TRIBAL GAMING IN CANADA

From Something to Nothing & Back Again

by Cory R. Levi

During their exploratory voyages for shorter travelling routes to Asia from the west of Europe, European explorers, dating back to the times of John Cabot, Jacques Cartier, Martin Frobisher and Samuel de Champlain, to name a few, fell upon foreign land – Canada. It was at this time that these famous explorers met and interacted with the native people already living there, the Aboriginals, also known as Canada's First Nations.

The European "white man" shared gifts with the Aboriginal peoples, such as alcohol, knives and iron, and in return the Aboriginal peoples traded furs and shared their cultures and traditions – their way of living; this included hunting, fishing and some of their activities to pass the time, such as sport and high stakes gambling.

The way of life was very different for the Aboriginal peoples than it was for Europeans. For one, they did not have markets where they could purchase food and other necessities, such as clothes. Instead, they had to hunt and fish for their own survival.

To pass the time and as a way to develop physical and mental skills, Canada's Aboriginal peoples played games, categorized as either games of chance, games of strategy or games of lifestyle mathematics in order to teach basic fundamentals such as hunting, problem solving and strategy.[1] Some of these games included "lacrosse" and "archery" in the summer months and "snowsnake" and "shinny" (which later evolved to present day hockey) in the winter months, and at times were played between villages.[2]

In fact, it was John Cabot who was said to first learn that Aboriginal peoples gambled while playing games of chance; he thought that Europe's dice and card games would be foreign to them, and while those specific styles of games were, the essence of gambling was not.[3] In reality, gambling dates back thousands of years prior to Cabot's arrival in Canada. "Slahal" (known as "stickgame" in English) is said to be the first form of gambling by Canada's First Nations and was used as an alternative to war or other violence to settle disputes and determine territory.[4] In addition, "Slahal" was also used for entertainment and spiritual purposes as well as a means for economic gains for First Nations' communities.[5]

In light of the foregoing, it can be said that, without a doubt, when John Cabot, and the many explorer that followed, first arrived on the shores of Canada, gambling amongst Canada's First Nations had already existed.

It wasn't until 1892 and the enactment of the Canada's *Criminal Code of 1892*[6] that gambling, tribal or not, officially became banned throughout the country, with many reforms and amendments occurring over the next few decades;

bingo and raffles were permitted for charitable purposes, with horse racing and lotteries soon to follow.

Notwithstanding the evolution of gambling itself in Canada, only the provinces were able to legally own and operate gambling facilities, and as the years went by and economic times for many First Nations' communities worsened, several Aboriginal tribes felt that they were being deprived of a right to which they rightfully laid claim – a right to carry out all forms of high stakes gambling for the economic development of their communities. But how could they achieve this? Canada's Aboriginal peoples were still, after all, Canadian citizens, and therefore had to respect and abide by the laws.

In 1982, with the enactment of the *Canadian Constitution Act, 1982*, and more specifically, the text of section 35(1) thereof, this perceived "right" became possible.

CLAIMING RECOGNITION OF A SECTION 35(1) RIGHT

R. v. *Sparrow:* the "Three Part Test"

In *R.* v. *Sparrow*,[7] the Supreme Court of Canada was presented with the question of determining whether section 35(1) of the Act rendered the terms of a food fishing license held by the Musqueam Indians, which terms are dictated by the *Fisheries Act*,[8] to be unconstitutional.

The Appellant therein, Ronald Edward Sparrow, was charged under section 61(1) of the *Fisheries Act* for fishing with a drift net of 45 fathoms in length instead of the permissible 25 fathoms, which went against the length allowed by his food fishing license; Mr. Sparrow did not contest the facts alleged by the Crown.

In his defense, Sparrow contended that he had been fishing pursuant to an existing Aboriginal right, recognized and affirmed by section 35(1) of the Act, and argued that the terms and restrictions of the fishing license issued by the government were inconsistent with section 35(1) of the Act, which states that *"The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."*

In its analysis, the Supreme Court of Canada, under the guidance of Chief Justice Dickson, set forth a "Three Part Test" by which all Aboriginal rights must pass in order to be afforded the protection of section 35(1) of the Act.

Part 1 of the "Three Part Test:" Origin of the right being claimed

The first part of the test pertains to the assessment and definition of an existing Aboriginal right.

Part 2 of the "Three Part Test:" Infringement

The second part of the test relates to the determination of whether or not the Aboriginal right being claimed has been infringed upon. The individual and/or group alleging the infringement has the onus of proving a *prima facie* infringement.

Part 3 of the "Three Part Test:" Justification

If a court of law comes to the conclusion as to the existence of a *prima facie* infringement, then the analysis shifts towards the third part of the test, more particularly, whether the infringement is justified.

The Supreme Court of Canada only dealt with the first part of the test, as the Crown did not reasonably contest the Musquems' Aboriginal right to fish.

R. v. *Van Der Peet*: Elaboration of part 1 of the "Three Part Test"

In *R.* v. *Van Der Peet*,[9] the Supreme Court of Canada further elaborated on the first part of the test set out in *Sparrow* and concluded that in order to declare the existence of an Aboriginal right, said claimed right must pass the "Integral to Distinctive Culture Test."

However, before addressing the "Integral to Distinctive Culture Test," the Court outlined some guiding principles. Among them was the recognition by the Court that Aboriginal rights are rights that exist because of their Aboriginal nature.

In addition, the Court recognized the "Fiduciary Duty" of the Crown owing to Aboriginal peoples. The Court held that this duty requires that where any ambiguity exists as to what is protected by section 35(1) of the Act, said doubt is to be resolved in favor of the Aboriginal community claiming the right.

In its analysis of section 35(1), the Supreme Court found that *"the Aboriginal rights recognized and affirmed by said section are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Euro-*

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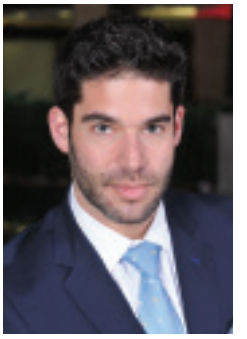

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peans in North America the land was already occupied by distinct Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of "Crown Sovereignty" over Canadian territory."[10]

The Supreme Court then clarified and refined the test for identifying an Aboriginal right (the "Integral to Distinctive Culture Test") and outlined the following factors and guiding principles to consider:[11]

1. Courts must take into account the perspective of Aboriginal peoples themselves;

2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right;

3. In order to be integral, a practice, custom or tradition must be of central significance to an Aboriginal society;

4. The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact;

5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating the Aboriginal claims;

6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis;

7. For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists;

8. The "Integral to Distinctive Culture Test" requires that a practice, custom or tradition be distinctive – it does not require that a practice, custom or tradition be distinct;

9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence;

10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

Ms. Van Der Peet failed the "Integral to Distinctive Culture Test" in part, because the Supreme Court characterized her claim as an Aboriginal right to exchange fish for money or for other goods instead of characterizing it as a claim based on a right to fish to provide for a moderate livelihood. Consequently, she failed to demonstrate that the exchange of fish for money or other goods was an Aboriginal right of her Aboriginal community.

The Court did not elaborate nor examine the claim on the basis of the remainder of the *Sparrow* test.

R. v. *Pamajewon*: An Aboriginal right to Gambling

The decision in *R.* v. *Pamajewon*[12] was delivered a day after the Supreme Court of Canada had given greater clarity to the first portion of the *Sparrow* test in the *Van der Peet* decision. Consequently, counsel for Pamajewon did not benefit from the knowledge of the "Integral to Distinctive Culture Test" that was used to determine whether the claimed Aboriginal right was protected under section 35(1) of the Act.

Pamajewon claimed that section 35(1) of the Act included the right to Self-Government which as a result, included the right to regulate gambling activities on the reserve.

The Supreme Court disagreed with Pamajewon's characterization of the nature of the claim, and instead ruled that the correct characterization was the participation in, and regulation of, high stakes gambling activities on the reserve.

In light of the foregoing, the Supreme Court of Canada found that the evidence did not support Pamajewon's claimed Aboriginal right to conduct and regulate high-stakes gambling on the reserve.

It is noteworthy to mention that the Supreme Court of Canada did not rule that the Ojibwa and Eagle Lake First Nations do not have the Aboriginal right to conduct and regulate gambling but, rather, it found that the evidence presented was insufficient to support the existence of such a right.

Consequently, the Supreme Court of Canada did not proceed with the remainder of the *Sparrow* test, namely, the determination of whether or not the claimed Aboriginal right had been infringed, nor did it address the issue of justification.

CONCLUSION

Sparrow outlined a general "Three Part Test" in order to determine if a claimed right should be deemed to be an Aboriginal right under section 35(1) of the Act, while *Van der Peet* clarified and refined the first part of the aforesaid test, introducing the test of "Integral to Distinctive Culture."

These decisions outline the necessary steps that Canada's Aboriginal peoples need to take in order to succeed in proving that they indeed possess an Aboriginal right to carry out gambling activities, in virtue of section 35(1) of the Act. ♣

1 *Games from the Aboriginal People of North America.* Arnason, K., Maeers, M., McDonald, J. and Weston, H. Taken from the Internet on January 17th, 2018 at http://centraledesmaths.uregina.ca/RR/database/RR.09.00/treptau1/

2 www.cepn-fnec.com/PDF/coin_jeunes/eng/Part3.pdf

3 www.ottawalife.com/article/gambling-has-a-long-and-turbulent-history-in-canada?c=5

4 *An Oral History of the Ancient Game of Sla-Hal: Man Versus Animals.* Indian Country Today. Roman Nose, R. May 27, 2012. Taken from the Internet on January 17th, 2018 at https://indiancountrymedianetwork.com/news/an-oral-history-of-the-ancient-game-of-sla-hal-man-versus-animals/

5 https://en.wikipedia.org/wiki/Slahal

6 *The Criminal Code, 1892.* 55-56 Victoria, Chap. 29.

7 [1990] 1 S.C.R. 1075

8 R.S.C. 1970, c. F-14

9 [1996] 2 S.C.R. 507

10 *R.* v. *Van Der Peet*, at par. 43

11 *R.* v. *Van Der Peet*, at par. 49

12 [1996] 2 S.C.R. 821