PAMAJEWON AND THE RECOGNITION OF INHERENT INDIGENOUS JURISDICTION

R v Pamajewon [1996] 2 SCR 821 is the only case to date where the Supreme Court of Canada has discussed the inherent Indigenous right to self-government.

This case tells us that the "integral to the distinctive culture" test from *Van der Peet* also applies to claims of a right to self-government.

Facts

In the 1980s, two Anishinaabe First Nations in Ontario passed resolutions to authorize gaming operations on their reserves. The First Nations argued that they had a right to use and manage their reserve lands, which included a right to self-government regarding gambling on their reserves.

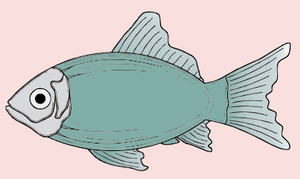
Supreme Court of Canada Decision

Chief Justice Lamer, writing for the majority of the court, did not agree with the argument made by the First Nations.

He characterized the right as being about the right to self-regulate gambling on their reserves instead of a general right to govern the use of their reserve lands.

In order to prove this right, the Court said that the First Nations had to demonstrate that gambling had been integral to their distinctive culture at the time of contact with Europeans - the "integral to the distinctive culture" test.

"Integral to the Distinctive Culture"



The Supreme Court says that the "integral to the distinctive culture" test from *R v Van der Peet* [1996] 2 SCR 507 should be used to prove **all** Aboriginal rights, from the right to sell fish to a right to self-government.

This test has been criticized for requiring Indigenous Nations to prove that each matter they claim self-government jurisdiction over was integral to their distinct culture hundreds of years ago. This prevents them from claiming self-government rights relating to modern issues.

This approach ignores the fact that Aboriginal Nations were self-governing prior to colonization, and deprives them of the ability to adapt their governance to the 21st century.

Potential Alternatives

Scholar Kent McNeil has identified two other approaches that could potentially be used instead of *Pamajewon* to assert the inherent Indigenous right to self-government.

In *Campbell v British Columbia (AG)*, 2000 BCSC 1123, Justice Williamson found that the communal nature of Aboriginal and treaty rights means that Indigenous communities must also have decision-making authority about how those rights are exercised.

However, communities must first have a right recognized before they can claim ancillary rights related to its management.

A second approach that McNeil has identified is for Aboriginal communities to strike out on their own and exercise their pre-existing sovereignty over their rights without waiting for official recognition.

However, to date the Supreme Court of Canada has only recognized the *Pamajewon* approach.