First Nation Retained Sovereignty

An Inherent Right to Participate in and Regulate Gaming Economies

By

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Abstract

First Nations in Canada and tribes in the United States share similar histories from pre-contact to present day. Indigenous peoples met newcomers from overseas and established relationships of trade and military alliance. This relationship changed over time, owing to many factors, not limited to shifts in demographics as a result of waves of immigration, war and disease. The emerging settler societies of Canada and the United States have maintained similar, but differing, relationships with the Indigenous nations on the respective sides of the present day border.

The differences emerge as result of the manner in which the settler colonies severed their relationship with the British Empire. In the United States, independence occurred in 1776 during a time when tribal nations were relied upon for military strength and when tribal political autonomy was self-evident. Not surprisingly, the newly formed union did not purport to exercise dominion over the tribes. Rather, the United States recognized tribal sovereignty. Since then, relying on notions of racial superiority, both the United States and Canada have wrested fundamental tenets of democracy to conclude that unilateral dominion is not only legal, but morally correct. This thesis seeks to support the position that tribal and First Nation sovereignty has not been extinguished and First Nations continue to possess inherent rights of self-government and sovereignty.

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Introduction

Manitoba is possibly the most saturated gaming market in Canada and generates approximately $600 million in annual revenue.[1] Unlike the United States, Canada does not have federal legislation preserving space in the gaming industry for First Nations.[2] Through this absence of federal legislation and a 1985 amendment of the Criminal Code, the Federal government delegated exclusive jurisdiction over gaming to the provinces.[3] Unless or until the federal government enacts legislation recognizing First Nation jurisdiction, the Manitoba government will be able to preclude or permit First Nation participation in gaming according to its own political policy.[4] As will be shown in this thesis, a key difference in the United States is that gaming is generally not characterized as a criminal activity; rather, gaming, in particular bingo, is a civilly regulated activity. As a result, tribes in the United States have been successful at fending off state interference in tribal gaming and ultimately the federal government codified the tribal right and jurisdiction over gaming in the Indian Gaming Regulatory Act ("IGRA").[5]

This thesis argues that First Nations ought to have a greater participation in gaming revenue creation and distribution in Manitoba owing to their inherent rights of sovereignty, or aboriginal right of self-government, deriving from First Nation prior occupation of this territory.

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[1] Manitoba Lotteries Corporation 2013-14 *Annual Report* p. 3. http://www.manitobalotteries.com/uploads/ck/files/Annual-Report_MLC_2013-14.pdf [hereinafter MLC *Annual Report*].

[2] The Indian Gaming Regulatory Act (Pub.L. 100–497, 25 U.S.C. § 2701 et seq.) [Hereinafter "IGRA"]

[3] Robin Kelley "First Nation Gambling Policy In Canada" (2002) 2:2 The Journal of Aboriginal Economic Development.

[4] *Manitoba First Nation Gaming Market Study 2007 p. 28. http://lgamanitoba.ca/documents/first-nations-gaming-market-study-2007.pdf* See also Bender, Jim True "North opens its Shark Club gaming centre at Cityplace" 2013 Winnipeg Sun http://www.winnipegsun.com/2013/06/18/true-north-opens-its-shark-club-gaming-centre-at-cityplace (June 18, 2013, Shark Club Gaming Center (Casino) is opened in downtown Winnipeg) See also Martin, Cash Chiefs Plan to Build Casino in Thompson 2014 Winnipeg Free Press http://www.winnipegfreepress.com/business/chiefs-plan-to-build-casino-in-thompson-248702991.html (Province refuses to consider Winnipeg as an option for First Nation Casino and instead completes a study and approves Thompson as potential future casino site for First Nations.)

[5] IGRA *supra* note 2.

Further, this thesis will argue that the underlying motivation of the Province of Manitoba for excluding First Nations from the gaming is the protection of their own gaming market share and not a genuine interest in the health, safety, and welfare of First Nations, as oft purported. This thesis will argue that the Crown perpetuates racially prejudiced-based law by relying on it to regulate, and limit, the participation of First Nations in the gaming economy. I will argue that the Canadian Crown lacks legitimate legal basis to unilaterally exercise authority over Indians or to exclude First Nation participation in gaming economies insofar as Canada rests its authority solely on outdated race-based doctrines. By contrast, the relationship between the tribes and the United States can be described as political in nature as evidenced by the government-to-government relationship as opposed to a government-to-subject relationship.[6] In other words the United States chooses to deal with Indian tribes rather than Individual Indians.[7]

Walter R. Echo-Hawk has argued that racism and colonialism have no place in our society.[8] The notion that Native Americans are "barbarians, infidels, or savages" is not reflective of modern values and "the legal doctrines built upon those classifications become legal fictions that are no longer tenable, logical, nor entitled to any effect."[9] This thesis will argue that as long as Canadian courts continue to rely on colonial values and pejorative legal fictions, such as the assertion that Indian jurisdiction and title of Indians was extinguished by discovery,[10] section 35(1) of the *Constitution Act, 1982* aboriginal rights will not provide for a favorable result as it pertains to First Nations' efforts to exercise their jurisdiction or self-government. This is because the test for proving whether an aboriginal right survived the assertion of sovereignty by

[6] Matthew L.M. Fletcher, "The Original Understanding of the Political Status of Indian Tribes" (2007) 82 St. John's Law Review 153 at 180. *See also,* Hamer Foster "Canadian Indians, Time and the Law" (1994) 7 Western Legal History 69 at 88-89.
[7] *Ibid*.
[8] Walter R. Echo-Hawk *In the Courts of the Conqueror, ed* (Golden, Colo.: Fulcrum Pub., 2010) p. 21.
[9] *Ibid*.
[10] *Johnson & Graham's Lessee v. M'Intosh* 21 U.S. 543 (1823) at 588.

the Crown was developed by Canada's Supreme Court,[11] and Canada's courts will not question the country's foundational principles. No matter how extravagant the principle may be, including the "pretension of converting the discovery of an inhabited country into conquest" will not be questioned by the courts once it becomes the "law of the land."[12] This also includes the extravagant notion that jurisdiction and title vested in the Crown upon discovery.[13] Thus, this thesis will argue that insofar as section 35(1) aboriginal rights are defined by the courts, the outcome of an adjudication of those rights will likely reflect the contention of the Canadian government that aboriginal rights survive only if they are compatible with the exercise of historical and modern Crown sovereignty.[14]

However, First Nations' occupation of North America predates the confederation of Canada as First Nations were, at the time of contact, already "occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures."[15] It follows that the political and social rights of First Nations are not derived from section 35 of the *Constitution Act, 1982*. Indeed, First Nations rights existed notwithstanding the activities of settlers and Canadian confederation.[16] Although Manitoba and First Nations have made some steps towards inclusion of First Nations, the participation is policy based rather than based on the inherent rights of First Nations. Moreover, several hundred private business owners, representing their own corporate interests, take home a larger share of gaming revenue in the province than the combined 63 First Nations. This is arguably problematic because First

[11] *R v Van der Peet* [1996] 2 S.C.R. 507
[12] *Johnson supra* note 10 at p. 591.
[13] *R v Sparrow* [1990] 1 S.C.R. 1075 at para 49.
[14] *Mitchell v Minister of National Revenue* [2001] 1 S.C.R. 911 at para 61.
[15] *Ibid at* para 9.
[16] *Calder et al. v. Attorney-General of British Columbia,* [1973] S.C.R. 313 at 118.

Nations have inherent rights deriving from their prior occupation and represent nearly 150,000 people combined with different histories, languages, economic needs and governments.[17]

This thesis will draw attention to the continued reliance on notions of racial inferiority of Indians as a justification for extinguishment of aboriginal rights by taking a closer look at the way in which common law interpretation of constitutional law is used to suppress jurisdictional aspects of First Nation's self-government in favor of foreign jurisdiction of Britain and its successor states: the United States and Canada. This thesis argues that continued reliance on common law and statutes that perpetuate colonialism to displace First Nation jurisdiction over their economy, including gaming, should not be sustained precisely because they are grounded in principles of racial superiority of Europeans and such principles are patently false.

The chapters of this thesis will focus first on an overview of the current gaming market in Manitoba, including the gaming revenue distribution in Manitoba, in order to get a sense for the economic interests at stake. Next, I will explore how Manitoba and neighboring jurisdictions have treated First Nation attempts to regulate and operate gaming, whether a First Nation has attempted to prove an aboriginal right under a section 35(1) or a right that exists extraneous to the Canadian constitutional and statutory framework. Here I argue that making a claim to an aboriginal right of self-government under section 35(1) is unlikely to succeed due to the assumption that Indigenous sovereignty was extinguished through the assertion of Crown sovereignty and because the aboriginal rights test is applied by a court whose existence depends on the legitimacy of the Crown's assertion of sovereignty. I argue that the assumption that Indigenous sovereignty was extinguished is inconsistent with the United States Supreme Court

[17] MLC *Annual Report supra* note 1 at 10 & 17. VLT's provided annual commissions and contributions of $100.8 million to all VLT siteholders who operate equipment on their premises. First Nations VLT site holders retained $41.74 million in 2013-14.

decisions in *Johnson*,[18] *Cherokee Nation v. Georgia*[19] and *Worcester*,[20] upon which Canada bases its assertion that the Crown extinguished First Nation sovereignty. By contrast, I argue that these cases support the conclusion that tribes retained sovereignty and that Indigenous sovereignty was only diminished, which is precisely how they are interpreted by the United States. This thesis will argue that tribes in the United States have the advantage of starting with the assumption that sovereignty exists unless diminished or extinguished and that First Nations are at a distinct disadvantage bearing the burden of proving each section 35(1) aboriginal right according to the Supreme Court of Canada's *Van der Peet* test under the assumption that sovereignty has been extinguished.

Next, this thesis will compare the United States' relationship with the Native American tribes and the United States' claims to plenary power over Indian tribes in light of the unique constitutional framework that exists in the United States. This chapter will demonstrate that although the two nations appear to start with the same foundational common law, their paths diverge and two very distinct results emerge. Further, we will see that whereas Canada uses American case law to prove that First Nations lack jurisdiction, the United States Supreme Court continues to uphold a balance of tribal sovereignty. By showing that the United States never accepted that Britain extinguished tribal sovereignty at the time of its independence, this thesis will demonstrate that Canada misappropriates United States law to the extent it attempts to rationalize British dominion over First Nations citing United States' precedent.[21]

Finally, this thesis will explore the United States case law related to the tribal efforts to exercise residual sovereignty to operate and regulate gaming on their reservations. I will argue

[18] *Johnson supra* note 10 at 543.
[19] *Cherokee Nation v Georgia*, [1831] 30 US 1.
[20] *Worcester v Georgia*, [1832] 31 US 515.
[21] See generally, Foster *supra* note 6.

that it is the starting point of residual sovereignty that enabled the tribes to defeat the efforts of the states to obstruct competing tribal participation in the gaming industry. Ultimately, tribal sovereignty was acknowledged in the United States federal legislation the *Indian Gaming Regulatory Act* as the basis for the tribal right to conduct gaming.

In addition to a critical examination of case law, this thesis will include policy analysis and statutory interpretation. Much of the gaming in Canada generally, and Manitoba in particular, is predicated upon policy rather than express statute. The provinces are afforded broad deference under the Criminal Code and much of what the provinces implement is based on policy rather than law. I will critique the policies insofar as they perpetuate the racist legal doctrines and assumptions in Canadian law.

Moving forward the United States offers a model that might be emulated by Canada. There, the federal government has enacted legislation to support the tribal inherent jurisdiction over the economy of gaming. At its core, the United States recognizes tribal sovereignty. As this thesis will discuss, the federal government supports tribal economic development and revenue generation as fundamental aspects of self-government. In order to move forward Canada, either through its judicial system or the legislative body, should recognize this activities as two of the constitutionally protected aboriginal rights. Although small advances might be made, the ad hoc province-by-province agreements do not present equitable or stable solutions.

CHAPTER 1

Gaming Revenue Distribution in Manitoba – Gaming as a Resource

In order to understand the motivation of governments to assert jurisdiction over gaming, it is important to understand the economic value of the resource. Like the many resources Europeans sought to control, jurisdiction over gaming represents another field of opportunity desired by European settlers and their settler governments.[22] This chapter provides a broad overview of the gaming market and framework of gaming in Manitoba to demonstrate that Manitoba claims that the Winnipeg market is saturated while approving facilities for private owners. It also demonstrates Manitoba's failure to recognize First Nations' inherent right to gaming.

In 2014 the Manitoba Lottery Corporation reported $599.6 million in total revenue and income.[23] Approximately $100 million annually in commissions is paid to VLT site holders, including First Nation VLT sites and privately held commercial sites.[24] First Nations received about $43.5 million in commissions in 2013 compared to the approximately $58.5 million in 2013 that was paid to private business owners including $6.3 million to the Manitoba Jockey Club.[25] First Nations use commissions to promote social and economic benefits within their communities and commercial site holders must to use their commissions to promote tourism.[26] It is unclear whether promoting tourism constitutes anything beyond continued operation of business. In any event, this thesis argues that First Nations have an inherent right to participate in gaming, whereas commercial site holders have no such claim. The author acknowledges the

[22] Robert N. Clinton, Indian Gaming Regulatory Act Symposium: Article: "Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?" (2015) 42 Ariz. St. L.J. 17 at 17.
[23] Annual Report *supra* note 1 (including VLT site holder fees) at 3.
[24] *Ibid*.
[25] *Ibid* at 25.
[26] *Ibid* at 17.

perspective that gaming may give rise to social costs such as addictions and poverty or that gambling itself may be considered morally wrong. However, this thesis does not evaluate whether gaming has provided a net benefit or loss to First Nation communities nor does it argue that First Nations are better or worse off by engaging in gaming economies or whether gaming is morally right or wrong.[27] The author acknowledges there may be empirical data that could be gathered evaluate the financial impact of gaming. Such research could possibly contrast the benefits of gaming such as employment, governmental capacity funded by gaming, education funding, graduation rates, and housing, to perceptibly negative indicators such as addiction and social service reliance. However, that topic is outside the scope of this thesis although it may be a worthy subject for a future project. In addition, the author leaves to the respective First Nations to determine whether or not gaming fits within their respective moral paradigm and choose whether to engage in gaming economies according to their sovereign powers and internal policy. In this thesis, I contend that First Nation and tribal governments retain the inherent right to conduct and regulate gaming if they choose to do so, regardless of how they weigh economic and moral outcomes. Evidently, the economics of gaming provide sufficient incentive for the Manitoba government to conduct gaming, despite any perceived morality concerns.

The Manitoba government net revenues for 2013 included $78 million net profit from Winnipeg casinos, $166 million from commercial VLT's, $53 million from lotteries.[28] The bulk of this money is captured in from the Winnipeg region or from "city site holders" and Winnipeg casinos.[29] The provincial government is able to protect their market share from First Nations because the *Criminal Code* currently delegates the authority to operate gaming exclusively to the

[27] For an historical perspective on gaming in indigenous communities, including gaming as a vice *see* Yale D. Belanger *Gambling with the Future, The Evolution of Aboriginal Gaming in Canada,* (Saskatoon: Purich Pub., 2006) at 24-39
[28] *Ibid* at 25.
[29] *Ibid*.

provinces.[30] Gaming might be compared to other valuable resources that explorers and settlers sought to dispossess from Indigenous peoples. There are hundreds of millions of dollars in revenue in Manitoba and potentially billions across Canada that provincial governments have an interest in protecting. The current regulatory framework reflects the province's protectionist approach of preserving these revenues for itself.

I. Legal Framework and Policy

On October 15, 1997, the Province of Manitoba issued a First Nations Gaming Policy Review Report.[31] The report is commonly known as the Bostrom Report owing to the name of the Committee Chair, Minister Harvey Bostrom. The Committee was tasked with providing advice on policy recommendations for future First Nation participation in the gaming economy in Manitoba.[32]

The statement by the Chair prefacing the report contains a number of caveats. First, the report is based on the Committee understanding of federal and provincial laws and regulatory framework.[33] Rather paradoxically, the Committee also stated that the report is not intended to affect existing Treaty or Aboriginal rights of any Aboriginal people in Manitoba.[34] The report simultaneously assumes legitimacy of federal jurisdiction over Indians and made recommendations that were compliant with the *Criminal Code* of Canada reflecting a position of exclusive authority of the Manitoba Gaming Control Commission to regulate gaming.[35] This thesis leaves aside the issues of federalism and works from the current status quo whereby the

[30] *Criminal Code*, RSC 1985, c C-46 s 206-7.
[31] *First Nations Gaming Policy Review Report* 1997 Manitoba Government Report [hereinafter "Bostrom Report"]
[32] *Ibid* at 5.
[33] *Ibid*.
[34] *Ibid.*
[35] *Ibid* at 12.

federal government delegated authority over gaming to provinces. This thesis will argue that First Nations possess an inherent right to operate gaming that has not been extinguished and therefore, such policy does adversely impact First Nation rights despite the stated intent. In addition, the position that federal and provincial power pre-empts Indigenous sovereignty is based on underlying principles of racial and religious superiority and such foundation is not tenable.

By denying First Nation inherent right to gaming, the province is able to limit First Nation participation. For example, the Bostrom Report recommended five destination gaming facilities or casinos to be strategically located within the Manitoba based market.[36] However, casino gaming markets outside Winnipeg in Manitoba are limited. So far, the province has not permitted any First Nation development within the City of Winnipeg even though First Nations express a clear desire to do so.[37] Provincial Ministers have indicated that a First Nation casino in Winnipeg will never happen.[38]

However, in 2014 the province approved a Winnipeg "gaming centre" in downtown Winnipeg.[39] This gaming centre, commonly known as the Shark Club, is premised on an agreement with private business owner Mark Chipman.[40] The gaming centre boasts 140 slot machines, of the same type located in the two provincial casinos, as well as blackjack and roulette tables.[41] The Shark Club has been named a gaming centre; yet, at the time the centre was opened the *Manitoba Lotteries Corporation Act Regulations* defined "casino" as any lottery

[36] *Ibid* at 9.
[37] Santin, "Fiery Struthers rejected Peguis deal, club claims" Winnipeg Free Press March 30, 2013. http://www.winnipegfreepress.com/local/fiery-struthers-rejected-peguis-deal-club-claims-200694431.html
[38] *Ibid.*
[39] Shane Gibson, "Shark Club, city's newest casino, opens in downtown" *Winnipeg* Metro June 18, 2013 http://metronews.ca/news/winnipeg/710490/photos-shark-club-citys-newest-casino-opens-in-downtown-winnipeg/
[40] *Ibid.*
[41] *Ibid.*

scheme that combines the use of the games commonly known as blackjack or roulette or both with any lottery scheme.[42] Thus it appears the centre fits the definition of casino and the decision to name the Shark Club a Gaming Centre may have been merely of a political attempt to uphold a representation that no new casinos would be opened in Winnipeg. In addition to the new Shark Club Casino/Gaming Centre, the province approved an additional 500 VLT machines for commercial sites including 200 urban machines in Winnipeg.[43] Notwithstanding this new influx of machines, the Province maintains that the Winnipeg market is saturated each time the First Nations press for participation.[44] In 2007, the Province engaged HLT Advisory to conduct a market study to determine possible locations for First Nation casinos. The study concluded that the Winnipeg gaming market was saturated; however, the issue could be revisited in 2013-14. In other words, the province expanded access to the Winnipeg market for itself and private business owners while continuing to refuse to consider First Nation participation in the Winnipeg market.

The Bostrom report also recommended that the on-reserve VLT allocation be set at "a maximum of 60 per reserve located in sites which are not contiguous."[45] As a result, First Nations have not been permitted to relocate their machines off-reserve, or to pool VLT machines on another First Nation's reserve that may be located near larger a population. Therefore, many First Nations will likely never use their full allocation for many years, and thus the province

[42] Lotteries Regulation, Man Reg 119/88 R , [Repealed or spent], (Manitoba Lotteries Corporation Act)
[43] "Manitoba government 'addicted' to VLTs: Opposition" Canadian Free Press (14 May 2013) http://globalnews.ca/news/557285/manitoba-government-raises-cap-for-vlts/
[44] Manitoba First Nation Gaming Market Study (Manitoba, Liquor and Gaming 2007). http://lgamanitoba.ca/documents/first-nations-gaming-market-study-2007.pdf See also Santin, "Fiery Struthers rejected Peguis deal, club claims" Winnipeg Free Press (30 March 2013). http://www.winnipegfreepress.com/local/fiery-struthers-rejected-peguis-deal-club-claims-200694431.html
[45] Bostrom Report *supra* note 31 at 11.

effectively limits First Nation participation in the gaming market while simultaneously purporting to have provided an opportunity.

Current First Nation gaming in Manitoba is conducted pursuant to gaming agreements with the Province of Manitoba. All First Nation VLT operations as well as each of the three "First Nation Casinos" have corresponding gaming agreements whereby the Province delegates its exclusive authority to operate gaming facilities within the geographical regions of the province. Nowhere does the province or the federal government concede to First Nation jurisdiction over gaming.

In Manitoba, the Government of Manitoba and the Assembly of Manitoba Chiefs signed a Letter of Understanding in 2005 establishing a Joint Steering Committee on gaming and economic development and identifying goals and objectives for the Committee.[46] The goal of the Committee regarding gaming is for the parties to "work together to help close the gap in Standard of Living between First Nations people in Manitoba and the rest of Manitobans."[47] In order to achieve this goal, the Committee commits to "focus on moving the gaming issues" as a means to "provide Revenues for all First Nations in Manitoba, as the main objective."[48] Like the Bostrom Report, the Letter of Understanding appears to defer to the federal *Criminal Code* as the governing authority stating that by, "proceeding with these initiatives, Manitoba and the AMC are seeking to…Comply with *Criminal Code* provisions and agreements regarding Provincial Authority over gaming, while supporting and respecting the First Nations jurisdictional aspirations."[49] At the same time the letter includes a non-derogation clause as to First Nation

[46] "Letter of Understanding Between The Government of Manitoba and the Assembly of Manitoba Chiefs" (14 December 2005).
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*

inherent rights of self-government confirming that "nothing in the [the letter] will be construed as any form of agreement or consent to any relinquishment of and First Nations jurisdiction, Treaty or Inherent Right."[50] Even though Manitoba appears to have agreed to work with First Nations in Manitoba to develop gaming activities it is important to remember that Manitoba was one of the few provinces that filed as intervenors in *Pamajewon*,[51] contesting an aboriginal right exercise jurisdiction over gaming.[52] In addition, the Manitoba government has contested First Nation attempts in operate gaming activities in Manitoba,[53] which will be discussed in chapter 2. Based on these examples it becomes evident that the provincial authorities do not fully support the First Nation self-government right to conduct gaming.

So we see from the foregoing that the potential cost of sharing jurisdictional authority over gaming is high and the Government of Manitoba opposes First Nation attempts to conduct gaming pursuant to First Nation inherent jurisdiction. Although this section focuses specifically on Manitoba, this paper will demonstrate that the battle over jurisdiction is common across North America. First Nation gaming in Manitoba is currently operated pursuant to provincial policy rather than pursuant to the recognition of any aboriginal right or inherent sovereignty. The authority of the *Criminal Code* that the province is keen to rely upon, stems from a 1985 amendment of the *Criminal Code* that sought to legalize gaming in Canada in order to address provincial and federal fiscal deficits.[54] The federal government has never reconciled First Nation's section 35 rights that may include the First Nation inherent right to self-government

[50] *Ibid*.
[51] *R v Pamajewon*, [1996] 2 S.C.R. 821
[52] Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon" *(1997) 42 McGill LJ. 1011* at 1017.
[53] *R v Nelson*, 2 C.N.L.R. 137 (1998).
[54] Belanger *supra* note 27at 41.

including the right to conduct gaming. As the following chapter demonstrates however, proving an aboriginal right of self-government is a difficult task.

CHAPTER 2

Gaming and Aboriginal Rights in Canada, Starting from Nothing – the Aboriginal Right to Conduct Gaming in Canadian Case Law

This chapter will examine two important cases where First Nations leadership attempted to assert First Nation jurisdiction to regulate and conduct gaming on the reservation, as an aboriginal right by opening casinos pursuant to their own regulations rather than pursuant to a provincial license. Through these examples this chapter will show that section 35(1) aboriginal rights, as defined by the Supreme Court, are unlikely to accommodate broad rights of self-government including and inherent right to regulate gaming. Aboriginal rights under section 35(1) are not defined and First Nations have the burden of proving each right exists as an "integral part of a distinctive aboriginal culture" according to a standard employed by the Supreme Court of Canada.[55] Under this test, First Nations are not presumed to possess inherent right to self-government unless validly extinguished; rather, a First Nation must prove that each aboriginal right survived the assertion of sovereignty and existed in 1982 when section 35(1) came into effect.

First Nation jurisdiction over land and people is inherent, deriving from their existence as Nations and their prior occupation of the American continent. In the aboriginal title case *Calder et al. v. Attorney-General of British Columbia*, the court reasoned that First Nation's rights were not merely "usufructory" rather, the court held "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries…What they are asserting in this action is that they had a right to continue to live on

[55] See *R v Van Der Peet* [1996] 2 S.C.R. 507 at para 175l.

their lands as their forefathers had lived and that this right has never been lawfully extinguished."[56] This acknowledgement supports the position that First Nations are Nations possessing sovereignty requisite to enter into treaties with Great Britain, a fact well established and evidenced by the *Royal Proclamation* of 1763.[57] It follows that First Nations also possessed the sovereign right of self-government including the right to develop and regulate their own economies including gaming. First Nation sovereignty, or aboriginal right to self-government, has not been legitimately extinguished, and rather than imposing a duty on First Nations to prove an aboriginal right of self-government continues to exist, Canada should bear the burden of demonstrating the extinguishment of the First Nation right to self-government without relying on outdated notions of racial superiority or the doctrine of discovery.

Under *Sparrow*, a First Nation must first demonstrate the right to self-government exists, a near impossible task against a backdrop of Eurocentric precedent, before Canada is obligated to justify legislative infringement of the aboriginal right.[58] Under this standard, aboriginal rights must yield to "justifiable" Canadian legislation even if the rights are proven to exist. Permitting the unilateral abrogation of aboriginal rights in favour of Canadian legislation implies that aboriginal rights are inferior to the interests of Canada which is currently only justified by reliance on racially-based historic cases.

Because there are those who might argue that First Nations surrendered their jurisdiction via treaty or through conquest by the Crown, it may be helpful to consider Canada's treatment of Indigenous peoples who have not entered into treaty with Canada such as the Dakota. The

[56] *Calder supra* note 16 at 328.
[57] Ralph W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash. L. Rev. 643 at 672.
[58] *Sparrow supra* at note 13 ("The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).")

Dakota effort to open a gaming facility is one of many recent manifestations of the jurisdictional battle between Canada and the First Nations.[59] The Dakota argue that they retained the inherent right of self-government to regulate gaming, perhaps more so than First Nations who might have entered treaty, by virtue of never having surrendered anything vis-à-vis treaty negotiations. However, whether or not a First Nation has entered treaty appears to make little difference to the courts in determining the applicability of the Crown's jurisdiction over Indians.

Manitoba Court of Queen's Bench has held that criminal laws apply to First Nation people regardless of tribal laws or membership in a sovereign First Nation recognized by the *Royal Proclamation* of 1763.[60] The Manitoba court has reasoned that the granting Indians immunity is inconsistent with the sovereignty of the Dominion of Canada.[61] By comparison, the British Columbia Court of Appeal applies the same logic to First Nations in territory that has not been surrendered or ceded by treaty.[62] Effectively then, provincial courts have held that treaties are not prerequisite to dispossess Indians of title and jurisdiction. Such positions have no foundation except that they are based on indefensible notions of racial superiority and erroneous interpretations of foreign case law which this thesis examines further in chapter 3.

The Dakota are not the first to challenge the provincially purported jurisdiction over gaming. In the 1990's Chief Terry Nelson of Roseau River, brought slot machines across the border from the United States and opened on-reserve gaming operations.[63] Also, Bernard Shepard, Chief of White Bear First Nation, located in present day Saskatchewan, used a similar

[59]Alexandra Paul, "Illegal native casino eyed, Two First Nations planning project" Winnipeg Free Press (7 April 2011). http://www.winnipegfreepress.com/local/illegal-native-casino-eyed-119386629.html. See also, "First Nations battle for Manitoba smoke shop" CBC News (17 September 2013). http://www.cbc.ca/news/canada/manitoba/first-nations-battle-for-manitoba-smoke-shop-1.1857076
[60] *R v Campbell*, 2011 MBQB 173 at paras 18, 20
[61] *R v Moody and Dysart* [2004] 2004 MBQB 247 at paras 10, 14
[62] *R v Williams*1994 CanLII 3301 (BC CA).
[63] *Nelson supra* note 53.

approach asserting First Nation jurisdiction.[64] In both of these instances, the Chiefs argued that they had a constitutionally protected aboriginal right to operate their respective casino or gaming facilities. This chapter will take a closer look at these cases and how the courts treated their aboriginal rights claims. I will return to the example of the Dakota later in this paper. I will give specific attention to gaming in Manitoba while using examples from other provinces and the United States to argue that First Nations in Manitoba, and in particular the Dakota, possess an inherent right, and potentially a constitutionally protected right to conduct gaming. Later in this thesis, I will examine how First Nations in Ontario unsuccessfully sought to defend the self-government right to conduct gaming.[65] While each province has developed distinct revenue sharing models with First Nation communities within their borders, the contention of this thesis is that First Nations retain an inherent right to conduct gaming. Under the current model, First Nations are forced to accept virtually whatever deal a province is willing to accommodate. However, when tribes are recognized as possessing legally recognized inherent rights, as was the case in the United States, the bargaining power of tribes is much different. The cases and examples examined further in this thesis are those that relate to First Nation attempts to exercise their inherent rights of self-government and jurisdiction over gaming.

I. White Bear First Nation – Bear Claw Casino

R. v. Bear Claw Casino Ltd. is one of the earlier cases where a First Nation asserted its jurisdiction over gaming. *Bear Claw* illustrates the First Nations' position that they possess the inherent right to regulate economic industry, such as gambling, within their community. It also shows the disagreement with the Canadian state even though the Provincial Court of Justice in this case appears to empathize with the First Nation's aboriginal rights claim to self-government.

[64] *R v Bear Claw Casino Ltd.* 1994 Can LII 4710 (SK PC).
[65] *Pamajewon supra* note 51.

In March of 1993 the Royal Canadian Mounted Police raided the Bear Claw Casino on the White Bear Reserve in Saskatchewan.[66] Chief Bernie Shepard had opened the casino, ostensibly to create economic benefit to the First Nation and its members.[67] Criminal charges were laid on Chief Shepard and others for alleged offenses, pursuant to the *Criminal Code*, and the slot machines were seized.[68] The charges related to keeping a common gaming house, knowingly allowing one or more machines or devices for gambling to be kept in a place under their control, importing one or more games or devices for gambling, and having money under their control relating to the keeping of one or more machines or devices for gambling.[69]

In his testimony, Chief Shepard spoke about his position on his "ability to control gaming on [the] reserve." Chief Shepard stated:

> Well, our position was when we laid out everything on the table, we laid out all the - - all the legal stuff, for example, the constitution, the treaties and everything. We put that in front of us and we had to sit down and ask ourselves if we were able to regulate gaming. And we came to the conclusion after we looked at all this information, that we were.[70]

Chief Shepard did not elaborate on what particular provisions they might have relied on. However, the actions of the Chief and Council appear to demonstrate a sincere belief that the White Bear First Nation retained the inherent right to regulate and conduct gaming. For example, in preparing to open the Bear Claw Casino, Chief Shepard and his council appointed a Gaming Commission to "operate and regulate gaming on the reserve and to obtain the necessary investment capital and consulting expertise in gaming management and training."[71] In addition, the Council took efforts to notify the various government agencies, sending them letters to

[66] *Ibid* at para 1.
[67] *Ibid* at para 11.
[68] *Ibid* at para 1.
[69] *Ibid* at para 4-7.
[70] *Ibid* at para 13.
[71] *Ibid* at para 14.

inform them of their intent to operate a gaming facility, import gaming machines, training activities, and even requesting the assistance of the R.C.M.P.[72] Notifying the government agencies demonstrates that Chief Shepard and his council sincerely believed they were acting pursuant to their legitimate authority.

This belief in the inherent right was demonstrated by others who testified during trial, such as White Bear First Nation councillor of ten years, Edward Harvey Lloyd Littlechief who was asked about the application of customary law within White Bear as it relates to the adoption of the *White Bear Gaming Act*. He replied, "we always were in the position, and were always led to believe by our elders that we control, and never have given up the right, to control any laws that apply to our territory. What we done at that point in time is occupied the field of gaming, and we passed our gaming laws through our own Chief and Council ---."[73] Mr. Littlechief's testimony illustrates that the White Bear elders understood that the Nation retained inherent rights of jurisdiction and that these rights included the ability to create laws to regulate the developing industries like gaming. Moreover, the provincial and federal authorities had not previously interfered White Bear First Nation's regulation of other forms of gaming on-reserve.[74] The position of the elders demonstrates the opposing views of the two distinct societies: Canada and White Bear First Nation.

In response to questions inquiring how long bingo had been on the reserve Mr. Littlechief responded, "I can remember being a child or eight or nine years old and actually going to bingo halls seeing bingo halls on the reserve...In those days it was regulated through Chief and Council and this past year and a half, I believe, it's been conducted through the gaming

[72] *Ibid* at paras 15-19.
[73] *Ibid* at para 44.
[74] *Ibid* at para 46. (R.C.M.P. constables observed White Bear Gaming Commission License to conduct Bingo on the wall and "nothing was ever said.")

commission…The White Bear First Nation Gaming Commission, yes."[75] Moreover, Mr. Littlechief testified that the R.C.M.P. were aware of the operation of bingo and even that he witnessed constables come in and "look at the license that was on the wall, that was put there by the Chief and Council giving us the authority to conduct bingo and nothing was ever said."

The actions of the White Bear Chief and Council were consistent with a government exercising regulatory authority. Here, White Bear posted the license in an open and conspicuous manner demonstrating their position that they retained the inherent right to pass laws governing gaming activity within their territory because it was never extinguished. The notion that the Crown's authority was supreme to that of White Bear was foreign and evidently inconsistent with the views of the White Bear government and society. This thesis argues that the Crown's authority is not inherently superior to that of First Nations nor does it automatically replace the sovereign authority of First Nations.

The court did not ultimately make a determination as to whether White Bear retained the ability to control gaming pursuant to a sovereign right of self- government. However, the court did provide some commentary suggesting that the First Nation position of self-government control over gaming may have some merit. The court dismissed the charges against the defendants because the activities "were not consistent with criminal guilt, but rather were consistent with some other legitimate purpose."[76]

In *Bear Claw*, the Crown attempted to rely on *R. v. Pamajewon*,[77] prior a case that dealt with similar circumstances where the defendants "honestly believed that they had a right to carry

[75] *Ibid* at para 46.
[76] *Ibid* at para 47.
[77] *Pamajewon supra* note 51.

on (provincially) unlicensed gaming on their reserve."[78] However, the court rejected the Crown's conclusion and interpretation of *Pamajewon*.[79] W.B. Goliath P.C.J. distinguished the facts of that case, determining that unlike *Pamajewon*, the White Bear First Nation was challenging the authority of Canada to enact laws that would apply to activities on-reserve.[80] By contrast the appellants in Pamajewon "ask[ed] the Court not to make statements that may adversely affect legal issues concerning Indian self-government."[81] In *White Bear*, the Court appeared to look favourably on the position of self-government. Goliath P.C.J. wrote, "I have read and studied counsel's Written Arguments and presentations including case law referred to and agree that they have a good argument in that regard, especially if the case of *R. v Sparrow* and the test contained therein is applied."[82]

In analysing whether the defendants possessed the requisite guilt to be convicted of the charges, the Court in *Bear Claw* appeared to weigh heavily the determination of Chief Bernie Shepard and the White Bear Council when they concluded that they had the authority to regulate gaming on their reserve. Additionally, the statements of witness Edward Harvey Littlechief appear to have been highly considered, i.e. that he recalled that the Chief and Council authorized on reserve gaming and that there was never an application made for a provincial license nor was one issued.[83]

The Court in *Bear Claw* considered principles pronounced in *R. v. Sparrow*, such that "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than

[78] *Bear Claw supra* note 64 at para 48.
[79] *Ibid* at para 50.
[80] *Ibid* at paras 49-50.
[81] *Ibid.*
[82] *Ibid* at para 47.
[83] *Ibid* at para 56.

adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic approach."[84] Additionally, the Court referred to the Royal Commission of Aboriginal Peoples and its paper "Partners in Confederation," which reasoned that, "there are persuasive reasons for concluding that under the common law doctrine of aboriginal rights, aboriginal peoples have inherent rights to govern themselves within Canada. This right is inherent in the sense that it finds its ultimate origins in the communities themselves rather than in the Crown or Parliament."[85] Goliath P.C.J. appears to get this decision right. It is unfortunate that the facts did not require him to render an opinion on the First Nation right to self-government as he may well have issued a favorable decision for First Nations.

Instead, the Court in *Bear Claw* concluded that after reviewing the evidence and the authorities, that the actions and belief of the defendants that the *Criminal Code*, in particular those related to gaming provisions did not apply to the on-reserve gaming activities could be considered reasonable.[86] As a result, the criminal charges against the defendants were dismissed. Thus, *Bear Claw* did not establish an aboriginal right or an inherent right for First Nations to conduct and manage gaming activities on-reserve; but, it did leave the possibility open for future litigation. The case offered some strong language suggesting that the First Nations may indeed retain those rights; however, the next case will demonstrate that the application of the aboriginal rights test offers many opportunities to deny the broad right to self-government.

Following the ruling in *Bear Claw*, the Province of Saskatchewan and the First Nations in Saskatchewan came to agreement on First Nation gaming in the province. Out of those discussions, the Saskatchewan Indian Gaming Authority, commonly known as SIGA was

[84] *Ibid* at para 58.
[85] *Ibid* at para 60.
[86] *Ibid* at para 63.

established. SIGA operates casinos throughout the province, in or around most major cities including: Swift Current, Yorkton, North Battleford, Prince Albert, and Saskatoon.

II. Chief Terrance Nelson - Roseau River First Nation Casino

During the time that White Bear was endeavoring to assert their rights to exercise jurisdiction over gaming, similar discussions and activities were occurring in Manitoba.[87] Chief Terrance Nelson of Roseau River First Nation was also actively establishing gaming operations on reserve.[88] An unfortunate distinction with Saskatchewan is that the Manitoba Provincial Court would find against Chief Nelson, and effectively against First Nations in Manitoba, rejecting an inherent right to regulate gaming on reserve. In this section I will show how a court can redefine or re-characterize a First Nation claim under the *Van der Peet* test resulting in increased difficulty of proving an aboriginal right to self-government over a more specific activity.[89] In *Nelson*, the court redefines the claim of an aboriginal right to conduct gaming to a claim of an aboriginal right to conduct "commercial gaming enterprise."[90]

On January 19, 1993 gaming operations established by Chief Nelson were raided and Chief Nelson was charged with keeping gambling devices within the meaning of s. 202(1)(b) of the *Criminal Code*.[91] The White Bear defendants were charged under the same section. According to the facts that were not in dispute by Chief Nelson, forty-seven VLT machines were seized by police from the following four First Nation reserves in Manitoba: Fort Alexander,

[87] *Nelson supra* note 53.
[88] *Ibid* at para 15.
[89] Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" 41 Ottawa L. Rev. 101 2009-2010 at p. 119.
[9090] *Nelson supra* note 53 at para 92.
[91] *Ibid.*

Sandy Bay, Roseau River, Waterhen, and Pine Creek.[92] All of the machines were found to be machines or devices for gambling within the meaning of the *Criminal Code*.[93]

Interestingly, in an opinion authored by Giesbrecht Prov. Ct. J., the court relied on some of the same case law as cited in *Bear Claw*. However, in *Bear Claw* the court dismissed the criminal charges because it concluded the defendants held a reasonable belief that they could conduct gaming pursuant to their inherent rights. By contrast, in *Nelson* the court applied the *Van der Peet test* and concluded that Chief Nelson did not have an individual aboriginal right to conduct gaming. The court re-characterized the right being claimed as "commercial gaming" meaning large scale gaming profiting off of the gambling of others, and determined that this specific activity is not an "integral aspect of Ojibway culture prior to contact."[94] The ability of the court to narrow the focus to a more specific activity enabled the court to require more specific evidence to prove the aboriginal right and thereby avoid addressing the society's function of regulating activities as they evolve. The court used the *Sparrow* framework for analyzing whether an aboriginal right exists, including the central or integral to a distinctive culture test.[95]

A. *Van der Peet* Test– Integral to Aboriginal Culture

Chief Justice Lamer articulated the test for determining when a person was acting pursuant to an aboriginal right in *R. v. Van der Peet*. Lamer C.J.C. stated, "…in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the

[92] *Ibid.*
[93] *Ibid* at para 16.
[94] *Ibid* at paras 325-26.
[95] *Ibid* at para 37

distinctive culture of the aboriginal group claiming the right."[96] Although the *Van der Peet* test appears to recognize a collective right, the focus of the Manitoba court was whether Chief Nelson had a right as an individual aboriginal person to operate gaming, rather than whether Roseau River First Nation held a right of self-government including the right to conduct gaming.

Chief Nelson argued that the adjective "integral" as interpreted by the courts results in an erosion of aboriginal rights such that only a subset of aboriginal rights that are deemed to be "critical" or "significant" ones are afforded the protection of section 35.[97] Indeed, this is precisely the effect of the test, which is inconsistent with the broad inherent rights enjoyed by tribes prior to settler government claims of sovereignty. The Court rejected Chief Nelson's argument in favour of the position that "integral" is equated to: central, crucial, significant, and a defining feature.[98] Moreover, Giesbrecht Prov. Ct. J. reasoned that the Supreme Court defined the scope of protected aboriginal rights and a standard of measurement that involves "ranking the relative importance of a practice, custom or tradition in a particular culture."[99] By interpreting "integral" to mean crucial, "central" or "defining" effectively opened the door for the court to rationalize the exclusion of all but the most stereotypical aboriginal rights such as hunting or fishing.[100] In reality, aboriginal people evolve just as any other nation or group of people and evolution has never been held to strip a person of his or her ethnic or national identity. Arguably, what is "integral" to any culture are the "power-conferring rules of a community" or the ability to self-govern or self-regulate.[101] The court's restriction of aboriginal rights to historical activities stymies First Nation inherent right of self-government and unnecessarily

[96] *R. v. Vanderpeet* [1996] 2 S.C.R. 507 at para. 46.
[97] *Nelson supra* Note 53 at para 38
[98] *Ibid.* at para. 39-40.
[99] *Ibid.*
[100] Morse *supra* note 52 at 1015.
[101] Luk *supra* note 89 at 119.

restricts the natural ability of First Nations to grow and evolve with emerging technology and legal issues.

By narrowing the right of self-government to specific activities, it becomes increasingly difficult to meet the *Van der Peet* test as increasingly specific evidence is required.[102] Conversely, the broader the claim the less specific the evidence required.[103] Thus, although Chief Nelson may be able to prove an aboriginal right to gamble, by re-characterizing or redefining the right being claimed to commercial gaming, the court is able to permit traditional forms of gaming while excluding modern forms of commercial gaming as distinct. Consequently, the corresponding self-government right to regulate the modern forms of commercial gaming is also excluded.

In the broadest sense, First Nations were wholly self-governing prior to contact, and under general analysis it would be difficult to demonstrate that "complete self-government was not integral to their distinctive culture."[104] However the courts have not provided any guidance on what the appropriate level of generality will be applied to the *Van der Peet* test.[105] Without disclosing the parameters by which a submission will be meted, it is possible for the court to "move the goal posts" and increases the risk of "results-oriented jurisprudence."[106] Indeed it appears that the Manitoba court may have been focused on a particular result in the case of *Nelson*.

The *Van der Peet* test requires, among other things, that the court identify precise nature of the claim being made, determine whether a practice is integral or of central significance to the

[102] *Ibid* at 126-7.
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*

aboriginal society, has continuity with traditions, customs and practices that existed prior to contact.[107] In making this assessment, the court is directed to adjudicate the right on a "specific rather than general basis."[108] As discussed above, this narrow analysis raises a serious hurdle for demonstrating a general right of self-government. John Borrows explains that re-characterizing self-government claims to specific activities "defeats many aboriginal peoples' aspiration for a fuller articulation of the powers relative to the federal and provincial governments."[109] Borrows concluded that it was clear that the Supreme Court was not willing to consider aboriginal rights to self-government on any global or general basis.[110]

It is important to note that the criteria of the *Van der Peet* test were not developed by First Nation people to determine the relative importance of their own rights. Moreover, the Supreme Court ignored its own principles designed to aid in treaty and statutory interpretation relating to section 35(1) rights when it developed the *Van der Peet* test.[111] The resultant long list of considerations presents seemingly limitless opportunities for the court to find deficiencies or conflicting views that can be relied upon to dismiss a claim of aboriginal rights. Additionally, although the court insists aboriginal views are to be given equivalent weight to non-aboriginal views, this does not tend to be the practice.[112] In short, the test appears more like a mechanism to screen out activities that are perceived as threatening or undesirable to the broader society than a legitimately objective test.

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[107] *Nelson supra* note 53 at para 43.
[108] *Ibid.*
[109] John Borrows, "Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada" (1996) 50 CR-ART 230.
[110] *Ibid.*
[111] Morse *supra* note 52 at 1031.
[112] *Ibid.*

B. Frozen Rights

The courts generally seem reluctant to provide protection for rights that go beyond permitting aboriginal peoples to "maintain their pre-colonization or 'savage' lifestyles."[113] The notion goes that "if aboriginal people want to act like white or "civilized" people, then they must follow the white laws, like everyone else."[114] This rationale runs contrary to the express principles in *Sparrow* of not freezing rights but "according to the Court, the bottom line is that the scope of aboriginal rights has been frozen since the time of contact."[115] However, by limiting First Nations' ability to evolve, the settler government is able to effectively monopolize its extraction of valuable resources from evolving economies or jurisdictions, including gaming.

It is important to note that the *Van der Peet* decision was not unanimous and the dissent provides valuable insight into the deficiencies of the test with regards to its freezing effect. The two dissenting opinions in *Van der Peet* criticized the requirement that practices be demonstrably continuous with pre-contact activity and central to the culture of the group claiming the right.[116] Justice L'Heureux-Dubé argued that associating the definition of aboriginal rights with pre-contact crystallizes the rights at an arbitrary date, is contrary to the perspective of aboriginal peoples.[117] Justice McLachlin's view was that the resultant effect was to "freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live."[118]

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[113] Brenda L. Gunn, "Protecting the Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6 Indigenous LJ. 31at 46.
[114] *Ibid.*
[115] Morse *supra* note 52 at 1031.
[116] *Van der Peet supra* note 11.
[117] *Ibid at para 167 per* L'Heureux-Dubé J. (dissenting).
[118] *Ibid* at para 240 per McLachlin J. (dissenting)

Requiring the continuity in specific practice prior to contact potentially freezes rights in time[119] contrary to the holding by the Supreme Court in *Sparrow* that rejected such rigid interpretation.[120] It is not essential that there be an "unbroken chain" of practice, commencing at pre-contact to the present day, in order to preserve an aboriginal right.[121] Giesbrecht Prov. Ct. J. rejected Chief Nelson's claim that the use of VLT's was the modern-day manifestation of an historic Ojibway practice, and therefore the court concluded that the Ojibway would not be permitted to engage in commercial gambling for profit.[122]

In his defence, Chief Nelson called thirteen witnesses to testify to the importance of gambling from the perspective of the Anishnabe culture, to meet the "integral" factor of the *Van der Peet* test. Witnesses testified regarding two aboriginal games that involved gambling: pagessan, also known as the bowl game, and the moccasin game.[123] A detailed description of how to play is not included here; rather, suffice to say that the games include a measure of skill and chance and gambling was commonly associated with the game, whether by the players themselves or by spectators.[124]

Two reputable witnesses testified that the "aboriginal perspective" was that gambling was integral to the Anishnabe way of life and that gambling was essential to games that were integral to the aboriginal way of life. James Morrison, who also served as a witness in *R. v. Pamajewon*,[125] testified that "the Ojibway people were playing their traditional games and were gambling at the time of contact with Europeans, and that they later adopted European games as

[119] Jane May Allain, "Aboriginal Fishing Rights: Supreme Court Decisions" (1996) http://www.parl.gc.ca/content/lop/researchpublications/bp428-e.htm
[120] *Ibid.*
[121] *Nelson supra* note 53 at para 268.
[122] *Ibid* at para 272
[123] *Ibid.*
[124] *Ibid* at paras 46-51.
[125] *Pamajewon supra* note 51.

well." [126] Mr. Morrison testified that gambling was essential to the games.[127] Dr. Kathi Kinew, who holds a doctorate in Native Studies, Anthropology, and Political Studies, also testified. In her opinion, gambling was "integral part of their way of life."[128] Dr. Kinew emphasised that the word "atagewin" was a word used instead of gambling and meant "you don't play for nothing."[129] Further, atagewin was used by the Ojibway to refer to all kinds of games.[130] She concluded that "from the Ojibway perspective" gambling was implicitly part of the game.[131]

Giesbrecht Prov. Ct. J. agreed that the particular aboriginal games, like pagessan and the moccasin game were an important part of the Ojibway culture. Giesbrecht Prov. Ct. J. also agreed with the accused that gambling was an important aspect of playing the game itself.[132] However, although the Court found that many witnesses testified about gambling in the communities, including, card games, horse races, traveling to casinos and playing VLT's, the Court noted that none of the witnesses tied gambling to the "preservation of culture."[133] Rather, the Court thought that there "seemed to be a distinction" between the modern gambling and the "traditional games such as the moccasin game."[134] The Court substituted its assessment for expert aboriginal perspective contrary to the *Van der Peet* first principle: that a court must take into account the perspective of the aboriginal people claiming the right.

A major critique here is that the trier of fact substitutes his judgment for that of the aboriginal people's perspective and relies extensively on his own interpretation and testimony of non-aboriginal people. Giesbrecht Prov. Ct. J. attempts to excuse his reliance on non-aboriginal

[126] *Nelson supra* note 53 at para 64.
[127] *Ibid* at para 64.
[128] *Ibid* at para 52.
[129] *Ibid* at para 76.
[130] *Ibid* at para 76.
[131] *Ibid* at para 79.
[132] *Ibid* at para 74.
[133] *Ibid* at para 89.
[134] *Ibid.*

perspective stating, "I recognize that one must be cautious in relying on the accounts and perceptions of non-aboriginal people who were viewing the culture from their own eyes and were making judgments about aboriginal practices according to their own values."[135] However, he does not say how he was cautious or how he compensated for potential bias. Whatever the measures, the test ignores the inherent rights of First Nations to govern themselves and does not address the Crown's unilateral usurpation of jurisdiction over Indians.

As argued above, such a narrow view of aboriginal rights focusing on a specific activity ignores the fundamental inherent right of government to govern the field of activities, and ignores the evolutionary forms and the need to continuously amend and update laws. Considering the lengthy list of factors to be considered under the *Van der Peet* test, a rejection of an aboriginal right may well have been a predictable outcome. The requirement that the practice be one of "those which have continuity with traditions, customs and practices that existed prior to contact" in particular proves to be too rigid in Chief Nelson's case.

The court considered extensive testimony and accounts related to general and specific gambling experiences of witnesses. Giesbrecht Prov. Ct. J. acknowledged that gambling was involved with many traditional aboriginal games and that high stakes gambling was not uncommon among Indigenous tribes, however, he did not agree that this pervasiveness was sufficient to establish that gambling was central and significant aspect of any of the tribes, including the Ojibway people.[136] The court reasoned that "whether viewed individually or collectively, these historical accounts of games and gambling among the Ojibway do not substantiate that gambling was a custom, practice or tradition that was of central significance to

[135] *Ibid* at para 188.
[136] *Ibid* at para 160.

the Ojibway society."[137] It begins to appear that perhaps no amount of evidence would have been sufficient to meet the criterion of "central significance" in the view of the court. Under an aboriginal rights analysis, if the Ojibway people are unable to establish commercial gambling as an aboriginal right, the question of an aboriginal right to self-government over commercial gambling becomes moot.[138]

C. Commercial Gaming

The Manitoba court agreed with the Crown's assertion that Chief Nelson was engaging in commercial gambling[139] or profiting off the gambling of others. The court focused on Chief Nelson as an individual and reasoned that there was no evidence presented that Chief Nelson personally played the 47 VLT's in question or that he "personally engaged in gambling at any time relevant to the charges against him."[140] As in *Pamajewon*, and other aboriginal rights cases, the court rejected the notion that an activity could be considered an aboriginal right, i.e. that it is "part of their distinctive aboriginal culture" if the purpose of the activity is for "purely commercial purposes."[141] In applying the *Van der Peet* test the court could ignore any generally asserted right of self-government or regulatory authority if Chief Nelson was unable to demonstrate that underlying activity constituted an aboriginal right.

Giesbrecht Prov. Ct. J. compared Chief Nelson's gambling claim to fishing rights cases that distinguished between fishing for commercial and non-commercial purposes.[142] Giesbrecht Prov. Ct. J. concluded that, as in the fishing cases, there was a need to draw the distinction

[137] *Ibid* at para 152.
[138] *Pamajewon supra* note 51 at para 41.
[139] *Nelson supra* note 53 at para 93.
[140] *Ibid* at para 108.
[141] *Ibid* at para 111.
[142] *Ibid* at para 116 citing *Van der Peet*, *Gladstone*, and *R. v. N.T.C. Smokehouse Ltd*. (1996), 109 C.C.C. (3d)129.

between commercial and non-commercial activities.[143] The Manitoba court agreed with reasoning in the fishing cases concluding that an aboriginal claim to engage in "commercial gambling venture places a more onerous burden on the accused than does a claim to an aboriginal right to gamble, or a claim to an aboriginal right to play traditional games."[144] In doing so, the court recognized the increased difficulty of proving a specific right versus proving a general right.

It is important to note that the Supreme Court case of *R. v. Gladstone*[145] found that the evidence supported an aboriginal right of the Heiltsuk to commercially trade fish.[146] Therefore, a commercial activity alone is insufficient to preclude an aboriginal right. The *Gladstone* court distinguished between *Van der Peet* and *N.T.C. Smokehouse*, reasoning that the commercial sale was not merely incidental to the social or ceremonial activities rather the trade itself was central and significant.[147] This conclusion demonstrates the inadequacy of Geisbrecht Prov. Ct. J.'s analysis when he concludes that purely commercial activities cannot be considered aboriginal rights.

Giesbrecht Prov. Ct. J.'s reasoned that the court must determine whether the Ojibway people used gambling to sustain themselves.[148] Giesbrecht Prov. Ct. J. concluded that "aboriginal societies historically were not interested in profit nor massive commercial ventures."[149] The Court emphasised that while there was significant evidence to establish that large amounts of goods were wagered on gambling, by spectators and players alike, the evidence

[143] *Ibid* at paras 115-7.
[144] *Ibid* at para 119.
[145] *R v Gladstone*, [1996] 2 S.C.R. 723
[146] *Nelson supra* note 53 at para 128.
[147] *Ibid* at para 129.
[148] *Ibid* at para 235.
[149] *Ibid.*

did not establish that the Ojibway sustained themselves by gambling or that the organizers of the games profited from the gambling of the participants or spectators.[150]

The court found that sufficient evidence existed to establish that traditional games and gambling were part of the Ojibway culture prior to contact,[151] however, it did not find any evidence that commercial gambling existed prior to contact.[152] Giesbrecht Prov. Ct. J. relied on the Supreme Court in *Pamajewon*, authored by Lamer C.J.C. when he stated, "commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst peoples and was never part of the means by which these societies were traditionally sustained or socialized."[153] Therefore, the court rejected Nelson's claim and consequently reinforced the outdated rationale that "aboriginal [rights] cannot be used in a modern—a.k.a. in a non-savage-Indian manner because that would be giving them an unfair advantage."[154] In any event this conclusion is inconsistent with findings in the *Gladstone* fishing case above.

D. Conflicting Perspectives and Central Significance

Another concern with the court's application of the *Van der Peet* test is the treatment of conflicting evidence or perspectives. The court gave significant weight to a statement of disapproval made by Rose Nelson, and elder, who spoke through an interpreter, saying that "it wouldn't really matter to her [if she couldn't play VLT's] because that's a white man's game."[155] By honing in on this isolated opinion, the court distinguished between the contemporary devices used for gambling and the traditional devices used for gambling. Conflicting opinions could

[150] *Ibid* at paras 236-240.
[151] *Ibid* at para 266.
[152] *Ibid* at para 250.
[153] *Ibid*.
[154] Gunn *supra* note 113 at 47.
[155] *Nelson supra* note 53 at para 88.

potentially provide the court with an opportunity to reject any claim, particularly those claims that may be viewed as contemporary by persons resisting change.

Giesbrecht Prov. Ct. J. accepts the recorded narrative of John Tanner, a non-aboriginal captive as evidence of the aboriginal people themselves that gambling was regarded as a vice.[156] At the same time the court rejected the views of Schoolcroft, a non-aboriginal scholar, stating his views "must be seen as an expression of his own opinion and not necessarily the perception of the Ojibway people."[157] The court labours on the notion that gambling is seen by some as a vice, as though morality plays a role in the determination of central significance of culture, and somehow, the disapproval of individual people within an aboriginal community renders the activity less important. Giesbrecht Prov. Ct. J. emphasised historical accounts that that illustrate hostility and occasional violence as evidence that gambling was not significant.[158] A standard of harmonious accord is another unreasonable standard employed by the court. As it is unlikely that there will be unanimous consensus in any nation as to what constitutes a "central" or "defining" feature of a culture.

E. Critical Cultural Studies – Alternative Theory

Giesbrecht Prov. Ct. J. conceded that it was clear that "whenever people gathered together for whatever purpose, for hunting, for picking blueberries or gathering wild rice, to exchange furs for other goods at the trading posts, or for religious or other ceremonies – these gatherings were also regarded as social occasions where there would be opportunities to visit, to play games and to gamble."[159] Notwithstanding, this was not enough to convince the court that

[156] *Ibid* at para 135.
[157] *Ibid* at para 187.
[158] *Ibid* at para 207.
[159] *Ibid* at para 169.

gambling was of central significance. It appears almost as though Giesbrecht Prov. Ct. J. is suggesting that to be of central significance an aboriginal right must be positively associated with religious belief or ceremony. He concluded, "The fact that gambling took place at religious events does not establish, however, that gambling itself was a religious or spiritual activity for the Ojibway people."[160] He further noted that the evidence suggested that gambling was "only incidentally associated with religious ceremonies and was not an aspect of the ceremonies themselves."[161] Giesbrecht Prov. Ct. J. refuted doctoral candidate Michael Angel, who testified that "all aspects of Ojibway life were connected in some way… and cannot be put in separate categories" determining that the witness' evidence did not demonstrate that gambling was "part of" religious ceremonies.[162] Even though a player or singer might seek assistance from a spiritual helper to improve his or her chances, the perspective of Giesbrecht Prov. Ct. J. was that this invocation did not "transform the playing of the game or the gambling associated therewith into a religious activity."[163]

The difficulty of establishing an aboriginal right of self-government to regulate gambling through the *Van der Peet* test becomes apparent through the continued rejection by the court of the breadth of testimony presented by Chief Nelson's witnesses. Although *Sparrow* may provide a "strong check" against the infringement of aboriginal rights by requiring the government to justify its actions that infringe on those rights[164] the initial hurdle of proving the existence of a right may render the issue of infringement moot. John Borrows explains that utilizing the courts

[160] *Ibid* at para 168.
[161] *Ibid* at para 170.
[162] *Ibid* at para 174.
[163] *Ibid* at 175.
[164] Matthew D. Wells, "Comment: Sparrow and lone Wolf: Honoring Tribal Rights in Canada and the United States" 66 Wash. L. Rev. 1119 (1991) at 1129.

to define aboriginal rights has its challenges.[165] Borrows stated that the courts "fall far short of the large liberal and generous interpretations of aboriginal rights considered throughout the political process. The judgments sharply challenge the commercial competitiveness and survival of [First Nations] in contemporary Canadian society."[166]

The court's analysis is illustrative of the difficulty of meeting the *Van der Peet* test without clear standards for determining what it means to be "integral" to culture. As discussed above, this leaves open the "possibility that the courts may short-circuit a claim after arguments have been completed by reformulating the right at a level of generality where there is insufficient evidence to prove it is a serious defect of this approach."[167] Ultimately, in the view of the Manitoba Court, the cumulative evidence in *Nelson* was not sufficient to establish gambling, or the more re-characterized right of commercial gambling, as an activity of central, significant, or defining feature of the Ojibway society.[168]

In contrast to the requirement to prove central and integral aspects of each aboriginal right, witness anthropologist Dr. Derek Smith, testified that evaluating gambling under critical cultural studies, the prevailing theory, gambling could be viewed as a practice that is central or core to a society.[169] Dr. Smith explained that the "structural functionalism" approach used by the Supreme Court has been displaced amongst anthropologists in favor of "critical cultural studies."[170] Under critical cultural studies, the prevailing theory, anthropologists recognize the "interconnectedness of all aspects of a culture…"[171] Under this theory anthropologists

[165] Borrows *supra* note 109.
[166] *Ibid.*
[167] Luk *supra* note 89 at 127.
[168] *Nelson supra* note 53 at para 325.
[169] *Ibid* at para 228
[170] *Ibid* at para 65-66
[171] *Ibid* at para 66.

acknowledge that "changes to seemingly minor cultural institutions can have unexpectedly profound effects."[172] By comparison, structural functionalism emphasises social integration and assumes "every social or cultural system is an integral whole that is composed of and can be analyzed in terms of its constituent part."[173] Under this theory anthropologists would classify society's institutions as primary, secondary or tertiary.[174] Further, under structural functionalism, "religion, art, music and other expressive institutions of a culture would tend to be allocated to a secondary or even a tertiary position."[175] Mr. Smith explained that under a structural functional approach gambling may not be regarded as a defining feature of aboriginal culture; notwithstanding, under a critical cultural studies approach, gambling, could be viewed as a practice that is central or core to a society.[176]

The court noted that "Mr. Smith is obviously an extremely bright and knowledgeable individual in his field" notwithstanding, Dr. Smith's expertise was insufficient to sway the court. That is, notwithstanding the numerous interconnections of gambling and Ojibway society, and testimony of the aboriginal people including cultural experts, First Nation leadership and anthropologists, the Giesbrecht Prov. Ct. J. determined that the evidence, in *his* view, did not establish that gambling was central, significant, or a defining feature of the Ojibway society.[177] Thus, the court applied the *Van der Peet* test in a manner that requires each activity to be scrutinized in isolation is inconsistent with modern and prevailing anthropologic theory. Much

[172] *Ibid* at para 66.
[173] *Ibid* at para 65.
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid* at para 228.
[177] *Ibid* at para 234.

like the notions of racism that form the "Eurocentric basis of the Canadian legal system,"[178] the test employed by the court is outdated, yet favored as it yields the desired outcome.

Ultimately, as it relates to the establishing an aboriginal right of the Ojibway people in *Nelson*, the court concluded that while the playing of traditional games was of central significance, there was not a right to engage in commercial gambling enterprise, i.e. profiting in large scale from the gambling of others. Moreover, gambling itself was determined, in the view of the Manitoba Provincial Court, not to be a central, significant or defining feature of the Ojibway people. Thus the notion of aboriginal right is seemingly confined to specific activities, ones that generally do not adversely impact the economic efforts of the settler, that can be said to have central significance to preserving the distinctive aboriginal culture. By contrast, gambling in Canada has a controversial past with vehement opposition to its legalization. Nevertheless, Canada is not precluded from developing legislation to govern the constantly evolving forms or even contemporary phenomenon such as high stakes commercial gambling. Thus the Crown does not hold itself to any standard that is equivalent to, or as limiting as an "aboriginal right." Aboriginal rights are rights that are restricted in their evolution by the subjective notions of the settler's court. The tribal experience in the United States offers insight into the issues related to retained sovereignty and tribal jurisdiction over gaming. I will consider the United States tribal experience in chapter 5.

[178] Gunn *supra* note 113 at 40.

CHAPTER 3

British Colonial Use of Race and Religion to Justify the Assertion of Sovereignty and Jurisdiction over Non-Citizen Indians

Canada and the United States both profess to exercise sovereign authority, or plenary power, over tribes. [179] Both countries also assert that their respective claims for sovereignty and jurisdiction over lands and people within their geographical boundaries relate back to British discovery of North America as held in *Johnson*.[180] Notwithstanding the commonality in legal precedent confirming tribal sovereignty, there are marked distinctions in the manner in which the two countries have dealt with the Indigenous peoples and the foundation of their respective claims of sovereign authority over Indigenous peoples over the past 145 years. Namely, whereas the United States recognized tribes as domestic dependent nations with residual sovereignty, Canada treated Indian people as subjects of the British Crown.[181]

The difference in treatment, in some ways, relates back to the manner in which the respective countries gained their independence from Britain. The United States engaged in combat with Great Britain in the Revolutionary War.[182] The American colonies drafted a new constitution and established a government founded upon the delegated authority of "we the people."[183] Indians and tribes are mentioned in the text of the constitution only to indicate that "Indians not taxed" were excluded in the calculation of the number of House representatives, and additionally, to indicate that Congress had the power to deal *with* tribes through the commerce

[179] Peter Scott Vicaire "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013) 58 McGill L.J. 607 at 634
[180] *Johnson supra* note 10.
[181] Vicaire, *supra* note 179 at 623-25.
[182] Merrill Jensen *The Founding of a Nation: A History of the American Revolution, 1763-1776* (Indianapolis/Cambridge: Hacket Publishing Company Inc., 2004).
[183] US Const. September 17, 1787.

clause.[184] Nowhere in the text of the constitution does it suggest that Congress had jurisdiction *over* tribes. Tribes were not part of the United States' political process resulting in a new constitution and were in fact, not citizens until 1924.[185] Even so, citizenship was unilaterally granted by the United States and did not necessarily reflect the volition of the tribes. The commerce clause was eventually interpreted to grant the federal government a plenary power over tribes.[186] The fallible claim of plenary power will be discussed in chapter 4.

By contrast, Canada remained a British colony and ultimately patriated its constitution in 1982. Nearly one hundred years after the American Revolutionary war, Britain enacted the 1867 *British North America Act* that now forms part of Canada's constitution, expressly purports to vest jurisdiction "over" Indians in the federal government.[187] However, in Canada, Indians were not entitled to vote and consequently were not part of the political process until 1960, save those individuals who were enfranchised or otherwise involuntarily lost their Indian status.[188]

Although the text of the *British North America Act* does not explain where the authority for jurisdiction over Indians and title over Indian lands is derived, the Supreme Court of Canada has provided clear statements that the claimed authority derives from "discovery" of the American continent by Christian Europeans as articulated by the United States Supreme Court.[189] In his dissenting opinion in *St. Catherine's Milling*, Strong J. provided some insight as to the importance of the *Johnson* and *Worcester* decisions in Canadian law:

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[184] US Const. Art. I Sec. 2 & 8.
[185] 1924 Indian Citizenship Act (43 U.S. Stats. At Large, Ch. 233, p. 253 (1924)).
[186] *Lone Wolf v. Hitchcock*, 187 U.S. at 564.
[187] The Constitution Act, 1867, 30 & 31 Vict, c 3, Sec. 91(24)
[188] Elections Canada *A History of the Vote in Canada* Chapter 3 Modernization, 1920–1981 http://www.elections.ca/content.aspx?section=res&dir=his&document=chap3&lang=e
[189] *St Catharines Milling and Lumber Co v R*, [1887] 13 SCR 577 at 610.

> The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to un-surrendered lands prevails in the United States, but what is vastly greater importance, they without exception refer to its origin to a date anterior to the revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America.[190]

The principles articulated by the United States Supreme Court were British policies or principles of law, related to the actions of the British government before the United States separated from Great Britain.[191] The Supreme Court of Canada's reliance on these cases is premised on the notion that these cases accurately reflect valid British policy and legal principles. However, whereas the United States recognizes a residual tribal sovereignty,[192] Canada purports to have displaced First Nation sovereignty, or title and jurisdiction from the outset through discovery.[193] The United States relies on *Worcester* to hold that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.[194] However, in Canada the court held that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown"[195] relying on *Johnson* and seemingly ignored *Worcester*. Thus, whereas in the United States Supreme Court recognized tribal sovereignty and an implicit power of Congress to extinguish the sovereignty through clear legislative intent, Canada asserted that

[190] *Ibid.*
[191] *Calder supra* note 16 at para 118.
[192] See *Worcester v. Georgia*, 6 Pet. 515, 559; *United States v. Mazurie* [1975] 419 U.S. 544, 557; F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." United *States v. Kagama*, [1886] 118 U.S. 375 at 381-382. See *United States v. Wheeler* [1978] 435 U.S. 313.
[193] *Sparrow supra* note 13. See also *Johnson supra* note 10.
[194] *Worcester supra* note 20.
[195] *Sparrow supra* note 13.

the British assertion of sovereignty is incompatible with tribal sovereignty and therefore, tribal sovereignty was immediately displaced tribal sovereignty upon discovery.[196]

First Nation people were living as separate and distinct nations in North America before the arrival of British explorers or colonizers.[197] In *Worcester*, the Supreme Court of the United States stated that, "the Indian Nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial…"[198] The Supreme Court of Canada affirmed that aboriginal rights existed *sui generis* resulting from the prior occupation of the territory when it re-examined aboriginal rights in *Calder*.[199] Judson J. stated plainly: "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[200] The Supreme Court thereby recognized that First Nation's existed in organized societies and their title is not derived from the Proclamation of 1763. The Court recognizes that Indians existed as organized societies. However, until 1973 Canada recognized Indians as subjects who possessed only that authority that the Crown of Great Britain and Canada granted them.[201] The *Calder* decision marked a change in the archaic and

[196] Leonard I. Rotman, "Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After Guerin" (2003) 22 Windsor YB Access to Just. 363 at 394.
[197] *Wahbung: Our Tomorrows, By the Indian Tribes of Manitoba; with messages from the Grand Chiefs of Manitoba: edited and with an introduction by the Manitoba Indigenous Cultural Education Centre. 40th Anniversary ed.*, 2nd ed (Winnipeg: Manitoba Indigenous Cultural Education Centre 2011) at 33.
[198] *Worcester supra* note 20 at 559.
[199] Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" 35 U.B.C. L. Rev. 1 (2001-02) at 22.
[200] *Calder supra* note 16 at 328.
[201] Peter Scott Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013) 58 McGill LJ. 607 at 630-31.

morally inept justification and appears to have followed the United States recognizing that the Indians possessed rights deriving from their prior occupation.[202]

The "legal and moral tardiness" of Canada has detrimentally impacted Aboriginal peoples.[203] In particular, the *Constitution Act, 1982* of Canada s. 35 recognizes and affirms, "existing aboriginal and treaty rights"[204] of aboriginal peoples. This constitutional language presupposes that aboriginal and treaty rights that may have been "legally" extinguished pursuant to currently discredited principles. Moreover, decisions following *Calder* continue to "suffer from residual effects of the centuries-old colonial mindsets that doggedly cling to interpreters of the law today."[205] Thus, First Nations are burdened with affirmatively proving each right through the subjective test articulated in *Van der Peet* as discussed in the previous chapter. However, the focus on specific activities as section 35 aboriginal rights detracts from the underlying sovereignty of tribes and the nation-to-nation relationship that formed the basis for the treaty-making process.[206] Mildred C. Poplar argues that,

> Instead of cooperating with the government we have to remember that we are Nations of people, and remember what it was we were fighting for in the first place. We were never fighting for section 35, we were fighting to preserve our Nation-to-Nation relationship, for recognition as Sovereign Nations, and to Decolonize Our People. In some ways, section 35 has diverted our people, and the new leadership instead of fighting for our rights, is negotiating to help Canada and the provinces define them… Section 35 might be one more tool to uphold the fiduciary duty that the Crown owes to Our People, but our real fight is to rebuild our Nations and to gain recognition at the international level.[207]

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[202] *Ibid.*
[203] *Ibid.*
[204] Const. Act. Canada 1982 s.35
[205] Vicaire *supra* note 201 at 631.
[206] Mildred C. Poplar, "We were Fighting for Nationhood, not Section 35." 27-8 in Ardith Walkem and Halie Bruce, eds,. *Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus Books Ltd. 2003).
[207] *Ibid.*

First Nations in Manitoba documented their view on the inherent nature of their rights by publishing a declaration: Wahbung: Our Tomorrows.[208] With regards to the source of treaty and aboriginal rights Wahbung states:

> We would emphasize for the purpose of clarity and to avoid any misunderstanding that the Indian tribes of Manitoba are committed to the belief that our rights, both aboriginal and treaty, emanate from our sovereignty as a nation of people. Our relationships with the state have their roots in negotiation between two sovereign peoples.[209]

Thus it appears that the Supreme Court and First Nations can now agree that the origin of First Nation rights derives from the prior occupation of Indigenous peoples as distinct societies on this continent, and not from the *Royal Proclamation*. However, unlike the tribes in the United States who were strictly considered non-citizens and subject to tribal laws, Indians in Canada were unilaterally considered subjects, without rights to vote or otherwise participate in the law making process that Canada asserts were applicable to them.[210]

The following section underscores the illegitimacy of Canada's authority, and constitutional authority over a people who had no voice in its development and institution. I will argue that First Nations did not participate as ordinary citizens in the political process establishing Canada's constitution and therefore were not part of what Canadian courts have described as "broad consensus" that might validate Canada's exercise of jurisdiction. First, I will highlight the contemporary challenges to jurisdiction raised by the Dakota and the Crown's corresponding position. Second, I will examine the case of *Nekaneet v. Oakes*[211] in order to highlight how Canada's application of law to the Indigenous peoples is inconsistent with

[208] Wahbung *supra* note 197 at 33.
[209] *Ibid.*
[210] Vicaire *supra* note 201 at 625-26.
[211] *Nekaneet First Nation v. Oakes* [2009] F.C.J. No. 183.

concepts of "broad consensus" that Canada's courts reason are prerequisite to the legitimacy of governance.

I. Subject to Citizen: Savage to Civilian

Recently, two of the Dakota communities challenged the Crown jurisdiction by opening a smoke shop outside their reserve boundaries but within their ancestral territories.[212] The Dakota argued that the Province of Manitoba lacked jurisdiction in the pre-trial proceedings, and asked the Crown to concede the presence of the Dakota prior to confederation in order to eliminate any prolonged debate about the Dakota's date of arrival in Canada.[213] The Crown took the position that it could exercise jurisdiction over the Dakota even though the Dakota had never entered treaty and regardless of whether the Dakota were present in Canada or exercised sovereignty prior to confederation. The Crown relied on Dickson C. J. and La Forest J. who wrote for the Supreme Court in *R. v. Sparrow* which states:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown.[214]

Notwithstanding, the text of the *Royal Proclamation* purports to restrict the Crown's subjects from interfering with the Indians rather than controlling the Indians. The following language is illustrative:

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[212]Matt Goerzen "Manitoba band ready to open smoke shop, VLT lounge" *Brandon Sun* (5 November 2011) http://www.canada.com/Manitoba+band+ready+open+smoke+shop+lounge/5663612/story.html

[213] The author is a member of the Dakota Plains Wahpeton Oyate that has a traditional Council comprised of all members. As a member of Council I was asked by Chief Smoke to attend some of the proceedings and communicate on behalf of Dakota Plains Wahpeton Oyate. Dakota traditional territory spans both sides of the Canada-United States Border and the Dakota maintain that they have maintained a presence in Canada since time immemorial and were present in Manitoba as distinct societies prior to the date of confederation. See generally Leo J. Omani "It is true: The Dakota Oyate in Canada since Time Immemorial Conference" Paper Presented at 2nd Annual Dakota Iapi Omniciye, Brandon, Manitoba, Canada (2009).

[214] *Sparrow supra* note 13 at para 49.

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them... And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.[215]

The Royal Proclamation describes the relationship as one whereby the Crown and the Tribes were "connected" and under "protection" but this does not indicate that the Indians were governed by the Crown. Nevertheless, in the Dakota matter the Crown noted that, like the Dakota, *R. v. Sparrow* involved a First Nation and "land to which no treaty applied and demonstrate conclusively that Crown title and legislative power exists independently of surrender agreements or treaties."[216] However, whereas *Sparrow* dealt with "aboriginal rights afforded by s. 35 of the Constitution Act, 1982"[217] the Dakota argue extra-constitutional rights.

The Crown reasoned that legislation must merely be justified but the First Nation people are not immune from "government regulation in a society that is increasingly more complex, interdependent and sophisticated."[218] The notion of complexity of co-existence as the justification for continued unilateral colonial domination is a novel one. The Crown's assertion that the Dakota, or other Indigenous people, did not exercise jurisdiction over other people, is self-serving and inconsistent with the United States Supreme Court precedent upon which Canada relies. To the extent that Canada relies on United State Supreme Court precedent, it is important to note that the United States continues to recognize tribal jurisdiction over non-Indians in both civil and some criminal matters, and the United States Supreme Court did not

[215] Royal Proclamation 7 October 1763.
[216] Supplementary Motion Brief of the Attorney General of Manitoba (Interlocutory Injunction) *The Attorney General of Manitoba and Franklin Brown et. al.* The Queens Bench. File No. CI 12-01-77227.
[217] *Ibid.*
[218] *Ibid.*

hold that tribal sovereignty and jurisdiction was extinguished by discovery or at time of assertion of British sovereignty.[219]

In the Dakota smoke shop case, as in gaming cases, the Crown focused on the criminal nature of offences in its attempt to downplay Indian tribal jurisdiction, and justify Crown jurisdiction over Indians.[220] Menzies J, for the Manitoba Court of Queen's Bench reasoned in *R. v. Moody* that Indians are "ordinary citizens" for purposes of criminal jurisdiction and any claim of immunity from criminal prosecution based on their aboriginal status is "inconsistent with the sovereignty of the federal and provincial governments."[221] In *Moody*, the Menzies J. stated:

> Their status is one found within and as part of the broader community over which Canada is sovereign. The Accused are, for some intents and purposes, "Indians" within the meaning assigned by the Constitution. However, for the purposes of the criminal law they remain ordinary members of Canadian society. To grant the Accused immunity from criminal prosecution would be inconsistent with the sovereignty of the Dominion of Canada.[222]

First Nation people were not considered ordinary citizens until recently for several reasons. Indeed, except through enfranchisement or voluntary assimilation, First Nations people were not citizens entitled to vote until 1960.[223] The Crown "dispensed" its responsibilities regarding Indians to the colonies in 1860 and in 1867 the *British North America Act* unilaterally placed the management of Indian affairs part of federal jurisdiction.[224] First Nation people had no voice in the process resulting in the *British North America Act* of 1867 (now the *Constitution*

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[219] Jane M. Smith, *Tribal Jurisdiction over Nonmembers: A Legal Overview Congressional Research Service 7-5700* www.crs.gov R43324 (26 November 2013) https://www.fas.org/sgp/crs/misc/R43324.pdf
[220] *Moody supra* note 61 at para 14.
[221] *Ibid.*
[222] *Ibid* at paras 10,14. See also *Mitchell v. Minister of National Revenue* 2001 SCC 33, at para 10 ("aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless [] they were incompatible with the Crown's assertion of sovereignty...")
[223] Vicaire *supra* note 201 at 626.
[224] Aboriginal Affairs and Northern Development Canada, *A History of Indian and Northern Affairs Canada* (Gatineau QC) online: https://www.aadnc-aandc.gc.ca/eng/1314977281262/1314977321448

Act of Canada 1867) wherein, jurisdiction over Indians and Lands reserved for Indians was reserved to the federal government.[225] The importance of the participation or consent of the governed is a fundamental tenet of democratic government.[226] This principle was applied to First Nation governments by a Canadian court in *Nekaneet First Nation v. Oakes* in determining whether Nekaneet First Nation had legitimately enacted a new constitution.[227]

Nekaneet First Nation v. Oakes

Members of the Nekaneet First Nation, held a Referendum Vote in February 2008 to enact their own *Nekaneet Constitution* and *Nekaneet Governance Act*.[228] On that occasion there was some degree of disagreement among the members regarding the new governing documents and many members boycotted the referendum. On March 28, 2008, two parallel elections took place resulting in two Chief and Councils. Those elected under the new governance act petitioned the federal court for resolution.[229]

Russell J. wrote the opinion and ultimately concluded that the *Nekaneet Constitution* and *Nekaneet Governance Act* were validly enacted and the leadership elected pursuant to those laws were the Chief and Council. More specifically, Russell J considered the following fundamental question in making his conclusion, "Whether the Nekaneet Constitution and Nekaneet Governance Act have been adopted by, and are acceptable to, a broad consensus of the Nekaneet First Nation, as 'broad consensus' is defined by the governing jurisprudence."[230] Whether or not a broad consensus was reached "requires a manifestation of the will of the band members to be

[225] The Constitution Act, 1867, 30 & 31 Vict, c 3 91(24)
[226] The United Nations, 1948, art. 21(c) "The will of the people shall be the basis of the authority of government."
[227] *Nekaneet supra* note 211.
[228] *Ibid.*
[229] *Ibid* at para 31.
[230] *Ibid.*

bound by a new set of rules."[231] Russell J was critical of the Respondents' efforts to boycott the referendum and opined that the Respondents were "obviously wedded to the status quo"[232] and reasoned that the Respondents "are tainted by a strong suggestion of self-interest regarding the control of communal land and band resources…[and] simply rel[y] upon traditional custom and practice to justify [their] own position…"[233] Russell J emphasised that the various facts and actions taken by the Respondents demonstrated that the governance issues at stake in the referendum were widely known and debated[234] and that the voters were sufficiently informed.[235] Ultimately, 136 eligible voters out of 267 participated in the referendum and 113 of those who participated voted in favour. This was determined to constitute "broad consensus." Russell J. concluded that the question to be resolved was what "Nekaneet First Nation wants for itself."[236] Moreover, Russell J issued the judgement, with some apparent consternation, stating, "I render judgment in this case with some reluctance because I am, in effect, pronouncing on the collective will of the Nekaneet First Nation as expressed in the broad consensus vote. That feels presumptuous to me, to say the least. The will of the Nekaneet people, in my view, is matter for the Nekaneet First Nation."[237]

Russel J.'s reluctance to interfere with the will of the Nekaneet demonstrates a recognition that self-governance is a matter for the Nekaneet people. The Crown's unilateral assertion of jurisdiction over Indians through the enactment of the *Constitution Act* of 1867 ignored the will of the Nekaneet people and all First Nation people as to whether they delegated their authority or otherwise consented to be governed by the British Crown. It could be said that

[231] *Ibid* at para 69.
[232] *Ibid* at para 50
[233] *Ibid* at para 44.
[234] *Ibid* at para 44.
[235] *Ibid* at para 71.
[236] *Ibid* at para 85.
[237] *Ibid* at para 87.

the British were "tainted by a strong suggestion of self-interest" regarding the control of land and resources and simply relied on their own traditional custom and practice to justify their position. Britain simply did not concern themselves with the will of the Nekaneet people, or other First Nations in justifying their usurpation of land and jurisdiction.

Yet notwithstanding the lack of First Nation participation in the law making process or even their historical exclusion from the mainstream society and confinement to reserves, the Supreme Court would go to great lengths to demonstrate that Indians exist within the broader society of Canada, and that Indians are merely part of "aboriginal societies that exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign."[238] The Supreme Court reasoned that, "Indians are citizens and, in the affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities … of other Canadian citizens." [239] One hundred and fifteen years after the *Constitution Act,* 1867 and one hundred and fifty-nine years after *Cherokee Nation v. Georgia*,[240] Canada's highest court reasoned, rather anecdotally, that Indians are citizens of Canada. There is no clear reference to a particular time or act that rendered First Nations people generally as citizens of Canada, although Indians were afforded a right to vote in 1960.[241]

By contrast, early on the United States Supreme Court took the clear position that Indians "have never been regarded as citizens or members of our body politic. They have always been, and still are, considered by our laws as dependent tribes, governed by their own usages and

[238] *Mitchell supra* note 14 at 133.
[239] *Ibid* at 133 citing Nowegijick v. The Queen, [1983] 1 S.C.R. 29.
[240] *Cherokee supra* note 19 at 16. ("The counsel have shown conclusively that they are not a State of the union, and have insisted that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a State must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.")
[241] Elections Canada *A History of the Vote in Canada* Chapter 3 Modernization, 1920–1981 Retrieved 31 May 2015 online http://www.elections.ca/content.aspx?section=res&dir=his&document=chap3&lang=e

chiefs but placed under our protection, and subject to our coercion so far as the public safety required it, and no farther."[242] Tribes entered treaties with Great Britain as Nations and did not thereby diminish their nationhood or sovereignty. Even when a tribe entered treaty to place itself under the protection of a more powerful nation, the Tribe would not thereby be stripped of its right to government and sovereignty.[243]

This rationale stands in stark contrast to Canada's interpretation of the same case law to justify the Canadian Crown's continued colonial domination. To reach the claim that Britain's assertion of sovereignty displaced First Nation sovereignty, the Supreme Court of Canada cites directly to the United States Supreme Court decision in *Johnson* that concludes "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[244] Reading the balance of *Johnson* reveals that such claims are based on notions of racial and religious superiority.[245]

The Supreme Court of Canada makes no effort to obfuscate the justification of their claim of sovereignty. The Supreme Court of Canada points directly to one of the "worst" Indian law cases ever decided: *Johnson v. M'Intosh.*[246] In *Johnson* the United States Supreme Court clearly justified the displacement of title based on religion and race stating:

> [the continent's] vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made

[242] *Cherokee supra* note 19 at 67.
[243] *Ibid at* 53.
[244] *Sparrow supra* note 13.
[245] *Johnson supra* note 10 at 572-73.
[246] Walter R. Echo-Hawk *In the Courts of the Conqueror*, ed (Golden, Colo.: Fulcrum Pub., 2010).

> ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity…"[247]

That Justice Marshall may have been influenced by the racial bias of his era provides no excuse for the fallible race-based doctrine of discovery that forms the foundation for the Canadian Crown's claim of title and jurisdiction. Justice Marshall authored the doctrine of discovery into United States law based on the foregoing tenets stating, "[the] principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[248] Thus we see that this claim of sovereignty did not require any sort of actual physical might or displacement of the people from their territory. Nor did it require that the Indian people even be aware of this pompous[249] claim. Marshall continued:

> [The Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain the possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principled, that discovery gave exclusive title to those who made it.[250]

The foundation of the Crown's claim of title and jurisdiction over Indians is unequivocally based on the claim that Indian sovereignty was "diminished" by "discovery" of Indian lands by Christians. Put another way, Indians could not have discovered the land because they were not Christian. The purported diminishment of sovereignty and exercise of jurisdiction over Indians was done not only without the consent of the Indigenous peoples, but also without their awareness of the process and assertions. Marshall concludes, "Thus, all the [Christian] nations of Europe, who have acquired territory on this continent, have asserted in themselves,

[247] *Johnson supra* note 10 at 572-73.
[248] *Ibid.*
[249] *Ibid* at 590.
[250] *Ibid.*

and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians."[251] In his book, *In the Courts of the Conqueror, The 10 Worst Indian Law Cases Ever Decided*, Walter R. Echo-Hawk describes the fundamental flaws of *Johnson v. M'Intosh* including: the absence of participation by or representation of Indians in the action, the apparent conflict of interest of Justice Marshall, and not least of all, the legal fictions based on racial prejudice.[252]

Therefore, even though Canada and the United States share a common history with the British Crown, we can see that the respective countries have taken different approaches in their relationship with First Nations or tribes. This chapter demonstrates that Canada relies on selective language of the United States Supreme Court in order to justify its jurisdiction over Indians, and does so even though the foundation of the claim is based on racial prejudice. In addition, we see that the United States recognized that tribes retained sovereign rights and this recognition is reflected in the United States' constitution. However, by the time Britain passed the *British North America Act* approximately 100 years later, Britain's relationship with tribes had changed dramatically such that the Crown unilaterally purported to exercise dominion over Indians. This approach was entirely inconsistent with the early tribal-British relationship and inconsistent with fundamental notions of legitimacy of government by broad consensus of the governed. Through comparative analysis of the law in the United States and Canada we can see determine how Canada and the United States have diverged in their treatment of First Nations and Indian tribes respectively. It becomes apparent that although both countries continue to rely on the Marshall-trilogy of cases in their treatment of Indigenous government, except that

[251] *Ibid.*
[252] Echo-Hawk *supra* note 246.

Canada's, and more particularly Manitoba's, denial of First Nation retained sovereignty, including jurisdiction over gaming, is not supported by jurisprudence.

Chapter 4

Aboriginal Self-Government Right to Gaming in Canada:

Starting from Nothing – the Assumption of Extinguished Sovereignty in Canada

This chapter will argue that Canada's treatment of the aboriginal right to self-government over gaming is inconsistent with the historical relationship between tribes and the British colonies. The first section examines the first time the aboriginal right to self-government was addressed in the Supreme Court of Canada in the context of gaming. The second section looks at early treaties between the United States and tribes to illustrate that the relationship between tribes and settler states was not initially one of European dominion or superiority. The final section argues that despite the early recognition that tribes existed outside the political and military reach of the settler states, the courts gradually wrested authority from the tribes based upon race-based doctrines that continue to be relied upon today.

The first time the aboriginal right to self-government was brought to the Supreme Court of Canada was in *R. v. Pamajewon*.[253] However, the two defendant First Nations, located in Ontario, were unable to prove the existence of an aboriginal right to gamble and consequently the court did not find that the First Nations had a self-government right to regulate the gambling activities.[254] By contrast, the tribal sovereign right to conduct and regulate tribal gambling activities was upheld in the United States case *California v Cabazon Band of Mission Indians.*[255] The case of *Pamajewon* illustrates the difficulty of establishing an aboriginal right to self-government under section 35(1) as compared to demonstrating that a residual tribal sovereign jurisdiction over gaming has not been extinguished.

[253] Morse *supra* note 52.
[254] *Pamajewon supra* note 51.
[255] *California v Cabazon Band of Mission Indians,* [1987] 480 US 202.

In *Pamajewon*, Shawanaga First Nation and Eagle Lake First Nation enacted by-laws to regulate lotteries pursuant to their inherent authority and not s. 81 of the *Indian Act*.[256] Both First Nations operated bingo on reserve.[257] Appellants from Shawanaga First Nation were charged with violating s. 201(1) of the Criminal Code for "keeping a common gaming house" and appellants from Eagle Lake First Nation were charged with "conducting a scheme for the purpose of determining the winners of property" in violation of s. 206(1)(d) of the Criminal Code.[258] The charges in *Pamajewon* were effectively the same as in the *Bear Claw* and *Nelson* cases discussed above and made under the same provisions of the *Criminal Code*. The question before the Supreme Court was "whether the regulation of high stakes gambling by the Shawanaga and Eagle Lake First Nations fell within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982."[259] Shawanaga First Nation members argued that the Nation had a constitutionally protected aboriginal right to self-government that included the right to regulate gaming.[260] Eagle Lake First Nation members argued self-government included a right to regulate its own economic activities.

The Supreme Court dismissed the appeal in *Pamajewon* reasoning that "[c]laims to self-government made under s. 35(1) are no different from other claims to the enjoyment of aboriginal rights and must be measured against the same standard."[261] That is, to prove an aboriginal right, a First Nation or First Nation individual must demonstrate that an "activity [is] an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal

[256] *Pamajewon supra* note 51 at paras 5, 10.
[257] *Ibid* at paras 4, 9.
[258] *Ibid*.
[259] *Ibid* at para 24.
[260] *Ibid* at para 24.
[261] *Ibid* "Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is that laid out in *R. v. Van der Peet*."

group claiming the right."[262] To apply the test a court must identify the exact nature of the activity and determine whether the activity is a defining feature of the aboriginal culture.[263]

The court characterized the right asserted by Shawanaga and Eagle Lake First Nations as the right to "participate in, and to regulate, gambling on their reserve lands" and reasoned that such a broad right to "manage the use of their reserve lands" was excessively general.[264] According to the Supreme Court, aboriginal rights "must be looked at in light of specific circumstances, in particular, in light of the specific history and culture of the aboriginal group claiming the right."[265] The Supreme Court concluded that the evidence did not establish that gambling or the regulation of gambling was integral or distinctive to the culture of either First Nation at contact and consequently not protected pursuant to s. 35(1).[266] Proving the existence of a general self-government right under the *Van der Peet* test proved to be virtually impossible as the Court "articulated legal standards replete with subjective elements, lacking in clear enduring principles to guide the effort, and based upon a museum-diorama vision of aboriginal rights."[267] The result in *Pamajewon* was similar to the result in *Nelson* where the Manitoba court also determined that Chief Nelson did not have an aboriginal right to conduct gaming.

The Supreme Court rejected a general jurisdiction or sovereignty of First Nations over the activities within their reserves.[268] Rather than admit First Nation ever had jurisdiction, or retained a residual jurisdiction like tribes in the United States, the Supreme Court of Canada

[262] *Ibid* at para 25.
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*
[266] *Ibid.*
[267] Vicaire *supra* note 201 at 656-57 quoting Bradford Morse.
[268] *Pamajewon supra* note 51 at para 27.

requires that First Nations prove an aboriginal right to engage in a particular activity.[269] Once that the activity is proven to be an aboriginal right, the First Nation can then attempt to prove a general self-government regulatory right over that activity.[270] The test becomes increasingly difficult the more contemporary the practice, as the activities are measured against practices as at the time of contact, and to notions of distinctive culture preserving activities. There is no comparable restriction, by one sovereign over another sovereign that curtails the ability to legislatively address emerging areas of law and economics.

The question remains as to the source of Canada's authority to extinguish First Nation sovereignty in the first place. Although Canada relies heavily on the doctrine of discovery articulated in *Johnson,* to justify its unilateral abrogation of First Nation sovereignty from the outset, the next section explains that this position is inconsistent with the constitutional text and historical political tribal-federal relationship in the United States and inconsistent with the United States Supreme Court decisions upon which Canada relies.[271] The doctrine of discovery has served as a foundation of the violation of human rights of Indigenous peoples and its principles of Christiandom are no longer tenable.[272] Contrary to the Canadian approach, the United States Supreme Court recognized tribes as retaining attributes of sovereignty shortly thereafter.[273]

I. United States' Congressional Plenary Power vs. Nation-to-Nation Treaties

In order to properly understand the relationship that existed between tribes and the various settler governments, it is helpful to look at the text of early treaties. The treaties provide

[269] *Ibid* at paras 25, 38.
[270] *Ibid* at para 41.
[271] Fletcher *supra* note 6.
[272] Tonya Gonnella Frichner *Preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery* E/C.19/2010/13
[273] *Cherokee supra* note 19; *Worcester supra* note 20.

insight as to the political nature of the nation-to-nation relationship and at least partially reveal desires of the respective treaty partners as well as their relative bargaining power. This section examines how the text of early treaties between tribes and settler governments supports the position that settler governments did not exercise plenary power or unitary sovereignty over Indians "from the outset." This section illustrates that the early British-tribal relationship was not one where the settler society exercised dominion over the tribes. Treaty negotiations demonstrate that the Indian tribes held significant negotiation power owing to their military strength. This section lends support to the First Nation perspective that British "discovery" of North America did not divest the Indian tribes of their sovereignty. Thus Canada should follow the United States approach.

After a comprehensive examination of the text of the United States constitution, treaties, statutes, case law, and legislative history among other things, Robert Clinton examined the assertion by the Supreme Court in *Lone Wolf v. Hitchcock*[274] that "[p]lenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of government."[275] With this statement the Supreme Court asserted that the courts did not have the authority to challenge Congress' treatment of the tribes due to the non-justiciability of political questions.

Clinton explains that "Congress never asserted any power to directly regulate Indian tribes until it enacted the Federal Major Crimes Act in 1885… Thus, in point of historical fact, 'the beginning' was less than two decades before *Lone Wolf*."[276] Moreover, if the United States

[274] *Lone Wolf supra* note 186 at 564.
[275] Robert N. Clinton "There is No Federal Supremacy Clause For Indian Tribes" (2002) 34 Ariz. St. L.J. 113.
[276] *Ibid* at 184.

truly exercised plenary authority as *Lone Wolf* suggests, Clinton explains that it would have been entirely unnecessary for George Washington's troops to approach the Lenni Lenape ("Delaware") Indian tribes to negotiate permission via treaty to enter their territory.[277] A similar approach was used with other tribes during the revolutionary war where the United States found it necessary to form military alliances with tribes and obtain tribal consent in order to secure strategic military sites.[278]

In the United States, the Treaty of Fort Pitt was the first ratified treaty between the United States and an Indian Tribe in 1778.[279] The text of the treaty demonstrates that the United States was not in a position of military or jurisdictional authority over the Delaware Indian tribe.[280] Article III of the treaty demonstrates that the United States sought the permission of the tribe to pass freely through the tribe's territory, notwithstanding the territory lay within the geographical boundaries of the new union of states.[281] Article III demonstrates that the United States was engaged in war and not in position to wrest permission from the Lenni Lenape:

> And whereas the United States are engaged in a just and necessary war, in defence and support of life, liberty and independence, against the King of England and his adherents, and as said King is yet possessed of several posts and forts on the lakes and other places, the reduction of which is of great importance to the peace and security of the contracting parties, and as the most practicable way for the troops of the United States to some of the posts and forts is by passing through the country of the Delaware nation, the aforesaid deputies, on behalf of themselves and their nation, do hereby stipulate and agree to give a free passage through their country to the troops aforesaid.[282]

[277] *Ibid* at 187 *See also* Fletcher *supra* note 6 at 166.
[278] *Ibid.*
[279] *Ibid* at 118.
[280] *Ibid* at 119.
[281] *Ibid.*
[282] Treaty with the Delawares, 1778. Sept. 17, 1778. | 7 Stat., 13. Article 3.

The Indian tribe's right to "govern, control, and exclude anyone within their lands, including Washington's army" was assumed by both treaty signatories.[283] The text of the treaty suggests that the Delaware were wary of the United States or that the United States sought to dispel any rumor that the United States sought to usurp the Delaware land or jurisdiction:

> Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.[284]

The Treaty of Fort Pitt contained other important provisions that expose the understanding that tribes were independent nations. First, the treaty established what might be described as an extradition agreement to deal with members of the respective nations that might offend the treaty.[285] Second, the treaty expressly provided that the Delaware tribe could join the union as a state if: "should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and to have representation in Congress."[286] Such provisions clearly contemplate the prerequisite consent of the tribes rather than unilateral dominion by the United States.

The text of the Delaware treaty demonstrates the mutual understanding between the United States and the tribe that the Indians were not citizens of the United States. In addition, the United States Supreme Court recognized that Indians born within the territorial limits of the

[283] *Ibid.*
[284] *Ibid* Article 6.
[285] *Ibid.*
[286] *Ibid.*

United States were not born subject to the jurisdiction of the United States, rather the Indians were comparable to aliens or "children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."[287] The United States Constitution recognized Indians were not part of the political community and therefore "not taxed" and "not to be counted for representational purposes."[288] The treaties are evidence that the relationship of Indian tribes with the United States was a political one.[289] The federal government did not exercise jurisdiction over Indian individuals or have a relationship with individual Indians except through the nation-to-nation relationship with the tribes.[290] Subsequent treaties between the United States and Indian tribes contemplated that citizens of the United States that ventured into the territory of the Indians would be subject to the laws of the tribe. The Treaty of Greenville with the Wyandots and Other Tribes is illustrative providing, "If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit..."[291] Clinton reasons that this sort of provision could be found "in almost every Indian treaty negotiated immediately before and after the adoption of the United States Constitution [and] clearly reflect the then contemporaneous understanding that Indian tribes had complete territorial sovereignty over their lands, including complete jurisdiction over any non-Indian intruders."[292] These provisions further demonstrate that the United States did not

[287] *Elk v. Wilkinson* [1884] 112 U.S. 94 at 102
[288] *Ibid.*
[289] Fletcher *supra* note 6 at 177.
[290] *Ibid.*
[291] Clinton "Supremacy" *supra* note 275 at 123.
[292] *Ibid.*

interfere with the jurisdiction of Indians over their territory, even when non-Indians ventured into the Indian territory. This recognition of tribal control over their territory was not riddled with exceptions related to any activity or offense that might include commerce and gaming, for example.

The treaty negotiation examples above illustrate that early relationships were not premised on the notion of plenary power i.e. unilateral domination of Congress over Indians. Rather, the "baseline original understanding" as Clinton explains was that "statehood for Indian tribes and inclusion of them within the federal union contemplated (1) the consent of the tribes through treaty and (2) representation in Congress as *separate* constituent Indian states within the union."[293] It was not until *Kagama* that the United States Supreme Court claimed plenary authority over Indians based on a doctrine of wardship.[294] Notably, the court rejected the notion that the Commerce clause was the source of plenary power as such a reading "would be a very strained construction."[295] As Clinton explains, the wardship doctrine offered an unlimited source of "undelegated authority over a non-consenting people" in an era of colonialism not bound by "constitutional principles of social compact and popular delegation."[296] Moreover, wardship is based on late nineteenth century notions of racial superiority.[297] The wardship doctrine was universally applied to all tribes to assert federal jurisdiction simply because they were racially and ethnically Indian.[298]

Today the United States Supreme Court routinely invokes the Commerce Clause as the source of plenary power over Indians even though the constitutional text or drafting history does

[293] *Ibid* at 127.
[294] *Ibid* at 180.
[295] *Kagama supra* note 192 at 378.
[296] Clinton "Supremacy" *supra* note 275 at 181.
[297] Ibid.
[298] *Ibid* at 195.

not support this interpretation and despite the Supreme Court's rejection of the Commerce Clause as the source of authority in *Kagama*.[299] Professor Clinton explained, "[i]nterpreting 'commerce with foreign nations' so subsume regulatory power over the internal commerce *of* foreign nations would, of course, self-evidently invade the sovereignty of such foreign nations and, therefore, never has been contemplated as a legitimate exercise of federal authority under the Foreign Commerce Clause."[300] Congress' actions following the enactment of the Constitution and its Commerce Clause did not give any indication that there was Congressional authority over Indians. Rather, Congress enacted the *Trade and Intercourse Acts* that "regulated and licensed the trade between non-Indians and Indians" and other matters, but do not pretend to regulate the internal affairs of Indians.[301] By comparison, in Canada authority over Indians was assigned to the federal government under the *British North America Act* without the participation of First Nation people.[302] The application of unilateral federal power over Indians over the next one hundred plus years resulted in the "wholesale erosion of First Nation governmental powers" before they received constitutional protection in 1982.[303]

Perhaps most telling of the views of the United States with respect the tribes jurisdiction over their internal affairs, can be found in a letter from John Quincy Adams, James Bayard, Henry Clay, and Albert Gallatin, who negotiated the Treaty of Ghent on behalf of the United

[299] Gregory Ablavsky "Beyond the Indian Commerce Clause" (2015) 124:4 Yale Law Journal 882 online: http://www.yalelawjournal.org/article/beyond-the-indian-commerce-clause
[300] Clinton "Supremacy" *supra* note 275 at 131.
[301] *Ibid* at 133. Citing Act of July 22, 1790, ch 33, 1 Stat. 137; Act of mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1Stat 469; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729. *See generally* Francis P Prucha, American Indian Policy in the Formative Years: the Indian Trade and Intercourse Acts, 1790-1834 (1962) for a discussion the Trade and Intercourse Acts and their impact.
[302] Ralph W. Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash L Rev. 643. at 708-09.
[303] *Ibid.*

States[304] to end the War of 1812.[305] In their letter they describe the independence of the Indians and the treaty relationship between the Tribes and the United States:

> Under [the United States constitutional] system, the Indians residing within the United states are so far independent that they live under their own customs, and not under the laws of the United States, that their rights upon the lands where they inhabit or hunt are secured to them by boundaries defined in amicable treaties between the United States and themselves; and that, whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which they receive from the United States ample compensation for every right they have to the lands ceded by them.[306]

According to this statement, the negotiators understood that Indian tribes were simply not under the control or subject to the laws of the United States. Early relationships between tribes and the United States were governed by voluntary treaties and not unilateral dominion. The tribes exercised their own jurisdiction through their own customs. In 1812, the tribes were instrumental allies of Britain that ultimately turned the War of 1812 in British favor.[307] It is evident that tribal sovereignty was not extinguished by discovery or otherwise displaced by the assertion of Crown sovereignty in 1812. However, by the time Britain would enact the *British North America Act* in 1867 the shift in powers would be perceptively different than 1812, and more so than in 1787 when the United States passed its constitution. This variance in power seems to have made all the difference in the respective countries' dealings with the Indigenous peoples.[308]

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[304] Clinton "Supremacy" *supra* note 275 at 136.
[305] Robert V. Remini *Henry Clay: Statesman for the Union* (rev. ed.) (New York: W. W. Norton & Co. 1993) at 103–22
[306] *Ibid.*
[307] Vicaire *supra* note 201 at 615.
[308] *Ibid.*

II. Johnson v. M'Intosh and the Doctrine of Discovery & the Recognition of Retained Tribal Sovereignty.

The United States and Canada continue to rely on *Johnson* to justify their claim to title and jurisdiction. The fundamental difference between the United States and Canada concerns the recognition of tribal sovereignty and the right of tribes to regulate their internal affairs, including gaming, by the United States, and the rejection of the same by Canada. This recognition by the United States formed part of the express rationale employed by Congress in the enacting of the *Indian Gaming Regulatory Act*.[309] The United States enacted IGRA with a goal and federal policy of promoting tribal economic development and strong tribal government.[310] Canada's parliament may have the ability to create comparable legislation to promote similar First Nation interests. However, the federal government has been reluctant to interfere with the 1985 delegation of gaming regulation authority to the provinces, and may require provincial consent.[311] Even if parliament did elect to pass legislation pursuant to section 91(24), such exercise of authority would merely perpetuate the notion of colonial domination over Indians. Obtaining the consent of the provinces is unlikely due to the provinces' pecuniary interest in maintaining regulatory control of the multi-billion dollar market.[312] Consent of the First Nations to surrender their jurisdiction over gaming played no role in the federal delegation of authority to the provinces over gaming.

This thesis does not purport to argue that gaming is the most effective, or even morally correct, way for tribes and First Nations to gain economic self-sufficiency. Rather, the answer to that question is best answered by each respective tribe or First Nation according to their own

[309] 25 U.S.C. 2701 (5).
[310] 25 U.S.C. 2701 (4).
[311] Morse *supra* note 52 at 1022-23.
[312] *Ibid* at 1020-21.

internal political and legal processes. By the same token, the question of whether to engage in gaming, is also a political question for Tribes and First Nations, insofar as they have not surrendered their original jurisdiction over economic development in general, and gaming in particular.

In *Johnson*, Marshall C.J. described the issue to be determined as whether the Indians possessed the power "to give, and of private individuals to receive, a title which can be sustained in the Courts of [the United States]."[313] The outcome turned on the law of Christendom, or the doctrine of discovery, that held "discovery gave title to assume sovereignty over, and to govern the unconverted [non-Christian] peoples…of North and South America.[314] Despite the superficial connection to religious virtues, the application of the doctrine of discovery is responsible for "centuries of destruction and ethnocide… and for the purpose of "accumulat[ing] wealth by engaging in unlimited resource extraction."[315] *Johnson* is relied upon by the United States, among other nations, to justify their occupation of Indigenous land, and "to forestall Native American legal efforts to recover lost land and sovereignty…"[316] As discussed in this thesis, Canada also relies upon *Johnson* to justify its usurpation of title and jurisdiction.[317] Ever since Europeans arrived on the shores of America, there has been an "unending story involving the transfer of valuable resources, like land, gold, coal, oil, timber, uranium, and even the very sovereignty of Indian peoples…"[318] Canada relies on *Johnson* to justify its regulatory control over gaming, a similarly valuable resource.

[313] *Johnson supra* note 10 at 572.
[314] Frichner *supra* note 272 at para 5.
[315] *Ibid* at para 9.
[316] Echo-Hawk *supra* note 246 at 76.
[317] *Sparrow supra* note 13 at para 49.
[318] Clinton "Return of the Buffalo" *supra* note 22.

Marshall C.J. could not author an opinion on matters outside the authority of the Supreme Court, or the powers vested in the Supreme Court by the constitution. Therefore, he concluded that the transfer of absolute title to the Britain, and subsequently the United States pursuant to the doctrine of discovery "cannot be questioned" and the restriction on the Indians from transferring title "cannot be rejected by the Courts of Justice" even if the restriction is opposed to a natural right of the Indians and usage of civilized nations. [319] As Marshall C.J. described the doctrine of discovery: "[discovery] gave title to the government by whose subjects, or by whose authority, it was made, against all Europeans governments, which title might be consummated by possession… The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[320]

Indian people were deemed "incapable" of possessing ownership rights sufficient to transfer title and retained only usufructory rights. Justice Marshall explained that the Indian

> character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence.[321]

Thus the principles in *Johnson* are "tainted by colonialism and overt racism."[322] The holding in *Johnson* relies on classifications of Indigenous peoples as "barbarians, infidels, or savages" as well as the notion that Christian religion is superior to non-Christian religion and should not be

[319] *Johnson supra* note 10 at 591-92.
[320] *Ibid* at 573.
[321] *Ibid* at 573.
[322] Echo-Hawk *supra* note 246 at 77.

sustained by any court.[323] Continuing to rely on decisions like *Johnson* perpetuate Eurocentric views whose "fundamental postulate is the superiority of Europeans over Aboriginal peoples."[324]

Nevertheless, *Johnson* does not conclude that tribal sovereignty was entirely extinguished as Canadian courts suppose, but that "their right to complete sovereignty, as independent nations, were [merely] diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[325] Indian sovereignty, even under the dubious doctrine of discovery under United States common law, continued to exist albeit in a diminished form. Thus, *Johnson* stands for a residual sovereignty that existed and yet remains.

Walter Echo-Hawk suggests that the legal doctrines in articulated in Johnson are outdated and "inconsistent with mainstream values and no longer enjoy a legitimate place in a land devoted to higher values."[326] This chapter demonstrated that the United States and Canada continue to rely on the doctrines pronounced in *Johnson* to extend their jurisdiction and laws over Indian tribes and First Nations. Further, *Johnson* does not provide for a legitimate extinguishment of sovereignty or Indigenous jurisdiction and title. Both Canada and the United States make the assertion that they possess the sovereignty or plenary power to unilaterally extinguish the sovereignty of First Nations and tribes respectively and both rely on outdated notions of racial and religious superiority. Absent an alternative legitimate foundation, based on consent, tribal and First Nation jurisdiction remain intact.

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[323] *Ibid* at 21
[324] Sakej Henderson "Taking Equality into the 21st Century: An Aboriginal Commentary" (2001) 12 Nat'l J Const L. 31 at 34.
[325] *Johnson supra* note 10 at 574.
[326] Echo-Hawk *supra* note 246 at 21

CHAPTER 5

Gaming and Tribal Sovereignty in the United States:

Starting From Something – Residual Tribal Sovereignty and the Right to Conduct Gaming In United States Case Law

Like First Nations in Canada, tribes in the United States faced similar legal challenges from the States in the early tribal efforts to conduct and regulate gaming. Unlike First Nations in Canada, tribes in the United States enjoy general recognition of sovereignty unless expressly diminished by clear legislative intent. As a result, tribes start from something. This chapter will demonstrate that this starting place, the presumption of residual sovereignty versus proving an aboriginal right, has made all the difference in the recognition of tribal jurisdiction over gaming.

The legal challenges to tribal gaming in the United States led to the enactment of the *Indian Gaming Regulatory Act* ("IGRA") in 1988 which is the current federal legislation that governs Indian gaming in the United States.[327] IGRA codified the tribes' right to conduct gaming within Indian country[328] and provided a mechanism for the states to exercise some control over gaming within the respective state's geographic borders through tribal-State gaming compacts.[329] Although there are tribes that benefit significantly from gaming revenues, many Indians saw IGRA as an encroachment on their sovereignty, particularly as it relates to State involvement.[330] That is, IGRA provided the States with a statutory right to negotiate compacts

[327] IGRA *supra* note 2.
[328] 18 U.S.C. § 1151 - Indian country defined, "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."
[329] 25 U.S.C. § 2710 (d)(1)(C).
[330] Clinton, "Return of the Buffalo" *supra* note 22 at 18.

and a corresponding obligation on the tribes to do so. Nevertheless, any curtailment of tribal sovereignty presupposes its existence. This chapter argues that tribal sovereignty over gaming continues to exist in both the United States and Canada.

Early legal challenges to Indian, or tribal gaming operations, demonstrate a struggle of jurisdiction. The struggle over jurisdiction is part of sovereignty or the right of self-government. As Chief Justice Marshall acknowledged in *Worcester*, the Crown did not interfere with the self-government of tribes stating, "Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians… [the Crown] never intruded into the interior of their affairs or interfered with their self-government so far as respected themselves only."[331] This statement by the court demonstrates that Indian tribes exercised powers of self-government before and after the arrival of Europeans. The Crown did not immediately exercise jurisdiction over the Indian people or their own territories. Tribes governed themselves pursuant to their own laws and customs. This is the starting place for the United States as it pertains to tribal jurisdiction and sovereignty. It follows that the Crown is in need of justification of its intrusion to the internal affairs of the Indian tribes; whether by consent or some other legitimate method. Tribes are regarded as "separate sovereigns" existing *ultra vires* the United States Constitution or "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[332]

Today the United States Supreme Court continues to recognize tribal sovereignty, and generally speaking, Tribes in the United States "retain attributes of sovereignty over both their members and their territory."[333] Tribal sovereign authority over their territory and people within

[331] *Worcester supra* note 20 at 547.
[332] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 at 56.
[333] *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission* [1987] 829 F.2d 967 (10th Cir.).

that territory is based the political entity of the tribe.[334] Although Congress has limited this authority, Indian Tribes continue to possess these attributes of sovereignty over their membership and territories.[335]

Chief Justice Marshall stated that the treaties signed with the tribes constitute evidence of tribal sovereignty.[336] Further, association by one nation with another nation for protection does not necessarily diminish the sovereignty of the weaker state.[337] The fundamental attributes of jurisdiction over Indian land and people continue to exist amongst tribes and are repeatedly upheld by the United States Supreme Court. One often cited occasion occurred in *Santa Clara Pueblo v. Martinez,* a controversy related to tribal control over citizenship.[338] In *Santa Clara,* children born of Indian women who married non-tribal members were ineligible for enrollment in the tribe pursuant to tribal ordinance.[339] Consequently, the children would be unable to vote, reside on the reservation in the event of their mother's death, or inherit their mother's property interest on the reservation.[340] Martinez was one such mother whose children were deemed ineligible for enrolment by the tribe. She sought declaratory and injunctive relief.[341]

Santa Clara Pueblo moved to dismiss the action on the basis that "the court lacked jurisdiction to decide intra-tribal controversies affecting matters of tribal self-government and sovereignty.[342] The courts ultimately sided with the tribe determining that the tribe's immunity

[334] Lisa Baird, "South Dakota v. Bourland: The Court Replaces the Cavalry" (1995) 28 Loy. L.A. L. Rev. 675 at 679.
[335] *Ibid.*
[336] *Worcester supra* note 20 at 520.
[337] Ibid.
[338] *Santa Clara Pueblo supra* note 332 at 55-56.
[339] *Ibid.*
[340] *Ibid* at 52-53.
[341] *Ibid* at 53.
[342] *Ibid.*

barred the action."[343] In reversing the lower court decisions, the United States Supreme Court explained that tribes are "distinct, independent political communities, retaining their original natural rights" in matters of self-government.[344] The Court reasoned that tribes have the power to make their own laws and enforce those laws in their own forums.[345] The Court was unwilling to interfere with the tribe's sovereignty as a "culturally and politically distinct entity."[346] In a footnote, the court elaborated stating that, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[347]

In the United States, tribes also contended that they maintain sovereignty over gaming. The fundamental contention of my thesis is that tribes and First Nations were not legitimately dispossessed of their sovereign rights including jurisdiction over gaming. I will return to the dubious common law rationale that the United States has employed to encroach on tribal sovereignty later in this chapter; however I now turn to contemporary case law, addressing Indian gaming that already assume that tribes do not enjoy all attributes of sovereignty.

U.S. v. Sosseur

Early efforts of Indian Tribes to conduct casino style gaming were opposed by the States.[348] In *U.S. v. Sosseur*, a member of an Indian tribe was "charged with the offense of operating slot machines on an Indian reservation" within the state of Wisconsin.[349] The tribal

[343] *Ibid* at 71-72.
[344] *Ibid* at 55 citing *Worcester v. Georgia*, 6 Pet. 515, 559 (1832); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945).
[345] *Ibid.*
[346] *Ibid* at 71-72.
[347] *Ibid* at footnote 32 citing *Roff v. Burney* [1897] 168 U. S. 218; *Cherokee Intermarriage Cases* [1906] 203 U. S. 76.
[348] *U.S. v. Sosseur* [1950] 181 F.2d 873 (9th Cir.)
[349] *Ibid* at 874.

member admitted ownership and operation of the slot machines; however, he contested the jurisdiction of Wisconsin statutes over Indians in Indian country.[350] The applicable federal *Criminal Code* provision, section 1152 outlines the applicability of criminal law to Indians. [351] That section provides that "the general laws of the United States as to punishment of offenses committee in any place within the sole and exclusive jurisdiction of the United States… shall extend to the Indian country."[352] However, offenses committed by one Indian person against another Indian, or offenses punished pursuant to tribal law or treaty is reserved to the exclusive jurisdiction of the respective tribes.[353]

Here, the defendant was operating the gaming venture pursuant to a license granted by the Tribal Council.[354] Therefore, the actions of Sosseur did not violate tribal law and did not correspond to any tribal punishment and one might predict that the defendant would not be subjected to contradicting State law.[355] The defendant argued that the federal *Indian Reorganization Act* and *Wheeler-Howard Act*, were "intended to reaffirm tribal sovereignty and recognize Indian rights to self-government," and that any element of sovereignty or right to self-government that is not "expressly limited remains within the domain of tribal sovereignty."[356] However, the court found that the federal *Assimilative Crimes Act*, permitted "the use of local State Statutes to fill in the gaps of the *Federal Criminal Code*, where no action of Congress has been taken to define the missing offense."[357] The State of Wisconsin did have a statute that

[350] *Ibid.*
[351] 18 U.S.C. § 1152
[352] *Ibid.*
[353] *Ibid.*
[354] *Sosseur supra* note 348 at 874.
[355] *Ibid.*
[356] *Ibid* at 875.
[357] *Ibid.*

criminalized the use of devices for gambling purposes to induce or entice others to gamble.[358] Here, the court interpreted section 1152 of the *Criminal Code* to mean that if the defendants were not actually punished pursuant to the tribal law, or the tribal law was expressly recognized as exclusive via treaty, that tribal members would be subject to state laws of general application through the federal act.[359] Although tribes could adopt a code of offenses, the tribal code would not take the offense "out of the realm of general laws" such that tribal members would be exclusively subject to tribal legislation.[360] Thus where the tribe adopted its own laws permitting licensed gaming activities, *Sosseur* was still found to be in violation of state law.[361]

The Court seemed to take issue with the fact that gaming facility was frequented by both Indians and non-Indians and thereby provided a means by which non-Indian and Indian play served to "undermine" the efforts of the state to enforce its law.[362] This is somewhat an exceptional argument insofar as states do not make similar contentions as it might relate to neighboring states. For example, residents of Wisconsin are certainly at liberty to frequent casinos in Nevada, Illinois or even on tribal reservations in the contiguous state of Minnesota, yet these visits are not subject to similar criticisms. In other words, Wisconsin cannot apply its laws to members of another state because its residents frequent casinos in that state.

The Court in *Sosseur* was arguably inconsistent with federal policy that only tribal authorities had lawful jurisdiction over gaming on Indian lands and appears to be the first time the *Assimilative Crimes Act* and the 1948 federal *Criminal Code* made state law applicable to

[358] *Ibid.*
[359] *Ibid* at 875.
[360] *Ibid* at 876.
[361] *Ibid.*
[362] *Ibid* at 876.

Indian country.[363] Remarkably, gambling was not illegal under federal law.[364] The result of this strained application of federal law was merely a delay the emergence of Indian Casinos.[365]

U.S. v. Farris

Thirty years later, the 9th Circuit had another opportunity to review lower court conviction of Indians operating commercial type gambling operation on Indian tribal lands.[366] The Court in *U.S. v. Farris* would hold that the *Organized Crime and Control Act* of 1970[367] constituted a federal law that was "generally applicable throughout the United States [and applied] with equal force to Indians on reservations."[368] This legislation provides that "illegal gambling business" means a gambling business which "is a violation of the law of a State or political subdivision in which it is conducted."[369] Here, the casino was operated on the Puyallup Indian reservations by both Indians and non-Indians.[370]

The court held that none of the three possible exceptions in the *Organized Crime and Control Act* applied to the defendants.[371] First, the activity was not purely intra-tribal and involved non-Indian clientele.[372] Second, there was no specific treaty language that permitted gambling or exempting defendant Indians from federal laws of general applicability.[373] Third, the Puyallup Indians pointed to no legislative history or other Congressional intent to exempt the

[363] Clinton, "Return of the Buffalo" *supra* note 22 at 23-24.
[364] *Ibid.*
[365] *Ibid* at 25.
[366] *U.S. v. Farris* [1980] 624 F.2d 890 (9th Cir.)
[367] 18 U.S.C. § 1955
[368] *Farris* at 893.
[369] 18 U.S.C. § 1955 (b)(1)(i)
[370] *Farris supra* not 366 at 893.
[371] *Ibid.*
[372] *Ibid.*
[373] *Ibid.*

Indian gaming activity.[374] The court also pointed to concerns related to organized crime and the notion that illegal gambling operations provided significant resources to organized crime, in affirming the lower court convictions,[375] even though no evidence of infiltration was presented. The court opined that risk of mob takeover was present, "whether [the Indians] realized it or not."[376]

Although the primary concern seems to be one of preventing crime, the court in *Farris* appears to have other economic concerns. The court reasoned that the Puyallup casinos might "flourish as mightily" as casinos in Vegas and Atlantic City and would defeat the federal interests of "protecting interstate commerce" and preventing takeover by organized crime.[377] The Court suggested that although the federal government has an interest in preventing large scale gambling, it is "Congress' judgment that the harm caused by large scale gaming, i.e. the 'major evil' of harm the national economy, is outweighed by the desires of the particular states."[378]

Like *Sosseur, Farris* relied on the application of federal law to the tribes under the assumption that Congress can exercise plenary power over Indian tribes.[379] In *Farris*, Washington State law was deemed to be applicable to Indian tribes because the federal law permitted it, otherwise States could not exercise jurisdiction on tribal reservations. In *Farris*, the court reasoned that the types of gaming activities engaged in were illegal in the State of Washington, and therefore section 1955 was extended to the Indian defendants and their

[374] *Ibid.*
[375] *Ibid* at 896.
[376] *Ibid.*
[377] *Ibid* at 894.
[378] *Ibid.*
[379] *Ibid.* at 897 citing *United States v. Wheeler* [1978] 435 U.S. 313, 323 which held that "until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty no withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

convictions affirmed.[380] In addition, the Court held that the laws of Washington were applicable to the non-Indian defendants on the reservation.[381]

The question of whether an Indian tribe could operate gaming in a state where such gaming was not illegal would be answered in by the 9th Circuit in the 1987 decision *Cabazon.*[382] The *Cabazon* court would find that the federal statue did not curtail the residual sovereign right of tribes to operate gaming on their reservation in a state where gaming was not illegal and where gambling elsewhere in the state was not prohibited as a matter of public policy but permissible and regulated.[383]

California v. Cabazon Band of Mission Indians

One of the landmark cases in Indian law leading up to the enactment of the *Indian Gaming Regulatory Act*[384] was *California v. Cabazon Band of Mission Indians*.[385] In that case, the Cabazon and Morongo Bands operated bingo and card games on their reservations outside Riverside California.[386] The games were open to the general public, both Indian and non-Indian patrons; however, most of the play was derived from non-Indian patronage.[387]

Here as in the previous cases, the state must demonstrate that tribal sovereignty to operated gaming has been diminished by Congress in order to successfully stop the tribe's gaming activity.[388] Under the plenary power doctrine, "tribes retain their existing sovereign

[380] *Ibid* at 895-96.
[381] *Ibid.*
[382] *Cabazon supra* note 255.
[383] *Ibid* at 220-21.
[384] IGRA *supra* note 2.
[385] *Cabazon supra* note 255 at 204.
[386] *Ibid.*
[387] *Ibid.*
[388] *Wheeler supra* note 192.

powers" unless withdrawn by treaty or statute.[389] In *Cabazon*, the State of California would unsuccessfully attempt to rely on Public Law 280 and the *Organized Crime Control Act* to curtail the tribe's gaming activities. Put another way, tribes were not subject to State jurisdiction absent some federal delegation of authority. The legislation California sought to invoke applied only to criminal matters. Therefore, the outcome would turn on whether or not the activity in question was criminal or civil in nature.

California is one of only a handful of states where states exercise additional jurisdiction on Indian reservation as a result of a law commonly known as Public Law 280. Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States. California was granted broad criminal jurisdiction over offenses committed by or against Indians in Indian country within the state; however, civil jurisdiction was more limited.[390] The court reasoned that the civil jurisdiction was not a general grant authorizing state interference in any jurisdictional matter.[391]

Cabazon turned on whether or not California prohibited the activities in question or whether the State regulated the activities. The court applied a test that distinguished between laws that are "criminal/prohibitory and laws that are "civil/regulatory.[392] The court reasoned, "If the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, however, if the state law generally permits the conduct at issue, subject

[389] *Ibid* at 323
[390] *Cabazon supra* note 255 at 207.
[391] *Ibid* at 208.
[392] *Ibid* at 209.

to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation."[393]

The prohibitory/regulatory analysis is not a bright line rule.[394] Nevertheless, the court noted that California does not prohibit all forms of gaming; rather, California itself engaged in gaming by way of state lottery and other forms of state-run gaming.[395] Indeed California openly encouraged gambling within the state.[396] The forms of games played in Cabazon, including bingo and card games, could be authorized within the state.[397] Bingo was legally played pervasively throughout California.[398] As a result, the court determined that California regulates rather than prohibits gambling in general and bingo in particular."[399] The test to determine whether the tribe's activity contravenes state law turns on whether it is contrary to "public policy" and the court determined that it was not.[400]

The court noted that tribal sovereignty was an "important federal interest" and reasoned that state interference with tribal gaming in the instant was also antithetical to that interest as well as the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development."[401] The Court noted that these interests were "reaffirmed by the President's 1983 Statement on Indian Policy."[402] The state was unable to demonstrate that tribal sovereignty had been diminished and therefore, Public law 280 did not diminish the tribe's inherent right to operate gaming.

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[393] *Ibid.*
[394] *Ibid* at 210.
[395] *Ibid.*
[396] *Ibid.*
[397] *Ibid* at 210-11.
[398] *Ibid.*
[399] *Ibid.*
[400] *Ibid* at 213.
[401] *Ibid* at 216.
[402] *Ibid* at 217.

This policy seems to be a dramatic shift from that articulated by the 9th Circuit in *Sosseur* more than thirty years earlier that did not emphasize Indian self-government. In addition, the United States Supreme Court's focus on the federal interest of promoting self-government is markedly different from the rationale of the 9th Circuit in *Farris* that emphasized a federal interest of protecting interstate commerce. The court in *Cabazon* recognized that the Department of the Interior was involved in promoting tribal bingo enterprises by facilitating negotiation of related loans by making grants and loan guarantees.[403] Moreover, the Secretary of the Interior approved tribal laws of Cabazon and Morongo to establish and regulate gaming by tribes on their reservations.[404] This is not to say that the Secretary created the sovereign right to conduct gaming. As this thesis demonstrates in chapter 3, tribal sovereignty in the United States continues to exist absent express extinguishment by Congress even if it is accepted that the United States can exercise plenary power over Indians. *Cabazon* and the previous United States cases demonstrate that the respective states sought to prove that tribal sovereignty with respect to gaming had been diminished or extinguished by federal plenary power. However, this section will show that tribal sovereignty over gaming was not extinguished but was supported by the federal government.

The intent of gambling initiatives in *Cabazon* was to create economic opportunities and revenue generation for tribal governments, and "[t]he tribal games at present provide the sole source of revenue for the operation of tribal governments and the provision of tribal services."[405] Therefore, the court declared that the tribes' interests were aligned with federal interests stating, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise

[403] *Ibid.*
[404] *Ibid.*
[405] *Ibid* at 218-19.

revenues and provide employment for their members."[406] This is a practical observation by the court and it should also be noted that gaming revenues are a source of income for provincial and state governments alike. The fact that most First Nations and tribes do not levy income taxes on their members magnifies the importance of gaming revenue.

The court rejected the State of California's argument that the tribes were simply marketing a tax exemption.[407] In doing so, the court distinguished between a prior ruling, *Washington v. Confederated Tribes of Colville Indian Reservation*, where the Supreme Court found that a "State could tax cigarettes sold by tribal smoke shops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services."[408] Similar to arguments made in *Sosseur*, the State of California appears to argue that jurisdiction over non-Indians who frequent the Casino ought to give rise to State jurisdiction over gaming activities on reserve. However, in *Washington*, the tribes were selling a product whose value was primarily generated outside of the reserve.[409] By contrast, the court reasoned that Cabazon and Morongo generated value on the reservation and, the product was consumed on the reservation in modern facilities. The patrons visited the reserves for extended periods of time and consumed product and service rather than making a purchase and leaving."[410]

In *Cabazon*, the State of California also attempted to justify its imposition of jurisdiction, per the notion that the tribes were at risk of infiltration by organized crime.[411] However, the Supreme Court did not find that the state interest of preventing organized crime was sufficient to

[406] *Ibid.*
[407] *Ibid.*
[408] *Ibid* citing *Washington v. Confederated Tribes of Colville Indian reservation,* [1980] 447 U.S. 134 at 155.
[409] *Ibid.*
[410] *Ibid.*
[411] *Ibid* at 220-22.

offset the "pre-emptive force of federal and tribal interests" in the case. The court noted that the state did not allege or present any evidence of criminal infiltration in the Cabazon and Morongo gaming enterprises.[412]

California sought to prohibit all bingo games from being played on reservation while, at the same time, permitting and regulating bingo off reservation.[413] Indeed, the court recognized the inconsistency and addressed California's underlying economic motives to prohibit tribal gaming enterprises in a footnote.[414] The court found that the state had no legitimate interest in permitting non-Indian owners of gambling facilities to profit from gaming while denying Indian tribes that same opportunity to profit from gaming.[415] The court reasoned that "[n]or is California necessarily entitled to prefer the funding needs of state-approved charities over the funding needs of the tribes, who dedicate bingo revenue to promoting health, education, and general welfare of tribal members."[416]

This result is entirely different from what we observed in Canada where provinces are able to deny First Nations the opportunity to engage in gaming in favor of state-approved operations. On a micro level, the difference could be attributed to the characterization of gaming as criminal or civil. We see from *Cabazon* that regulatory policies of a State toward gaming can render the activity civil in nature. By contrast Canada characterizes all gambling activity as criminal unless authorized by the provincial government. As a result, First Nation gaming activities are criminalized unless approved by the province.

[412] *Ibid* at 221.
[413] *Ibid* at 204.
[414] *Ibid* at footnote 25.
[415] *Ibid.*
[416] *Ibid.*

The difference occurs even though states and provinces may share common desire to preclude tribes or First Nations respectively. The starting place of residual sovereignty requires States to prove that there is a federal exercise of power that extinguished tribal sovereignty over gaming in the United States. Thus in *Cabazon* the tribe ultimately remained outside the jurisdiction of the State because neither Public Law 280 nor the Organized Crime Control Act provided for a delegation of authority to the State of California. By contrast, in Canada, First Nations must prove that a right exists and that it is integral to their culture, even when there has been no express Parliamentary encroachment on the claimed aboriginal right.

Senator Daniel J. Evans added his comments to the legislative history of IGRA dismissing the notion that the State motive to control Indian gaming was a benevolent desire to prevent infiltration of organized crime: "[w]e should be candid about gambling. This issue is not one of crime control, morality, or economic fairness. Lotteries and other forms of gambling abound in many States, charities, and church organizations nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry choose to live."[417] Whatever the reasons for wanting to preclude tribal participation, the states did not have the consent of the tribe to regulate internal tribal affairs. Senator Evans distinguished between the ability of the states to exercise limited jurisdiction over individual Indians pursuant to Public Law 83-280 from the exercise of State law over tribes. He stated that "[Public Law 280] did not subject the governing processes of the tribes to State law and public policy constraints, which would be a fundamental derogation of tribal self-government."[418]

[417] U.S. Department of Justice, Office of Legislative and Intergovernmental Affairs, *Additional Views of Mr. Evans* (Washington: 14 January 1988).
[418] *Ibid.*

What we learn from *Cabazon* is that in the United States tribal sovereignty includes the right to operate gaming activities on reservation unless it can be shown that Congress limited the tribal sovereignty through legislation. The federal policy of promoting tribal self-government including self-sufficiency supported the conclusion that tribes retained the inherent right to operate gaming on their reservations. States were unable to prohibit tribes from participating in the market. This conclusion is even clearer in the following case.

Langley v. Ryder

Tribes in non-Public law 280 states were positioned differently with regards to gaming. In Louisiana, the Coushatta Tribe of Louisiana was not subject to provincial jurisdiction over criminal activities, including gaming operations because Louisiana is not a Public Law 280 State.[419] In *Langley v. Ryder*, the Coushatta Tribe of Louisiana petitioned the Court for an injunction barring state officials from prosecuting criminal charges against the tribe for conducting gaming on tribal lands.[420] The issue before the Court was the federal government or the State government had jurisdiction over the land.[421]

The Court determined that the gaming occurred in Indian country, and therefore, state criminal jurisdiction was preempted by federal jurisdiction and the interest of protecting tribal self-government.[422] The Court reasoned that States generally have no criminal jurisdiction in Indian country absent clear and unequivocal grant of authority by Congress.[423] The Court concluded that there was no congressional grant of jurisdiction to the State, therefore, the State

[419] *Langley v Ryder* [1985] 778 F.2d 1092 (5th Cir.).
[420] *Ibid* at 1094.
[421] *Ibid.*
[422] *Ibid* at 1095
[423] *Ibid* at 1096.

lacked jurisdiction over the lands and crimes committed thereon.[424] This reasoning assumes that Congress is endowed with legitimate authority over tribes, which is not conceded in this thesis. Nevertheless, *Langley* demonstrates that the federal courts acknowledge the federal interest of protecting tribal self-government and the view that State sovereignty and jurisdiction cannot unilaterally displace tribal sovereignty.

Canada's approach of assuming that First Nation sovereignty was incompatible with Crown sovereignty runs contrary to this outcome even though the foundational case law is the same. Canada ought to revisit its interpretation of *Johnson* and *Worcester* and correct its erroneous conclusion that First Nation sovereignty and self-government rights were entirely extinguished. As discussed in chapter 3, Canada acknowledges in *Calder* that First Nations possessed inherent rights deriving from their prior occupation of North America and existence in distinct societies. However, Canada's courts have yet to reverse its assumption that First Nation sovereignty was extinguished pursuant to the "discovery" of their territories by peoples of a different religious and ethnic background. Another distinction between Canada and the United States, discussed in the following case, is the recognition that raising revenue is a traditional function of government.

Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission

The United States courts have recognized that raising revenue is a traditional government function and a function of sovereignty. In 1987, the Muscogee (Creek) Nation and Indian Country, U.S.A., Inc. (ICUSA), successfully argued that the State of Oklahoma does not have jurisdiction to impose a tax on the Creek Nation Bingo.[425] The 10th Circuit Court affirmed the

[424] *Ibid.*
[425] *Oklahoma Tax Commission supra* note 333.

district court holding that the State's sales tax laws could not be applied to Creek Nation bingo because it impermissibly interfered with tribal jurisdiction and federal laws and policies.[426] The State unsuccessfully argued that bingo was not a traditional activity, the tribe was marketing an exemption and the state's interests outweighed tribal interests because of a potential for organized crime.[427]

The Court relied on the reasoning in *Cabazon* stating, "current federal policy promotes Indian bingo, and state regulation is preempted even if it is not a traditional activity."[428] The Court emphasized that the traditional government function at issue was not the type of game, rather the traditional government function of raising revenue. [429] The court emphasized that the focus should not be on the specific tradition but instead on the government function. In this case, the government function is raising revenue which is the exercise of tribal "inherent sovereign governmental authority." [430]

Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission demonstrates a clear difference in the view of the courts of Canada and the United States with respect to whether raising revenue through gaming constitutes a traditional activity. Canada's approach focusing on the historical nature of activities that are integral to preserving culture stymies the ability of First Nations exercise traditional governmental functions such as regulation and revenue generation. Recall from *Nelson* that aboriginal rights in Canada do not include the regulation of gaming activity or a traditional governmental function of raising revenue through commercial gaming, or

[426] *Ibid.* at 988.
[427] *Ibid* at 981.
[428] *Ibid* at 982.
[429] *Ibid.*
[430] *Ibid.*

large scale gaming for profit.[431] By contrast, the Manitoba court found that commercial gaming itself was not a traditional activity and therefore found it unnecessary to determine whether there was a self-government right to regulate the activity.

The State's concern about the infiltration of organized crime was not deemed to be a sufficient concern to outweigh the pre-emptive federal and tribal interests in *Oklahoma Tax Commission*.[432] However, despite the lack of merit, the concern of organized crime would prove to be an important consideration in ultimately providing the states a right to negotiate tribal gaming compacts under IGRA.

Indian Gaming Regulatory Act

Congress enacted the *Indian Gaming Regulatory Act* on October 17, 1988.[433] This section examines parts of the text of IGRA and comments made by the Congressional Committee that oversaw the enactment, to demonstrate that Indian gaming in the United States is reflective of how the recognition of tribal sovereignty in the United States differs from Canada.

As a result of the tribal success in *Cabazon*, states and local governments pressured Congress to take action by passing legislation to regulate Indian gaming.[434] The reason advanced by the states was the reduction of organized crime on Indian Gaming.[435] However, federal officials viewed gaming as a potential avenue to reduce tribal dependence on federal funding and a means to self-sufficiency.[436] The states may have had other concerns top of mind including protecting state businesses engaged in gaming operations. Senator John McCain,

[431] *Nelson supra* note 53 at paras 108 & 327.
[432] *Oklahoma Tax Commission supra* note 333 at 985.
[433] IGRA *supra* note 2.
[434] Matthew L.M. Fletcher, "Bringing Balance to Indian Gaming" (2015) 44 Harv. J. on Legis. 39 at 50.
[435] *Ibid.*
[436] *Ibid* at 55-56.

commentated in the legislative history related to the *Indian Gaming Regulatory Act* expressing it became clear that the States' interests "extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition."[437] Mr. McCain asserted that in the previous 15 years of gaming in Indian country, "there has never been one clearly proven case of organized criminal activity. In spite of these and other reasons, the State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribes have is negotiable."[438]

The text of IGRA explains the reasoning behind its enactment. Among other things, Congress finds that a principal goal of the legislation is the Federal Policy to "promote tribal economic development, tribal self-sufficiency, and strong tribal government."[439] In addition, Congress codified the decision in *Cabazon* stating, "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[440]

The Congressional Committee elaborated on the Policy recognizing the well-established principle that unless Congress so authorizes, the application of State laws do not extend to Indian lands.[441] Further, the Committee "recognized and affirmed" that it is "by virtue of their original sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished."[442] Here the

[437] U.S. Department of Justice, Office of Legislative and Intergovernmental Affairs *Additional Views of Mr. McCain* (Washington: 14 January 1988).
[438] *Ibid.*
[439] 25 U.S.C. §2701 2(4)
[440] 25 U.S.C. §2701 2(5)
[441] 25 U.S.C. §2702.
[442] *Ibid.*

legislation clearly identifies the residual sovereignty that is ignored in Canada. It is precisely the legal recognition of residual sovereignty that tribes were able to rely on to withstand the challenges from the States. And it is precisely the lack of such recognition that enables the provinces of Canada to preclude First Nations full participation in gaming.

IGRA also provided consistency and uniformity as it relates to the regulation of gaming in Indian country.[443] As a result of the legislation, tribes are no longer uncertain as to what gaming rights they have. However, IGRA also curtailed tribal sovereignty in that it provided federal regulatory oversight and prohibited certain activities in the absence of a tribal-State compact.[444] IGRA provided for the creation of a National Indian Gaming Commission that would oversee and approve certain classes of gaming in Indian Country.[445] Pursuant to IGRA only tribes can own the tribal gaming enterprise and revenues would be used for tribal government operations, general tribal welfare, economic development and charity.[446] In the end, Indian tribes may have gained far more than they compromised under IGRA.[447]

IGRA remains in effect today and provides a clear path and regulatory framework for tribes, in the United States, to engage in gaming which has resulted in economic self-sufficiency for some tribes but not for all. By contrast, Canada's First Nations lack both recognition of residual sovereignty and statutory certainty with regards to gaming opportunities. This thesis does not take a position on the appropriateness of gaming as a means to economic development; rather, it focuses on the discussion of jurisdictional struggles between Indigenous peoples and the settler societies related to gaming.

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[443] *Ibid.*
[444] See generally Clinton "Return of the Buffalo" *supra* note 22.
[445] 25 U.S.C §2706
[446] 25 U.S.C 2710.
[447] Clinton, "Return of the Buffalo" *supra* note 22 at 92.

Conclusion

Jurisdiction over gaming can be viewed much like any other resource for which First Nation and settler governments compete. This thesis demonstrates that gaming revenues are a significant source of revenue for governments, in particular for the provincial government of Manitoba and potentially for First Nation governments in Manitoba. Currently, the Manitoba government captures approximately $600 million in revenue and nets almost $300 million and the bulk of this revenue originates from the population of Winnipeg. The provincial regulatory framework in Manitoba precludes First Nations from participating in the Winnipeg casino market and limits First Nation participation throughout the province in casino and other forms of gaming. First Nations are treated similarly to private site holders and earn commissions for hosting provincial video lottery terminals. First Nation government commissions were approximately $43.5 million in 2013 compared to $58.5 million private site holder commissions in the same year.

This thesis argues that First Nations participation in the local gaming economy is disproportionate to their inherent rights to regulate and conduct gaming and these rights have not been legitimately extinguished by the Crown. Put another way, these inherent rights form part of First Nations' inherent rights of self-government that survived the "discovery" of North America by European Christian explorers. Unfortunately, First Nations are faced with the difficult challenge of overcoming the judicial assumption that Crown sovereignty extinguished First Nation sovereignty by virtue of their incompatibility and the supposed superiority of European culture and religion. So far, First Nations have been unsuccessful in proving an aboriginal right to regulate gaming pursuant to inherent rights of self-government under the Supreme Court's *Van der Peet* test. This thesis argues that the Supreme Court test is unlikely to yield a positive

result for First Nations' self-government due to the difficulty in overcoming criteria that require First Nations to demonstrate particular activities were historically and presently integral and central to the First Nation culture. Further, the test permits the court to distinguish between activities e.g. commercial gaming and individually played traditional games, thereby thwarting First Nation efforts to assert broad self-government rights. The test has the effect of limiting rights to historical and often stereotypical activities and stymying the evolution of First Nation jurisdiction. By applying the test in a manner that assumes First Nations do not have a particular aboriginal right unless proven, the constitutional recognition of aboriginal rights under section 35(1) of Canada's constitution affords limited benefit.

By contrast, the United States recognizes tribes as possessing inherent rights including general and broad rights of sovereignty. The United States Supreme Court upholds tribal sovereignty unless expressly diminished or extinguished by Congress. Thus, even though both Canada and the United States continue to rely on pejorative race and religious based law as the basis for jurisdiction over Indians, the tribes in the United States benefit from the federal recognition of tribal sovereignty while First Nations in Canada do not. That is, the starting place for tribes in the United States is that tribal sovereign jurisdiction over gaming continues to exist unless expressly extinguished, while Canada's First Nations are assumed to have no jurisdiction unless they are able to produce evidence of the specific regulatory activity and demonstrate that the activity was integral to First Nation culture prior to confederation of Canada. This thesis argues that this starting point has enabled tribes to advance their participation in gaming in the United States while provinces have been able to inhibit First Nation access to the gaming market.

At the core of the issue of jurisdiction is the fundamental question of delegation of power from the people. This thesis argues that First Nations did not participate as ordinary citizens in

the political process establishing Canada's constitution and therefore did not form part of a broad consensus that might validate Canada's exercise of jurisdiction. Rather, First Nations remained part of their own distinct societies and subject to the jurisdiction of their own government and regulatory processes in the same or similar way that the tribes in the United States were acknowledged to be non-citizens and not subject to the jurisdiction of the United States. Nevertheless, both Canada and the United States have wrested these early pronouncements and found authority in the application of race-based law.

This thesis demonstrates that Canada's governments are able to block First Nation efforts to exercise jurisdiction over gaming by continuing to rely on outdated race-based doctrine that is upheld and perpetuated by Canada's courts. These doctrines are those articulated by the United States Supreme Court in cases such as *Johnson* and *Cherokee Nation*. Although both Canada and the United States continue to rely on these precedents to assert unilateral dominion over Indians, only Canada asserts that Indian jurisdiction was extinguished wholesale by European discovery. However, the very same United States Supreme Court cases, upon which Canada gleans its logic, maintain that tribes retained sovereignty albeit in a diminished form. The recognition that sovereignty was diminished presupposes that tribal sovereignty existed pre-contact and acknowledges retained sovereignty. Canada's courts have completely ignored First Nations' retained sovereignty doctrine in favour of unitary Crown sovereignty.

In the final chapter, this thesis demonstrates that tribes in the United States prevailed in litigating their inherent right to conduct and regulate gaming by demonstrating that Congress had not extinguished tribal sovereignty over gaming. While recognizing that tribes have an advantage of federal recognition of sovereignty, this thesis argues that claims of plenary power by the United States are equally erroneous as Crown's claims of sovereign superiority over First

Nations insofar as both countries continue to rely on race-based arguments that were equivocal the first time they were pronounced. In the absence of some alternative source of authority, this thesis contends that Crown assertions of sovereignty and exclusive jurisdiction over First Nation activities such as gaming must fail. First Nations were sovereign at the time of contact and the assertion that tribal jurisdiction was extinguished by the mere arrival of a distinct ethnic and religious group is categorically false and inconsistent with fundamental values of government by consent.

Despite this apparent impasse, it may be possible that First Nation and provincial sovereigns could come to an agreement on a distribution of regulatory authority and participation in the gaming economy with the aid of federal legislation. Although the IGRA model of the United States represents a unilateral exercise of federal authority and even an intrusion on tribal sovereignty,[448] the effect of the legislation is to provide a level certainty for tribes as to the manner in which they can participate in gaming, despite the requirement that certain forms of gaming would subsequently be conditioned upon state consent.[449] Notwithstanding its shortcomings, the IGRA model might be looked upon favorably by Canada and First Nations to develop their own regulatory framework to address meaningful participation for First Nations.

In order for such a model to succeed, consistent with the main contention of this thesis, it is incumbent upon Canada to recognize First Nation inherent rights, including sovereignty over gaming, and simultaneously cease to rely on race-based legal doctrines. This does not mean that First Nations necessarily become lawless enclaves not subject to federal law. Rather, in recognizing First Nation sovereignty over gaming much like the declarations made in IGRA,

[448] Rebecca Tsosie, "Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act" (1997) 29 Ariz. St LJ. 25.
[449] *Ibid* at para 51.

Canada might amend its *Criminal Code* to reflect the independent right of First Nations to legally conduct and manage gaming within negotiated parameters. By negotiating with First Nations the fundamental nation-to-nation relationship would be reinforced in place of race-based dominion. In addition, contemporary thought suggests that this process could be seen as having the effect of strengthening the sovereignty of both Canada and the First Nations rather than diminishing the sovereignty of either party.[450] Indeed gaming compacts in the United States expressly recognize the respective sovereignty of tribes and States.

With this mutual understanding, it may be possible for the respective provincial governments to negotiate agreements for First Nation participation in gaming once the necessary amendments were made to the *Criminal Code*. Despite the fact that such an amendment might be perceived as adverse to First Nation sovereignty, First Nations would in all likelihood support an amendment affirming a First Nation inherent right to conduct gaming. It is less clear whether the provinces would be supportive of a modification of the 1985 *Criminal Code* amendment. Nevertheless, in the possible circumstance where the federal government followed the United States gaming model and enacted legislation comparable to IGRA, it would be necessary to compel the provinces to similarly enter into good faith negotiation.[451] For provinces such as Manitoba, good faith negotiation would require the province to loosen its monopoly on the Winnipeg market and will likely be met with resistance by the province. Therefore, whether the federal government creates a national oversight commission or arbiter, it is important that such body be independent from the province and provincial funding, in order to increase the fairness of any proceedings where necessary to oblige provincial negotiation. Whatever the provinces'

[450] Kal Raustiala "Rethinking the Sovereignty Debate in International Economic Law" (2003) 6 J Int Economic Law 841.
[451] The author acknowledges that the IGRA provision obligating states to negotiate in good faith was successfully challenged in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

concerns may be regarding the ability of First Nations to adequately regulate and control gaming, the numerous successful examples of tribal casinos in the United States and First Nation gaming operations in Canada provide ample evidence of the competency of the business and government acumen of First Nations.

This thesis does not purport to provide a comprehensive framework for a proposed federal legislation. The author submits that IGRA provides a largely successful template despite some admitted or proven flaws. Whether Canada eventually enacts a similar piece of legislation or not is not the main argument of this thesis; however, the author does submit that the IGRA model and experience can provide valuable guidance to First Nation and Canada's federal and provincial governments seeking to increase self-sustainability of First Nation governments and recognition of tribal sovereignty. Regardless of the future path, the contention of this thesis is that First Nations, like tribes, retain sovereign rights owing to their prior occupation of this continent as well as their existence in distinct self-governing societies. Consequently, Canada must confront the race-based origins of its claims to unilateral dominion over First Nations, including jurisdiction over gaming, and seek to replace that doctrine with some form of legitimate authority, presumably stemming from the broad consensus of the First Nation societies themselves. If such result is resolutely pursued in the area of gaming, or other jurisdictions, the solution will predictably include the participation and support of the First Nations.

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