The Successes and Shortcomings of Aboriginal Groups in the Courts: 
The Need for Negotiation over Litigation

Introduction

Aboriginal groups throughout Canada have certainly succeeded and failed in the pursuit of their constitutional rights. These include land rights associated with commercial fishing, land claims, democratic rights, self-determination, self-government, and the general interpretation of section 35 in Canada’s Constitution Act of 1982, which affects the outcome of many Aboriginal rights claims. The Supreme Court of Canada’s interpretation of section 35 over many years has gradually progressed to positively benefit Aboriginal groups and improve the scope of Aboriginal rights (Dalton, 2006, p. 11). In this research paper, I will discuss several ways in which Aboriginal groups have succeeded in litigation, with particular focus on R. v. Sparrow, R. v. Kapp, and other cases showing the gradual shift in the interpretation of section 35. While these cases are certainly successful ones, the Court continues to reject the Aboriginal right to self-determination. Importantly, the judiciary accepts the doctrine of reconciliation, which is essential to Aboriginal success in the courts.

On the other hand, Aboriginal groups have suffered and failed at the hands of the Court as well. I will highlight several crucial losses in the courts, such as the Van der Peet trilogy and R. v. Delgamuukw (Macklem, 2001, p. 95). Overall, have Aboriginal groups been more successful in the courts or do their setbacks outweigh their successes? If the former is true, are these victories merely lip service or are they effective? While I believe there is both success and failure in the Aboriginal movement, and that there are clear examples of both, in this research paper I will argue that their losses outweigh their successes in court. Much more progress can still be made in the pursuit of Aboriginal rights.
This leads to the question of whether Aboriginal rights claims are best left to the judiciary or Canadian government. The federal government has certainly made the case that it is more effective in addressing Aboriginal rights claims than the judiciary. This question will be addressed at the conclusion of the paper, but I essentially argue that Aboriginal rights claims are best left to negotiations with the federal and provincial government. This argument is due to various reasons given by Professor Jennifer Dalton and Patrick Monahan. Before I turn to examples of the Aboriginal movement’s success and failure in the courts, the origins of the Aboriginal movement will be briefly discussed. They help to explain why Aboriginal groups have confronted the judiciary (and government) and demanded their rights.

The Origins of the Aboriginal Rights Movement

The origins of the Aboriginal rights movement began with land claims and treaty disputes between native groups and federal and provincial governments. As Christopher Alcantara explains, the federal government was negotiating land treaties with Aboriginal groups until 1921, when the federal government discontinued treaty negotiations (Alcantara, 2007, p. 343). Then the federal government attempted to assimilate Aboriginal groups into mainstream society, prompting Aboriginal groups to politically and legally mobilize themselves to protect their lands and rights in the 1960s (Alcantara, 2007, p. 344). The shift towards increased recognition of Aboriginal rights began in 1973, when the Supreme Court in *R. v. Calder* formally recognized Aboriginal title to land (Dalton, 2007, p. 283; *R. v. Calder*, 1973, *R. v. Sparrow*, 1990). This decision also prompted the federal government to recommence the recognition of Aboriginal treaty rights and introduce a formal land claims process. However, recognition of specific Aboriginal rights, such as fishing, hunting, and others, had not been achieved until Aboriginal
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groups confronted the federal and provincial governments in litigation (Dalton, 2007, p. 289). This led to a flurry of cases reaching the Supreme Court of Canada, many of which were clear victories for specific groups in different contexts, but also achievements for the Aboriginal movement as a whole.

Aboriginal Success at the Supreme Court of Canada and Lower Courts

*Sparrow and the Doctrine of Reconciliation*

Ronald Edward Sparrow was a member of the Musqueam Nation charged for fishing with a net that was larger than the length allowed under the Musqueams’ food fishing license. Sparrow contended that he should have been permitted to have a larger net and the limits placed on the net’s size were unconstitutional due to his right to fish, which existed under section 35 of the Constitution (R. v. Sparrow, 1990). Sparrow also argued that he and his Musqueam Nation had the right to regulate fishing resources. By extension this is a claim to self-determination, which is the right to choose one’s own lifestyle by adhering to one’s norms, law, and culture (Dalton, 2007), and more specifically a claim to self-government, which is the right of an individual or group to govern themselves. The trial judge rejected the right to self-determination and self-government, however, the Supreme Court did not focus on the applicability of those rights. Although they unquestionably maintained Crown sovereignty, they did not discuss Aboriginal self-government because they did not want to consider it in that particular context and would perhaps leave the issue of self-determination for a future case (McNeil, 2007, p. 7). They considered the question of whether the net restriction violated Sparrow’s rights under section 35, and whether fishing was inherently part of that section. The Court’s decision would forever
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change the scope of section 35 and provide the future framework for protecting Aboriginal rights.

The Court unanimously decided that there was an inherent constitutional right to fish under section 35. In order to reach this conclusion they interpreted specific words in that section. For example, the word “existing” in reference to existing Aboriginal and treaty rights was interpreted as rights being inextinguishable rather than applying exclusively to a specific time in history (R. v. Sparrow, 1990). In other words, Aboriginal and treaty rights were not limited to the time period in which the Constitution Act of 1982 was passed, but existed much before then. The Crown could not provide evidence showing that the right to fish was terminated before the patriation of the Constitution because there were not any laws explicitly prohibiting that right (R. v. Sparrow, 1990). Previous historical laws and regulations under the Fisheries Act only served to regulate their fishing rights, not extinguish them. The Court held that the words “recognized and affirmed” meant that the government had a “fiduciary relationship” with Aboriginal peoples, which required the sovereign power to exercise restraint when potentially interfering with Aboriginal rights (R v. Sparrow, 1990; Dalton, 2009, p. 16). Although the government has a fiduciary duty to Aboriginal groups, the Court recognizes that Aboriginal rights are not absolute. They can be limited but justification of infringement is required. Therefore, the Court presents the Sparrow test, a set of requirements that must be fulfilled before the government can infringe Aboriginal rights. Firstly, a valid legislative objective must accompany the infringement or limitation. Whenever a policy change is proposed, the measure of legislative impact on Aboriginal rights must be evaluated and critiqued (R. v. Sparrow, 1990; Dalton, 2009, p. 15). Similar to the Oakes test, there must be minimal impairment of rights, compensation must be
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provided where appropriate, and Aboriginal groups must be consulted or at the least informed where appropriate. These are the criteria of the Sparrow test.

Overall, the Sparrow case does not promise immunity from governmental interference but places a strong responsibility and obligation on the government to consider Aboriginal needs. Although there could be potential issues relating to the decision’s true effectiveness, many view Sparrow as an important victory for the assertion and improvement of Aboriginal rights. Not only does it expand the scope of section 35, but it also promotes the doctrine of reconciliation between Aboriginal groups and the government (Kulchyski, 1994, p. 234; Walters, 2008, p. 166). As Mark Walters suggests, the doctrine of reconciliation is a prominent aspect of legality that is often overlooked by Western legal systems. The type of reconciliation that Walters speaks about in this context is in a relationship between two or more parties, where a harmonious relationship is established by ignoring past differences (Walters, 2008, p. 168). Reconciliation includes having a genuine desire to compromise and reconcile with one another. R. v. Sparrow is the first instance in which the Court adopts this attitude and encourages the government and Aboriginal groups to do the same. The judiciary’s acknowledgement of reconciliation has proven to be essential in affirming Aboriginal rights in the courts, and this case is an irrefutable example of success experienced by the Aboriginal rights movement.

Thus far I have discussed Calder and Sparrow as examples of Aboriginal success in the courts. These cases have recognized Aboriginal title to land, the right to fish as part of section 35, and the doctrine of reconciliation that requires the government to act in good faith and be part of a genuine fiduciary relationship. Furthermore, I argue that there are additional court cases that
have benefitted Aboriginal groups in various ways. I now turn to the cases of *Kapp* and *Corbiere*, which are seen as victories for the Aboriginal rights movement.

**Kapp and Corbiere: Using Section 15 to Argue for Communal Fishing and Band Voting Rights**

According to the *Aboriginal Communal Fishing Licences Regulations* in the federal *Fisheries Act*, Aboriginal bands were permitted to fish one day before the regular fishing season began on the Fraser River. John Kapp and other non-Aboriginal fishermen protested against this regulation by fishing before the season began, and were charged with fishing without a license. Kapp and others claimed that this distinction violated their equality rights in section 15 (1) (*R. v. Kapp*, 2008). They claimed that the licensing regulations unfairly favoured Aboriginal groups and were discriminatory on the grounds of race. The Supreme Court dismissed the appeal after it was rejected by the trial judge and appellate court, seeking to clarify the *Law* test and reaffirm the importance of the *Andrews* test, both of which provide justification for violating equality rights under section 15.

The Supreme Court focuses its analysis on the significance of section 15 and its goals. The purpose of section 15 (1) was to protect discrimination against minorities and other disadvantaged groups (*R. v. Kapp*, 2009). However, this implies formal equality, which is not sufficient to guarantee freedom from discrimination and that is why section 15 (2) was introduced. The Court continues to value substantive equality and stresses the importance of section 15 (2). Section 15 (2) gives government the right to implement affirmative action programs in order to protect minorities beyond formal equality, which does not always promise true and complete equality. The licences granted to the Aboriginal bands are protected by section
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15 (2) because they qualify as a “law, program, or activity” (Canadian Charter of Rights and Freedoms). They meet the criteria to qualify; they have a remedial purpose and must target a visible minority or disadvantaged group (R. v. Kapp, 2009; R. v. Andrews, 1990). It is important to note that the program does not require remedial effects. It only requires the genuine goal of preventing discrimination against minorities. The appellants also claim that most of the Aboriginal fishermen and the groups that they are part of have not experienced discrimination, but the Court states that this possibility is irrelevant to the goals of the fishing regulations (R. v. Kapp, 2009).

In essence, the ameliorative factor of the fishing regulations is the sole factor in determining whether the fishing regulations violate Kapp’s section 15 (1) rights. It is no longer necessary to conduct a section 15 analysis, also known as the Law test, to consider constitutionality. This decision lowers the standard for justifying government-sponsored affirmative action programs because an affirmative action program need only have a remedial purpose and not the complete set of criteria provided by the Law test. On the other hand, Regardless, it could be argued that this is a legal victory for Aboriginals, who are recognized as a disadvantaged group that are protected by section 15 (2) when the government decides to implement policy initiatives in the name of substantive equality. The Court’s expansive interpretation of section 15 (2) has been instrumental in improving Aboriginal rights.

While the Court expands the scope of section 15 (2) in the Kapp case, it expands the use of section 15 (1) in Corbiere v. Canada. John Corbiere and other members of the Batchewana Band claim that section 77 of the Indian Act violated their section 15 (1) equality rights. Section 77 only allows band members who are “ordinarily resident on the reserve” to vote in their
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elections. This is problematic considering that more than one third of registered band members live on the reserve (Corbiere v. Canada, 1999). Therefore, does the exclusion of band members who do not live on the reserve violate section 15 (1) of the Canadian Charter of Rights and Freedoms?

All of the justices of the Supreme Court found that section 77 violated Corbiere and non-resident band members’ equality rights. The infringement was unjustifiable in a free and democratic society (Corbiere v. Canada, 1999). The Court acknowledged that special attention must be paid to aboriginal rights when considering whether equality rights have been compromised. This is the first time that the Law test was applied after its initial creation and application in Law v. Canada. The Court found that section 77 gave differential treatment between the claimant and others “on the basis of one or more personal characteristics” (Law v. Canada, 1999). In this case the comparator group consisted of on-reserve band members, and it was clear that the law discriminated based on one characteristic, namely residency. There is a clear distinction being made, which gives band members an unfair choice between residency and political rights. The majority declared the legislation to be invalid for 18 months pending the federal government’s revision of the Indian Act. Although all of the judges arrived at the same conclusion, the minority’s analysis is particularly significant and noteworthy as it considers off-reserve Aboriginal groups’ human dignity.

The dissent, led by Justice L’Heureux-Dube, agreed that there was differential treatment and that aboriginal-residency was an analogous ground in section 15 (1) (Corbiere v. Canada, 1999). She considers whether section 77 violates Corbiere’s human dignity as set in Law v. Canada. Human dignity is violated when groups are devalued and excluded, and this is the case
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with section 77 and its exclusion of off-reserve band members. L’Heureux-Dube acknowledges that the common stereotype is that Aboriginal peoples belong in a rural setting or reserve, resulting in discrimination in urban environments. In fact, the dissent refers to the 1996 Report of the Royal Commission on Aboriginal Peoples to corroborate this finding. The dissent states that Aboriginals experience racism, culture shock, exclusion, and severe identity issues (*Corbiere v. Canada*, 1999). After acknowledging the government’s attempts at assimilation and laws aimed at destroying Indian status, as well as the drastic reduction of the Batchewana band’s land that resulted in most of its member living off-reserve, the dissent concluded that section 77 unreasonably violated section 15 (1) and reaffirmed stereotypes that off-reserve band members were less Aboriginal than those living on the reserve (*Corbiere v. Canada*, 1999).

Although it is seemingly a minor issue, this is a significant victory for the Aboriginal people and an affirmation of their political rights. As shown, both section 35 and 15 have shown to benefit Aboriginal groups in different ways. The Court acknowledged racism experienced by Aboriginal peoples, identity issues, and the exclusion of Batchewana band members who are compelled to decide between political rights and place of residence (*Corbiere v. Canada*, 1999). However, the Court’s recognition of historical and current suffering is not enough to improve Aboriginal rights, although it did affirm their political rights in this case. Section 77 of the *Indian Act* remains unchanged to this day, which continues to prevent off-reserve Aboriginals from voting in their band elections (Young, 2009).

The Gladue and Eskasoni Courts: Examples of Tangible Results Coming from Supreme Court Decisions
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So far I have discussed some examples of success by Aboriginal groups in the courts. There are many more examples resulting in concrete results, such as the creation of the Gladue Court as a result of *R. v. Gladue*. In *Gladue*, the Supreme Court interpreted section 718.2 (e) of the *Criminal Code* in the context of sentencing for Aboriginal offenders. When considering a sentence for an Aboriginal offender the judge or court must consider every option other than prison. Courts must also pay special regard to each Aboriginal person’s past and current circumstances. This decision is not merely lip service to Aboriginal groups, but a sincere effort by the judiciary to combat the disproportionate amount of Aboriginals in Canadian prisons (*R. v. Gladue*, 1999). The Aboriginal Legal Services of Toronto, headed by Professor Johnathan Rudin, and many other legal aid organizations, intervene at the Supreme Court, advocate for Aboriginal rights, and provide legal services to Aboriginal offenders at the Gladue courts, which are located across Ontario (Aboriginal Legal Services of Toronto web page). The Gladue Court is an example of something useful coming from the Supreme Court’s decision.

Similarly, Jane L. McMillan examines the results of the creation of the Eskasoni Court in Nova Scotia. The Eskasoni court was created to ease the divide between Aboriginal (Mik’maq) customs and colonial tradition. McMillan examines the legal consciousness of the Mi’kmaq people, which could be defined as the extent to which one, or a group, is aware of the law and its implications. According to McMillan, legal consciousness “reflects the ideas and concerns, the contests and contradictions, produced within and between Mi’kmaq communities and mainstream society” (McMillan, 2011, p. 173). Although it reinforces Crown sovereignty and domination, the Eskasoni Court has positive intentions. It aims to be informal, which eases its intimidating process, and is extremely accessible for the Mik’maq people (McMillan, 2011, p.
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175). Before the Don Marshall Inquiry in which this court was recommended, “there were no restorative justice measures, no Mi’kmaq lawyers or legal professionals, no Mi’kmaq police officers, and certainly no Aboriginal justice programs” (McMillan, 2011, p. 175). There was no efficient way for this native population to solve their issues effectively without the strong prospect of prison and harsh sentences. The Eskasoni court has improved the Mi’kmaq peoples’ legal consciousness by attempting to reverse the alienation that colonization creates and improving access to justice.

As mentioned, there are minor problems with all of these examples of success. Generally, the cases of Kapp, Corbiere, Sparrow, and Calder are steps in the right direction. The Gladue and Eskasoni courts are tangible results of the Supreme Court’s advice in R. v. Gladue and the Royal Commission on the Donald Marshall, Jr., Prosecution (McMillan, 2011, p.171). I will now turn to well-known examples of the Aboriginal movement’s shortcomings experienced in the courts The Van der Peet trilogy and the Delgamuukw case will be discussed, specifically the problematic notion of Aboriginality in the former case and further questions and recommendations that Monahan and Dalton propose in the Delgamuukw case.

The Van der Peet Trilogy: Issues with the Supreme Court’s Definition of Aboriginality

The Van der Peet trilogy consists of R. v. Van der Peet, R. v. NTC Smokehouse Limited, and R. v. Gladstone. Each case deals with the constitutional question of whether commercial fishing without a license is an Aboriginal right and within the scope of section 35 (Borrows, 2002, pg. 59). Each appellant is charged for exchanging fish for money without a commercial fishing license. In the interest of avoiding redundancy, I will discuss how the Van der Peet and
Gladstone cases are devastating for the Aboriginal movement and a massive setback in the progressive interpretation of section 35.

The constitutional question in Gladstone is whether section 20 (3) of the Pacific Herring Fishery Regulations violates William and Donald Gladstone’s section 35 rights, which they argue include commercial fishing rights. The majority agreed that Gladstone and the Heiltsuk people have sufficiently proven that this commercial fishing practice occurred before European contact (R. v. Gladstone, 1996). The Heiltsuk people have established that their fishing practices were an integral part of their distinct culture, and not an incidental or minor aspect of their lifestyle. The Court referred to the Sparrow test and decided that the Crown and the Pacific Herring Fishery Regulations did not attempt to extinguish fishing rights, merely control and regulate them (R. v. Gladstone, 1996; Allain, 1996, section D). In spite of determining that the Heiltsuk people possessed an inherent right to commercial fishing, the majority concluded that they could not determine whether the regulations unreasonably infringed on Gladstone’s rights. The Supreme Court ordered a new trial, citing lack of evidence to establish whether or not the regulations infringed on Aboriginal rights. Although the Court expanded the list of potential violations on Aboriginal rights (Dalton, 2009, p. 285), its indecisiveness in both cases and failure to consistently define Aboriginality is very concerning for the Aboriginal movement. I will elaborate on this problem after my summary of the Van der Peet case.

Dorothy Van der Peet was charged for selling ten salmon contrary to section 27 (5) of the B.C. Fishery (General) Regulations. Again, she claimed that this regulation violated her right to sell fish under section 35 (1). The Court disagreed and decided that in this case section 35 (1) did not extend to exchanging fish for money or other items (R. v. Van der Peet, 1996). Citing the
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A fiduciary relationship between the government and Aboriginal peoples the Court created an **Integral to a Distinctive Culture Test** to redefine what constitutes an Aboriginal right under section 35. In order for an Aboriginal right to be established, it must be proven that the practice in question is part of an Aboriginal group’s tradition that is integral or central to its distinct culture (R. v. Van der Peet, 1996; Barsh and Henderson, 1996, p. 993, Dalton, 2009, p. 283). The dissenting opinion was very critical of the majority’s interpretation of section 35. Issued by Justices McLachlin and L’Heureux-Dube, it stated that Van der Peet had a right to fish in a commercial manner only for survival purposes. They express that this decision is a move in the wrong direction because it enforces the idea that rights are frozen in time (Barsh and Henderson, 1996, p. 1001). The Court has only connected rights to practices that have existed before European contact and have not considered how they may have evolved. Its view of Aboriginal culture as static is very problematic.

Several important Aboriginal scholars have offered interesting critiques on the Van der Peet decision and trilogy as a whole. Professor John Borrows agrees with the Court’s statement in Van der Peet that its goal is to reconcile historical injustice towards Aboriginal people. However, he disagrees with the new definition of aboriginality that requires Aboriginal groups to prove the centrality of a practice before European contact (Borrows, 2002, p. 61). It disregards the possibility of cultural development and makes them dependent on their past (Borrows, 2002, p. 64). This is in stark contrast to Sparrow, when the Court acknowledges the current exercise of rights by the Musqueam people that is integral to their culture. The disappearance of the consideration for contemporary practices being integral to Aboriginal culture is devastating for the advancement of Aboriginal rights. This decision does not consider what is imperative for the
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The survival of Aboriginal groups today (Borrows, 2002, p. 60). There are many other issues with the Van der Peet trilogy as well.

Additionally, although the Court states that it must consider Aboriginal perspectives on the meaning of their rights in question, it did not elaborate on how each legal system would change to reach a fair compromise (Borrows, 2002, p. 62). Another issue with the Van der Peet trilogy is that the Court narrows the type of right being claimed. In Smokehouse and Van der Peet, the right was narrowed down to “the right to fish for money or other goods” rather than the general right to commercial fishing (Borrows, 2002, p. 63). The numerous steps needed to validate an integral Aboriginal practice demonstrate the Court’s hesitancy to grant broad Aboriginal rights (Borrows, 2002, p. 64). Furthermore, the new test does not give justification for why incidental Aboriginal practices do not qualify as Aboriginal rights. It is contrary to R. v. Simon in which the Court considers incidental practices as part of Aboriginal rights (Borrows, 2002, p. 65). The issue with refusing to protect incidental practices is that the Court is not willing to protect “the means necessary to make the exercise of rights meaningful” (Borrows, 2002, p. 65). Borrows is at a loss for how the Supreme Court will resolve this inconsistency in future cases. He examines both positive and negative aspects of Aboriginal case law and concludes that overall, the Court restricts Aboriginal rights and forces Aboriginal groups to conform to Western legal norms (Borrows, 2002, p. 66). Rights must be interpreted in a broad manner so as to accommodate ever-changing Aboriginal rights and practices.

According to Russel Lawrence Barsh and James Youngblood Henderson, the Van der Peet decision is an example of European paternalism because the courts have been given the authority to define what constitutes Aboriginal culture (Barsh and Henderson, 1996, p. 1002).
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The Court decides which Aboriginal practices can be reconciled with and included in Canadian culture. Furthermore, the *Van der Peet* trilogy presents a high burden of proof for Aboriginal groups to overcome when making rights claims. They must prove that the practice in question is central to their culture and tradition. Secondly, it must be shown that the practice in question was not extinguished before the *Constitution Act of 1982*, and that it was indeed violated after 1982. Finally, it must be proven that the government’s actions unreasonably infringed on their rights. The Crown must prove that it has participated in the fiduciary relationship by ensuring that the Aboriginal group enjoys the resources and practices it has traditionally held (Barsh and Henderson, 1996, p. 1004). Not only do these criteria present a high burden of proof for Aboriginal groups, but they also present a greater chance of an unfavourable ruling. The *Van der Peet* trilogy has further limited Aboriginal rights and is very discouraging for Aboriginal groups seeking to make future rights claims.

**Delgamuukw: The Refusal to Recognize Aboriginal Title and Recommending Negotiation with the Government**

The *Van der Peet* trilogy is not the only major setback for Aboriginal groups in the courts. Another adverse ruling is *Delgamuukw v. British Columbia*, which is a great example showing the shortcomings of litigation and part of my argument that Aboriginal issues are best left to negotiate with the government (Monahan, 2000, p. 522). This is another argument that I will discuss after my analysis of *Delgamuukw*. I intend to show how the decision is devastating for Aboriginals and the recognition of Aboriginal title.

In 1984, the appellants of the Gitksan and Wet’suwet’en Nation represented by Delgamuukw claimed title and self-government rights to approximately 58,000 square
kilometres of land in British Columbia (Dalton, 2006, p. 20). The Gitksan and Wet'suwet'en Nation originally claimed jurisdiction and ownership of the land as well. They had oral testimony and evidence to support their claims (*Delgamuukw v. British Columbia*, 1997). The Court swiftly denied that the groups had ownership of the land, explaining that Crown sovereignty did not allow for Aboriginal self-government (*Delgamuukw v. British Columbia*, 1997; Dalton, 2006, p. 20). The majority considered whether Aboriginal title was protected by section 35 of the Charter and if the provincial government of British Columbia was able to terminate Aboriginal title after confederation in 1867. The Supreme Court ordered a new trial for reasons that are both beneficial and detrimental to Aboriginal rights.

In their decision, the Court interpreted section 35 as including aboriginal title in the communal sense. Aboriginal title is held by every member of an Aboriginal nation. They also stated that decisions are made by members of the group. As a result of these statements by the Court, Professor Jennifer Dalton argues that self-government is an inherent and implied right of section 35 (Dalton, 2006, p. 20). They imply some sort of communal system of governance that Aboriginals are entitled to. However, at the same time the judiciary presents many criteria for justifying the violation of Aboriginal rights. Legislative endeavours that are “compelling and substantial” are justifiable for violating Aboriginal rights (Dalton, 2006, p. 21; *Delgamuukw v. British Columbia*, 1997). Once again, the Court does not directly address the question of self-government and offers very little protection for it (Isaac, 2004, p. 57, 69; Dalton, 2006, p. 21). This is a recurring theme in Aboriginal case law. The Court fails to directly address the relationship between Aboriginal groups and the federal and provincial governments, leading to more questions for the future of Aboriginal title and self-government.
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Although the Court recognizes Aboriginal title, what are the parameters of this right? Patrick Monahan asks this question along with several others that Delgamuukw poses (Monahan, 2000, p. 522). At the most, recognition of Aboriginal title could lead to title or ownership of the land or at the least, the right to possess the land with conditions and for specific purposes. How can judges interpret oral history and how do they test its credibility or validity? How would this test differ from the examination of written history (Monahan, 2000, p. 523)? Alas, Delgamuukw presents more questions than answers about the nature of Aboriginal title, which speaks to the disadvantages of litigation. As Monahan and Dalton suggest, these questions could perhaps be resolved outside of the court setting.

Monahan not only presents an interesting analysis of Delgamuukw but a thought-provoking suggestion on the next steps that Aboriginal groups should take. At the end of the Court’s decision on Delgamuukw the Chief Justice recommended that Aboriginal groups pursue negotiation over litigation in future claims to rights (Monahan, 2000, p. 521). Negotiation presents stable results because the parties agree to them and both have a role in reaching a compromise. Negotiation is also more likely to result in lasting decisions rather than those by the judiciary (Monahan, 2000, p. 522). Both are costly but litigation usually results in a higher social cost by creating further conflict. Litigation presents solutions for narrow issues while negotiation has the ability to tackle widespread and broader Aboriginal issues (Monahan, 2000, p. 522). Ergo, Aboriginal groups will have a greater ability to raise their concerns and resolve several issues in negotiation, resulting in a detailed and thorough settlement.

Another advantage of negotiation is that it takes much less time to complete. Over ten years had passed from the time the claim was filed in Delgamuukw to the time the Court made its
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decision (Monahan, 2000, p. 522). Moreover, negotiation presents predictable results because the solution is definite. The conclusion does not present further questions and confusion like Delgamuukw and countless other Aboriginal cases at the Supreme Court. It is obvious that Aboriginal groups must politically mobilize themselves and invest resources into negotiation with federal and provincial governments. They have the potential to accomplish more by continuing to expand the scope of section 35, with fewer resources and within a shorter time frame.

Conclusion

In this research paper I have discussed examples of success and failure that Aboriginal groups have experienced in the courts. It is clear that the losses and further questions outweigh the minor victories that they have achieved. These victories are very encouraging and present some hope for Aboriginal groups, however, much more progress can be made. The Supreme Court’s progressive interpretation of section 35 reached a roadblock when it decided on the Van der Peet trilogy and Delgamuukw. Although these cases acknowledge Aboriginal title, the Supreme Court fails to elaborate on the nature of this right, leading to the suggestion that Aboriginals revisit the prospect of negotiation with the federal and provincial governments. It is time for Aboriginal groups to seriously pursue their rights and regain their identity as self-governing peoples, or at the very least, with broad section 35 rights that allow them to regulate themselves and possess land for the purposes of survival and sustenance. This is the least that the government can do for these people, which is the same government responsible for attacking their identity and lifestyle.
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