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Pre-European Economic Activity

Ongoing injustice of poverty for Indigenous consequence of Van der Peet | Angelique EagleWoman

By **Angelique EagleWoman**

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(November 20, 2019, 10:44 AM EST) -- According to the Canadian Poverty Institute, Indigenous peoples are experiencing the highest levels of poverty with one in every four persons in poverty and 40 per cent of Indigenous children living in poverty. As Indigenous leaders attempt to assert self-government and engage in economic development, systemic barriers undermine their efforts.

While s. 35(1) of the *Constitution Act, 1982* was intended to protect existing Aboriginal rights, the provision has been so narrowly interpreted as to deprive Aboriginal peoples of self-government and economic rights. Therefore, Indigenous communities are unable to address the dire poverty conditions being experienced post-contact with Europeans.

In 1996, the Supreme Court of Canada handed down the decision in *R. v. Dorothy Marie Van der Peet* [1996] 2 S.C.R. 507 denying a Sto:lo woman the Aboriginal right to sell 10 salmon as not within the "existing Aboriginal rights" of s. 35(1) of the *Constitution Act, 1982*. For Aboriginal peoples, this ruling is shocking at best. The decision setting forth the so-called "*Van der Peet* test" and its progeny have proven to be a sentence of poverty and lack of economic control for Aboriginal peoples and this injustice should be corrected.

In the majority opinion, an Aboriginal right to be "existing" must "be an element of a practice, custom or tradition integral to the distinctive culture" of the peoples asserting the right. Next, to determine whether the activity is integral the court must find the activity to be "of central significance to the aboriginal society — one of the things which made the culture of the society distinctive."

Continuing this line of reasoning, "The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society … [and such rights] are not to be determined on a general basis."

To clarify, the court also opined that "[a] practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences."

Examining this rationale, the court is stating that the judiciary is in a position to conclusively decide what pre-contact European activities Aboriginal peoples engaged in. Further, this opinion requires more than simply engaging in an activity, but also an external judicial forum evaluating how "integral" the activity is to contribute to distinction of an Indigenous society pre-contact.

It should be apparent that this is a problematic evaluative test where an external European-based court is determining centrality of activities occurring pre-contact for Aboriginal peoples. Ironically, the *Van der Peet* case dealt with the primary activity engaged in between Aboriginal peoples and Europeans setting up trading posts in North America — selling foodstuffs and other Aboriginal economic trading goods. Further, the idea that an external judicial forum also has the ability to deny

an Aboriginal existing right by finding that it was influenced by Europeans who engaged in the activity with Aboriginal societies is simply illogical.

The result of this case is far reaching and subjugates Aboriginal peoples to denial of the purpose for enactment of s. 35(1) of the *Constitution Act, 1982*. The primary purpose was to enshrine protection of Aboriginal rights and to decolonize policies and laws going forward in line with recognition of collective human, governmental and treaty rights of Aboriginal peoples. When the right in question involves economics, the court has applied the *Van der Peet* test to negate, rather than to protect those rights.

Shortly after delivering the *Van der Peet* decision, the court applied its new test on "existing" Aboriginal rights in the *R. v. Pamajewon* [1996] 2 S.C.R. 821 decision denying the regulation and commercial operation of high stakes bingo in gambling establishments on the Shawanaga First Nation Reserve and the Eagle Lake First Nation Reserve.

Both band councils had enacted laws authorizing and regulating their businesses and asserted the inherent right of self-government to do so. Further, the band councils both asserted as Anishnabe peoples they had a long history of engaging in gambling activities and sporting events that were conducted pre-contact with Europeans.

Rather, than analyze from the standpoint of a continuous activity of gaming for Aboriginal peoples, the court narrowed the focus to only consider as "the most accurate characterization of the appellants' claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands."

The court then drew upon both opinions from the lower court judges of European heritage to conclude that commercial gaming was not central to the Anishnabe cultures or traditions and that high stakes bingo in particular was not part of an existing Aboriginal activity recognized under s. 35(1). This type of cultural dismantling by external judges reeks of stereotyping, ethnocentric assumptions and false narratives.

When Europeans entered the Western Hemisphere landscape, they engaged in economic interactions with Aboriginal peoples that included trading in foodstuffs, timber and engaging in gaming, such as games of chance, games of skill and betting on horse races or other activities. Three books on point include: *Games of the North American Indians* (Lincoln: University of Nebraska Press 1992, originally published in 1907) by Stewart Cullin; *Indian Games and Dances with Native Songs* (Lincoln: University of Nebraska Press 1994) by Alice Fletcher and *Gambler Way: Indian Gaming in Mythology, History, and Archaeology in North America* (Boulder: Johnson Books 1996) by Kathryn Gabriel.

In the lands of the Anishnabe to the south separated by the Canada-U.S. border, commercial gaming is alive and well on Indigenous lands regulated by tribal governments as a form of self-government and a continuance of societal activities from time immemorial.

This is part one of a two-part series.

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