RIGHTS-BASED JUDICIAL REVIEW AND SUBTANTIVE EQUALITY FOR ABORIGINAL PEOPLES: THE CASE OF CANADA

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Abstract

In their attempts to obtain differential treatment under the law, Aboriginal peoples are increasingly choosing rights-based judicial review as a promising alternative to political negotiations. However, it remains to be seen to what extent, and under what conditions, rights-based judicial review will live up to the expectations Aboriginal people have vested in choosing this route. In order to measure the effectiveness of rights-based judicial review for Aboriginal peoples, this article proposes to study Canadian case law. More specifically, it reviews the constitutional jurisprudence of the Supreme Court of Canada pertaining to five key Aboriginal rights issues: fishing and hunting rights, institutional representation, welfare policies, land rights and self-government. It also considers how this jurisprudence was received and applied by governmental authorities. The article reveals that the constitutional recognition of specific Aboriginal rights, which go beyond fundamental political and civil rights brings about positive political change for Canada's Aboriginal communities, even though these rights have been given a narrow interpretation. However, in this climate of positive political change, the inability for Aboriginal peoples to obtain self-government through judicial review emerges as a clear problem. The article comes to the conclusion that institutional nation-building objectives may limit judicial review's potential for recognising a deep level of substantive equality for Aboriginal peoples.

I Introduction

In their attempts to obtain differential treatment under the law, Aboriginal peoples are increasingly choosing rights-based judicial review as a promising alternative to political negotiations. However, it remains to be seen to what extent, and under what conditions, rights-based judicial review will live up to the expectations Aboriginal people have vested in choosing this route. Significant scholarly attention has been given to the value of constitutionally entrenching rights, the judiciary's power to invalidate laws that contravene them[1] and the need for a certain institutional culture of rights.[2] Very few studies however, have examined which aspects of rights-based judicial review protect Aboriginal peoples' rights in particular. When engaging in judicial review, Aboriginal peoples seem to be confronted with two theorised challenges. First, they seek substantive equality as opposed to formal equality, which entails the recognition of positive and collective rights. However, the rights Aboriginal peoples base their judicial challenges on are often couched in negative and individualistic terms. Second, the claims of Aboriginal peoples, especially the recognition of land tiles and self-government, may conflict with their host state's nation-building objectives.

In order to measure the effectiveness of rights-based judicial review for Aboriginal peoples, this article proposes to study Canadian case law. This choice is informed by the fact that Canada's judicial review process encompasses many of the elements that should theoretically guarantee the legal success of Aboriginal claims. In 1982, Canada constitutionally entrenched the *Canadian Charter of Rights and Freedoms* ('*Charter*'),[3] which is judicially enforceable. Its section 25, as well as section 35 of the *Constitutional Act 1982*,[4] protect special cultural rights for Aboriginal peoples. Furthermore, Canada is increasingly defining itself by its rights culture,[5] a notable example being the Federal Government's direct funding of Aboriginal groups to support their legal mobilisation efforts.[6] Yet, despite all these favourable conditions, rights-based judicial review as a means of achieving substantive equality for Aboriginal peoples has its limits.

The first section of this article provides a theoretical framework for understanding the different levels of

equality, rights-based judicial review can provide. It contrasts the concept of 'undifferentiated' citizenship from that of 'polyethnic' and 'multinational' citizenship. The second section discusses the new rights-based litigation opportunities for Aboriginal peoples created by Canada's new constitution. The third section reviews the constitutional jurisprudence of the Supreme Court of Canada pertaining to five key Aboriginal rights issues: fishing and hunting rights, institutional representation, welfare policies, land rights and self-government. It also considers how this jurisprudence was received and applied by governmental authorities. The fourth section reveals that the constitutional recognition of specific Aboriginal rights which go beyond fundamental political and civil rights brings about positive political change for Canada's Aboriginal communities, even though these rights have been given a narrow interpretation. In this climate of positive political change however, the inability for Aboriginal peoples to obtain self-government through judicial review stands out as a problem. The article comes to the conclusion that institutional nation-building objectives may limit judicial review's potential for recognising a deep level of substantive equality for Aboriginal peoples. It argues that even though there is interpretive space for such a constitutional reading, the ideal of a 'polyethnic' citizenship permeates Canadian institutions and prevents the recognition of new self-government rights for Aboriginal peoples.

II Theoretical Framework

Aboriginal substantive equality claims demand that certain cultural rights be practically recognised by the government, the law and society in general. Cultural rights can be translated into differing conceptualisations of citizenship, governed by special legal provisions and political structures, as well as governmental policies and programs.[7] The cultural rights structure of these conceptions of polity will determine the type of cultural citizenship, which each provides a differing level of equality for minorities. First, the 'universal' or 'undifferentiated' conception of citizenship is based on the rights-bearing equality of individuals and blindness to cultural group differences.[8] It promotes formal equality and does not satisfy traditional Aboriginal demands. For example, Canadian Aboriginal peoples rejected the 1969 *White Paper*[9] which sought to abolish special status for Indians in order to permit Aboriginal peoples' full participation in Canadian society.[10] Many of them wanted to preserve their special status in Canada and saw the *White Paper* as assimilationist.[11] They asked to be recognised as 'citizens plus,'[12] which meant they would be considered full Canadian citizens while still being able to maintain their 'Aboriginality'. Aboriginal peoples usually prefer a 'pluralist' or 'differentiated' conception of citizenship, which affirms that 'real' or substantive equality demands a differential treatment of certain cultural minorities.[13]

In contrast to this 'universal' or 'undifferentiated' conception of citzenship, Will Kymlicka provides two contrasting models of differentiated citizenship: the 'polyethnic' and the 'multinational'.[14] While 'polyethnic' citizenship promotes group-differentiated rights for minorities that permit cultural retention, it also emphasises the need to facilitate their integration into the dominant culture. For example, special hunting and fishing rights for Aboriginal peoples fall in the 'polyethnic' rights category. They consist of '[e]xemptions from laws which penalise or burden cultural practices'.[15] Related to 'polyethnic' citizenship are also representation rights that seek to give minorities a say in the majority's institutions. Also noteworthy are assistance rights, such as redistributive and preferential policies, which allow the minority to 'to do those things the majority can do unassisted.'[16] 'Multinational' citizenship provides for the recognition of a deeper degree of substantive equality than 'polyethnic' citizenship, especially for territorially-concentrated national minorities such as Aboriginal peoples. It can help national minorities resist cultural assimilation from the mainstream society and protect their distinct collective identity.[17] This is achieved mostly with the establishment of parallel social structures, such as Aboriginal land titles and self-government.

In view of achieving substantive equality, Aboriginal peoples have increasingly sought to have both 'polyethnic' and 'multinational' cultural rights recognised by Canadian courts. As it will be discussed in the next section, this process was facilitated by the introduction of new litigation opportunities.

III New Litigation Opportunities

Prior to 1982, Aboriginal rights in Canada had limited constitutional protection.[18] The *Royal Proclamation 1763* reserved lands to Aboriginal peoples that had not been ceded to, or purchased by, the Crown.[19] It also posited that these reserved lands could only be surrendered to the Crown. This provision was meant to protect Aboriginal peoples from being 'molested' by white settlers and traders who had an interest in their land.[20] Even though the *Royal Proclamation*

has facilitated treaty-making between Aboriginals and the Crown since then,[21] it has not permitted jurisprudential breakthroughs for Aboriginal peoples.[22] Later, the *Constitution Act 1867*[23] did not grant specific rights to Aboriginal peoples. Section 91(24) of the *Constitution Act 1867* only mentioned that 'Indians, and Land reserved for the Indians' were to be placed under the authority of the Parliament of Canada. Under this power, the Federal Government passed in 1876 the *Indian Act*[24], which made Aboriginal peoples legal wards of the State.[25] More concretely, this Act defined eligibility to Indian status as well as the rules governing the organisation of reserves and bands. Many Aboriginal women contested the patriarchal character of this legislation whilst the Métis people contested its exclusivity and others contested its paternalism.[26]

The adoption of the *Constitution Act 1982*[27] was a turning-point for Aboriginal peoples and their rights. To start, it first acknowledged the existence of 'Aboriginal peoples'[28] and 'Aboriginal rights'[29] within the constitutional edifice. Though the scope and depth of the provisions related to Aboriginal peoples and their rights were somewhat unclear, it was obvious that they would be remedial in nature.[30]

The first provision pertaining to Aboriginal peoples and their rights can be found in section 25 of the *Charter*, which constitutes part 1 of the *Constitution Act 1982*. It reads as follows:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [A]boriginal, treaty or other rights or freedoms that pertain to the [A]boriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[31]

The *Charter* does not recognise new rights for Aboriginals but rather protects and affirms their rights that exist independently of the *Charter*. The phraseology of section 25 is inclusive and does not limit the types of Aboriginal rights protected to those specified in subsections 25(a) and 25(b).[32] Some authors suggested that the provision would shield all those rights derived from Aboriginals' distinctive status, such as common law and statutory rights.[33] The consensus was that under section 25, special arrangements made to the advantage of Aboriginals could not be challenged on the grounds of the equality clause found in section 15.[34] Legal scholars disagreed however on whether or not section 25 rights would be exempted from the application of section 28, pertaining to gender equality.[35]

One point of contention among scholars related to the possible effect of the limitation clause found in section 1 on the rights protected by section 25. Section 1 of the *Charter* provides that rights and freedoms are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' Leslie Claude Green suggested that section 1 could be used to justify a derogation from section 25 rights,[36] but Brian Slattery argued 'that section 1 could not be used to reduce the insulating effect of section 25.'[37] That being said, Aboriginal peoples could find comfort in the fact that section 25 is not subject to the notwithstanding clause found in section 33 of the *Charter*, which allows Canadian governments to limit *Charter* rights in certain circumstances.[38]

The promise of greater accommodation of Aboriginals' collective aspirations is embodied by section 35 of the *Constitution Act 1982*. Although this provision falls outside of the *Charter*, it is considered to be an integral part of the '*Charter* revolution' because it consists of a 'declaration of the special rights of Canada's most salient racial minority'[39] and it has been the object of significant judicial review. It reads as follows:

> 35. (1) The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, '[A]boriginal peoples of Canada' includes the Indian, Inuit, and Métis peoples of Canada.
>
> (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.
>
> (4) Notwithstanding any other provision of this Act, the [A]boriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[40]

As understood in Canadian jurisprudence at the time of its enactment, subsection 35(1) recognises and affirms 'Aboriginal land rights' and 'land-based rights, such as those

of hunting, fishing and trapping.'[41] The big question was whether it recognised and affirmed an inherent right to self-government for Aboriginals: some scholars believed it did or could[42] and others thought it clearly did not.[43] As for the term 'existing rights,' it was thought to exclude those titles to land lawfully extinguished, but include those rights to hunt, fish and trap that had been restricted by federal or provincial legislation.[44] As Douglas Sanders put it, subsection 35(1) 'does not substantively enhance [Aboriginal] rights,' but '[i]t does prevent their non-consensual limitation or extinguishment by other than constitutional amendment.'[45]

As for subsection 35(2), it specifies the classes of person whose rights are protected by sections 25 and 35, namely the Indian, Inuit and Métis peoples.[46] One of the main purposes of this provision was to recognise a constitutional status for the Métis.[47] While it had been confirmed that Inuits were considered to be Indians for the purposes of the *Constitution Act 1867* in *Reference Whether 'Indians' includes 'Eskimo'* (1939),[48] it was unclear whether the Métis were.[49] Yet section 35(2) does more than merely state under whose authority Aboriginals fall, as did section 91(24) of the *Constitution Act 1867*.[50] It compels Canadian governments to develop comparable policies for categories of Aboriginal peoples with different realities.[51] Subsection 35(3) also dissipated all doubts that subsection 35(1) treaty rights included those rights established by treaty or land claims agreements after 1982. Finally, subsection 35(4) stressed the importance of recognising the equality rights of Aboriginal women. In *Attorney-General of Canada v Lavell* (1974),[52] the Supreme Court upheld under the *Canadian Bill of Rights*[53] subsection 12(1)(b) of the *Indian Act*, which provided that Indian-status women could lose their status if they married a non-status Indian, while the reverse was not true for men. Subsequent to the adoption of the *Constitution Act 1982*, this provision was amended to conform to the requirements of gender equality.[54]

Because section 35 falls outside of the *Charter*, it is not subject to its remedial mechanisms. The fact that section 35 rights are not subject to the limitation clause found in section 1 of the *Charter* led Slattery to declare that they were absolute in nature.[55] He believed that this would prompt a legal interpretation of the section guided by standards of reasonableness. Still, it could be argued that this would trigger a more restrictive approach to section 35 rights. Then again, the government may not suspend the application of section 35 rights as they are not subject to the legislative override provision found in section 33 of the *Charter*. Yet, since section 35 is not judicially enforceable by way of section 24(1),[56] its effectiveness was made uncertain.[57] Aboriginals thus had to rely on section 52(1) of the *Constitution Act 1982*,[58] which established constitutional supremacy in Canada, to have their rights upheld.

As discussed, Canada's new constitution created new rights-based litigation opportunities for Aboriginals, but it remained to be seen if those opportunities would translate into real legal and political gains. Moreover, it was unclear whether the process of judicial review would lead to the promotion of an undifferentiated, polyethnic or multinational citizenship. The next section reviews the post-1982 constitutional jurisprudence on Aboriginal issues.

IV Post-1982 Jurisprudence

The jurisprudence on Aboriginal issues has involved many rights associated with a 'polyethnic' model of citizenship, such as hunting and fishing rights, institutional representation rights and particular welfare policies. It has also involved claims associated with a 'multinational' model of citizenship, like that of land rights and that of self-government. It will be argued that the constitutional review based on 'polyethnic' rights has been more successful than the one based on 'multinational' rights. The following section will review these different rights claims in turn.

A Fishing and Hunting Rights

Aboriginals have been quite successful at securing exemption rights under section 35 of the *Constitution Act 1982*. The exemptions claimed mostly include the right to hunt or fish for food and ceremonial purposes,[59] as well as to hunt or fish for commercial purposes.[60] Some exemption demands were incidental to these rights, like the right to be exempted from paying an entry fee to access a controlled harvest zone ('ZEC')[61] or to construct a log cabin in a provincial park.[62] Other exemption claims concerned the duty payable on goods imported into Canada,[63] wood harvesting[64] and the regulation of gambling activities.[65] With regards to Aboriginals, exemption rights involved establishing that the legislation was of no force or effect with respect to them, and did not require governments to amend their respective legislations. In nine out of 13 cases, Aboriginals were granted a full or partial exemption. In all the cases, the authorities followed suit.

(i) The Sparrow Test

The Court first explored the content and scope of section 35(1) in the landmark case of *R v Sparrow* (1990).[66] The unanimous decision held that the 'existing' Aboriginal rights protected under section 35 referred to those rights that had not been extinguished prior to 1982, the year of enactment of the provision, rather than those rights that were able to be exercised in 1982. Extinguishment of a right could only be established by a 'clear and plain' intention of the Crown to extinguish such a right and not by a simple regulation.[67] This meant, according to Dickson CJ and La Forest J, that 'an existing [A]boriginal right c[ould] not be read so as to incorporate the specific manner in which it was regulated before 1982.'[68] With this reasoning, the judges opted for a flexible approach that allowed for the evolution of Aboriginal rights over time, rather than a restrictive frozen rights approach.

Furthermore, the Court specified what it entailed for Aboriginal rights to be 'recognised and affirmed' under section 35. First, the fact that section 35(1) rights were 'affirmed,' mandated that they would be given a generous liberal interpretation. The bench also asserted that they should be interpreted with a purposive approach. Because section 35(1) rights were the end result of an extended and painful fight for the recognition of Aboriginal rights in the political realm, the Court asserted that the provision should be remedial in nature. Therefore, disputes involving Aboriginals and government would be resolved in favour of Aboriginals when in a situation of legal uncertainty. Following *R v Taylor and Williams* (1981),[69] *Nowegijick v The Queen* (1983)[70] and *Guerin v The Queen* (1984),[71] the judges decided that section 35(1) enlivened the Crown's fiduciary duty towards Aboriginals. This meant that '[t]he relationship between the Government and [A]boriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of [A]boriginal rights must be defined in light of this historic relationship.'[72]

Mindful of the fact that section 35(1) was not subject to the limitation clause found in section 1 of the *Charter*, the Court also placed internal limits on the exercise of Aboriginal rights by developing a test for justified limitation by the Crown. It posited that Aboriginal rights were not absolute since the Federal Government retained jurisdiction over Indians as per section 91(24). In order to reconcile federal power with federal duty, the judges determined that the Federal Government had to justify any interference with an Aboriginal right. The first stage involves the establishment by the individual or group challenging the law of a *prima facie* interference with an Aboriginal right. Chief Justice Dickson and La Forest J mentioned three questions that had to be answered at this stage: 'First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?'[73] If an infringement is found, the analysis must then move to a second stage relating to the issue of justification. According to the judges, the government would first need to prove that the law has a valid objective. Conservation of a coveted resource and prevention of harm were found to be compelling and substantial objectives. Then, the government would need to show that the honour of Crown is upheld by the infringement. Questions such as these might be answered: 'whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the [A]boriginal group in question has been consulted with respect to the conservation measures being implemented.'[74]

The Sparrow test awarded formidable protection to Aboriginal rights against Crown infringement in its first years of application.[75] It was decided in *R v Badger* (1996)[76] that the Sparrow test should apply not only to Aboriginal rights but also to treaty rights, which were also protected under section 35(1) of the *Constitution Act 1982*. No infringements of treaty rights were justified under the Sparrow test in the cases surveyed.[77] While the jurisprudence in *Sparrow* and *Badger* posited that Aboriginal and treaty rights were not absolute, it was nevertheless very promising for Aboriginals. However, the framework for analysing Aboriginal rights claims was later narrowed in the *Van der Peet* trilogy.[78]

(ii) The *Van der Peet* Test

More than half a decade after *Sparrow* (1990), the Court defined the precise meaning of Aboriginal rights for the first time in three landmark companion cases known as the *Van der Peet* trilogy: *R v Van der Peet* (1996),[79] *R v Gladstone* (1996)[80] and *R v NTC Smokehouse Ltd* (1996).[81] In *Van der Peet*, the majority found that the purposive approach to section 35(1) developed in Sparrow was too cursory. Basing itself on Canadian, American and Australian jurisprudence, a majority of the Court asserted that the special constitutional status given to Aboriginals derived solely from the fact that

'when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.'[82] According to the majority of the Court, section 35(1) fulfilled a double purpose: first, that of recognising the pre-existence of distinctive Aboriginal societies; and second, that of reconciling this prior occupation with the sovereignty of the Crown on Canadian territory.

Taking this reasoning into account, the majority established *the Van der Peet* test for identifying Aboriginal rights in section 35(1), which had to be considered before the *Sparrow* test for extinguishment, infringement and justification could be applied. In *Sparrow*, the Court had identified the Musqueam's right to fish for food based on the anthropological evidence showing fishery had 'always constituted an integral part of their distinctive culture.'[83] Building on this precedent, the majority argued in *Van der Peet* that, in order to qualify as protected rights, Aboriginal practices had to be 'integral to the distinctive cultures of [A]boriginal peoples.'[84] In order for a practice to meet this standard, the majority pin-pointed several factors that should be kept in mind when evaluating Aboriginal rights claims,[85] two of which were crucial. First, the Aboriginal right claimed had to be 'of central significance to the Aboriginal society in question' before first contact with the Europeans.[86] In the twin cases of *R v Adams* (1996)[87] and *R v Côté* (1996),[88] Aboriginal rights were soon after deemed to be mostly site-specific and not abstract rights which could be exercised anywhere. Practices exercised for survival purposes were further found to be of central significance for certain groups in *R v Sappier; R v Gray* (2006).[89] Second, a claimed right needed to 'have continuity with the practices, customs and traditions that existed prior to contact.'[90] This requirement was later adjusted in the special case of the Métis in *R v Powley* (2003).[91]

The approach developed by the majority in *Van der Peet* was severely criticised by L'Heureux-Dubé and McLachlin JJ in their respective dissents. They both argued that the 'integral distinctive culture test', developed by the majority, was founded on a frozen rights approach which diminished the original promise of section 35(1) by imposing too great a burden of proof on Aboriginals to have their rights recognised. In opposition to this frozen rights approach, L'Heureux-Dubé J proposed a dynamic approach. She contended that Aboriginal practices should be protected rights when they 'are sufficiently significant and fundamental to the culture and social organization of a particular group of [A]boriginal people.'[92] Additionally, she determined that the period of time relevant to the assessment of this characteristic should not be the first contact with Europeans but rather 'a substantial continuous period of time,'[93] which could be between 20 and 50 years in her opinion. In search of a middle ground, McLachlin J privileged what she termed an empirical historic approach to Aboriginal rights. She suggested that a modern Aboriginal practice could be recognised as a right if it could be linked to a traditional law or custom of a native group, without specifying a time period for the enactment of the latter.

Even though the *Van der Peet* test has been criticised as limiting the scope of constitutional Aboriginal rights,[94] more than half of the cases were able to meet its requirements.[95] When a claimed right had passed the *Van der Peet* test, no infringement on that right was subsequently justified under the Sparrow test, except in the case of *Côté*. In the cases where no constitutional Aboriginal right was recognised under the *Van der Peet* test,[96] the claimant had failed to prove that that the claimed right was of central significance to the Aboriginal society in question prior to contact.

B Institutional Representation

Some Aboriginal groups have made significant legal and political gains under judicial review in favour of a polyethnic citizenship in the area of institutional representation. The representation rights of minorities in decision-making bodies usually involve three aspects: 'the presence of members of the minority group,' 'the chance for members of the minority group to choose representatives' and 'protection of minority group interest.'[97] The demand made by female Aboriginal groups for more presence in decision-making bodies under the equality provision found in section 15 of the *Charter* were unsuccessful.[98] In contrast, 'off-reserve' Indians were more successful at having their right to elect their representatives under the same provision.[99] Aboriginal peoples in general were also successful at having their minority group interest protected under section 35 of the *Constitution Act 1982* in an eventual Quebec secession negotiating process.[100]

(i) Presence of Members of the Minority Group

In *Native Women's Association of Canada v Canada* (1994),[101] Aboriginal women claimed their *Charter* rights had been breached by the fact that they were not directly funded and invited to participate in the constitutional negotiations leading

to the 1992 *Charlottetown Accord* by the Federal Government, whilst the 'male-dominated' national Aboriginal organisations were. The *Charlottetown Accord* attempted to amend Canada's constitution to establish, among other things, Aboriginal self-government. The Native Women's Association of Canada ('NWAC') feared that its lack of representation in the process would in general undermine concerns for the equality of Aboriginal women and in particular, prevent the future application of the *Charter* to Aboriginal self-government. While the NWAC based its legal action on the freedom of expression found in section 2(b) of the *Charter*[102] and the gender equality clause found in section 28, a majority of the Court found that the issue should preferably be dealt with under section 15. In the bench's view, the NWAC had failed to prove that, by not providing it with a particular platform of expression, the Federal Government was under-inclusive and acting in a discriminatory fashion. First, the NWAC had had the opportunity to express its views to government through the national Aboriginal organisations, as well as by means other than formal constitutional negotiations (as it had done so through the Beaudoin-Dobbie Committee).[103] Second, there was no evidence that the national Aboriginal organisations advocated in favour of a 'male-dominated' approach to self-government.

In deciding the case, the judges also made a pronouncement that had potentially wide-ranging implications for all Aboriginals. They asserted that section 35(1) of the *Constitution Act 1982* did not include the right for Aboriginal peoples of Canada to participate in constitutional discussions. Consequently, section 35(4), which stipulates that Aboriginal and treaty rights apply equally to male and female, was of no help to the NWAC. In the end, the Court did not call for any governmental remedy in the case. Since the failed *Charlottetown Accord*, the Canadian constitution has not been re-opened for debate and it is impossible to know whether or not the Federal Government would be more sensitive to Aboriginal's participatory needs in future constitutional negotiations in general, or even to the NWAC's needs in particular.

(ii) Choosing Minority Group Representatives

Aboriginal peoples were more successful in having their right to choose their representatives recognised. In *Corbiere v Canada* (1999),[104] the Court determined that the *Indian Act*'s 'on-reserve' residency requirement for the right to vote in band council elections was unconstitutional since it discriminated against 'off-reserve' Indians. More specifically, the residency requirement found in section 77(1) of the *Indian Act*[105] was found to violate section 15 of the *Charter*. In applying the *Law* test,[106] the Court first determined that the law imposed differential treatment between 'off-reserve' and 'on-reserve' Indians, and that 'off-reserve' Indians were denied equal benefit of the law. Second, it argued that 'Aboriginality-residence' was a ground of discrimination analogous to the ones enumerated in section 15, which are associated with potentially discriminatory and stereotypical decision-making. Third, the Court decided that the distinction at issue was discriminatory. As McLachlin and Bastarache JJ explained in the majority judgment:

> It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve [A]boriginals in a stereotypical way. It presumes that [A]boriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves.[107]

In general, the law was found to violate the dignity of 'off-reserve' Indians and to constitute a violation of substantive equality. The Court also deemed that it could not be saved under section 1 of the *Charter*. In applying the *Oakes* test,[108] the judges recognised as pressing and substantial Parliament's objective 'to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council.'[109] However, they believed that excluding completely 'off-reserve' Indians from voting in band council elections did not minimally impair their equality rights. According to them, other electoral schemes that balance the rights of 'off-reserve' and 'on-reserve' band members were available.

Pursuant to these findings, the Court invalidated section 77(1) of the *Indian Act* and gave the Federal Government an 18 month stay. It suggested that the development of an electoral process that balances the rights of 'off-reserve' and 'on-reserve' band members should be privileged. In her concurring judgment, L'Heureux-Dubé J emphasised the need for the government to consult with Aboriginals in addressing electoral reform for the reserve bands. In response to *Corbiere*, the government announced that it

would comply with the decision in a two-phase process.[110] Only one month before the end of the judicial stay, the government started by amending its regulations on Indian band elections[111] and Indian referendums to allow for the participation of 'off-reserve' Indians.[112] Later in 2002, the government introduced the *First Nations Governance Act*[113] which constituted an overhaul of the *Indian Act*. It provided for, among other things, band-designed leadership selection codes (subject to federal government standards) that balanced the interests of 'off-reserve' and 'on-reserve' band members. Many national Aboriginal leaders opposed this legislative proposal, notably on the basis that it had been drafted without proper consultation and respect for their self-government aspirations.[114] In the end, the *First Nations Governance Act* was never ratified and the *Indian Act* was thus never amended.

(iii) Protection of Minority Group Interest

Aboriginal peoples were also able to secure their interests in an eventual Quebec secession negotiating process. In *Reference Re Secession of Quebec* (1998),[115] Aboriginal organisations successfully intervened against allowing Quebec to unilaterally separate from Canada without consideration for Aboriginals. The Court established that 'protection of minorities' constitutes an underlying principle of the Canadian constitution that needed to inform any secession process.[116] It pin-pointed that the inclusion of section 25 of the *Charter* and section 35 of the *Constitution Act 1982* was a clear illustration of the concern for the safeguard of minority rights in Canada's constitutional edifice. The judges added that '[t]he protection of [Aboriginal] rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.'[117] It followed that 'a clear democratic expression of support for secession would lead under the Constitution to negotiations in which Aboriginal interests would be taken into account.'[118] Pursuant to these judicial pronouncements, the Federal Government adopted the *Clarity Act 2000* which provides that Aboriginals' points of view shall be considered with respect to the wording of a referendum question involving succession and the evaluation of this referendum result, as well as to the terms of this secession.[119] Of significance here is that the Court and Parliament underlined the importance of protecting Aboriginal interests in constitutional negotiations whilst failing to provide them with a formal seat at the negotiation table. Furthermore, the *Clarity Act* is contested by the province of Quebec on the basis that the Court has never ruled that the Federal Government could unilaterally determine the conditions for secession.[120] In response to this federal law, the Quebec National Assembly passed *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State* (also known as 'Bill 99'), which provides that a simple majority is sufficient for a winning referendum on secession.[121] Bill 99 states that the Quebec government seeks to promote Aboriginal interests in exercising its constitutional prerogatives, but as well, does not provide Aboriginal people with a formal seat at the negotiation table.[122]

C Welfare Policies

Aboriginal peoples were somewhat unsuccessful at securing assistance rights under section 15 of the *Charter*. Assistance rights translate into two types of policies for disadvantaged groups: redistributive and preferential policies.[123] While Aboriginal groups were legally recognised as an historically disadvantaged group,[124] they failed to encourage the implementation of new redistributive policies under section 15(1) in *Lovelace v Ontario* (2000)[125] and *Ermineskin Indian Band and Nation v Canada* (2009).[126] They were only able to ensure the protection of a preferential policy under section 15(2) in *R v Kapp* (2008).[127] The jurisprudence thus mandated no new policy initiative to be put in place by the government to the benefit of Aboriginals, thus preserving the status quo. In this area of the law, the Court did not take a strong stance in favour of polyethnic citizenship.

(i) Redistributive Policies

Aboriginal groups first sought better redistributive justice in *Lovelace*. At issue in this case was Ontario's *Casino Rama Revenue Agreement* (1996) which provided that part of Casino Rama's proceeds would be redistributed amongst the province's First Nations communities registered as bands under the *Indian Act*.[128] The province's first reserve-based commercial casino was the result of long negotiations pertaining to Indian bands' participation in gaming activities in view of increasing their self-government capabilities. The appellants who were registered as individual Indians, and not as band members under the *Indian Act*, were claiming that the agreement violated their equality rights by excluding them from a share in the casino's proceeds and any related negotiation process. In applying the *Law* test, however, the Court found that an analysis of contextual factors of the case

did not lead to the conclusion that the Ontarian government had acted in a way that was substantively discriminatory towards non-band communities under section 15(1). First, it was determined that the governmental policy was tailored to the specific needs and circumstances of Indian band communities and that it therefore had to be distinguished from a universal comprehensive benefit scheme. Second, the ameliorative purpose of the targeted program, which was to empower Indian bands, was found to be consistent with the purpose of section 15(1). Finally, the judges did not see how the exclusion of non-band Indians from the program would prevent them from being self-governing as well.

In *Ermineskin Indian Band and Nation*, Aboriginal groups contested the money management system chosen by the Crown to administer bands' royalties from natural resource exploitation under sections 61 to 69 of the *Indian Act*. This system precluded the Crown from investing Aboriginal royalties in a diversified portfolio, and privileged instead their holding in the Federal Government's Consolidated Revenue Fund with interest payable to the bands, calculated on the basis of the yield on long-term government bonds. In the appellant's view, the Crown's failure to invest their royalties resulted in lower returns for Indians than those available to non-Indians and thus constituted a violation of their section 15(1) rights. In applying the *Andrews* test,[129] the Court determined that the differential treatment established by the *Indian Act* in this matter was not discriminatory in the sense that it did not 'perpetuat[e] disadvantage through prejudice or stereotyping.'[130] On the contrary, it was said to show concern for Aboriginal autonomy and self-government. Not only was the investment of Aboriginal royalties deemed to be financially risky and to prevent complete liquidity, it would have forced the Crown to exercise greater control over the bands' budgets. Though the case was framed mainly according to a prudent investment logic by the Court, what was really at stake were the merits of state subsidisation of Aboriginal bands. As Rothstein J put it, the Crown 'is not required to supplement the return it is legislatively restricted to providing from its own resources, in this case, the public treasury.'[131]

(ii) Preferential Policies

A preferential policy was upheld in *Kapp* to the benefit of Aboriginal communities. At issue in this case was a pilot sales program granting an exclusive communal fishing licence to three Aboriginal bands to fish salmon from the Fraser River for 24 hours under the Federal Aboriginal Fisheries Strategy.[132] Commercial fishers who were mainly non-Aboriginal and who were thus forbidden to fish during that period argued that the program violated their section 15(1) equality rights. They contended it discriminated against them on the basis of race. The Court determined that the appellants' section 15(1) claim was inadmissible since the governmental program was protected under section 15(2), whose purpose is to 'enabl[e] governments to pro-actively combat discrimination'[133] by creating programs aimed at improving the well-being of marginalised groups. The judges thereby affirmed that section 15(2) is 'more than an interpretive aid to section 15(1) [and] can insulate certain ameliorative programs from any kind of scrutiny under section 15(1).'[134] In the case at hand, the program had been put in place to further the self-sufficiency of Aboriginals who had qualified as a disadvantaged group in Canadian society. The precedent established in *Kapp* sent a clear message that existing Aboriginal rights or privileges could not be taken away on the basis that they gave an unfair advantage. Rather, *Charter* equality was to be understood in substantive terms and allow for affirmative action in the case of Aboriginals.

D Land Rights

Aboriginal peoples have tried to get their traditional legal codes recognised and enforced by the Canadian legal system through constitutional review in the area of land rights in order to establish a multinational citizenship. According to Jacob T Levy, 'at the base of [I]ndigenous land rights claims is the notion that the legal system of the settlers ought to recognize the property systems established according to native law, and that if a particular group owned a particular piece of land under traditional law, they ought to have a valid title under settlers' law as well.'[135] Recognition and enforcement of Aboriginal law cases initially involved the establishment of Aboriginal land title,[136] but were eventually more concerned with the protection of Aboriginal interests in land.[137]

(i) Aboriginal Land Title

In *Adams* (1996) and *Côté* (1996), the judges affirmed that Aboriginal title to land was a category of Aboriginal rights that was afforded protection under section 35(1) of the *Constitution Act 1982*. The recognition and enforcement of Aboriginal title was advocated in the landmark decision of *Delgamuukw v British Columbia* (1997).[138] The case

sought to have Aboriginal perspectives taken into account for determining the legal content of Aboriginal title and establishing its proof.

The Court affirmed that not solely common law, but Aboriginal law as well, should inform the content of Aboriginal title. The judges qualified Aboriginal title as *sui generis*, and as such, associated three general features to it. First, they held that '[l]ands held pursuant to Aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.'[139] Second, they declared that Aboriginal title arises from ownership and occupation by Aboriginal peoples before the assertion of British sovereignty according to the common law principle, but also from Aboriginal law itself. Third, they stated that Aboriginal title was communal in nature and that decisions affecting it should be made by the community that owns it. From these general features, the Court extrapolated two propositions regarding Aboriginal title:

> [F]irst, that [A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[140]

Although the judges insisted on the need to take into account Aboriginal law for defining Aboriginal title, no Aboriginal legal tradition or system was utilised to do it.[141] The Court did not consider that some Aboriginal legal perspectives might perceive land ownership as individual and alienable.

In *Delgamuukw*, the Court also stressed the importance of Aboriginal law to establish proof of Aboriginal title. In *Van der Peet* (1996), it had been suggested that in Aboriginal rights adjudication, '[t]he courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would [normally] be applied.'[142] Following this precedent, the bench affirmed in *Delgamuukw* that oral histories could be admitted as evidence in judicial proceedings to establish Aboriginal title, to the same extent as common law evidence. As per the Court, three criteria needed to be met in order to prove Aboriginal title. First, the Aboriginal community had to prove that prior to the assertion of the British Crown, it occupied the claimed territory. In *Tsilhqot'in Nation v British Columbia* (2014), McLachlin CJ favoured a 'culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question - its laws, practices, size, technological ability and the character of the land claimed - and the common law notion of possession as a basis for title.'[143] In the case of nomadic or semi-nomadic Aboriginal groups, sufficient occupation was not limited to specific sites of settlement, but was understood as encompassing territories used for hunting, fishing, trapping and foraging. The second criteria for establishing an Aboriginal title, as determined by *Delgamuukw*, was continuity of occupation.[144] Nonetheless, the Aboriginal community did not have to demonstrate an unbroken chain of continuity between present and pre-sovereignty occupation. Third, the Aboriginal community had to prove that at the time of the assertion of British sovereignty, the land was used exclusively by it, or if shared with another community, that the land was used in shared exclusivity.

Following the precedent in *Sparrow*, the judges affirmed however that Aboriginal title to land was not absolute and could be limited by the Crown. In *Delgamuukw*, they therefore proceeded to adapt the test for justification of infringement developed in *Sparrow* to Aboriginal title. At the first stage of the analysis, the Crown had to show that it was infringing Aboriginal title pursuant to a compelling and substantial legislative objective. Economical development and environmental protection objectives all qualified in the case of Aboriginal title. At the second stage of the analysis, the Crown needed to prove that it was acting in a manner consistent with its fiduciary duty towards Aboriginals. This could be done in three ways. First, the Crown had to give priority to Aboriginal title which involved a degree of scrutiny in justifying an infringement. As later specified in *Tsilhqot'in Nation* by McLachlin CJ: 'Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).'[145] Second, the Crown's fiduciary duty could be satisfied with the consultation and involvement of the Aboriginal group in the decision-making process regarding its land. Third, the fiduciary duty could be fulfilled by fairly compensating the Aboriginal group for the infringement of their title.

These legal developments have translated mostly into negotiation tools for establishing Aboriginal title. With respect to the land claim made in *Delgamuukw*, the Court reordered a trial so Aboriginal law could be given proper weight in the Gitxsan and Wet'su'weten's dispute settlement. However, the judges noted that generally speaking treaty negotiation rather than litigation was more appropriate in solving Aboriginal land claims. They added that the Crown also had the moral and legal duty to negotiate in good faith. In the end, no trial was re-ordered in the case of *Delgamuukw* and negotiations were favoured. In the *Marshall-Bernard* cases, the Court rejected the Mi'kmaq's title claim due to a lack of evidence, but the adoption of the *Made in Nova Scotia Process* (2007)[146] framework laid the path for a larger land settlement for Nova Scotia's Mi'kmaq through negotiation. Yet, treaty negotiations being lengthy and strenuous have not resulted in the establishment of title for the Gitxsan and Wet'su'weten, nor for the Mi'kmaq.[147] The only case in which the Court recognised an Aboriginal title to land was in *Tsilhquot'in Nation*.

(ii) Aboriginal Interests in Land

The twin cases of *Haida Nation v British Columbia* (2004)[148] and *Taku River Tlingit First Nation v British Columbia* (2004)[149] 'mark[ed] the emergence of a new constitutional paradigm governing [A]boriginal rights.'[150] The new jurisprudence emphasised the need to base Aboriginal land rights on the 'Principles of Reconciliation,' which allowed for Aboriginal interests in land to be taken into account rather than on the 'Principles of Recognition,' which was only concerned with the establishment of formal Aboriginal title.[151] This shift can be explained by the need to modernise Aboriginal land rights in order to simultaneously accommodate Aboriginal interest, but also public and private interest on claimed territory.

The importance for the Crown to consult and accommodate Aboriginal peoples regarding their land had already been identified in *Delgamuukw*. In *Haida Nation* and *Taku River Tlingit First Nation* however, it was elevated to a positive right. The Court determined that the Crown had the duty to consult and accommodate Aboriginals even before their title to land had been legally recognised, if the Crown had 'knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplate[d] conduct that might adversely affect it.'[152] It was later determined in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (2010),[153] that Aboriginal groups had to demonstrate the causal relationship between the contemplated Crown action and an impending adverse impact on their rights. Consequently, past and continuing breaches do not trigger the Crown's duty to consult, rather negotiation about compensation. Though the judges grounded the duty to consult in the principle of the honour of the Crown, they asserted that it was 'an essential corollary to the honourable process of reconciliation that section 35 of the *Constitution Act, 1982*, demands.'[154] While the 'Principle of Reconciliation' was emphasised, the 'Principle of Recognition' of a *sui generis* title was not totally evacuated. The judges added that the degree of consultation and accommodation required would vary according to the strength of the land claim and the severity of the possible adverse effects of an Aboriginal right infringement by the Crown.

The jurisprudence on Aboriginal land rights has been more effective in preserving Aboriginal interests in land than in granting them land titles. In 2002, the British Columbian Government adopted the *Provincial Policy for Consultation with First Nations*,[155] which recognised the need to consult and accommodate Aboriginal interest in land even if a title had been claimed but not yet proven, thereby applying the decisions made by the Court of Appeal of British Columbia in 2002, and upheld later by the Supreme Court in *Haida Nation* and *Taku River Tlingit First Nation* in 2004. Pursuant to the finding in *Haida Nation,* that the Crown should have consulted and accommodated the Council of the Haida Nation regarding the harvest of Haida Gwaii, the *Haida Gwaii Strategic Land Use Agreement 2007*[156] was signed by the two parties. In the case of *Taku River Tlingit First Nation*, the plaintiffs failed to have the British Columbian Government rescind its certificate of approval given to the mining company Redfern, to build a road to transport ore on their traditional territory. The Court determined that they had been adequately consulted and accommodated.[157] In the case of *Rio Tinto*, the Court decided that the Energy Purchase Agreement between Rio Tinto Alcan and BC Hydro would not have adverse effects on First Nations rights and that the duty to consult was not triggered.

Another jurisprudential development for Aboriginal peoples came with *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2011),[158] where the Court asserted that the Crown's duty to consult and accommodate Aboriginals is not discharged in the context of treaties.[159] As Binnie J put it: 'Treaty making is an important stage in the long

process of reconciliation, but it is only a stage.'[160] Under *Treaty 8* (1899), First Nations had surrendered their land to the Crown, but maintained the right to hunt, trap and fish on it, except on tracts to be taken up for settlement and other profitable activities. In 2000, the Federal Government ordered the construction of a winter road that adversely affected the traditional lifestyle of the Mikisew Cree First Nation, without consultation of its members. The Court ruled that the Crown's duty to consult had been triggered in this case, but that it was at the low end of the spectrum considering that *Treaty 8* provided for tracts to be taken up.

Later in *Beckman v Little Salmon/Carmacks First Nation* (2011),[161] a majority of the Court further decided that the Crown's duty to consult and accommodate is enlivened, even in the context of a modern comprehensive land claims treaty that provides for consultation mechanisms for the implementation of its provisions. In 1997, the Salmon/Carmacks First Nation signed a lands claim agreement which protected their right to fish and hunt on their traditional land. The agreement also provided that surrendered land could be taken-up for purposes such as agriculture. In the case at hand, the Salmon/Carmacks First Nation argued that the Yukon Territory had not properly consulted with its members before consenting to an agricultural land grant. The Yukon Territory had invited members of the Salmon/Carmacks to discuss the issue at a meeting, but they had decided not to attend the meeting and to voice their opposition to the agricultural land grant by way of a letter. A majority of the Court ruled that the Crown's duty to consult had been adequately discharged in this case. The duty to consult fell at the lower end of the spectrum since the treaty provided for land to be surrendered and since no elaborate consultation process had been included in the treaty for its application. In their minority judgment, Deschamps and Lebel JJ agreed with the result, but argued that when a treaty provides for consultation mechanisms, the duty to consult is discharged by the application of the terms of the treaty and must not be engaged independently of the treaty. They were of the view that:

> To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation.[162]

E Self-government

Contrary to the hope of some,[163] Aboriginals were not able to have the general right to self-government recognised and to establish a true multinational citizenship through rights-based judicial review. In *R v Pamajewon* (1996),[164] the Court refused to decide whether claims to self-government were included in section 35. In this case, the Shawanaga First Nation and the Eagle Lake First Nation had been convicted of operating common gaming houses without a provincial authorisation contrary to the *Criminal Code*.[165] In their defence, they asserted an inherent right to self-government that would allow them to regulate gambling activities. Chief Justice Lamer, writing for the majority, judged that their claim was too broad and that '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 rights.'[166] Assuming, without deciding, that section 35 encompasses the right to self-government, the majority decided that the legal standard developed in *Van der Peet* (1996) was the appropriate one to follow. It found that the regulation of gambling did not constitute a practice that was an integral part of the distinctive culture of the Shawanaga First Nation and the Eagle Lake First Nation.

By reverting to the culturalist approach to deal with specific self-government claims instead of developing a specific approach to the general right to self-government, the Court left the matter of Aboriginal governance to the other branches of government. A few months after the decision in *Pamajewon*, the Royal Commission on Aboriginal Peoples ('RCAP') tabled its final report recognising Aboriginal peoples' inherent right to self-government and recommending the implementation of a third order of government in Canada.[167] When confronted a year later in the case of *Delgamuukw* (1997) with an indirect self-government claim, the Court avoided it again. Chief Justice Lamer pointed out the complexity of the establishment of a third order of government for Aboriginals, as illustrated by the RCAP final report itself. While the Federal Government has not pushed for the establishment of a third order of government, it has adopted since 1995 a self-government policy which seeks to negotiate self-government agreements with different Aboriginal groups, rather than to establish a legal definition of the inherent right to self-government.[168]

V Analysis

A Legal Change

The rights-based litigation opportunities created by Canada's new constitution have translated into considerable legal gains for Aboriginal peoples, but with a few caveats. The overwhelming majority of their judicial victories can be attributed to the purposive approach given to section 35(1) of the *Constitution Act 1982*. Noteworthy here are the exemptions granted to Aboriginal peoples with respect to land-based rights. Although the framework for analysing these claims was narrowed in the *Van der Peet* trilogy (1996), it undeniably contributed to the expansion of Aboriginal rights in Canada. Still, this jurisprudence has attracted severe criticism from academia.[169] Apart from putting an unfair burden of proof on Aboriginals, the *Van der Peet* test has tended to overemphasise what was important in the past to guarantee the distinctiveness of Aboriginal cultures, rather than what Aboriginal cultures need today to preserve their cultural distinctiveness. This neo-colonial logic that permeates the whole Indigenous rights jurisprudence has tended to deny Aboriginals a just share of the land and resources to the benefit of the non-Aboriginal population.

Furthermore, section 35(1) allowed for a recognition of land titles for Aboriginal peoples. While the Court claimed Aboriginal law should determine the legal content of Aboriginal title and establish its proof, it has not played such a role in the jurisprudence. In the end, the Court only recognised one Aboriginal group's title to land, but it identified the way in which the first inhabitants of this country could have land titles recognised[170] and have their interests in land preserved.[171] As James B Kelly and Michael Murphy suggest:

> [J]udicial review in Canada has facilitated an [...] intergovernmental dialogue among First Nations and Canadian governments over the implementation of section 35. The Supreme Court has generally established the framework within which policy remedies must be framed but has left substantive policy choices to the discretion of political actors.[172]

Similarly, Slattery considers that Aboriginal title has metamorphosed into a generative right, meaning that it 'exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous Party and the Crown.'[173]

Even though section 35(1) rights are not subject to the limitation clause found in section 1 of the *Charter*, the Court has constructed substantial internal limits on them. In *Sparrow* (1990), the judges affirmed that Aboriginal rights are not absolute and that infringements on those rights are sometimes justifiable. In the same case, the Court established a test for justifying governmental interference with Aboriginal land-based rights, and in *Delgamuukw* (1997) a test for justifying interference with Aboriginal title to land. Interestingly, no infringement on an Aboriginal right was validated under those two tests. In *Haida Nation* (2004) however, the right for the Crown to infringe on Aboriginal title was insinuated as Aboriginal peoples were only left with the right to be consulted and accommodated. Some have argued that the possibility of infringing on Aboriginal rights amounts to a complete denial of Aboriginal sovereignty and the perpetuation of a colonial relationship between Aboriginal peoples and the Crown.[174]

The Aboriginal rights protected under section 35(1) were not defined by the Court as including the right to participate in constitutional discussions.[175] Aboriginal peoples were only guaranteed that their interests would be taken into consideration in an eventual Quebec secession process.[176] However, section 35(1) of the *Constitution Act 1982* gives Aboriginals a say in future constitutional negotiations affecting section 25 and 35 of the same Act, as well as section 91(24) of the *Constitution Act 1867*.

What was more startling is the Court's refusal to determine whether section 35(1) of the *Constitution Act 1982* encompassed the right to Aboriginal self-government. As Paul Joff puts it:

> It would be difficult to conceive of how an [A]boriginal people that is considered to be an 'organized society' for the purposes of s[ection] 35(1) of the Constitution Act, 1982 and possessing collective [A]boriginal and treaty rights could be determined to have few or no rights of self-government.'[177]

Many scholars have developed approaches to section 35(1) that would recognise Aboriginal self-government.[178] One central explanation for why the judges decided to assume, without deciding, that section 35(1) includes a right to self-government, is the inherent conflict between the individualistic values of the *Charter* and the collective values

on which self-governing Indian bands would be based.[179] Aboriginal peoples have therefore had to rely on political negotiations, rather than judicial review, to have their right to self-government recognised.

The more restrictive approach to Aboriginal rights developed over time in the jurisprudence on section 35(1) of the *Constitution Act 1982* was also adopted in the jurisprudence on section 25 of the *Charter*. In reality, the Court has shied away from interpreting this constitutional provision which was supposed to protect specific Aboriginal rights from *Charter* abrogation. In *Kapp* (2008), when section 25 was first invoked at the Supreme Court level, a majority of the bench preferred to decide the case under section 15(2) than to delineate the former. The majority added that it was unclear whether the impugned law that granted an exclusive fishing right to Aboriginals to the detriment of non-Aboriginals fell within the ambit of section 25, because it was statutory and not constitutional in nature. The majority also questioned whether section 25 constituted an absolute bar to other *Charter* claims, or if it was only a mere guide to interpretation. Rather than tackling these important questions and developing a general interpretative approach under section 25, the Court opted for solving these issues on a case by case basis. Justice Bastarache, in a concurring judgment, was alone in asserting that statutory rights were protected under section 25 and to affirm that the provision constituted a shield for Aboriginal rights from erosion based on the *Charter*. While he developed a generous approach to section 25 in *Kapp*, it remains to be seen whether it will be applied in future cases. It is thus too early to speculate on the provision's propensity to expand Aboriginal rights.

Aboriginal peoples were clearly less successful at having their rights recognised under the more general provisions of the *Charter*. The *Charter* jurisprudence per se only granted Aboriginals one representation right in *Corbiere* (1999) and one assistance right in *Kapp*. While the bench did not limit Aboriginal rights under section 1, it refused to hear *Native Women's Association of Canada* (1994) on the basis of freedom of expression found in section 2(b) and gender equality protected by section 28 of the *Charter*. Most of the Aboriginal *Charter* cases were decided under the equality clause found in section 15. Challenges under section 15(1) were unsuccessful in all cases[180] but one: that of *Corbiere*. As for the only case involving section 15(2), it ruled in favour of Aboriginal peoples.[181]

In two of the three cases that failed under section 15, considerations for self-reliance and self-government were invoked. In *Lovelace* (2000) the Court refused to take some of the proceeds of the Casino away from bands to the benefit of non-band Indians for the purpose of enhancing the former's self-reliance abilities. In *Ermineskin Indian Band and Nation* (2009), the Court vindicated the Federal Government's bands' royalties management scheme because it showed concern for Aboriginal self-government. One may ask if the judges were primarily concerned with promoting self-government or simply restraining public spending? Even though the proceeds of the Casino were limited, the Court could have mandated the government to put in place other measures to help non-band Indians. In the case of *Ermineskin Indian Band and Nation*, the Court could have mandated the government to calculate the interest on the royalties in a way that was more advantageous to Aboriginal peoples. Finally, in the cases involving alleged intra-group discrimination,[182] the Court has tended to favour the majority Aboriginal group rather than the minority Aboriginal group.

B Political Compliance

In the cases surveyed, the Crown's compliance with the Supreme Court judgments has been total. The notwithstanding clause found in section 33 of the *Charter* could only be invoked pursuant to the decision in *Corbiere* (1999), but the Federal Government decided not to. However, the federal and provincial governments have not really exceeded their constitutional obligations either with regards to Aboriginal peoples. Persuant to *Corbiere*, the Federal Government gave 'off-reserve' Indians the right to vote in band council elections, but did not follow through with its intention of reforming the *Indian Act* to truly recognise band-designed leadership selection codes.[183] Furthermore, Nova Scotia adopted a framework for land settlement with the Mi'kmaq, even though they failed to have their title to land recognised in *Marshall-Bernard* (2005). But this initiative can also be traced to *Delgamuukw*'s (1997) more general exhortation to settle Aboriginal claims by way of negotiations.[184] What is telling is that the governments accepted wholeheartedly the controversial jurisprudence laid out in the *Van der Peet* trilogy, even though the Court was split on the matter. Interestingly, authorities have been more willing to exceed their constitutional obligations in response to Court decisions involving minority groups other than Aboriginals, such as linguistic[185] and religious minorities.[186] Finally, the fact that section 35 of the *Constitution Act 1982*

falls outside of the *Charter* and is not subject to section 24(1), did not prevent its enforcement.

C The Promotion of Cultural Citizenship

Judicial review in the area of Aboriginal issues has revealed a clear repudiation of an 'undifferentiated' model of citizenship in Canada. The special constitutional status awarded to Aboriginal peoples has given them group-differentiated rights, notably fishing and hunting rights, institutional representation rights, welfare policies and land rights. Nevertheless, the new constitutional regime of 1982 has not promoted a true 'multinational' conception of citizenship. As exemplified by the *Van der Peet* trilogy, a simple retention of Aboriginal culture was favoured, as opposed to the implementation of parallel social structures, such as Aboriginal self-government. The recognition of Aboriginal title as a protected right under section 35 represents, to some extent, a step towards a 'multinational' citizenship, though land settlement processes are still ongoing.

The cultural rights arrangement established by constitutional review in Canada has rather promoted a 'polyethnic' model of citizenship. Constitutional review upheld existing Aboriginal-friendly legislation and even went further by pushing for the adoption of new Aboriginal-friendly legislation. The large majority of rights recognised have been group-differentiated and while they have permitted cultural retention, they promoted first and foremost social integration. Essentially, Aboriginals were granted many hunting and fishing rights merely to lessen the cultural costs of partaking in mainstream society. Welfare policies were also affirmed to facilitate their well-being in Canada. Finally, they benefited from representation rights within existing Canadian institutions.

VI Conclusion

One question remains: Why has constitutional review not brought about greater substantive equality? In reality, the implementation of a truly 'multinational' citizenship runs counter to Canada's institutional nation-building objectives. Since the end of World War II, national unity has been at the forefront of the Federal Government's concerns, especially with the persistence of the Quebec secessionist threat. There was a sense that allowing national minorities, such as French-speaking Quebecers through the unimpeded control of the Quebec State and Aboriginal communities through the establishment of a third order of government, to further the development of a citizenship distinct from the all-encompassing Canadian one, would diminish their attachment to the latter, and eventually lead to the disintegration of the Canadian territory.

In a country as culturally diverse as Canada, finding a common identity to which every citizen can adhere has been difficult. Canadian leaders have thus preferred to emphasise what unites Canadians, rather than what sets them apart. For Prime Minister Pierre Elliott Trudeau, the answer was in their common humanity and thus in their equal right to dignity. But since basing Canadian citizenship solely on universal principles would create a conception of Canadian identity that was too thin, it was important to recognise superficial cultural differences as part of that identity as well. Furthermore, it was only by embracing a 'polyethnic' conception of citizenship that the Canadian State could secure the national adhesion of several cultural groups and tame cultural unrest. This state of affairs was put in place well before the adoption of the *Charter.* Out of a concern for national cohesion, the Federal Government strategically supported the advocacy activities of groups who had been historically disadvantaged such as Aboriginal peoples.[187]

The development of parallel social structures in Canada has also been seen as a direct threat to the territorial unity of the country. Even though, the country is officially multicultural since 1971, the primary goal of the official multiculturalism policy was social integration rather than cultural retention.[188] Therefore, the recognition of Aboriginal self-government is seen as an impediment to Canadian sovereignty, notably the provinces' 'jurisdiction and control over lands, natural resources and populations.'[189] This reluctance to recognise self-government for Aboriginal peoples by the institutions was also present in the Canadian population as a whole, who refused to ratify the *Charlottetown Accord* in 1992. Finally, the Federal Government adopted a self-government policy in 1995, but insisted that the provisions of the *Charter* applied to the new Aboriginal governments,[190] which prevented the development of a parallel legal system in Canada.

While the Supreme Court of Canada has often been described as an umpire of federal-provincial relations,[191] it is above all a federal institution rather than a supranational one. This assertion can be supported by the fact that the bench is nominated on the recommendation of the Prime Minister of Canada. According to historical institutionalism,

institutional arrangements may affect judicial decision making.[192] Therefore, the supposition is that the Federal Government's preference for a 'polyethnic' citizenship would have permeated the Court as well.[193] Though there was interpretive space for a more generous reading of the constitutional provisions in favour of a 'multinational' conception of Canadian citizenship, the Court has chosen to stick to a 'polyethnic' one.

In summary, one can ask whether Aboriginal peoples have exhausted the potential of judicial review. One possible avenue would be for them to bring a case before the Court on the application of section 25 of the *Charter.* Another would be to find a way to force the country's highest tribunal to decide for good whether section 35 of the *Constitution Act 1982* includes the right to Aboriginal self-government. In the past, when faced with such challenges, the judges have been reluctant to take a stance. Perhaps the changing composition of the bench in the upcoming years will create new opportunities for Aboriginals to have these constitutional questions answered. In the meantime, it seems that the faith of Canadian Aboriginal peoples lay in the outcomes of the negotiation processes taking place all across their country. As Frances Abele and Michael J Prince point out, treaty-making processes between Aboriginal peoples and the Crown are very complex and lengthy.[194] Self-government and comprehensive land claim agreements take an average of 15 years to be negotiated and to date, there are only 23 that have been finalised between the Federal Government and Aboriginal peoples,[195] while 93 negotiations are ongoing.[196]

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1 Albert J Rosenthal and Louis Henkin, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press, 1990); David M Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff Publishers, 1994); Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000).

2 Ran Hirschl, '"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order' (2000) 22(4) *Human Rights Quarterly* 1060; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001); Tom Ginsburg, 'Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan' (2002) 27(4) *Law & Social Inquiry* 763.

3 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

4 *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*').

5 See, especially, Michael Ignatieff, *The Rights Revolution* (House of Anansi Press, 2000).

6 See, Linda Cardinal, 'Le pouvoir exécutif et la judiciarisation de la politique au Canada: une étude du programme de contestation judiciaire' (2000) 19(2-3) *Politique et Sociétés* 43.

7 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995); Jacob T Levy, 'Classifying Cultural Rights' in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and Group Rights* (New York University Press, 1996) 22.

8 Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) *Ethics* 250.

9 Jean Chrétien, Department of Indian Affairs and Northern Development, 'Statement of the Government of Canada on Indian Policy' (White Paper, Department of Indian Affairs and Northern Development, 1969).

10 Sally M Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto University Press, 1981).

11 Allan C Cairns, *Citizen Plus: Aboriginals Peoples and the Canadian State* (UBC Press, 2000).

12 Harold Cardinal, *Citizen Plus: A Presentation by the Indian Chiefs of Alberta to the Right Honourable P E Trudeau* (Indian Association of Alberta, 1970); note that the expression 'citizen plus' had been borrowed from the Hawthorn Report (1966-1967), see, Harry B Hawthord, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, (Research Paper Vol 1 and 2, Department of Citizenship and Immigration, 1966-1967).

13 Kymlicka, above n 7.

14 Ibid.

15 Levy, above n 7, 25.

16 Ibid.

17 Kymlicka, above n 7.

18 Aboriginal rights were protected to some extent at common law in Canada. See, eg, *Calder et al v A-G of British Columbia* [1973] SCR 313, which affirmed that Aboriginal title to land existed prior to colonisation by European nations, but that it could be extinguished by virtue of a government's exercise of sovereignty on the land.

19 *Royal Proclamation 1763* (UK), reprinted RSC 1985, App II, No 1.

20 William F Pentney, *The Aboriginal Rights Provisions in the Constitution Act 1982* (University of Saskatchewan: Native Law Center, 1987) 34.

21 John Borrows, 'The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (UBC Press, 1997) 155.

22 For example, Aboriginals were not able to have rights recognised under the *Royal Proclamation* in *St. Catharines Milling and Lumber Co v R* [1887] 13 SCR 577 and *Calder et al v A-G of British Columbia* [1973] SCR 313.

23 *Constitution Act 1867* (Imp), 30 & 31 Victoria, c 3 ('*Constitution Act 1867*').

24 *Indian Act*, RSC 1876, c 18.

25 Canada, Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation (Final report)* (Indian and Northern Affairs Canada, 1996) ('*RCAP Final Report*').

26 See, Weaver, above n 10; it must be noted however that many Indians opposed the Federal White Paper (1969) which would have scrapped the *Indian Act* thereby abolishing special status for Indians and the privileges attached to it.

27 *Canada Act 1982* (UK), c 11, sch B ('*Constitution Act 1982*').

28 *Canada Act 1982* (UK), ss 25, 35.

29 *Canada Act 1982* (UK), ss 25, 35.

30 Brian Slattery, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (1982-3) 8(1-2) *Queen's Law Journal* 232; Douglas Sanders, 'The Rights of the Aboriginal People of Canada' (1983) 61(1) *Canadian Bar Review* 314.

31 Section 25(b) was repealed and re-enacted by the *Constitution Amendment Proclamation 1983,* SI/84-102 ('*Constitution Amendment Proclamation 1983*'). It originally read as follows: '(b) any rights or freedoms that may be acquired by the Aboriginal peoples of Canada by way of land claims settlement'.

32 Kenneth Lysyk, 'The Rights of Aboriginal Peoples of Canada' in Walter S Tarnopolsky and Gérard A Beaudoin (eds), *The Canadian Charter of Rights and Freedoms: Commentary* (The Carswell Co Ltd, 1982) 467; Pentney, above n 20.

33 Slattery, above n 30; Pentney, above n 20.

34 Sanders, above n 30; Kent McNeil, 'The Constitutional Rights of Aboriginal Peoples in Canada' (1982) 4 *Supreme Court Law Review* 255; Pentney, above n 20; alternatively, some argued that the Aboriginal rights protected in section 25 of the *Canadian Charter of Rights and Freedoms* would need to be extended to non-Aboriginals under the equality clause found in section 15, see, eg, Leslie Claude Green, 'Aboriginal People, International Law and the Canadian Charter or Rights and Freedoms' (1983) 61(1) *Canadian Bar Review* 339; *Canadian Charter of Rights and Freedoms*, s 15 reads as follows:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

35 Slattery, above n 30; Pentney, above n 20; *Canadian Charter of Rights and Freedoms*, s 28 reads as follows: 'Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.'

36 Green, above n 34.

37 Slattery, above n 30, 240.

38 *Canadian Charter of Rights and Freedoms*, s 33 reads as follows:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

39 Frederik Lee Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press, 2000) 42.

40 Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation 1983.*

41 Sanders, above n 30, 329.

42 McNeil, above n 34; Pentney, above n 20.

43 Sanders, above n 30; Lysyk, above n 32.

44 Slattery, above n 30; McNeil, above n 34; Lysyk, above n 32; Pentney, above n 20.

45 Sanders, above n 30, 314.

46 Pentney, above n 20, 82-3.

47 Ibid 82.

48 *Reference whether 'Indians' includes 'Eskimo'* [1939] SCR 104.

49 Lysyk, above n 32; Pentney, above n 20.

50 Cairns, above n 11, 81.
51 Ibid 76.
52 *Attorney-General of Canada v Lavell* [1974] SCR 1349.
53 *Canadian Bill of Rights*, RSC 1960, c 44.
54 *An Act to Amend the Indian Act*, SC 1985, c 27, reprinted in RSC 1985, c 32 (1st Supp).
55 Slattery, above n 30.
56 *Canadian Charter of Rights and Freedoms*, s 24(1) reads as follows: 'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'
57 Pentney, above n 20, Lysyk, above n 32.
58 *Constitution Act 1982*, s 52(1) reads as follows: 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.'
59 *R v Sparrow* [1990] 1 SCR 1075 ('*Sparrow*'); *R v Badger* [1996] 1 SCR 771 ('*Badger*'); *R v Nikal* [1996] 1 SCR 1013 ('*Nikal*').
60 *R v Van der Peet* [1996] 2 SCR 507 ('*Van der Peet*'); *R v NTC Smokehouse Ltd* [1996] 2 SCR 672 ('*NTC Smokehouse*'); *R v Gladstone* [1996] 2 SCR 723 ('*Gladstone*'); *R v Adams* [1996] 3 SCR 101 ('*Adams*'); *R v Côté* [1996] 3 SCR 139 ('*Côté*'); *R v Marshall (No 1)* [1999] 3 SCR 456 ('*Marshall (1)*'); *R v Marshall (No 2)* [1999] 3 SCR 533 ('*Marshall (2)*').
61 *Côté* [1996] 3 SCR 139.
62 *R v Sundown* [1999] 1 SCR 393 ('*Sundown*').
63 *Mitchell v MNR* [2001] SCC 33 ('*Mitchell*').
64 *R v Sappier*; *R v Gray* [2006] SCC 54 ('*Sappier-Gray*').
65 *R v Pamajewon* [1996] 2 SCR 821 ('*Pamajewon*').
66 *Sparrow* [1990] 1 SCR 1075.
67 Ibid [37].
68 Ibid [24].
69 *R v Taylor and Williams* [1981] 34 OR (2d) 360.
70 *Nowegijick v The Queen* [1983] 1 SCR 29.
71 *Guerin v The Queen* [1984] 2 SCR 33.
72 *Sparrow* [1990] 1 SCR 1075 [59].
73 Ibid [70].
74 Ibid [82].
75 See *Sparrow* [1990] 1 SCR 1075; *Nikal* [1996] 1 SCR 1013.
76 *Badger* [1996] 1 SCR 771.
77 Ibid; *Sundown* [1999] 1 SCR 393; *Marshall (1)* [1999] 3 SCR 456; *Marshall (2)* [1999] 3 SCR 533.
78 *Van der Peet* [1996] 2 SCR 507; *Gladstone* [1996] 2 SCR 723; *NTC Smokehouse* [1996] 2 SCR 672.
79 *Van der Peet* [1996] 2 SCR 507.
80 *Gladstone* [1996] 2 SCR 723.
81 *NTC Smokehouse* [1996] 2 SCR 672.
82 *Van der Peet* [1996] 2 SCR 507 [30] (emphasis in original).
83 *Sparrow* [1990] 1 SCR 1075 [40].
84 *Van der Peet* [1996] 2 SCR 507 [45].
85 Ibid [48]-[75].
86 Ibid [55].
87 *Adams* [1996] 3 SCR 101.
88 *Côté* [1996] 3 SCR 139.
89 *Sappier-Gray* [2006] SCC 54.
90 *Van der Peet* [1996] 2 SCR 507 [60].
91 *R v Powley* [2003] SCC 43 ('*Powley*').
92 *Van der Peet* [1996] 2 SCR 507 [160].
93 Ibid [198].
94 See, eg, Russel Lawrence Barsh and James Youngblood Henderson, 'The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand' (1997) 42(4) *McGill Law Journal* 993.
95 *Gladstone* [1996] 2 SCR 723; *Adams* [1996] 3 SCR 101; *Côté* [1996] 3 SCR 139; *Powley* [2003] SCC 43; *Sappier-Gray* [2006] SCC 54.
96 *Van der Peet* [1996] 2 SCR 507; *NTC Smokehouse* [1996] 2 SCR 672; *Pamajewon* [1996] 2 SCR 821; *Mitchell v MNR* [2001] SCC 33.
97 Levy, above n 7, 44.
98 *Native Women's Association of Canada v Canada* [1994] 3 SCR 627 ('*Native Women's Assn*').
99 *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 ('*Corbiere*').
100 *Reference Re Secession of Quebec* [1998] 2 SCR 217 ('*Secession Reference*').
101 *Native Women's Assn* [1994] 3 SCR 627.
102 *Canadian Charter of Rights and Freedoms*, s 2(b) provides that '[e]veryone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'.
103 The Beaudoin-Dobbie Committee was put in place in 1991 by the Federal Government to consult Canadians on a set of proposed constitutional amendments. The final report it delivered served a base for the failed Charlottetown Accord.
104 *Corbiere* [1999] 2 SCR 203.
105 *Indian Act*, RSC 1985, c I-5, s 77(1) reads as follows: 'A member of a band who has attained the age of 18 years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.'
106 The *Law* test was developed in *Law* v *Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 to determine whether there is a s 15 right violation.

107 *Corbiere* [1999] 2 SCR 203 [18].

108 The Supreme Court of Canada developed a test for the application of the limitation clause in *R v Oakes* [1986] 1 SCR 103. The Oakes test was later clarified by Iacobucci J in *Egan v Canada* [1995] 2 SCR 513 [182]:

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

109 *Corbiere* [1999] 2 SCR 203 [21].

110 Canada, Department of Indian Affairs and Northern Development, 'Backgrounder: Consultation on the Corbiere Decision' (Department of Indian Affairs and Norther Development, 1999).

111 *Regulations Amending the Indian Band Election Regulation*, SOR/2000-391.

112 *Regulations Amending the Indian Referendum Regulation*, SOR/2000-392.

113 Bill C-7, *First Nations Governance Act*, 2nd Sess, 37th Parl, 2002 (Second Reading 9 October 2002).

114 John Provart, 'Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada' (2003) 2 *Indigenous Law Journal* 117.

115 *Secession Reference* [1998] 2 SCR 217.

116 'Federalism', 'democracy', as well as 'constitutionalism' and the 'rule of law' were the other principles identified by the Court.

117 *Secession Reference* [1998] 2 SCR 217 [82].

118 Ibid [139].

119 *Clarity Act*, RSC 2000, c 26, [2(3)], [3(2)].

120 See, eg, Daniel Turp, 'The *Clarity Bill* and the Québec Secession Reference: Shooting Down the Lodestar of Canadian Federalism' in Daniel Turp (ed), *The Right to Choose: Essays on Quebec's Right to Self-Determination* (Éditions Thémis, 2001) 713, 716-17; Andrée Lajoie, 'The Clarity Act in Its Context' in Alain-G Gagnon (ed), *Québec: State and Society* (Broadview Press, 2004) 151, 160.

121 *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*, RSQ 200, c E-20.2 ('*Bill 99*').

122 *Bill 99* ss 11-12.

123 Levy, above n 7, 29-32.

124 *Lovelace v Ontario* [2000] SCC 37 ('*Lovelace*').

125 Ibid.

126 *Ermineskin Indian Band and Nation v Canada* [2009] SCC 9 ('*Ermineskin Indian Band and Nation*').

127 *R v Kapp* [2008] SCC 41 ('*Kapp*').

128 Ontario, *Casino Rama Revenue Agreement*, (Government of Ontario, 2000). This is an agreement between Ontario's First Nations Ltd Partnership and Mnjikaning First Nation Ltd Partnership.

129 The *Andrews* test was developed in *Andrews* v *Law Society of British Columbia* [1989] 1 SCR 143 to determine whether there was a s 15 right violation. The return to the *Andrews* test after the development of the *Law* test can be explained by the problems of the 'human dignity' analysis associated with the latter, as discussed in *Kapp* [2008] SCC 41. See, Sophia Moreau, '*R v Kapp*: New Directions for Section 15' (2009) 40(2) *Ottawa Law Review* 283.

130 *Ermineskin Indian Band and Nation* [2009] SCC 9 [202].

131 Ibid [147].

132 *Aboriginal Communal Fishing Licences Regulations*, SOR/1993-332.

133 *Kapp* [2008] SCC 41 [37].

134 Moreau, above n 129, 283.

135 Levy, above n 7, 37.

136 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 ('*Delgamuukw*'); *R v Marshall*; *R v Bernard* [2005] SCC 43 ('*Marshall-Bernard*').

137 *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73 ('*Haida Nation*'); *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] SCC 74 ('*Taku River Tlingit First Nation*').

138 *Delgamuukw* [1997] 3 SCR 1010.

139 Ibid [113].

140 Ibid [117].

141 See, Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening?' (2006) 69 *Saskatchewan Law Review* 283, 289.

142 *Van der Peet* [1996] 2 SCR 507 [68].

143 *Tsilhqot'in Nation v British Columbia* [2014] SCC 44 [41] ('*Tsilhqot'in Nation*').

144 *Delgamuukw* [1997] 3 SCR 1010.

145 *Tsilhqot'in Nation* [87].

146 Nova Scotia, *Made in Nova Scotia Process (Framework Agreement)*, (Halifax: Government of Nova Scotia, 2007). This agreement is between Mi'kmaq of Nova Scotia and Canada.

147 Government of Canada, *Negotiation Tables* (1 September 2013)

Aboriginal Affairs and Northern Development Canada <https://www.aadnc-aandc.gc.ca/eng/1346782327802/1346782485058> ('*Negotiation Tables*').

148 *Haida Nation* [2004] SCC 73.

149 *Taku River Tlingit First Nation* [2004] SCC 74.

150 Brian Slattery, 'The Metamorphosis of Aboriginal Title' (2007) 85(2) *Canadian Bar Review* 255, 285.

151 Ibid 262.

152 *Haida Nation* [2004] SCC 73 [35].

153 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* [2010] SCC 43 ('*Rio Tinto*').

154 *Haida Nation* [2004] SCC 73 [38].

155 British Columbia, *Provincial Policy for Consultation with First Nations* (Victoria: Government of British Columbia, 2002).

156 British Columbia, *Haida Gwaii Strategic Land Use Agreement* (Victoria: Government of British Columbia, 2007). This agreement is between Indigenous People of Haida Gwaii and British Columbia.

157 In a twist of faith, the road was never built due to the high cost associated with it. See, Chuck Tobin, 'Barge Plan Would Save $45 Million', *Whitehorse Star* (Whitehorse), 31 January 2007, 6. Redfern sought instead governmental approval to construct an air-cushioned barge on the Taku River to transport the ore. After consulting with the Taku River Tlingit First Nation, British Columbia amended the mining company's environmental assessment certificate in 2009 so it could go forward with its barging alternative. See, British Columbia Ministry of Environment, 'Tulsequah Chief Mine Receives Certificate Amendment' (Press Release, 2009ENV0011-000262, 27 February 2009).

158 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2011] SCC 69 ('*Mikisew Cree First Nation*').

159 The Crown's duty to consult and accommodate Aboriginals in the context of treaties was confirmed in *Grassy Narrows First Nation v Ontario (Natural Resources)* [2014] SCC 48.

160 *Mikisew Cree First Nation* [2011] SCC 69 [54].

161 *Beckman v Little Salmon/Carmacks First Nation* [2011] SCC 53 ('*Beckman*').

162 Ibid [107].

163 McNeill, above n 34; Pentney, above n 20.

164 *Pamajewon* [1996] 2 SCR 821.

165 *Criminal Code*, RSC 1985, c C-46.

166 *Pamajewon* [1996] 2 SCR 821 [27].

167 *RCAP Final Report*, above n 25.

168 See, Jill Wherrett , 'Aboriginal Self-Government' (Parliamentary Information and Research Services of the Library of Parliament, 1999).

169 Barsh and Henderson, above n 94; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002); Michael Murphy, 'Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?' (2001) 34(1) *Canadian Journal of Political Science* 109.

170 *Delgamuukw* [1997] 3 SCR 1010.

171 *Delgamuukw* [1997] 3 SCR 1010; *Haida Nation* [2004] SCC 73; *Taku River Tlingit First Nation* [2004] SCC 74.

172 James B Kelly and Michael Murphy, 'Shaping the Constitutional Dialogue on Federalism' (2005) 35(2) *Publius* 217, 219.

173 Slattery, above n 150, 255.

174 See, eg, Gordon Christie, 'A Colonial Reading on Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation' (2005) 23(1) *Windsor Yearbook of Access to Justice* 17.

175 *Native Women's Assn* [1994] 3 SCR 627.

176 *Secession Reference* [1998] 2 SCR 217.

177 Paul Joffe, 'Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec' (2000) 45(1) *McGill Law Journal* 155, 167.

178 McNeil, above n 34; Pentney, above n 20.

179 Frederik Lee Morton, 'Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Québécois' in Neil Nevitte and Allan Kornberg (eds), *Minorities and the Canadian State* (Mosaic Press, 1985) 71; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing, 1994).

180 *Native Women's Assn* [1994] 3 SCR 627; *Lovelace* [2000] SCC 37; *Ermineskin Indian Band and Nation* [2009] SCC 9.

181 *Kapp* [2008] SCC 41.

182 *Native Women's Assn* [1994] 3 SCR 627; *Corbiere* [1999] 2 SCR 203; *Lovelace* [2000] SCC 37.

183 Provart, above n 114, 153-5.

184 Nova Scotia, *Made in Nova Scotia Process (Framework Agreement)* (Halifax: Government of Nova Scotia, 2007). This agreement is between: Mi'kmaq of Nova Scotia and Canada.

185 Since 2002, the government of New Brunswick guarantees the right to French-English bilingual judges, even though *Société des Acadiens v Association of Parents* [1986] 1 SCR 549 had ruled that individuals only had the right to be heard in one of Canada's official languages, but not the right of being understood by a judge that qualifies as a receptive bilingual. Pursuant to *Mahe v Alberta* [1990] 1 SCR 342, the government of Alberta established a school governance scheme for Franco-Albertans instead of just giving Francophone parents significant representation on Edmonton's existing school board.

186 While the judges had upheld Ontario's Sunday-closing law in *R v Edwards Books and Art Ltd* [1986]2 SCR 295, the provincial government decided ultimately to grant exemptions for all non-Sunday religious observers. Pursuant to *Adler v Ontario* [1996] 3

SCR 609, the government of Ontario also chose to extend special education services to disabled children attending faith-based schools even though the Court did not require it.

187 Leslie Alexander Pal, *Interests of State: The Politics of Language, Multiculturalism and Feminism in Canada* (McGill-Queen's University Press, 1993).

188 See, eg, Lance W Roberts and Rodney A Clifton, 'Exploring the Ideology of Multiculturalism' (1982) 8(1) *Canadian Public Policy* 88; Howard Brotz, 'Multiculturalism in Canada: A Muddle' (1980) 6(1) *Canadian Public Policy* 41.

189 Khayyam Zev Paltiel, 'Groups Rights in the Canadian Constitution and Aboriginal Claims to Self-determination' in Robert J Jackson, Doreen Jackson and Nicolas Baxter-Moore (eds), *Contemporary Canadian Politics: Reading and Notes* (Prentice-Hall, 1987) 26, 36.

190 Jill Wherrett, above n 168.

191 See, eg, Katherine L Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Carswell, 1990).

192 Cornell W Clayton and Howard Gillman, 'Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making' in Cornell W Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Insitutionalist Approaches* (University of Chicago Press, 1999) 1, 6-7.

193 This is a reason why the Quebec Government has always made the power to nominate judges from Quebec on the Supreme Court one of its traditional constitutional demands.

194 Frances Abele and Michael J Prince, 'Aboriginal Governance and Canadian Federalism' in François Rocher and Miriam Catherine Smith (eds), *New Trends in Canadian Federalism* (Broadview Press, 2003) 135.

195 Government of Canada, *Fact Sheet: Aboriginal Self-Government* (Aboriginal Affairs and Northern Development Canada, 1 September 2013) <https://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294>.

196 Government of Canada, *Negotiation Tables*, above n 147.