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Pre-contact Industry

More economic injustice for Indigenous people as result of Van der Peet | Angelique EagleWoman

By **Angelique EagleWoman**

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(November 28, 2019, 8:53 AM EST) -- Author's note: In the first part of this two-part series, I discussed how courts have exacerbated Indigenous poverty by falsely redefining pre-contact economic activity and thereby limiting economic opportunities for Indigenous peoples. It is important to note that all of the decisions discussed involved criminal charges brought against Indigenous peoples engaged in commercial activity which was the primary point of contact with Europeans who entered North America.

With the decisions in *R. v. Dorothy Marie Van der Peet* [1996] 2 S.C.R. 507 and *R. v. Pamajewon* [1996] 2 S.C.R. 821, the Supreme Court of Canada engaged in narrow tests to determine what the "existing rights" of Aboriginal peoples were to fit within s. 35(1) of the *Constitution Act, 1982*. The first case denied a Sto:lo woman the right to sell salmon and the second case denied the self-government and economic rights of the Anishnabe to engage in government-regulated gaming.

Further limiting the economic rights of Indigenous peoples, the next case to be discussed involved interpretation of treaty language to severely cap economic activity. In *R. v. Marshall* [1999] 3 S.C.R. 456, the Supreme Court of Canada construed an Aboriginal right to sell eels by a Mi'kmaq citizen focusing on documents exchanged with British representatives and the Aboriginal leadership from the mid-1700s.

The document being reviewed included a request for a "truckhouse" or trading post to be established to expedite commerce with the British. Rather than uphold the economic rights of the Aboriginal peoples in the negotiations, the court determined that the purpose of the document was to "trade for necessaries" rather than a general right of commerce. Next the court further funnelled this as equivalent to a "moderate livelihood."

This type of revisionist interpretation whittling down the trading relationships that formed the basic contact between Europeans and the Indigenous peoples of North America is economic discrimination. There is no reasoned basis for denying Indigenous peoples the ability to gain wealth and an abundant quality of living based on Indigenous resources and workmanship exercised since time immemorial.

A comparative perspective is offered in the U.S. Supreme Court case *U.S. v. Winans* 198 U.S. 371, 381(1905) where the court stated: "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted." Thus, any right not waived through express wording in a treaty by an Aboriginal nation continues to exist as a right of self-government. By entering a treaty, a nation does not lose its self-government status. Only nations enter into treaties together.

The whole rationale that Aboriginal peoples must trace their rights to a treaty document is a no-win situation as no government enters a negotiation to spell out every one of its reserved powers as a government.

In another example of applying the *Van der Peet* test, the court decided in *R. v. Sappier; R. v. Gray*

[2006] 2 S.C.R. 686 that harvesting timber only for personal use on Crown-owned lands did fit within the Aboriginal and treaty rights of the Maliseet and Mi'kmaq men criminally charged and thus, the charges were dismissed.

The Aboriginal men presented evidence on the importance and use of wood to their cultures as a resource. The court found this "unusual because the jurisprudence of this Court establishes the central importance of the actual practice in founding a claim for an aboriginal right."

Further, the court set out the narrow lens for upholding s. 35(1) rights as follows. "Aboriginal rights are founded upon practices, customs or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. They are not generally founded upon the importance of a particular resource. In fact, an aboriginal right cannot be characterized as a right to a particular resource because to do so would to treat it as akin to a common law property right. In characterizing aboriginal rights as *sui generis*, this Court has rejected the application of traditional common law property concepts to such rights."

Thus, the common sense idea that Aboriginal peoples harvested, used and sold timber and wood products was not upheld by the court or protected as property rights under existing Aboriginal rights.

The court refers to the rights as "sui generis" meaning unlike other rights. This is exactly the problem. By labelling Aboriginal rights as different than other legal rights, the court can freely develop and apply its narrow and limiting tests that completely nullify the basic economic rights enjoyed by Aboriginal peoples pre-contact with Europeans and in trading relationships with Europeans in the land that became Canada.

Self-government existed as was evidenced in the numerous treaties, agreements and councils held with European representatives and officials at the time of contact.

The trading relationship was the basic point of contact with Europeans. It is unjust for the judiciary to negate the self-government and economic rights of the Indigenous peoples of Canada through these types of discriminatory rulings.

On the one hand, the *Van der Peet* test interpreting s. 35(1) of the *Constitution Act, 1982* has required a record through a European lens to uphold self-government rights. On the other hand, the court has interpreted treaty documents as eliminating any self-government rights not expressly stated in the document. Both of these lines of reasoning are unjust and negate the self-government and economic rights of Aboriginal peoples existing pre-contact and during contact with Europeans.

To address the widespread and persistent poverty experienced by Indigenous peoples, Aboriginal nations must be able to freely assert their self-government and economic rights once more as existed pre-contact with Europeans. Aboriginal peoples are not asking for a handout, rather a fair shake to freely do business and provide for their communities as they have since time immemorial.

This is part two of a two-part series. Part one: Ongoing injustice of poverty for Indigenous consequence of Van der Peet.

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