2002

The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum

Gordon Christie
Allard School of Law at the University of British Columbia, christie@allard.ubc.ca

Citation Details

Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 Sup Ct L Rev (2d) 285.

THE COURT'S EXERCISE OF PLENARY POWER: REWRITING THE TWO-ROW WAMPUM

Gordon Christie*

I. INTRODUCTION

Mitchell v. M.N.R.[1] stands as an illustration of so much of what is wrong in contemporary jurisprudence on Aboriginal rights. In Binnie J.'s concurring judgment we may also be witness to a preview of the Court's approach to claims of Aboriginal rights to self-determination. If so, it signals an approach which will, if anything, amplify what is wrong in contemporary jurisprudence on Aboriginal rights. Unfortunately, should Binnie J.'s approach be rejected, the default position — the standard approach to Aboriginal rights developed in *R. v. Van der Peet*[2] — may simply be extended to questions of Aboriginal self-determination, a situation which does not promise to Aboriginal people any greater measure of control over their lives and territories.

In the first section of this work the major findings of the majority decision in *Mitchell* will be quickly examined, effort being made to highlight how their treatment of the claimed right exhibits so many of the faults of the domestic treatment of Aboriginal law. This allows for a more leisurely examination of the more interesting developments in *Mitchell,* most of which are explicitly found in Binnie J.'s decision. Since the problematic approach to Aboriginal rights exemplified in *Mitchell* is now firmly entrenched in Canadian

---

* Gordon Christie has been an Assistant Professor at Osgoode Hall Law School since 1998. He has his LL.B. from the University of Victoria (1997) and his doctorate (in philosophy) from the University of California at Santa Barbara (1997).

1 [2001] 1 S.C.R. 911 [hereinafter *Mitchell*].

2 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

jurisprudence, energies are best spent on getting a clear picture of where the Court has indicated in *Mitchell* it may be on the brink of taking the law (and so, Canada).

While the full Court has yet to choose the path suggested by Binnie J., on a fundamental level whether it does or not may be irrelevant, for a history of settled decisions acts as a control on alternatives the Court will consider. It will not be surprising if the Court decides to take the path Binnie J. suggests, though as a radical extension and amplification of troubling doctrine it would nevertheless be serious and disturbing. If, on the other hand, the Court rejects this approach in favour of adopting what it will undoubtedly trumpet as a "liberal and generous" alternative, it will most certainly fall in line with the disturbing road well-travelled, that road illustrated by what is so wrong with its treatment of Aboriginal rights in *Mitchell*. This study ends, then, with something of an archaeological investigation, a dig into the ruins of Aboriginal law, to make sense of the doctrine of sovereign incompatibility, to come to some sense of how the field of Aboriginal law has come to trap Aboriginal peoples. The paper closes with suggestions about how this excavation might lead to the resurrection of Aboriginal rights from the ruins of Aboriginal law.

II. The General Approach to Aboriginal Rights, and Obvious Problems

Chief Justice McLachlin, writing for the majority, applied to the claimed right the now firmly entrenched approach to Aboriginal rights, as set out in *Van der Peet*.[3] This is a *purposive* approach, applied to existing Aboriginal and treaty rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.[4] The purpose of this constitutional provision has been determined to be to protect Aboriginal rights so as to effect a reconciliation between (a) the presence of organized Aboriginal societies prior to the arrival of Europeans, and (b) Crown sovereignty. This reconciliation mandates that the law protect those practices, traditions and customs that are

---

[3] *Ibid.*

[4] *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*]. Section 35 (1) states that: "The existing [A]boriginal and Treaty Rights of the [A]boriginal Peoples of Canada are hereby recognized and affirmed."

"Aboriginal" in nature — that is, those which are integral to the distinctive culture of the people claiming the right.

The party claiming the right must demonstrate to the court, then, that it engaged in the tradition, practice or custom at the time of contact with Europeans, that this activity was central to their collectivity, that the right is one aspect of the party's culture that "made [the party] what [it was]," and that the activity engaged in today — the subject of the legal dispute — is a modern form of that activity, one not unduly tainted by European influence (so it can still properly be thought of as "Aboriginal").

As one concern to be addressed within the *Van der Peet* test, a court has to consider how to properly frame the claimed right. In *R. v. Sparrow*[5] the Supreme Court dealt with the issue of how to properly frame a claim in the context of unpacking the meaning of the word "existing" in section 35. So as to avoid having the unpalatable result of a "patchwork" of rights across Canada, each partially defined in relation to regulations tied to the various jurisdictions within which Aboriginal peoples live, the Court chose to avoid defining rights in relation to government action.[6]

In her dissent in *Van der Peet*, McLachlin J. (as she then was) argued for a clear distinction between a right and its exercise, stating that the definition of the right must be cast in general terms, and allowing that the exercise of the right may "take many forms and vary from place to place and from time to time."[7] In a similar vein, L'Heureux-Dubé J., in her dissent in *Van der Peet*, asked that Aboriginal rights be "contemplated on a multi-layered or multi-faceted basis", avoiding the practice of simply "focusing on a particular practice, tradition or custom."[8] As L'Heureux-Dubé J. went on to note by analogy, section 2(b) of the Charter is not understood to merely protect "political speech, commercial expression or picketing, but involves rather the protection of the *ability* to express".[9]

Chief Justice Lamer, speaking for the majority in *Van der Peet*, ignored the arguments of McLachlin and L'Heureux-Dubé JJ., seemed to turn away from the discussion in *Sparrow*, and chose another path. Rather than avoid definition in relation to government

---

[5] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]

[6] *Ibid.*, at 1091–93.

[7] *Van der Peet, supra*, note 2, at para. 238.

[8] *Ibid.*, at para. 156.

[9] *Van der Peet, supra*, note 2, at para. 158 (emphasis added).

action, rather than framing the right in general terms, rather than ensuring that the right be framed as a "right" and not an activity, the majority decided that in defining an Aboriginal right a court is to "consider such factors as the nature of the action which the applicant is claiming was done pursuant to an [A]boriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right."[10]

Given this understanding of how Aboriginal claims would be characterized as "rights", the Mohawk interests in the *Mitchell* case were certain to be miscast. The interests would not be expressed as general abilities to do certain sorts of things, but as the particular things themselves — they would be called "rights" when they were more on the order of activities, the sorts of things that would normally be considered to be things protected under rights.

As the Court deployed the three factors which go into "properly" characterizing the right, it determined that the right was properly cast as one of moving across the St. Lawrence River/border for the purpose of trading. It could not be simply a right to trade, for that would fail to bring in the "nature of the governmental regulation, statute or action being impugned".[11] It had to be, then, a right to cross the river, for that characterization engaged the border restrictions. However, it could not be simply a right to move freely across the border, for the Mohawk in this case wished to trade with their northern neighbours. Finally, it could not be simply a right to avoid having to pay customs duties on the goods they wished to transport, for that would too narrowly focus on the government action, which is essentially an incident to the government's underlying action, that of controlling the border.

With its characterization in hand — the product of egregious principles determining the process of characterization — the Court turned to the manner by which the trial court both admitted evidence and gave it weight. Over both these govern rules of evidence, "applied purposively to promote truth-finding and fairness",[12] but applied flexibly in the context of Aboriginal claims, "in a manner

---

[10] *Ibid.*, at para. 53.
[11] *Ibid.*, at para. 53.
[12] *Mitchell, supra*, note 1, at para. 30.

commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in section 35(1)."[13]

The Court found no fault with the trial judge's findings concerning which evidence to admit, but had serious concerns over the weight he seemed to then give to this evidence. Acknowledging that "a consciousness of the special nature of [A]boriginal claims is critical to the meaningful protection of section 35(1) rights",[14] the Court found it "imperative that the laws of evidence operate to ensure that the [A]boriginal perspective is 'given due weight by the courts'".[15] But giving due weight is not the same thing as putting that evidence automatically in the category of "persuasive". Courts must continue to operate under general evidentiary principles, a process which (apparently) is synonymous with the application of principles of "common sense".[16]

Under this understanding of how to weigh admitted evidence, the Court found that while there was evidence that trading was a central and distinguishing feature of traditional Mohawk culture, there was insufficient evidence to find that this trading was established along a north-south axis, across the St. Lawrence River.

This was sufficient to decide the case, as the Mohawk had not shown that moving across the St. Lawrence to trade was an activity in which they had traditionally engaged. The Court went on to note, however, that the Mohawk had also failed to establish that this particular activity was *integral* to their distinctive culture. Furthermore, since the right had not been established, the issue of infringement did not have to be addressed. One can only imagine how this might have been argued had an Aboriginal right been found.

III. The Significance of Mitchell: The Impact of Crown Sovereignty

The majority felt that by carefully characterizing the claimed right, by properly weighing the admitted evidence, and by applying the test for Aboriginal rights, the claim of the Mohawk was found not

---

[13] *Ibid.*, at para. 29.

[14] *Ibid.*, at para. 37.

[15] *Ibid.*, at para. 37, quoting from *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

[16] *Mitchell, supra*, note 1, at para. 38.

to be protected by section 35. With this result, it was not felt to be appropriate to comment on an innovative argument raised by the Crown, that the claimed right was incompatible with the sovereignty of the Crown.[17] If the right were incompatible with the sovereignty of the Crown, so the argument went, it would not have been capable of surviving sovereign succession.

Nevertheless, in deciding not to consider this argument, McLachlin C.J. went on to suggest that when the appropriate occasion arose, the argument might run into some judicial reluctance:

> In the *Van der Peet* trilogy, this Court identified the [A]boriginal rights protected under section 35(1) as those practices, customs and traditions integral to the distinctive cultures of [A]boriginal societies. ... Subsequent cases affirmed this approach ... and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between [A]boriginal rights and competing claims, including claims based on Crown sovereignty.[18]

Concurring in the result, Binnie J. (speaking also for Major J.) felt it necessary to make some comments on the issue of sovereign incompatibility. In particular Binnie J. felt that the agreed-upon result *should* be the outcome of application of *this* doctrine, as this case highlighted the sort of claimed right which could not survive sovereign succession. It would be a mistake in his mind, then, to simply go ahead and apply the *Van der Peet* test, as the claimed right would not actually arise as a candidate for consideration under section 35(1).

Central to Binnie J.'s musings about the nature of this doctrine is his claim that the general nature of section 35 rights must be understood in the context of both the history around sovereign succession and the history around section 35 itself. The events comprising sovereign succession took place in an historical context, when the common law (through principles structuring the legal nature of this succession) held that the laws and customs of local people brought under the sovereignty of the Imperial Crown would be respected (the element of continuity), subject to their being compatible with the

---

[17] In the context of rights potentially falling under s. 35 this is an innovative argument, but a form of this argument has undergirded the position of the Crown for quite some time.

[18] *Mitchell, supra*, note 1, at para. 63.

"conscience" of the common law and the sovereignty of the Crown (the doctrine of sovereign incompatibility).[19]

Similarly, the emergence of section 35 must be placed in its own historical context, one marked by the decision on the part of the "elected representatives of Canadians"[20] to recognize and affirm the existing rights of the Aboriginal peoples of Canada.

As the latter history highlights the political origins of section 35 and the rights it protects, the rights can be *said* to be based in Mohawk society; but ultimately, if the asserted claim "is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result."[21] According to Binnie J., linking these two histories together is the understanding of the political framers of the *Constitution Act, 1982*, for they would "undoubtedly" have had in mind the common law's approach to sovereign succession.[22] Bolstering this argument about the intent of the framers is the notion that there is nothing to suggest that section 35 signals a wholesale repudiation of the common law approach to Aboriginal rights, especially as regards their vulnerability to sovereign incompatibility. In Binnie J.'s colourful phrase, "[t]he *Constitution Act, 1982* ushered in a new chapter but it did not start a new book."[23]

The common law approach to sovereign succession is expounded upon in *Campbell v. Hall* and *Calder v. British Columbia (Attorney General)*.[24] The Imperial court in *Campbell* held that in situations of conquest certain principles govern the transition from the legal regime in place before conquest to the establishment of Crown sovereignty. The local laws and customs in place before the assertion of sovereignty are presumed to continue to exist, subject to the exceptions noted earlier, until the new sovereign acts to alter, eliminate or replace. In *Calder* the Supreme Court took note of these principles,

---

[19] That laws and customs deemed "unconscionable" would not survive sovereign succession would seem more likely to be a principle derived from the law of equity, but having a long pedigree, it actually reflects (as Mansfield C.J. notes in *Campbell v. Hall* (1774) 1 Cowp. 204, 98 E.R. 1045 [hereinafter *Campbell*]) Christian sensibilities. Justice Binnie notes (at para. 141) that Blackstone (in his *Commentaries on the Laws of England*, 4th ed., (Oxford: Clarendon Press, 1770), Book 1, at p. 107), gives the example of "infidel" laws.

[20] *Mitchell, supra*, note 1, at para. 70.

[21] *Ibid.*, at para. 69.

[22] *Ibid.*, at para. 114.

[23] *Ibid.*, at para. 115.

[24] *Supra*, note 19; *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 [hereinafter *Calder*].

and applied them to the common law situation in Canada, not one marked by conquest, but nevertheless found to be appropriately subject to this approach.[25]

It is this common law understanding of the principles governing sovereign succession that Binnie J. would have the Court apply to the perceived need to understand the standing of rights claimed under section 35. Those which would not have been presumed to continue past the point of the assertion of Crown sovereignty — that is, as running contrary to the mere existence of the new sovereign — are not rights which ever had any existence within the domestic legal system, and so could not be now considered as candidates for consideration under section 35.

Would it be appropriate to label this a form of extinguishment? There would seem to be no conceptual barrier, so long as one is careful to appreciate the nature of the "extinguishing" taking place. In particular, one must appreciate that the common requirement that the Crown exhibit clear and plain intent to effect the extinguishment of Aboriginal rights does not apply in this context.[26] It only makes sense to impose this requirement in relation to *exercises* of Crown sovereignty, so this requirement would apply to those rights which survived the initial transition to Crown sovereignty. Rights which did not survive may have had some form of existence prior to the assertion of Crown sovereignty (grounded as they would have been in the earlier legal regime of local laws and customs), but this existence did not continue past the point of sovereign succession. This failure to survive past that point most naturally would not be seen as the result of some Crown action, but as the result simply of the Crown "coming to be" sovereign in this new region. In a sense there would be no "right" to be extinguished — one might think of this as extinguishment before birth.

It should be borne in mind that this entire approach — as we noted above — may run into future objections from the full Court, when it finally feels it must turn its mind to this sort of situation. The Court may not agree with the notion that the common law can

---

[25] Justice Hall noted in *Calder, supra*, note 24, that "*a fortiori* the same principles ... must apply to lands which become subject to British sovereignty by discovery or by declaration". Why these principles would apply with even better reason in these contexts is not entirely clear.

[26] See *Calder, supra*, note 24. This principle was firmly entrenched in domestic law in *Sparrow*, [1990] 1 S.C.R. 1075.

be used to make sense of section 35, and may instead decide that section 35 has its own logic, one articulated in *Sparrow, Van der Peet, Gladstone*[27] and *Delgamuukw*. This logic, as regards sovereign incompatibility, would rather that the question come up under either extinguishment or infringement.

If considered under "garden-variety" extinguishment, the argument would have to be made that the federal government exhibited a clear and plain intent to extinguish the rights in question prior to 1982. Given the concern voiced above, that the requirement of clear and plain intent seems out of place in the context of the mere movement from the point in time before the assertion of Crown sovereignty to the point after, an attempt might be made to tie down the extinguishment in question to particular acts which accompany or flow from the transition. In a case such as *Mitchell*, for example, the potentially extinguishing government action might be the creation of a border.

With rights which continued to exist past the point at which Aboriginal and treaty rights were "constitutionalized", the only option for their diminishment would be through justified infringement.[28] Since in this case the claimed right was not found to have been established under the Van der Peet test, the Crown did not have to concern itself with showing that the existence of the border (established as an incident to its sovereignty) was a justifiable infringement of the right. Clearly this option would, however, have been not only present, but also likely adequate to the task of justifiably restricting the movement across the border for the purposes of trading.

IV. The Significance of Mitchell Revisited: The Impact of Court Power

Is there much, then, to be concerned about with the developments in *Mitchell*? Will the doctrine of sovereign incompatibility as sketched out by Binnie J. take flight in Canada? If not, will the question of sovereign incompatibility only emerge at either the stage of extinguishment or — more likely — infringement?

---

[27] *R. v. Gladstone*, [1996] 2 S.C.R. 723.

[28] Naturally for rights not extinguished before 1982 there would also be the possibility of justifiable infringement pre-1982.

1. Justice Binnie Rewrites the Two-Row Wampum

Entwined with the doctrine of sovereign succession and its application in the *Mitchell* case is the Two-row Wampum. This Wampum signifies the historic relation entered into between the Imperial Crown and the Mohawk, and speaks of a relationship of territory sharing marked by jurisdictional separation. The central defining feature of Binnie J.'s argument is a rewriting of the Two-row Wampum. From a composition which speaks of two separate vessels travelling side-by-side, each party in each vessel refraining from steering the other, Binnie J. arrives at a notion of "merged sovereignty", a vision of one vessel, composed of the materials of the previous two, "pulling together as a harmonious whole." This is said to be a "modern embodiment of the 'two-row' [W]ampum concept, modified to reflect some of the realities of a modern state."[29]

What legitimates this rewriting? How can a representative of the one vessel decide to reformulate the nature of the relationship? Justice Binnie's argument is not transparent, but it emerges clearly enough from the many clues he scatters throughout his discussion. Justice Binnie argues that the two vessels are now one, and under the control of the Crown — the sovereignties having merged under the Crown — are simply a fact of history.[30] Justice Binnie seems to find two supports for this vision: (a) the simple brute fact of the existence of the Mohawk in Canada today, and (b) their implicit acceptance of that place. On occasion Binnie J. speaks of the "reality" which is unavoidable,[31] while in other passages he suggests that the Mohawk have accepted their place under the control of the Crown.[32]

Under Binnie J.'s approach, this vision of "reality" is tempered by an explication of what this reality encompasses: it is not said to be a simple matter of the Crown exerting control over the Mohawk, but of the Mohawk being partners in confederation, active parties within Canadian society.[33] As such there has been and continues to be no theft of their autonomy: historically this was merged within the structure of the Canadian state, and today we find ourselves living in a state in which this has been accomplished.

---

[29] *Mitchell*, [2001] 1 S.C.R. 911 at para. 130 and para. 129.
[30] *Ibid.*, at paras. 129-30.
[31] *Ibid.*, at paras. 129 and 133.
[32] *Ibid.*, at paras. 131-32.
[33] *Ibid.*, at paras. 129-30, and 133.

This leads not only then to a rewriting of the Two-row Wampum, but of the judicially-determined purpose of section 35. While the majority in *Van der Peet* spoke of the purpose of recognizing and affirming Aboriginal rights as being defined by the goal of achieving a reconciliation of the prior presence of Aboriginal societies to Crown sovereignty, Binnie J. now introduces the notion that this reconciliation has already taken place.[34] Under this vision, since Crown sovereignty already enfolds within it Mohawk autonomy, there is no need for the fact of Mohawk pre-existence to be worked into the fabric of Canadian society. Cases dealing with Aboriginal claims, then, are reconceptualized as disputes about movement away from what is already in place, with the law acting to pull things into line with what is already both legally mandated and in existence. When an Aboriginal people claim a right they are in effect merely pressing the Crown to maintain the structure heretofore in place.

The majority has not yet embraced this path of dealing with claims to Aboriginal self-determination. Undoubtedly some of the justices are well aware of the difficulties this invites. In situations marked by power imbalances, especially when the imbalance is created by the party now exercising control over the other, consent can neither be constructed nor found to be tacit or implicit. The history Binnie J. would have the law wash over is one of colonialism, a history marked by repeated efforts at subverting the original agreement contained in the Two-row Wampum. The Mohawk did not ask the Canadian government to subvert their traditional councils in 1924. Chief Mitchell does not now speak of his allegiance to the Haudenosaunee as part of some sort of game.

People of conscience cannot imagine beginning today with a "clean slate", forgetting the colonial history upon which Canada now rests. People of conscience cannot imagine that living "with a foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities"[35] signals acceptance of this rewriting of the Two-row Wampum. Appeals to neither "reality" nor

---

[34] *Ibid.*, at paras. 129 and 164. In para. 129 Binnie J. writes:

> If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that [A]boriginal and non-[A]boriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing [A]boriginal and treaty rights must be reconciled.

[35] *Ibid.*, at para. 131.

implicit consent will legitimize the lack of free consensual relationship-building between the Mohawk and Canada.

2. The Court Has Already Rewritten the Two-Row Wampum

This does not mean that the majority necessarily has in mind considering an alternative which will promise a just and fair resolution of the problems swirling around the lack of consent in the legal and political framework currently structuring the Mohawk-Canadian relationship. One can read in the majority decision in *Mitchell* not just a reluctance to consider the argument about sovereign incompatibility, but a strategy which can appear to the observer to be both more insidious and potentially more dangerous than that laid out by Binnie J. The majority has seemingly chosen to *ignore* the problem of lack of consent, and married this aversion of the eyes to an approach to Aboriginal rights which the observer might suppose is meant to ensure that this problem will never need to draw the Court's attention.

The majority has chosen to approach the question of the nature of Aboriginal rights in such a way as to ensure that "power" or authority is never an aspect of the claimed right in question. By the phrase power or authority it is not meant simply the ability or capacity to *do* some thing, if that doing must first be authorized by another. Rather, it refers to the simple ability to *decide* to do that thing, coupled with the ability or capacity to do so. For example, in *Sparrow* the Musqueam were found to have the "power" (in the first sense of this term outlined above) to fish with overly long nets, but not the authority (in the second sense outlined above) to *decide* to do so.

Seen in this light it is clear that choosing to characterize claimed rights as activities not only makes it difficult for Aboriginal peoples to demonstrate the continued existence of rights, but also impacts on the nature of sovereign succession. With rights tied down to traditional practices or customs, and not traditional legal regimes authorizing those practices or customs, the nature of the laws and customs presumed to continue into the new regime are predetermined to be such as to raise few if any serious questions about the continued autonomy of Aboriginal peoples.[36]

---

[36] Even Binnie J. seems well aware of this, for he notes that the doctrine of sovereign incompatibility will be sparingly used, as it will be sparingly required. See *ibid.*, para. 154.

To fully appreciate how Aboriginal rights as characterized by the Court are unlikely to ever lead to questions about Aboriginal autonomy, we need to also consider the impact of the inclusion of the requirement that a claimed right be defined in relation to government action. It is instructive to begin by noting that the Court in *Mitchell* was faced with a number of different possible characterizations of the claimed right, from a right to trade, to a right to trade with certain First Nations in Canada, to a right to bring goods across the border without paying customs, to a right to move freely across the border. Why did the Court apparently backtrack from *Sparrow*, and decide to narrow down the "properly" characterized right by reference to the interaction of the activity in question and government action? What purpose does this serve, especially given the direction in *Sparrow* not to do precisely this?

We earlier took note of how Aboriginal rights are restricted to traditions, practices and customs, a process of characterization which makes recognition of Aboriginal autonomy difficult. By further characterizing the right in relation to government action the framework constraining Aboriginal claims draws an ever-tighter noose around the neck of Aboriginal self-determination, for it then becomes that much more conceptually difficult to frame the right in a manner which brings in the notion of Aboriginal authority. Government action does not intersect with the autonomy of parties caught up in its regulations and laws, but rather is directed at, once again, the *activities* of these parties.

While Binnie J. is correct to note that this case is really about an attempt by the Mohawk to see how far their autonomy extends within the Canadian system under section 35, this neglects to mention that the Court-defined right does not appear capable of containing an aspect of this autonomy. Only indirectly (and tenuously) is the autonomy of the Mohawk capable of being "extended" or protected by the sort of claim recognized by the Court.

For example, consider how *Mitchell* would have played out if the evidence had been found to be "persuasive". The Court would have found that the evidence supported the contention that the Mohawk traded north of the St. Lawrence, and so this activity in its modern form — that of crossing the Canadian-U.S. border with goods to trade — would have been protected under section 35. But besides the obvious problem, that this activity would still be subject to justifiable infringement by the Crown, the larger problem looms over this scenario: the Mohawk would not have directly protected an Aboriginal

right to *control* their trading activity. As with the Musqueam in *Sparrow*, they would have defended the right to do a certain thing, but not a right to *decide* to do that very thing.

Clearly that is what the Mohawk wished to protect, and Chief Mitchell wished to argue before the Court that the Mohawk have an Aboriginal right to move *freely* across the border, a right which would have contained, *ex hypothesi*, a degree of authority and control. The *Van der Peet* test, however, is not designed to protect such rights. What I am suggesting is that it seems designed to deny such claims from *getting before the Court*. This provides for an escape from the over-arching issue — that of finding a just place in Canada for First Peoples neither conquered, nor discovered, nor capable of being subjugated by declaration. The Two-row Wampum has already been rewritten.

Seen in this light, then, Binnie J.'s approach appears not only less insidious, but can also be seen to have the virtue of providing an opportunity to call the judiciary to task for its seizure of power. If the judiciary wishes to follow Binnie J.'s lead it will open itself to questions about how it could defend such an approach. Will anyone reading judgments based on the notion of "merged sovereignty" accept that it could be a simple fact? Would not this notion of sovereignty, at the heart of the Canadian state seen as a liberal democracy, invite questions about the *process* which led to this purported fact? Neither history nor "reality" can be that process, for the first is the chronicle of colonialism, the second a denial of that history. Who could avoid the conclusion that the process, quite simply, has yet to take place: the act of merging the sovereign authorities of the Crown and Aboriginal peoples is the goal, not the starting point. To think otherwise is to condone colonialism, to live colonialism.

3. A Radical Departure From Colonialism

How then might the judiciary act if it were to forsake its current colonial status? The key lies in how it decides to conceive of the process of "sovereign succession". With the arrival of the Crown in what is today Canada, multiple sovereign entities entered into a dance over single tracts of territory. Since this came to pass over Mohawk territory, Mohawk sovereignty has been, unquestionably, diminished; for two jurisdictional authorities cannot begin to co-habitate without making some accommodations. Equally unquestionable, however, is the diminishment of Crown sovereignty. It arrived in

lands already seized of responsibilities and obligations, with peoples organized according to their own visions of how the land is to be lived upon. For there to be a radical departure from colonialism, sovereign succession must be structured by principles which begin from this conception.

To speak of structuring sovereign succession through principles built on a recognition of the need to fit two sovereign entities together over one territory is to twist somewhat the expression "sovereign succession". This phrase is ordinarily meant to capture moments when sovereign authority passes from one party to another. We are imagining, for a moment, that the judiciary would dare to think of this expression as covering the passage from Aboriginal sovereignty to a truly shared and just arrangement worked out between the new arrival and the ancient order.

4. Moving Away From Colonialism: A Shift in the Right Direction

The Court may feel reluctant, however, to surrender power (on behalf of itself, and Canadian society), and may choose instead to imagine (or simply presume) a form of "constructive conquest" over the territories of Canada. That is, the Court may wish to partially follow Binnie J.'s lead, and begin to more openly acknowledge that it wishes to unilaterally wash over the Two-row Wampum in Canada. But rather than accept that the history of colonialism in Canada is that of the illegitimate suppression of Aboriginal sovereignty, it may push aside questions of illegitimacy in this context, and begin its tales with the premise of Crown supremacy, a premise grounded in the axiom of conquest.

How then might it act (imagining that it would commit this original sin, but then want to mask it with a respectable gloss)? Bear in mind that we are supposing that the Court would expand the notion of conquest, imagining that the Mohawk were "gradually" conquered, the growing acquisition of sovereignty over Canada by the Crown washing over sovereignty originally exercised by the Mohawk. There would still be a need, however, for this constructed conquest to be governed by the rule of law (as this construction takes place in a constitutional liberal democracy). To see how the Court could imagine such a "conquest", to see how it could do so while maintaining a vestige of Crown "honour", we turn to the principles of sovereign succession advanced in *Campbell*, and accepted in *Calder*.

What creates an opportunity for the resurrection of the entire law of Aboriginal rights is the tremendous amount of play contained within these bare principles. When the principles speak of the presumption that the laws and customs of the local peoples will remain in place until altered or removed by the Crown they do not specify what legal order is being presumed to continue. First, this could mean that the basic superstructure of the legal regime of the local peoples is presumed to continue, though now a sub-regime within the common law. This would be the meaning which best accords with the Mohawk vision of the Two-row Wampum, for it keeps the Mohawk vessel intact (subject of course to the conqueror's power to commence dismantling this vessel, as it sees fit). Second, this could mean that the rights protected within the legal regimes of the conquered peoples are presumed to continue, though now as rights protected under the common law. The superstructure disappears, but what it served to protect continues on (again, until interfered with by the Crown). Finally, this could mean that activities the conquered people engaged in are presumed to be acceptable, until deemed not so by the Crown.

We might term the second interpretation "compassionate colonialism", for it envisions a complete transfer of power to the Crown, but with the *rights* of the indigenous peoples afforded the protection expected of rights of other subjects of the Crown. What we have seen so far from the Supreme Court, however, is not any form of compassion, for they seem to be moving toward the third sort of interpretation. Not only does this earn the title "ugly" colonialism, it goes hand-in-hand with the free play of the power of the conqueror, for the things protected are, strictly speaking, not rights. Again, the labours of the Court are extremely troubling, for not only have they indicated they may unreflectively move toward this vision of sovereign succession, one only sensible under the presumption of conquest, one which calls the Aboriginal interests it protects "rights" when they are really the sorts of activities which would fall under rights, they also take great efforts to simultaneously highlight the power of the Crown/conqueror to "infringe" upon these supposed rights.

The path the Court *should* take, however, is clear. Bearing in mind that we are supposing the Court will likely want to continue to exercise its plenary power (and protect the plenary power of the state, with rhetoric of "constitutional protection" masking this fact), the first choice at least offers some protection of the truly vital inter-

ests of Aboriginal peoples. It is the only option that offers any promise of a meaningful measure of Aboriginal self-determination. This would be especially so if coupled with a reconsideration of what the constitutionalization of Aboriginal rights ought to entail. While currently these "rights" continue to be subject to legislative infringement, as constitutionally protected rights removed from the reach of section 1 they *ought* to enjoy a form of "absolute" protection. This would be the only movement deflecting away from (as opposed to renouncing) Canada's colonial history which holds out some promise of a truly just accommodation of Aboriginal autonomy within Canada, if only because it alone would hold out some promise of negotiations between parties essentially equal.