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FROZEN RIGHTS IN CANADA: CONSTITUTIONAL INTERPRETATION AND THE TRICKSTER

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The trickster is alive and well. The Supreme Court of Canada illustrated this in the recent cases of *R. v. Vanderpeet*,[1] *R. v. Gladstone*,[2] *R v. N.T.C. Smokehouse*[3] and *R. v. Pamajewon*[4] when it considered how it would define Aboriginal rights "recognized and affirmed" under section 35(1) of the Canadian Constitution.[5] Until these judgments were released, the country's highest court had supplied very little guidance concerning the test it would use to identify those rights protected by section 35(1). In 1982 Aboriginal rights were placed within Canada's newly patriated Constitutional Act, and outside of its Charter of Rights and Freedoms,[6] at the insistence of many Aboriginal governments.[7]

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1. 137 D.L.R.4th 289, 9 W.W.R. 1. (Can. 1996). In *Vanderpeet* the accused was charged under section 61(1) of the Fisheries Act, R.S.C. ch. F-14 (1970), with selling salmon caught under the authority of an Indian food fishing license, contrary to section 27(5) of the British Columbia Fishery (General) Regulations at SOR/84-248, which prohibited the sale or barter of fish caught under such a license.

2. 137 D.L.R.4th 648, 9 W.W.R. 1 (Can. 1996). *Gladstone* the accused was charged under section 61(1) of the Fisheries Act with attempting to sell herring spawn on kelp caught under the authority of an Indian food fish license, contrary to the same regulations used to charge *Vanderpeet*, and of attempting to sell herring spawn on kelp caught without a license, contrary to section 20(3) of the Pacific Herring Fishery Regulations at SOR/83-324.

3. 137 D.L.R.4th 528, 9 W.W.R. 114 (Can. 1996). In *Smokehouse* the accused was an incorporated company which owned and operated a food processing plant. They were charged under section 61(1) of the Fisheries Act with selling and purchasing fish not caught under the authority of a commercial fishing license, contrary to section 4(5) of the British Columbia (General) Regulations, and of selling and purchasing fish contrary to section 27(5) of these same regulations.

4. 138 D.L.R.4th 204 (Can. 1996). In *Pamajewon* the accused were charged under sections 201(1) and 206(1) of the Criminal Code with the offense of keeping a common gaming house and conducting a scheme for the purposes of determining the winners of property.

5. Section 35(1) states: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canadian Act of 1982, (U.K.), 1982, ch. 11. For information on the enactment of section 35(1), see Brian Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, 8 QUEEN'S L.J. 232 (1983); Kent McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, 4 SUP. CT. L. REV. 255 (1982); Douglas Sanders, *The Rights of the Aboriginal Peoples of Canada*, 61 CAN. BAR REV. 314 (1983).

6. Aboriginal rights were placed outside of the Canadian Charter to shield collective Aboriginal rights from erosion due to its individualist orientation. *See* William Pentney, *The*

Section 35(1) protected these rights by stating "[t]he existing [A]boriginal and treaty rights of the [A]boriginal people of Canada are hereby recognized and affirmed."[8] The problem with this language was that no one was quite sure what Aboriginal rights were, and therefore what, if anything, was being protected.[9]

After the failure to define these rights through four high profile First Ministers conferences, and a nationally negotiated Charlottetown Accord,[10] the task of defining Aboriginal rights passed to the country's highest Court. The Supreme Court of Canada's definitions of Aboriginal rights in these cases fell far short of the large, liberal and generous interpretations of Aboriginal rights considered throughout the political process,[11] and urged by previous court judgments.[12]

Rights of the Aboriginal Peoples of Canada and the Constitution Act 1982, Part I: The Interpretive Prism of s. 25, 22 U.B.C. L. REV. 21 (1988). Section 25 of the Constitutional Act reflects this concern:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [A]boriginal, treaty or other rights or freedoms that pertain to the [A]boriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired

For judicial interpretation confirming this protection, see R v. Stienhuaer, [1985] 3 C.N.L.R. 187, 191 (Alta Q.B.); Barlow v. R., [1987] 1 C.N.L.R. 20, 44 (N.B.C.A.). For an excellent article discussing the problems of imposing individual rights on Canadian Aboriginal peoples, see Mary Ellen Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences*, 6 CAN. HUM. RTS Y.B. 3 (1989-1990).

7. Douglas Sanders, *The Indian Lobby, in* AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTIONAL ACT 301-32 (Keith Banting & Richard Simeon eds., 1983).

8. *Canadian Charter of Rights and Freedoms*, Part I of the Constitutional Act, 1982, being Schedule B to the Canadian Act 1982 (U.K.), 1982, ch. 11.

9. Bryan Schwartz, *Unstarted Business: Two Approaches to Defining s. 35 — What's in the Box, and What Kind of Box?, in* FIRST PRINCIPLES, SECOND THOUGHTS 353-64 (1986).

10. For an analysis of the First Ministers Conferences mandated by section 37 of the Constitution, see Kathy Brock, *The Politics of Aboriginal Self-Government: A Canadian Paradox*, 34 CAN. PUB. ADMIN. 272 (1991). For suggestions building upon the Charlottetown Accord, see Peter Hogg & Mary Ellen Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues*, 74 CAN. BAR REV. 187 (1995).

11. The most recent example of the wider view of Aboriginal rights which can emerge from the political process is found in the final report of The Royal Commission on Aboriginal Peoples. 1-5 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES (1996). This report summarizes and extends many ideas for protecting and improving Aboriginal rights within Canada.

12. Previous cases which held that Aboriginal rights should be given a large, liberal, and generous interpretation include Jones v. Meehan, 175 U.S. 1, 10-11 (1899); Nowegijick v. The Queen, 144 D.L.R.3rd 193, 198 (Can. 1983); R. v. Simon, 24 D.L.R.4th 390, 435 (Can. 1985); R. v. Sioui, 70 D.L.R.4th 427, 453 (Can. 1990).

The Supreme Court was asked to consider the meaning of Aboriginal rights in the context of criminal charges brought against Aboriginal people under sections of the Fisheries Act and Criminal Code. In the *Pamajewon* case, charges were laid under the Canadian Criminal Code for keeping a common gaming house and conducting a scheme for the purposes of determining the winners of property.[13] The Canadian Supreme Court held that Aboriginal rights did not include "high stakes gambling" and were not a defense to the convictions entered under the Criminal Code. In the *Vanderpeet, Smokehouse* and *Gladstone* cases charges were laid under the Fisheries Act for exchanging fish for money without possessing a commercial fishing license. These cases were more varied in their results.

In *Vanderpeet* and *Smokehouse*, the Court held that these particular groups did not have an Aboriginal right to sell and exchange fish, while in *Gladstone* the Court ruled that the group in question did possess such a right. This latter ruling was significant in Canadian jurisprudence because for the first time the Court held that it is possible for Aboriginal peoples to possess commercial-like rights to harvest and sell resources within their territories. However, these rulings are also important because in arriving at these conclusions the Court seriously undermined the future commercial competitiveness and survival of Aboriginal nations in contemporary Canadian society. This comment will focus on the Court's partiality concerning the contemporary nature of aboriginal rights.

First Nations have an intellectual tradition that teaches about ideas and principles that are partial and incomplete. The elders teach these traditions through a character known as the trickster.[14] He has various persona in different cultures. The Anishinabe (Ojibway) of the Great Lakes call the trickster Nanabush; the First Nations people of the coastal North-west know him as Raven; he is known as Glooscap by the Mi'kmaq of the Maritimes; and as Coyote, Crow, Wisakedjak, Badger, or Old Man among other First Nations people in North America. The trickster offers insights through encounters which are simultaneously altruistic and self-interested.[15] In his adventures the trickster

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13. R.S.C. ch. C-46 (1985).

14. The trickster's role is revealed in a brief exchange from an interview between Lenore Keeshig-Tobias (an Anishinabe story-teller from my reservation) and Harmut Lutz:

> H.L.: Was that your idea, founding the society for the Reawakening of the Trickster?
>
> LKT: The Committee to Re-Establish the Trickster. You know, this is to learn from mistakes. The Trickster, The Teacher is a paradox: Christ-like in a way. Except that from our Teacher, we learn through the Teacher's mistakes as well as the Teacher's virtues.

HARMUT LUTZ, CONTEMPORARY CHALLENGES: CONVERSATIONS WITH CANADIAN AUTHORS 85 (1991).

15. PENNY PETRONE, NATIVE LITERATURE IN CANADA: FROM ORAL TRADITION TO THE PRESENT 16 (1990).

roams from place to place and fulfills his goals by using ostensibly contradictory behaviors such as charm and cunning, honesty and deception, kindness and mean tricks.[16] The trickster also displays transformative power as he takes on new persona in the manipulation of these behaviors and in the achievement of his objectives.[17] Lessons are learned as the trickster engages in actions which in some particulars are representative of the listener's behavior, and on other points are uncharacteristic of their comportment.[18] The trickster encourages an awakening of understanding because listeners are compelled to interpret and reconcile the notion that their ideas may be partial. As such, the trickster assists people in conceiving of the limited viewpoint they possess. The trickster is able to kindle these understandings because his actions take place in a perplexing realm that partially escapes the structures of society and the order of cultural things.[19] The trickster's interaction with the Supreme Court of Canada demonstrates these insights.[20]

This comment draws upon this intellectual tradition and sites Nanabush at the center and edge of recent Aboriginal rights cases from the Supreme Court of Canada. It examines these judgments by alternatively interchanging Anishinabe

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16. GERALD VIZENOR, THE PEOPLE NAMED THE CHIPPEWA: NARRATIVE HISTORIES 3-4 (1984). Vizenor states:

> Naanabozho, the compassionate woodland trickster, wanders in mythic time and transformational space between tribal experiences and dreams. The trickster is related to plants and animals and trees; he is a teacher and healer in various personalities who, as numerous stories reveal, explains the values of healing . . . . More than a magnanimous teacher and transformer, the trickster is capable of violence, deceptions, and cruelties; the realities of human imperfections. The woodland trickster is an existential shaman in the comic mode, not an isolated and sentimental tragic hero in conflict with nature.

Id.

17. For a composite Trickster Story, see Thomas King, *The One About Coyote Going West*, *in* ALL MY RELATIONS: AN ANTHOLOGY OF CANADIAN NATIVE FICTION 89 (William Hebert New ed., 1990).

18. Daniel David Moses, *The Trickster Theatre of Tomson Highway*, 60 CAN. FICTION MAG. 83 (1987).

19. See Barbara Babcock Adams, *A Tolerated Margin of Mess: The Trickster and His Tales Reconsidered*, 11 J.of Folklore Inst. 147 (1975); Henry Rowe Schoolcraft, *Historical and Methodological Perspectives*, *in* ANDREW WIGET, CRITICAL ESSAYS ON NATIVE AMERICAN LITERATURE 21 (1985); John Borrows, *Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation*, 28 U.B.C. L. REV. 1, 6-10 (1994); GERALD VIZENOR, THE TRICKSTER OF LIBERTY: TRIBAL HEIRS TO A WILD BARONAGE (1988).

20. The trickster's interaction with the court is an effective vehicle for examining law because: "Stories are a great device for probing the dominant narrative. We use them to examine presupposition, the body of received wisdoms that pass as truth but actually are contingent, power-serving, and drastically disadvantage our people." Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, The Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 549 (1995); *see also* Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997) (describing foundationalist and anti-foundationalist uses of narrative in law).

and Canadian jurisprudential narratives and providing commentary on what this exchange reveals. The distinctions highlighted within this encounter accentuate where confusion, misinformation and self-contradiction appear in the Supreme Court's story about Aboriginal rights.[21] The trickster's unique placement generates a language between "western" and "Aboriginal" accounts of law,[22] which incorporates intersecting and oppositional cultural perspectives.[23] Following this approach develops a perspicuous contrast, or vocabulary of comparison, between the Court's narration and First Nation understandings, and renders a clearer reflection on the appropriateness of the cases' analysis and effects.[24] Thus, this methodology simultaneously frames and centers the judgments as the trickster stands inside and outside of the Court, both as a member and as one of its critics. His appearance provides alternative constitutional interpretations,[25] and reveals the cultural construction and contingency of law.[26] The trickster's incongruous entry into legal discourse presents law from a perspective which is outside of the conventional structure of legal argument and exposes its hidden cultural (dis)order.[27]

Seegwun

Seegwun - spring. Nanabush is walking up a stream. Around his ankles the water breaks free and flees to the Nottawasaga River. Imprisoned as ice for too long it hurries its escape towards Georgian Bay and Lake Huron. He notices the water's rush is met by travelers going in the opposite direction. Fish run into and through the water's swollen charge. In the midst of this collision there are

21. For a series of articles that examines the similarities and differences between jurisprudence and stories, see PETER BROOKS & PAUL GEWIRTZ, LAW'S STORIES (1996).

22. *See* JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990). "To attempt to translate puts you in a place between texts, between languages." *Id.* at 255.

23. *See* JURGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS (1993).

24. For further discussion on the use of this methodology, see 2 Charles Taylor, *Understanding and Ethnocentricity, in* PHILOSOPHY AND THE HUMAN SCIENCE: PHILOSOPHICAL PAPERS 116-33 (1985); Charles Taylor, *The Politics of Recognition, in* MULTICULTURALISM AND THE POLITICS OF RECOGNITION (Amy Gutman & Charles Taylor eds., 1992); Borrows, *supra* note 19, at 1-10.

25. For a discussion of how racialized perspectives can create alternative legal interpretations, see Richard Devlin, *We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in* R. v. R.D.S., 18 DALHOUSIE L.J. 408 (1995).

26. *See* John Borrows, *Living Between Water and Rocks: First Nations, Environmental Planning and Democracy*, 47 U.T.L.J. 417 (1997).

27. In this sense the Trickster's methodology has similarities with objectives often associated with critical race theory, see *Introduction in* MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 4-7 (Charles Lawrence et al. eds., 1993); RICHARD DELGADO & JEAN STEPHANIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION (1994).

periods of rest. In a shallow pool Nanabush spots a solitary rainbow trout. He breaks the walls of a downstream beaver dam. He waits. Within a few minutes the water in the pool goes down. Trapped, the fish has nowhere to go. Another prisoner caught on life's precarious road. He walks towards it, slowly puts his fingers under its belly, and feels the weight of life within. Nanabush lifts the fish into the next pool and watches it swim away.

Neebin

Neebin - summer. Nine people are dressed in red, with white ermine framing their costumes. They are wearing their traditional regalia.[28] It is the members of the Supreme Court of Canada, asked to consider the meaning of Aboriginal rights in the context of criminal charges laid against Aboriginal people exchanging fish for money. Their Chief Justice, Antonio Lamer, is delegated to speak for the group. The Chief Justice steps into court. He notices that Aboriginal rights are "held by [A]boriginal people because they are [A]boriginal."[29] With this as his starting point, to define Aboriginal rights he is going to have to tell us what Aboriginal means. How is he going to do this? Maybe he knows what it means to be Aboriginal. He writes: "The Court must define the scope of section 35(1) in a way which captures both the [A]boriginal and the rights in [A]boriginal rights."[30] He will define Aboriginal by "capturing" the Aboriginal and the right? How is he going to do this? What will he do once he captures it? He searches for a purpose, that might help him. In the jurisprudential stream behind him, he sees a purposive rationale and a foundation to explain "the special status that [A]boriginal peoples have within Canadian society."[31] He pulls the sticks from this structure; a deluge ensues. Aboriginal rights in section 35(1) exist "because of one simple fact: when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[32]

The Chief Justice is nearly washed away by this flood. When he pulled the sticks he was standing on the wrong side of the weir and could have been knocked over. If Aboriginal peoples have prior rights to land and participatory governance, how did the Crown and Court gain their right to adjudicate here? He has to stem the flow. He has to regain his footing. He plants a flag, "[A]boriginal rights recognized and affirmed by section 35(1) must be directed towards their reconciliation of the pre-existence of [A]boriginal societies with

28. The Supreme Court of Canada wear these robes as a symbol of respect for the judicial office.

29. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 19 (Lamer, C.J.C.).

30. *Id.* at para. 20.

31. *Id.* at para. 27.

32. *Id.* at para. 30.

the sovereignty of the Crown."[33] He now has a purpose with which to capture both the Aboriginal and the right - "the reconciliation of pre-existing claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory."[34] The assertion of non-aboriginal sovereignty provides familiar ground from which to define Aboriginal.[35]

Now comes the clairvoyant moment when he will tell us what Aboriginal means. He reaches his fingers into the cold stream of past decisions; but there is only one judgment he relies on to define Aboriginal. At his feet, in a shallow pool of reasoning, the Chief Justice finds the *Sparrow* Court's acknowledgment that the Aboriginal right to fish for food was considered to "ha[ve] always constituted an integral part of their distinctive culture."[36] From this solitary line, where the Court never doubted the Aboriginal's right to fish for food, the Chief Justice tells us what Aboriginal means, and by extension what rights Aboriginals possess. Aboriginal rights are those activities that are "integral to the distinctive culture of the [A]boriginal group claiming the right."[37] But what is integral to being Aboriginal, and claiming rights? He takes another step, and sets out to explain what is integral to Aboriginal people.

> [T]he test for identifying the [A]boriginal rights recognized and affirmed by s[ection] 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with Europeans.[38]

Integral thus means central, significant, distinctive, defining. The Chief Justice notes: "a practical way of thinking about this problem is to ask whether, without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it WAS."[39]

With this test, as promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, "once upon a time," central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today. His test invites stories about the past.[40]

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33. *Id.* at para. 31.

34. *Id.* at para. 36.

35. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 572-74 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542-43 & 559 (1832); R. v. Sparrow, 70 D.L.R.4th 385 (Can. 1990). "[T]here was from the outset, never any doubt, that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown." *Id.* at 404.

36. *Sparrow*, 70 D.L.R.4th at 398.

37. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 46 (Lamer, C.J.C.).

38. *Id.* at para. 44.

39. *Id.* at para. 59 (emphasis added); *see also Id.* at paras. 55-58.

40. This test has the potential to reinforce stereotypes about Indians. In order to claim an

These stories speak about whether a protected Aboriginal right has its "origins pre-contact",[41] "prior to the arrival of Europeans",[42] because "it is the fact that distinctive [A]boriginal societies lived on the land prior to the arrival of Europeans that underlies the [A]boriginal rights protected by section 35(1), it is to that pre-contact period that the courts must look in identifying [A]boriginal rights."[43] Aboriginal means a long time ago; pre-contact. Aboriginal rights protect only those customs which have continuity with practices existing before the arrival of Europeans. Aboriginal rights do not sustain central and significant Aboriginal practices which developed solely as a result of their contact with European cultures.[44] The jurisprudential dam is now back in place. A stagnant pool is once again beginning to fill. With this judgment, the Chief Justice lifts the Aboriginal right and gently places it back in this pool, behind some of its centuries long, common law encumbrances. As he set out to do, he has captured both the Aboriginal and the right. Nanabush waits.

A New Test For Defining Aboriginal Rights

As the above account reveals, the Canadian Supreme Court developed its definition of Aboriginal rights by using a questionable definition of Aboriginality. However, the Court's initial inquiry was appropriate, as it sought to discover "the purposes behind section 35(1) as they relate to the scope of the rights the provision is intended to protect."[45] The Court properly found that the "special legal and constitutional status of [A]boriginal peoples" existed to reconcile "pre-existing [A]boriginal rights with the assertion of Crown sovereignty."[46]

Two reasons were advanced in support of this proposition. First, Aboriginal people enjoy Constitutional protection "because of one simple fact: when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[47] Second, Aboriginal rights were also placed

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Aboriginal right, these determinations of Aboriginal will become more important than what it means to be Aboriginal today. The notion of what was integral to Aboriginal societies is steeped in questionable North American cultural images. *See* DANIEL FRANCIS, THE IMAGINARY INDIAN: THE IMAGE OF THE INDIAN IN CANADIAN CULTURE (1992).

41. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 62 (Lamer, C.J.C.).

42. *Id.* at para. 61.

43. *Id.* at para. 60.

44. *Id.* at para. 73.

45. *Id.* at para. 22.

46. The articulation of this second purpose, reconciliation, as a reason for the entrenchment of section 35(1) in the Constitution was unexpected because it was not formerly a part of Aboriginal rights jurisprudence.

47. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 30 (Lamer, C.J.C.). The justification for this reason drew strongly from early U.S. jurisprudence in the Marshall cases. For commentary

within the Constitution to reconcile the assertion of British sovereignty with the pre-existing rights of Aboriginal peoples.[48] The decision might not have been as troubling had the Court stopped there, since its reasons seem to recognize legal equality for Aboriginal people. However, in further searching for the intention behind the entrenchment of Aboriginal rights, the Court applied disturbing stereotypes of Aboriginal culture to frame the reconciliation it suggested. It defined Aboriginal practices "prior contact with Europeans" as the legally relevant date for reconciliation.[49] As a result, to establish an Aboriginal right, Aboriginal peoples have to demonstrate that the practices for which they seek protection are a "central and significant part of the society's distinctive culture,"[50] "prior to the arrival of Europeans."[51] In so ruling, the Court placed those activities that developed solely as a result of European culture outside of the protection of the Canadian Constitution.[52] This was reflected in Nanabush's walk through the water, and the Chief Justice's walk through the jurisprudence. This decision relegated Aboriginal peoples to the backwaters of social development, deprived them of protection for practices that grew through intercultural exchange, and minimized the impact of Aboriginal rights on non-Aboriginal people.

In its reasons for judgment, the Court elaborated upon ten factors it would consider in the application of the integral to a distinctive culture test. These factors were articulated to provide guidance for future courts in defining Aboriginal rights. They form an important insight on how the Court developed the integral test. They also demonstrate the Court's limited cultural understanding of Indigenous communities.[53]

First, in applying this new test the Court noted that it must consider the perspective of Aboriginal peoples themselves on the meaning of the rights at

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on the Marshall cases, see Rennard Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, The Cherokee Cases and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111 (1994); Philip Frickey, *Marshalling the Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

48. It is ironic that this assertion of British sovereignty should form one of the principal bases and underlying purposes for the existence of Aboriginal rights. At its most simple level, one might have thought that the assertion of British sovereignty was the last thing that would inform the constitutionalized protection of Aboriginal rights, since it is almost always British sovereignty that most severely threatens these rights. For criticism of the law's artificial and self-serving acceptance of the Crown claims of sovereignty, see Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727, 730 (1987).

49. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 44 (Lamer, C.J.C.).

50. *Id.* at para. 46.

51. *Id.* at paras. 55, 60.

52. Or to put the question affirmatively, in recognizing Aboriginal rights, one must ask "whether or not a practice, tradition or custom was a defining feature of the culture in question" prior to European influences. See *Vanderpeet*, 137 D.L.R.4th 289, at para. 59 (Lamer, C.J.C.).

53. For a discussion of the court's limited understanding of Aboriginal culture, see Turpel, *supra* note 6.

stake. This factor for defining Aboriginal rights was first spoken of in the path-breaking case of *R. v. Sparrow*[54] and was elaborated upon in *Vanderpeet.* While the *Sparrow* Court observed that the Aboriginal perspective on their rights was crucial, in *Vanderpeet* they modified this approach and stated that the Aboriginal perspective must be "framed in terms cognizable to the Canadian legal and constitutional structure,"[55] to incorporate both Aboriginal and non-Aboriginal legal perspectives. This reformulation substantially weakened the potential for Aboriginal claimants to express the law on their own terms, according to their own customs. To facilitate an understanding among Canadian judges, Aboriginal laws will need reframing and reinterpretation. This creates the very real danger of mischaracterizing Aboriginal law in order to make it "fit" another system, and thus not accurately protect the underlying context and reason for the rule's existence within the Aboriginal community.[56] Curiously, the Court reasoned that this approach best reconciles the prior occupation of Canada with Crown sovereignty because it bridges two legal perspectives.[57] It seems unusual that the Aboriginal perspective on the meaning of their rights must incorporate non-Aboriginal legal perspectives. One would think that the Aboriginal perspective is needed precisely because the non-Aboriginal perspective does not effectively reconcile the prior occupation of Canada with assertions of Crown sovereignty. In the end, however, even the limited protection of a mediated Aboriginal perspective may provide few benefits for Aboriginal litigants, as the Court failed to invoke the Aboriginal perspective of

54. 70 D.L.R.4th 385, 411 (Can. 1990). For an excellent commentary on this case, see Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on* R. v. Sparrow, 29 ALTA L. REV. 498 (1991). For a comparison with U.S. law, see Matthew D. Wells, *Sparrow and Lone Wolf: Honoring Tribal Rights in Canada and the United States*, 66 WASH. L. REV. 1119 (1991).

55. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 49 (Lamer C.J.C.).

56. For an elaboration of the difficulties encountered in articulating Aboriginal world-views before common law courts, see Robin Riddington, *Cultures in Conflict: The Problem of Discourse*, *in* NATIVE WRITERS AND CANADIAN WRITING 273 (William Herbert New ed., 1990); LESLIE H. PINDER, THE CARRIERS OF NO: AFTER THE LAND CLAIMS TRIAL (1991); Joan Ryan & Bernard Ominayak, *The Cultural Effects of Judicial Bias*, *in* EQUALITY AND JUDICIAL NEUTRALITY 346 (Kathleen Mahoney & Sheilah Martin eds., 1987); Louise Mandell, *Native Culture on Trial*, *in* EQUALITY AND JUDICIAL NEUTRALITY 358 (Kathleen Mahoney & Sheilah Martin eds., 1989); Michael Jackson, *The Case in Context*, *in* COLONIALISM ON TRIAL: INDIGENOUS LAND RIGHTS AND THE GITKSAN AND WET'SUWET'EN SOVEREIGNTY CASE x-xi (Don Monet & Sakau'u eds., 1992).

57. In dissent, Madam Justice L'Heureux-Dube stated "I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the native when defining [A]boriginal rights." *Vanderpeet*, 137 D.L.R.4th 289, at para. 145 (L'Heureux-Dube, J).

the rights in question in its subsequent decisions of *Pamajewon*, *R. v. Cote* [58] and *R. v. Adams*.[59]

The second factor the Court identified in determining integral Aboriginal practices concerns the nature of the claim being made. The Court narrowed the nature of claim being put forward, as it often does when considering collective rights.[60] The Chief Justice wrote that to define integral Aboriginal rights one must identify the precise nature of the claim to determine whether the evidence provided supports its recognition. The correct characterization of a claim involved three considerations: "the nature of the action which the applicant [was] claiming was done pursuant to an [A]boriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right."[61] The application of these steps in determining the precise nature of the claim asserted was a very significant activity in all four cases. The Court's characterization of the claim in some instances changed the very question the people were attempting to litigate.[62]

For example, in *Pamajewon* it would not be an unfair reading of the case to observe that the appellants were asserting a right to self-government. However, since rights to Indian self-government have not yet been explicitly recognized in Canadian jurisprudence,[63] the Supreme Court considered that assertions of Aboriginal rights to self-government were cast at a level of "excessive

58. 138 D.L.R.4th 385 (Can. 1996). In the *Cote* case, the issues were: whether an Aboriginal right to fish must be necessarily incidental to a claim of Aboriginal title, and whether section 35(1) protections outlined in *Vanderpeet* extended to areas included with the former colonial regime of New France. The Court held that "[A]boriginal rights may exist independently of [A]boriginal title" and that section 35(1) "would fail to achieve its noble purpose [if it] only protected those defining features [of Aboriginal societies] which were fortunate enough to receive the protection of European colonizers." *Id.* at paras. 38, 52, (Lamer, C.J.C.). Thus, Aboriginal rights could extend to areas within the former colonial regime of New France.

59. 138 D.L.R.4th 657 (Can. 1996). The *Adams* case also addressed the issue of whether Aboriginal rights are inherently based in claims to land, or whether claims to land are simply one manifestation of a broader concept of Aboriginal rights. The Court held "[A]boriginal rights do not exist solely where a claim to Aboriginal title has been made out." *Id.* at para. 26 (Lamer, C.J.C.). It stated that the *Vanderpeet* test does not require that an Aboriginal group satisfy a further hurdle of demonstrating that their connection to land where the activity was taking place was of central significance to their distinctive culture.

60. For a discussion on the willingness of courts to alter the nature of claims to collective rights, see Leon Trakman, *Native Cultures in a Rights Empire: Ending the Dominion*, 45 BUFF. L. REV. 189, 196-212 (1997).

61. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 53 (Lamer, C.J.C.).

62. For a perceptive article that discusses the law's re-characterization of Aboriginal claims because of its inability to directly address colonialism, see Mary Ellen Turpel, *Home/Land*, 10 CAN. J. FAM. L. 17, 34 (1991).

63. *But see* R. v. Sioui, 70 D.L.R.4th 427 (Can. 1990). Sioui provides for a recognition of the existence of Aboriginal self-government in the historic period.

generality."[64] The court observed that if section 35(1) rights encompass claims to self-government, which it did not decide, one must consider these claims in the light of specific practices integral to the pre-contact Aboriginal culture. The Court's re-characterization of the right illustrated its unwillingness to consider self-government rights on any general basis.

This approach defeats many Aboriginal peoples' aspirations for a fuller articulation of powers relative to the federal and provincial governments.[65] It is clear that the current Court was unwilling to consider Aboriginal rights to self-government on any global basis. Thus, in the *Pamajewon* case, the precise nature of the right was characterized as a right to "participate in, and to regulate, high stakes gambling activities on the reservation."[66] The Court rejected this claim as an Aboriginal right and refused to consider it on a broader basis.

Similarly, in the *Vanderpeet* and *Smokehouse* cases, the Court also narrowed the consideration of the claimed practice to a more precise articulation of the potential right. These two cases held that the most accurate characterization of the Aboriginal position consisted of a right "to exchange fish for money or other goods."[67] Since the evidence in these cases did not support this more limited right, it was not necessary to consider the nature of this right at a more general level. However, in the *Gladstone* case, compelling evidence existed that the sale and exchange of fish was integral to the Nation's culture, and thus the court looked even further to determine whether there was an associated Aboriginal right to trade on a commercial basis. It found that such a right existed, which was a significant finding because it confirmed that Aboriginal peoples can possess constitutionally-protected commercial rights. By holding that an Aboriginal right could exist at this level of generality, the Court held out a thin thread of hope for Aboriginal peoples seeking more encompassing rights. The *Gladstone* case demonstrated that precise rights to a practice may also evidence more general rights. This step by step approach to defining Aboriginal rights underlines the Court's hesitancy to articulate them more broadly.

The third factor the court considered in the application of the integral to a distinctive culture test concerned the centrality of the practice to the group claiming the right. The majority wrote that "the claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture."[68] As noted previously, to have a practice protected as a right the group must show that the activity was distinctive - a defining feature of the culture. "A practical way of thinking about this problem

64. *See Pamajewon*, 138 D.L.R.4th 204, para. 27 (Lamer, C.J.C.).

65. The legal basis for broader claims to self-government is set out in ROYAL COMM'N OF ABORIGINAL PEOPLES, PARTNERS IN CONFEDERATION: ABORIGINAL PEOPLES, SELF-GOVERNMENT AND THE CONSTITUTION (1993).

66. *See Pamajewon*, 138 D.L.R.4th 204, at para. 26 (Lamer, C.J.C.).

67. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 76 (Lamer, C.J.C.); *Smokehouse*, 137 D.L.R.4th 528, at para. 21 (Lamer, C.J.C.).

68. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 58 (Lamer, C.J.C.).

is to ask whether, without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it [was]."[69] This element of the court's test was based on a passage in *Sparrow* where the Musqueam right to fish for food was stated to "ha[ve] always constituted an integral part of their distinctive culture".[70]

One might question whether it was appropriate for the Court in *Vanderpeet* to develop its test for the definition of Aboriginal rights from these observations, since the Aboriginal right to fish for food in *Sparrow* was never open to serious question. Furthermore, in the same paragraph, the *Sparrow* Court also wrote, with equal authority, that the Musqueam "always fished for reasons connected to their cultural and physical survival", and noted that "the right to do so may be exercised in a contemporary manner".[71] This raises an additional question about why, in *Vanderpeet*, notions of survival and the contemporary exercise of rights did not form part of the integral to a distinctive culture test, since the idea of "integral" in *Sparrow* included the contemporary exercise of rights necessary for physical and cultural survival. Aboriginal rights should exist to ensure Indigenous peoples' physical and cultural survival, not necessarily to preserve distinctive elements of pre-contact culture. The acceptance of these considerations would have strengthened Aboriginal peoples interactions with other Canadians, and been more consistent with the Court's previous rulings.

The fourth factor the Court articulated in determining whether an Aboriginal practice is integral to a distinctive culture was whether they had continuity with the activities which existed "prior to the arrival of the Europeans in North America."[72] The focus on pre-contact practices restricts contemporary Aboriginal development. The rights of other Canadians are not limited to those practices which have continuity with their activities prior to their first arrival in North America. They would find such a limitation as the gravest form of injustice. However, for the Court this factor was relevant in defining Aboriginal rights "[b]ecause it [was] the fact that distinctive [A]boriginal societies lived on the land prior to the arrival of Europeans that underlies the [A]boriginal rights protected by section 35(1), it [was] to that pre-contact period that the courts must look in identifying [A]boriginal rights."[73] The two dissenting judgments criticized this part of the majority's test as "freezing" Aboriginal rights, contrary to the admonition found within *Sparrow*.[74] Justice L'Heureux-Dube noted that the definition of Aboriginal rights by reference to pre-contact practices inappropriately crystallized Aboriginal rights at an arbitrary date.[75]

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69. *Id.* at para. 59 (Lamer, C.J.C.).

70. R. v. Sparrow, 70 D.L.R.4th 385, 401 (Can. 1990).

71. *Id.*

72. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 60 (Lamer, C.J.C.).

73. *Id.*

74. "[T]he phrase 'existing [A]boriginal rights' must be interpreted flexibly so as to permit their evolution over time." *Sparrow*, 70 D.L.R.4th at 397.

75. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 167 (L'Heureux-Dube, J.).

She argued this was contrary to the perspective of Aboriginal peoples, and overstated the impact of European influence on Aboriginal peoples.[76] Similarly, Justice McLachlin stated that the majority's failure to recognize the distinction between rights and contemporary form "freeze[s] [A]boriginal societies in their ancient modes and den[ies] to them the right to adapt, as all peoples must, to the changes in the society in which they live."[77] These dissenting judgments implicitly recognize the inequity in creating non-Aboriginal rights following contact and not extending this same entitlement to Aboriginal peoples.

After exploring the above four factors relevant to the application of the integral to a distinctive culture test in some detail, the Court breezed through a list of six other considerations appropriate to defining Aboriginal rights. They wrote that in defining Aboriginal rights "[t]he courts must not undervalue the evidence presented by the [A]boriginal claimants," simply because it did not conform precisely with evidentiary standards in private litigation.[78] This was an important subsidiary qualification in defining integral rights rooted in the ancient practices because difficulties will arise in obtaining certain evidence of pre-contact European practices.[79] The Court eased the evidentiary burden by this admonishment.

The Court then stated that claims to Aboriginal rights were not general and universal, but related to the specific history of the group claiming the right.[80] The Court's failure to articulate general features of Aboriginal claims prevented their expansion. If claimants cannot rely on the victories of other communities, because cases may always be distinguishable through particular histories, then this provides very little basis for Aboriginal peoples to build a principled, protective jurisprudence. Yet, despite this disadvantage the Chief Justice wrote that "[t]he fact that one group of [A]boriginal people has an [A]boriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another Aboriginal community has the same [A]boriginal right."[81] While there was a certain amount of truth in this statement that Aboriginal rights are fact and site specific, these reasons ignore a more global basis for Aboriginal rights. "Aboriginal rights are rooted in an overarching jurisprudential infrastructure . . . First Nation's laws are integral to the exercise of all Aboriginal rights."[82] The Court failed to recognize that one right that all

76. *Id.* at paras. 165-67.

77. *Id.* at para. 240 (McLachlin, J.).

78. *Id.* at para. 68 (Lamer, C.J.C.).

79. For evidentiary problems in Aboriginal rights litigation, see Michael Asch & Catherine Bell, *Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw*, 19 QUEEN'S L.J. 503 (1993-1994); Clay McLeod, *The Oral Histories of Canada's Northern Peoples, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past*, 30 ALTA. L. REV. 1276 (1992).

80. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 69 (Lamer, C.J.C.).

81. *Id.*

82. John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 MCGILL L.J.

Aboriginal peoples possess as an integral right was their organization in societies according to their traditions, customs and laws.[83] The organization and laws of Aboriginal peoples were universally protected as something each group could successfully claim, though it was true their content varied from group to group.

A seventh factor to consider in applying the integral test was that the claimed practice contain independent significance to the community, and not be a mere incidence to another tradition. Without providing justification or reasons the court wrote that "[i]ncidental practices, customs and traditions cannot qualify as [A]boriginal rights through a process of piggybacking on integral practices, customs and traditions."[84] This assertion seems contrary to the Court's earlier ruling in *R. v. Simon*, where incidental practices were protected as Aboriginal rights.[85] It also suggests that, while the Court was willing to protect independent rights in the abstract, it was unwilling to preserve the place and means necessary to make the exercise of rights meaningful. Only the future will reveal if and how the Court will resolve this seeming contradiction.

The other three factors the Court identified as important in determining Aboriginal rights involved the "distinctive" nature of the Aboriginal practice.[86] A distinctive practice is one that does not arise solely as a response to European influences,[87] and which can arise separately from the Aboriginal group's relationship to the land.[88] Distinctiveness and the European influence on Aboriginal rights have been touched upon elsewhere in this comment and will receive no further attention at this point. However, the idea that Aboriginal rights may arise not only from prior occupation of land, but from the prior social organization and distinctive cultures of Aboriginal people is novel. Prior to these cases it was not clear whether Aboriginal rights arose only through claims to Aboriginal title.[89] Now it is clear that Aboriginal title does not necessarily need the requisite proof to sustain other Aboriginal rights. Section 35(1) of the Constitution is emerging as the most relevant criteria in defining Aboriginal rights in Canada. The subsequent Supreme Court cases of *Adams* and *Cote* followed this approach, wherein it was held that Aboriginal peoples

631, 645-6 (1996) [hereinafter Borrows II].

83. The court does not recognize that Aboriginal laws are universally protected Aboriginal rights even though they note that traditional laws form the basis of Aboriginal rights in an earlier part of the judgment. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 42 (Lamer C.J.C.).

84. *Id.* at para. 70.

85. R. v. Simon, 24 D.L.R.4th 390 (Can. 1985) (the Aboriginal accused had a right to carry a gun in closed season on his hunting grounds because its possession was reasonably incidental to his protected treaty right to hunt in all seasons).

86. *See Vanderpeet*, 137 D.L.R.4th 289, at paras. 71-72 (Lamer, C.J.C.).

87. *Id.* at para. 73.

88. *Id.* at para. 74.

89. For the inappropriateness of applying the "integral" test to aboriginal title, see Kent McNeil, *The Meaning of Aboriginal Title, in* ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE 135-54 (Michael Asch ed., 1997).

in Quebec could claim food fishing rights, even if they had not established Aboriginal title in the area in question.[90]

The net effect of these ten considerations is to circumscribe Aboriginal rights and bring them more fully under the cultural assumptions of the common law. They establish non-Aboriginal characterizations of Aboriginality,[91] evidence,[92] and law[93] as the standards against which Aboriginal rights are measured. Taken together, these factors compel the conformity of Aboriginal rights to "western" formulations of law in order to find recognition and affirmation in Canada's constitution. This creates problems for Aboriginal groups since these norms are generally not sensitive to the Aboriginal perspective on the meaning of the rights at stake[94] and consequently constrain the reception of Aboriginal viewpoints. Yet, the Court should not interpret these rights in such an inflexible and narrow manner.[95] The trickster conveys this principle.

Tahwahgi

Tahwahgi - Fall. The Couchiching Narrows, Orillia, Ontario. Nanabush has recently presided over the opening of the casino on the Chippewas of the Rama reservation. Confined for over a century, Anishinabe self-government has escaped federalism's cells and now spills into the surrounding communities. Over one-hundred thousand people travel to Rama and drop quarters in the Casino's well. The Woodland art of its outer walls encloses the interaction of mean tricks and kindness, help and neglect, charm and cunning. The rush to get into self-government's outward flow has its periods of rest too. Nanabush takes the three minute walk to the Lake. On the water the boat's sails hang loosely. For 4000 years an Aboriginal weir raked these Narrows to trap fish behind its wooden bars. Now behind the Lake's shores the fingers of a new presence reach out. Nanabush looks back towards it; thinks about how he placed it

90. *See* R. v. Cote, 138 D.L.R.4th 385 (Can. 1996); R. v. Adams, 138 D.L.R.4th 657 (Can. 1996).

91. For accounts that problematize non-aboriginal accounts of aboriginality, see Ghislain Otis, *Opposing Aboriginality to Modernity: The Doctrine of Aboriginal Rights in Canada*, 12 BRITISH J. CANADIAN STUD. 1 (1997), and Gillian Cowlishaw, *Did the Earth Move for You? The Anti-Mabo Debate*, 6 AUSTRALIAN J. ANTHROPOLOGY 32 (1995).

92. For commentary on non-aboriginal interpretations of aboriginal evidence, see Geoff Sherrott, *The Court's Treatment of the Evidence in* Delgamuukw v. B.C., 56 SASK. L. REV. 441 (1992); Louis Assier-Andrieu, *Anthropology as the Eye of the Law: Comment on Canadian Jurisprudence*, 33 J. LEGAL PLURALISM 179 (1993); Marlee Kline, *The Colour of Law: Ideological Representations of First Nations in Legal Discourse*, 3 SOCIAL & LEGAL STUD. 451 (1994).

93. For a critique of the application of non-aboriginal characterizations of aboriginal law, see COLONIALISM ON TRIAL: INDIGENOUS LAND RIGHTS AND THE GITKSAN AND WET'SUWET'EN SOVEREIGNTY CASE (Don Monet & Sakau'u eds., 1992)

94. R. v. Sparrow, 70 D.L.R.4th 385, 411 (Can. 1990).

95. *See* John Borrows, *Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics*, 43 U.N.B.L.J. 19 (1994).

perfectly. Buses disgorge their contents, cars and trains arrive every few minutes, the people of the reserve are also swept into its flow; its grasp is extensive.

North of Rama, Chief Justice Antonio Lamer presides over the fate of two casinos on the Shawanaga and Eagle Lake reservations. It is the *Pamajewon* case. The communities have risked asking the Court to rule that Aboriginal rights to self-government include high-stakes gambling. The outward rush into these communities is just beginning to build. The land is cleared for a new gaming hall and hotel, and signs on the highway announce the arrival of monster bingo. The Chief Justice takes a thirty-two paragraph stroll around the place. With *Vanderpeet* as a companion - a "legal standard against which the appellants' claim must be measured"[96] - he tells us the character of Aboriginal rights. Once again he gets to decide the character traits. He not only defines the character of an Aboriginal, he defines the character of an entire Aboriginal community. How is he going to do this? Can he identify the character of another culture? He consults his companion. *Vanderpeet* has some words of advice: change the characterization of what the Aboriginal people are claiming. The Chief Justice agrees; that makes it easier. He confides:

> 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 [A]boriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right.[97]

The Chief Justice provides three factors to consider in developing the correct characterization of a claim, there is no mention of standards by which one should judge these factors. What principles will guide judgments about the characterization of these factors? Should Aboriginal claims be characterized in a large, liberal and generous manner,[98] with sensitivity to the "[A]boriginal perspective on the meaning of the rights at stake"?[99] Nope. No mention of that here. With that out of the way, the Chief Justice provides his own characterization of what is being claimed.

He walks on. The people want him to see how the band participates in deciding who lives where on the reserve, and under what conditions. He is invited to tour the band council office, read their governing bylaws, see how the people depends on them. He declines. He stays out near the road. The Chief Justice turns his attention to the empty casino land, sees the monster being advertised. In the next breath, he states, "When these factors are considered in

96. *See Pamajewon*, 138 D.L.R.4th 204, at para. 23 (Lamer, C.J.C.).
97. *Id.* at para. 26.
98. R. v. Sioui, 70 D.L.R.4th 427, 453 (Can. 1990).
99. R. v. Sparrow, 70 D.L.R.4th 385, 404 (Can. 1990).

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".[100] His short promenade sidesteps claims about Aboriginal rights to self-government. "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."[101] This is a comfortable pace. One needs to get a little exercise, but no use over-extending yourself. "The factors laid out in *Vanderpeet*, 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."[102] It is too high a level of generality to think that Aboriginal people would actually have a broad right to manage the use of their own lands.

The Chief Justice is almost through with his visit. It is getting dark. He just has something to dispose of before he leaves - whether Shawanaga and Eagle Lake's "participation in, and regulation of, gambling on reserve lands was an integral part of their distinctive culture."[103] The evidence "d[oes] not demonstrate that gambling, or that the regulation of gambling, was of central significance to the Ojibway people." Prior to contact, informal gambling activities took place on a "small scale." The Chief Justice refers to a prior visitor: "I also agree with the observation made by Flaherty Prov. Ct. J . . . commercial lotteries such as bingo [were] a twentieth century phenomena and nothing of the kind existed amongst [A]boriginal peoples and was never part of the means by which these societies were traditionally sustained or socialized."[104] Done. End of the trail. The claim is defeated since Anishinabe gambling, prior to contact, was not done on a twentieth century scale. Hardly surprising that this standard of evidence could not be met. Not many activities in any society, prior to this century, took place on a twentieth-century scale. It is a good thing the rights of other Canadians do not depend on whether such rights were important to them two to three hundred years ago. What would it be like for Canadians to have their fundamental rights defined by what *was* integral to European people's distinctive culture prior to their arrival in North America?[105]

The door slams. The Chief Justice drives away. Self-government will serve more time in isolation, locked within federalism's cells. Very few people will

100. *See Pamajewon*, 138 D.L.R.4th 204, at para. 26 (Lamer, C.J.C.).

101. *Id.* at para. 27.

102. *Id.*

103. *Id.* at para. 28.

104. *Id.* at para. 29.

105. Unfortunately, some Canadians may know exactly what it is like to have fundamental rights defined by what was integral to European culture prior to its arrival in North America. People disadvantaged on the basis of sex, class, race, etc., may well feel their rights depend on what was defining European culture 200-300 years ago.

visit Shawanaga and Eagle Lake, even fewer will leave their money behind. The people of Shawanaga and Eagle Lake will not spend the rest of their lives, and that of their children's children, caught inside a casino.[106] The fresh October wind is brisk. Clear. Orange and yellow leaves dance in this breeze, and mimic the setting autumn sun. A walk to shore reveals Indian fishers pulling in their nets. Whitefish and trout will be served tonight. Lake Huron has witnessed this activity for centuries. No buses, trains or cars crowding the life out of the community. No new presence - no grasping; quiet settles back into the familiar rhythms of activity.

An Alternative Basis for the Constitutional Entrenchment of Aboriginal Rights

As the preceding account reveals, the idea that Aboriginal peoples will have to base the source and temporal roots of their rights in their historic presence - their ancestry - in North America and reconcile these with Crown sovereignty is disputed.[107] As Justice McLachlin noted in dissent,

> Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the [A]boriginal people in question. . . . One finds no mention in the text of s[ection] 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an [A]boriginal right.[108]

Even the majority judgment in these cases mentioned the fact that traditional laws and customs were the basis for Aboriginal rights.[109] The current Supreme Court test defines Aboriginal rights as those rooted in practices which were central to their societies prior to the arrival of European culture, and not solely a result of European influence. Therefore, if the purposes underlying the existence of section 35(1) in the Constitution were even slightly differently conceived, then the test defining an Aboriginal right would vary accordingly. This was illustrated in Nanabush and the Chief Justice's visit to the casino.

Furthermore, the Aboriginal right's nexus to "crucial elements" of pre-existing societies is, in the words of Justice McLachlin, too broad a

106. For an excellent novel where an Anishinabe writer has described this experience, see LOUISE ERDRICH, THE BINGO PALACE (1994). For United States statute and case law dealing with Indian gaming, see Naomi Mezey, *The Distribution of Wealth, Sovereignty and Culture Through Indian Gaming*, 48 STAN. L. REV. 711 (1996); Kathryn Rand & Steven Light, *Virtue of Vice? How IGRA Shapes the Politics Of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 380 (1997).

107. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 32 (Lamer, C.J.C.).

108. *Id.* at para. 247 (McLachlin, J.).

109. *Id.* at para. 40 (Lamer, C.J.C.).

characterization of the rights, too indeterminate and too categorical.[110] The first criticism of this new test involved the over-broad denotation because "integral is a wide concept, capable of embracing virtually everything that an Aboriginal people customarily did."[111] Moreover, the integral test is too indeterminate because "one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision maker."[112] Finally, the integral to a distinctive culture test is inappropriately categorical because "[w]hether something is integral is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the grounds of justification."[113]

An alternative basis for defining Aboriginal rights is the common law's recognition of the ancestral laws and customs "of the [A]boriginal peoples who occupied land prior to European settlement."[114] This basis for Aboriginal rights is preferred to that of the majority because it is more in line with the existing case law and the "time honoured methodology of the common law."[115] Under this new methodology, the Court would evaluate new situations by reference to what the law recognized in the past. The Chief Justice did not follow this methodology, but engaged in a more theoretical approach to Aboriginal rights which reasoned from broad principles which found little or no support in past judgments. On the other hand, Madam Justice McLachlin's methodology and reasons followed a "golden thread" of case law which defined the nature and incidents of Aboriginal rights by reference to the laws and customs of Indigenous people.[116] Her reasons led her to hold that the purpose of section 35(1) was, first, to protect the existing customary laws and rights of Aboriginal peoples and, second, to ensure that such customs and rights remain in the Aboriginal people until extinguished or surrendered by treaty. These two principles, according to McLachlin, were supported by the common law and history, and "may safely be said to be enshrined in s[ection] 35(1) of the Constitution Act, 1982."[117] Thus for McLachlin, since Aboriginal rights rested on Aboriginal laws, section 35(1) must define these rights by reference to these pre-existing laws.

Yet, the Chief Justice's test defines Aboriginal rights according to stereotypical perceptions of Aboriginal characteristics, rather than by their

110. *Id.* at paras. 256-60 (McLachlin, J.).
111. *Id.* at para. 256.
112. *Id.* at para. 257.
113. *Id.* at para. 258.
114. *Id.* at para. 263.
115. *Id.* at para. 261.
116. *Id.* at para. 265.
117. *Id.* at para. 275.

nature and source. This approach freezes the development of certain Aboriginal practices in the distant past. For example, under the Chief Justice's reasoning, an Aboriginal right does not include Aboriginal hunting rights to sell and exchange furs because some argue this practice developed solely as a result of European influence.[118] This understanding of Aboriginal rights cannot be correct. The idea that Aboriginal people do not have rights which developed solely in response to European influences is contrary to the history and the very possibility of the exploration and early development of many parts of North America.[119] This restriction of Aboriginal rights goes against the Chief Justice's own observation that the rights developed from the "peculiar meeting of two vastly different legal cultures."[120] If Aboriginal rights developed through the meeting of two cultures, then surely those practices which resulted solely in response to European culture must encompass this legal regime. Otherwise, it is difficult to see how the law is "intersocietal."[121] Early European presence in North America would have been frustrated if Aboriginal people did not have rights to hunt and trade because some of these practices developed through contact with Europeans. Europeans relied on the profit from the fur trade and would have been seriously handicapped in asserting sovereignty in North America if Aboriginal people had no rights to sell furs to them.[122] Furthermore, Aboriginal people themselves would also have rebelled or refused to trade if anyone would have seriously suggested that they had no rights to exchange or sell animals.[123] Such a policy would have undermined one of the principal reasons underlying colonial policy in the settlement of Canada found in the Royal Proclamation's assertion that the "[t]rade with the said Indians shall be free and open to all."[124] As such, the Lamer's holding

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118. ARTHUR J. RAY, INDIANS IN THE FUR TRADE: THEIR ROLE AS TRAPPERS, HUNTERS, AND MIDDLEMEN IN THE LANDS SOUTHWEST OF HUDSON BAY 1660-1870, at 51-57 (1974).

119. RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815, at 50-142 (1991); JAMES RODGER MILLER, SKYSCRAPERS HIDE THE HEAVENS 23-82 (1989); OLIVE P. DICKASON, CANADA'S FIRST NATIONS: A HISTORY OF FOUNDING PEOPLES FROM EARLIEST TIMES 86-215 (1992); 1 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 99-137 (1996).

120. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 42 (Lamer, C.J.C.) (quoting Mark Walter, *British Imperial Constitutional Law and Aboriginal Rights: A Comment on* Delagamuukw v. British Columbia, 17 QUEEN'S L.J. 412-13 (1992)).

121. *Id.* (citing Brian Slaterly, *The Legal Basis of Aboriginal Title*, *in* ABORIGINAL TITLE IN BRITISH COLUMBIA: DELGAMUUKW V. THE QUEEN 121-22 (1992)).

122. *See generally*, HAROLD ADAMS INNIS, FUR TRADE IN CANADA: AN INTRODUCTION TO CANADIAN ECONOMIC HISTORY (1956).

123. In fact, Indians did rebel on those occasions where they were told they had no rights to occupy and use their lands, see FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE (1975); CORNELIUS JAENEN, FRIEND OR FOE: ASPECTS OF FRENCH-AMERINDIAN CULTURAL CONTACT IN THE SIXTEENTH AND SEVENTEENTH CENTURIES (1976); LESLIE STOKES UPTON, MICMACS AND COLONISTS, INDIAN-WHITE RELATIONS IN THE MARITIMES (1979).

124. The Royal Proclamation of October 7, 1963, R.S.C., 1985, App. II, No. 1; *See* Borrows, *supra* note 19.

does not comport with history or Aboriginal law if the development of Crown/Aboriginal relations, which he himself described as "intersocietal law," was predicated on this denial of the continued development of Aboriginal practices solely as a result of European influence.[125]

To take away the possibility that Aboriginal laws, traditions and practices could develop and receive protection as rights in relation to the appearance of European cultures is to take away the means to allow Aboriginal people to compete on the same basis, with equal power, with the settling peoples. Why is it that European laws, practices and traditions, some of which developed solely through contact with Aboriginal peoples, are allowed to grow and develop from the moment of contact, while Aboriginal laws and practices, which also developed from the same moment of contact, are stifled in their progression? Such a holding is contrary to the Chief Justice's assertion that "the essence of [A]boriginal rights is their bridging of [A]boriginal and non-[A]boriginal cultures."[126] To accomplish this bridging of cultures and truly render the Aboriginal perspective of Aboriginal rights in terms "cognizable to Canadian law," as required by Lamer in the *Vanderpeet* case, true reconciliation requires those in power to give "equal weight" to Aboriginal law.[127]

The downgrading of Aboriginal rights is even more apparent in the greater power given to Canadian governments to infringe Aboriginal rights in these cases. In *Gladstone*, the majority provided strong obiter dicta stating that Aboriginal rights must be capable of being limited and, as such, could be infringed by justifiable government legislation.[128] This potentially widens the government's power to interfere with Aboriginal rights. Justifiable legislative objectives could include "the pursuit of economic and regional fairness, and the recognition of the historic reliance upon, and participation in, the fishery by non-[A]boriginal groups."[129] This further potential for the infringement of Aboriginal rights must be considered in the light of the fact that government already has a generous two-step chance for justifying interference with Aboriginal rights outlined in *Sparrow*.[130] The concern that motivated the

125. A holding that denies the protection of Aboriginal practices which developed solely as a result of European contact would also violate Canada's fiduciary obligation towards Aboriginal peoples, to maintain the honor of the Crown in dealings with Aboriginal peoples. For discussion of this doctrine, see LEN ROTMAN, PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA (1996); David Elliot, *Aboriginal Peoples in Canada and the United States and the Scope of the Fiduciary Relationship*, 24 MAN. L.J. 137 (1996); Peter W. Hutchins et al., *When Do Special Fiduciary Obligations to Aboriginal Peoples Arise?*, 59 SASK. L. REV. 97 (1995).

126. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 42 (Lamer, C.J.C.).

127. *Id.* at paras. 59-60.

128. *See Gladstone*, 137 D.L.R.4th 648, at para. 73 (Lamer, C.J.C.).

129. *Id.* at para. 75.

130. Under the *Sparrow* test for infringement, first, the Aboriginal group must demonstrate a prima facie interference with their rights because legislation is either unreasonable, causes undue

widening of permissible legislative infringement in *Gladstone* was the lack of any inherent limitation for Aboriginal people on the exercise of their rights. This concern is curious, from an Aboriginal perspective, because there are limitations placed on these rights - the laws and traditions of Aboriginal peoples.[131] Aboriginal peoples have laws which dictate the appropriate exercise of a right.[132] Furthermore, non-Aboriginal peoples exercise exclusive rights all the time. In fact, exclusive rights are one of the distinguishing features of western legal systems. Why should an extra concern arise when Aboriginal peoples exercise exclusive rights? What can explain the concern in assigning Aboriginal peoples exclusive rights, when the Court generally shows no anxiety when allotting them to non-Aboriginal peoples?

The Chief Justice's failure to place equal weight on Aboriginal practices, customs and traditions contradicts his stated purpose for the inclusion of section 35(1) in the Constitution. The downgrading of Aboriginal practices severely constrains true reconciliation between the assertion of Crown sovereignty and the pre-existing rights of Aboriginal peoples. Reconciliation usually requires that each party to a relationship concede something to the other, and the majority's test does not require any relinquishment on the part of the Crown in accomplishing this objective. Lamer's test compels only Aboriginal peoples to give something up in reconciling the assertion of Crown sovereignty with pre-existing Aboriginal occupation. For example, the integral to a distinctive culture test requires Aboriginal peoples to concede any protection for practices which may have developed solely as response to European cultures. Yet since the adoption of new practices, traditions and laws in response to new influences is integral to the survival of Aboriginal communities, reconciliation should not require a concession of those practices which allow them to survive as a contemporary community.[133] By limiting Aboriginal rights to integral practices not developed solely as a result of European influences, the Court is denying these cultures the right to survive by adapting to new situations never before encountered. This test appears to work against Aboriginal peoples competing on an equal footing within Canadian society, and extinguishes their contemporary vigor as dynamic, competitive communities. Surely the Chief Justice could not have meant to uphold such a result for the avowed noble purpose underlying section 35(1) of the

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hardship, or denies the preferred means of exercising rights. If the group passes this test the court still may hold that interference is justified if the Crown can show a valid legislative objective for infringing the law, and demonstrate that the honor of the Crown was preserved in the enactment.

131. Although the Supreme Court of Canada has recently narrowed the bounds in which First Nations laws can apply, see R. v. Nikal, 133 D.L.R.4th 658 (Can. 1996); R. v. Lewis, 133 D.L.R. 700 (Can. 1996).

132. Borrows II, *supra* note 82, at 646-57.

133. For a discussion about the importance of the continued interaction of state law and customary Indigenous law, see Maria Teresa Sierra, *Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra De Pueblo*, 29 LAW & SOC'Y REV. 227 (1995).

Constitution.[134] Once again, the trickster's engagement with the court can help identify whether the Court has upheld such a purpose.

Peebon

Peebon - Winter. Frozen rights. Peebon's return always brings hardship, decay and dissolution. His perpetual defeat of Neebin withers the plants, hardens the ground and sends white beings through the skies. With his approach the animals sleep, and fish return to deep lakes escaping the rivers' congealing arteries. To the north, the ancient grandfathers retreat to their lodges. Their fires reflect on the sky - blue, white and cold red, and illuminate the path of souls for those traveling to the land of the dead. Some time will pass before the grandfather's voices again accompany the clouds and let their fire fall across the earth. For now, they remain in their lodges, protect their fires, and await the return of Neebin. Peebon and Neebin's perpetual quest for supremacy continually enforces this cycle on the Anishinabe. While Peebon is in the ascendancy, Nanabush looks for ways to steal fire from the grandfathers, to bring it back to the Anishinabe and keep them warm.

Peebon's frigid sovereignty has wide dominion. Aboriginal practices that developed solely as a response to European culture are now frozen, courtesy of the "integral test." How can one reconcile this with Chief Justice Antonio Lamer's own observation that Aboriginal rights developed from the "peculiar meeting of two vastly different legal cultures."[135] Nanabush stalks the land and looks for ways to steal fire. He approaches the common law warily. He might get burned. With suspicion that comes from experience, he knows the danger of trying to take something of value from that which can harm him so greatly. Yet he is both brave and foolish, so he tries.

Nanabush reasons that if Aboriginal rights emerged through the meeting of two legal cultures, then Aboriginal rights must be litigated by reference to both societies' laws. The Chief Justice would appear to agree: "[T]he law of [A]boriginal rights is 'neither English or [A]boriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.'"[136] Yet, despite this endorsement of Aboriginal law, in developing the "integral to a distinctive culture" test Nanabush observes that the Chief Justice did not consult or apply Sto:lo, Nuu-Chah-Nulth, Heiltsuk or Ojibway law in defining Aboriginal rights under section 35(1) of the Constitution.[137]

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134. *See Cote*, 138 D.L.R.4th 385, at para. 52 (Lamer, C.J.C.).

135. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 42 (Lamer, C.J.C.).

136. *Id.*

137. These communities have laws relating to selling fish and gambling that the Court could receive and consider in developing its sui generis Aboriginal rights jurisprudence. These laws "may be helpful by way of analogy" in defining and interpreting Aboriginal rights, see R. v. Simon, 24 D.L.R.4th 390, 404 (Can. 1985).

While the Court asserted that Aboriginal rights are based on traditional laws and customs "passed down, and arising from, the pre-existing culture and customs of [A]boriginal peoples,"[138] nowhere in these cases does the Chief Justice use the laws of the people charged, or the laws of any other Aboriginal people, to arrive at the standards through which he will define these rights.[139] As such, the Court does not use "intersocietal" law in developing its test for Aboriginal rights.[140] In so observing Nanabush has peered into the fire and found a branch sufficiently dense in its grain to keep a flame burning while he brings it back home to his people.

Nanabush reaches in through the smoke and observes that the Chief Justice engaged in an abstract, theoretical approach to define Aboriginal rights. He did not fully reference the "long-standing practices linking the various communities" in defining Aboriginal rights.[141] Vacuous reasons about section 35(1) reconciling Crown assertions of sovereignty with the fact that Aboriginal peoples were here first, may at the most elementary level qualify as an application of intersocietal law. However, the idea that this reconciliation should take place upon contact finds no support in either Aboriginal or non-Aboriginal law. It is the Chief Justice's invention. Nanabush has firmly grasped the branch and taken it from the fire. The smoke is clearing. Nanabush then finds a confederate, quoting from Madam Justice McLachlin's dissent in *Vanderpeet*, he states:

> Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the [A]boriginal people in question. . . . One finds no mention in the text of s[ection] 35(1), or in the jurisprudence, of the moment of European contact as the definitive all-or-nothing time for establishing an [A]boriginal right.[142]

Nanabush finds in this statement a more substantial basis upon which to define Aboriginal rights. A "morally and politically defensible conception of [A]boriginal rights will incorporate both legal perspectives."[143] The development of the "integral to a distinctive culture test" does not incorporate either legal perspective because neither the common law nor Aboriginal laws

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138. *Id.* at 40.

139. For an excellent discussion of the persistence of customary tribal law, see Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

140. For a discussion of the diverse sources of law in Canada, including Aboriginal law, see Patrick Glenn, *The Common Law in Canada*, 74 CAN. BAR REV. 261 (1995).

141. *See Vanderpeet*, 137 D.L.R.4th 289, at para. 42 (Lamer, C.J.C.) (citing Brian Slaterly, *The Legal Basis of Aboriginal Title*, *in* BRITISH COLUMBIA: DELGAMUUKW V. THE QUEEN 121-22 (1992)).

142. *Id.* at para. 247 (McLachlin, J.).

143. *Id.* at para. 42 (Lamer, C.J.C.).

held that the "moment of European contact" was the "definitive" time for establishing an Aboriginal right.

It is now time for Nanabush to run for home. The fires of his people are almost extinguished. What he has found may re-kindle them. The common law's recognition of Aboriginal ancestral laws and customs, and their continual evolution and interaction with the Crown, is preferred as a basis for defining Aboriginal rights because it is more in line with the existing case law and the "time honoured methodology of the common law."[144] This methodology follows a "golden thread" of case law which defines the nature and incidents of Aboriginal rights by reference to the laws and customs of Indigenous people.[145] This methodology also fans the embers of Aboriginal law and encourages its development as a greater source of authority for Aboriginal and non-Aboriginal Canadians.[146] With this basis for defining Aboriginal rights, the purpose of section 35(1) becomes truly "intersocietal." It also strengthens the continued interaction of these laws because Constitutional protection of the existing customary laws and rights of Aboriginal peoples ensures that such customs and rights remain in the Aboriginal people until extinguished or surrendered by treaty. Since Aboriginal rights rest on Aboriginal laws, section 35(1) must define these rights by reference to these pre-existing laws.

While Nanabush steals fire, Peebon's chilling pervasiveness is felt all around. Nanabush's solitary actions may not be enough to help the thaw. The Supreme Court of Canada's interpretations of Aboriginal rights remain restrictive and burdensome. The integral to a distinctive culture test freezes the protection of practices which may have developed solely as response to European cultures. Yet the adoption of new practices, traditions and laws in response to new influences is always integral to the survival of any community in its relations with another. Reconciliation should not require Aboriginal peoples to concede those practices which allow them to survive as a contemporary community. However, the Court's new test threatens Aboriginal cultures precisely on this point, since in adapting to new situations they do not have protection for the practices devised in meeting challenges solely as a result of European influence.[147] Such a restriction is contrary to the Chief Justice's assertion that "equal weight" be placed on Aboriginal law[148] by

144. *Id.* at para. 261 (McLachlin, J.).

145. *Id.* at para. 265.

146. For supporting argument, see Sakej Henderson, *First Nations Legal Inheritances: The Mikmaq Model*, 23 MAN. L.J. 1 (1996); Sakej Henderson, *Micmaw Tenure in Atlantic Canada*, 18 DALHOUSIE L.J. 196 (1995); Borrows II, *supra* note 82.

147. If reconciliation is to be used to define Aboriginal rights at all, a better approach to reconciliation would have made 1982 the effective date for the definition of rights. The Constitution Act recognized and affirmed those rights which were existing in 1982, NOT at the date when Europeans asserted sovereignty in what is now Canada.

148. *See Vanderpeet*, 137 D.L.R.4th 289, at paras. 59-60 (Lamer, C.J.C.).

rendering it in terms "cognizable to Canadian law." The "integral to a distinctive culture" test does not place equal weight on traditional Aboriginal law,[149] and denies legal equality to Aboriginal peoples in their relationship with Canada.[150]

Peebon remains ascendant. His icy embrace chills. The dissolution and decay continue. Throughout the land Aboriginal practices are coldly suspended. Have to wait for the thaw again. It may be a long winter.

Conclusion

This comment has attempted to show how Aboriginal rights in Canada's Constitution remain partial and incomplete. The Court's integral to a distinctive culture test does not extend protection to aboriginal practices that developed solely as a result of European influence - even if those practices are crucial to their contemporary physical and cultural survival. Surely this result is less than a full recognition and affirmation of aboriginal rights. Aboriginal peoples are entitled to expect legal protection for their existence as communities and nations within North America. Otherwise, what is the value of entrenching aboriginal rights in the Constitution if the societies these rights were meant to protect cannot survive? Canadian courts have not yet come to terms with the fact that, like others, Aboriginal people are traditional, modern and post-modern. Physical and cultural survival depends as much on attracting legal protection for contemporary activities, as it does on gaining recognition for traditional practices. The courts need to recognize that aboriginal rights attach to Aboriginal activities, whether making moccasins or marketing computers. It is not specific practices that are necessarily important to the definition of Aboriginal rights; what counts in determining Aboriginal rights is whether these practices contribute to the survival of the group. The rights exist first and foremost to protect the group, and are only incidentally concerned with the protection of specific practices. However, the courts are operating under the assumption that protecting specific "[A]boriginal" activities satisfies the Constitutional purpose for the entrenchment of Aboriginal rights (and they get to decide what is Aboriginal). They do not interpret aboriginal in a "large, liberal and generous manner," with "sensitivity to the [A]boriginal perspective on the meaning of the rights at stake."[151] Thus, they interpret

149. The downgrading of Aboriginal rights is even more apparent in the greater power given to Canadian governments to infringe Aboriginal rights in these cases. For further comment, see Kent McNeil, *How Can Infringements of the Constitutional Rights of the Aboriginal Peoples Be Justified*, 8 CONST. F. 33 (1997).

150. For an argument which develops the equality of peoples as central to reconciling Crown/Aboriginal relationships, see Patrick Macklem, *Normative Dimensions of an Aboriginal Right of Self-Government*, QUEEN'S L.J. 173 (1995); Patrick Macklem, *Distributing Sovereignty: Indian Nations and the Equality of Peoples*, 45 STAN. L. REV. 1311 (1993).

151. *See* R. v. Sioui, 70 D.L.R.4th 427, 453 (Can. 1990); R. v. Sparrow, 70 D.L.R.4th 385,

Aboriginal in an incomplete way, and do not take account of their physical and cultural survival in North America.

The courts need to embrace broader notions of Indian rights. As I have tried to demonstrate, Native peoples of the Americas can use their intellectual traditions to assist in this venture. Our ideologies and approaches to law may yield important insights on the partiality of current legal discourse. The trickster's deployment represents one such methodology and illustrates the relevance of First Nations inquiry in understanding the law. Indigenous traditions are not static and their strength lies in their ability to survive through the power of tribal memory and renew themselves by incorporating new elements.[152] By intermingling these approaches with the law, the trickster and other traditions can speak as strongly to the continent's dominant legal institutions, as they can to long-standing tribal relationships. Their vitality and authenticity points us beyond ourselves.[153] Their power lies not in how closely they adhere to their original form, but in how well they are able to develop and remain relevant under changing circumstances.[154]

Aboriginal ideologies are jurisprudentially relevant in reflecting upon the law in its general and specific contexts. Aboriginal ideologies, like Aboriginal practices, are not frozen. Their practice is integral to the distinctive culture of Aboriginal people today, even if these narratives may have developed as a result of colonial influence. Their use is vital to physical and cultural survival. The trickster is alive and well. His travels, insights and experiences still have much to teach us about this survival.

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404 (Can. 1990).

152. PENNY PETRONE, NATIVE LITERATURE IN CANADA: FROM ORAL TRADITION TO THE PRESENT 17 (1990).

153. JARISLAV PELIKAN, THE VINDICATION OF TRADITION 54 (1984).

154. Katharine T. Barlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 306-19.