23
[209] *Mitchell v. Canada (M.N.R.)*, [1998] F.C.J. No. 1513 at para. 33. Judge Letouneau, dissenting on a different issue, for Federal Court of Appeal in characterized the Mohawk claim as an exemption from the payment of customs and duties.
[210] *Mitchell, supra* note 39 at para. 23.

interests through treaties, and the qualified immunity from Crown power or control are all constitutional Aboriginal rights under s. 35. Indeed, Justice L'Heureux-Dube, in her dissenting judgment, endorsed this approach to identifying Aboriginal rights when she held; rights in s. 35 should be conceptualized in a "more generic" and "fairly high level of abstraction."[211] This establishes how the *Van der Peet* test, and its identification of rights with specific activities, is unable to identify all constitutional Aboriginal rights. Moreover, when paralleled with the reasoning of *Delgamuukw*, the inappropriateness of applying the *Van der Peet* test to questions of Aboriginal rights of self-government is further highlighted with a Hohfeldian analysis.

## D. Hohfeldian Theory and the Doctrine of Aboriginal Title

Aboriginal title jurisprudence before and after *Van der Peet* is more consistent with a Hohfeldian analysis because it defines the right to Aboriginal title in abstract terms. A complex aggregation of concrete claim-rights, privileges, powers, and immunities are associated with the abstract right. Observing that title is different from activity based rights, Lamer C.J. in *Delgamuukw* did not apply the *Van der Peet* test to Aboriginal title. He held that in addition to differing in the degree of connection with the land,[212] Aboriginal rights and Aboriginal title are different in nature. Noting that "[t]o date, the Court has defined aboriginal rights in terms of activities,"[213] he

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[211] *Van der Peet, supra* note 3 at para. 149. See also *Van der Peet, supra* note 3 at para. 155. Where in describing the approach towards identifying Aboriginal rights, she held that "[a] better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality." See also *Van der Peet, supra* note 3 at para. 238. Where Justice McLachlin held that "[r]ights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time."

[212] *Delgamuukw, supra* note 160.

[213] *Ibid.* at para. 140.

found that what Aboriginal title confers "is a right to the land itself."[214] He held, "[t]his difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly."[215] Chief Justice Lamer then explained that "Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land."[216] Where a *Van der Peet* concept of rights stems from the distinctive cultures of Aboriginal peoples, Aboriginal title is rooted in the prior occupation of land. In order to prove title the following criteria must be satisfied: "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."[217]

There are two main differences between the *Van der Peet* and *Delgamuukw* approaches that Lamer C.J. reconciled. First, he held that the requirement that customs, practice, and traditions be integral to the Aboriginal culture in the *Van der Peet* test is subsumed under the requirement of occupation in the Aboriginal title test.[218] He reasoned, "that in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants."[219] Second, he held different time periods are used to

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[214] *Ibid.*
[215] *Ibid,* at para. 141.
[216] *Ibid.* quoting *Van der Peet, supra* note 3 at para. 74
[217] *Ibid.* at para. 143.
[218] *Ibid.* at para. 142.
[219] *Ibid.* at para. 151.

identify the historical foundations of Aboriginal title (assertion of Crown sovereignty) and Aboriginal rights other than title (pre-contact)[220] flow from the different nature of the rights themselves. *Van der Peet* rights are activities that are elements of practices, customs, and traditions integral to the distinctive culture of the Aboriginal group and are distinguished from activities influenced or introduced by European contact. Aboriginal title, on the other hand, is a burden on the Crown's underlying title, crystallizes at the time of asserted sovereignty, and is not dependent on culture in the *Van der Peet* sense. Chief Justice Lamer also explained that using the time of asserted Crown sovereignty to determine the existence of Aboriginal title is more practical because of the difficulties in determining the precise time of contact.[221] Similar arguments can be applied to rights other than title, such as rights of self-government.

Other rationale for rejecting the application of an unmodified *Van der Peet* test to Aboriginal title also apply to questions of self-government. First, Aboriginal self-government is a right to govern. Like the concept of title, the concept of governance has commonly understood components. For example, governance is commonly understood to mean collective decision making authority over general subject matters. This is a broader understanding of the right to engage in specific law making activities. Just as we have a general understanding of title and it would be impractical to try to list and prove all of the activities included within title, we have an understanding of Aboriginal self-government and the pragmatic difficulties of proving its contents are the same. A similar unreasonable evidentiary burden would

[220] *Ibid.* at para. 144.
[221] *Ibid.* at para. 145.

arise if Aboriginal people were expected to prove the integrallness of each historic activity that constitutes the abstract power of self-government.

As argued in the first section of this paper, Aboriginal rights of self-government also existed at the time the Crown asserted sovereignty. Before the Crown's assertion of sovereignty Aboriginal peoples were "sovereign-like" with a "sovereign-type" right of self-governance.[222] After the assertion of Crown sovereignty, a diminished form of an Aboriginal right of self-government existed in, for example, the sense that the Aboriginal power of self-government to dispose land without restriction at the collective Aboriginal will was denied by the Crown.[223] However, as with title the relevant date to assess its content is assertion of sovereignty. The form of its expression is found in prior occupancy and social organization, as is the case with Aboriginal title.[224] Since *Van der Peet* roots Aboriginal rights in distinctive historic cultures, it is unable to identify both Aboriginal title and rights of self-government that have different sources.

Brian Slattery argues the right to ancestral territory [Aboriginal title]; the right to cultural integrity, the right to customary law, the right to honourable treatment by the Crown, and self-government are generic rights and should so be conceived because this "represents a fair estimate of the current state of jurisprudence."[225] He argues that the right of self-government "is a generic right, which recognizes a uniform set of governmental powers held by Aboriginal peoples as a distinct order of

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[222] See *supra* note 94 for further discussion of applying sovereignty to Aboriginal people.
[223] *Van der Peet, supra* note 2 at para. 36 citing Chief Justice Marshall *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 542 (U.S.S.C. 1823 p. 572-3.
[224] *Delgamuukw, supra* note 161 at para. 141. See Chapter II for a discussion on how self-government is sourced in prior social organization.
[225] Slattery, "Generative Structure," *supra* note 9 at 600.

government within the Canadian federal system."[226] This abstract right allows "Aboriginal groups to establish and maintain their own constitutions, which take a variety of forms."[227] He parallels Aboriginal constitutional powers with provincial powers, arguing that these abstract powers are uniform but may differ in their concrete manifestation. Since *Delgamuukw* recognizes the additional category of generic rights, it is more sensible to consider the right of self-government under the model of Aboriginal title, rather than as a list of specific rights through *Van der Peet.*

With a generic right, "[t]the basic scope of the right does not vary from group to group; however its concrete application differs depending on the circumstances."[228] Suppose two different Aboriginal groups enjoy Aboriginal title. The title is the same in the generic sense that the uses to which the land can be put must be consistent with the group's original attachment to the land. The title would be different in the specific sense (its concrete manifestation) that the two groups may very well have different original attachments to the land. This reasoning applies to self-government. Slattery explains the generic right of self-government

> does not mean that Aboriginal people possess the same internal constitutions or that they exercise their governmental powers up to their full theoretical limits. The generic right of self-government gives an Aboriginal group the power to establish and amend its own constitution within the overarching framework of the Canadian federation.[229]

The concept of Aboriginal title adopted in *Delgamuukw* is consistent with Hohfeld's theory on the concept of rights. Simmonds explains that "on a Hohfeldian

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[226] *Ibid.* at 601.
[227] *Ibid.*
[228] *Ibid.*
[229] *Ibid.* at 606.

analysis, the owner of Blackacre possesses not a single right over an area of land, but a complex aggregation of claim-rights, powers, privileges and immunities."[230] These rights are held against a large and indefinite class of people and include for example:

> a series of multital claim-rights that persons should not trespass on the land; a series of multital privileges to enter upon and exploit the land himself; a series of multital powers to transfer title to the land or create lesser interests in it; and a series of multital immunities against having his title affected by the acts of other persons."[231]

As is elaborated in Chapter five below, the same analysis can be easily applied to self-government.

Before moving on, it should be noted that the collective nature of Aboriginal title raises an issue as to the appropriateness of applying Hohfeldian theory to Aboriginal right claims. The Hohfeldian analytical framework was developed within the paradigm of individual rights rather than collective rights.[232] However, the essence of Hohfeldian analysis transcends the difference between individual and collective rights. At its heart is the understanding of rights as relationships and conceptualizing rights at a more abstract level with a number of concrete manifestations. This is contrasted with the *Van der Peet* approach to identifying Aboriginal rights with the exercise of specific activities. Thus, we see the Hohfeldian approach is consistent with understandings of Aboriginal title.

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[230] Simmonds, "Introduction" *supra,* note 173 at xvii.
[231] *Ibid.* at xvi-xvii.
[232] Simmonds, "Introduction" *supra* note 173 at xiii.

## Chapter Five: Identifying Concrete Aboriginal Rights of Self-Government

The above arguments demonstrate that the *Van der Peet* test for determining concrete manifestations of the more abstract right of self-government is not consistent with Hohfeldian theory, a predominant theory of rights that informs Canadian common and constitutional law. Existing legal literature provides at least three alternatives to the *Van der Peet* approach that are more consistent with Hohfeld. After describing and analyzing these alternative approaches, I conclude that an appropriate way for giving legal recognition to Aboriginal rights of self-government may be a multi-dimensional approach to interpreting abstract rights already recognized in Canadian constitutional law, such as Aboriginal title and the duty to consult.

### A. Core and Peripheral Areas of Jurisdiction

In 1993 the RCAP published its preliminary report, "Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution," which described an approach for delineating the nature and scope of Aboriginal rights of self-government under s. 35.[233] While this approach was created prior to the *Van der Peet* test, it still provides an understanding of how Aboriginal rights of self-government may be recognized under s. 35 in a manner more consistent with principles of constitutional interpretation and Hohfeldian theory. Drawing a middle ground between a unilateral Aboriginal power to exercise rights of self-government and an Aboriginal incapacity to exercise rights of self-government without agreement with the Crown, *Partners in Confederation* suggests an organic model to identify

[233] Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution (Co-Chairs R. Dussault, j.c.a. and G. Erasmus) (Ottawa: Canada Communication Group, 1993). See also *Restructuring the Relationship*, *supra* note 59 at 213-223.

Aboriginal rights of self-government that draws on the concept of governmental relationships (in particular powers and immunities) and general principles to govern the interaction of those relationships drawn from the *Sparrow* case and conflicts of law principles applicable to the division of powers between the federal and provincial governments.

Under the organic model, "the right of self-government would include the power to exercise jurisdiction over certain core subject-matters, without the need for court sanction or agreements with the Crown."[234] The core areas of jurisdiction would include "matters of vital concern to the life and welfare of the community that...do not have a major impact on adjacent jurisdictions and do not rise to the level of overriding national or regional concern,"[235] and can be exercised at the will of Aboriginal governments. The reference to matters of vital concern is taken from the passage in *Sparrow* that describes taking of salmon as "an integral part" of Musqueam life and contemporary "distinctive culture."[236] Peripheral areas of Aboriginal jurisdiction are also included. These potential powers and immunities, and correlate liabilities and disabilities, are rights of self-government that need to "be adapted to the particular needs of the [Aboriginal people and their governments] either by agreement with the Crown or perhaps by arbitrary mechanisms established under judicial supervision."[237] The peripheral areas of jurisdiction are the powers and immunities over subject-matters that have a major impact on adjacent jurisdictions.

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[234] *Ibid.* at 38.
[235] *Ibid.*
[236] *Sparrow, supra* note 48 at paras. 29, 40.
[237] *Ibid.*

*Partners in Confederation* offers three principles to delineate the outer limits of core areas of Aboriginal jurisdiction and its interaction with federal and provincial jurisdiction. First, the boundary of Aboriginal jurisdiction is "roughly the same scope as the federal head of power over "Indians, Lands reserved for the Indians" recognized in section 91(24) of the *Constitution Act, 1867.*"[238] Second, Aboriginal jurisdiction takes priority over a concurrent federal jurisdiction, except where the federal law can be justified under the *Sparrow* test. Third, "the interaction between Aboriginal and provincial laws is regulated by rules similar to those that govern the interaction of federal and provincial laws in this area."[239]

An important rule in the latter category is the doctrine of inter-jurisdictional immunity which provides that the core of a federal head of power is immune from the exercise of provincial jurisdiction. Under the organic model's concurrent federal and Aboriginal exclusive jurisdiction over "Indians and lands reserved for Indians," provincial laws of general application would not apply to Aboriginal people if that law touches on the core of "Indianness."[240] Aboriginal rights fall under the core of "Indianness" and would normally be immune from the exercise of powers under provincial jurisdiction. However, the organic model does provide for the application of provincial laws of general application where there is no inconsistent Aboriginal law.

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[238] *Ibid.*
[239] *Ibid.* at para. 39.
[240] *Delgamuukw, supra* note 161at paras. 178-181.

Catherine Bell has argued that there are a number of problems with the report in general and with the model of self-government in particular.[241] One problem is the failure to adequately address treaties as a source of self-government.[242] Another problem is the proposed limited form of Aboriginal autonomy realized through the operation of provincial encroachments on Aboriginal jurisdiction, even if such jurisdiction is limited to laws of general application.[243] Provincial law will reach into core areas of Aboriginal jurisdiction if a court determines it does not touch on the core of "Indianness" as developed under s. 91(24).

The organic model is problematic for several other reasons. Measuring Aboriginal powers of self-government based on what is of vital concern to Aboriginal life and welfare sounds suspiciously close to identifying Aboriginal rights with activities that are "central" to the Aboriginal culture. As Barsh and Henderson write, trying to determine the centrality of any activity to any culture is subjective and susceptible to misunderstanding, wrongly presumes the severability of cultural elements, and ignores the reality of dynamic cultures whose central activities may change over time.[244] The proposed method by which conflicting Federal and Aboriginal powers of self-government are resolved also perpetuates inequities for Aboriginal peoples when compared to the rights of other individuals and governments. One problem is that the *Sparrow* justification test could operate to disable Aboriginal powers of self-government based, in part, on economic compensation to the Aboriginal people because the second part of the *Sparrow* test

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[241] Bell, "Comment on Partners of Confederation" *supra* note 37 at paras. 18-27.
[242] *Ibid,* at paras. 22-23.
[243] *Ibid.* at para. 25.
[244] Barsh & Henderson, "The Van der Peet Trilogy" *supra* note 44.

anticipates compensation for infringements of rights.[245] By authorizing the limitation of rights with economic compensation, a court improperly implies that all Aboriginal and treaty rights are measurable in monetary terms.[246]

Another problem is that under the *Sparrow* test, economic or regional fairness and the interests of non-Aboriginal people are valid legislative objectives that can lead to limiting the exercise of Aboriginal and treaty rights.[247] Further, through the purpose of reconciliation, as contrasted to the purpose of a just settlement of Aboriginal claims, applying the *Sparrow* justification test could be used to prioritize broad government industrial or agricultural development objectives over Aboriginal rights of self-government. Legitimate objectives have been held to include: "the development of agriculture, forestry, mining, and hydro industries"; "the general economic development of the interior of British Columbia"; the protection of the environment or endangered species; the building of infrastructure; and the "settlement of foreign populations to support those aims."[248]

Relying on the criterion of "vital" to limit the scope of Aboriginal jurisdiction also leads the courts to the awkward position of trying to determine which exercise of Aboriginal powers of self-government is, in pith and substance, sufficiently Aboriginal, or Indian, so as to limit the operation of provincial legislation.[249] Issues

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[245] Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests" (1999), 62 Sask. L. Rev. 543-566 at 16 citing W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217 at para, 232.
[246] See *Delgamuukw supra* note 161 at para. 129. Lamer C.J. held, "[w]hat the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component."
[247] *Ibid.* at para. 38.
[248] *Ibid.*
[249] See Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 for a discussion on the subject of "Indianness" in the context

important to Aboriginal people such as the regulation of labour on reserves or the custody and care of children could be seen as not falling within the scope of Aboriginal powers of self-government because it does not meet the standard of being vital to "Indianness" and, consequently, fall under provincial heads of power.[250]

## B. Choice of Law or the Law of Place Approach

Another approach to identifying more concrete manifestations of rights to self-government, as Barsh and Henderson argue draws on *lex loci* (law of place) and the doctrine of continuity.[251] They write that s. 35 entrenched "the *lex loci* of Aboriginal nations, to the extent that their own laws had not clearly been extinguished prior to 1982."[252] In their opinion, the Supreme Court of Canada in considering origins of rights should have worked with the traditional British Commonwealth framework and "adopted the principle of deference to the *lex loci* absent unambiguous evidence of a surrender of the right by treaty, or a legitimate extinguishment by the Crown."[253] Drawn from international law, *lex loci* here means "the law of place" and is "a very ancient principle among nations. It was recognized by the Roman Empire and still applies to disputes over contracts, the ownership of private property, and family relationships, when parties live in different countries."[254]

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of federal and provincial jurisdiction over Indians and Land reserved for Indians and s. 88 of the *Indian Act*. See also Mark Stevenson, "Metis Aboriginal Rights and the "Core of Indianness"" (2004) Sask. L. Rev . 301 at paras 15-16. He writes that "there is a "core of Indianness" that falls within the exclusive legislative jurisdiction of the federal government, [but] remains a bit of a mystery in the field of Indian and Aboriginal law."

[250] See for example the cases involving provincial jurisdiction reaching into reserves cited in *supra* note 156.

[251] Barsh & Henderson, "The Van der Peet Trilogy" *supra*, note 44 at 1007.

[252] *Ibid.* at 1008.

[253] *Ibid.*

[254] Erica-Irene A. Daes, "Defending Indigenous Peoples' Heritage" Keynote Address delivered at Protecting Knowledge-Traditional Resource Rights in the New Millenium, Vancouver, British

In an Aboriginal context, its application would mean that laws of Aboriginal people would be the choice of law for application within their territories in the event of a conflict with other laws. For example, within Tsimishian territory "British Columbia can not properly make laws controlling Tsimishian heritage – nor can Canada or the United Nations. Instead, British Columbia, Canada, and the United Nations should recognize, respect, and enforce Tsimishian laws."[255] In a Canadian context, the principle of the "law of place"[256] grounds application of provincial laws within provincial boundaries.

This approach is consistent with what McLachlin J., (as she was then), described in her dissenting opinion in *Van der Peet* as the empirical historic approach. She explained that while the principles governing the relationship between Aboriginal and non-Aboriginal peoples have not been consistently applied, running through history is a "golden thread—the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement."[257] After outlining the common law principle of recognizing pre-existing Aboriginal rights and discussing the nature of those Aboriginal rights, she described the proper considerations for identifying Aboriginal rights. For her, the issue in the context of a right to fish is whether "an aboriginal people can establish that it traditionally fished in a certain area."[258] If so, the Aboriginal peoples have the right to

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Columbia, Canada 23-26 February 2000 at 6, online: < http://www.ubcic.bc.ca/Resources/conferences/papers.htm>.

[255] *Ibid.*

[256] *Ibid.* at 6. She writes that this principle is "found in the *Convention on Indigenous and Tribal Peoples, 1989 (No. 169)* adopted by the International Labour Organisation, and is implied very strongly in the United Nations *Convention on Biological Diversity.*"

[257] *Van der Peet, supra,* note 3 at para. 263.

[258] *Ibid.* at para. 277.

fish in that area. In this instance the right to fish may also be characterized as "the right to continue to obtain from the river or the sea in question that which [the fish] the particular aboriginal people have traditionally obtained from the portion of the river or sea."[259] This right may also include a right "to trade in the resource to the extent necessary to provide the replacement goods and amenities."[260] The existence of ancestral laws or customs related to the fishery is implied with her analysis and forms part of the law of the place that is to be applied.

Applied as a "choice-of-law rule"[261] under s. 35, this would require courts to apply the ancestral Aboriginal laws applicable within a particular territory, as they have changed over time, to determine whether the Aboriginal group can exercise the rights and jurisdiction in the area claim. This approach is also consistent with empirical history and the foundations of the common law discussed in the first section of this thesis. For example, a modern Aboriginal group, existing in continuity with an historic Aboriginal group, which both engages the activity of fishing and has laws surrounding the fishery, would enjoy Aboriginal rights to fish within the confines of the territorial jurisdiction of those laws. This principle is also implied with the *Mikisew* decision where Justice Binnie, explaining that location of the exercise of treaty rights is important, writes:

> While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be

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[259] *Ibid.* at para. 278
[260] *Ibid.*
[261] Barsh & Henderson, "The Van der Peet Trilogy" *supra* note 44 at 1008.

> compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf.[262]

The Mikisew would be unable to invade Aboriginal territories to hunt and trap because, along with the practical reasons articulated by the court, the reach of Mikisew law governing the exercise of hunting and trapping would be limited to the Mikisew traditional territory.

Articulating the limits of right through Aboriginal laws of place (or as core and peripheral areas of jurisdiction above), also embraces the Western Legal Tradition's understanding of the Rule of Law. As F.C. DeCoste writes:

> For, in the Western Legal Tradition, law has forever been about *the constraint of the power of the state* to claim sovereignty over the lives of its subjects. And it is just that assertion that provides conceptual content and stability to the Rule of Law: when we speak of the Rule of Law, we are speaking about constraining the state's power, or else we are speaking gibberish."[263]

Under the *lex loci* or choice of law approach, Aboriginal governments are empowered and the power of Canadian governments constrained by the Aboriginal laws that are historically connected with the land and continue to operate on those lands absent lawful extinguishment or justified interference. These powers are also limited by the scope of its territorial jurisdiction.

The law of place analysis may also be framed in terms of jurisdictional power over certain subject matters (eg. solemnization of marriage) within identifiable territories of an Aboriginal people. The issue would be whether the historic Aboriginal group maintained laws with respect to the subject matter at hand. If so,

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[262] *Mikisew, supra* note 195 para. 47.
[263] DeCoste "Smoked," *supra* note 82.

then s. 35 would require a court to apply the Aboriginal laws with respect to that subject matter. However, to exist as recognized and protected s. 35 rights, the Aboriginal powers of self-government, whether over activities or subject matters, would still have to go through the separate analysis of whether the power is consistent with Crown sovereignty and whether it has been extinguished with a clear and plain legislative intention.

Consistent with Hohfeldian analysis, this approach also includes a broader range of Aboriginal immunities related to self-government by recognizing the existence of a broader spectrum of powers over legal relationships or rights. For example, recognition of the right to control solemnization of marriage within a territory precludes the application of federal or provincial laws with respect to the solemnization of marriage within the boundaries of place. The Aboriginal freedom from the legal power of federal or provincial law with respect to a legal relationship, activity, or subject matter is an Aboriginal immunity.

A potential problem may be an attempt to define subject matters over which laws were exercised at the time the Crown asserted sovereignty over the land in question. This problem is demonstrated in the debate concerning Aboriginal title. In *Delgamuukw,* Lamer C. J. rejected the need to do this in determining the content of Aboriginal title and the rejected the argument that Aboriginal title is limited to traditional uses of the land.[264] Aboriginal title entails more than the sum of all historic activities conducted on the land.[265] The inherent limitation of Aboriginal title is defined negatively according to what cannot be done; namely, the land can not be

[264] *Delgamuukw, supra* note 161 at para. 111.
[265] *Ibid.*

used in a manner irreconcilable with the original Aboriginal attachment to the land. This can be contrasted with a positive definition of Aboriginal title that would include a list of authorized uses of Aboriginal title lands.

Likewise, Aboriginal powers of self-government entail more than the sum of all historic positive exercises of governmental powers over particular activities or subject matters. Such a list is bound to be incomplete. Rather, powers of self-government also have a commonly understood content and that content in relation to Aboriginal governments can be defined broadly and negatively through the restriction of power and the Rule of Law. Like title, Aboriginal self-government could be restricted to the exercise of powers that are reconcilable with the original exercise of Aboriginal powers of self-government at the time sovereignty was asserted over the lands in question. For example, powers of self-government could include the power to regulate, for example, radio broadcast on Aboriginal title lands. The power would not stem from a historic Aboriginal law regulating the activity or subject matter of radio broadcasting. It would first be based on whether the exercise of the modern power is reconcilable with the historic Aboriginal laws and then subject to any limitation on immunity arising from the justification test.

This approach to defining more concrete Aboriginal rights is also consistent with understanding of Western law advanced by H.L.A. Hart. He writes about the open texture of law. The uncertainties of an indeterminate number of future fact situations and the inherent limitation of language will prove application of laws, whether legislation or precedent, dependant upon a further choice between

alternatives. Laws cannot provide for their own interpretation.[266] The necessity for such a choice is "our relative ignorance of fact [and] our relative indeterminacy of aim."[267] The world is characterized by an infinite number of facts, and combinations of facts, that are impossible to anticipate, and, "this inability to anticipate brings with it a relative indeterminacy of aim."[268] This means that even if we have a general rule of conduct, such as one person speaks at a time, we will "have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs."[269] Something more is required. Further, "[t]he open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials...."[270]

With historic Aboriginal laws over activities or subject matters unable to contemplate an indeterminate number of future fact situations, defining Aboriginal powers of self-government according to a finite list of laws over historic activities or subject matters will disable Aboriginal powers of self-government with respect to laws related to unpredicted future circumstances. While Hart's "open textured" concept is developed in the context of primary and secondary rules, it may still apply to Aboriginal legal orders through rules analogous to Hart's rules. In any even, to the extent that Aboriginal rules will need to be interpreted, Aboriginal legal orders are also "open textured." Aboriginal legal orders did not anticipate in advance an indeterminate number of future fact situations and define Aboriginal powers of self-

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[266] H.L.A. Hart, *The Concept of Law,* 2d ed. (Oxford: Oxford University Press, 1994) at 124-128 [Hart, *The Concept of Law*].
[267] *Ibid.* at 128.
[268] *Ibid.*
[269] *Ibid.* at 129.
[270] *Ibid.* at 135.

government according to a finite number of laws over a finite number of historic subject matters. To do so would disable Aboriginal institutions of law and government with respect to unpredicted future circumstances. Further, the open texture of Aboriginal legal orders to grow and respond to change, is consistent with the Supreme Court of Canada's decision that,

> the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.[271]

H.L.A. Hart offered a similar warning in his discussion of law and the need for further choice in the application of general rules to particular cases. He explains that one method is to "freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question."[272] The problem here is that "to do this is to secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant."[273] He adds, [w]e shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably settled when they arise and are identified."[274]

In summary, the choice of law approach is appealing for identifying Aboriginal rights of self-government because it does not identify rights with specific

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[271] *Sparrow, supra* note 48 at para. 27.
[272] Hart, "The Concept of Law" *supra* note 266 at 129.
[273] *Ibid.* at 130.
[274] *Ibid.*

physical activities, bases Aboriginal rights of self-government on empirical history, respects the British Commonwealth framework of recognizing the laws of a colonized territory absent legitimate acts of extinguishment, infuses Aboriginal powers and immunities within the analysis in a manner consistent with Hohfeldian theory, and parallels the Western Legal Tradition's understanding of the Rule of Law by limiting Aboriginal self-government powers according to Aboriginal laws. However, like Aboriginal title, an Aboriginal right of self-government is more than the sum of Aboriginal powers over historic activities or subject matters. Identifying Aboriginal self-government powers over activities or subject matters according to empirical history, risks disabling Aboriginal rights of self-government based on Aboriginal laws of the past whose content or subject matters could not have related to an indeterminate number of future fact situations.

### C. Higher Order Principles: Recognition and Reconciliation

Brian Slattery writes about another approach that recognizes the need for higher principles to resolve conflicts of laws using Aboriginal title as an example.[275] His paper analyzes three concepts of Aboriginal title as: (1) a customary right rooted in indigenous law, (2) a translated right[276] held under English common law, and (3) a *sui generis* right at common law derived from inter-societal law. He concludes by defending a *sui generis* conception of Aboriginal title and suggesting that the purpose of the law of Aboriginal rights is best achieved by distinguishing Principles of

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[275] Brian Slattery, "The Metamorphosis of Aboriginal Title" 85 (2006) Can. B. Rev. 255 [Slattery, "Metamorphosis"].

[276] *Ibid.* at 267. He explains that "[t]his theory maintains that aboriginal title results from the application of standard categories of English property law to Indigenous customary practices. In effect, it seeks to *translate* Indigenous occupation and modes of land use into right known to English law."

Recognition with Principles of Reconciliation. It is this latter point about the need for a higher order inter-societal law that provides us with insight into another way to define the contours of Aboriginal jurisdiction under s. 35.

Slattery argues that Aboriginal laws, on their own, are unable to resolve conflicting indigenous claims because each group's title "may be supported by its own customary laws. .... [and we] need a set of rules that rises above the laws of the contending parties and regulates their interaction."[277] Similarly, when Aboriginal title land is held through private ownership, higher order principles are required to resolve the conflict between the indigenous system of law and the general system of law as each system of law would recognize different title to land. We may choose to apply one system of law over the other, but "even on this simple "choice of law" approach, we need a higher order rule to tell us which body of law should prevail."[278] He also argues that "overarching principles are needed to define the Crown's relationship to indigenous lands,"[279] because the traditional indigenous legal systems had no concept of the "Crown" and English property law had no concept of Aboriginal title.

The transfer of indigenous land to private parties outside the group, he also argues, requires a conflicts rule to determine the validity and effect of the transaction. He adds that "a choice of law approach may not be sufficient, because neither indigenous law nor the general legal system may have rules that are well-adapted to the new situation,"[280] and the history of Crown/indigenous relationships suggests that

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[277] *Ibid.*
[278] *Ibid.*
[279] *Ibid.*
[280] *Ibid.* at 266.

these transactions were governed by a body of law that "incorporated elements of both indigenous and English traditions."[281]

Finally, by distinguishing between external and internal aspects of title, he suggests that even if an indigenous legal order does not recognize any collective title to the group as a whole, the group may still maintain a collective Aboriginal title. The relationship between the Aboriginal group and others, the external aspect of title, is "governed by uniform rules supplied by an overarching body of law."[282] The internal aspects of title may differ from entity to entity. For example, in the context of sovereignty, Slattery writes "the *external* sovereignty of an independent political entity is governed by uniform rules laid down by international law...the form that sovereignty takes *internally* differs from entity to entity, depending on their domestic constitution."[283]

Slattery's solution calls for creating higher order principles to resolve conflicts with laws relating to title (and other associated rights) that are not exclusively grounded in English property law or the customary laws of each indigenous group. These principles are sourced in inter-societal laws regulating the early relationship between the Aboriginal people and the Crown, and, in their internal dimensions, as delineating the sphere of autonomy in which the customary laws of each group may

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[281] *Ibid.*
[282] *Ibid.* at 267.
[283] *Ibid.* at 267.

operate.[284] He draws on discussions of the early treaty relationship and British Imperial law to validate this approach.[285]

The application of the inter-societal legal approach, Slattery argues, involves a distinction between Principles of Recognition and Principles of Reconciliation. For example, Principles of Recognition "govern the nature and scope of aboriginal title at the time of Crown sovereignty."[286] Recognition of this historic title provides the starting point of any inquiry into the modern character of Aboriginal title and in the assessment of indigenous dispossession. Emphasizing a need for further elaboration in the context of future cases, he suggests four features should govern Principles of Recognition: (1) in accordance with Judge Judson in the *Calder* case,[287] they should acknowledge the historic reality that all Aboriginal people occupied territory and had historic rights to their ancestral lands; (2) they should account for the historical Crown indigenous relationship and the body of inter-societal law that emerged from those relationships; (3) they should draw from principles of international law and justice; and (4) they should envisage the continued operation of indigenous law while explaining the relationship of those laws with other systems of law.[288]

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[284] *Ibid.* at 270.
[285] *Ibid.* at 271-278, citing *Johnson v. Mc'Intosh* , 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 5 Peters 1 (U.S.S.C. 1831); *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C. 1832); *St. Catharine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577 (S.C.C.); *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.); *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399 (P.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[286] *Ibid.* at 281.
[287] *Ibid.* at 283. Slattery quotes *Calder v. A.G.B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.) at 328, "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."
[288] *Ibid.* at 283, 284.

Slattery writes that "*Principles of Reconciliation* govern the legal effects of Aboriginal title in modern times."[289] Application of these principles begins with recognition of historic Aboriginal title, and involves considering the subsequent history of the Aboriginal title, the indigenous group's contemporary interests, and the interests of third parties and the larger society. He proposes five basic features of the Principles of Reconciliation: (1) they should acknowledge the historical rights of indigenous peoples to their ancestral lands as the starting point of analysis; (2) they should explain how historic aboriginal rights were transformed into generative rights over time and through other interests; (3) they should distinguish in principle between core and peripheral areas of Aboriginal rights; (4) they should guide the accommodation of rights and interests of third parties within historic Aboriginal territories; and (5) they should create strong incentives for reaching negotiated settlements within a reasonable period of time.[290]

The constitutional basis for these principles of recognition and reconciliation is found in the *Haida Nation* and *Taku River* cases. Here, the law "mandates the Crown to negotiate with indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with the needs and interests of the broader society."[291] The honour of the Crown is premised on the fact that the Crown asserted sovereignty in the face of indigenous sovereignty and territorial rights. As such, the Crown must consult Aboriginal people and accommodate these rights by adjusting its activity. Further, Chief Justice McLachlin stressed that the

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[289] *Ibid.* at 282 [emphasis in original].
[290] *Ibid.* at 284, 285.
[291] *Ibid.* at 285.

Crown has a duty to participate in the negotiation of these rights and that this duty "does not come to an end even when treaties are successfully concluded."[292]

What does applying the theory of inter-societal law mean in terms of defining the content of Aboriginal rights to self-government? It begins with recognizing that Aboriginal people were self-governing when the Crown asserted sovereignty. It also means recognizing that Aboriginal people maintain a historic and modern Aboriginal right of self-government. It envisions the continued operation of indigenous lawmaking powers of self-government and lends itself to RCAP's approach to identifying core and peripheral areas of jurisdiction. In the even of a conflict it suggests:

(1) in a conflict between Aboriginal laws, as an expression of rights of self-government, between two Aboriginal groups requires a new set of overarching laws for the resolution of the conflict;

(2) in a conflict between private possession of land and Aboriginal laws of self-government, higher order principles are needed to resolve the dispute;

(3) Aboriginal powers of disposition not anticipated historically should be governed with reference to both indigenous and English traditions as they were historically;

(4) external and internal dimensions of Aboriginal rights of self-government may require a uniform and overarching system of law govern the external relationship between groups.

However, considered more critically each of these applications may have exceptions. For example, conflict of laws may, in some instances, have been resolved with exclusive reference to the Aboriginal legal orders making this the appropriate source of law to resolve conflicts between them. Some of the evidence presented in the *Samson* case alludes to how these jurisdictional conflicts may have historically

[292] *Ibid.* at 286.

been resolved between First Nations. Mrs. Holmes', expert testimony on the extent of Plains Cree pre-contact territory is reproduced and described by the court as follows;

> The Henday journal entry reads as follows:
>
> - [December] 26 & 27 Thursday & Friday. Killed 2 Waskesew and 2 Moose: I set a Wolf-[tr]ap. I asked the Natives why they did not [tr]ap Wolves; they made Answer that the Archithinue [Blackfoot?] Natives would kill them if they trapped in their country. I then asked them when & where they were to get the Wolves &c, to carry down in the Spring. They made no answer; but laughed to one another.
> - 28. Saturday. Frost & snow & very cold weather: I travelled 5 Miles N.E.b.N. Level land, & narrow ledges of poplar, Alder & trees. got a Wolf in my [tr]ap, & set 2 morel; the Wolves are numerous. An Indian told me that my tent-mates were angry with me last night for speaking so much concerning Happing, & advised me to say no more about it, for they would get more Wolves, Beaver &c. from the Archithinue Natives in the spring, than they can carry.
>
> Ms. Holmes acknowledged that this entry shows the Blackfoot had allowed the Cree into their territory, where Henday travelled, but she considers that to be an instance of shared territory (transcript volume 26, pp. 3613-3614).[293]

This passage alludes to the existence of historic mechanisms that regulated title, or alternatively, uses of that title, between Aboriginal groups. It may be that these mechanisms were an overarching understanding of laws between the Blackfoot Confederacy and the Plains Cree. These mechanisms, however, could just as plausibly be an expression of the internal Aboriginal governance laws respecting the relationships with neighboring Nations. Ultimately, though, the historic right to trap wolves and power to exclude or allow others to do the same, in conjunction with concepts of shared Aboriginal territory, all suggest that conflicts between different

[293] *Samson, supra* note 145 at paras. 376, 377.

Aboriginal rights of self-government, could, and were, resolved without reference to English law.

Again, this approach is more consistent with Hohfeld in that rights are considered in terms of intergovernmental relationships, as powers and immunities, and are not reduced to claim-rights to practice historic activities protected by weak immunities.

## Chapter Six: Self-Government as a Dimension of Generic Rights

### A. Introduction

Another way to conceptualize rights of self-government is as a dimension of another recognized Aboriginal right such as Aboriginal title or the duty to consult. I argue that this is the best approach to identifying Aboriginal rights of self-government under s. 35 for at least four reasons:

1. This approach avoids equating Aboriginal rights of self-government with the mere exercise of historically based activities. For example, if Aboriginal rights of self-government are presumed to exist as a dimension of Aboriginal title, the logical application of Aboriginal title jurisprudence is for courts to presume the existence of the full spectrum of Aboriginal rights of self-government; including the negative claim-rights, privileges, powers, and immunities of self-government.

2. This approach avoids the subjective, culturally inappropriate, exercise of defining Aboriginal rights of self-government in terms of historic areas of jurisdiction that were and continue to be of "vital" Aboriginal concern inherent in two of the three other approaches considered above. It recognizes government *per se* is of vital concern, in the same way that Aboriginal title is considered integral to the Aboriginal culture in *Delgamuukw.*[294]

3. Presuming the existence of Aboriginal rights of self-government in an abstract sense as part of title and the duty to consult embraces the doctrinal benefits of the law of place/choice of law rule, or empirical historic approach, without inheriting its

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[294] *Supra,* note 161.

potential problems. These benefits include corresponding to the British Commonwealth legal tradition of recognizing the *lex loci* of colonized territories, giving effect to the Aboriginal perspective through presuming the existence of Aboriginal self-government, and remaining faithful to the historic empirical reality that pre-Crown sovereignty Aboriginal self-government was exclusively restricted by, and through, Aboriginal laws. At the same time it avoids some potential dangers such as: identifying rights of self-government as the sum of specific exercises of historic Aboriginal powers, laws, and other rights of self-government; and failing to account for the indeterminacy of future fact situations, which are important and relevant to all governments, including Aboriginal.

It should also be noted that recognizing a right of self-government as a dimension of title and the Crown duty to consult is not that radical a step for the courts to take. Indeed, along with taking advantage of the benefits and avoiding the pitfalls of other approaches, there is legal precedent for presuming the existence of rights of self-government as a dimension of other Aboriginal rights. The next two parts of the thesis discuss how such rights can be presumed as, and conceived of, an element of Aboriginal title and the duty to consult as well as how this is consistent with the Hohfeldian analytical framework.

## B. Self-Government Rights as a Dimension of Title

Kent McNeil provides argument for the existence of governance within title.[295] This argument is supported by accounting for the *sui generis* features of

[295] See Kent McNeil "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473 [McNeil, "Aboriginal Self-Government"]; Kent McNeil "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L. Rev. 282 [McNeil, "Aboriginal Title"].

Aboriginal title and its relationship to self-government. First, he argues, the general inalienability of Aboriginal title lands should be understood, in part, as the settler's inability to acquire lands with an Aboriginal jurisdictional dimension.[296] Second, Aboriginal title is not held by individuals; it is a collective title and "the decision-making authority Aboriginal communities have in regard to their Aboriginal title lands is governmental in nature."[297]

To situate McNeil's argument within Hohfeldian analytical framework, the "general inalienability" is a partial disabling of the collective Hohfeldian power to dispose Aboriginal title lands. The collective Aboriginal power of disposition forms part of the governmental nature dimension of title.[298] Applying a Hohfeldian analysis to the Aboriginal powers of disposition is similar to the collective decision making authority to alter legal relationships with respect to the land. This is an example of the jurisdictional or governmental dimension of Aboriginal title.

Chief Justice Lamer uses slightly different language than McNeil in describing the decision making authority included within title. Chief Justice Lamer held, "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."[299] Applying this to the issue of defining more concrete elements that constitute an abstract right of self-government, it is not necessary to delineate the precise content of the decision making

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[296] McNeil, "Aboriginal Title" *supra* note 295 at para. 12 citing McNeil, "Aboriginal Self-Government" *supra* note 295. He notes that "it is also argued (at 501-502) that Aboriginal title should be transferable to other Aboriginal communities, a position supported by La Forest J. in *Delgamuukw*."
[297] McNeil, "Aboriginal Title" *supra* note 295 at para. 12 citing *Campbell, supra,* note 29 at paras 134-138.
[298] *Campbell, supra* note 29 at paras. 134-138.
[299] *Delgamuukw, supra* note 161 at para. 115.

powers in terms of specific instances of the exercise of that power through governmental activities.[300] The Aboriginal powers of self-government to alter legal relationships with respect to the land are conceived broadly. This is reflected in other decisions of Justice Dickson (as he was then); in the context of a question on an *Indian Act* tax exemption. He held for a unanimous Supreme Court of Canada:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.[301]

This is also consistent with the principle that constitutional Aboriginal rights should be interpreted in a liberal and generous manner.[302]

It seems that permissible decisions with respect to the land would at least include matters such as conditional surrenders for leasing purposes and other matters proscribed by the federal Indian legislation. The more difficult question relates to the extent that this Aboriginal decision making power of self-government with respect to land can be exercised over the people on that land.[303] An answer suggested here is derived from the nature of legal relationships or Hohfeldian rights. Hohfeld explains that a right *in rem* and a right *in personam* are similar in that both are rights that reside in a person or a group of persons; and they are different in that the rights are either availed against a large and indefinite class of people (*rem*) or against a single or

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[300] For an argument why the specific governmental powers can not be listed see notes 272-274 and accompanying text.
[301] *R. v. Nowegijick*, [1983] 1 S.C.R. 29 at 36.
[302] *Sparrow, supra,* note 48 at para. 16.
[303] See Macklem, "Normative Dimensions" *supra* note 85.

a few similar and definite persons respectively (*personam*).[304] Notice that both rights reside in and are between people, not just the thing itself. For the same reason that a right *in rem* and a right *in personam* are both rights with respect to people not just things, Aboriginal powers of self-government with respect to land is a power to change legal relationships of people on the land, not just a power over the land itself. A power with respect to land resides in a person, and in the case of Aboriginal decision-making powers of self-government a collective.

One might argue that the scope of this power is determined by the broad words use by Chief Justice Dickson, "in respect of" and would include matters affecting people on, with reference to, connected to, in relation to, and any other relationships of connection between people and Aboriginal title land. The degree or extent of the personal connection to land may or may not be relevant when determining the scope of the Aboriginal powers of self-government within title. In some instances any degree of connection to the land is sufficient. For example a person residing or working on Aboriginal title land may be sufficiently connected to the land to fall within the scope of the Aboriginal powers of self-government with respect to land.

The inherent limit on Aboriginal title that it may not be used in a manner irreconcilable with the group's original attachment to the land is consistent with McNeil's analysis on the connection between Aboriginal title and governance. This inherent limit on the content of Aboriginal title may also be understood as a limitation

[304] Hohfeld, "Fundamental Legal Conceptions" *supra* note 169 at 53.

on a Hohfeldian privilege; namely the liberty to put the land to use.[305] The reader will recall a privilege is an absence of duty and correlates with the no-right.[306] A limit placed on a privilege is an imposition of a duty. Applied to self-government, the decision making privilege with respect to Aboriginal title land is a collective authority that is governmental in nature. Thus, any limitations on that privilege are attached to the collective governmental authority and may be manifested in terms of a duty held by the Aboriginal collective. For example, the Aboriginal collective decision making authority may have a duty to ensure its use of the land does not jeopardize the growth of medicinal plants for the use of future generations.

With every imposition of duty, or limitation of privilege, there is a correlate claim-right. The duty correlate claim-right is also the held by the Aboriginal collective. This is not as strange as it sounds. For example, within a Cree understanding, collective title to land includes interests of past, present, and future generations. As Kent McNeil explains referring to the work of Leroy Little Bear:

> Leroy Little Bear has explained that Aboriginal peoples generally did not have a concept of land ownership that would have included authority to transfer absolute title to the Crown. They received their land from the Creator, subject to certain conditions, including an obligation to share it with plants and animals. Moreover, the land belongs not just to living Aboriginal persons, but to past and future generations as well.[307]

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[305] *Supra,* note 240.
[306] *Supra,* note 175 and accompanying text.
[307] Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L. Rev. 301 McNeil also notes "[f]or an indication that communal rights in England cannot be surrendered for the same reason, see Wyld v. Silver, [1963] 1 Ch. 243 at 255-56, 1 Q.B. 169 at 180-81 (C.A.). Lord Denning M.R. there stated that the present inhabitants of a parish could not waive or abandon a right to hold a fair because that would take the right away from future generations" at para. 4.

Little Bear summarizes, "the standard or norm of the aboriginal peoples' law is that land is not transferable and therefore is inalienable."[308]

This understanding of collective title is not unique to the Cree. For example, Yael Tamir, in developing the background argument for her thesis, provides another example:

> In the political debate over a possible withdrawal of Israel from the territories it occupied in the 1967 War, some opponents of withdrawal put for a claim very similar to the one professed by McDonald. The territories in question, they argue, were promised by God to the Jewish people as a whole – past, present and future generations included. The present generation cannot, without approval of all other generations, surrender rights grounded in this divine promise.[309]

If this analysis is extended to self-government, an inherent limitation on concrete manifestations of the self-government privilege to put the land to use may be imposition of a present day duty owed to the past, present, and future Aboriginal collective generations. This is consistent with the common laws rationale underlying the inherent limitation on Aboriginal title lands because Aboriginal title arises from historic occupation and "[i]mplicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time."[310] Chief Justice Lamer explains:

> The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented

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[308] *Ibid,* quoting Leroy Little Bear "Aboriginal Rights and the Canadian 'Grundnorm'" in J. R. Ponting, ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland & Stewart, 1986) 243 at 247.

[309] Yael (Yuli) Tamir, "Against Collective Rights" in Lukas H. Meyer et. al., ed, Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz (Oxford: Oxford University Press, 2003) 183 at 186.

[310] *Delgamuukw, supra* note 161 at para. 126.

> from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.[311]

Chief Justice Lamer adds this inherent limitation means, basically, that the Aboriginal title land may not be used in a manner that destroys the land for the traditional use of future generations.[312]

In summary, it is clear that Aboriginal title has proprietary and jurisdictional dimensions. The jurisdictional dimension is governmental in nature. There are at least three features of Aboriginal title which give rise to a governmental dimension, all of which are related to the collective nature of Aboriginal title. First, the general inalienability of Aboriginal title is derived, at least in part, from the inability of individual settlers to acquire property with an Aboriginal governmental dimension. Second, the collective decision making authority resulting from, or included within, Aboriginal title is governmental in nature. Third, the inherent limitation on the content of Aboriginal title is an imposition of a duty on the Aboriginal government owed to the Aboriginal collective. Each of these three distinct features of title gives rise to a more concrete manifestation of the rights of self-government that coalesce into the jurisdictional dimension of Aboriginal title.

### C. Self-Government Rights as a Dimension of the Duty to Consult

Aboriginal rights of self-government may also be presumed to exist as a dimension of the federal and provincial duty to consult. This section will trace the evolution of the Crown duty to consult Aboriginal people by examining the source and content of

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[311] *Ibid.* at para. 127.
[312] *Ibid.* at para. 129.

the duty. As part of the content of the duty, it will then argue that the Crown duty to accommodate Aboriginal interests gives rise to a concrete manifestation of the Aboriginal self-government dimension of the negative claim-right to be consulted.

The source of the duty to consult has its roots in pre-constitutional Aboriginal rights jurisprudence. Gordon Christie provides an account of the evolution of the source of the duty to consult.[313] He organizes his analysis into four epochs of jurisprudence. The first epoch is the Supreme Court of Canada's comments on Aboriginal title in *Calder* and the introduction of the fiduciary doctrine for Aboriginal rights jurisprudence in *Guerin.* The second epoch marks the emergence of the duty to consult in *Sparrow* and *Delgamuukw,* which, according to Christie, was situated within the broader Constitutional Aboriginal rights conceptual framework with *Sparrow, Van der Peet, and Gladstone.* The third epoch provides some of the answers to unresolved questions "swirling around this duty, [which] in essence...is marked by the progress through the courts"[314] of *Haida Nation, Taku River Tlingit,* and *Mikisew Cree First Nation.* The fourth epoch is the period after the Supreme Court of Canada cases where courts are "faced with parties grappling to digest the impact of the Supreme Court of Canada pronouncements."[315]

With its roots in the ultimate power of the Crown over Aboriginal peoples and their lands,[316] the duty to consult was expressed in *Sparrow* as an element of the test for justifying infringements of Aboriginal rights and was subsumed under the

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[313] Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 U.B.C. L. Rev. 139 [Christie "Developing Case Law].
[314] *Ibid.* at para. 6.
[315] *Ibid.*
[316] *Ibid.* at paras. 7-15.

Crown's fiduciary obligations owed to Aboriginal people. This is Christie's second epoch which witnesses a function of fiduciary obligations as tempering "the power of the 'unquestioned sovereignty of the Crown."[317] Christie argues that the force constraining Crown power is not an Aboriginal sovereign.[318] Rather, the Crown power is "constrained by legal duties, imposed by the *Constitution Act, 1982*, and their application overseen by the rule of law."[319] Christie writes that this constraint can be considered a channeling of Crown power because "the existence of Aboriginal rights has the power to direct the exercise of Crown sovereignty into (somewhat) different paths."[320]

Even after *Sparrow* held that any *prima facie* infringement of Aboriginal rights imposes a burden of the Crown to justify that infringement – a process that includes a Crown duty to consult Aboriginal people prior to the infringing measure – the state of the law was still unclear as to what happens when an infringement is anticipated, but not proven. This jurisprudential context, which also includes an explanation of the content of the duty to consult in *Delgamuukw* as ranging from mere discussion for relatively minor Crown infringements to outright Aboriginal consent for serious Crown infringements is the subject of Christie's third epoch and the latest Supreme Court of Canada pronouncement of the source and nature of the duty to consult.

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[317] *Ibid.* at para. 17.
[318] *Ibid.* at paras. 18-19.
[319] *Ibid,* at para. 19.
[320] *Ibid.*

In *Haida Nation* the Crown's duty to consult is sourced in the honour of the Crown.[321] The Court rejected the Crown arguments that it can not know what Aboriginal rights exist until they are recognized by law or agreement and no duty to consult exists until those rights are proven to be infringed. A unanimous court held that a Crown duty to consult is triggered when "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[322] Drawing a distinction between the existence of the duty to consult and the content of the duty to consult, Chief Justice McLachlin held that the "content of the duty to consult and accommodate varies with the circumstances."[323]

The level of consultation required is situated along a spectrum, proportionate to the seriousness of the proposed anticipated infringing measure and the strength of the Aboriginal right claim. The common thread on the part of the Crown "must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised through a meaningful process of consultation."[324] Moreover, in *Taku River Tlingit,* Chief Justice McLachlin held that consultation "always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process."[325] At a minimum the duty on the Crown "may be to give notice, disclose information, and discuss any issues raised in response to the notice."[326] At the other end of the spectrum, where there is a strong

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[321] *Haida Nation, supra* note 192 at para. 16.
[322] *Ibid.* at para. 35.
[323] *Ibid.* at para. 39.
[324] *Ibid.* at para. 42 quoting *Delgamuukw, supra* note 160 at para. 168.
[325] *Taku River, supra* note 192 at para. 29.
[326] *Haida Nation, supra* note 192 at para. 43.

case for the existence of the right, the right and potential of infringement of the right is of great significance to the Aboriginal group, and there is a high risk of non-compensable damage, deep consultation is required.[327] While this list is not exhaustive or mandatory, deep consultation may involve the "opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[328] With every situation, the degree of requisite consultation may change as new information comes to light.

Consultation may require the Crown to change its proposed action or amend its policy with respect to the proposed action. This is an effect of consultation, characterized as a duty of accommodation, that may arise "where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way."[329] Finally, the duty to consult, in this context, does not give Aboriginal people a power of veto over proposed government decisions affecting Aboriginal rights pending final resolution of the claim.[330] Chief Justice McLachlin held that "[t]he Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case."[331]

This reasoning on consultation was applied also to treaty relationships in *Mikisew Cree First Nation.*[332] The issue here was whether the federal government

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[327] *Ibid.* at para. 44.
[328] *Ibid.*
[329] *Ibid.* at para. 47.
[330] *Ibid.* at para. 48.
[331] *Ibid.*
[332] *Mikisew Cree First Nation, supra* note 196.

owed a duty to consult the Mikisew Cree First Nation prior to issuing a decision that may have interfered with hunting and trapping rights protected by Treaty no. 8. The relevant written clause of Treaty no. 8 reads as follows:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[333]

Justice Binnie, for a unanimous Supreme Court of Canada, begins by observing that "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signaled the advancing dawn of a period of transition."[334] He considered how land subject to a treaty right can be transferred into land "taken up" by the government. Applying *Haida Nation* and *Taku River*, he first reasoned that "[i]n the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult."[335] Though the content of the duty varies, the threshold to trigger the duty is low. If the contemplated action "might" adversely affect a treaty right, the Crown duty to consult is triggered. Justice Binnie then considered, and rejected, three

[333] *Ibid.* at para. 2 quoting *Report of Commissioners for Treaty No. 8* (1899), at p. 12 in Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc., reprinted from 1899 edition. Ottawa: Queen's Printer, 1966 [emphasis in original].
[334] *Ibid.* at para. 27.
[335] *Ibid.* at para. 34.

arguments against the existence of a duty to consult the Mikisew Cree First Nation, two of which will be discussed below.[336]

First, the argument that the federal government has a treaty right to take up land so long as it is not in bad faith and there remains a meaningful right to hunt within Treaty 8 territory or the province as a whole was rejected. Justice Binnie reasoned that Treaty 8 promised "a *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation."[337] Further, the meaningful right to hunt is determined in relation to the First Nation's traditional hunting territories. By building a road through a First Nations traditional territory that is subject to a treaty right to hunt and trap, the Crown might adversely affect the treaty rights. This triggers a duty to consult. Second, Justice Binnie rejected the argument that the negotiations leading to Treaty 8 and the treaty itself fulfilled the duty to accommodate because "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[338] The signing of Treaty 8 "was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."[339]

Applying a Hohfeldian analysis to the Crown duty to consult, the Crown duty correlates with an Aboriginal negative claim-right to be consulted.[340] These cases raise an issue, therefore, as to where the negative claim-right to be consulted resides.

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[336] The third issue is whether the Minister, through Parks Canada, fulfilled its duty to consult. On the facts of the case, it did not.
[337] *Ibid.* at para. 47 [emphasis in original].
[338] *Ibid.* at para. 54.
[339] *Ibid.*
[340] *Haida Nation, supra* note 192 at para. 42. Chief Justice McLachlin used the language of 'rights' in discussing the duty to consult when she held "[m]ere hard bargaining, however, will not offend an Aboriginal people's right to be consulted."

The resolution of this issue also informs the self-government dimension of the duty to consult and accommodate. The existence of a treaty entered between governments is a legal relation that continues to be defined between governments through consultation. The collective nature of Aboriginal rights also places the claim-right of consultation in a group. As Catherine Bell writes when describing Aboriginal rights, the courts have used the term collective in two different manners. First, "it refers to rights which only group members have that are exercised by individuals...[and second,] collective rights also refers to rights of a collectivity which can only be claimed by a collectivity."[341] Whether exercised by individuals or enjoyed by collectives, the collective nature of Aboriginal rights is also reflected in the fact that Aboriginal rights are sourced and defined, in part, by the pre-existing Aboriginal societies and their legal orders.[342] Moreover, some Aboriginal rights, like title, can only be maintained by an Aboriginal collective.[343] Logically, the holder of the negative claim-right to be consulted resulting from any potential interference with the rights exercised by individuals or enjoyed by collectives is the collective, or the governmental authority recognized by the collective. This is affirmed in *Haida.*

The requirement of accommodation that is sometime required as part of the duty to consult also implies an Aboriginal collective decision making authority.[344] This collective decision making authority may be viewed as an expression of an Aboriginal power of self-government. When the degree of requisite consultation is at

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[341] Catherine Bell, "Who are the Metis in s. 35(2)" (1991) 29 Alta. L. Rev. 351 at 353-354 .
[342] See Chapter two.
[343] See *Delgamuukw, supra,* note 161 Chief Justice Lamer held "aboriginal title cannot be held by individual aboriginal persons" at para. 115.
[344] See Borrows, "Tracking Trajectories" *supra,* note 300 John Borrows writes: "If the Crown is going to consult with Aboriginal groups to secure their participation or feedback, implicit in such an exercise is the existence of an organized authority to give an appropriate response" at para. 23.

the low end of the spectrum (notification, disclosure, and good faith discussion with a Crown intention of substantially addressing Aboriginal concerns) the power of Aboriginal governments to affect Crown decisions is limited. With the level of the duty of consultation and accommodation falling along the middle of spectrum or higher, the duty to of consultation and accommodation becomes a privilege that constrains and channels Crown power[345] at the will of the Aboriginal collective.

[345] Christie, "Developing Case Law" *supra* note 313 at paras. 17-19 .

## Chapter Seven: Conclusion

This thesis has argued Aboriginal rights to self-government exist as an abstract legal right and is protected under s. 35 of the *Constitution Act, 1982.* Whether in abstract or more concrete forms, rights of self-government are not fully understood, or properly identified, through the application of the *Van der Peet* test. Recent decisions have adopted a more liberal approach towards identifying Aboriginal rights by emphasizing the goal of protecting the survival of a way of life. However, these approaches relying on *Van der Peet* remain inconsistent with Hohfeldian theory, which is a fundamental theory informing understandings of law and legal relationships, and other Aboriginal rights jurisprudence that take a more abstract view of Aboriginal constitutional rights. Prevailing theories for translating abstract rights into more concrete forms include those explored in this thesis: RCAP's proposal for recognizing core and peripheral areas of jurisdiction, the law of place or choice of law approach, and Slattery's thesis on inter-societal law. I have demonstrated concerns with each of these theories drawing on historical encounters and legal institutions, Canadian law, and Hohfeldian theory. I have also argued why Hohfeldian theory should, and indeed does, apply to Aboriginal constitutional rights. Given these concerns, I conclude that Aboriginal self-government should be presumed as a dimension of Aboriginal title and the duty to consult. This approach is preferred because it avoids equating self-government with the exercise of activities and it defines self-government in negative terms as apposed to a positive list of permissible powers. Canadian courts have planted the seeds for this approach to self-government and have provided an opportunity for it to grow. This thesis has strived to show how

this may occur in a manner consistent with western both western law and legal theory, and indigenous legal orders.

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