

## The Inherent Indigenous Right of Self-Government

By: Kent McNeil

**Matter Commented On:** *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, [2022 QCCA 185 \(CanLII\)](#) [Quebec Reference, quotations from the unofficial English translation]

In this Quebec Reference, the Attorney General of Quebec challenged the constitutional validity of the federal *Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c24](#). This statute acknowledges that the Indigenous peoples of Canada have an inherent right of self-government, which includes jurisdiction over child and family services and is recognized and affirmed by section 35(1) of the [Constitution Act, 1982](#). The Quebec Court of Appeal (CA) rejected Quebec's contention that this statute is beyond the jurisdiction of Parliament. The Act's pith and substance, the CA said, is to ensure the well-being of Indigenous children, and this is clearly within Parliament's jurisdiction over "Indians" in section 91(24) of the *Constitution Act, 1867*. The CA also decided that the Act does not amend the Constitution by acknowledging the inherent right of self-government because this right is already an Aboriginal right within section 35(1). The constitutional validity of the Act was therefore upheld, with the exception of two provisions that would have given some Indigenous laws relating to family matters absolute paramouncy over provincial laws. This decision is now on appeal to the Supreme Court of Canada.

This comment focuses on the CA's decision on the existence and nature of the inherent right of self-government. It addresses the question of whether this aspect of the decision is consistent with Supreme Court case law, especially *R v Pamajewon*, [1996 CanLII 161 \(SCC\)](#), [\[1996\] 2 SCR 821](#), the only case in which the Court has addressed the issue of Indigenous self-government directly.

*Pamajewon* involved a claim by two Anishinaabe First Nations to self-government over activities on their reserves, specifically gambling. The Court was willing to assume, without deciding, that section 35(1) includes self-government rights. However, it decided that these rights, like other section 35(1) rights, must be established by application of the test the Court laid down in *R v Van der Peet*, [1996 CanLII 216 \(SCC\)](#), [\[1996\] 2 SCR 507](#), decided the day before the *Pamajewon* judgment was handed down. Chief Justice Antonio Lamer, delivering the principal judgment in *Pamajewon*, said that "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" (at para 24), i.e. the *Van der Peet* standard that bases Aboriginal rights (in that case, fishing rights) on practices, customs, or traditions integral to an Indigenous people's distinctive culture at the time of contact with Europeans. By conflating self-government with harvesting rights, Lamer CJ completely disregarded the clear common law distinction between jurisdiction over, and rights to lands and resources acknowledged in *St. Catherine's Milling and Lumber Company v The Queen* (1888) 14 App Cas 46, in which the Privy Council held that Parliament has jurisdiction over Aboriginal title land and the provincial Crowns have the underlying title.

In *Pamajewon*, the Court characterized the claimed right narrowly: instead of “a broad right to manage the use of their reserve lands” (as the First Nations had claimed), Chief Justice Lamer said the claimed right had to be characterized more narrowly as a right “to participate in, and to regulate, gambling activities on their respective reserve lands” (at paras 27 and 26, respectively). To characterize the claim as the First Nations described it would “cast the Court’s inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right” (at para 27). As the First Nations were unable to prove that gambling – especially high-stakes gambling – and regulation thereof had been a significant part of their distinctive culture prior to contact with Europeans, their self-government claim was rejected, and the accused, who had been charged with violating sections of the *Criminal Code* prohibiting gaming, were convicted.

In the Quebec Reference, the CA nonetheless decided that Indigenous peoples have an inherent right of self-government over child and family services. The court did not determine as a matter of fact that specific Indigenous peoples provided and exercised governance authority over these services prior to European contact, as would have been required had the court followed *Pamajewon*. Instead, the CA decided that a “generic right” of self-government over child and family services “extends to all Aboriginal peoples, because it is intimately tied to their cultural continuity and survival” (at para 59). On what basis, then, did the CA justify departing from *Pamajewon*?

To justify not following a Supreme Court precedent, lower courts must either distinguish it or rely on a new legal issue or novel facts not considered in the earlier decision. In *Canada (Attorney General) v Bedford*, [2013 SCC 72 \(CanLII\)](#), [\[2013\] 3 SCR 1101](#), Chief Justice Beverley McLachlin explained that, in a *Charter* case, “a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate” (at para 42; see also *Carter v Canada (Attorney General)*, [2015 SCC 5 \(CanLII\)](#), [\[2015\] 1 SCR 331](#), where the Supreme Court overruled its own precedent in *Rodriguez v British Columbia (Attorney General)*, [1993 CanLII 75 \(SCC\)](#), [\[1993\] 3 SCR 519](#), and legalized physician-assisted dying). In the Quebec Reference, the CA, without mentioning *Bedford*, appears to have relied both on significant developments in the law and on changes in circumstances.

The CA began its analysis of the self-government issue by recognizing that Indigenous peoples governed themselves at the time of European contact and continued to do so after Crown assertion of sovereignty and the Royal Proclamation of 1763 (at paras 51, 57). Moreover, the distribution of legislative powers between Parliament and the provincial legislatures by the *Constitution Act, 1867* was not exhaustive and did not take away Indigenous governance authority (at para 57; the CA also relied upon *Campbell et al v AG BC/AG Cda & Nisga’a Nation et al*, [2000 BCSC 1123 \(CanLII\)](#) at paras 427-28). Nor has any pre- or post-Confederation statute extinguished Indigenous governance rights (at para 57).

Later in its judgment, the CA considered whether the *Pamajewon* decision applied to a right to self-government over child and family services. The court acknowledged that *Pamajewon*

“suggests that the right to self-government, if it does exist as an Aboriginal right, must satisfy the *Van der Peet* test in order to be recognized as a s. 35 Aboriginal right” (at para 406). However, the CA noted that, in creating a test for Aboriginal title the very next year in *Delgamuukw v British Columbia*, [1997 CanLII 302 \(SCC\)](#), [\[1997\] 3 SCR 1010](#), the Supreme Court modified the application of the *Van der Peet* test considerably because land title is a “distinct species of aboriginal right that was recognized and affirmed by s. 35(1)” (at para 417, quoting *Delgamuukw* at para 2). Lamer CJ acknowledged that the “difference between aboriginal rights to engage in particular activities [such as fishing] and aboriginal title [which is a right to the land itself that is not limited to particular activities] requires that the test I laid down in *Van der Peet* be adapted accordingly” (*Delgamuukw* at para 141, quoted in Quebec Reference at para 419).

The CA went on to point out that the right of self-government claimed in *Delgamuukw* had not been dealt with by the Supreme Court (unlike in the BCCA, which had split 2 for, 3 against, its existence: Quebec Reference at paras 409-15). Lamer CJ explained that the trial judge had made errors of fact, the right had been characterized too broadly in a way inconsistent with the more specific approach mandated by *Pamajewon*, and the issue had not been sufficiently argued in the Supreme Court (*Delgamuukw* at paras 170-71). Despite this reference to *Pamajewon*, the CA concluded that the Supreme Court did not indicate in *Delgamuukw* “whether the *Van der Peet* test and factors should be adapted when considering the right to self-government, as it had done with respect to Aboriginal title, nor did it add anything to what it had already said in *Pamajewon*. Thus, to date, the Supreme Court of Canada has not ruled on the existence or content of the right to Aboriginal self-government, nor has it considered at length the application of the *Van der Peet* test and factors in the context of the right to self-government” (at para 421).

While admitting that “*Pamajewon* may suggest that the right to self-government is not a generic right with uniform legal characteristics, but rather a specific right that varies from one Aboriginal group to another according to the particular circumstances of each group,” the CA suggested that “the remarks of Lamer, C.J. in *Pamajewon* must be understood in light of his subsequent comments in *Delgamuukw*” (at para 422). The CA agreed with Professor Brian Slattery, who commented that, “[i]n light of *Delgamuukw*, it seems more sensible to treat the right of self-government as a generic Aboriginal right, on the model of Aboriginal title, rather than as a bundle of specific rights. In this view, the right of self-government is governed by uniform principles laid down by Canadian common law. The basic scope of the right does not vary from group to group” (Brian Slattery, “A Taxonomy of Aboriginal Rights”, in Hamar Foster et al, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, (Vancouver: UBC Press, 2007) at 121, quoted in Quebec Reference at para 422). The CA also pointed out that the Supreme Court modified the application of the *Van der Peet* test to the Métis in *R v Powley*, [2003 SCC 43 \(CanLII\)](#), [\[2003\] 2 SCR 207](#), to take account of their unique history and circumstances (at para 424).

The CA concluded that “[t]he right to self-government also requires an adaptation of the *Van der Peet* framework. As with Aboriginal title, the right to self-government is similar in scope for all Aboriginal peoples, a position which Binnie, J. seemed to support in *Mitchell* ... [in which he] appears to have taken a broad – rather than specific – view of such a right” (at para 425-26). In *Mitchell v MNR*, [2001 SCC 33 \(CanLII\)](#), [\[2001\] 1 SCR 911](#), Justice Ian Binnie, in a concurring judgment, opined that, while an Aboriginal right to bring goods into Canada duty free would be inconsistent with Canadian sovereignty and the need to control borders, this does not mean that

Indigenous peoples in Canada do not have an inherent right to self-government similar to that acknowledged by the US Supreme Court since the 1820s and 1830s.

The CA held that a right to self-government over child and family services is a section 35(1) Aboriginal right (at paras 468-85). In reaching this conclusion, it focused, not on the practices, customs, and traditions of particular Indigenous societies, but on the importance of jurisdiction over these matters for the maintenance of culture. It noted that maintenance of cultural identity, which stems from family and community, is an essential part of the reconciliation that the Supreme Court has said is at the heart of section 35: “This reconciliation requires, among other things, ‘ensuring the continued existence of these particular aboriginal societies’ and ‘provid[ing] cultural security and continuity for the particular aboriginal society’” (at para 474, quoting *R v Sappier; R v Gray*, [2006 SCC 54 \(CanLII\)](#), [2006] 2 SCR 686 at paras 26, 33). The CA also noted that Indigenous customary law in relation to family matters has been recognized in court decisions and legislation, demonstrating its continuing validity (at para 484). From all this, the CA concluded that “the regulation of child and family services comes very close to being ‘an element of a practice, custom or tradition integral to the distinctive culture’ of the Aboriginal peoples of Canada within the meaning of *Van der Peet* and *Pamajewon*. Indeed, the regulation of these services is intimately tied to the flourishing and cultural survival of Aboriginal peoples as distinct peoples” (at para 485).

The CA went on to explain why the right of self-government over child and family services is a generic right (like Aboriginal title in *Delgamuukw*), not a specific right (like the fishing right claimed in *Van der Peet*). The court said it must be generic because, “[b]y its very nature, this right pertains to Aboriginal peoples as peoples. As we have just seen, this is a right which is intimately tied to the cultural survival of Aboriginal peoples, but is not necessarily based on the practice of distinctive cultural activities in the strict sense. As with Aboriginal title, the factors to be considered in recognizing the right of Aboriginal peoples to regulate child and family services must therefore be tailored to take into account the particular characteristics of that right” (at para 486, CA’s emphasis).

The CA’s reasons for requiring “an adaptation of the *Van der Peet* framework” where the right of self-government is concerned could be based on what McLachlin CJ referred to in *Bedford* as “significant developments in the law”, arising in part from *Delgamuukw*, *Powley*, and *Mitchell* in particular. But the CA also relied implicitly on McLachlin CJ’s second ground for a lower court not to follow a precedent, namely, where “there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”

The parameters of the debate over self-government were already shifting before *Pamajewon*, though the Supreme Court does not appear to have taken that into account. The CA pointed out that all the participants in the 1992 Charlottetown Accord had recognized the existence of such a right. Although the referendum on the Accord failed, in 1995 the federal government adopted a Self-Government Policy that recognized the right, recommending implementation through negotiation (at paras 55, 184-85). The 2007 UN [Declaration on the Rights of Indigenous Peoples](#) affirmed the existence of the Indigenous right to self-determination, and Canada has not only endorsed the Declaration without qualification but has also enacted legislation aimed at making Canadian law consistent with it (at paras 55, 198). In 2017, the federal government released its [“principles respecting the Government of Canada’s relationship with Indigenous peoples”](#), which

went beyond the 1995 policy statement, “refashioning it on the basis of s. 35 of the *Constitution Act, 1982* and the UN Declaration” (at para 193). Principle 1 of the 10 principles provides: “The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government” (Quebec Reference at para 193). Numerous statutes have also been enacted that either ratify modern-day treaties containing self-government provisions or refer to Indigenous self-government in other contexts (at paras 186-89). Finally, the shift in the parameters of the debate since *Pamajewon* has been revealed, as the CA noted, by the fact that “the vast majority of doctrinal writers in Canada have expressed the opinion that s. 35 confirms the existence of a right of self-government” (at para 55; see also para 434 n 454, for a long list).

In addition to the reasons the CA has provided for why the *Pamajewon* approach to self-government should no longer be strictly followed, there are also pragmatic reasons. Application of the *Van der Peet* test for Aboriginal rights to self-government claims is simply unworkable. The test’s requirement, as applied in *Pamajewon*, that claims be characterized narrowly in relation to specific activities, such as gambling, means that each Indigenous claimant would have to prove practices, customs, or traditions in relation to each and every matter it claims self-government authority over, a costly and next-to-impossible task. Moreover, Indigenous societies prior to European contact existed and governed themselves in a world vastly different from the complex, modern Canadian world they are part of today. If their Indigenous governance rights were limited to specific activities they exercised authority over prior to contact (which in Eastern Canada can be over 400 years ago), the scope of their self-government rights would be very limited indeed.

In the up-coming appeal, the Supreme Court will have an opportunity to address the inherent right of self-government directly. This vital matter has been judicially unresolved for far too long. The Quebec CA has provided an excellent basis for the Supreme Court to move beyond *Pamajewon*, making Canadian law consistent with federal policy and the UN *Declaration on the Rights of Indigenous Peoples*, which Canada has adopted.

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