R. *v.* Pamajewon, [1996] 2 S.C.R. 821

Howard Pamajewon and Roger Jones *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Arnold Gardner, Jack Pitchenese and Allan Gardner *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General for Alberta,
the Assembly of Manitoba Chiefs,
the Federation of Saskatchewan Indian Nations and
White Bear First Nations,
and Delgamuukw et al. *Interveners*

Indexed as: R. *v.* Pamajewon

File No.: 24596.

Hearing and judgment: February 26, 1996.

Reasons delivered: August 22, 1996.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Aboriginal rights -- Self-government and high stakes gambling -- First nations passing lotteries by-laws -- By-laws not passed pursuant to s. 81 of Indian Act -- Criminal charges laid for alleged breach of gambling provisions -- Whether an aboriginal right to gamble -- Whether an aboriginal right to self-government which includes the right to regulate gambling activities -- Constitution Act, 1982, s. 35(1) -- Criminal Code, R.S.C., 1985, c. C-46, ss. 201(1), 206(1)(d), 207 -- Indian Act, R.S.C., 1985, c. I-5, s. 81.

The Shawanaga First Nation and the Eagle Lake First Nation both passed by-laws dealing with lotteries. Neither by-law was passed pursuant to s. 81 of the *Indian Act* and neither First Nation had a provincial licence authorizing gambling operations. The Shawanaga First Nation asserted an inherent right to self-government and the Eagle Lake First Nation asserted the right to be self-regulating in its economic activities.

The appellants Howard Pamajewon and Roger Jones, members of the Shawanaga First Nation, were charged with keeping a common gaming house contrary to s. 201(1) of the *Criminal Code*. The charges arose out of high stakes bingo and other

gambling activities on the reserve. The appellants Arnold Gardner, Jack Pitchenese and Allan Gardner, members of the Eagle Lake First Nation, were charged with conducting a scheme for the purpose of determining the winners of property, contrary to s. 206(1)(*d*) of the *Code*. The charges related to the band's bingo activities on the reserve. All were convicted and the convictions were upheld on appeal. At issue here was whether the regulation of high stakes gambling by the Shawanaga and Eagle Lake First Nations fell within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The constitutional question before the Court queried whether ss. 201, 206 or 207 of the *Code*, separately or in combination, were of no force or effect with respect to the appellants by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is that laid out in *R. v. Van der Peet*. Claims to self-government made under s. 35(1) are no different from other claims to the enjoyment of aboriginal rights and must be measured against the same standard.

In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether that activity could be said to be "a defining feature of the culture in question" prior to contact with Europeans.

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. To characterize the appellants' claim as "a broad right to manage the use of their reserve lands" would cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.

The evidence presented at trial did not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations at the time of contact. The activity was therefore not protected by s. 35(1).

Per L'Heureux-Dubé J.: To characterize the appellants' claim as the existence in their bands of a broad authority, protected by s. 35(1) of the *Constitution Act, 1982*, to make decisions regarding natives' social, economic, and cultural well-being (including the regulating of gambling activities) is overly broad. The claim, nevertheless, should not be characterized as "the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands". The proper inquiry focuses upon the activity itself and not on the specific manner in which it has been manifested. The claim must be broadly characterized: do the appellants possess an existing aboriginal right to gamble? If such a right can be shown to exist it would oblige the government to justify the infringement upon that right by the *Criminal Code*, which essentially prohibits gambling.

The definition of aboriginal rights should refer to the notion of the "integral part of a distinctive aboriginal culture", and to be recognized under s. 35(1), must be sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. The evidence presented did not show that gambling ever played an important role in the cultures of the Shawanaga and Eagle Lake First Nations. Gambling as a practice was not connected enough to the self-identity and self-preservation of the aboriginal societies involved here to deserve the protection of s. 35(1). It was unnecessary to consider whether s. 35(1) encompasses a broad right of self-government which includes the authority to regulate gambling activities on the reservation. Even if some rights of self-government existed before 1982, there was no evidence that gambling on reserve lands generally was ever the subject matter of aboriginal regulation.

Cases Cited

By Lamer C.J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

By L'Heureux-Dubé J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723.

Statutes and Regulations Cited

Constitution Act, 1867, s. 91(24).

Constitution Act, 1982, s. 35(1).

Criminal Code, R.S.C., 1985, c. C-46, ss. 15, 201(1), 206(1)(*d*), 207 [rep. & subs. c. 52 (1st Supp.), s. 3].

Indian Act, R.S.C., 1985, c. I-5, s. 81 [am. c. 32 (1st Supp.), s. 15].

Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron. Reprinted from the edition of 1939. Ottawa: Queen's Printer, 1964.

Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

APPEAL from a judgment of the Ontario Court of Appeal (1994), 21 O.R. (3d) 385, 120 D.L.R. (4th) 475, 95 C.C.C. (3d) 97, 36 C.R. (4th) 388, 77 O.A.C. 161, 25 C.R.R. (2d) 207, [1995] 2 C.N.L.R. 188, dismissing appeals by Howard Pamajewon and Roger Jones from convictions by Carr Prov. Ct. J. and by Arnold Gardner, Jack Pitchenese and Allan Gardner from convictions by Flaherty Prov. Ct. J. Appeal dismissed.

Arthur C. Pape, *Clayton C. Ruby* and *Jean Teillet*, for the appellants.

Scott C. Hutchison, for the respondent.

Ivan G. Whitehall, Q.C., and *Kimberley Prost*, for the intervener the Attorney General of Canada.

Pierre Lachance, for the intervener the Attorney General of Quebec.

Kenneth J. Tyler and *Richard A. Saull*, for the intervener the Attorney General of Manitoba.

Paul J. Pearlman, for the intervener the Attorney General of British Columbia.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Margaret Unsworth, for the intervener the Attorney General for Alberta.

Jack R. London, Q.C., and *Martin S. Minuk*, for the intervener the Assembly of Manitoba Chiefs.

Mary Ellen Turpel-Lafond and *Lesia Ostertag*, for the interveners the Federation of Saskatchewan Indian Nations and White Bear First Nations.

Louise Mandell and *Peter W. Hutchins*, for the interveners Delgamuukw et al.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

THE CHIEF JUSTICE --

I. Introduction

1 This appeal raises the question of whether the conduct of high stakes gambling by the Shawanaga and Eagle Lake First Nations falls within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

1 The appeal was heard on February 26, 1996 and judgment was given dismissing the appeal. The following brief reasons will explain the basis for this decision.

II. Statement of Facts

Pamajewon and Jones

1 The appellants Pamajewon and Jones are members of the Shawanaga First Nation. On March 29, 1993, both were found guilty of the offence of keeping a common gaming house contrary to s. 201(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. Section 201(1) of the *Criminal Code* reads:

> **201.** (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

1 The charges arose out of the high stakes bingo and other gambling activities which took place on the Shawanaga First Nation Reservation between September 11, 1987 and October 6, 1990. Throughout this period Jones was Chief of the Shawanaga First Nation and Pamajewon was a member of the Shawanaga Band Council.

1 Gambling on the reservation took place pursuant to the authority of the Shawanaga First Nation lottery law. This lottery law, enacted by the Band Council in

August 1987, was not a by-law passed pursuant to s. 81 of the *Indian Act*, R.S.C., 1985, c. I-5.

1 The Shawanaga First Nation did not have a provincial licence authorizing its gambling activities. The band had met with the Ontario Lottery Corporation but had refused the Corporation's offer of a gambling licence on the basis that such a licence was unnecessary because the band had an inherent right of self-government.

1 At trial the appellants Pamajewon and Jones were convicted. Their convictions were upheld by the Ontario Court of Appeal.

Gardner, Pitchenese and Gardner

1 The appellants Arnold Gardner, Jack Pitchenese and Allan Gardner are all members of the Eagle Lake First Nation. On November 19, 1993 they were found guilty of conducting a scheme for the purpose of determining the winners of property, contrary to s. 206(1)(*d*) of the *Code*. Section 206(1)(*d*) of the *Code* reads:

> **206.** (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
>
> . . .
>
> (*d*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of....

1 At the time they were charged Arnold Gardner was Chief of the Eagle Lake Band and chairman of the bingo committee. Jack Pitchenese managed the bingo operations. Allan Gardner was the chief bingo caller.

1 The gambling activities on the Eagle Lake Reserve were conducted pursuant to the Eagle Lake First Nation Band Council's lottery law, enacted in March 1985. This lottery law was not a by-law passed pursuant to s. 81 of the *Indian Act*.

1 The Eagle Lake First Nation did not have a provincial licence authorizing its gambling operations; the band had refused to negotiate with the Ontario Lottery Commission, even though it was approached for this purpose by the Ministry of Consumer and Commercial Relations. The band would not negotiate because it asserted the right to be self-regulating in its economic activities.

1 The appellants Gardner, Pitchenese and Gardner were convicted at trial. Their convictions were upheld by the Ontario Court of Appeal.

III. Judgments Below

Provincial Court

Pamajewon and Jones

1 At trial the appellants Pamajewon and Jones argued that the Crown had failed to prove the essential elements of the offence. Carr Prov. Ct. J. rejected this argument. It has not been pursued on appeal. The appellants argued further that they should not be convicted because their actions were taken pursuant to laws enacted by persons in possession of *de facto* sovereignty, as per s. 15 of the *Code*. Carr Prov. Ct. J. also rejected this argument, holding that the appellants had not demonstrated either that they were acting in "obedience" to the Shawanaga First Nation's lottery law (it did not require

them to act as they did) or that the band council had *de facto* sovereignty. This argument has not been pursued on appeal.

1 The appellants' final argument was that the application of s. 201(1) of the *Code* was an unconstitutional violation of the Shawanaga First Nation's inherent right of self-government. Carr Prov. Ct. J. rejected this argument. Relying on the terms of the *Royal Proclamation of 1763* and the Robinson Huron Treaty of 1850, and the granting of exclusive jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government under s. 91(24) of the *Constitution Act, 1867*, he held that any right of self-government which was once held by the Shawanaga First Nation had been extinguished by the clear and plain intention of the Crown, with the result that the appellants could not rely on such a right as a defence to the charges against them.

1 In the result, Carr Prov. Ct. J. convicted the appellants and sentenced them to a fine of $1,500 each.

Gardner, Pitchenese and Gardner

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The appellants Gardner, Pitchenese and Gardner argued that they should not be convicted because s. 206 of the *Code* unjustifiably interfered with the Eagle Lake First Nation's s. 35(1) right to self-government. Flaherty Prov. Ct. J. rejected this argument. He held that the appellants' argument amounted, in essence, to an attempt to base the right to self-government on the economic disadvantages suffered by the Eagle Lake First Nation. Flaherty Prov. Ct. J. held that such a claim must fail:

> However one may wish to complain about ones economic disadvantage and however apparent it might be, redress needs to be found in other ways. People need to find ways of creating wealth and generating revenue that are not contrary to the Criminal law. . . . I am not persuaded that the economic disadvantages of the Eagle Lake First Nations people as evident as they have been established to be in these proceedings and of First Nations people generally can be addressed by activity which contravenes the Criminal law nor can I strike down a section of the Criminal Code which is otherwise constitutionally valid for the reasons carefully and ably submitted in this case.

1 Flaherty Prov. Ct. J. convicted the appellants Gardner, Pitchenese and Gardner and sentenced them to a fine of $1,500 each.

Ontario Court of Appeal (1994), 21 O.R. (3d) 385

1 At the Ontario Court of Appeal the appellants argued that their convictions violated their respective bands' rights to self-government. They argued that the right to self-government existed either as an incident to aboriginal title in the reserve land or as an inherent aboriginal right. The Court of Appeal rejected this argument. Osborne J.A. held that the basis of aboriginal title, as was held by Macfarlane J.A. at the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97, is the aboriginal use and occupation of the land, and that the content of such title is determined by the nature of the traditional aboriginal enjoyment of that land. Osborne J.A. held that in light of this basis and content it could not be said that aboriginal title gave rise to a broad right of self-government. Instead, the specific right of self-government claimed must be considered and a determination made as to whether that specific right arises from the traditional aboriginal culture and land use of the particular claimants. In this case the specific right of self-government claimed was the right to regulate high stakes gambling; Osborne J.A. held, at p. 400, that there "is no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were

part of the First Nations' historic cultures and traditions, or an aspect of their use of their land".

1 Osborne J.A. held further that *R. v. Sparrow*, [1990] 1 S.C.R. 1075, is authority for the proposition that any broad inherent right to self-government held by the appellants was extinguished by the British assertion of sovereignty. The success of a claim to any more specific right of self-government will depend on the historical evidence regarding the aboriginal community of the particular claimant. In this case he held at p. 400 that the appellants' claim to self-government was not supported by the evidence: "there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation. Moreover, there is no evidence of an historic involvement in anything resembling the high stake gambling in issue in these cases". Osborne J.A. went on to hold that, in any case, any regulatory right over gambling held by the appellants in these cases was extinguished by Parliament's enactment of prohibitions on gambling in the *Code*.

IV. Grounds of Appeal

1 Leave to appeal to this Court was granted on June 1, 1995: [1995] 2 S.C.R. viii. On July 6, 1995 the following constitutional question was stated:

> Are s. 201, s. 206 or s. 207 of the *Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s. 52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellants?

1 The appellants appealed on the basis that the Court of Appeal erred in restricting aboriginal title to rights that are activity and site specific and in concluding that self-government only extends to those matters which were governed by ancient laws or customs. The appellant argued further that the Court of Appeal erred in concluding that the *Code* extinguished self-government regarding gaming and in not addressing whether the *Code*'s gaming provisions unjustifiably interfered with the rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

1 The Federation of Saskatchewan Indian Nations and White Bear First Nations intervened on behalf of the appellants. The Attorney Generals of Canada, Quebec, Manitoba, British Columbia, Saskatchewan and Alberta intervened on behalf of the respondent.

V. Analysis

1 The resolution of the appellants' claim in this case rests on the application of the test, laid out by this Court in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, for determining the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The appellants in this case are claiming that the gambling activities in which they took part, and their respective bands' regulation of those gambling activities, fell within the scope of the aboriginal rights recognized and affirmed by s. 35(1). *Van der Peet*, *supra*, lays out the test for determining the practices, customs and traditions which fall within s. 35(1) and, as such, provides the legal standard against which the appellants' claim must be measured.

1 The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling

activities on the reservation. Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet*, *supra*. Assuming s. 35(1) encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*, *supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.

1 In *Van der Peet*, *supra*, the test for identifying aboriginal rights was said to be as follows, at para. 46:

> . . . in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

In applying this test the Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be (*Van der Peet*, at para. 59) "a defining feature of the culture in question" prior to contact with Europeans.

1 I now turn to the first part of the *Van der Peet* test, the characterization of the appellants' claim. In *Van der Peet*, *supra*, the Court held at para. 53 that:

> To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.

When these factors are considered in this case it can be seen that the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation. The activity which the appellants organized, and which their bands regulated, was high stakes gambling. The statute which they argue violates those rights prohibits gambling subject only to a few very limited exceptions (laid out in s. 207 of the *Code)*. Finally, the applicants rely in support of their claim on the fact that the "Ojibwa people ... had a long tradition of public games and sporting events, which pre-dated the arrival of Europeans". Thus, the activity in which the appellants were engaged and which their bands regulated, the statute they are impugning, and the historical evidence on which they rely, all relate to the conduct and regulation of gambling. As such, 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.

1 The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

1 I now turn to the second branch of the *Van der Peet* test, the consideration of whether the participation in, and regulation of, gambling on the reserve lands was an

integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. The evidence presented at both the Pamajewon and Gardner trials does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. In fact, the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and prevalence of gaming in Ojibwa culture. While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.

1 I would note that neither of the trial judges in these cases relied upon findings of fact regarding the importance of gambling to the Ojibwa; however, upon review of the evidence I find myself in agreement with the conclusion arrived at by Osborne J.A. when he said first, at p. 400, that there "is no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nations' historic cultures and traditions, or an aspect of their use of their land" and, second, at p. 400, that "there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation". I also agree with the observation made by Flaherty Prov. Ct. J. in the Gardner trial when he said that

> commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized.

1 Given this evidentiary record, it is clear that the appellants have failed to demonstrate that the gambling activities in which they were engaged, and their respective bands' regulation of those activities, took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

VI. Conclusion

1 These are my reasons for dismissing the appeal and for affirming the decision of the Court of Appeal upholding the trial judge's conviction of the various appellants for violating ss. 201 and 206 of the *Code*. There will be no order as to costs.

1 For the reasons given above, the constitutional question must be answered as follows:

Question : Are s. 201, s. 206 or s. 207 of the *Criminal Code*, separately or in combination, of no force or effect with respect to the appellants, by virtue of s. 52 of the *Constitution Act, 1982* in the circumstances of these proceedings, by reason of the aboriginal or treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellants?

Answer : No.

The following are the reasons delivered by