CASE COMMENT

Whose Claim Is It, Anyway?

Lax Kw'alaams Indian Band v. Canada (A.G.), 2011 SCC 56, [2011] 3 SCR 535

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* Kerry Wilkins is a member of the Bar of Ontario. Thanks, as usual, to Kent McNeil for helpful comments on an earlier draft. Special thanks this time to Alyssa Holland and Lauren Edwards, whose comments on the argument in that same draft helped improve the text materially. Truth in packaging: I had some role in shaping Ontario's position as intervener before the Supreme Court of Canada in this appeal. For a prose presentation that closely resembles Ontario's position in the appeal, see Michael E. Burke and Malliha Wilson, "Considering Reconciliation in Characterizing and Proving Commercial Harvesting Rights Claims" (Paper presented to inSight Information's 10th Annual Aboriginal Law Conference, Toronto, Ontario, 24-25 October 2011) [unpublished].

I Introduction

In *Lax Kw'alaams*[1]—the first case since *Donald Marshall*[2] in which it had given leave to appeal to an Aboriginal party seeking the protection of s. 35 of the *Constitution Act, 1982*[3]—the Supreme Court of Canada held unanimously that a practice of trading in the grease from a fish called the eulachon, even if itself integral to the pre-contact way of life of an Aboriginal community, is insufficient foundation, qualitatively and quantitatively, for a contemporary Aboriginal right to harvest and trade all available species of fish.[4] It held as well that the Crown had not promised, expressly or by implication, to give the appellants preferential access to the fishery when it established their reserves.[5] These are important conclusions—though hardly surprising ones, given the findings of fact in the courts below—but they are not the principal source of my interest in the decision. I propose to focus instead on the other issue the *Lax Kw'alaams* appeal has raised: the one relating to the characterization of claims of Aboriginal right. Briefly, who gets to decide, and on what basis, what claim of Aboriginal right is before the courts for adjudication, and why?

II The Backstory

It all started with the Supreme Court's *Van der Peet* trilogy.[6] In each of those proceedings, the defendants claimed an Aboriginal right to sell fish in response to charges, under federal fisheries regulations, of selling fish—or, in *Gladstone*, of attempting or offering to sell herring spawn on kelp—in prohibited circumstances.[7] These assertions met with mixed success in the lower courts before being rejected, in all three cases, by the British Columbia Court of Appeal.[8] The defendants in each case appealed.

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1 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*].

2 *R. v. Marshall*, [1999] 3 SCR 456, motion for rehearing denied [1999] 3 SCR 533.

3 *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.), 1982, c. 11 [*Constitution Act, 1982*]. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*] and *R. v. Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*] were both Aboriginal-side appeals involving treaty right issues, but neither turned on s. 35. *Mikisew* dealt exclusively with the Crown's duty to consult; *Morris* dealt exclusively with division of powers issues and s. 88 of the *Indian Act*, RSC 1985, c. I-5, as amended.

4 *Lax Kw'alaams*, *supra* note 1 at paras 48-59.

5 See *ibid* at paras 69-72.

6 *R. v. Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672 [*N.T.C.*]; and *R. v. Gladstone*, [1996] 2 SCR 723 [*Gladstone*].

7 See *Van der Peet*, *supra* note 6 at para 6; *N.T.C.*, *supra* note 6 at para 7; *Gladstone*, *supra* note 6 at para 7.

8 Mrs. Van der Peet's claim failed at trial ([1991] 3 CNLR 155 (BCPC)) but succeeded at the British Columbia Supreme Court ((1991), 58 BCLR (2d) 392); the Messrs. Gladstone succeeded below (1990 CarswellBC 1498) in establishing the Aboriginal right they had asserted but were convicted nonetheless: at trial, because the relevant regulations infringed the right, but justifi-

Here is what the Supreme Court said in *Van der Peet*, the principal case, about the subject matter of the appeal: "[I]n assessing a claim to an [A]boriginal right a court must first identify the nature of the right being claimed; ... The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support."[9]

This seems fair enough so far, but also sufficiently obvious that one might wonder why the Court felt moved to say it. The next paragraph of *Van der Peet* answers that question. "[B]oth the majority and the dissenting judges in the Court of Appeal erred," the Court said, "with respect to this aspect of the inquiry":[10] the majority, for assuming that the defendant, who was charged with having sold 10 fish caught by her common law spouse,[11] was asserting an Aboriginal right to sell fish "on a commercial basis"; the dissenting judges, for "cast[ing] the [A]boriginal right in terms that are too broad ...."[12] Having thus found fault with what the Court of Appeal had said the case was about, the Supreme Court went on to describe what it considered the proper approach:

> To characterize an applicant's claim correctly, a court should 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. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.[13]

It added that "a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level."[14] In the result, the Court held that "the most accurate characterization of the appellant's position is that she is claiming an [A]boriginal right to exchange fish for money or for other goods."[15] This was so for two reasons: because the activity for which she was charged—selling 10 salmon for $50—"cannot be said to constitute a sale on

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ably; on first appeal ((1991), 13 WCB (2d) 601), because the regulations did not infringe the right. The N.T.C. defendants failed throughout the lower courts to demonstrate the Aboriginal right on which they relied.

9 *Van der Peet*, *supra* note 6 at para 51.

10 *Ibid* at para 52.

11 *Ibid* at para 6.

12 *Ibid* at para 52.

13 *Ibid* at para 53.

14 *Ibid* at para 54.

15 *Ibid* at para 76; emphasis in the original omitted.

a 'commercial' or market basis";[16] and because "[s]he does not need to demonstrate an [A]boriginal right to fish commercially" to defend herself against a regulation that "prohibit[s] *all* sale or trade of fish caught pursuant to an Indian food fish licence."[17]

The Supreme Court applied this same general approach in identifying the subject matter of the Aboriginal rights inquiry in *N.T.C.*[18] and in *Gladstone*.[19] Unlike the facts in *Van der Peet*, however, which pointed unequivocally towards the narrower characterization of the Aboriginal right,[20] the facts in both *N.T.C.* and *Gladstone* pulled in differing directions. In both, as in *Van der Peet*, proof of the narrower right would have sufficed to anchor a good defence to the charge, because the relevant regulation prohibited *all* sale of fish under the relevant conditions. In each, however (unlike *Van der Peet*), the activity for which they were charged "appear[ed] to be best characterized as the commercial exploitation of" the fishery resource.[21] The Court dealt with this apparent antinomy by entertaining both possible characterizations of the Aboriginal right. Because "[t]he claim to an [A]boriginal right to exchange fish commercially places a more onerous burden on the appellant than a claim to an [A]boriginal right to exchange fish for money or other goods,"[22] proof of the former suffices as proof of the latter, and failure to prove the latter entails concomitant failure to prove the former.[23]

Do you see what just happened here? The Supreme Court of Canada appropriated for the courts, but ultimately to itself, the power to decide, after all the evidence is in and the parties have gone home to await the decision, what Aboriginal right the Aboriginal party is going to be deemed to have claimed. By doing so, it created the distinct possibility, in any given proceeding about a claim of Aboriginal right, that the case would turn out to be about something different from what the claimant party had set out to prove and from what the Crown (or whoever) had set about to answer. It created, in other words, irreducible potential for surprise. And whether it meant to do so or not, it gave the courts the capacity to reach pretty much whatever result they preferred in a given case by characterizing the claim of Aboriginal right before them in a

16 *Ibid* at para 77.
17 *Ibid* at para 78; emphasis in the original.
18 *N.T.C.*, *supra* note 6 at para 16.
19 *Gladstone*, *supra* note 6 at para 23.
20 See *supra* notes 15-17 and accompanying text.
21 *Gladstone*, *supra* note 6 at para 24. Compare *N.T.C.*, *supra* note 6 at para 18 ("The sale of in excess of 119,000 pounds of salmon by 80 people, an amount constituting approximately 1,500 pounds of salmon per person, would appear to be much closer to an act of commerce . . . than was engaged in by Mrs. Van der Peet ....").
22 *N.T.C.*, *supra* note 6 at para 20.
23 *Ibid.* See also *Gladstone*, *supra* note 6 at para 24.

way that comported—or in a way that did not comport—with the evidence offered in support of it.

Why would the Supreme Court do that? We shall never know for sure, of course, but one hypothesis is that the Court was seeking to compensate for the inchoate condition in which it found Canadian Aboriginal rights law at the time it decided the *Van der Peet* trilogy. It was only in *Van der Peet*, after all,[24] that we learned definitively that an Aboriginal right is "an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right,"[25] one whose origin dates from before the claimant community's first contact with Europeans.[26] There was, and to some extent still is, confusion and controversy over where the conceptual boundaries of one Aboriginal right might end and those of another begin. It is possible that the Supreme Court reserved the power to characterize, after the fact, claims of Aboriginal right to be able to protect the interests of those who had framed and advanced such claims in unavoidable ignorance of what they would have to prove to establish them.[27] In *Côté*,[28] for example, another prosecution involving Aboriginal fishers (but that time food fishers), the Court, applying *Van der Peet*'s characterization formula,[29] rescued the defendants from their earlier mistaken assumption that Aboriginal rights to fish depended on proof of Aboriginal title.[30] All they needed to prove to exonerate themselves from

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24 Before that, it had been "unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) [of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11] are to be defined" (*Van der Peet*, *supra* note 6 at para 2).

25 *Ibid* at para 46.

26 *Ibid* at paras 60-67. We now know, of course, that the reference date for Métis claims of Aboriginal right is the date of effective European control over the relevant territory (see *R. v. Powley*, 2003 SCC 43, [2003] 2 SCR 207 [*Powley*] at paras 17-18) and that the reference date for claims of Aboriginal title is the moment the Crown acquired sovereignty over the relevant land (see *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*] at paras 144-145).

27 One finds quite similar reasoning explicit, albeit in a somewhat different context, in *Delgamuukw*, *supra* note 26. There, the Supreme Court allowed (at paras 74-75) a *de facto* amendment to the Aboriginal plaintiffs' pleadings in a civil action asserting Aboriginal rights of land ownership and jurisdiction, because

> "that ruling ... was made against the background of considerable legal uncertainty surrounding the nature and content of [A]boriginal rights, under both the common law and s. 35(1) [of the *Constitution Act, 1982*]. The content of common law [A]boriginal title, for example, has not been authoritatively determined by this Court and has been described by some as a form of 'ownership'. As well, this case was pleaded prior to this Court's decision in [*R. v.*] *Sparrow*[, [1990] 1 SCR 1075 [*Sparrow*]], which was the first statement from this Court on the types of rights that come within the scope of s. 35(1). The law has rapidly evolved since then. Accordingly, it was just and appropriate for the trial judge to allow for an amendment to pleadings which were framed when the jurisprudence was in its infancy" (*ibid* at para 75).

28 *R. v. Côté*, [1996] 3 SCR 139 [*Côté*].

29 See *supra* note 13 and accompanying text.

30 See *Côté*, *supra* note 28 at paras 35-36.

the relevant charges, the Court observed, was an Aboriginal right to fish for food within the relevant waters,[31] and the evidence, though not led for that purpose, sufficed to establish that.[32]

Closer inspection, however, casts some doubt on this supposition. We know from *Van der Peet* that the inquiry into the soundness of a claim of Aboriginal right turns on "the practice, custom or tradition being relied upon to establish the right";[33] specifically, on the antiquity of the practice, tradition or custom and on its centrality to the way of life of the community to which the right is said to belong. Despite equipping itself in *Van der Peet* to tailor claims of Aboriginal right to the relevant custom, tradition or practice,[34] the Supreme Court, when embarking on the characterization exercise, has rarely done so.[35] Instead, its focus has been on the offence provision to which the defendant must respond and on the activity for which the defendant was charged. "At this stage of the analysis," Lamer C.J. said in *Gladstone*, "the Court is, in essence, determining what the appellants will have to demonstrate to be an [A]boriginal right in order for the activities they were engaged in to be encompassed by s. 35(1). There is no point in the appellants' being shown to have an [A]boriginal right unless that [A]boriginal right includes the actual activity they were engaged in."[36] These considerations have little, if anything, to do with the merits of a claim of Aboriginal right, once characterized. Reliance on them, therefore, afforded no protection or assistance to claimants asserting Aboriginal rights at a time of doctrinal uncertainty.

Perhaps for that reason, *Côté* is the only Supreme Court Aboriginal rights decision in which judicial intervention at the characterization stage has worked to the advantage of the Aboriginal claimant.[37] As a general rule, the Court's forays into characterization have had no effect on the outcome of Aboriginal rights appeals. In *Van der Peet*,[38] *N.T.C.*[39] and *Pamajewon*,[40] the Court held that the evidence did not support even the narrowed claim; in *Gladstone*,[41] it held that the facts supported even a full-strength Aboriginal

31 See *ibid* at paras 56-57.
32 See *ibid* at paras 59-71.
33 *Van der Peet*, *supra* note 6 at para 53.
34 *Ibid.*
35 *Mitchell v. Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*], is an exception. At para 20, the court said that "the [A]boriginal practice relied upon ... is what defines the right." But attentiveness in *Mitchell* to what the Court considered the relevant Aboriginal practice did not assist the Aboriginal claimant. The Court in *Mitchell* reversed the decisions of the lower courts, both of which had accredited Grand Chief Mitchell's claim of Aboriginal right.
36 *Gladstone*, *supra* note 6 at para 23.
37 *Côté*, *supra* note 28.
38 *Van der Peet*, *supra* note 6.
39 *N.T.C*, *supra* note 6.
40 *R. v. Pamajewon*, [1996] 2 SCR 821 [*Pamajewon*].
41 *Gladstone*, *supra* note 6.

right to harvest and sell herring spawn on kelp commercially; in *Sappier*,[42] the claim of Aboriginal right, successful below, succeeded on appeal despite its judicial reconfiguration. (In *Adams*[43] and *Powley*,[44] the Court was content with the manner in which the trial judge had understood the claim, and decided accordingly.) But on at least two occasions, the characterization game has worked to the distinct disadvantage of the Aboriginal claimants. In *Mitchell*,[45] unlike the others, a civil, not a penal proceeding, the claim of Aboriginal right, a claim that the trial judge had construed in much the manner of *Van der Peet*,[46] had succeeded in both courts below. The Supreme Court reconfigured it,[47] and then held that the evidence could not support the claim of right it had substituted. And in *Marshall/Bernard*,[48] a case like *Côté*,[49] in which the defendants based their defence not on an Aboriginal right to engage in the conduct for which they were charged (commercial logging on Crown land) but on Aboriginal title, the Court refrained altogether from characterization analysis. Instead, it took the claim at face value as a claim of Aboriginal title,[50] and found it wanting.[51]

These results do not disclose a uniform approach; *Marshall/Bernard*, in particular, departs altogether from the approach to claim identification originating in *Van der Peet* and seems utterly irreconcilable with *Côté*. But if these cases do display a *general* pattern or trend, it appears to be to size the claim of Aboriginal right to fit closely the activity for which the Aboriginal claimant seeks protection in response to the legislation or government action alleged to infringe the putative right.[52] Put differently, the Supreme Court has gener-

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42 *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 SCR 686 [*Sappier*].

43 *R. v. Adams*, [1996] 3 SCR 101 [*Adams*].

44 *Powley*, *supra* note 26.

45 *Mitchell*, *supra* note 35.

46 See *ibid* at 21, rejecting the trial judge's characterization of the right asserted as "a right to engage in 'small, noncommercial scale trade.'" Compare *Van der Peet*, *supra* note 6, where the Court, having noted (at para 77) that "Mrs. Van der Peet sold 10 salmon for $50," concluded that "the most accurate characterization of the appellant's position is that she is claiming an [A]boriginal right to exchange fish for money or other goods" (*ibid* at para 76; emphasis in original omitted).

47 See *Mitchell*, *supra* note 35 at paras 14-25.

48 *R. v. Marshall*; *R. v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall/Bernard*].

49 *Côté*, *supra* note 28.

50 See *Marshall/Bernard*, *supra* note 48 at para 60: "In this case, the only claim is to title in the land .... The question is whether the practices established by the evidence, viewed from the [A]boriginal perspective, correspond to the core of the common law right claimed." This despite having acknowledged in the paragraphs just preceding (*ibid* at paras 58-59) that Aboriginal rights short of title could exist in respect of lands whose use and occupation by members of the claimant community did not suffice to ground Aboriginal title.

51 See *ibid* at paras 78-83.

52 See *supra* notes 17, 34-36 and accompanying text.

ally characterized such claims no more broadly than is necessary to capture the relevant activity and answer the legislation or government action being challenged.[53]

What real difference does any of this make? Why should we care that the Supreme Court has given the courts, and itself, the final word on what an Aboriginal rights case is about? I can think of several reasons.

First, it deprives the person claiming the Aboriginal right (and the benefit of that right) of ownership of the claim. There are many reasons why an Aboriginal party might choose to present a claim of Aboriginal right in a particular way, even in the prosecutorial context. It might sometimes be, as the Court's most frequent practice seems to assume, that the claimants would be happy with whatever Aboriginal right might protect them from the offence with which they are charged. But the case might just as easily be a test case and the claim an attempt to establish, perhaps for some larger strategic purpose, the existence of a specific Aboriginal right with particular features or dimensions.[54] Either way, judicial intervention in the business of claim definition complicates the exercise for the claimant. It cannot now be assumed that the claim advanced is going to be the claim that the courts adjudicate; some triangulation may well be required to obtain an answer to the question the claimant really wants to have answered.[55] And uncertainty about what the claim is about inevitably complicates the task of gathering evidence and developing argument in support of the claim. Such impediments discourage the assertion of Aboriginal rights in judicial proceedings.

By way of example, consider the Supreme Court's stated unwillingness even to entertain Aboriginal rights claims that it considers too broad, or too narrow. In *Pamajewon*,[56] for instance, the appellants, charged with illegal

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53 *Gladstone*, *supra* note 6, is one conspicuous exception. There, the Court held (at para 26) that the evidence "support[ed] the appellants' claim that exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the culture of the Heiltsuk prior to contact" and noted (at para 24) that proof of that right would suffice to answer the offence with which the appellants were charged. Nonetheless, it concluded (at para 28) that "the Heiltsuk have demonstrated an [A]boriginal right to sell herring spawn on kelp on a scale best described as commercial," because the evidence led at trial also sufficed to establish that such a practice was integral to their pre-contact way of life; see *ibid* at paras 26-28. *Mitchell*, *supra* note 35, is an exception of a different kind. At para 20, the Court there warns against the temptation "to tailor the right claimed to the contours of the specific act at issue." See the quotation below in note 66.

54 *Pamajewon*, *supra* note 40, is an obvious, if remarkably ill-considered, example.

55 Having granted leave to appeal from the British Columbia Court of Appeal's decision in *Moulton Contracting Ltd. v. Behn*, 2011 BCCA 311, 335 DLR (4th) 330 [*Behn*], leave to appeal granted April 5, 2012, the Supreme Court of Canada will have an opportunity to clarify the circumstances, if any, in which individual members of an Aboriginal collectivity may assert or rely in civil proceedings upon unproved Aboriginal rights said to belong to that collectivity.

56 *Pamajewon*, *supra* note 40.

gaming under s. 201 of the *Criminal Code*,[57] sought to shelter their activity under what the Supreme Court called "a broad right to manage the use of their reserve lands":[58] in effect, an Aboriginal right of self-government. The Court said this:

> To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the [A]boriginal group claiming the right. The factors laid out in *Van der Peet* ... allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.[59]

It is hardly surprising that the *Pamajewon* decision, whose reasons were released the day after those in the *Van der Peet* trilogy,[60] applied the *Van der Peet* metric in characterizing the claim of right. But notice the difference in tone and rationale between those decisions and this one. The point in *Pamajewon* was not, as it had been in *Van der Peet*, that the appellants did "not need to demonstrate an [A]boriginal right" broader than the one the circumstances appeared to require;[61] it was that they would not be allowed to try to demonstrate the broader Aboriginal right. Whereas in *N.T.C.* and *Gladstone* the Court was prepared to look and see if the evidence could support a full-strength Aboriginal right to fish commercially,[62] in *Pamajewon* it was unprepared even to entertain the possibility that the Shawanaga and Eagle Lake peoples might have the broad self-government rights they had asserted. Thus, in *Delgamuukw*,[63] a civil proceeding whose principal purpose was to ascertain whether the Gitksan and Wet'suwet'en peoples had Aboriginal title and self-government rights over particular territory, the Court, invoking *Pamajewon*, held that the claimants had "advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1)."[64] Conversely, in *Mitchell*,[65] the Court rejected the claimant's attempt to present a

57 RSC 1985, c. C-46, as amended.
58 *Pamajewon*, *supra* note 40 at para 27.
59 *Ibid*.
60 On February 26, 1996, the Supreme Court had dismissed the *Pamajewon* appeal from the bench, with reasons to follow. See *ibid* at para 2.
61 See, again, *Van der Peet*, *supra* note 6 at para 78.
62 *N.T.C.*, *supra* note 6; *Gladstone*, *supra* note 6.
63 *Delgamuukw*, *supra* note 26.
64 *Ibid* at para 170. Despite this, the Court was careful, in both *Pamajewon*, *supra* note 40 (at paras 24, 27) and *Delgamuukw*, *supra* note 26 (at paras 170-171), not to foreclose the possibility that rights of self-government, properly characterized, might qualify for constitutional protection as Aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.
65 *Mitchell*, *supra* note 35.

claim in a form that it considered "artificially narrow."[66] Such gateway restrictions on the kinds of claims of Aboriginal right the courts will even entertain make the prospect of mounting and trying to substantiate such claims unattractive and daunting.

But the claimant party is not the only one at risk of compromise from judicial intervention in the task of defining claims of Aboriginal right. The Crown, which must respond, in court and elsewhere, to such claims, has reasons of its own to be concerned about this practice. For one thing, it has, if anything, even less control than the claimant over the ultimate outcome of the characterization game. It too stands at risk of surprise when a court releases its decision indicating that the claim adjudicated is different from the claim it thought it was defending against. Like the Aboriginal claimant, it must marshal its evidence and develop its argument without knowing for sure what claim it must oppose. It too, therefore, must endure the ever-present possibility of prejudice when the courts determine, after the fact, the subject matter of Aboriginal rights litigation.[67]

But another operational problem besets the Crown in its dealings with claimant Aboriginal communities. We have known since 2004 that the Crown has an enforceable duty, derived from the honour of the Crown, to consult a given Aboriginal community when it "has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title [that may belong to that community] and contemplates conduct that might adversely affect it."[68] The

66 See *ibid* at para 20: "It may be tempting for a claimant or a court to tailor the right claimed to the contours of the specific act at issue. In this case, for example, Chief Mitchell seeks to limit the scope of his claimed trading rights by designating specified trading partners .... These self-imposed limitations may represent part of Chief Mitchell's commendable strategy of negotiating with the government and minimizing the potential effects on its border control. However, narrowing the claim cannot narrow the [A]boriginal practice relied upon, which is what defines the right .... As a matter of necessity, pre-contact trading partners were confined to other First Nations, but this historical fact is incidental to the claim .... Thus, the limitations placed on the trading right by Chief Mitchell and the courts below artificially narrow the claimed right and would, at any rate, prove illusory in practice."

67 The courts have acknowledged in civil-side Aboriginal rights litigation that the Crown stands at risk of prejudice when an Aboriginal party amends its pleadings too much or too late in the proceedings. In *Delgamuukw*, *supra* note 26, for example, the Supreme Court held (at para 76) that a pleadings amendment consolidating into two collective claims—one for the Gitskan, the other for the Wet'suwet'en—the self-government and Aboriginal title claims of the 51 Gitksan and Wet'suwet'en houses prejudiced the Crown because "the collective claims were simply not in issue at trial." As a result, it sent back to trial a case that had consumed 374 trial days and resulted in a trial judgment nearly 400 pages in length (see *ibid* at paras 5-6) and a Court of Appeal decision more than 300 pages in length. It is interesting that the courts have not been similarly solicitous when surprise has resulted from their own reconfigurations of the Aboriginal rights claims before them.

68 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*] at para 35. Compare *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku*] at para 24 and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*], esp. at para 31.

scope of the Crown's consultation obligation, where that obligation exists, depends on the *prima facie* strength of the claim of Aboriginal right and on the seriousness or severity of the adverse impact of the proposed Crown conduct on the right claimed.[69] A growing body of British Columbia case law holds that the fulfillment of the Crown's consultation duties in a given instance requires that the Crown have properly assessed, at the outset of the process, the scope of those obligations in that instance.[70] It is generally accepted that this assessment must be correct, not merely reasonable.[71] But the Crown's chances of being correct in assessing, at the relevant time, the strength of the claim, and even the severity of the potential adverse impact on the right being claimed, diminish dramatically in a regime in which no one can know what the right being claimed even is until it receives definitive characterization from the final court adjudicating upon it.

No one involved in the litigation of Aboriginal rights claims, therefore, can reasonably expect to benefit from the uncertainty that results from judicial interposition in the task of characterizing claims of Aboriginal right. Compounding the uncertainty are the discrepancies (displayed above) in the way the Supreme Court has dealt, from case to case, with the question of characterization.[72]

The consequences of such confusion and uncertainty are especially acute when the subject matter is Aboriginal rights. Unlike the rights contained in treaties or guaranteed in the *Charter*,[73] Aboriginal rights do not come prepackaged and individuated for easy application. The only way—the *only* way—of ascertaining what Aboriginal rights, considered as such, exist and to whom they belong is through judicial determination as a result of litigation. Pending such determinations, everyone—non-Aboriginal settlers, proponents of private or public/private developments, tribunals and officials on whose approval such developments quite frequently depend, members of Aboriginal communities, governments that must enforce their existing regulatory regimes in a

69 See, for example, *Haida*, *supra* note 68 at paras 43-45; *Taku*, *supra* note 68 at para 32; *Rio Tinto*, *supra* note 68 at para 36.

70 See, for example, *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 CNLR 74 at paras 126-127; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 CNLR 315 at paras 143, 147, 245; *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 CNLR 110 at paras 18, 119; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 BCLR (5th) 234 [*West Moberly*] at para 151; *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945, 60 CELR (3d) 179 at paras 455, 630, 632-641. But see also *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Beckman*], where the Supreme Court held (at paras 76-79) that the Yukon government had fulfilled its duty to consult the First Nation, despite having mistakenly maintained throughout that it had no duty to consult the First Nation in those circumstances (see *Beckman* at paras 58-66).

71 See, for example, *Haida*, *supra* note 68 at para 63; *West Moberly*, *supra* note 70 at paras 151, 174.

72 See *supra* notes 37-51 and accompanying text.

73 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 24.

manner consistent with the rule of law,[74] and, of course, the potential claimant Aboriginal communities themselves—must perforce operate on the basis of conjecture or assumption. Everyone stands to benefit from having an accurate map, fairly acquired, of the physical and conceptual geography of Aboriginal rights in Canada. We are all quite simply better off knowing what kinds of Aboriginal rights there are, where and to whom they pertain, and which, if any, of a given community's claims of Aboriginal right are sound.[75] Arrangements that discourage and frustrate determination of the merits of Aboriginal rights claims are, for this reason, especially unfortunate.[76]

Which brings us, finally, back to *Lax Kw'alaams*.

III The Appeal

When I first learned that the Lax Kw'alaams appellants were seeking leave to appeal to the Supreme Court on a characterization issue, I assumed that their goal would be to wrest back from the courts control over the definition of the Aboriginal rights they were claiming. As it turned out, I could not have been more mistaken.

Lax Kw'alaams,[77] like *Delgamuukw* but unlike all the Supreme Court's other Aboriginal rights jurisprudence,[78] was a purely civil proceeding, not a proceeding that arose from Crown enforcement activity.[79] It began as a claim asserting fishing rights and Aboriginal title, but an early procedural decision

74 See, for example, *R. v. Catagas* (1977), 38 CCC (2d) 296 (Man CA).

75 When an Aboriginal community has a weak but credible claim of Aboriginal right, for instance, the Crown must continue consulting with that community about proposed measures that "might adversely affect it" unless and until the courts determine decisively that the claim is unsound. See, for example, *Haida*, *supra* note 68 at para 37.

76 It is for this reason that I have serious reservations about the British Columbia Court of Appeal's decision in *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 80 BCLR (3d) 212. There, the Court held that an Aboriginal community could not seek and obtain determination of a claim of Aboriginal right except in circumstances where it could allege that the right is being infringed. (This conclusion may very well follow from the Supreme Court's remarks in the *Van der Peet* trilogy on the characterization of Aboriginal rights; see *supra* notes 13-23 and accompanying text.) The practical effect of this restriction is to ensure that confrontation or dispute must precede any judicial clarification of Aboriginal rights, not to promote the reconciliation of Aboriginal and non-Aboriginal interests of which the Supreme Court so often speaks: see, for example, *Van der Peet*, *supra* note 6 at para 31; *Gladstone*, *supra* note 6 at para 72; *Delgamuukw*, *supra* note 26 at paras 141, 148, 161; *Haida*, *supra* note 68 at paras 14, 17, 20, 26, 32-33, 35, 38, 45, 49-51; *Beckman*, *supra* note 70 at paras 10 ("The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*"), 12, 52

77 *Lax Kw'alaams*, *supra* note 1.

78 *Delgamuukw*, *supra* note 26.

79 *Mitchell*, *supra* note 35, had the form of a civil proceeding, but it resulted from the Crown's seizure of goods that Grand Chief Mitchell sought to bring, free of duty, into Canada from the United States.

severed the Aboriginal title claim. At the time the Supreme Court released its decision, the title claim was still in abeyance.[80] The claim for fishing rights proceeded alone.

In their pleadings, the Lax Kw'alaams sought "an Aboriginal right 'to harvest, manage and sell on a commercial scale Fisheries Resources and [processed] Fish Products ... for the purpose of sustaining their communities, accumulating and generating wealth, and maintaining their economy.'"[81] At trial,[82] they succeeded in proving that "the harvesting and consumption of Fish Resources and Products, including the creation of a surplus supply for winter consumption, was an integral part of their distinctive culture" at the time of contact;[83] so was the "exchange of luxury goods such as ... eulachon grease."[84] But these findings of fact proved insufficient, in the trial court's view, to establish a contemporary Aboriginal right to harvest all available species of fish for commercial sale.[85] Trade in other fish or fish products did not, it said, figure regularly or substantially enough in the claimant peoples' pre-contact way of life to anchor an Aboriginal right,[86] and "it would be stretching the concept of an evolved Aboriginal right too far to say that the Coast Tsimshian practice of trading in eulachon grease is equivalent to a modern right to fish commercially all fish in their Claimed Territories."[87] And because the plaintiffs' pleadings were deemed to have focused on the assertion of a full-scale *commercial* fishing right, the trial judge declined to accredit any Lax Kw'alaams Aboriginal rights that the facts as found might otherwise have substantiated. The Court of Appeal agreed, in essence,[88] with the trial judge's findings of fact and conclusions of law and held that her decision not to accredit other, related rights that had not been clearly pleaded was a "judgment call" she was entitled to make.[89]

Before the Supreme Court of Canada, the Lax Kw'alaams argued,[90] unsuccessfully, as mentioned above,[91] that the facts as found at trial did suffice to substantiate a modern Aboriginal right to fish all species for commercial sale. But—more to the point for present purposes—they argued in the alternative

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80 *Lax Kw'alaams*, *supra* note 1 at para 1.
81 *Ibid* at para 23, quoting from para 62 of the plaintiffs' Second Amended Statement of Claim; emphasis added in SCC quotation deleted.
82 2008 BCSC 447, [2008] 3 CNLR 158.
83 *Ibid* at para 494.
84 *Ibid* at para 495.
85 See, for example, *ibid* at para 501.
86 *Ibid* at paras 495-496.
87 *Ibid* at para 501.
88 2009 BCCA 593, 314 DLR (4th) 385.
89 See *ibid* at para 62.
90 Factum of the Appellants, the Lax Kw'alaams Indian Band et al., filed November 2, 2010 [Appellants' Factum], at paras 67-77, 81-89, 105-107.
91 See *supra* note 4 and accompanying text.

that they should not be held to their pleadings because it was the role of the courts, not the role of the parties, to characterize claims of Aboriginal right asserted in litigation.[92] Here is the heart of the argument they made:

> In this case, the courts below refused to consider whether a variation of the character of the right was necessary in light of the pre-contact practice and way of life of the Coast Tsimshian. Rather, the trial judge considered the characterization of the right to be determined by the specific relief sough[t] in the pleadings and the Court of Appeal declined to interfere.
>
> On this reasoning, [A]boriginal rights plaintiffs must forecast in their Prayer for Relief the proper characterization of their rights by precisely anticipating the findings of fact that will be made at trial about the long-ago practices of their ancestor societies. The significance of this risk is demonstrated by the fact that this Court has changed the proposed characterization of the right in almost every [A]boriginal rights case that has come before it. Had those cases been brought as civil actions, each would have been dismissed on the basis of their pleadings ....
>
> Members of this Court have expressed concern about adjudicating [A]boriginal rights in regulatory prosecutions, suggesting that [A]boriginal claims should "properly be the subject of civil actions for declarations." However, on the Court of Appeal's reasoning, there is little incentive to bring a claim as a civil action when a regulatory prosecution presents no risk of incorrectly forecasting the characterization of the claimed right in the pleadings.[93]

Pared to its essence, the appellants' complaint was that the courts were *not* second-guessing their claim of Aboriginal right, not that they were. Given its strongest formulation, their argument is this: (1) In its previous Aboriginal rights jurisprudence, most of which resulted from regulatory prosecutions, the Supreme Court has generally given little, if any, weight to the manner in which Aboriginal claimants have characterized their own claims, reserving instead the prerogative of defining the subject matter of the claim in relation to the circumstances of the litigation. (2) Given these precedents, there was no reason for the appellants (or for Aboriginal rights claimants generally) to assume that the courts would begin ascribing any special significance to the manner in which they happened to frame their claims of Aboriginal right. It was reasonable to suppose instead that the courts would continue doing what they generally have done— themselves defining the claim in the way they thought most appropriate. (3) Denying the benefit of such judicial flexibility to those who assert their Aboriginal rights claims in civil proceedings specifically discourages resort to civil proceedings and encourages reliance on

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92 They argued as well, again unsuccessfully, that their pleadings were indeed phrased broadly enough to put in play claims of Aboriginal right to fish for food, social and ceremonial purposes or for trade on a more limited, modest scale; see Appellants' Factum, *supra* note 90 at paras 91-95.

93 *Ibid* at paras 97-99; footnote omitted.

prosecutions for that purpose. (4) Any such result would be unwise and inappropriate because civil proceedings are the better means of litigating claims of Aboriginal right.

For reasons given at length above,[94] I doubt the wisdom, and the benefit to Aboriginal claimants, in the Supreme Court's hitherto prevailing practice of redefining the claims of Aboriginal right brought before it. Apart from that, however, I think the appellants' line of argument warrants some serious consideration.

Let us begin with the final two points set out in my redraft of the argument above. As early as *Sparrow*,[95] the first Supreme Court decision to deal with Aboriginal rights as constitutional rights, a unanimous Court had expressed concern that "the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an [A]boriginal right."[96] In *Marshall/Bernard*,[97] LeBel J., in his concurring reasons, observed that "[t]here is little doubt that the legal issues to be determined in the context of [A]boriginal rights claims are much larger than the criminal charge itself and that the criminal process is inadequate and inappropriate for dealing with such claims."[98] He called attention to "[p]rocedural and evidentiary difficulties inherent in adjudicating [A]boriginal claims[, which] arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact" and to the "special difficulties [that] come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges."[99] "These claims," he added, "may also impact on the competing rights of a number of parties who may have a right to be heard at all stages of the process."[100] "[A]ll interested parties should have the opportunity to participate in any litigation or negotiations" of them, because the "question of Aboriginal title and access to resources ... is a complex issue that is of great importance to all the residents and communities of the provinces."[101] "Accordingly," he concluded, "when issues of [A]boriginal title or other [A]boriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charges so that the [A]boriginal claim can be properly litigated in the civil courts."[102] In

94 See *supra* notes 6-76 and accompanying text.
95 *Sparrow*, *supra* note 27.
96 *Ibid* at 1095.
97 *Marshall/Bernard*, *supra* note 48.
98 *Ibid* at para 143.
99 *Ibid* at para 142.
100 *Ibid.*
101 *Ibid* at para 144.
102 *Ibid.*

Lax Kw'alaams,[103] the Court agreed unanimously: "If litigation [of Aboriginal rights claims] becomes necessary," Binnie J. wrote for the Court,

> we have ... said that such complex issues would be better sorted out in civil actions for declaratory relief rather than within the confines of regulatory proceedings. In a fisheries prosecution, for example, there are no pleadings, no pre-trial discovery, and few of the procedural advantages afforded by the civil rules of practice to facilitate a full hearing of the relevant issues.[104]

In view of these well-founded concerns expressed in earlier Supreme Court judgments, it would seem perverse to design an incentive structure for Aboriginal rights litigation that rewarded those who chose to assert their claims by breaking the law to attract prosecution. Such incentives would not encourage reconciliation of Aboriginal rights and claims with mainstream law or sensibilities.[105]

But consider as well the two initial propositions derived from the appellants' argument. As the Lax Kw'alaams were correct to observe, the Supreme Court's previous jurisprudence on Aboriginal rights had given no clear indication that the Aboriginal claimant had any significant role to play in determining the shape of the claim of Aboriginal right.[106] Except in *Marshall/Bernard*,[107] the Court had insisted routinely that the task of characterizing claims of Aboriginal right in litigation lay with the courts. It is true that almost all this doctrine emerged in appeals from prosecutions, but never before had the Court expressly confined its reach to the prosecutorial context. And there had been two previous Supreme Court decisions on Aboriginal rights appeals that did not derive from prosecutions. In *Mitchell*,[108] the Court had conspicuously revised (to his detriment) the claim of Aboriginal right that Grand Chief Mitchell had brought,[109] even though the parties had chosen their evidence, and argued the case in three courts, on the basis of the claim as he had presented it. And in *Delgamuukw*,[110] where the Court did find the Crown to have been prejudiced by a defect in the pleadings,[111] it had not dismissed the claim, as the courts below had done in *Lax Kw'alaams*, but had sent the case back to trial to be reconsidered on proper pleadings.[112] Never, apart from *Marshall/*

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103 *Lax Kw'alaams*, *supra* note 1.
104 *Ibid* at para 11.
105 See *supra* note 76 and accompanying text.
106 See *supra* notes 6-76 and accompanying text.
107 *Marshall/Bernard*, *supra* note 48.
108 *Mitchell*, *supra* note 35.
109 See *ibid* at paras 16-25.
110 *Delgamuukw*, *supra* note 26.
111 "To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case" (*ibid* at para 76).
112 "[G]iven the importance of this case and the fact that much of the evidence of individual territorial holdings is extremely relevant to the collective claims now advanced by each of the

Bernard (a prosecution!), had an Aboriginal rights claim failed because of the way the claimant had chosen to articulate it. It hardly seems unreasonable for the Lax Kw'alaams to have supposed that this pattern might continue.

The appellants in *Lax Kw'alaams* were therefore in for yet one more surprise on the carousel of characterization.

IV The Decision

But first, the good news. The Supreme Court in *Lax Kw'alaams* acknowledged, for the first time (to the best of my knowledge), the surpassing importance to everyone of Aboriginal rights litigation: of ascertaining, fairly and accurately, the soundness of claims of Aboriginal right.[113] It reaffirmed that civil proceedings are clearly preferable to prosecutions for this purpose,[114] but warned that "[s]uch potential advantages are dissipated ... if the ordinary rules governing civil litigation, including the rules of pleading, are not respected."[115] Accordingly, the Court continued, the appropriate course for a court dealing with a claim of Aboriginal right at the characterization stage is to "identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings."[116] Although "the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation,"[117]

> the necessary flexibility can be achieved within the ordinary rules of practice. Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties. The trial judge adopted the proposition that "he who seeks a declaration must make up his mind and set out in his pleading what that declaration is," but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to *all* parties after a month of evidence than it did at the outset. If necessary, amendments to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed.[118]

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appellants, the correct remedy for the defect in pleadings is a new trial, where, to quote the trial judge ..., '[i]t will be for the parties to consider whether any amendment is required to make the pleadings conform with the evidence'" (*ibid* at para 77).

113 "Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. The existence and scope of Aboriginal rights[,] protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders" (*Lax Kw'alaams*, *supra* note 1 at para 12).

114 *Ibid* at para 11, quoted in text *supra* at note 104.

115 *Ibid.*

116 *Ibid* at para 46.

117 *Ibid.*

118 *Ibid* at para 45; emphasis in the original.

This is an eminently sensible result, as far as it goes. It leaves with the parties, who by now "are generally well resourced and represented by experienced counsel,"[119] both the power and the responsibility to define the subject matter of Aboriginal rights litigation. By holding the parties to their pleadings while allowing them to amend those pleadings (in more or less the usual ways) in response to developments in the course of trial, it ensures that all participants know what claims of Aboriginal right are at stake throughout civil proceedings and can tailor their preparations, and compile their evidence, accordingly.[120] This is exactly as it should be. It is, to be frank, exactly the kind of approach a reasonable person would have expected the courts to take in adjudicating such claims if the Supreme Court had not, in decisions beginning with *Van der Peet*,[121] inserted judicial discretion so precipitously into the characterization game. Perhaps it bespeaks some recognition that judicial usurpation of the task of claim definition after the close of argument operates to destabilize, and therefore to discourage, the orderly litigation of claims of Aboriginal right.

If so, it is so far, alas, only partial recognition. And therein lies the bad news in the *Lax Kw'alaams* decision. At least three grounds for ongoing concern arise from it. The first is particular to the Lax Kw'alaams; the second to potential Aboriginal claimants more generally. The third is more general still.

For the Lax Kw'alaams, it is bad news indeed that the Supreme Court penalized them for believing the Court's own repeated affirmations that claims characterization was a task for the courts, not a task for them. In dismissing their claim, the Court took no account of, and no responsibility for, the confusion its own jurisprudence had wrought on their expectations about the proper conduct of Aboriginal rights litigation. In *Delgamuukw*,[122] by contrast, the Court had acknowledged "the background of considerable legal uncertainty surrounding the nature and content of [A]boriginal rights,"[123] and it had given the Aboriginal plaintiffs some slack in respect of their pleadings, even sending back to trial a claim it could have dismissed outright on account of defective pleading.[124] Under the circumstances, it would have been gracious for the Su-

119 *Ibid* at para 12.

120 "Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement" (*ibid* at para 43).

121 *Van der Peet*, *supra* note 6.

122 *Delgamuukw*, *supra* note 26.

123 *Ibid* at para 75, quoted at greater length *supra* at note 27.

124 See *ibid* at paras 76-77, quoted in part *supra* at notes 111 and 112.

preme Court to consider doing likewise in *Lax Kw'alaams*.[125] (A few months later, the Court did something similar on a Crown appeal in *Ahousaht*.[126]) Such nuances can make claimant Aboriginal communities wary of the welcome that awaits them in mainstream Canadian judicature.

For other Aboriginal communities contemplating civil proceedings to establish Aboriginal rights, the *Lax Kw'alaams* decision gives additional cause for apprehension.[127] Under the characterization rules that developed pursuant to *Van der Peet*, the courts reserved two different, though related, powers to intervene in the claim definition exercise: the power to reconfigure, even after the close of argument, a claim of Aboriginal right as they considered appropriate;[128] and the power to determine summarily that a claim as presented was unacceptable on its face because it was either artificially narrow,[129] or too broad to be cognizable.[130] In *Lax Kw'alaams*, the Supreme Court es-

125 *Lax Kw'alaams*, *supra* note 1. In fairness, retrial might well not have made a difference to the disposition of a Lax Kw'alaams claim to "lesser included" Aboriginal rights to trade in fish generally, because such a claim lacked an evidentiary basis. "[B]y rejecting the claim to the 'greater' commercial fishery on the basis that *trade* in fish other than eulachon was not integral to pre-contact society," the Supreme Court said, "the trial judge was equally required to reject a 'lesser' commercial right to fish 'all species.' Her problem on this branch of the argument was not only the scale of the commercial fishery but whether and to what extent 'trade' in the pre-contact period could support *any* sort of modern commercial fishery—whether full-scale or lesser in scope. Her conclusion that *trade* in fish apart from eulachon grease was *not* integral to Coast Tsimshian pre-contact society was as fatal to the lesser commercial claim as it was to the greater commercial claim" (*ibid* at para 62; all emphasis in the original). The same was not true, however, of the Lax Kw'alaams claim of Aboriginal right to fish for food, social or ceremonial purposes, or of a "lesser included" right to continue trading in eulachon grease; the facts found at trial did provide an evidentiary basis for such claims (see *ibid* at para 16 and text accompanying *supra* note 84). The Supreme Court gave no weight to that claim because "[t]he Lax Kw'alaams presently hold federal fisheries licences for these purposes. Their entitlement seems not to be a contentious issue. It was therefore not an issue of significance in the present litigation. Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation and it was certainly within the discretion of the trial judge to refuse to do so here" (*ibid* at para 14). The Court does not say clearly here whether the "entitlement" to which it refers is entitlement to the federal licence or entitlement to the Aboriginal right. But even if it were the latter, remitting the case for retrial on that issue would have given the Lax Kw'alaams the option of satisfying themselves whether their claim to subsistence fishing rights really was contentious.

126 *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237, 19 BCLR (5th) 20 [*Ahousaht*] is another case in which the courts had to characterize a claim of Aboriginal right to harvest fish for commercial sale. In *Ahousaht*, however, the Aboriginal plaintiffs were largely successful, both at trial and at the Court of Appeal. On March 29, 2012, in response to the Crown's application for leave to appeal the decisions below, the Supreme Court remanded *Ahousaht* "to the Court of Appeal for British Columbia to be reconsidered in accordance with the decision of this Court in *Lax Kw'alaams*" (2012 CanLII 16558 (SCC)).

127 It is here, and in the three subsequent paragraphs of text, that my debt to Alyssa Holland and Lauren Edwards is greatest. But for their intervention, I likely would have overlooked this concern and its significance.

128 See *supra* notes 9-51 and accompanying text.

129 See *supra* notes 65-66 and accompanying text.

130 See *supra* notes 56-64 and accompanying text.

chewed the first of these prerogatives in respect of civil proceedings but said nothing about the second.

Consider the possible consequences of this. Under the *Van der Peet* rules, a court would reconfigure a claim of Aboriginal right—or, as happened in *Delgamuukw*, perhaps send it back to trial[131]—when it concluded that the claim, as brought, was either too broad or artificially narrow.[132] For all the reasons given above, this outcome was fraught with potential for prejudice for one side or the other in the litigation. It, did, however, have for the Aboriginal claimant the one distinct advantage of keeping its claim of Aboriginal right in play, albeit revised, for adjudication on its merits. In a regime that holds claimants to their pleadings, even as amended, the power to dismiss Aboriginal rights claims summarily for excessive breadth or narrowness becomes a power to ambush. In the absence of clear direction—much clearer direction than the Supreme Court has chosen to provide so far—about the permissible size and scope of Aboriginal rights, the claimant community has no way of knowing how to ensure that it has framed its claim in a way the courts will be willing to entertain. From this standpoint, what looked like a poker game in which several cards were wild now looks a lot more like Russian roulette.

This is, of course, only the most disturbing scenario, not the only possible one. Mechanisms are available during the course of trial through which the parties can test, and if need be adjust, the scope of a given claim of Aboriginal right or plead alternative claims, or versions of it. If courts are content to deal with issues of cognizability solely on the basis of the submissions tendered within a proceeding, not as opportunities for judicial improvisation, there need be no occasion for concern or for unpleasant surprise. Neither need there be cause for surprise if the courts disclose the basis on which they are going to be making cognizability determinations: if, in other words, they indicate what must be true of a given claim of Aboriginal right for it to avoid disqualification, irrespective of the evidence offered in support of it. Finally, the courts have the option of considering on its evidentiary merits the Aboriginal right claim as pleaded, whatever the claim might be. Nothing in the *Lax Kw'alaams* decision precludes any such approaches.[133]

The trouble is that nothing in *Lax Kw'alaams* ensures endorsement of any of these approaches, either; nothing there precludes the courts from continuing, if so moved, to disqualify claims of Aboriginal right peremptorily

131 See *Delgamuukw*, *supra* note 26 at paras 170-171.

132 See, for example, *Pamajewon*, *supra* note 40 at paras 23-27; *Mitchell*, *supra* note 35 at paras 14-22.

133 It is interesting that the Court in *Lax Kw'alaams*, *supra* note 1, makes no mention of screening Aboriginal rights claims for scope or cognizability when it sets out in some detail, at para 46, how "a court dealing with a s. 35(1) claim would appropriately proceed." This invites speculation about whether the Court has abandoned the gatekeeping function of scrutinizing Aboriginal rights claims for permissibility.

on grounds of improper scope or cognizability. As long as this is so, there remains in the wake of *Lax Kw'alaams* an inherent risk for Aboriginal claimants contemplating civil action to establish Aboriginal rights. Even framing a claim of Aboriginal right in civil proceedings—especially a novel one that reaches beyond familiar rights of subsistence—is now an act of hope. Such a development hardly encourages the orderly mapping of existing Aboriginal rights.

With this as background, consider now perhaps the greatest cause for general concern about the *Lax Kw'alaams* decision: the sharp distinction the Court has drawn between civil and penal proceedings that feature claims of Aboriginal right. In the penal context, the Court observed, "it is the prosecution that establishes the boundaries of the controversy by the framing of the charge. Here, however, the Lax Kw'alaams First Nation is the moving party, and it lay in its hands to frame the action ... as it saw fit."[134] This deserves some elaboration.

In respect of prosecutions, the Supreme Court sought in *Lax Kw'alaams* to explain and rationalize its role in the characterization enterprise. *Sappier*,[135] for example, the Court said,

> was a prosecution for unlawful possession or cutting down of Crown timber from Crown lands and the Court's inquiry was whether the accused could establish an Aboriginal right to engage in that particular conduct. The Aboriginal right asserted by the defence was broader than necessary and in its broad generality risked being rejected as invalid. In that context (as in many other prosecutions), it was necessary for the court to re-characterize and narrow the claimed right to satisfy the forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming.[136]

(Never mind that the claim of Aboriginal right in *Sappier* had succeeded on the evidence in the courts below.) Citing *Van der Peet*[137] and *Pamajewon*[138] as other examples of this propensity (somewhat curious choices given that, as the Court acknowledged, "it was held" in both "that even the narrower claim was not established on the evidence"[139]), the Court described its task as that of defining a claim of Aboriginal right in a way that "would suffice to obtain an acquittal,"[140] without being "broader than required to defeat the prosecution."[141]

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134 *Ibid* at para 39.
135 *Sappier*, *supra* note 42.
136 *Lax Kw'alaams*, *supra* note 1 at para 44.
137 *Van der* Peet, *supra* note 6.
138 *Pamajewon*, *supra* note 40.
139 *Lax Kw'alaams*, *supra* note 1 at para 44.
140 *Ibid*.
141 *Ibid*.

Considered as legal history, this account is somewhat selective and revisionist. It overlooks *Gladstone*[142] and *Marshall/Bernard*,[143] for instance, where the Court did no such thing,[144] and *Mitchell* (not a prosecution, true, but an enforcement proceeding),[145] where the effect and intention of the characterization analysis were neither to "satisfy the forensic needs" of the Aboriginal claimant nor to protect Grand Chief Mitchell from "overclaiming."[146] But considered as jurisprudence, *Lax Kw'alaams* may very well constitute explicit prospective judicial endorsement in the prosecutorial context of the "size to fit" approach that, as I suggested above,[147] most closely approximated the Court's prevailing previous practice in construing Aboriginal rights claims: entertaining for accreditation the narrowest version of the claim that would, if established, "suffice to obtain an acquittal" in a given prosecution.

By contrast, when an Aboriginal party initiates civil proceedings to establish an Aboriginal right, the task of claim definition, according to *Lax Kw'alaams*,[148] rests with that party.[149] "The statement of claim" in a civil proceeding "defines what is in issue. The trial of an action should not resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight."[150] In particular, the Supreme Court said, the appellants were wrong to assert that a court "must *first* inquire and make findings about the pre-contact practices and way of life of the claimant group" before characterizing a claimed Aboriginal right.[151] (Here again, it took no notice of *Mitchell*,[152] which had adopted a version of the very approach the Court rejected here.)[153] It is, it seems, all right for the courts to help an accused in a prosecution identify a suitable candidate Aboriginal right, but impermissible for them to do so when the claimant elects instead to initiate civil proceedings.

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142 *Gladstone*, *supra* note 6.

143 *Marshall/Bernard*, *supra* note 48.

144 See *supra* notes 48-51 (*Marshall/Bernard*) and 53 (*Gladstone*) and accompanying text.

145 *Mitchell*, *supra* note 35.

146 See *supra* notes 45-47, 65-66 and accompanying text.

147 See *supra* notes 24-53 and accompanying text.

148 *Lax Kw'alaams*, *supra* note 1.

149 See *supra* notes 113-121 and accompanying text. To date, the party initiating the claim of Aboriginal right in proceedings other than prosecutions that reached the Supreme Court of Canada has always been the plaintiff or applicant: see, in addition to *Lax Kw'alaams*, *ibid*, *Delgamuukw*, *supra* note 26 and *Mitchell*, *supra* note 35. As a result, we do not yet know what characterization rules will apply to Aboriginal parties asserting Aboriginal rights as defences in civil proceedings. Perhaps the *Behn* appeal, *supra* note 55, will give the Supreme Court of Canada an opportunity to consider and comment on that issue.

150 *Lax Kw'alaams*, *supra* note 1 at para 41.

151 *Ibid* at para 40, quoting from the Appellants' Factum, *supra* note 90 at para 57 (emphasis in Appellants' Factum).

152 *Mitchell*, *supra* note 35.

153 *Ibid* at para 20 ("the [A]boriginal practice ... is what defines the right"), quoted at greater length in *supra* note 66.

The Supreme Court in *Lax Kw'alaams* reaffirmed, for some very good reasons, its preference for civil over prosecutorial process as the vehicle for adjudicating claims of Aboriginal right.[154] Yet its ruling in that same decision on characterization—what it says and what it does not say—strongly encourages potential claimants to continue resorting preferentially to the prosecutorial stream: in effect, to advance their claims by engaging in civil disobedience. Why would any sensible claimant opt in these circumstances for the civil process, especially while the courts reserve the power to wield, without articulating clearly when or why they might do so, the hammer of cognizability? Is this really the optimal way of "reconcil[ing] ... the pre-existence of [A]boriginal societies with the sovereignty of the Crown"?[155]

V The Legacy

An optimally fair adjudication regime for Aboriginal rights will have at least four key features.

First, it will encourage Aboriginal communities to bring forward the claims that matter to them—those, at least, they believe they can prove—and to see them through to final determination. This is in everyone's interest. No one benefits from the current climate of ignorance and controversy over which communities have which Aboriginal rights and where. We can all plan our affairs more rationally and more harmoniously once we know the answers to these questions.

Second, it will reduce to an absolute minimum the potential for unpleasant surprise in the course of Aboriginal rights litigation. If certain kinds of claims of Aboriginal right are going to be deemed impermissible, regardless of the strength of the evidence available in support of them, Aboriginal claimants need to know that this is so, why this is so and what kinds of claims those are: what principles are going to govern this threshold determination. In addition, no one, on whatever side of Aboriginal rights litigation, should be in doubt by the close of trial about the subject matter of the litigation: about the Aboriginal right claim that is in play. Claimants need to be able to choose with confidence the claims for which they will seek mainstream judicial accreditation; the Crown, and any relevant others, need to be able to know in time the case to which they must respond.

Third, it will use, and encourage the use of, the best and most powerful tools available to mainstream law to ascertain the merits of the various claims of Aboriginal right. Under the current dispensation, those are without question the tools of civil, not those of prosecutorial, process. Prosecutions will,

154 See text accompanying *supra* note 104 for the relevant quotation.

155 *Van der Peet*, *supra* note 6 at paras 31-32 identifies this as the purpose of section 35(1) of the *Constitution Act, 1982*.

of course, continue to occur and Aboriginal rights and claims of right will sometimes be relevant when they do, but the scheme should be encouraging recourse to the more careful, inclusive process, not to the one that is by nature less well suited to the authoritative determination of such difficult issues.

Finally, it will function in a way that promotes, not compromises, the reconciliation of Aboriginal rights with the mainstream legal order.

Judged by these standards, *Lax Kw'alaams* is a decidedly mixed blessing. It is, in the long run, constructive for the Court to have prescribed judicial restraint in respect of claims definition in civil proceedings, vesting in the claimant party responsibility for identifying the claim to be adjudicated. (Whose claim is it, anyway?) This development can and should promote the eventual realization of both the first and the second of the optimal features identified above by ensuring that the courts adjudicate the claims the parties ask them to adjudicate, not somewhat different ones.

In the short run, however, *Lax Kw'alaams* risks jeopardizing compliance with any of these four standards. At present, claimants are still left to guess whether courts will be willing to entertain the Aboriginal rights claims they wish to bring in the forms in which they wish to bring them. As long as this is so, they may well hesitate to advance their claims at all: an outcome inconsistent with the first of our four desiderata. If they do decide to proceed, the option of abiding the judicial bowdlerization of their claims to achieve confirmation of *some* Aboriginal right will, despite seeming disrespectful and paternalistic, quite often have compelling strategic appeal. And as long as that option is available only in the prosecutorial stream, those claimants can hardly be faulted for preferring prosecution, despite the truncated process and the resulting threats to the prospect of reconciliation.

To convert the ruling in *Lax Kw'alaams* from a mixed to an unmixed blessing, there are at least two additional things the courts will have to do. The first is to structure and limit (at a minimum) their discretion to refuse to entertain claims on grounds of cognizability.[156] (Players of any game are entitled

156 This is, of course, neither the time nor the place to discuss in detail what kinds of Aboriginal rights claims, if any, the courts should deem impermissible as such. But it may help to mention a precedent in imperial constitutional law that may have some relevance, if only as a place to start the discussion. Under what has come to be called the "doctrine of continuity," the pre-existing laws, rights and interests of a colonized people survive the Crown's acquisition of sovereignty unless they are either (1) incompatible with the assertion of Crown sovereignty, or (2) repugnant to natural justice, equity and good conscience. In *Mitchell*, *supra* note 35, the majority acknowledges (at para 10) the historical relevance of the "sovereign incompatibility" screen; Binnie J., in concurring reasons, articulates and applies the notion (at paras 141-154). In *Mabo v. Queensland (No. 2)* (1992), 175 CLR 1, Brennan J., writing for a plurality of the High Court of Australia, acknowledges (at 61) the ongoing relevance of the other one. I discuss the provenance of these two traditional screens, and their operation in Commonwealth jurisprudence, in *Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government* (LLM Thesis, University of Toronto, 1998) [unpublished] at 189-195.

to know at the outset the shape and the boundaries of the playing field.) The second, once they have done the first, is to retire altogether—not just in the civil stream—from the game of characterizing Aboriginal rights in recognition of the fact that the law, and the sophistication of the parties to Aboriginal rights litigation, have matured to the point where claimants themselves may own and formulate their claims. (Referees and umpires ordinarily leave the play of the game to the players.) Coupled with these two further refinements, the *Lax Kw'alaams* decision would minimize the disincentives that now beset potential claimants with worthy claims of Aboriginal right, eliminate for all parties the potential for unpleasant surprise in the course of Aboriginal rights adjudication and do away with the perverse incentives that make prosecution an attractive means of bringing such claims before the courts.

If it helped bring about this state of affairs, the *Lax Kw'alaams* decision would deserve our praise as a turning point in Canadian law about Aboriginal rights. But whether it will indeed have that effect remains to be seen.