Aboriginal Rights

Section 35 of the *Constitution Act, 1982* recognizes and affirms "the existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada."[1] However, section 35 does not create Aboriginal rights, nor are Aboriginal rights "granted" by the Crown. Rather, they are inherent rights that exist because "when the settlers came, the [Aboriginal peoples] were there, organized in societies and occupying the land as their forefathers had done for centuries."[2] When the Crown asserted its sovereignty over Aboriginal peoples, it "superimpose[ed] European laws and customs on pre-existing Aboriginal societies"[3] without extinguishing their inherent rights. As such, Aboriginal peoples' prior occupation of the land we now call Canada gives rise to both Aboriginal rights and title.[4]

The *Van der Peet* Test for Aboriginal Rights

In *R v Van der Peet*, the Supreme Court of Canada established the test to for identifying Aboriginal rights. A claimant will have an Aboriginal right to engage in an activity, the Court said, if that "activity [is] an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right."[5] To give rise to an Aboriginal right, this practice, custom, or tradition must have been a "defining feature of the culture in question"[6] and must have "truly made the society what it was."[7] It must be grounded in the practices, customs, and traditions of the claimant's community from pre-contact times,[8] even if the activity was interrupted for a time[9] or was influenced by European culture (eg from historic use of bows and arrows to contemporary use of rifles for hunting).[10] Activities that all societies share (eg eating to survive) or that are incidental to the group claiming the right are not sufficient.[11]

Under *Van der Peet*, a court presented with an Aboriginal rights claim must first identify the nature of the right being claimed.[12] To help frame this analysis, the court will consider: (1) the nature of the complainant's action which "was done pursuant to an [A]boriginal right,"[13] (2) the nature of the impugned Crown action, and (3) the practice, custom, or tradition that gives rise to the right claimed.[14] Once the nature of the claimed right is established, the court must determine whether the activity is integral to the distinctive culture of the claimant's community.[15] If the activity is integral to the Aboriginal claimant's distinctive culture, it will rise to the level of an Aboriginal right under section 35 of the *Constitution Act, 1982*. If not, the activity will not enjoy constitutional protection.

Aboriginal rights are not absolute and may be infringed pursuant to the *Sparrow* Test.

[1] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] *Calder v Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), at 156 ["Calder"]. See also *R v Van der Peet*, 1996 CanLII 216 (SCC), at para 30 .

[3] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII), at para 67.

[4] *Van der Peet*, *supra* note 2 at para 33 (citing *Calder*, *supra* note 2 at 328, internal quotations removed).

[5] *Ibid* at para 46.

[6] *Ibid* at para 59.

[7] *Ibid* at para 55.

[8] *Ibid* at para 63.

[9] *Ibid* at para 65.

[10] *Ibid* at para 73.

[11] *Ibid* at para 56. Cf *R v Sappier; R v Grey*, 2006 SCC 54 (CanLII) at paras 46 (in this case, the Court cautions against "reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized [A]boriginal stereotypes" such as canoe-building and basket-making. Rather, the courts must seek to understand how the pre-contact activity relates to the Aboriginal people's way of life).

[12] *Van der Peet*, *supra* note 2 at para 76.

[13] *Ibid* at para 53.

[14] *Ibid* at para 53.

[15] *Ibid* at para 80.