Reconciliation and the Supreme Court:

The Opposing Views of Chief Justices Lamer and McLachlin

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The Supreme Court of Canada has said that Aboriginal rights were recognized and affirmed in the Canadian Constitution in 1982 in order to reconcile Aboriginal peoples' prior occupation of Canada with the Crown's assertion of sovereignty. However, sharp divisions appeared in the Court in the 1990s over how this reconciliation is to be achieved. Chief Justice Lamer, for the majority, understood reconciliation to involve the balancing of Aboriginal rights with the interests of other Canadians. In some situations, he thought this could justify the infringement of Aboriginal rights to achieve, for example, economic and regional fairness. Justice McLachlin, on the other hand, in strongly worded dissent, regarded infringement for such purposes as unconstitutional. In her opinion, reconciliation can best be achieved through negotiation and the time-honoured process of treaty making.

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This article will critically examine the contrasting notions of reconciliation of former Chief Justice Lamer and current Chief Justice McLachlin. It will explain why Chief Justice McLachlin's understanding is preferable, and express the hope that the Court, under her leadership, will modify the Lamer Court's approach to justifiable infringement.

I INTRODUCTION

The notion of reconciliation as a legal concept affecting the relationship between the Aboriginal peoples of Canada and the Crown appears to have originated with recognition and affirmation of Aboriginal and treaty rights by s.35(1) of the *Constitution Act, 1982*.[1] In its first decision interpreting and applying s.35(1), the Supreme Court of Canada, in the unanimous judgment delivered by Dickson C.J. and La Forest J. in *R.* v. *Sparrow*, said this:

> There is no explicit language in the provision [s.35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts [A]boriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights*.[2]

The Court then went on to lay down what is known as the *Sparrow* test for justification of infringement of Aboriginal rights, requiring the federal government to prove both a valid legislative objective and respect for the Crown's fiduciary obligations to the Aboriginal peoples.

The concept of reconciliation that the Supreme Court had in mind in *Sparrow*, therefore, seems to relate to the impact of constitutional recognition and affirmation of Aboriginal and treaty rights on the legislative authority of the Parliament of Canada. Parliament still has legislative power in relation to those rights,[3] but the exercise of that power will be scrutinized by the courts to ensure

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1. Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 35(1) provides: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed."
2. [1990] 1 S.C.R. 1075 at 1109 [hereinafter *Sparrow*][emphasis added].
3. It is important to note that this authority is vested in Parliament, not in the executive branch of the federal government. In *R.* v. *Adams*, [1996] 3 S.C.R. 101 at para. 54, Lamer C.J. pointed out that, for an infringement by the executive to be valid, Parliament would have had to delegate specific authority containing definite guidelines to it:

that it is exercised only for compelling and substantial legislative objectives in ways that are consistent with the honour of the Crown and its fiduciary obligations.[4] In the specific context of the Aboriginal right to fish for food, societal and ceremonial purposes that was at issue in *Sparrow*, this meant that after the valid legislative objective of conservation had been met, Parliament had to give the Aboriginal fishing right complete priority over fishing for commercial and sport purposes. Reconciliation did not involve taking account of the interests of non-Aboriginal users in the allocation of the fishery resource.

The issue of reconciliation in the context of Aboriginal fishing rights was revisited by the Supreme Court in 1996 in what has become known as the *Van der Peet* trilogy. Of these three cases, *R.* v. *Van der Peet*[5] is the leading decision on the test for identifying and defining Aboriginal rights (apart from Aboriginal title to land[6]) and *R.* v. *Gladstone*[7] is the leading post-*Sparrow* decision on justification of infringements of Aboriginal rights.[8] In these cases, the then Chief Justice, Antonio Lamer, and the current Chief Justice, Beverley McLachlin, differed significantly on the meaning and application of the concept of reconciliation. This article will analyze and compare their respective views and show how Chief Justice McLachlin's understanding of reconciliation is more in

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> In light of the Crown's unique fiduciary obligations towards [A]boriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing [A]boriginal rights in a substantial number of applications in the absence of some specific guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an [A]boriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of [A]boriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of [A]boriginal rights under the *Sparrow* test.

A fortiori, administrative or executive action that is *unsupported by legislative authority* will be incapable of infringing Aboriginal rights: see note 61. See also *R.* v. *Marshall [No. 1]*, [1999] 3 S.C.R. 456 at para. 64 [hereinafter *Marshall [No. 1]*] and *R.* v. *Marshall [No. 2],* [1999] 3 S.C.R. 533 at para. 33 [hereinafter *Marshall [No. 2]*], where the Court quoted this passage from *Adams* and applied it to treaty rights.

4. For critical commentary on this continuing legislative authority, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95, reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 184 [hereinafter *Emerging Justice*]. See also Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17 C.J.L.S. 41.
5. [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].
6. In *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*], the Court took a different approach to definition and proof of Aboriginal title: see notes 84-85 and accompanying text and Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998) [hereinafter *Defining Aboriginal*].
7. [1996] 2 S.C.R. 723 [hereinafter *Gladstone*].
8. The other decision in the trilogy, *R.* v. *N.T.C. Smokehouse*, [1996] 2 S.C.R. 672, will not be discussed in this article because reconciliation was not mentioned in it.

keeping with the constitutional principles that should govern the relationship between Aboriginal peoples and the Crown.

II CHIEF JUSTICE LAMER'S VIEWS

The *Van der Peet* case involved prosecution of Dorothy Van der Peet, a member of the Sto:lo Nation in British Columbia, for violation of the federal *Fisheries Act*.[9] Ms. Van der Peet had sold ten salmon that had been caught by her common law partner and his brother under the authority of an Indian food fish licence. In defence, she asserted an Aboriginal right to sell the salmon and relied on s.35(1) of the *Constitution Act, 1982*. In rejecting this defence, Chief Justice Lamer, speaking for a majority of the Supreme Court, laid down the following test for identifying and defining Aboriginal rights:

> [I]n order to be an [A]boriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right.[10]

The time at which this "integral to the distinctive culture" test is applied is immediately prior to contact between the Aboriginal people in question and Europeans.[11] As Ms. Van der Peet "failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact,"[12] the Supreme Court held that she had not proven her Aboriginal right, and so was guilty as charged.

It is not my intention to reiterate the many legitimate criticisms that have already been directed at the "integral to the distinctive culture" test.[13] Instead, I want to focus on Chief Justice Lamer's re-interpretation in *Van der Peet* of the concept of reconciliation that first appeared in Canadian Aboriginal rights law in *Sparrow*. Applying a "purposive analysis" to s.35(1), Lamer C.J. said this:

> [W]hat s.35(1) does is provide the constitutional framework through which the fact that [A]boriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and *reconciled with the sovereignty of the Crown*. The substantive rights which fall within the provision must be defined in light of this purpose; the [A]boriginal rights recognized and affirmed by s.35(1)

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9. R.S.C. 1970, c. F-14, now R.S.C. 1985, c. F-14.
10. *Van der Peet*, *supra* note 5 at para. 46.
11. *Ibid.* at paras. 60-67. See also *R.* v. *Adams*, *supra* note 3 at paras. 37-46; *R.* v. *Côté*, [1997] 3 S.C.R. 139 at paras. 58-68.
12. *Van der Peet, supra* note 5 at para. 91.
13. See *e.g.* Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 56-76.

> must be directed towards *the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown*.[14]

For the Chief Justice, then, the reconciliation that s.35(1) was designed to achieve related both to the pre-contact origins of Aboriginal rights and to the legislative authority over those rights that accompanied Crown acquisition of sovereignty.[15] In both respects, reconciliation appears to operate to the disadvantage of the Aboriginal peoples.[16]

In the introduction to his analysis in *Van der Peet*, Lamer C.J. said that the "task of this Court is to define Aboriginal rights in a manner which recognizes that Aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by Aboriginal people because they are *Aboriginal*."[17] He distinguished Aboriginal rights from rights guaranteed by the *Canadian Charter of Rights and Freedoms* because the latter are held by all members of Canadian society, whereas the former are held only by Aboriginal peoples:

> The Court must neither lose sight of the generalized constitutional status of what s.35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society ... [A] purposive approach to s.35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: Aboriginal peoples and their rights in relation to Canadian society as a whole.[18]

This passage reveals that, while the rights that are recognized and affirmed by s.35(1) are those that were already in existence when the section was enacted,[19]

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14. *Van der Peet*, *supra* note 5 at para. 31 [emphasis added]. Lamer C.J. went on to find support for his conception of reconciliation in American and Australian law, as well as in academic commentary in Canada: *ibid.* at paras. 36-43.
15. The Supreme Court has deftly avoided the issue of how Crown sovereignty could have been acquired without Aboriginal consent. For critical commentary, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw* v. *British Columbia*" (1999) 37 Osgoode Hall L.J. 537; Michael Asch, "First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology" in Curtis Cook and Juan D. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal & Kingston: McGill-Queen's University Press, 2000) 148.
16. While Lamer C.J. said that true reconciliation will place equal weight on Aboriginal and common law perspectives on Aboriginal rights (*Van der Peet*, *supra* note 5 at paras. 49-50), the formulation of the "integral to the distinctive culture" test in *Van der Peet* and its application in other cases such as *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821 and *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, reveal how little Aboriginal perspectives really count: see Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. Comp. & Int'l L. 253, at 261-62, 265, 292-93 [hereinafter "Aboriginal Rights"], reprinted in *Emerging Justice*, *supra* note 4, 58 at 66-67, 69-70, 96-97.
17. *Van der Peet*, *ibid*. at para. 20 [emphasis in original].
18. *Ibid.* at paras. 20-21.
19. See *Sparrow*, *supra* note 2 at 1091; *Van der Peet*, *ibid*. at para. 28.

constitutional recognition is somehow relevant (illogical as this may seem) to the *definition* of the rights because of "the *necessary specificity* which comes from granting special constitutional protection to one part of Canadian society."[20] So it appears that, for Lamer C.J., constitutional recognition was a reason for restricting Aboriginal rights to practices, customs and traditions that were truly "Aboriginal," that is, that were central to distinctive Aboriginal societies as they existed prior to contact with Europeans.[21] The interests of reconciliation would not be served, in his opinion, by providing constitutional protection to practices, customs and traditions that were not crucial elements of those societies or that arose after contact.[22]

As a majority of the Supreme Court found that Dorothy Van der Peet had not established her Aboriginal right to exchange fish, Chief Justice Lamer did not deal with the issue of justifiable infringement of Aboriginal rights in *Van der Peet*. That issue, however, did figure prominently in the Court's decision in *Gladstone*,[23] delivered the same day as *Van der Peet*. Donald and William Gladstone, who are members of the Heiltsuk Nation in British Columbia, had been charged under the *Fisheries Act*[24] with illegally attempting to sell herring spawn on kelp. They claimed an Aboriginal right to sell the herring spawn and, unlike Ms. Van der Peet, were able to prove it to the satisfaction of a majority of the Supreme Court by meeting the "integral to the distinctive culture" test.[25] The Crown failed to show that this right had been extinguished. As the appellants were able to demonstrate that their Aboriginal right to take and sell herring spawn on kelp in commercial quantities had been infringed by the *Fisheries Act*

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20. *Van der Peet*, *ibid*. at para. 20 [emphasis added]; see also para. 29.
21. See *ibid.* at para. 44:

> In order to fulfil the purpose underlying s.35(1)—*i.e.*, the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America [A]boriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions—the test for identifying the [A]boriginal rights recognized and affirmed by s.35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the [A]boriginal societies that existed in North America prior to contact with the Europeans.

See also *ibid.* at para. 57. For critical analysis, see the works cited *supra* note 13.

22. Lamer C.J. claimed, nonetheless, that he was not adopting a "frozen rights" approach, as pre-contact practices, customs and traditions could be modified to meet changing conditions as long as sufficient continuity was maintained: *Van der Peet*, *supra* note 5 at paras. 62-64. L'Heureux-Dubé J., in her dissenting opinion, forcefully disagreed: *ibid.* at paras. 164-79.
23. *Supra* note 7.
24. *Supra* note 9.
25. For valuable commentary, see Douglas C. Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34 U.B.C. L. Rev. 195.

and regulations made under it, a majority of the Court turned to the issue of justification of the infringement.[26]

The majority judgment in *Gladstone* was also authored by Chief Justice Lamer. After outlining the test laid down in *Sparrow* for justification of infringement of Aboriginal rights, he said that, as the framework for analyzing Aboriginal rights depends on the legal and factual context, "it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out in order to apply that test to the circumstances of this appeal."[27] He found that the circumstances of *Gladstone* differed from those of *Sparrow* in two significant ways.

First, the Aboriginal fishing right in *Sparrow* was limited to fishing for food, societal and ceremonial purposes, whereas the right in *Gladstone* was a full-blown commercial right. While the former was limited internally by the quantity of fish that could be consumed by the Aboriginal community, the latter had no internal limit—it was subject only to "the external constraints of the demand of the market and the availability of the resource."[28] For Lamer C.J., this meant that the complete priority after conservation that had been accorded to the fishing right in *Sparrow* could not apply to the commercial right established in *Gladstone*, as "to give priority to [the latter] right in the manner suggested in *Sparrow* would be to give the right-holder exclusivity over any person not having an [A]boriginal right to participate in the herring spawn on kelp fishery."[29] For this reason, the Chief Justice modified the way priority operates in a commercial context:

> Where the [A]boriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an [A]boriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of [A]boriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive: at the stage of justification the government must demonstrate both that

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26. La Forest J., dissenting, was of the view that the appellants had not established their Aboriginal right, but had they done so he would have found it to have been extinguished. He was therefore able to avoid the justification issue entirely. L'Heureux-Dubé J. and McLachlin J. (as she then was) wrote judgments in which they concurred that a new trial was necessary. L'Heureux-Dubé J. agreed with the majority on the issue of justification, whereas McLachlin J. avoided this issue by concluding that a new trial was needed to determine whether the Aboriginal right had been infringed: see notes 38-39 and accompanying text.
27. *Gladstone*, *supra* note 7 at para. 56.
28. *Ibid.* at para. 57.
29. *Ibid.* at para. 59. Lamer C.J. however, could have avoided this perceived problem of a monopoly in another, more appropriate way, namely by limiting the exercise of the Heiltsuk's right to harvest herring spawn on kelp to their traditional fishing grounds: see Harris, *supra* note 25, esp. at 229-30. See also note 38.

> the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of [A]boriginal rights holders in the fishery.[30]

However, Lamer C.J. admitted that "[t]he content of this priority—something less than exclusivity but which nonetheless gives priority to the [A]boriginal right—must remain somewhat vague pending consideration of the government's actions in specific cases."[31]

The second significant difference that Lamer C.J. saw between *Gladstone* and *Sparrow* was that, unlike *Sparrow*, the circumstances of *Gladstone* involved legislative objectives that went beyond conservation. Once conservation goals had been met, the government still had to allocate the herring resource among the various users. This led the Chief Justice to consider what kinds of objectives, in addition to conservation, might be sufficiently compelling and substantial to justify infringement. In doing so, he referred to the purposive approach to s.35(1) and the concept of reconciliation that he relied upon in *Van der Peet*, and then went on to observe:

> In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or—*and at the level of justification it is this purpose which may well be most relevant—at the reconciliation of [A]boriginal prior occupation with the assertion of sovereignty by the Crown.*[32]

At the justification stage of the analysis, reconciliation therefore provided Lamer C.J. with a rationale for expanding the range of legislative objectives that could meet the compelling and substantial requirement laid down in *Sparrow*. He said:

> Because ... distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that [A]boriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, *equally* a necessary part of that reconciliation.[33]

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30. *Gladstone*, *supra* note 7 at para. 62.
31. *Ibid.* at para. 63. Lamer C.J. however, did outline some of the factors that should be considered in determining whether the government had shown sufficient respect for the Aboriginal right: see *ibid.* at para. 64.
32. *Ibid.* at para. 72 [emphasis added].
33. *Ibid.* at para. 73 [emphasis in original].

After using conservation as an example of a legislative objective that achieves this goal of reconciliation, the Chief Justice went on to suggest objectives involving allocation of the fisheries resource that might also justify infringement of Aboriginal rights:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-[A]boriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of [A]boriginal societies with the rest of Canadian society may well depend on their successful attainment.*[34]

In this passage, I think an important aspect of Lamer C.J.'s conception of reconciliation is revealed: Aboriginal rights, even though they are constitutionally protected, might have to give way to the interests of other Canadians in order to achieve vague goals like "economic and regional fairness." Moreover, in determining whether allocation of a resource in a way that infringes Aboriginal rights is justified, courts can take account of historical, non-Aboriginal use of the resource. In other words, past violations of Aboriginal rights by non-Aboriginal persons apparently can be used to justify continuing infringements of those rights today.[35] The reason why this is permissible appears to be that "successful attainment" of reconciliation "may well depend" on this kind of balancing of rights and interests. In this context, reconciliation appears to relate more to the maintenance of established economic interests than to the protection of constitutional rights.[36]

In *Gladstone*, Lamer C.J. did not have to go beyond the general framework he laid down for justifying infringements of Aboriginal rights in the context of allocation of fishery resources because no evidence had been presented at trial on this issue.[37] He therefore ordered a new trial to determine whether the

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34. *Ibid.* at para. 75 [emphasis in original].
35. To be constitutionally recognized in 1982, we have seen that Aboriginal rights have to meet the "integral to the distinctive culture" test: see notes 10-11 and accompanying text. This means that they must have originated from pre-contact Aboriginal practices, customs and traditions, and must not have been extinguished prior to the enactment of s.35(1). As the Aboriginal rights must have been in existence when non-Aboriginal persons began to use the resources to which those rights relate, historical non-Aboriginal resource use probably violated Aboriginal rights in many instances. For evidence of this in relation to the herring spawn on kelp fishery, see Harris, *supra* note 25.
36. For more detailed discussion, see Kent McNeil, "The Vulnerability of Aboriginal Land Rights in Canada and Australia" in Andrew Buck, John McLaren and Nancy Wright, eds., *Property Rights in the Colonial Imagination and Experience* (Vancouver: University of British Columbia Press) [forthcoming] [hereinafter "Vulnerability"].
37. The explanation for this was that the trial took place before the *Sparrow* decision laid down the justification test: see *Gladstone*, *supra* note 7 at para. 77.

infringement of the appellants' Aboriginal right to harvest and sell commercial quantities of herring spawn on kelp could be justified.

III MCLACHLIN J.'S VIEWS BEFORE SHE BECAME CHIEF JUSTICE

McLachlin J. (as she then was) wrote her own judgment in *Gladstone*, in which she agreed that a new trial was necessary, but for reasons different from those of Lamer C.J. In her opinion, "the [A]boriginal right to trade in herring spawn on kelp from the Bella Bella region [the Heiltsuk territory] is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities."[38] She thus defined the right more narrowly than the Chief Justice. She also disagreed with the majority on the issue of infringement, which in her view had not been established on the evidence. As she found that a new trial was necessary to decide this issue, she did not deal with justification, other than to observe:

> If infringement were established at a new trial, the question of whether such an infringement was justified should be decided at that point, according to the principles set out in *Van der Peet*.[39]

Given that Lamer C.J. did not discuss the issue of justification in *Van der Peet*, the principles McLachlin J. had in mind must have been those in her own dissenting judgment in that case. To understand her position on justification, we therefore need to return to *Van der Peet*.

McLachlin J. began by addressing the question of whether Dorothy Van der Peet had established an Aboriginal fishing right within the meaning of s.35(1) of the *Constitution Act, 1982*. Speaking generally, she said the significance of s.35(1) is twofold: first, it entrenches Aboriginal rights in the Constitution so that, henceforth, "these rights can be limited only by treaty"; and second, it recognizes "the right of [A]boriginal peoples to fair recognition of [A]boriginal rights and settlement of [A]boriginal claims."[40] After assessing the significance of s.35(1) in this way, she offered the following comments on Lamer C.J.'s view that the section's purpose is to achieve reconciliation:

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38. *Ibid.* at para. 165. Note that Harris, *supra* note 25 at 230, thought that the words "from the Bella Bella region" hinted at a territorial limitation on the right that is not present in Lamer C.J.'s judgment: see note 29. See also *Van der Peet*, *supra* note 5 at para. 277, where McLachlin J. said: "If an [A]boriginal people can establish that it traditionally fished *in a certain area*, it continues to have a similar right to do so, barring extinguishment or treaty" [emphasis added]. In her dissent in that case, she found that the Sto:lo Nation have an Aboriginal right to take fish from the Fraser River for sustenance purposes: *ibid.* at para. 282. See also *Mitchell* v. *M.N.R.*, *supra* note 16, esp. at paras. 55-60, where she did place a geographical limitation on a claimed right to trade.
39. *Gladstone*, *supra* note 7 at para. 174.
40. *Van der Peet*, *supra* note 5 at para. 229.

> It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s.35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest,[41] s.35(1) recognizes not only prior [A]boriginal occupation, but also a prior legal regime giving rise to [A]boriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also *to reconcile them in a way that provides the basis for a just and lasting settlement of [A]boriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with [A]boriginal peoples.*[42]

She then repeated the Court's view in *Sparrow* that, as a consequence of s.35(1),

> [f]ederal power is to be reconciled with [A]boriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of [A]boriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard of honourable dealing which the Constitution and the law imposed on the government in its relations with [A]boriginals.[43]

Unlike Lamer C.J., McLachlin J. did not rely on constitutional recognition and the concept of reconciliation to limit the scope of Aboriginal rights. And while agreeing with him that an activity, to qualify as an Aboriginal right, "must be an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right,"[44] she was critical of his elaboration of the "integral to the distinctive culture" test.[45] Instead, she preferred to take what she called an "empirical historical approach"[46] to the definition of Aboriginal rights:

> In my view, the better approach to defining [A]boriginal rights is an empirical approach. Rather than attempting to describe *a priori* what an Aboriginal right is, we should look to history to see what sorts of practices have been identified as [A]boriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as [A]boriginal rights under s.35(1). Confronted by a particular claim, we should ask, "Is this *like* the sort of thing which the law has

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41. In the previous paragraph, McLachlin J. had quoted the following from *Sparrow*, *supra* note 2 at 1105:

> 35(1) of the *Constitution Act, 1982* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights. The strong representations of [N]ative associations and other groups concerned with the welfare of Canada's [A]boriginal peoples made the adoption of s.35(1) possible ... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords [A]boriginal peoples constitutional protection against provincial legislative power.

42. *Van der Peet*, *supra* note 5 at para. 230 [emphasis added].
43. *Ibid.* at para. 231. See also text accompanying note 2.
44. *Ibid.* at para. 255, quoting from Lamer C.J.'s judgment at para. 46.
45. *Ibid.* at paras. 255-59.
46. *Ibid.*, heading before para. 260 [italics removed and upper case replaced with lower case].

> recognized in the past?" This is the time-honoured methodology of the common law.[47]

McLachlin J. found evidence in the *Royal Proclamation* of 1763[48] and the Indian treaties of

> the acceptance by the colonizers of the principle that the [A]boriginal peoples who occupied what is now Canada were regarded as possessing the [A]boriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding—the *Grundnorm* of settlement in Canada—was that the [A]boriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them.[49]

She concluded that the fundamental right of the Aboriginal peoples to use the land as they had traditionally done for sustenance is "enshrined in s.35(1)."[50] Applying this general approach to Aboriginal fishing rights, she expressed the view that trade in fish could be engaged in to provide for sustenance in the present-day if that is "the only way of using the resource to provide the modern equivalent of what they traditionally took."[51] Apparently, then, Aboriginal people do not have to prove that trade in fish was a traditional practice as long as they can establish that they derived sustenance from fishing.[52] Once that is established, their present-day right to sustenance can involve trade "to provide basic housing, transportation, clothing and amenities—the modern equivalent of what the [A]boriginal people in question formerly took from the land or the fishery."[53] As the evidence in *Van der Peet* established both that the Sto:lo had used fish from the Fraser River for centuries to sustain themselves and that the scale of fishing involved in the case was well within the quantity required for a moderate livelihood, and since the Crown had failed to prove extinguishment,

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47. *Ibid.* at para. 261 [emphasis in original].
48. R.S.C. 1985, App. II, No. 1.
49. *Van der Peet*, *supra* note 5 at para. 272.
50. *Ibid.* at para. 275.
51. *Ibid.* at para. 278. Note that McLachlin J. rejected the distinction Lamer C.J. drew between commercial fishing and small-scale exchange of fish for money and other goods. For her, any sale of fish is commercial. See *ibid.* at paras. 233-37.
52. She drew a distinction between Aboriginal rights, which should be defined broadly and which remain constant, and the exercise of those rights, which "may take many forms and vary from place to place and from time to time": *ibid.* at para. 238. Note, however, that for her not all Aboriginal people who fished historically would have a right to derive sustenance from fishing, as occasional fishing for food or sport "would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood": *ibid.* at para. 279.
53. Her judgment in *Gladstone* is consistent with this: see note 38 and accompanying text.

McLachlin J. found that Dorothy Van der Peet had been exercising an existing Aboriginal right when she sold the fish.[54]

As mentioned above, reconciliation was not really a factor in McLachlin J.'s approach to the identification and definition of Aboriginal rights. In her view, these rights arose from pre-existing Aboriginal customs and laws,[55] which the common law recognized.[56] We have seen that, for her, the purposes of s.35(1) were "to preclude extinguishment and to provide a firm foundation for settlement of [A]boriginal claims."[57] She therefore addressed the issue of reconciliation mainly in the context of justification of infringement of Aboriginal rights. In this respect, her criticisms of Chief Justice Lamer's approach in *Gladstone* were devastating.

After finding that a *prima facie* infringement of Dorothy Van der Peet's Aboriginal fishing right had been established, McLachlin J. turned to the issue of justification, which she said involved "an inquiry into the extent the state can limit the exercise of the right on the ground of policy."[58] Her use of the words "limit the exercise of the right" is significant because she thought that, in the context of the fishing right in question, s.35(1) had taken away the authority of Parliament to limit the right itself.[59] Post-s.35(1), non-Aboriginal regulatory power has been limited to conservation of the resource and other compelling and substantial objectives, such as prevention of harm to Aboriginal people and others.[60] More generally, she said that "the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use."[61] While she did envisage that "future cases may endorse limitation of [A]boriginal rights on other bases," she said that, "[f]or the purposes of this case ... it may be ventured that the range of permitted limitation of an established [A]boriginal right is confined to the *exercise* of the right rather than the diminution, extinguishment or transfer of the right to others."[62]

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54. *Van der Peet*, *supra* note 5 at paras. 282-95.
55. She also rejected Lamer C.J.'s pre-contact time frame. For her, the traditional laws and customs that give rise to Aboriginal rights are those that "held sway before superimposition of European laws and customs," which in some cases occurred long after contact: *ibid.* at para. 248.
56. *Ibid.* at paras. 261-69.
57. *Ibid.* at para. 232, summarizing her views on the significance of s.35(1). See notes 40-42 and accompanying text.
58. *Ibid.* at para. 301.
59. See *ibid.* at paras. 238-42, where she distinguished between Aboriginal rights and the exercise of those rights.
60. *Ibid.* at para. 305, relying on *Sparrow*, *supra* note 2 at 1113.
61. *Van der Peet*, *supra* note 5 at para. 302. McLachlin J.'s use of the word "Crown" in this context is problematic, as it might suggest that the executive branch of government can regulate the constitutional rights of the Aboriginal peoples. Legislative authority apart, this cannot be so, as even the common law protects legal rights against the prerogative power of the Crown: see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L. Rev. 301. See also note 3. So what McLachlin J. probably had in mind was the Crown acting through Parliament or exercising authority delegated to it by Parliament.
62. *Van der Peet*, *supra* note 5 at para. 306 [emphasis in original].

Focusing on Lamer C.J.'s majority judgment in *Gladstone*, McLachlin J. observed:

> Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: *Gladstone*, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required.[63]

Regarding the authorities, McLachlin J. compared the compelling and substantial legislative objectives of conservation and safety referred to in *Sparrow* with the economic, regional, and non-Aboriginal interests mentioned by Lamer C.J. in *Gladstone*:

> The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-[A]boriginal fishers ... would negate the very [A]boriginal right to fish itself, *on the ground that this is required for the reconciliation of [A]boriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-[A]boriginals.* It is a limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.[64]

McLachlin J. found that Chief Justice Lamer deviated from *Sparrow* in regard to the second aspect of the justification test as well, namely, respect for the Crown's fiduciary obligations. She said this:

> The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of [A]boriginal rights, this requires that the Crown not only preserve the [A]boriginal people's interest, but also manage it well: *Guerin*.[[65]] The Chief Justice's test, however, would appear to permit the constitutional [A]boriginal fishing right to be conveyed by regulation, law or executive act to non-[N]ative fishers who have historically fished in the area in the interests of community harmony and reconciliation of [A]boriginal and non-[A]boriginal interests.[66]

For her, then, Lamer C.J.'s approach was inconsistent with the Crown's fiduciary obligations and undermined the priority that Aboriginal rights are supposed to enjoy because they are constitutionally protected.[67]

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63. *Ibid.* at para. 302.
64. *Ibid.* at para. 306 [emphasis added].
65. *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335.
66. *Van der Peet*, *supra* note 5 at para. 307.
67. *Ibid.* at paras. 307-8.

McLachlin J.'s second objection to the Chief Justice's approach to justification was that "it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement."[68] She elaborated as follows:

> "In the right circumstances," themselves undefined, governments may abridge [A]boriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the [N]ative interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile [A]boriginal and non-[A]boriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed.[69]

She then turned to her third reason for disagreeing with the Chief Justice and addressed the issue of reconciliation directly in a passage that deserves to be quoted at length:

> My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the "reconciliation" of [A]boriginal and non-[A]boriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between [A]boriginal and non-[A]boriginal communities as a goal of fundamental importance. The desire for reconciliation, in many cases long overdue, lay behind the adoption of s.35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s.35(1) was the achievement of a just and lasting settlement of [A]boriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of [A]boriginal rights with the larger non-[A]boriginal culture in which they must, of necessity, find their exercise ... . *The question is how this reconciliation of the different legal cultures of [A]boriginal and non-[A]boriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of [A]boriginal and non-[A]boriginal interests require that we permit the Crown to require a judicially authorized transfer of the [A]boriginal right to non-[A]boriginals without the consent of the [A]boriginal people, without treaty, and without compensation? I cannot think it does.*[70]

McLachlin J. observed that her own historical approach to the definition of Aboriginal rights would generally limit them to "the basics of food, clothing and housing, supplemented by a few amenities," as Aboriginal societies generally did not value "excess or accumulated wealth."[71] So if this approach is adopted,

> the right imposes its own internal limit—equivalence with what by ancestral law and custom the [A]boriginal people in question took from the resource. The government

68. *Ibid.* at para. 309.
69. *Ibid.* at para. 309.
70. *Ibid.* at para. 310 [emphasis added].
71. *Ibid.* at para. 311. See also notes 49-53 and accompanying text.

> may impose additional limits under the rubric of justification to ensure that the right is exercised responsibly and in a way that preserves it for future generations. There is no need to impose further limits on it to effect reconciliation between [A]boriginal and non-[A]boriginal peoples.[72]

McLachlin J. gave another reason for rejecting Lamer C.J.'s broad approach to justification: for her, the reconciliation he envisaged could be achieved in a way that was more in accord with Canada's historical relationship with the Aboriginal peoples and more respectful of constitutional principles. She observed that the way Aboriginal and non-Aboriginal perspectives on Aboriginal rights have generally been reconciled is by negotiated treaties. In her own words:

> It is for the [A]boriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized [A]boriginal rights. This process—definition of the rights guaranteed by s.35(1) followed by negotiated settlements—is the means envisaged in *Sparrow*, as I perceive it, for reconciling [A]boriginal and non-[A]boriginal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which [A]boriginal and non-[A]boriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode [A]boriginal rights seriously.[73]

Then, in her most biting criticism of all, McLachlin J. characterized Chief Justice Lamer's approach to justification as unconstitutional:

> The Chief Justice's proposal comes down to this. In certain circumstances, [A]boriginals may be required to share their fishing rights with non-[A]boriginals in order to effect a reconciliation of [A]boriginal and non-[A]boriginal interests. In other words, the Crown may convey a portion of an [A]boriginal fishing right to others, not by treaty or with the consent of the [A]boriginal people, but by its own unilateral act ... . How, without amending the Constitution, can the Crown cut down the [A]boriginal right? The exercise of the rights guaranteed by s.35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from [A]boriginals to non-[A]boriginals, would be to diminish the substance of the right that s.35(1) of the *Constitution Act, 1982* guarantees to the [A]boriginal people. This no court can do.[74]

Applying her own approach to justification to the facts, she concluded that the infringement of Dorothy Van der Peet's Aboriginal right to sell fish for sustenance purposes had not been justified.

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72. *Ibid.* at para. 312.
73. *Ibid.* at para. 313.
74. *Ibid*. at para. 315.

IV ANALYSIS OF THESE DIVERGENT VIEWS OF RECONCILIATION

With all due respect, I find McLachlin J.'s critique of Chief Justice Lamer's conception of reconciliation and of his approach to justification to be right on the mark. As conceived by the Chief Justice, reconciliation does not involve resolution of conflicts between Aboriginal and non-Aboriginal interests by means of negotiations and mutually acceptable agreements. Instead, he used it primarily to justify unilateral governmental infringement of Aboriginal rights for the benefit of other Canadians. I think McLachlin J. correctly portrayed this as an unconstitutional attempt to achieve "social harmony" or "societal peace."[75] But if social harmony and peace depend on violation of the constitutional rights of the Aboriginal peoples, what does this say about Canadian society? Are non-Aboriginal Canadians really so mean-spirited? Would we accept violation of *our* constitutional rights because respect for them might threaten social harmony? Would we not seek to achieve social harmony and peace in ways that did not involve violation of fundamental rights?

If Lamer C.J. was right that respect for Aboriginal rights might undermine social harmony and peace, then surely what is needed is not more erosion of those rights, but greater public understanding of their historical and legal bases. Governments that share the Chief Justice's concern should be directing their energies in that direction, rather than seeking to justify further infringements of Aboriginal rights. Moreover, even if some Canadians might favour their own economic and regional interests over the constitutional rights of the Aboriginal peoples, one needs to be aware of the potential reactions of the Aboriginal peoples to further violation of their rights. Many of them are likely to view court-sanctioned infringement of their rights as an illegitimate erosion of the constitutional protection that they thought they had achieved in 1982.[76] While Aboriginal people to date have shown remarkable patience and restraint, future generations may not be so tolerant of continuing violation of their rights. The social harmony that Lamer C.J. sought may thus be put in jeopardy from the Aboriginal side, especially in parts of Canada where demographics favour the Aboriginal peoples. Surely, as McLachlin J. suggested, the chances of achieving social harmony and peace would be greater if solutions leading to bilateral resolution of Aboriginal and non-Aboriginal interests by treaty were negotiated rather than imposed.

It would be unfair, however, to expect certain segments of Canadian society to pay a greater price than other Canadians for protection of Aboriginal rights. In situations, therefore, where government failure to respect Aboriginal rights in the past has resulted in tension between those rights and the interests of a particular group, such as non-Aboriginal commercial fishers, it is appropriate for the government in question to compensate the members of that group for any real losses they might suffer as a consequence of respecting those rights today. So

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75. *Ibid.* at paras. 302, 316. See quotations from her judgment accompanying notes 63 and 66.
76. See the quotation from *Sparrow* in note 41.

where commercial fishing licences were issued to non-Aboriginal persons, for example, in the expectation that they would utilize fishery resources, and it turns out that in so doing they have been violating Aboriginal rights, the government that issued the licences should be prepared to compensate them.[77] The obvious reason for this is that the cost of respecting Aboriginal rights should be borne by all Canadians, rather than by particular segments of Canadian society whose interests must give way to those rights.

Quite apart from the disturbing and possibly false assumptions that underlay the apparent view of Lamer C.J. that reconciliation requires Aboriginal rights to yield in order to preserve social harmony and peace, as McLachlin J. pointed out there are also serious *constitutional* objections to governmental authority that permits the redistribution of the substance of Aboriginal rights to other Canadians. If constitutional entrenchment means anything, it must protect Aboriginal rights against government actions that are designed, not to achieve overriding public objectives like conservation and safety that are essential for the preservation of Aboriginal rights and the well-being of all Canadians, but to benefit the private interests of certain segments of Canadian society such as commercial fishers. A useful comparison can be drawn here between infringement of Aboriginal rights and expropriation of property. Although legislatures have the constitutional authority in Canada to expropriate non-Aboriginal property for the benefit of *private* persons,[78] they usually do not do so. Instead, expropriation statutes restrict governmental taking of property to *public* purposes, such as provision of roads and airports,[79] as it is generally regarded to be inappropriate for governments to take the property of some citizens for the private benefit of others.[80] And yet, as McLachlin J. pointed out, that is exactly what Chief Justice Lamer seems to have envisaged in *Gladstone* when he said that Aboriginal fishing rights might be infringed so that some of the resource could be apportioned among other users. This would be disturbing enough if Aboriginal rights were simply protected by the common law. But given their constitutional status, it is a startling revelation of Lamer C.J.'s

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77. This would be in addition to compensation payable to the Aboriginal people in question for violation of their fishing rights up to the time they were accorded respect: see generally Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing, 2001).

78. This is because in Canada, unlike in the United States, private property is not constitutionally protected: see Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's* Delgamuukw *Decision* (Vancouver: The Fraser Institute, 2000) 55 at 56-57 [hereinafter "Aboriginal Title"], reprinted in *Emerging Justice*, *supra* note 4, 292 at 293-95.

79. See generally Eric C. E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Toronto: Carswell, 1992).

80. Taxation for the purpose of creating a social safety net might be regarded as an exception to this, though it can be argued that the objective of providing a minimum standard of living to all members of Canadian society is itself a public purpose.

opinion of the value of those rights relative to the rights and interests of other Canadians.[81]

V FURTHER DEVELOPMENTS: *DELGAMUUKW* AND *MARSHALL*

While space does not permit detailed discussion of the jurisprudential impact of Chief Justice Lamer's conceptualization of reconciliation and his approach to justification in subsequent cases, brief mention should be made of the Supreme Court's decisions in the *Delgamuukw*[82] and *Marshall* cases.[83] In each of these cases, the Court not only affirmed these aspects of Lamer C.J.'s judgment in *Gladstone*, but also extended their application to other circumstances.

After defining Aboriginal title in *Delgamuukw* as an exclusive, proprietary "right to the land itself,"[84] and laying down guidelines for proof that diverged significantly from the "integral to the distinctive culture" test,[85] Chief Justice Lamer, who once again wrote the principal judgment,[86] turned to the test for justification of infringements of Aboriginal title. He reviewed this aspect of the *Sparrow* and *Gladstone* decisions, quoting passages from his judgment in the latter case where he had relied on the concept of reconciliation to justify limiting Aboriginal rights.[87] He repeated as well that valid legislative objectives for infringement include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-[A]boriginal groups."[88] Applying the same general approach to justification of infringements of Aboriginal title, he said this:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the *reconciliation* of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are

81. For further discussion, see "Vulnerability", *supra* note 36.
82. *Supra* note 6.
83. *Marshall [No. 1]*, *supra* note 3; *Marshall [No. 2]*, *supra* note 3.
84. *Delgamuukw*, *supra* note 6 at para. 138. See also paras. 113, 117 and 140 and discussion in "Aboriginal Title", *supra* note 78.
85. See "Aboriginal Rights", *supra* note 16 at 261-77 (*Emerging Justice*, *supra* note 4 at 66-81).
86. La Forest J., L'Heureux-Dubé J. concurring, arrived at the same result in a separate judgment. McLachlin J. concurred with Lamer C.J., adding that she was "also in substantial agreement with the comments of Justice La Forest": *Delgamuukw*, *supra* note 6 at para. 209.
87. *Ibid.* at paras. 161-64. Passages from *Gladstone* that he relied upon included those quoted in the text accompanying notes 30 and 33.
88. *Delgamuukw*, *ibid*. at para. 161, quoting from *Gladstone*, *supra* note 7 at para. 75.

> consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.[89]

Quite apart from the serious division-of-powers problems presented by this list of potentially valid legislative objectives,[90] one can see how the Chief Justice used the concept of reconciliation to envisage justification of almost any kind of infringement of Aboriginal title. Even "the conferral of fee simples for agriculture, and of leases and licences for forestry and mining" on Aboriginal title lands, was contemplated by him.[91] So despite its constitutional status, Aboriginal title has been rendered more vulnerable than common law real property interests,[92] all in the name of reconciliation.

The *Marshall* case involved treaty rather than Aboriginal rights. However, as both received the same constitutional recognition and affirmation by s.35(1), the Supreme Court has used the same test for justification of infringements.[93] Donald Marshall Jr., who had caught and sold 463 pounds of eels to support himself and his spouse, was charged with illegal taking and sale of fish. In *Marshall [No. 1]*, Binnie J., for a majority of the Court, held that Mr. Marshall, as a member of the Mi'kmaq Nation that had entered into a treaty with the Crown in 1760-1761, had a right to exchange fish for "necessaries."[94] Binnie J. characterized this treaty right in a modern-day context as a right to obtain a "moderate livelihood" from fishing, which he said, "includes such basics as 'food, clothing and housing, supplemented by a few amenities', but not the accumulation of wealth."[95] Significantly, this characterization came from McLachlin J.'s definition of the Aboriginal fishing right in *Gladstone*,[96] which was not accepted by the majority in that case.[97] But in *Marshall [No. 1]*, of

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89. *Delgamuukw*, *ibid*. at para. 165 [emphasis in original].
90. For detailed discussion of these problems, see Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431, reprinted in *Emerging Justice*, *supra* note 4, 249 and "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C. L. Rev. 159; Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185 and "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta. L. Rev. 458.
91. *Delgamuukw*, *supra* note 6 at para. 167. How Lamer C.J. was able to reconcile "the conferral of fee simples" with his own statement in *Van der Peet*, *supra* note 5 at para. 28, that "[s]ubsequent to s.35(1) [A]boriginal rights cannot be extinguished" is a good question, unless he thought that Aboriginal title and fee simple estates could co-exist.
92. For critical commentary, see *Defining Aboriginal*, *supra* note 6; "Vulnerability", *supra* note 36; "Aboriginal Title", *supra* note 78.
93. See *e.g. R.* v. *Badger*, [1996] 1 S.C.R. 771 at paras. 13-14 (Sopinka J.), 75-79, 96 (Cory J.); *R.* v. *Côté*, *supra* note 11 at para. 81 (Lamer C.J.); *R.* v. *Sundown*, [1999] 1 S.C.R. 393 at para. 38 (Cory J.). For critical commentary, see Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149.
94. *Marshall [No. 1]*, *supra* note 3 at para. 58.
95. *Ibid.* at para. 59, quoting from *Gladstone*, *supra* note 7 at para. 165 (McLachlin J.).
96. See notes 50-54 and accompanying text.
97. See *Marshall [No. 1]*, *supra* note 3 at para. 60.

course, the extent of the right depended on interpretation of *the treaty*, not on the test for identifying and defining *Aboriginal* rights. It is also noteworthy that McLachlin J., Gonthier J. concurring, dissented in *Marshall [No. 1]*. She held the view that the treaty right was not a general right to trade, but depended on trading posts known as 'truckhouses' or the system of licenced traders that replaced them. When those trading outlets ceased to exist in the 1780s, the treaty right disappeared as well.

The majority in *Marshall [No. 1]* found that the treaty right to derive a moderate livelihood from fishing was a general right that had not disappeared and that there had been a *prima facie* infringement of it by regulations made under the federal *Fisheries Act*.[98] As the Crown had made no attempt to justify the infringement, Mr. Marshall was acquitted. Because justification was not an issue, the Supreme Court did not address it in *Marshall [No. 1]*. Binnie J. simply observed that the treaty right is subject "to regulations that can be justified."[99]

Marshall [No. 2] arose from an application by an intervener in *Marshall [No. 1]*, the West Nova Fishermen's Coalition, for a rehearing on the federal government's regulatory authority over the east coast fisheries, a new trial on the matter of justificatory infringement of the treaty right and a stay of the *Marshall [No. 1]* judgment in the meantime. In dismissing the application the Supreme Court, in a unanimous by-the-Court judgment, elaborated on several aspects of its decision in *Marshall [No. 1]*. The issue of justification figured prominently in this "clarification" of its earlier decision. The Court pointed out that this was a separate issue that had not been dealt with because the Crown had chosen to lead no evidence on it.[100] The Court nonetheless emphasized that, as mentioned several times in *Marshall [No. 1]*, the treaty right was subject to justifiable infringement.

In its discussion of justifiable infringement in *Marshall [No. 2]*, the Court referred to *Gladstone* and quoted the passage in which "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-[A]boriginal groups," were accepted as valid legislative objectives, as "*such objectives are in the interest of all Canadians and, more importantly, the reconciliation of [A]boriginal societies with the rest of Canadian society may well depend on their successful attainment*."[101] The Court continued:

> This observation applies with particular force to a treaty right. The [A]*boriginal* right at issue in *Gladstone*, *supra*, was by definition exercised exclusively by

98. *Supra* note 9. See *Marshall [No. 1]*, *ibid.* at paras. 62-65.
99. *Marshall [No. 1]*, *ibid.* at para. 7. See also paras. 4, 56, 64 and 66. Binnie J. relied on *R.* v. *Badger*, *supra* note 93, where the Court first applied the justificatory test to treaty rights: see discussion in Rotman, *supra* note 93. See also *Marshall [No. 2]*, *supra* note 3 at para. 32.
100. *Marshall [No. 2]*, *ibid.* at paras. 2-3, 6, 14.
101. *Ibid.* at para. 41, quoting from *Gladstone*, *supra* note 7 at para. 75 [emphasis in original] (see text accompanying note 34 for the full quotation).

> [A]boriginal people prior to contact with Europeans. As stated, no such exclusivity ever attached to the *treaty* right at issue in this case. Although we note the acknowledgment of the appellant Marshall that "non-[A]boriginal regional/community dependencies ... may be taken into account in devising regulatory schemes," and the statements in *Gladstone*, *supra*, which support this view, the Court again emphasizes that the specifics of any particular regulatory regime were not and are not before us for decision.[102]

The reason the Court gave for the non-exclusivity of the treaty right was that non-Aboriginal persons were participating in the fishery at the time the treaty was entered into.[103] Nonetheless, since the enactment of s.35(1) in 1982, the treaty right has enjoyed constitutional protection and so is entitled to priority.[104]

The Court's reliance on the passage from *Gladstone* quoted in the preceding paragraph reveals that reconciliation is the underlying rationale for allocation of fishery resources among Aboriginal and non-Aboriginal fishers, even if that involves infringement of a treaty right to fish. What is odd about this is that allocation was viewed as potentially justifiable in *Gladstone* because the fishing right in that case had no internal limit, and so might be an exclusive right if it were accorded complete priority, as the right to fish for food, societal and ceremonial purposes had been in *Sparrow*.[105] Given that the majority in *Marshall [No. 1]* held the treaty right to fish to be limited to obtaining a moderate livelihood,[106] it did have an internal limit. Also, like the fishing right in *Sparrow* it was not exclusive. So the priority accorded to the treaty right in the *Marshall* case should have been the priority that was accorded to the fishing right in *Sparrow*, rather than the more limited priority accorded to the right in *Gladstone*. One has to wonder whether the Supreme Court was spooked by the sometimes violent reaction to *Marshall [No. 1]* in the Maritime Provinces[107] and so made concessions to elements of the non-Aboriginal populace. Moreover, with respect it seems inappropriate for the Court to have addressed such an important and substantive issue in *Marshall [No. 2]* on an application for a rehearing, especially when the matter was not even before the Court in *Marshall [No. 1]*.[108]

We have seen that the disagreement between Chief Justice Lamer and Justice McLachlin in *Van der Peet* and *Gladstone* related both to the scope of the

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102. *Marshall [No. 2]*, *ibid.* at para. 41 [emphasis in original].
103. *Ibid.* at para. 38.
104. *Ibid.* at paras. 6 and 45. While the Court did not refer directly to the priority of the fishing right in *Marshall [No. 2]*, we have seen that even *Gladstone* accorded limited priority to Aboriginal fishing rights: see notes 30-31 and accompanying text.
105. See notes 27-31 and accompanying text.
106. See notes 94-95 and accompanying text.
107. See Ken S. Coates, *The Marshall Decision and Native Rights* (Montreal & Kingston: McGill-Queen's University Press, 2000); Leonard I. Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in *R.* v. *Marshall*" (2000) 63 Sask. L. Rev. 617.
108. See Bruce H. Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*" (1999/2000 Access to Justice Lecture, Faculty of Law, University of Windsor, March 2000) [unpublished].

fishing rights in question and to justification of their infringement. While Lamer C.J. was willing to accept a generous definition of the commercial right in *Gladstone*, he exposed that right to a broad governmental power of infringement. McLachlin J. took a more restrictive approach to defining the rights in both *Van der Peet* and *Gladstone*, limiting them to sustenance, which she equated with a moderate livelihood. But she would not envisage infringement of those rights for purposes other than ensuring the conservation of the resource and the responsible exercise of the Aboriginal rights. She regarded measures that would diminish the rights themselves by allocating part of the resource to non-Aboriginal users as unconstitutional and hence unjustifiable.

In *Marshall [No. 1]*, the majority interpreted the treaty right to fish as a right to derive a moderate livelihood from fishing, just as McLachlin J. had defined the Aboriginal rights in *Van der Peet* and *Gladstone*. And then in *Marshall [No. 2]*, the Court said that the *Gladstone* test for justificatory infringement applies to this more limited right. While the limited definition of the right arose from the Court's interpretation of the treaty, the broad power of infringement that the Court endorsed in *Marshall [No. 2]* again relates to reconciliation. It seems that even a constitutional right to obtain a moderate livelihood from fishing can be infringed, not just to ensure that the resource is conserved and responsibly used, but also to allocate part of it to non-Aboriginal fishers in the interests of social harmony and peace. Regrettably, this appears to be the end result of Chief Justice Lamer's conception of reconciliation.[109]

VI CONCLUSION

Two months after the decision in *Marshall [No. 2]* was handed down, Beverley McLachlin replaced Antonio Lamer as the Chief Justice of Canada. We have seen that her views on reconciliation differ significantly from those of the former Chief Justice. While she has generally taken a more restrictive approach than her predecessor to the definition of Aboriginal and treaty rights, in her dissent in *Van der Peet* she was adamant that the way to reconciliation is through the consensual treaty process—it will not be achieved by unilateral diminution of the rights of the Aboriginal peoples. After *Van der Peet*, however, McLachlin J. (as she still was) concurred with Lamer C.J.'s decision in *Delgamuukw* and participated in the by-the-Court decision in *Marshall [No. 2]*, both of which endorsed—and even extended—the approach to justifiable infringement articulated by Lamer C.J. in *Gladstone*. Does this mean that she has given in on this matter and acquiesced to his approach? Or is she biding her time and waiting for an appropriate case to reopen the issue?

Since becoming Chief Justice, McLachlin has written only two judgments in cases involving Aboriginal issues, neither of which cast further light on this

109. Lamer C.J. concurred with Binnie J. in *Marshall [No. 1]* and participated in the by-the-Court judgment in *Marshall [No. 2]*.

question. In *Musqueam Indian Band* v. *Glass*,[110] involving the valuation of leased reserve land, she dissented in part, but as reconciliation was not an issue, the case provides no indication of how she might deal with it in the future. The other case, *Mitchell* v. *M.N.R.*,[111] involved a claim to an Aboriginal right to bring goods from the United States into Canada for the purposes of trade with other First Nations without paying duty. Writing the principal judgment, McLachlin C.J. defined the right narrowly by limiting it geographically to north-south trade across the St. Lawrence River, thereby undermining the evidentiary basis for the right. This is consistent with her tendency to take a more restrictive approach to the definition of Aboriginal rights than Chief Justice Lamer had done.[112] Given, however, her finding that the claimed right to trade had not been established, she did not have to deal with justifiable infringement, over which she and Lamer C.J. were so at odds in the context of reconciliation. She therefore did not refer to reconciliation in *Mitchell*, other than to reiterate Lamer C.J.'s general view that "s.35(1) is aimed at reconciling the prior occupation of North America by [A]boriginal societies with the Crown's assertion of sovereignty."[113]

It might be thought that the Supreme Court would be deterred by the doctrine of *stare decisis* from reopening the issue of the meaning of reconciliation in the context of justifiable infringement. Significantly, however, in none of the Aboriginal cases decided so far by the Court has infringement of an Aboriginal or treaty right actually been held to be justified; instead, the Court has either found no justification or sent the case back to trial to determine the matter. Moreover, the Court clearly is not bound by its earlier decisions, and although it has seldom explicitly acknowledged this fact, it has occasionally in effect overruled its own precedents when it concluded that they were no longer appropriate expressions of the law.[114] More commonly, the Court modifies the law by distinguishing or limiting the scope of its earlier decisions.[115] This is what Lamer C.J. said he was doing in *Gladstone* when he modified the test for justifiable infringement that had been laid down by Dickson C.J. and La Forest J. in *Sparrow*.[116] We have seen, however, that McLachlin J. (as she then was) disagreed. In her opinion, the test articulated by Lamer C.J. in *Gladstone* was inconsistent with *Sparrow*.[117] Moreover, she thought it was also unconstitutional because it allowed the reallocation of the substance of an Aboriginal right from

110. [2000] 2 S.C.R. 633.
111. *Supra* note 16.
112. See note 38 and accompanying text. See also *Marshall [No. 1]*, *supra* note 3, where, dissenting, she interpreted a treaty right to fish more narrowly than the majority.
113. *Mitchell* v. *M.N.R.*, *supra* note 16 at para. 12. See also *per* Binnie J., concurring in result, at paras. 74, 76, 80, 123, 129, 133, 155, 164, 167.
114. See Peter W. Hogg, *Constitutional Law of Canada*, Student ed. (Toronto: Carswell, 2002) at 8.7.
115. For use of these methods by English courts, see generally Rupert Cross, *Precedent in English Law*, 3d ed. (Oxford: Clarendon Press, 1977).
116. See notes 27-36 and accompanying text.
117. See text accompanying notes 63-67. For an illuminating article that explains and criticizes this change in the law, see Christie, *supra* note 4.

Aboriginal to non-Aboriginal people, which she said, "no court can do."[118] Given the evident strength of her views on this matter and the constitutional nature of her disagreement with Chief Justice Lamer,[119] she may well be inclined to try to move the Court back from *Gladstone* to the more appropriate position that was unanimously expressed by the Court in *Sparrow*.

For the present, we will have to wait for the McLachlin Court to deal with another case involving justifiable infringement. But regardless of whether the current Chief Justice re-examines the issue, the weaknesses inherent in Lamer C.J.'s understanding of reconciliation and approach to justification remain. Subjecting Aboriginal and treaty rights to non-consensual redistribution of the substance of those rights to other Canadians for purposes like the pursuit of economic and regional fairness makes a mockery of the constitutional protection that those rights are supposed to enjoy.

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118. *Van der Peet*, *supra* note 5 at para. 315 (The passage where these words appear is quoted at length in the text accompanying note 74.).

119. In the recent decision of the High Court of Australia in *Western Australia* v. *Ward*, [2002] H.C.A. 28, Kirby J., concurring in result, referred at para. 594 to the duty of a dissenting judge to accept the opinion of the majority, until overturned by legislation or a subsequent majority of the Court itself, "in matters of statute and common law." However, he went on to say at para. 598 that a dissenting judge may adhere to his or her opinion "where the source of the dissent is the higher law of the Constitution."