Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada

SENWUNG LUK*

The content of the constitutionally protected Aboriginal right to self-government in Canada is currently determined by the approach established in *R. v. Pamajewon*. This case applied the test for the constitutional protection of Aboriginal rights as established in *R. v. Van der Peet*. The test holds that only those practices, customs and traditions that are continuous with and integral to the distinctive culture of an Aboriginal community as it existed prior to European contact will attract constitutional protection.

This article examines how the *Van der Peet* approach is difficult to apply in practice and leads to an indeterminate definition of constitutional protection for Aboriginal self-government rights. The *Van der Peet* test is particularly indeterminate when applied to self-government rights. Consider self-governance and law-making as pre-contact practices, customs or traditions. At their most general, self-governance must have been integral to all pre-contact communities. The power-conferring rules that were customary in historic Aboriginal communities likely came with no evidence of limits to jurisdiction. Moreover, the recognition of customary rules also raises issues about whether any government infringement of the right of Aboriginal communities to set their own boundaries would be unconstitutional.

The article concludes by looking briefly at the American approach to the analogous issue and how it avoids the problems with the *Pamajewon* approach.

À l'heure actuelle, c'est l'approche dégagée dans l'arrêt *R.c. Pamajewon* qui définit le contenu du droit des autochtones, protégé par la Constitution, à l'autonomie gouvernementale au Canada. Dans cette affaire, la CSC a appliqué la norme en matière de protection constitutionnelle des droits ancestraux établie dans l'arrêt *R. c. Van der Peet*. Selon ce critère, seules les pratiques, coutumes et traditions faisant partie intégrante de la culture distinctive d'une collectivité autochtone, telle qu'elle existait avant le contact avec les Européens, bénéficieront d'une protection constitutionnelle.

Cet article examine la difficulté qu'il y a à appliquer l'approche de l'arrêt *Van der Peet* dans la pratique et fait observer qu'elle mène à une définition vague de la protection accordée par la Constitution aux droits ancestraux en matière d'autonomie gouvernementale. Le critère élaboré dans l'arrêt *Van der Peet* est particulièrement incertain lorsqu'on tente de l'appliquer aux droits à l'autonomie gouvernementale. Si l'on considère l'autonomie gouvernementale et les pouvoirs législatifs comme des pratiques, coutumes et traditions antérieures au contact avec les Européens, on peut aisément supposer que l'autonomie gouvernementale devait faire partie intégrante de toutes les collectivités antérieures à l'arrivée des Européens. Les règles conférant des pouvoirs qui étaient coutumières dans les collectivités autochtones traditionnelles ne contiennent aucune restriction à l'étendue de ces pouvoirs. La reconnaissance des règles coutumières soulève en outre des questions quant à la constitutionnalité de toute atteinte gouvernementale au droit des collectivités autochtones à établir leurs propres limites.

L'article conclut en comparant cette approche à celle des États-Unis sur le sujet et montre la manière dont ils ont su éviter les problèmes qui découlent de l'arrêt *R.c. Pamajewon*.

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* Associate at Olthuis Kleer Townshend, Toronto; B.A. (Yale); J.D. (Osgoode); B.C.L. (Oxford); member of the Bar of Ontario. This article was originally submitted to fulfil the requirements of the dissertation for the B.C.L. degree. I am grateful to my parents for their support, to Karen Snowshoe for introducing me to the topic, Leslie Green, Kent McNeil, Dwight Newman, Thomas Chacko, Stuart Hargreaves, Bob Simpson, Martin Olszynski, Howard Kislowicz, to the two anonymous reviewers for their very helpful comments, and to the editors at the Law Review for their patience and diligence. All views expressed herein are mine and do not necessarily reflect those of any other person.

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I. Introduction

Aboriginal communities in Canada have a very different relationship to the Canadian state than non-Aboriginal communities. One aspect of that difference is that organized Aboriginal societies pre-date the assertion and acquisition of sovereignty by the Crown, and the establishment of settler societies and governments. As Justice Judson wrote in the landmark Supreme Court of Canada case *Calder v. British Columbia (A.G.)*, "the fact is that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries."[1] That is, Aboriginal communities, since time immemorial, have done the things that organized societies do: they have established rules of membership, they have established rules of conduct prohibiting certain behaviour, and they have assigned different statuses to members, empowering them to do things that would otherwise be prohibited or frowned upon.

Through the centuries of colonial experience, during which law and policy have sought at times to accentuate the separateness of Aboriginal communities from non-Aboriginal communities, and at other times to obliterate it, Aboriginal communities have remained a world apart from their non-Aboriginal neighbours. Most Aboriginal people are still geographically and legally separate from the rest of Canada.[2] In short, Aboriginal communities relate to the rest of Canada as communities apart.

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1. [1973] S.C.R. 313 at 328, 34 D.L.R. (3d) 145 at 156 [emphasis added].
2. Aboriginal peoples of Canada, as defined in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*], include Indians, Inuit and Métis. Generally, those who identify as Indians and Métis may qualify as status Indians according to the test set out by the *Indian Act*, R.S.C. 1985, c. I-5, ss. 6–7 [*Indian Act*], as am. by R.S.C. 1985 (1st Supp.), c. 32, s. 4; R.S.C. 1985 (4th Supp.) c. 43, s. 1. According to Statistics Canada, 30 per cent of Indians live on reserve, where the *Indian Act* puts them under a separate legal regime for the purposes of ownership of real property, wills and estates, education, etc. See "Where do Aboriginal people live?" *Statistics Canada* (7 September 2007), online: Statistics Canada <http://www41.statcan.ca/2007/10000/ceb10000_003_e.htm>; *Indian Act*, ss. 4, 20–29, 45–46, 114–12. In this article, "Indian" will only be used as a term of art in reference to the *Indian Act*, and in some cases, the American law on native peoples.

How and to what extent can the separateness of Aboriginal societies be expressed in the practice of governance? Recently, and especially since "aboriginal rights" were "recognized and affirmed" in the *Constitution Act, 1982*,[3] articulating the separateness of Aboriginal government has taken on the character of rights claims. The litigants and the courts have tried to articulate a right to self-government from the text of the constitution. As this article will show, the open-endedness of the text articulating this right has meant that judges have the burden of articulating that difference and its legal significance. The Supreme Court of Canada has taken some early stabs at the problem, most notably in *R. v. Pamajewon*.[4] In that case, Chief Justice Lamer, in reasons which commanded the support of all but one judge of the Court, established a test for self-government rights that restricted their constitutional protection to only those practices, customs and traditions that have continuity with practices, customs and traditions that were integral to the Aboriginal community as it existed prior to European contact.[5] The aim of this article is to show that the Court, in its reasons in that case, takes a conceptually flawed approach to understanding the kinds of norms that Aboriginal communities might use in their governance. It uses

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3. *Ibid.*

4. [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 [*Pamajewon* cited to S.C.R.]. The most extensive commentary on the case is the article by Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011 [Morse, "Permafrost"]. The *Pamajewon* decision, as an application of the *Van der Peet* test, is subject to many of the same criticisms as have been levelled against the *Van der Peet* decision. For instance, some commentators see the *Van der Peet* approach as "freezing" Aboriginal rights to some historical artefact. See Morse, "Permafrost" at 1037; Leonard I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alta. L. Rev. 1 at 5; Chilwin Chienhan Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 55 U.T. Fac. L. Rev. 419 at 433; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997–98) 22 Am. Indian L. Rev. 37. Morse, "Permafrost" at 1034, for instance, has also wondered if the *Van der Peet* approach is too subjective to be workable.

   Coming as it did on the heels of the Supreme Court of Canada's *Van der Peet* trilogy, *Pamajewon* probably attracted less commentary than one might have expected. Some commentators have included a discussion of *Pamajewon* in their reviews of *Van der Peet* without discussing *Pamajewon* in great detail. See e.g. Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and Its Treatment in Canadian Jurisprudence" (2001–02) 35 U.B.C. L. Rev. 1 at 29–33 [Jenkins, "John Marshall"]; Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1997–98) 5 Tulsa J. Comp. & Int'l L. 253 at 278–91 [McNeil, "Aboriginal Rights"].

   This article builds upon this extensive literature on *Van der Peet* and *Pamajewon* by aiming to offer a critique from how analytical jurisprudence, broadly taken, conceives of the nature of law. It sees *Pamajewon* as an attempt by the Supreme Court of Canada to direct the inquiry for the existence of self-government rights toward an inquiry into the existence of law in pre-contact Aboriginal communities. It suggests that if analytical jurisprudence has accurately described our concept of law, then the *Pamajewon* inquiry will run into major conceptual difficulties. As such, this article aims to add a new set of reasons for why the courts should devise a new approach to self-government rights, if it wants to develop a jurisprudence that is free from the difficulties that this article identifies.

5. *Pamajewon*, *ibid.* at paras. 23–31.

insights from analytical jurisprudence to identify some problems with the conceptual assumptions that the Court makes in its reasoning. It shows that the Court's approach mires any analysis according to the approach set out in *Pamajewon* in conceptual dead-ends and dooms the courts to unpredictable decisions about the centrality of governmental practices and the jurisdictions they command. Based on this critique, the article concludes by considering how the approach to the analogous problem used in the United States avoids the problems that it identifies.

II. Situating the Problem: Why Self-Government and Why *Pamajewon?*

In order to understand the persistent significance of the *Pamajewon* case, this article will briefly outline some of the history of Aboriginal-Crown relations leading up to the decision.

Prior to the late nineteenth century, imperial policy toward Aboriginal communities in North America tended to recognize the authority of those communities over their own members.[6] The common law doctrine of continuity presumed that "in inhabited territories acquired by conquest or cession, Parliament or the Crown could abrogate or alter local law, but until this power was exercised, local laws, institutions, customs, rights and possessions remained in force."[7] (Consider the alternative: without the doctrine of continuity, English law would deem all property rights nonexistent and all marriages invalid as soon as the Crown asserted sovereignty over the colonized territory.[8]) As late as 1838, William Jarvis, the Superintendent of Indian Affairs, reported a case where an Anishinabek community on the French River in (then) Upper Canada found in their midst a member of the community who had apparently become afflicted with a serious mental illness, and had become a danger to the community. The community, after discussing the matter in council, decided to execute the man. Jarvis reported this without any indication that he saw a role for the

6. For a fascinating account of the development of self-government among one band in early colonial history, see Mark D. Walters, "'According to the old customs of our nation': Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–1847" (1998–1999) 30 Ottawa L. Rev. 1.

7. See 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 at 715. The most commonly cited authority is *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.).

8. For reasons to prefer the doctrine of continuity to the alternative doctrine of recognition, which holds that no legal relationships exist in the acquired territory unless recognized by the Crown, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1989) at 161–92. The doctrine of continuity is good law in Canada, see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 147–48, 153 D.L.R. (4th) 193.

Crown in the affairs and decisions of the Anishinabek community.[9] In other examples, Cree rules about marriage were held to be as valid as Roman Catholic marriage rules as late as 1867,[10] and cases where Aboriginal rules of social organization were recognized by common law courts continued into the late nineteenth century.[11]

The Crown began to use law to seriously meddle in the affairs of Aboriginal communities in the late nineteenth century,[12] though it would be imprudent to conclude that the enactment of a law garnered perfect conformity from the officials and Aboriginals who were supposedly subject to it. Nonetheless, enactments with important implications for self-government rights were pursued. For instance, the *Indian Act* of 1876 originally defined an Indian "band" as "any tribe, band or body of Indians" who held reserve lands in common,[13] and left norms about who belonged to any particular band to the band itself. By the early twentieth century the government had enacted statutes to govern the rules of membership of Indian bands,[14] establishing

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9. John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006) at 45–46 [Borrows, "Legal Traditions"]. Borrows cites this case as an example of the application of Anishinabek law and cites this case to the Jarvis Papers, Metro Toronto Reference Library, Collection # S-125, Volume B57. Cornelia Schuh, "Justice on the Northern Frontier: Early Murder Trials of Native Accused" (1979–80) 22 Crim. L.Q. 74 at 76–80 discusses the growth of the interest of the colonial administration in these "Wendigo murders" in the nineteenth century.
10. *Connolly v. Woolrich*, [1867] 11 L.C. Jur. 197, 17 R.J.R.Q. 75 (Qc. Sup. Ct.) [*Connolly*]. In this case, Connolly, a man from Montreal who went to trade fur in the West, married a Cree woman there, under Cree rites. Twenty-years later, Connolly returned to Montreal and married Woolrich, under Roman Catholic rites, and lived with her for fifteen years. After Connolly died, the plaintiff, a son from the first marriage, sued Woolrich for his father's estate. He won, the court having found that the Roman Catholic marriage was invalid because Connolly was already married.
11. See *R. v. Nan-E-Quis-A-Ka*, [1889] 1 Terr. L.R. 211 (N.W.T.S.C.) [*Nan-E-Quis-A-Ka*], an appeal from a case where an Indian was charged with assault. In his defence, he called as witnesses his two wives. The trial judge excluded the evidence of the woman whom the accused had married first, affirming the validity of marriages by Aboriginal custom, as long as they were monogamous. He refused to exclude the evidence of the woman whom the accused had married second, holding that the marriage, regardless of its validity by Aboriginal custom, was not recognized in English law because the accused was already in a previous marriage. For more on *Connolly*, *ibid.*, *Nan-E-Quis-A-Ka*, and the history of the imposition of Victorian concepts of marriage onto Aboriginal communities, see Sarah Carter, "'Complicated and Clouded': The Federal Administration of Marriage and Divorce among the First Nations of Western Canada, 1887–1906" in Sarah Carter *et al.*, eds., *Unsettled Pasts: Reconceiving the West through Women's History* (Calgary: University of Calgary Press, 2005) 151; Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), online: <http://www.aupress.ca> especially c. 5–6. For a detailed consideration of the important nineteenth century cases on the validity of Aboriginal marriage law from the perspective of the Canadian legal system, see Bradford W. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980) 8 Am. Indian L. Rev. 199 at 222–39.
12. For an excellent index of amendments to the *Indian Act* through its first century of existence, see Sharon Helen Venne, *Indian Acts and Amendments 1868–1975* (Saskatoon: University of Saskatchewan Native Law Centre, 1981).
13. *Indian Act*, R.S.C. 1906, c. 81, s. 2.
14. *Ibid.*, s. 14, depriving Indian women who marry non-Indians of their Indian status. For a full list of amendments on band membership, see Venne, *supra* note 12 at xxiii. For a more detailed account of the development of the *Indian Act* membership rules and band recognition provisions, see John Giokas & Robert K. Groves, "Collective and Individual Recognition in Canada: The *Indian Act* Regime" in Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 41.

complicated rules of descent and lineage. That control was sufficiently effective and resulted in the Crown establishing an Indian Register in 1951 to purportedly comprehensively manage and record the band affiliation of individual Indians.[15] More than just asserting control over membership rules in their communities, the *Indian Act* purported to rid First Nations communities of their traditional structures of governance by empowering the Governor-in-Council to introduce the system of direct elections for Chief and Councillor.[16] In this way, the Crown purported to erase many of the sophisticated methods of governance that had developed among various First Nations communities over the centuries. For instance, the Iroquois Confederacy was a federal polity governed by a constitution where each member nation had a role in a complicated collective decision-making process involving qualified majority voting and vetoes.[17] The *Indian Act* sought to replace all of this with a Chief and Council system.

With the enactment of *The Criminal Code* in 1892, the hands of the Crown reached deeply into the regulation of social relations in Aboriginal communities.[18] Where *The Criminal Code* purported to replace Aboriginal norms of social relations, the *Indian Act* established a uniform set of political processes and governance structures that all Indian bands are still obligated to follow. For example, each band must have a chief and councillors, who serve two-year terms; a majority of councillors may pass a proposal for a by-law on certain limited local subjects,[19] but these only become

15. *The Indian Act*, S.C. 1950–51, c. 29, s. 5. For a full list of amendments creating and modifying the Indian Register, see Venne, *supra* note 12, at xxiii.
16. See *An Act to further amend the Indian Act*, S.C. 1898 (61 Vict.), c. 34, s. 9. For a list of amendments to the *Indian Act* concerning the election of councillors, see Venne, *supra* note 12 at xxv.
17. See Arthur C. Parker, *The Constitution of the Five Nations or The Iroquois Book of the Great Law* (Albany, N.Y.: The University of the State of New York, 1916) at 97–103. For a lawsuit brought by the traditional government of the Iroquois Confederacy to challenge the authority of the *Indian Act* empowered band government to surrender the lands of the band, see *Logan v. Styres et. al.*, [1959] 20 D.L.R. (2d) 416, [1959] O.W.N. 361 (Ont. H.C.).
18. *R. v. Bear's Shin Bone*, [1899] 4 Terr. L.R. 173, 3 C.C.C. 329 (N.W.T.S.C.), where an Indian was charged under s. 278(a) of *The Criminal Code*, R.S.C. 1892, c. 29, a provision making it an offence to enter into a polygamous union. Ironically, the court applied *Nan-E-Quis-A-Ka*, *supra* note 11, for the proposition that marriages carried out under Aboriginal custom were valid and convicted the man. Criminal law was seen as an important instrument of colonization by Crown officials. There is extensive literature on the penetration of Anglo-Canadian criminal law into Aboriginal communities. See e.g. Shelley Ann Marie Gavigan, *Criminal Law on the Aboriginal Plains: The First Nations and the First Criminal Court in the North-West Territories, 1870–1903* (S.J.D. Thesis, University of Toronto, 2008); Hamar Foster, "'The Queen's Law Is Better Than Yours': International Homicide in Early British Columbia" in Jim Phillips, Tina Loo & Susain Lewthwaite, eds., *Essays in the History of Canadian Law Volume V Crime and Criminal Justice* (Toronto: University of Toronto Press, 1994) 41; Tina Loo, "Tonto's Due: Law, Culture, and Colonization in British Columbia" in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law Volume VI British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995) 128; Schuh, *supra* note 9. One common thread in the literature on this subject is the distance between the norms introduced by the Crown and the realities of the effectiveness of their enforcement on Aboriginal communities.
19. *Indian Act*, *supra* note 2, s. 81.

valid upon the approval of the Minister of Indian Affairs in Ottawa.[20] All other powers of regulation, such as over health and education, rest with the federal government. This uniform structure was imposed to replace whatever traditional governance structures were in place prior to the enactment of the *Indian Act*. To this day, the governance of certain First Nations communities remains difficult because of continuing struggles between the authorities that draw their claims of validity from traditional customary governance and those that draw their claims from the *Indian Act*.

The new *Constitution Act, 1982* seemed to promise to change the relationship between the Crown and Aboriginal peoples. The full text of the relevant provision, section 35(1), reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[21] In "recognizing and affirming" Aboriginal rights, it created a new way for an Aboriginal community to articulate their desired relationship with the Crown through claims to constitutional rights. The vagueness of the provision is striking. Constitutional conferences that were convened for the purpose of delineating those rights failed to arrive at an agreement that would be of substantive help in interpreting the scope of the provision.[22] The task of identifying constitutionally significant rights, then, fell to the courts.

It is helpful to note that the identification and infringement of "treaty rights," as named in the text of section 35(1), is a separate doctrinal problem from the category of "aboriginal rights." Judicial authority in *Campbell v. British Columbia (A.G.)* has recognized that self-government rights are capable of recognition as either a type of Aboriginal right or a type of treaty right.[23] In *Campbell*, a treaty between the federal and provincial Crowns and the Nisga'a Nation was held to be a valid method for endowing the Nisga'a Treaty provisions for self-government with constitutional pro-

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20. *Ibid.*, s. 82.
21. *Constitution Act, 1982*, *supra* note 2.
22. *Ibid.*, ss. 37(1) and 37(2) of the *Constitution Act, 1982* originally read:

> 37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

Nothing in the way of "identification and definition of the rights of those peoples to be included in the Constitution of Canada" ever came to fruition in those conferences. The March 1983 conferences produced a minor amendment to s. 25, entrenching a clause that protected rights and freedoms acquired through land claims from abrogation or derogation by the *Charter*. That conference also produced a provision specifying at last three additional First Ministers' conferences to be held in 1984, 1985 and 1987. Those subsequent conferences produced no additional amendments. See David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, 1989) at 3–8.

23. 2000 BCSC 1123, [2000] 189 D.L.R. (4th) 333, 4 C.N.L.R. 1.

tection. Although *Campbell* affirms that treaty negotiation is a valid way of securing self-government rights, it does not give any direct answers on how to deal with claims to rights that exist outside of a negotiated treaty framework. In analyzing the *Pamajewon* case, the concern is primarily with self-government rights as litigated Aboriginal rights. This article will also demonstrate the implications that the courts' definition of section 35 self-government rights as Aboriginal rights has for the negotiation of section 35 self-government rights as treaty rights.

Pamajewon, the decision that would delineate the constitutionalized Aboriginal right as it relates to self-government, was a progeny of earlier decisions on rights to natural resources. *R. v. Sparrow*[24] and *R. v. Van der Peet*[25] are especially salient. *Sparrow* was the first Supreme Court decision to interpret section 35(1) in relation to "aboriginal rights." Two propositions from *Sparrow* remain doctrinally significant: first, aboriginal rights function much like any other constitutional right, in that otherwise validly made laws are invalid to the extent that they infringe Aboriginal rights; and second, the infringement could be saved if it is "justified" and *Sparrow* provides a framework for determining whether an infringement is justified.[26] The precise contours of the justification test are not relevant here, but it is significant that despite the broad formulation of Aboriginal rights in section 35(1), *Sparrow* already provides a gatekeeper to limit the extent of their application.

The Court formulated a second gatekeeper in *Van der Peet* as *Sparrow* did not devise a test for identifying what counted as Aboriginal rights. Chief Justice Lamer also wrote for the majority in *Van der Peet*, which held that "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 the aboriginal group claiming the right."[27] The Court then added a further limitation on the right: those activities must be "practices, traditions and customs central to the aboriginal societies that existed in North America *prior to contact with the Europeans.*"[28] Contemporary activities, in order to receive constitutional protection, must have "continuity" with the pre-contact practices.[29] The *Van der Peet* test is relevant to the right to Aboriginal self-government as a species of Aboriginal rights because this was the test that was applied to the first and only direct

24. [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.].
25. [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].
26. S. 35 is a part of the *Constitution Act, 1982*, *supra* note 2, but not part of the *Canadian Charter of Rights and Freedoms*, which is made up only of ss. 1–34 of the *Constitution Act, 1982*. S. 35 rights, therefore, are not subject to the s. 1 limits to rights. See *Sparrow*, *supra* note 24 at 1102. The Court nonetheless devised a test for justified infringements to Aboriginal rights. See *ibid.* at 1110–111.
27. *Van der Peet*, *supra* note 25 at para. 46.
28. *Ibid.* at para. 44 [emphasis added].
29. *Ibid.* at para. 59.

consideration of self-government rights as constitutional rights by the Supreme Court in *Pamajewon*.

Briefly, in *Pamajewon* the appellants Roger Jones and Howard Pamajewon were charged under section 201(1) of the *Criminal Code*, which prohibits the keeping of a common gaming house.[30] They had done so on a reserve within the meaning of the *Indian Act*, the land of which was reserved from the general surrender of their traditional territory to the Crown through treaty. The appellants argued that since title to the land had not been surrendered to the Crown and at no point had the community ever surrendered their power to govern themselves to the Crown, the *Criminal Code* did not apply to them. Without dealing with counsel's arguments, the Court applied the freshly minted *Van der Peet* test to this claim. It asked whether the regulation of high-stakes gambling was a practice, custom or tradition integral to the pre-contact culture of the appellants' community. The Court reasoned that the activity of high stakes gambling did not exist in the pre-contact community, and that no such regulation existed either. It concluded against the appellants.

Pamajewon remains the only case in which the Supreme Court of Canada has directly confronted the issue of self-government, even fourteen years after the decision. Courts have continued to apply the *Pamajewon* approach to similar claims,[31] and for that reason alone the case remains important. But litigation is not the only method by which Aboriginal communities could secure constitutional protection for their rights to self-government. Since *Pamajewon*, the right to Aboriginal self-government has become recognized in Canada mainly through the negotiation of constitutionally recognized treaties. In 1995, the federal government put forward a policy on negotiations for Aboriginal self-government, which recognized the right of self-government as part of the rights recognized by section 35(1) of the *Constitution Act, 1982*.[32] The policy acknowledges:

> [T]he inherent right of self-government may be enforceable through the courts and . . . there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements.[33]

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30. *Criminal Code*, R.S.C. 1985, c. C-46, s. 201(1).
31. See e.g. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444*, 2007 ONCA 814, [2007] 88 O.R. (3d) 583, 287 D.L.R. (4th) 452.
32. Indian and Northern Affairs, Message from the Ministers, QS-5324–000-BB-A1, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (1995), online: Government of Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp>.
33. *Ibid.*

Negotiations to give effect to those rights have proceeded since then, but have resulted in few agreements.[34] One important part of the policy though is its offer of "constitutional protection" to certain aspects of self-government agreements through recognition of those provisions as treaty provisions. This other form of constitutional recognition arises out of the same section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms "treaty rights" along with "aboriginal rights." Shortly after the *Constitution Act, 1982* was proclaimed, the following provision was appended to section 35: "35(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."[35] By agreeing to declare the agreement to be an agreement within the meaning of section 35(3), the parties could secure constitutional protection for the agreement.[36] Alternatively, the parties could enter into a simple contractual agreement with a constitutional force that remains uncertain, as the Crown did with the First Nations of the Yukon.[37]

There are therefore three ways an Aboriginal community can get the federal and provincial governments to recognize a right to self-government: litigation, a non-constitutionally protected contract, or a constitutionally protected treaty. Should the public orders of government ever infringe upon an agreement, be it constitutionally protected or not, the community might seek to defend its rights through litigation as well. A community may choose to pursue its claims to self-government rights in any of those three ways. This results in a complex set of incentives for negotiators of self-government agreements, all stemming from a basic problem: without a definition of the extent of self-government rights protected by section 35(1) as Aboriginal rights, how will the Crown and the Aboriginal parties decide what positions to take in their

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34. For the self-government agreements that were concluded successfully, see Canada, Minister of Indian Affairs and Northern Development, *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of Yukon* (Ottawa: Minister of Supply and Services, 1993), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/ykn/umb/umb-eng.pdf> [*Umbrella*]; Nunavut Implementation Panel, *Annual Report For 2001–2004: The Implementation of the Nunavut Land Claims Agreement* (1993), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/ar0104/ar-eng.pdf>; *Nisga'a Final Agreement* (1999), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.pdf>; *Land Claims and Self-Government Agreement among the Tlicho, the Government of the Northwest Territories and the Government of Canada* (2003), online: <http://www.collectionscanada.gc.ca/webarchives/20051229013601/http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr2_e.pdf> [*Tlicho Agreement*]; *Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation* (2003), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/wfn/wfn-eng.pdf>; *Land Claims Agreement between the Inuit of Labrador, Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada* (2004), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/labi/labi-eng.pdf>.

35. *Constitution Amendment Proclamation*, S.I./84–102, C. Gaz. 1984.II.2985.

36. See e.g. *Tlicho Agreement*, *supra* note 34, s.2.1.1.

37. *Umbrella*, *supra* note 34, s. 24.12.1.

negotiations with one another?[38] What rights should they seek to protect through a constitutional treaty? What rights should be defined through ordinary contract? Should they seek to negotiate at all, or try to assert their rights to self-government through litigation, through the species of "aboriginal rights" rather than "treaty rights"? All of these questions depend on the alternatives available to the parties outside of negotiation. How much to codify in a self-government agreement depends on the norms that are recognized even in the absence of the agreements. How much protection against legislative derogation to put into the agreement depends on how well the self-government relationship is protected in the absence of its explicit recognition in treaties. The way to determine the shape of the self-government relationship between the Crown and Aboriginal communities must begin in the standards set down in the *Pamajewon* case. And, as Bradford Morse argues, to follow the *Pamajewon* approach would mean that every Aboriginal government would need to engage in *Van der Peet*-style litigation "for each and every head of jurisdiction it wishes to exercise."[39]

One need only consider a simple provision from one of these agreements to see the conceptual difficulties imposed by the *Pamajewon* approach. In the Yukon Territory, the various First Nations and the Crown reached an *Umbrella Final Agreement* from which each Nation and the Crown have made agreements for small variances to fit particular circumstances. The *Umbrella Final Agreement* is valid under the Canadian legal system through its enactment by the federal *Yukon First Nations Self-Government Act*.[40] Self-government agreements under this scheme are not constitutionally protected treaties, but are instead only ordinary contracts between the Crown and the First Nation.[41] Article 24.1.2.7 of the *Umbrella Final Agreement* lays out that the Crown and a Yukon First Nation government may agree to give the self-government authority a power to "borrow money."[42] Consider a hypothetical situation where the federal government and a Yukon First Nation government find themselves in a dispute. The federal government threatens to revoke the power of the First Nation to borrow money by amending the federal legislation that incorporates the self-government agreement. The issue is brought to court where the First Nation argues that Parliament's revocation of its statutory authority to borrow money has no effect on its *power* to borrow money—borrowing money is a power that it possesses by virtue of an inherent right to self-government that is protected as an Aboriginal

38. For an analysis of how one such treaty, the Nisga'a Treaty, interacts with existing s. 35 Aboriginal rights, see Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty" (2001) 35 U.B.C. L. Rev. 455.
39. Morse, "Permafrost," *supra* note 4 at 1036.
40. S.C. 1994, c. 35, ss. 5(1)-5(2).
41. *Umbrella*, *supra* note 34 at s. 24.12.1.
42. *Ibid.* at s. 24.1.2.7.

right under section 35(1). The First Nation argues that the statute was merely recognition of that pre-existing right, rather than the instrument that created the First Nation's power to borrow money. How would a court evaluate that argument? It would feel bound by the *Pamajewon* test. The inquiry then would be: Was the ability to borrow money integral to the distinctive culture of the Aboriginal community prior to European contact? The Crown would argue that since there was no conception of money in the community prior to European contact, the ability to borrow money could not have been integral to the culture of the First Nation, and therefore the claim must fail. The First Nation, on the other hand, would adduce evidence of how, in times of need, communities would help each other by lending tools, food and supplies. Such lending would have been centrally important to the community because it allowed it to survive as a community. One could imagine a similar kind of argument arising out of many of the provisions in a self-government agreement. Debates about this kind of claim would be framed in reference to some imagined and undefined set of practices, customs and traditions "integral to the distinctive culture" of a community as it existed prior to European contact. At best, the *Pamajewon* test provides unreliable guidance for the development of the constitutional protection of self-government rights. There is no ready list of all the practices, customs and traditions of a community. Even if one arrived at such a list, the question of how integral those practices, customs and traditions are to the culture of the community does not seem capable of admitting any principled analysis. It is equally difficult to interpret the continuity of a historical practice in light of the contemporary jurisdiction under dispute.[43] The indeterminacy of this test seems reason enough to abandon it,[44] but as the rest of this article will show, other features of the test reveal deeper flaws that make it unlikely that subjects of the law will be able to derive much guidance from it. The analysis that the Chief Justice undertook did not have a clear conception of the practice of self-government, and as a result, the *Pamajewon* approach leads to deeply unstable protection for self-government rights.

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43. The notions of "integrality" and "continuity" have already been subject to much criticism, even right at the delivery of the judgment. See e.g. the dissenting reasons of Justice L'Heureux-Dubé in *Van der Peet*, *supra* note 25 at 164–80, characterizing the Chief Justice's approach as leading to "frozen rights." See also the dissenting reasons of Justice McLachlin (as she then was) in *Van der Peet*, *supra* note 25 at paras. 252–60, worrying that the *Van der Peet* test was overbroad and indeterminate.

    See also Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993, who wonder whether a court would find ice hockey to be integral to the distinctive culture of the Québécois. They point to the difficulty for outsiders to identify the centrality of a practice to a community, the integrality approach's presumption of the independence of cultural elements, and that centrality itself is not static. See also *supra* note 4 and accompanying text.

44. See e.g. Dwight G. Newman, "Negotiated Rights Enforcement" (2006) 69 Sask. L. Rev. 119 at 121, for a discussion of how an imperfect knowledge of alternatives to negotiation adds complications to negotiations.

These nagging indeterminacies of the *Pamajewon* approach reveal a troubling picture of Canada's constitutional structure. The most immediate consequences of this picture arise in negotiations for self-government that have been progressing across the country.[45] Recall that litigation and negotiation are both ways for Aboriginal communities to achieve recognition of their right to self-government. Without a judicial test that provides reasonable guidance as to what might result from litigation, the best strategy may be to delay and hold out for greater certainty. This may explain why few self-government agreements have been concluded since the introduction of the inherent right policy.

For these reasons it remains important to analyze a thirteen-year old court judgment in detail.[46] In spite of its brevity, *Pamajewon* established a constitutional framework for the governance rights of Aboriginal peoples in Canada. Any changes that take place to the outmoded colonial governance regime (as delivered by the *Indian Act*, under which First Nations people still live) must now take place on top of the constitutional groundwork laid by *Pamajewon*. Fundamental problems with this groundwork hamper any efforts to build a post-colonial Canada.

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45. For theoretical arguments about the consequences of an unclear alternative to a negotiated settlement, see *ibid.* at 120–22. Newman at 122 suggests that "judicial silence on some issues [is] tantamount to allocating them to negotiation. . . ." He suggests that the judicial preference for negotiation in Aboriginal rights issues is an example of such silence. When the law fails to give clear guidance, it fails to cast a shadow that can guide the parties to a settlement that avoids litigation. The parties must then rely on their perceptions of their best alternative to a negotiated agreement, which can be wildly divergent. One party's ability to shift the other party's perceptions of available alternatives, or of the degree of each party's risk aversion may then have an impact on the substantive outcome of the negotiations. For a formulation of the theory of private ordering in the "shadow of the law," see Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

    Morse, "Permafrost," *supra* note 4 at 1037 suggests that "[a]n alternative approach to assessing the practical implications of *Pamajewon* is to conclude that the Supreme Court has elaborated the law on self-government in such a way as to close the door on future litigation on this subject for the foreseeable future. That is, the Court has created a legal standard that is so hard to meet and has rendered litigation so expensive to pursue that it is thoroughly unattractive for First Nations and the Metis to seek a judicial solution. The political route of pressuring for legislative change, or seeking negotiated self-government agreements with constitutional protection to implement the inherent right, may now have become the only option. If this is accurate, then the negotiating leverage of Aboriginal communities has been diminished significantly." This article offers significant support for this view.

46. This article only canvasses the continuing importance of *Pamajewon* from the perspective of the key role it plays in the system of legal norms that governs the law of Aboriginal self-government in Canada. For a broader discussion of why self-government is important to the lives of Aboriginal people, see Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and The Pragmatics of Advocacy" (1999) 27 Man. L.J. 241 at 250–52. See also *Delgamuukw*, *supra* note 8 at para. 136, for another possible approach to self-government rights.

III. The *Pamajewon* Litigation

On May 12, 1987, the Shawanaga Band Council passed Resolution 797.[47] The Shawanaga Band Council was a body constituted in compliance with the *Indian Act*, and it exercised authority granted to it under that statute. It also exercised authority as part of the inherent right to self-government that arises from the common law doctrine of continuity of Aboriginal law through the assertion of sovereignty by the Crown. The boundaries between each of these sources of authority are not always clear. In any event, the Band Council exercised that authority over the Shawanaga First Nation, an Indian Band within the meaning of the *Indian Act*, with jurisdiction over three reserves consisting of about 4,500 hectares of land about two hundred kilometres north of Toronto. Shawanaga is a community of Anishinabek. Resolution 797 reads as follows:

> Be it resolved that the Shawanaga First Nation Government officially advises the Federal Government of Canada and the Provincial Government of Ontario that the Shawanaga First Nation Government does not recognize these governments' laws having any application or jurisdiction on our sovereign land base set out in the 1850 Robinson Huron Treaty which was set aside and held by our people.
>
> Further, be it resolved that the Shawanaga First Nation rejects any enforcement officer entering Shawanaga First Nation lands to enforce federal or provincial laws without first signing a treaty agreement with the Shawanaga First Nation Government giving these governments jurisdiction on our lands.[48]

What the Chief and Council appeared to have had in mind when they made this dramatic claim of exclusive jurisdiction was the opening of a casino that would generate revenue for the benefit of the community.[49] Chief Roger Jones explained in his testimony at trial:

> [T]he rationale behind it was to create revenues to build a school, build a community centre, build a medical centre, to build housing, to provide services to our people by way of salaries, to have money for budgets for new roads, look after septic systems, all of those things that our government would have to be responsible for.[50]

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47. For more details on the circumstances of *Pamajewon*, see Morse, "Permafrost," *supra* note 4 at 1023–30 who provides an excellent summary of the facts, the trial decision, and the decision of the Court of Appeal for Ontario.
48. *R. v. Jones and Pamajewon* (1993), 3 C.N.L.R. 209 (Ont. Ct. (Prov. Div.)).
49. According to Morse, "Permafrost," *supra* note 4 at 1019–23 the Shawanaga and Eagle Lake First Nations were something of pioneers in introducing gaming to reserves in Canada. Morse at 1020 also provides details as to the economic benefit of gambling to Indian nations in the United States.
50. *Pamajewon*, *supra* note 4 (Evidence, trial testimony of Roger Jones) at 115 [Jones Evidence].

Chief and Council then proceeded to consult community members on the casino plan throughout the summer. The consultations culminated in the Shawanaga First Nation Lottery Law,[51] which the Chief and Council made the subject of a referendum on August 31, 1987.[52] In the referendum, the community approved of the Lottery Law, notably, by a unanimous vote. Among other things, the Lottery Law established a Shawanaga First Nation Lottery Authority, the membership of which was to be appointed by the Shawanaga Band Council. The Lottery Law empowered the Lottery Authority to grant licences for the operation of gambling establishments, such as the one that eventually became the subject of the criminal charges that led to the appeal to the Supreme Court of Canada.

At his trial, Chief Jones was asked in examination-in-chief about the referendum:

> Q. Is this the normal way in which your community makes decisions?
> A. Yes, it is. We've always been democratic and I guess, maybe I could give you an example of that. There are many times we have people from other First Nations or Indian reserves . . . who want to transfer to our community and become member[s] of our community. What we do in that particular case is we send a petition around to all of the people to look at, to vote for or against, as whether this person should become a member of our community. So that everybody gets their opportunity of say. And after that is completed we move ahead and take that direction. If it's favourable, we pass the appropriate resolution to ask that person to be allowed to come into our community and released from the other community as well. So whenever we do something we want to involve the people in our community. And I guess we're kind of lucky in the sense that we have a small population, perhaps, you know, we have over a hundred people living on the reserve now, and we can call the people together within a few hours and talk to them.
>
> Q. How long have decisions been made that way in the community?
> A. As long as I can remember, they have been made that way. You know, if you can't get the people out to a meeting, it's always that you go around from house to house and at least speak with the people over a cup of tea, and let them know what's happening. So, that's the way we have done business. It's not something where the Council is there making decisions for all of the people and without involving them. We are there to take direction from the people who put us there.[53]

In accordance with the Lottery Law, the Lottery Authority was appointed, and the gambling operations began in September 1987.[54] The gambling operations were

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51. *Pamajewon*, supra note 4 (Evidence, Shawanaga First Nation Lottery Law) at 807.
52. Jones Evidence, *supra* note 50 at 115.
53. *Ibid.* at 116–17.
54. *R. v. Pamajewon* (1994), [1995] 120 D.L.R. (4th) 475 at 479, [1995] 2 C.N.L.R. 188 (Ont. C.A.).

advertised in cities near the reserve, and a steady clientele of non-Aboriginal people came to gamble.[55] The province of Ontario, which has the jurisdiction to regulate games of chance, offered a gambling licence to the Band, but the Band refused the offer "on the basis that such a licence was unnecessary because the band had an inherent right of self-government."[56] In 1990, Howard Pamajewon, a band councillor, and Chief Roger Jones were charged under s.201(1) of the *Criminal Code*, which read: "Everyone who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."[57] At trial, and throughout the appeal to the Court of Appeal for Ontario, and then to the Supreme Court of Canada, Jones and Pamajewon relied, among other things, on a self-government argument: the *Criminal Code* did not apply to them because they had never surrendered their reserve land to the Crown, and thus, the Crown's law did not apply on reserve land. They also argued that, in any event, nothing about the Crown's authority ousted the Band's authority to regulate gambling.

The lawyer for Jones and Pamajewon called evidence of Anishinabek governance practices into the record, tendering evidence from historian James Morrison. Among other things, he read into the record the Jarvis report about the execution of the mentally ill man:

> He came among us at the very beginning of last winter, having in most severe weather walked six days, without either kindling a fire, or eating any food.
> During the most part of this winter he was quiet enough, but as the sugar season approached got noisy and restless. He went off to a lodge, and there remained ten days, frequently eating a whole deer at two meals. After that he went to another [lodge] when a great change was visible in his person. His form seemed to have dilated and his face was the color of death. At this lodge he first exhibited the most decided professions of madness; and we all considered that he had become a Windigo (giant). He did not sleep but kept on walking round the lodge saying "I shall have a fine feast." Soon this (caused) plenty of fears in this lodge, among both the old and growing. He then tore open the veins at his wrist with his teeth, and drank his blood. The next night was the same, he went out from the lodge and without an axe broke off many saplings about 9 inches in circumference. [He] never slept but worked all that night, and in the morning brought in the poles he had broken off, and at two trips filled a large sugar camp. He continued to drink his blood. The Indians then all became alarmed and we all started off to join our friends. The snow was deep and soft and we sank deeply into it with our snow shoes, but he without

55. *Ibid.*

56. *Pamajewon*, *supra* note 4 at para. 6. Morse, "Permafrost," *supra* note 4 at 1024, suggests that the Aboriginal parties might have also been worried that seeking a licence from the Crown would undermine their claim to a right of self-government.

57. *Criminal Code*, *supra* note 30.

> shoes or stockings barely left the indent of his toes on the surface. He was stark naked, tearing all his clothes given to him off as fast as they were put on. He still continued drinking blood and refused all food eating nothing but ice and snow. We then formed a council to determine how to act as we feared he would eat our children.
> It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it. . . .
> The lad, who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son. We also have all made the old man presents and he is now perfectly satisfied.
> This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.[58]

Morrison went on to testify about the use of consensus to make other important decisions for the community, such as for land surrenders to the Crown:

> [I]t was actually a source of . . . discontent to Government Officials because they felt that the necessity of this kind of consensus was very slow and made it difficult to get decisions out of various bands. That in a lot of ways the Government would have preferred to deal with the Chiefs alone on a one to one basis. They often complained about this slowness of arriving at a decision because of the native consensus tradition.[59]

As this evidence about historical governance practices was the basis of the argument of the parties before the Supreme Court, as well as the argument that had been rehearsed in the lower courts, it is striking how far the Court's reasoning departed from these arguments. Before the Supreme Court, the appellants repeated the argument about self-government over unceded land, and, as in the lower courts, based their submissions on the proposition that the inherent right to self-government was an incident of Aboriginal title. The Supreme Court of Canada's reasons for judgment, however, show no trace of those arguments and instead apply the *Van der Peet* test.

IV. The Reasoning in *Pamajewon*: Some Preliminaries

This section will consider in detail how the reasoning in *Pamajewon* applied the test laid out in *Van der Peet*, and suggest that the *Van der Peet* test is an inappropriate way to delineate the instances of an exercise of the right of self-government that ought to be protected by the constitution. The next section will show that this approach, in looking for practices, customs and traditions integral to the distinctive culture of a com-

58. Borrows, "Legal Traditions," *supra* note 9 at 45–46; *Pamajewon*, *supra* note 4 (Evidence, testimony of James Morrison) at 328 [Morrison Evidence].

59. Morrison Evidence, *ibid.* at 300.

munity, encounters difficulties when applied to self-government practices. Specifically, *Pamajewon* seems to ignore the possibility that power-conferring rules may have been integral practices for a community. The possibility of the constitutional protection of power-conferring rules, though, creates conceptual problems. First, however, this section will point out some of the ambiguities in the reasoning of *Pamajewon*. By identifying them, they will be less distracting from the substantive conceptual issues at stake in the *Pamajewon* approach to self-government rights. This section also identifies some problems with the *Pamajewon* reasoning from the perspective of legal process: namely, the reformulation of the terms of the law beyond the case that the parties would have thought they needed to meet.

The first step in the *Pamajewon* reasoning is a redefinition of the appellants' claims, which the Chief Justice claims he was entitled to do by virtue of the *Van der Peet* test.[60] He writes:

> [27] The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands." To so characterize the appellants' claim would be to 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. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.[61]

The Chief Justice narrowed the appellants' claim from that of managing the use of their lands to a claim to a right "to participate in, and to regulate, gambling activities on their respective reserve lands."[62] Regulation, at its broadest, means the formation of norms through the making of rules and the application of those norms to particular cases.[63] The Chief Justice proceeds to apply the *Van der Peet* test to the activity of making rules on the subject of gambling and then directs his inquiry toward the existence of rules about gambling in the pre-contact Aboriginal community. He decides that he cannot find anything to discharge the burden of the test:

> [28] I now turn to the second branch of the *Van der Peet* test, the consideration of whether the participation in, and regulation of, gambling on the reserve lands was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. The evidence

60. The Chief Justice cited *Van der Peet*, *supra* note 25 at para. 53, cited in *Pamajewon*, *supra* note 4 at para. 26.
61. *Pamajewon*, *supra* note 4 at para. 27.
62. *Ibid.* at para. 26.
63. The reasons in *Pamajewon*, *supra* note 4 also seem to assume that all governance must be done through regulation. Whether this is a good assumption is an interesting question, but it is beyond the scope of this article.

> presented at both the Pamajewon and Gardner trials[64] does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. In fact, the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and prevalence of gaming in Ojibwa culture. *While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal. . . .*
>
> [30] Given this evidentiary record, it is clear that the appellants have failed to demonstrate that the gambling activities in which they were engaged, and their respective bands' regulation of those activities, took place pursuant to an aboriginal right recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.[65]

It will be helpful to pause here to consider two ambiguities in the cited reasoning. First, as the Chief Justice frames it, there are two verbs in the claim: to participate and to regulate.[66] The Chief Justice does not explain whether these describe separate rights or the same right, but it seems clear that one is not dependent on the other. The incidence of participation in an activity is a question of whether some set of historical events actually took place, whereas the regulation of an activity is a question of the existence of rules in an area of social life. If the rules are customary, their existence must be determined from inquiring into the state of mind of those who were subject to the rules. Participation and regulation do not depend on one another. For instance, insofar as a community can participate in murder, it does not need to participate in murder in order to regulate it and it does not need to regulate it in order to participate in it. Thus, a conclusion about the lack of one activity cannot be taken as a conclusion about the lack of the other. The analyses must proceed separately.[67]

The second ambiguity in the Chief Justice's reasoning arises in relation to the right to regulate gambling. At paragraph 28, he characterizes the available evidence from Morrison, the expert historian. The Chief Justice held that while the evidence did show there was some evidence that the Ojibwa gambled, it failed to show that the

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64. The appeal in *Pamajewon*, *ibid.*, was heard together with that of Gardner, and both were disposed of for the same reasons.
65. *Ibid.* at paras. 28–30 [emphasis added].
66. See *ibid.* at para. 28.
67. McNeil, "Aboriginal Rights," *supra* note 4 at 282 also draws attention to this elision: "[T]here is a distinction here between an Aboriginal right to gamble, and a right of self-government in relation to gambling. To have the former, an Aboriginal people must have engaged in similar gambling historically, but to have the latter apparently they must go further and prove as well that they regulated that gambling."

gambling the Ojibwa engaged in was "large-scale," but only that it was "small-scale." Moreover, he found that there was no evidence of regulation of small-scale or large-scale gambling in the pre-contact community. It is ambiguous whether the Chief Justice's reasons require there to be evidence of pre-contact regulation of large-scale gambling in order for the appellants to establish their case, or whether evidence of traditional regulation of traditional gambling would have been sufficient. Whether regulation of small-scale gambling in pre-contact times would suffice to prove a right to regulate large-scale gambling in the contemporary era raises the issue of what is meant by "continuity" of practices from pre-contact times to the present, but the case does not appear to turn on this point.[68] Because the Chief Justice does not find either kind of regulation, it is only necessary to point out that this is a second ambiguity in his reasoning.

Parenthetically, the lack of evidence seems like a peculiar argument for the Chief Justice to rely on here, as the test that he applies, the *Van der Peet* test, did not exist when the *Pamajewon* case was heard.[69] The *Pamajewon* hearing took place on February 26, 1996, and on the same day the appeal was dismissed by the Court from the bench. Reasons were only given almost six months later, on August 22, 1996, applying the *Van der Peet* test, which is found in a decision that was only released a day before, on August 21, 1996. It is not surprising then that the evidence adduced by the appellants would be insufficient to meet the burden of proof established by the *Van der Peet* test, because counsel could not have known the requirements of the *Van der Peet* test when they made their submissions for a test that did not yet exist. The arguments of counsel naturally did not focus on establishing the activity of law-making as a practice, custom or tradition integral to the distinctive culture of the Anishinabek, but instead went to establishing the continuing sovereignty of the Anishinabek over unceded land. Simply as a matter of legal process, it seems unfair for the Court to have relied on the insufficiency of evidence to reach its conclusions.

In these preliminaries, I have noted that the *Pamajewon* reasoning is ambiguous between deciding upon large- and small-scale gambling, and between participating

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68. The progeny of *Van der Peet*, *supra* note 25 has not offered much guidance as to how to determine whether a modern practice is sufficiently continuous with a pre-contact practice either. See *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, 274 D.L.R. (4th) 75 [*Sappier*] which held that the contemporary harvesting of wood for domestic purposes is continuous with the pre-contact practice of harvesting wood for survival. But often the courts will employ continuity-type arguments in their abstraction and integrality analyses. See *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, where the Court was faced with a claim by a Mohawk appellant, who argued that he had the right to bring certain domestic goods from a neighbouring Mohawk reservation in the United States into Canada without paying duty on the goods. The Court held that while east-west trade was integral to his culture, north-south trade was not, and rejected the appeal.

69. See also Morse, "Permafrost," *supra* note 4 at 1028, where Morse makes a similar point.

and regulating an activity. There is however a much more substantial problem with the Chief Justice's reasoning. The Chief Justice's reasons at paragraph 30 result in a conclusion against the appellants, on both the participation right and the regulation right. From the lack of evidence that gambling was the subject of regulation of the ancient Anishinabek, the Chief Justice concluded that authority to regulate gambling was not integral to the distinctive culture of the appellants, and thus held that section 35(1) did not oust the application of the *Criminal Code*. This is the keystone of this argument to uphold the conviction, but the reasoning ignores a crucial category of evidence.

V. The Reasoning in *Pamajewon*: Conceptual Problems

Assume that no evidence of gambling or the regulation of gambling, either large- or small-scale, could be found. That is, if we overlook the gaps in the reasoning outlined above and assume the Chief Justice was correct in concluding that no evidence of pre-contact regulation of gambling existed, does that exhaust the inquiry? No, it does not, because while the lack of such evidence might suffice to establish that the community *did not regulate* the activity in question, it is not sufficient to establish that the pre-contact community *could not have regulated* the activity. Why is it necessary to ask both questions in order to conduct a *Van der Peet* inquiry? For one, there might have existed in the pre-contact community what legal philosopher H.L.A. Hart has called "power-conferring rules,"[70] that may have been overlooked by the Chief Justice, yet could have satisfied the requirements of the *Van der Peet* test. If a power-conferring rule is integral to the distinctive culture of a community, should it not receive constitutional protection? Posing the question in this way moves the conceptual work to be done to finding the appropriate level of generality at which to begin the inquiry, and to the appropriate approach to an absence of evidence of limits to the jurisdiction of the pre-contact community. Yet neither of these are helpful ways of defining the right to self-government. This section concludes by highlighting the crucial part of the conceptual puzzle that the *Pamajewon* approach ignores: every customary norm is a norm of some community, and the test as it is currently formulated has no resources to identify the appropriate boundaries of the community for which a norm is valid.

A. The Recognition of Power-Conferring Rules

The lack of evidence of pre-contact Ojibwa laws regulating gambling was probably the proposition the Chief Justice relied on to reject the appellants' claims. Yet, on the

70. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994) at 26–42.

terms of the *Pamajewon* test that is not reason enough to reject a claim because there might have been some other rules that actually empowered the community to regulate gambling. Power-conferring rules could have been part of the customs that were integral to the pre-contact distinctive culture of a community. To explain this point, it is helpful to begin by noting an elision in the *Pamajewon* reasoning. In the final two sentences of paragraph 28, the Chief Justice switches between two versions of the characterization of the evidentiary claim: in the penultimate sentence, he states that the evidence does not address the extent to which this gambling was "the subject *of* regulation."[71] In the final sentence of the paragraph, he says that the evidence does not describe gambling as having been "subject *to* regulation." Because the Chief Justice does not actually apply the law to any specific evidence before him, it is not clear if he is making two different points here, or only one. To explain what the distinction might be between an area of social life being the "subject *of* regulation" and it being "subject *to* regulation," consider two ways in which the Anishinabek might have regulated gambling:

1. By custom, the Anishinabek might have had rules that restricted gambling or prohibited it outright. For example, "No one around here is to gamble."
2. By custom, the Anishinabek might have had some recognized procedure by which to make rules (about different areas of social life, one of which could be gambling) that have authority over the community. For example, "As a community, we have a custom that when we come to consensus we may make rules about anything. Gambling did not used to exist in our community, but now that it does, we as a community have decided that it will be regulated according to scheme X."

The concept of something being the "subject *of* regulation" only captures the rules in category (1). Category (2) is a fundamentally different kind of rule from those that fall under category (1). Rules in category (2) are examples of gambling being in some way "subject *to* regulation," even if they were not the "subject *of* regulation." To conclude that gambling was not subject to regulation at all, the Chief Justice would have had to conclude about the absence of category (2) rules as well as the absence of category (1) rules.[72]

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71. In this and the following paragraphs, the emphasis on the preposition between "subject" and "regulation" is mine.
72. I also refrain here from taking any position on whether pre-contact Aboriginal governance is accurately described as "law." I have tried to use the terms "norms" and "rules," where it is sensible to do so, to replace references to "law," to describe both Aboriginal governance and governance through the contemporary state "legal system." The argument here does not depend on whether pre-contact Aboriginal governance is characterized as "law." As long as there is one norm from the pre-contact community that would fit into that category of norms identified as "power-conferring rules," then the critique posed here remains valid. It is also possible that there were methods of governance that did not involve norms or rules, but for the purposes of this article I will bracket that possibility.

To see the importance of this distinction, it will be helpful to outline some basic concepts used by analytical legal philosophers, such as H.L.A. Hart and Joseph Raz. One of Hart's great insights is that legal rules do not come just in one form.[73] Some rules are rules of obligation, such as the obligation to refrain from murder: these can be called duty-imposing rules. There are also rules that empower a person to change his or her own normative situation, or that of another, upon the satisfaction of certain conditions: these are power-conferring rules.[74] The classic example of a power-conferring rule is the rule about making wills: unless a will bears the signatures of two witnesses, it has no validity within the legal system. That power-conferring rule provides conditions of validity for the exercise of powers to make a will that will be recognized by the legal system. In the case of wills, the requirement for two signatures is a necessary condition for the exercise of the power to control one's property from beyond the grave.[75] The disposal of A's estate is therefore subject to A's decisions about how to draft her will, if she decides to draft one at all. If A does draft a will, then the disposal of her estate becomes the subject *of* her decisions as reflected in the will. If A dies intestate, the disposal of her estate will *not* be the subject *of* her decisions,[76] even though it was always subject *to* her power, should A have drafted a will while she was still alive. Rules about the conditions it takes to make a valid will are therefore rules that confer power on the testator upon the fulfilment of certain conditions. To generalize, this type of rule might confer power upon a member of a community to act in a certain way. For instance, a rule might confer upon a community the power to make a decision binding upon the whole community going forward, whenever consensus has been reached. Thus, rules that could have touched upon gambling might have come in the shape of power-conferring rules or rules of recognition, like the rules in category (2) above. A rule that conferred power on cer-

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73. *Supra* note 70.

74. For an elaboration of this distinction, see e.g. Joseph Raz, *The Concept of a Legal System*, 2d ed. (Oxford: Oxford University Press, 1980) at 147–67; Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1975) at 49–106; Leslie Green, "Law and Obligations" in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 514 at 516–19. Contrast this view with, for instance, John Austin's view, which was more prevalent before the publication of Hart, *supra* note 70. Austin held that all law, properly so called, are commands that oblige: John Austin, *The Province of Jurisprudence Determined* (Indianapolis: Hackett Publishing, 1998) at 24–33. Because of the difficulty that Austin's theory would have in explaining the law requiring two signatures on a will for validity, or the law empowering a legislature to make law, Hart's theory is generally preferred. The many interesting debates about the normative nature of law are unfortunately beyond the scope of this article. The logic of my argument about the *Pamajewon* case depends only on the validity of the basic distinction between duty-imposing and power-conferring rules.

75. *Supra* note 70 at 36.

76. Unless, of course, A had made a decision to die intestate.

tain members of the community need not have any restrictions on the content of the power that it purports to confer; it need not foresee all of the actions that these people might be permitted to undertake. If prior to European contact the Anishinabek had some rule of validity or power-conferring rule that allowed them to regulate gambling, the rule could have made gambling subject *to* regulation without making it the subject *of* regulation.

It is difficult to tell from the brief reasons of the Chief Justice whether he thought that the lack of evidence showing that gambling was the subject *of* regulation was sufficient to establish that gambling was not subject *to* regulation, or whether he thought these were separate issues, and concluded on both based on separate evidence. The first possibility appears to be an error in logic. However, for the second possibility, if they are considered as separate issues, it seems apparent that there was indeed evidence consistent with the proposition that gambling *could* have been subject *to* regulation. One rule that was adduced as evidence before the Court and that the Chief Justice did not specifically address in his reasons for judgment was the rule about the consensus procedure for making decisions for the community. As discussed above, evidence was adduced regarding the use of this rule on at least three occasions. In the first case, the community was faced with a man who had become a Windigo. They called a community meeting, and came to a consensus to execute the man. They empowered one man to carry out the execution—an act which, if not for the normative consequences of the community's consensus about the matter, would have been regarded as murder. In the second case, the community came to a consensus about the terms of the land surrendered to the Crown. The person representing the community was not empowered to meet with the Crown until consensus had been reached. In the third case, consensus was required before the community admitted a new member. These cases, along with the evidence of a general rule about the use of the consensus procedure, were adduced as evidence in the expert testimony of historian James Morrison. Consensus in these cases was a condition of validity for the conferral of power to act in the name of the community and to reach a decision to form a norm that was authoritative for the community. The evidence adduced seemed to add up to establish the existence of a customary power-conferring rule by which certain procedures were regarded as recognized ways of creating authoritative norms for the community and binding upon members of the community. As seen in the testimony of Chief Roger Jones, when the Shawanaga First Nation decided to enact the Lottery Law, they understood it to be an application of the rule that consensus enabled the community to act as a group. The Shawanaga Band Council was explicitly applying its ancient rule regarding the authority granted by the consensus procedure. The Council held the referendum expressly to try to achieve the kind of consensus that would have arisen from the pre-contact plenary meeting. Although the evidence of consensus decision-making in ancient times does not show that the community could have used it to make the very decision it made in enacting the Lottery Law, there is no reason to believe that it would have been an invalid use of the pro-

cedure.[77] In any case, this evidence did not form any part of the Chief Justice's explicit reasoning in the judgment. To reach the conclusion that gambling was never subject *to* pre-contact Anishinabek regulation, it is necessary for the Court to provide further reasons about why the consensus procedure does not pass the *Van der Peet* test. At the very least, then, the Chief Justice's reasoning moved too quickly and failed to address evidence of the consensus procedure. In any event, the evidence of the consensus procedure stands for the possibility that some power-conferring rule might be a customary rule that an Aboriginal community could claim as being both continuous from and integral to their pre-contact distinctive culture. Applying the *Van der Peet* test to such a claim reveals at least three fundamental problems with the approach. The first two problems arise from the lack of conceptual tools within the *Van der Peet* approach to deal with problems of the appropriate level of generality of the inquiry, and the lack of evidence as to limits to jurisdiction. The third relates to the problem of selecting the appropriate community for which to ask whether a given norm was a custom of that community.

B. Levels of Generality

The first conceptual problem relates back to the Chief Justice's decision to reframe the claim of the appellants. Recall that while the appellants had asserted "a broad right to manage the use of their reserve lands," the Chief Justice held that this claim was "at a level of excessive generality."[78] He narrowed the claim to the right "to participate in, and to regulate, gambling activities on their respective reserve lands."[79] By narrowing the appellants' claim, the Chief Justice made it more difficult for them to succeed.[80] While this feature may be true of all rights claims under the *Van der Peet* test, it is necessarily true of self-government claims based on power-conferring rules. The broader a claim is for self-government rights, the less specific the evidence to prove it needs to be. Since all Aboriginal communities were once wholly self-governing, clearly, if framed at the ultimate level of generality, it would be difficult to show that complete self-government was not integral to their distinctive culture.

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77. The Crown might have argued that a referendum does not have the same deliberative nature as a meeting of an assembly and suggested that the contemporary practice did not have sufficient continuity with the pre-contact practice. However, like the appellants, the Crown did not have the opportunity to present its arguments applying the *Van der Peet* test.
78. *Pamajewon*, *supra* note 4 at para. 27.
79. *Ibid.* at para. 26.
80. Linda Popic, "Sovereignty in Law: The Justiciability of Indigenous Sovereignty in Australia, the United States and Canada" (2005) 4 Indigenous L.J. 117 at 148 makes a similar point: "[B]y narrowing down the scope of the right to govern, and assessing the particular activities undertaken before European contact, it seems it would be possible to decide that the rights of autonomy in relation to specific affairs were not integral to Indigenous culture."

On the other hand, the narrower the characterization of the right, the more specific the evidence needs to be to prove it. For instance, a claim to a right to regulate large-scale gambling would require the Aboriginal claimant to prove that the pre-contact community had jurisdiction not only over gambling, but over large-scale gambling. On the other hand, a general right to self-government would include a right to regulate large-scale gambling as well. The courts have not provided any principles to find the appropriate level of generality of a claim. Without this, the *Van der Peet* test effectively permits the courts to move the goalposts after the parties have completed their submissions.[81] This feature of the test means that it is very difficult for those subject to the law to have guidance without going to court.[82] Further, it exacerbates the risk of a results-oriented jurisprudence. The existence of power-conferring rules at the highest levels of generality attracting *Van der Peet* protection begs the question of why such claims should not succeed. The possibility that the courts may short-circuit a claim after arguments have been completed by reformulating the right at a level of generality where there is insufficient evidence to prove it is a serious defect of this approach. The conceptual problem is that short of reframing the right, there is really no logic within the integral to the distinctive culture test for rejecting claims, like the one made in *Pamajewon*, that are framed at a highly general level.

C. Absence of Evidence of Limits to Jurisdiction

Now let us consider how the *Van der Peet* test applies to a claim for constitutional protection for a power-conferring rule, regardless of the level of abstraction with which it has been framed. How should the requirement of continuity from pre-contact

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81. Compare Justice Scalia's judgment in *Michael H. v. Gerald D.*, 491 U.S. 110 (1990) at 127, holding that privacy rights are to be framed with reference "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." In a curious parallel with the *Van der Peet* jurisprudence, Justice Scalia was trying, at 111, to demarcate interests protected by the Fourteenth Amendment to the US Constitution by only protecting a "liberty" interest [that] is one so deeply imbedded within society's traditions as to be a fundamental right. . . ." See Laurence H. Tribe & Michael C. Dorf, "Levels of Generality in the Definition of Rights" (1990) 57 U. Chicago L. Rev. 1057 for a discussion of how determining the level of generality with which to conduct a rights inquiry can be determinative of the outcome, and the impossibility of formulating a value-neutral approach to setting the level of generality.

82. See e.g. the recent Supreme Court of Canada decision in *Sappier*, *supra* note 68, for an apt illustration of this problem. The respondents had been charged with unlawful possession and unlawful cutting of timber from Crown lands, to which they pleaded that they had a s. 35 Aboriginal right to harvest timber from those lands. The respondents argued, at para. 20, for an Aboriginal right "to harvest timber for personal use," and focused on the importance of wood to their culture and the uses to which the wood was put. The Crown, on the other hand, argued at para. 46 that the evidence would have been sufficient to make out a right to gather "birch bark for the construction of canoes or hemlock for basket-making. . . ." Between these two poles, the Court at para. 24 reasoned that the appropriate characterization of the claim was to "a right to harvest wood for domestic uses as a member of the aboriginal community."

("T_1") to post-contact ("T_2") practices be applied to a customary power-conferring rule? With the practice of activities that are not governmental in nature, the application is conceptually straightforward, even if vulnerable to indeterminacy. For instance, to ask whether commercial fishing at T_2 is a practice continuous with bartering fish for other goods at T_1 is a conceptually unchallenging inquiry.[83] But inquiring about the right to make duty-imposing rules is a less straightforward inquiry. For instance, one could hypothetically ask whether a rule prohibiting the eating of certain parts of an animal at T_1 is continuous with a rule prohibiting the sale of junk food at T_2. Assuming that the rule prohibiting the eating of parts of an animal was integral to the distinctive culture of the Aboriginal community at T_1, the *Van der Peet* test would then demand that a court determine whether the T_2 example is sufficiently similar to, or sufficiently continuous from, the T_1 example. This would require the court to inquire only as to the kinds of decisions that *were* made and then to generalize from that to a proposition on the decisions that *could have been* made. This kind of inquiry is difficult for the kind of community boundary-drawing concerns outlined in the next subsection, but otherwise it is similar to any other inquiry about continuity of practices from T_1 to T_2. The Court might have asked for a list of decisions that were made at T_1 using the consensus procedure, and generalize from there into certain concepts of jurisdiction, such as "the regulation of food consumption" in our example. The same question asked of a power-conferring rule of unspecified scope, like the one seen in *Pamajewon*, is conceptually even dicier. Consider again the consensus procedure as presented in *Pamajewon*. If the Court had chosen to deal with a claim to constitutional protection for the right to make binding decisions as a community by coming to a consensus, then it might have asked what kind of decisions were made or could have been made at T_1 using the consensus procedure. But the fact that only those decisions were made in the past does not mean that the powers of the community were conceived as being limited to those decisions. In trying to make this inquiry, the Court may be confronted with a situation where there was no explicit understanding of any limits to what the community could have decided using the procedure. In a way analogous to how English law understands the Sovereign in Parliament to have no conceptual boundaries to its jurisdiction, one could imagine Aboriginal communities that would have had no conceptual boundaries to what they understood themselves to be able to do as a community. In the absence of any evidence as to limits to the jurisdiction of any power-conferring rule, how is a court to interpret a limit to the kinds of actions a pre-contact community could have taken under that rule? The inquiry would then seek to compare the claim at T_2 to the absence of evidence from

83. *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648.

T_1. The only option open to the courts is to speculate, counterfactually, about what people at T_1 would have thought were limits to that jurisdiction. Otherwise, should an absence of evidence of limits to jurisdiction at T_1 be taken to mean a similar absence of limits in T_2, suggesting that there are no limits to the self-governing authority's jurisdiction protected by the constitution? At best, like the reframing of the Aboriginal party's claim above, this feature of the *Van der Peet* test makes it very difficult to be guided by the law of constitutional protection of self-government rights. Again, the *Van der Peet/Pamajewon* approach risks a results-oriented jurisprudence where the court consistently finds itself looking for limits to historical conceptions of jurisdiction where none are to be found.

D. Recognition of Norms as Norms of a Community

Considering the analysis of customary rules through the *Van der Peet* test suggests a third deficiency of the current approach. This deficiency stems from the nature of custom: every custom, and therefore every customary rule, is the custom of some community. It is both a necessary and sufficient condition for a custom to be authoritative merely for it to be accepted as binding by some community.[84] Any customary norm is dependent on at least two deeper norms: first, that a given community is a group of people capable of making decisions together, as a group, and second, that the given community can, through custom, bind each other and that deviations from the decision will be regarded unfavourably. For instance, pedestrians on the street might have a custom of walking on the left side of the pavement rather than the right. Similarly, a group of people who see each other every day in the library might have a custom of being quiet while working. Bearing this in mind, let us consider the project in which the *Van der Peet* approach engages. Recall that the common law doctrine of continuity holds that upon the Crown's assertion of sovereignty over a community, the local laws, institutions, and customs of that community remain in force unless the Crown expressly abrogates or alters them. Applied to the self-government practices of Canadian Aboriginal communities, the doctrine would hold that the rules of membership of Aboriginal communities remained in force until the Crown modified them. When the Crown made treaties with Indian bands, for example, it dealt with representatives of Aboriginal communities of their community's own choosing who were empowered by their community to negotiate with the Crown. Throughout these transactions, the boundaries of the community were determined by the community itself. However, the *Indian Act* gradually introduced norms into the commu-

84. For an illuminating account, see John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) at 238–45.

nities' regulation of their own boundaries, eventually to centrally control the membership of those communities, making the Indian Register the authoritative record of band membership. The Crown introduced rules that overrode the norms made by Aboriginal communities about the boundaries of the community that had continued through the assertion of sovereignty.

The *Van der Peet* test holds that practices, customs and traditions identified as continuous from and integral to the pre-contact culture of Aboriginal communities have constitutional immunity from Crown legislative interference. Are the norms about the boundaries of the community also subject to section 35 protection? [85] Consider the legal situation that would have ensued had the appellants in *Pamajewon* succeeded in securing constitutional protection for the right to regulate gambling. Could the Crown then have responded by administratively merging the Shawanaga First Nation with a neighbouring band that had more members and were unanimously opposed to the hosting of a casino in the community? Could the Crown have administratively dissolved the Shawanaga First Nation by reassigning members of the band to various neighbouring bands? If the *Van der Peet* test confers constitutional protection only on a selected set of Aboriginal customary laws, does it confer protection also on those norms constituting the boundaries of Aboriginal communities, the existence of which are necessary for the existence of customary law? Does it also protect the norm that the communities are capable of self-regulation through the making of binding norms? If not, then the protection that the *Van der Peet* test offers is of doubtful utility to the Aboriginal community. If so, then the powers that the Minister possesses to organize bands and their membership might be of doubtful constitutional validity. The nature of customs as belonging to communities is thus also a source of great uncertainty stemming from *Pamajewon*. In asking for evidence of custom without giving any way of determining the boundaries of the community for which a

85. Currently, the *Indian Act*, *supra* note 2 at s. 17, empowers the Minister to merge bands only with the consent of the majority of electors of the bands to be merged. However, as the *Indian Act* is an ordinary statute, it is subject to amendment by Parliament. Parliament, subject to the restrictions in the Constitution, can empower the Minister to merge bands without their consent. However, seeing as an analysis of the constitutional rights of bands to avoid an administrative merger will once again depend on the *Van der Peet* test, it seems that the problem raised here remains valid.

It may be that any such exercise of power by the Minister is subject to the duty to consult, but it would seem that the duty to consult must be grounded in a pre-existing Aboriginal right. See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 35, 245 D.L.R. (4th) 33. I am grateful to Bryce Edwards for highlighting this problem for me.

This analysis also ignores any arguments that might arise from the doctrine of extinguishment of Aboriginal rights. Moreover, it may be that in most cases such administrative mergers would be politically unpalatable. However, this article seeks to point out a problem with the coherence of the *Van der Peet* test as doctrine.

norm is a custom, *Pamajewon* lacks a major conceptual tool that is necessary for the kind of analysis it purports to undertake. Before recognizing any norm as a constitutionally protected customary law, the doctrine must develop a way to delineate the boundaries of communities.[86] Otherwise, the question remains as to whether the *Van der Peet/Pamajewon* approach also protects the integrity of the boundaries of a community from Crown interference.

VI. The US Alternative to the *Van der Peet* Historicist Approach

Both the Canadian and American legal systems are descendants of the English legal system. Both also face an analogous problem of how to recognize the self-government rights of their indigenous inhabitants. Yet the American system has arrived at a solution that avoids the problems of the Canadian approach.

The United States Supreme Court in early cases established doctrines for the recognition of Aboriginal self-government that with some modification have lasted to this day. Faced with a lack of statutory and textual constitutional guidance on the matter, Chief Justice Marshall, in what has become known as the Marshall Trilogy,[87] arrived at a framework for reconciling the sovereignty of the United States with the continued existence of the Aboriginal Nations (or in the US, "Indian Nations") as self-governing communities. In the US, Indian tribes are "domestic dependent nations"[88]—neither fully-fledged foreign nations nor domestic communities deprived

86. A hint of an approach that might suffice on this score may be found in *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321. In that case, part of the Court's task was to determine an approach to the delineation of constitutionally protected rights for Métis people. Because the Métis do not have the same history of intense regulation of membership as Indians, the Court's approach also had to account for whether the claimants were indeed Métis within the meaning of s. 35. The Court held at para. 10 that "[t]he term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears." The Court, however, refrained from laying down a general approach for verifying the identity of Métis claimants. It said at para. 29, "In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable." The Supreme Court has recognized the problem of community boundaries as a problem for the Métis, but not yet for other Aboriginal communities. Some lower courts have been applying the *Powley* test to claims by non-status Indians. See e.g. *R. v. Lavigne*, 2007 NBQB 171, [2007] 4 C.N.L.R. 268. While this may eventually answer the doctrinal question as it relates to non-status Indians, the question in relation to status Indians that I have highlighted remains.

87. *Johnson and Graham's Lessee v. William M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *The Cherokee Nation v. Georgia*, 8 U.S. (5 Pet.) 1 (1831) [*Cherokee Nation*]; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester*].

88. *Cherokee Nation*, *ibid.* at 17.

of all sovereignty. Except for foreign affairs,[89] or where jurisdictions have been surrendered by treaty,[90] or where Congress has acted to derogate from Aboriginal sovereignty,[91] the Indian Nations remain in full possession of the law-making powers that they possessed prior to the arrival of Europeans. As Chief Justice Marshall summarized:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[92]

Although there has been some retreat from this doctrine since those historical judgments, the basic structure of analysis of Aboriginal sovereignty in the United States remains based on this doctrine.[93]

The application of this approach to an analogous claim to a right to operate a gambling facility on a reservation was considered by the US Supreme Court in *California v. Cabazon Band of Mission Indians*.[94] In that case, California had sought to apply its licensing scheme for bingo operations to the gambling operation on the reservation. The Court held against the state. It began from the starting point of tribal sovereignty, which is "dependent on, and subordinate to, only the Federal Government, not the States."[95] Congress had enacted Public Law 280, which granted six states, including California, jurisdiction to apply its criminal law, but not its civil law, to all areas within Indian country.[96] Federal law also contained a definition of "Indian country,"[97] which included all areas of Indian reservations, and as such, this point was not in dispute in this case. The Court then had to consider whether the state law on gambling was criminal or civil law. Since the California scheme for licensing bingo operations was not sufficiently prohibitive of conduct, but rather, permitted it

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89. *Worcester*, *supra* note 87 at 547.
90. *Ibid*. at 553–54.
91. *Ibid*. at 557.
92. *Ibid*. at 561.
93. For a helpful summary of the basic contours of the American doctrine, see Morse, "Permafrost," *supra* note 4 at 1032–33. Morse has argued that the U.S. approach is superior to the *Pamajewon* approach. This article aims to bolster that position. Generally speaking, the exercise of Indian tribal jurisdiction depends on whether the party or parties involved are "Indian," whether the facts of the case took place in "Indian country," and whether the community claiming to exercise jurisdiction is a recognized tribe. See Larry Long & Clay Smith, eds., *American Indian Law Deskbook*, 4th ed. (Boulder, Colo.: University Press of Colorado, 2008) at 6–8, 48–78.
94. 480 U.S. 202 (1987).
95. *Ibid*. at 207, citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).
96. 18 U.S.C. §1162 (1989).
97. 18 U.S.C. §1151 (1989).

under licence, the majority of the court held that Public Law 280 did not referentially incorporate the California bingo licensing scheme so as to apply it to Indian country. Hence, state law did not apply to the gambling operations of the Cabazon Band. This is obviously a skeletal summary of a very complex set of rules on Indian gambling in the US, but the outline suffices to highlight the differences between the US approach and the *Pamajewon* approach.

It is helpful to notice that the US approach avoids many of the fundamental problems that plague the Canadian doctrine. First, the recognition of constitutional rights does not depend on some set of historically defined practices, and so the vagaries of historical research do not form the basis for any legal standard. Second, the US doctrine does not incorporate notions of integrality or continuity, and so avoids the unpredictability of the application by courts of those very vague concepts to the practices of people who belong to another cultural community. Most significantly, however, from the perspective of the argument made in this article, the US approach also avoids the special problems with the constitutional protection of power-conferring rules that arise from the *Van der Peet* approach. The US approach asks, and has doctrinal formulas for analyzing the following questions: (1) over whom, or what territory, does the Indian government have authority? and (2) over what jurisdictions does the Indian government have authority? These are the classic questions in any jurisdictional dispute. The US doctrine, like any legal doctrine, is not always clear on the answers to those questions, but at least the doctrine poses the right questions. In considering the approach laid out in *Van der Peet* and *Pamajewon*, it is apparent that the Canadian doctrine has no answers to the first question about the extent of the personal or territorial jurisdiction of the Aboriginal entity claiming authority. As discussed above, all custom is custom of a certain community. *Pamajewon* provides no way of identifying what the relevant community is in which the inquiry into custom is to take place, or a requirement that claimants to self-government rights demonstrate their authority over a community.

As for the second question, that of the content of jurisdiction, the Canadian approach suggests a backward-looking inquiry into historical governance practices. Yet, as this article has pointed out, Aboriginal communities prior to contact must have been entirely self-governing. *Pamajewon* provides no way of discerning what jurisdictional space will receive constitutional protection in the modern era, from that full box of pre-contact jurisdiction. This is the point made by the sections of this article on power-conferring rules, on levels of generality, and on the absence of evidence of historical limits to jurisdiction. Where the customary rules contain a power-conferring rule with no explicit limits to the jurisdiction over which that power could be recognized, the *Van der Peet* approach provides no tools for analyzing the claim, but the US approach avoids this question altogether. Rather, it seeks to draw boundaries to tribal jurisdiction in terms of the subject matter of regulation, which raises no similar conceptual difficulties. Those boundaries are set by, and can be changed by, Acts of Congress. The US doctrine recognizes tribal communities as sources of norms for

their members while they are in Indian country. It ranks those norms as superior to state law but inferior to federal law. US law on Indian self-government is simply a matter of varying that basic principle of recognition of tribal authority in different areas of jurisdiction.

The Canadian doctrinal problem is slightly different because unlike in the US, the question is not merely of recognition of customary law, but of its constitutional protection.[98] Therefore, where US law can be content with recognizing the existence of the tribes as sources of normative authority, and allow Congress to deal with the scope and existence of that authority as it sees fit, Canadian law has the additional complication of seeking to protect the scope and existence of that authority after it has recognized its existence. Thus, while tribal jurisdiction may be infringed at Congress' pleasure, in Canada section 35 rights have constitutional protection. Canadian doctrine already contains another gatekeeper to constitutional protection. The *Van der Peet* integral to the distinctive culture test is one and the *Sparrow* justified infringement test is another. If in the future courts begin to recognize all self-government practices as integral to and continuous from the distinctive culture of the community—if they constitutionally protect all the self-government rights that the Marshall trilogy approach would recognize—then that self-government would still be restricted by any justified restrictions that the Crown wished to impose on the community. But, unlike in the current approach, where courts and subjects alike must go through unreliable inquiries into continuity and integrality, a justified infringement test could be based on normative considerations that actually animate concerns about Aboriginal self-government. One could ask why should Aboriginal communities have self-government, and given those reasons, what kind of jurisdictions do they need? A clue is given by the text of a failed constitutional amendment proposed in the *Charlottetown Accord*, which would have protected Aboriginal jurisdiction:

> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
>
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environments, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies. [99]

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98. For an argument that the Canadian doctrine as it stands is a more robust protection of Aboriginal rights against federal power than the American, see Jenkins, *supra* note 4. This article is worried less about the robustness of rights protection and more about the coherence of the doctrine.

99. Charlottetown Accord, Draft Legal Text, 9 October 1992, s. 35.1(3), cited in Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ont.: Carswell, 2007) at 28-26 to 28-27.

This text provides an example of a way of framing the purpose of the recognition of Aboriginal self-government rights. From this framework the courts could begin to develop a normatively justifiable way of limiting the self-government rights of Aboriginal communities. If the community had instituted large-scale gambling in order to fund projects to protect the cultures and institutions of the community, for instance, such benefits might have to be weighed against the harms that gambling would cause in terms of increased crime and addiction. This is an incomplete analysis, but it points the debate in the direction of finding a normatively defensible relationship between Aboriginal and non-Aboriginal communities.

VII. Conclusion

Aside from the general problems of indeterminacy associated with the *Van der Peet* test, the application of the test to self-government involves at least three even deeper sources of unpredictability. The latitude that the courts have in framing the rights claim, the possibility of power-conferring laws without any limits to the jurisdiction that could be conferred, and the nature of customary rules as rules of a community, mean that the *Pamajewon* approach to the constitutional protection of self-government rights cannot, as it stands, viably play the role in the Constitution that the Supreme Court of Canada envisions it playing. Replacing the brief reasons in *Pamajewon* with something akin to an approach based on a *Sparrow* test analysis of justified infringement would render the law of self-government in Canada much more predictable, analytically precise, and normatively defensible. It would rid the doctrine of the unpredictability of the integrality and continuity requirements, while equipping it to recognize the basic norms of recognition and power-conferral that enable the exercise of governmental functions. Most importantly, it would centre debates about self-government on normative issues that are actually relevant to the relationship between Aboriginal and non-Aboriginal communities. Such a doctrine would form a much firmer foundation for the law of Aboriginal self-government in Canada and make it easier for Aboriginal and non-Aboriginal communities to move toward a post-colonial relationship.