
The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand

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In *R. v. Van der Peet*, a majority of the Supreme Court of Canada has substantially modified the test for the existence of Aboriginal rights unanimously adopted six years earlier in *R. v. Sparrow*. Under the old test, the proponent of an Aboriginal right to engage in some activity had to show that it was practiced aboriginally and was never properly extinguished. Under the new test, the proponent must also establish the centrality of that activity to the precolonial Aboriginal culture. Even if this higher threshold is met, the right nonetheless exists only to the extent that the Justices deem it to be compatible with Anglo-Canadian law as a whole. Activities in which First Nations have engaged continuously for centuries may therefore be extinguished judicially, notwithstanding section 35 of the *Constitution Act, 1982*.

The authors question the logic of determining the centrality of particular activities to a culture, arguing that cultural elements are interdependent and ever-changing, and that their cultural significance is completely subjective. To illustrate this point, the authors apply the reasoning in *Van der Peet* to the proposed recognition of Quebec as a "distinct society", with absurd results that nullify the federalist aims of such a provision. As an alternative, it is suggested that the Supreme Court follow the reasoning of Australia's High Court in *Mabo v. Queensland*, and rule that Aboriginal legal systems — as opposed to particular activities or rights — were imported intact into the common law.

Dans l'arrêt *R. c. Van der Peet*, la décision majoritaire de la Cour suprême a modifié de manière substantielle le test servant à déterminer l'existence d'un droit ancestral. En vertu de l'ancien test, adopté à l'unanimité six ans plus tôt dans l'arrêt *R. c. Sparrow*, toute personne affirmant l'existence d'un droit ancestral devait démontrer qu'il avait été exercé depuis des temps ancestraux et qu'il ne s'était jamais éteint. En vertu du nouveau test, il importe également de démontrer que l'activité en litige jouait un rôle central dans la culture autochtone avant la conquête. De plus, même si l'existence d'un droit est établie, il ne peut être exercé que dans la mesure où il est jugé compatible avec le droit anglo-canadien. Des activités auxquelles les peuples autochtones se livrent depuis des siècles pourraient ainsi se voir interdites, et ce malgré l'article 35 de la *Loi constitutionnelle de 1982*.

Les auteurs remettent en question la logique de la Cour suprême dans la détermination du rôle central d'une activité dans la culture autochtone, affirmant plutôt que les éléments qui forment une culture sont interdépendants et en constante évolution. Pour illustrer cette affirmation, les auteurs appliquent le raisonnement de la Cour dans l'arrêt *Van der Peet* à la proposition de reconnaissance du statut de société distincte au Québec. Ce raisonnement mène à des conclusions absurdes, qui viennent nier les buts fédéralistes poursuivis par une telle provision. Les auteurs proposent plutôt que la Cour suprême adopte le raisonnement de la *High Court* d'Australie dans l'arrêt *Mabo c. Queensland*, en concluant que des systèmes juridiques autochtones entiers — plutôt que des droits spécifiques — ont été incorporés à la *common law*.

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III. What Is the Alternative?

I. A Fable¹

In 1999, a last-ditch effort to save Confederation before the Millennium resulted in the enshrining of a “distinct society” clause in the Canadian constitution. Scarcely a year had passed when the Supreme Court was confronted with three related appeals from Quebec invoking this new, and as yet untried constitutional principle. The most sensational case, *von Pietat*, was brought by a Montreal Lutheran challenging Quebec legislation requiring the display of Roman Catholic messages and Papal symbols in public places. In *Frites Nationales*, the defendant Quebec corporation was charged with transporting potatoes into the province without complying with all applicable federal marketing and inspection regulations. Lastly, the plaintiff in *Hockey Night Promotions Ltd.* sought relief from the restriction of athletic broadcasting and product-endorsement franchises to Quebec firms.

The carefully reasoned majority opinion of Chief Justice Ciper in *Hockey Night* explained that the term “distinct” must not be confused with the term “distinctive”. While the former term implied a differentiation from all other human societies, the latter referred to those elements that have characterized a particular society, and “made it what it was”. It was obvious that the purpose of entrenching the “distinct society” clause in the constitution was to reconcile the distinctness of Quebecois society with the sovereignty of the Crown. Hence the threshold question for the courts was whether a claim of Quebecois rights was based on traditions or practices that make Quebec “distinct”. This analysis required courts to take into account the Quebecois perspective, but Ciper C.J. warned against attaching rights to everything that the Quebecois themselves might consider “significant”. Only those things that are absolutely central to Quebecois identity, and that have distinct historical roots in Quebecois society prior to the accession of Crown sovereignty, should be considered. Traditions and practices that are simply “incidental”, or that reflect the shared development of francophone and anglophone Canada, cannot be elevated to the status of constitutional rights.

Applying these criteria to the facts in *Hockey Night*, Ciper C.J. acknowledged the argument that the sport of hockey is integral to the contemporary culture of Quebec, but held that the Province had failed to establish that hockey was played there in 1763. It was indeed possible, as certain *amici curiae* contended, that the seventeenth-century *habitants* had played a kind of proto-hockey, derived from the ice sports of First Nations, but the very nature of this argument undermined the defendant’s assertion of “distinctness”. Even if it were to be assumed, *arguendo*, that the playing of this sport was “distinctly” Quebecois (which any

¹ We cheerfully acknowledge the inspiration afforded us by Professor J. Borrows, “The Trickster: Integral to a Distinctive Culture” (1997) 8:2 Constitutional Forum 27, whose Anishinabe tale persuaded us that non-Aboriginal readers should have a fable told within their own distinct (or distinctive?) cultural context.

Canadian schoolchild would undoubtedly dispute), the case at bar did not involve the freedom of Quebecois to play hockey, but the opportunity of non-Quebecois firms to profit from hockey. We must be very careful, the learned Chief Justice stressed, to identify with precision the nature of the rights claimed. While the Provincial Court Judge had found that “playing and watching hockey have long held a deep and cherished place in Quebec society”, she made no finding with respect to the historical centrality of commercial mass marketing of athletic events.

Douteux J. dissented on the grounds that the mass marketing of athletic contests, far from being “incidental” to the right to observe and participate in such events, was essential for raising the capital required to build arenas, train and pay professional athletes, and maintain broadcasting facilities. She also reasoned that the use of 1763 as a reference point for the distinctness of Quebecois society was arbitrary, restrictive and a denial of the natural right of cultures to evolve and change in response to the environment in which they find themselves.

The Supreme Court disposed of the two companion cases within the framework developed by the Chief Justice in *Hockey Night*. In *von Pietat*, the majority, per CIPHER C.J., agreed that Catholicism had long formed a “distinctive” element of Quebecois society, but then reasoned that this Church was nonetheless not an institution that rendered Quebec “distinct” from the rest of Canada or, for that matter, from societies elsewhere in the world. The majority referred to the recent public debate in France over the association of the baptism of King Clovis and the founding of the French nation. There was plainly no consensus about the significance of the Church to pre-1763 development of francophone societies. Douteux J. again dissented, arguing that the majority failed to accord sufficient weight to the views of the Quebecois themselves.

In *Frites Nationales*, the Supreme Court unanimously found that *poutine* is a “distinct”, as well as distinctive, historical source of sustenance for Quebecois. Its origins shrouded in antiquity, *poutine* was obviously impossible without potatoes, which clearly had been consumed in Nouvelle France prior to 1763. There could be no doubt about Quebec’s right to ensure for itself a sufficient supply of this tuber for its subsistence. CIPHER C.J. explained for the Court, however, that this did not mean that Quebec enjoyed an unlimited constitutional right to import potatoes with no regard for the interests of Canadians as a whole. Rather, the “distinct society” clause made it incumbent on Ottawa to exercise its regulatory jurisdiction in a manner that was “respectful” of Quebec’s appetite for *poutine*, and reserved for Quebec a priority in the domestic distribution of potatoes. Since no evidence had been submitted at trial regarding the extent to which the federal minister had taken account of the *poutine* requirements of Quebec, the case was remanded for further proceedings consistent with the Supreme Court’s rulings.

II. A Critical Analysis of the Trilogy

Ridicule? Bien sûr. No more ridiculous, however, than the Supreme Court's recent ruminations on "aboriginal rights" in *R. v. Van der Peet*² (and the two companion cases of the *Van der Peet* trilogy).

Although we attempted to reproduce the logical structure of the *Van der Peet* trilogy faithfully in our fable, we do not wish to risk any accusation of distortion. We will permit the learned Justices to speak for themselves.

A. What the Supreme Court Said

Dorothy Van der Peet, a Sto:lo, was prosecuted for selling ten salmon. The British Columbia Provincial Court found that Sto:lo trade in salmon was originally "incidental and occasional only", and not a part of a "market system", although a commercial market did develop by 1846 in connection with Hudsons Bay Company posts.⁴ Writing for a majority of the Supreme Court, Chief Justice Lamer embraced what he characterized as a "purposive approach" to the task of defining "aboriginal rights" under section 35(1) of the *Constitution Act, 1982*.⁵ The purpose of enshrining a reference to "aboriginal rights" in the constitution, he asserted (without any recourse to learned treatises or the *travaux préparatoires*), was to achieve a "reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."⁶ The key terms in this formula are "pre-existence" and "reconciliation".

"Aboriginal", the Chief Justice reasoned, necessarily refers to what existed on this continent before the Crown arrived.⁷ It is therefore the courts' task to ascertain "the crucial elements of those pre-existing distinctive societies", which is to say those elements which are "integral" to the identity of each First Nation.⁸ The significance of a challenged practice to the First Nation itself is a necessary but insufficient factor;⁹ to qualify for section 35(1) protection, the practice must be "a central *and* significant part of the society's distinctive culture"¹⁰ and must not have existed in the past "simply as an incident" to other cultural elements¹¹ or merely as a response to European influences.¹²

² [1996] 2 S.C.R. 507, 4 C.N.L.R. 177 [hereinafter *Van der Peet* cited to S.C.R.].

³ *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 4 C.N.L.R. 130 [hereinafter *Smokehouse* cited to S.C.R.]; and *R. v. Gladstone*, [1996] 2 S.C.R. 723, 4 C.N.L.R. 65 [hereinafter *Gladstone* cited to S.C.R.].

⁴ *Van der Peet*, *supra* note 2 at 528.

⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶ *Van der Peet*, *supra* note 2 at 539.

⁷ *Ibid.* For those benighted readers who have difficulty conceiving of the Crown "arriving" anywhere, we recommend W.P. Kinsella, "The Queen's Hat" in *Moccasin Telegraph* (Markham, Ont.: Penguin, 1983) 141.

⁸ *Van der Peet*, *ibid.* at 548-49.

⁹ *Ibid.* at 552.

¹⁰ *Ibid.* at 553, 564 [emphasis added].

¹¹ *Ibid.* at 560.

A challenged practice, however, need not distinguish a First Nation from all other human societies.¹³

“Reconciliation” implies a judicial balancing process which “takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law,” the Chief Justice explained, adding that “[t]rue reconciliation will, equally, place weight on each.”¹⁴ Aboriginal perspectives must be rendered “cognizable to the non-Aboriginal legal system”¹⁵ through this process of judicial adjustment or accommodation.

The majority of the Supreme Court thus proposed a two-stage decision-making process. In the first stage, judges must examine the historical roots of the challenged practice to determine its centrality to the precolonial indigenous culture. If it passes this test, the challenged practice must then be adjusted to make it “cognizable” to the imported legal system. Only then can the practice enjoy the status of an “existing right” under section 35(1).

B. A Doctrine Plucked from Thin Air

As an initial critique, we note that this decision-making process adds two hurdles to the Supreme Court’s analysis of “existing aboriginal rights” in *R. v. Sparrow*.¹⁶ According to *Sparrow*, a practice “existed”, and became constitutionally entrenched in 1982, if it had existed prior to the accession of Crown sovereignty, and had not clearly and properly been extinguished by the Crown before 1982. *Van der Peet* now requires, in addition, that the precolonial practice be shown to have been “central” to the First Nation’s culture (which arguably could result in a far smaller set of eligible practices) and be further “reconciled” with British law (implying that the right to engage in the practice may have been circumscribed or extinguished prior to 1982 by the mere existence of British settlement).¹⁷

This second hurdle — extinguishment by the mere implication of inconsistency with British law — is a distortion of the Dickson Court’s use of the term “reconciliation” in *Sparrow*:

Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to In-

¹² Defenders of a practice must demonstrate “continuity” with pre-contact conditions (*ibid.* at 554), although this does not disqualify practices that have evolved or changed as a result of contact with European cultures (*ibid.* at 558-59, 561-62).

¹³ See the Chief Justice’s discussion of “distinctness” as opposed to “distinctiveness”, *ibid.* at 560-61. The challenged practice must simply be one of the elements that “made the society what it was,” the Chief Justice explained.

¹⁴ *Ibid.* at 551.

¹⁵ *Ibid.* Compare *Oyekan v. Adele*, [1957] 2 All E.R. 785 at 788 (interests in land under indigenous legal systems should not be expropriated without compensation, “even though those interests are of a kind unknown to English law”).

¹⁶ [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160 [hereinafter *Sparrow* cited to S.C.R.].

¹⁷ See *supra* notes 8-10, which refer to the “centrality” and “integrality” tests.

dians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.¹⁸

In other words, the Dickson Court used “reconciliation” to refer to a limitation on federal power, while the Lamer Court uses the same term to limit further the scope of Aboriginal rights. The result is reminiscent of the United States Supreme Court’s conclusion, in *Oliphant v. Suquamish Indian Tribe*,¹⁹ that the accession of American sovereignty “implicitly” divested Indian tribes of those powers of self-government that American courts decide today had been “inconsistent with their status” as Indians a century ago.

Taken to its logical extreme, the “reconciliation” test has the effect of extinguishing everything that had not already been judicially recognized prior to 1982. But this does not reflect accurately the aims of Aboriginal constitutional negotiators, nor even those of their non-Aboriginal opposites. In the words of one of them, Saskatchewan Premier Roy Romanow, “[o]ne can argue that the purpose of inserting ‘existing’ might be to freeze aboriginal rights as defined on 17 April 1982,” but “that view, which is offered by many credible constitutional lawyers, is one that I do not share.”²⁰ Furthermore, more than a year before *Van der Peet*, the Royal Commission on Aboriginal Peoples issued two reports on the nature of the Crown-Aboriginal relationship which spoke in terms of “co-existence” and “partnership”, which is to say a sharing of powers and a division of constitutional authority in furtherance of First Nations’ unextinguished right to self-government.²¹ The Chief Justice, however, did not refer to the Royal Commission’s views. “Reconciliation”, then, was pulled from thin air, in defiance of the main trends in contemporary Canadian constitutional thought.

C. Centrality and Paternal Illusion

Apart from the problem posed by implying the circumscription of Aboriginal rights by the mere existence of settlers, there are fundamental objections to the Supreme Court’s quest for the grail of “centrality”, which we believe is philosophically hopeless and morally unjust. Three considerations lead us to this conclusion.

¹⁸ *Supra* note 16 at 1109.

¹⁹ 435 U.S. 191 at 208ff. (1978). See R.L. Barsh & J.Y. Henderson, “The Betrayal: *Oliphant v. Suquamish Indian Tribe* and the Hunting of the Snark” (1979) 63 *Minnesota L. Rev.* 609.

²⁰ R. Romanow, “Aboriginal Rights in the Constitutional Process” in M. Boldt & J.A. Long, eds., *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 73 at 81. See our review and analysis of positions taken by Aboriginal negotiators, R.L. Barsh & J.Y. Henderson, “Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and ‘Constitutional Renewal’” (1982) 17:2 *J. Canadian Studies* 55.

²¹ See *Partners in Confederation; Aboriginal People, Self-Government, and the Constitution* (Ottawa: Minister of Supply & Services, 1993); and *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Minister of Supply & Services, 1995).

1. Centrality Cannot Be Objectified

The extent to which an idea, symbol or practice is central to the cultural identity of a particular society is inescapably subjective to that society — or, in the jargon of anthropologists, *emic* (a matter of subjective meaning) rather than *etic* (a phenomenon which can be reliably and consistently measured by outsiders).²² Hence, that which is most dear to a society may be overlooked or regarded as “incidental” by others. It may be argued that non-Aboriginal judges are able to understand the inner meaning of things from Aboriginal testimony. But we question whether a judge is ordinarily competent to *disregard* the cultural testimony of an Aboriginal person on the basis that it is erroneous or self-serving. Either judges possess sufficient expertise to reject *any* opinion offered by Aboriginal persons about their cultures, or they must accept the opinion of *every* Aboriginal witness — which we seriously doubt Canadian judges will do. This dilemma has already arisen in the United States, where the courts have ruled that American Indians’ religious practices enjoy constitutional protection only to the extent that they are “central and indispensable” to the religious beliefs of particular groups.²³ Determinations of “centrality” have generally been left to the trier of fact, with results that have attracted substantial scholarly criticism.²⁴ Without referring to the American experience, Canada’s Supreme Court blithely copies it on an even grander scale, applying “centrality” to *all* rights of Aboriginal peoples.

2. The Search for Centrality Presumes the Independence of Cultural Elements

The application of “centrality” to Aboriginal rights on this grander scale exacerbates the problem of distinguishing between what is “central” to a culture, and what is merely “incidental”. Making any such distinction presumes that cultural elements can exist independently of one another, so that the loss of one element does not compromise the perpetuation or enjoyment of the others. This presumption of independence is, in and of itself, utterly incompatible with Aboriginal philosophies, which tend to regard all human activity (and indeed all of existence) as inextricably *inter*-dependent. At the

²² Compare the critical review of attempts to measure the existence of democracy and freedom in R.L. Barsh, “Measuring Human Rights: Problems of Methodology and Purpose” (1993) 15:1 Human Rights Q. 87. For the uninitiated, anthropological methodologists derived the *emic/etic* distinction from “phonemic” and “phonetic” in linguistics, which refer to the *meaning* and the *sound* of words, respectively. Debates persist over whether there is any possibility of conveying meaning reliably across cultures. See for example D. Tedlock, “Questions Concerning Dialogical Anthropology” (1987) 43:4 J. Anthropological Research 325; D. Gewertz & F. Errington, “We Think, Therefore They Are? On Occidentalizing the World” (1991) 64:2 Anthropological Q. 80.

²³ *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 at 1164 (6th Cir. 1980), *certiorari denied* 449 U.S. 953 (1980). This line of American decisions is reviewed in R.L. Barsh, “The Illusion of Religious Freedom for Indigenous Americans” (1986) 65 Oregon L. Rev. 363. Also see, more recently, *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

²⁴ See e.g. R.S. Michaelsen, “Law and the Limits of Liberty” in C. Vecsey, ed., *Handbook of American Indian Religious Freedom* (New York: Crossroad, 1991) 116. See also the submissions reproduced in *Religious Freedom Act: Hearing before the Select Committee on Indian Affairs, United States Senate*, Senate Hearing 102-698 (1992).

same time, we consider that it is empirically fallacious.²⁵ The notion of centrality in human society is, we contend, as absurd as arguing that an ecosystem remains the same after the removal of a few “incidental” species.²⁶ We wonder if the Supreme Court would dare render an opinion as to what is “central” to modern Canadian society (hockey? beer? the maple-leaf flag?). Centrality is a judicial fiction, an especially slippery slope, and undermines Aboriginal societies by exposing their purportedly “incidental” elements to judicial excision notwithstanding section 35 of the *Constitution Act, 1982*.

3. Centrality Itself Is Not Static

Cultures continue to change, reorder their priorities and revise their conceptions of themselves. Indeed, the General Conference of UNESCO declared in 1966 that it is “the right and the duty” of every people to develop its own culture.²⁷ Assuming, *arguendo*, that societies self-consciously identify certain elements of their life-ways as particularly positive or distinctive achievements, these cultural self-assessments are as fluid as culture itself. This is as true of Canada as of Aboriginal peoples. We gravely doubt that Thomas Chandler Haliburton would recognize many of the symbols or practices that are dear to Canadians today, although his writings were definitive of the Canadian self-image 150 years ago.²⁸ Change (and arguments over its direction) is not only essentially human, but essential for survival in a world of changing ecological and political forces. To presume that Aboriginal societies are less dynamic or creative than other cultures, or that they must remain stuck in time in order to remain authentic and deserve to retain their rights, is sociological nonsense recalling the discredited social-Darwinist conception of “primitivity”. To be sure, Chief Justice Lamer acknowledges the fact that all cultures change, and calls upon his colleagues to be flexible in determining what is genuinely Aboriginal.²⁹ But his underlying paradigm nonetheless requires the demonstration of precolonial roots, as well as the centrality of the challenged

²⁵ See, for example, Tewa anthropologist Alfonso Ortiz’s brilliant map of the inter-relationships of ideas and practices within his own society, *The Tewa World: Space, Time, Being, and Becoming in a Pueblo Society* (Chicago: University of Chicago Press, 1969) and sociologist Menno Boldt’s disquisition on the necessity for allowing Aboriginal societies to develop and renew themselves as cultural wholes, in *Surviving As Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993) at 180-90.

²⁶ We recommend John Donne’s meditation, “For Whom The Bell Tolls”, which comprised an elegant humanistic argument against the belief of some of Donne’s contemporaries that society could be divided into important and incidental persons (see J. Donne, “Devotions Upon Emergent Occasions — Meditation 17”, reprinted in H. Gardner & T. Healy, eds., *John Donne: Selected Prose* (Oxford: Clarendon Press, 1967) 100 [as No. 7]; see also R.H. Ray, *A John Donne Companion* (New York: Garland, 1990) at 94-95).

²⁷ *Declaration of the Principles of International Cultural Co-operation*, UNESCO, Gen. Conf., 14th Sess. (4 November 1966), art. 1(2), reprinted in United Nations, *Human Rights: A Compilation of International Instruments*, Volume 1 (Second Part) (New York, 1994) 595 at 596 (UN Doc. ST/HR/1/Rev. 5 (Vol. I/Part 2), Sales No. E.94.XIV.1 (Vol. I, Part 2)).

²⁸ See e.g. T.C. Haliburton, *Sam Slick* (Toronto: McClelland & Stewart, 1941).

²⁹ *Van der Peet*, *supra* note 2 at 557.

practice to precolonial Aboriginal society. A precolonial practice is permitted to evolve, but an Aboriginal culture cannot adopt new elements and remain genuine.

Even the concept of "culture" is inherently cultural and, in *Van der Peet*, "culture" has implicitly been taken to mean a fixed inventory of traits or characteristics.³⁰ Anthropologists long regarded "culture" as something that could be observed, counted, measured and then compared, and tribal societies were routinely characterized as simple, transparent and static.³¹ The aim of fieldwork for more than a century was to produce a comprehensive ethnography — a book that contained everything that was useful or interesting about a society. From this conceit — that a "simple" society could be described adequately in one book when European society has not even begun to exhaust its possibilities (and its ambiguities) in a hundred thousand books — arises the presumption that a Euro-Canadian jurist today can sit in judgment of what a Heiltsuk or Sheshaht once believed or valued most.

The fundamental issue is the identity of the decision-maker. The *Van der Peet* test entrenches European paternalism because the courts of the colonizer have assumed the authority to define the nature and meaning of Aboriginal cultures. The Supreme Court has declared to Aboriginal peoples, in effect, "We shall decide which of your values and practices can be reconciled with our culture, and with our vision of Canada." It has done so evidently with the best of intentions — but we all know that best intentions alone can be dangerous.

The Lamer Court's naive imperialism betrays the efforts of the Dickson Court to bring a degree of accountability and self-restraint to Crown dealings with Aboriginal nations. In *Guerin v. The Queen*,³² the Dickson Court characterized the Crown as a "fiduciary". The fiduciary concept, however, is inherently ambiguous and two-edged. It can be construed (as it was by then-Chief Justice Dickson in *Guerin*) by analogy to a trust relationship in private law, which implies strict accountability to the interests of the beneficiary. Alternatively, it recalls the "sacred trust of civilization" notion, which former generations of bureaucrats in London and Ottawa wielded in justification of paternalism and oppression. Unfortunately, we believe the Lamer Court has embraced the latter construction, as we demonstrate below in our discussion of *R. v. Gladstone*.

³⁰ We can find no precise equivalent of European concepts of "culture" in Mi'kmaq, for example. How we maintain contact with our traditions is *tan'elo'tlieki-p*. How we perpetuate our consciousness is described as *tilinuo'li'k*. How we maintain our language is *tilinuita'sim*. Each of these terms connotes a process rather than a thing. On the problem of translating Mi'kmaq ideas into European languages, see J.Y. Henderson, "Governing the Implicate Order: Self-Government and the Linguistic Development of Aboriginal Communities" in *Proceedings of the Conference of the Canadian Centre for Linguistic Rights* (Ottawa: University of Ottawa, 1995) 285.

³¹ See R.F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Knopf, 1978) at 49-69; R.L. Barsh, "Are Anthropologists Hazardous to Indians' Health?" (1987) 15:4 *J. Ethnic Studies*; E. Gellner, "The Politics of Anthropology" (1988) 23:3 *Government & Opposition* 290.

³² [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120 [hereinafter *Guerin* cited to S.C.R.].

D. Was "Centrality" a Stillbirth?

These philosophical problems have already produced confusion and back-tracking in the Supreme Court's efforts to apply *Van der Peet* to other facts.

*R. v. N.T.C. Smokehouse Ltd.*³³ and *R. v. Gladstone*,³⁴ announced the same day as *Van der Peet*, involved more overtly profit-oriented fisheries, also in British Columbia. In *Smokehouse*, Sheshaht and Opetchesaht fishers had sold some 119,000 pounds of salmon to a commercial processor. In *Gladstone*, two Heiltsuk fishers tried to sell 4,200 pounds of herring spawn on kelp to a Vancouver-area retailer. A majority of the Supreme Court (*per* Lamer C.J.) agreed with the findings at trial in *Smokehouse* that barter or exchanges of salmon between the Sheshaht and their neighbours prior to 1846 were at best "occasional", and that the role of salmon in the region's renowned potlatch feasts was merely "incidental".³⁵

In *Gladstone*, however, a majority of the Supreme Court (*per* Lamer C.J.) concluded that barter and trade of fish was a "central and defining feature" of Heiltsuk culture, and that it existed on a large scale comparable to modern-day commercial exploitation. What is most disturbing about this is the fact that the Sheshaht and Heiltsuk were neighbours, traditionally living and fishing on the Queen Charlotte Strait within roughly 250 kilometres of one another, and were members of the same traditional trading network.³⁶ To put this inconsistency into a more familiar context, it is as if the Justices had declared that baseball was a central element of American culture, but not Canadian culture, when both countries participate in the same leagues and World Series. It should be noted that the testimony at both trials was given by academic experts, rather than by Aboriginal people, and it appeared that European observers recorded more about Heiltsuk trade than Sheshaht trade during the critical period of the early nineteenth century.

If the Heiltsuk were indeed a mercantile people who lived by trading fish, should it not follow that they retain an Aboriginal right to harvest fish commercially without external interference? According to *Gladstone*, the Heiltsuks' right to fish commercially merely entitles them to a "priority" in year-to-year allocations of fish stocks; the government of the day may continue to manage and divide the resource as long as it is properly "respectful" of the Heiltsuks' Aboriginal right.³⁷ Hence the discretion of the

³³ *Supra* note 3.

³⁴ *Supra* note 3.

³⁵ *Smokehouse*, *supra* note 3 at 689-90. This conclusion was disputed by L'Heureux-Dube J., who argued in dissent that the trial judge had laboured under a misconception of the applicable standards of law, and thereby disregarded substantial expert testimony as to the extent and economic importance of trade in salmon among the Sheshaht and their neighbours (*ibid.* at 705-11). The classic study of Coast Salish subsistence and trade (not cited by the majority or dissenters) is "Coping with Abundance: Subsistence on the Northwest Coast", chapter 4 in W. Suttles, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 45.

³⁶ See the endpaper maps in Suttles, *ibid.* Part of the problem was the majority's reluctance to reconsider findings of fact made by the trial courts in these cases.

³⁷ *Gladstone*, *supra* note 3 at 766-67. The Chief Justice acknowledged that this standard was inherently "vague".

“fiduciary” remains paramount over the self-defined interests and needs of the beneficiaries.³⁸ The fiduciary’s freedom to share Aboriginal nations’ traditional resources with immigrants flows logically from the principle in *Van der Peet* that all Aboriginal rights must be “reconciled” with the imported legal system, and thereby with the self-interest of non-Aboriginal people.

It should be recognized that this is yet *another* new hurdle that Aboriginal peoples must overcome before they can invoke the protection of section 35(1). If all the hurdles announced by *Sparrow*, *Van der Peet* and *Gladstone* are assembled, they form a formidable and intimidating barrier: the Aboriginal practice at issue must be shown to be preexisting and central; it must be shown never to have been extinguished by the Crown prior to 1982; it must have been infringed by government action after 1982; the government action must be shown to have lacked adequate justification; and it must be shown to go beyond the reasonable discretion enjoyed by the Crown as a “fiduciary” to determine whether the Aboriginal community concerned has been given an adequate “priority” in the enjoyment of the resources it has traditionally utilized. All of this translates into a heavier evidentiary burden at trial, more expense, and greater risk of an adverse ruling, amounting to a present-day extinguishment of the rights asserted.

The next two fishing-rights cases heard by the Supreme Court were nonetheless decided in the Aboriginal parties’ favour. *R. v. Adams* involved a Mohawk food fishery in Quebec. The Court unanimously concluded that fishing had once been an “important and significant source of subsistence” for the Mohawks, and the Province was therefore barred from insisting that Mohawks obtain licenses.³⁹ *R. v. Côté* involved an Algonquin food fishery, also in Quebec. The Court unanimously agreed that freshwater fishing had been “an important source of sustenance” for the Algonquins, once again obviating the need to acquire provincial licenses.⁴⁰ Significantly, the defendant in *Côté* had not been fishing for his own subsistence, but to show young Algonquins how to fish. Chief Justice Lamer, writing for the unanimous Court, explained that “a substantive Aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.”⁴¹

What is curious about these two cases is that the Court made no finding of “centrality”, deriving the Aboriginal right to fish from evidence that the practice of fishing preexisted and was, at least in the past, “important”. The Court retreated from

³⁸ The reader should bear in mind that, under the original *Sparrow* test, reaffirmed by the majority in *Van der Peet*, *supra* note 2 at 526, the Crown is still permitted to encroach upon the exercise of an “existing aboriginal right” if it can show an acceptable “justification” for so doing. Thus *Gladstone* affords the Crown two bites at the apple: even if the Crown cannot come up with a sufficient “justification” for restricting the right, it is largely free to allocate the resource concerned between the Aboriginal right-holders and other Canadians.

³⁹ [1996] 3 S.C.R. 101 at 128, 4 C.N.L.R. 1 [hereinafter *Adams* cited to S.C.R.].

⁴⁰ [1996] 3 S.C.R. 139 at 180-81, 4 C.N.L.R. 26 [hereinafter *Côté* cited to S.C.R.].

⁴¹ *Ibid.* at 176. A collateral issue in the case was whether Quebec could impose its access fees on motor vehicles driven onto public lands by Algonquin fishers. The Chief Justice reasoned that such fees did not constitute an infringement of the Algonquin aboriginal right to fish, because the proceeds had been used to improve road access to fishing areas (*ibid.* at 187-88).

its blanket rejection of "incidental" practices in *Van der Peet*, signalling a willingness to consider arguments that challenged activities are important means of supporting the continued exercise of "existing aboriginal rights", and therefore also merit constitutional protection.

The chronology of these decisions suggests a "legal realist" interpretation. The *Van der Peet* trilogy divided the Court, with two Justices arguing that the majority was being too restrictive, both in its preoccupation with "centrality" as a criterion and in its analysis of the evidence for the aboriginality of challenged practices.⁴² Two months later, the Court was unanimous in *Adams* and *Côté*.⁴³ The Chief Justice appears to have achieved unity in the latter two cases by backpeddling on "centrality".

It is tempting to take comfort in *Adams* and *Côté*, and regard them as indicative of a tendency for the Supreme Court to be more generous and flexible in the future. More may be involved in the Court's new unity, however, than the abandonment of "centrality". The Court applied a lower threshold for *subsistence*, as opposed to commercial fishing, suggesting a presumption that "aboriginality" is ordinarily incompatible with profit.⁴⁴ This inference gains support from the cavalier manner in which the Court unanimously rejected the defendants' efforts in *R. v. Pamewejon*⁴⁵ to derive a contemporary right to control on-reserve gambling houses from the precolonial prevalence of games of chance at social events. As in *Smokehouse* and *Gladstone*, the Justices resisted the notion that a traditional practice could be a source of contemporary wealth. First Nations apparently can eat a tradition, but they cannot market it.

E. Is the Van der Peet Trilogy "Law"?

In *Van der Peet*, the Chief Justice concluded that the particularity of Aboriginal practices dictates a case-by-case approach to determining the contents of the constitutional box of existing aboriginal rights.⁴⁶ The Heiltsuk box will contain a different mix of traditions and practices from the Sheshalit box, and the courts will eventually have to determine the contents of more than 600 individual First Nation boxes, based on evidence specific to each group. Historians, anthropologists and lawyers should rejoice well into the next millennium.

⁴² *Van der Peet*, *supra* note 2 at 592-93 (L'Heureux-Dube J.) and 640-41 (McLachlin J.); *Smokehouse*, *supra* note 3 at 710-11 (L'Heureux-Dube J.) and 717 (McLachlin J.); *Gladstone*, *supra* note 3 at 803-805 (L'Heureux-Dube J.). In *Gladstone*, moreover, La Forest J. complained that the Chief Justice was misapplying his own "centrality" test (*ibid.* at 783-90).

⁴³ Although L'Heureux-Dube J. concurred in a separate opinion in *Adams*, *supra* note 39 at 135. See also *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 4 C.N.L.R. 164, discussed below, decided by a unanimous Court one day after the *Van der Peet* trilogy.

⁴⁴ Or, that Aboriginal peoples must remain poor to remain genuine — an especially pernicious way of being stuck in the past. We find it intriguing, furthermore, that the Justices applied a lower threshold to disputes that arose in Quebec, as opposed to British Columbia or Ontario.

⁴⁵ *Supra* note 43.

⁴⁶ *Van der Peet*, *supra* note 2 at 559.

Does this case-by-case approach to decision-making qualify as "law"? We first asked ourselves this question shortly after the United States Supreme Court adopted a similar method for its review of American Indian appeals fifteen years ago.⁴⁷ Sadly, the Supreme Court of Canada appears once again to have decided to copycat without admitting the source of its inspiration, thereby distracting Canadians' attention from the fact that the American prototypes have already failed utterly.⁴⁸

In his classic essay, "The Model of Rules", Professor R. M. Dworkin argued that Western legal systems are characterized by a combination of rules (black-letter law) and principles (custom or convention).⁴⁹ Principles provide a necessary logical framework for interpolation within the spaces between rules, for resolving conflicts and inconsistencies among rules, and for clarifying the meaning of ambiguous rules. Principles may be more flexible than rules, Professor Dworkin explained, but they lend a consistency and predictability to adjudication that otherwise would not exist.

Van der Peet jettisons principles in favour of an evidence-driven approach to resolving Crown-Aboriginal disputes. We think that this abandonment of principles, together with the complexity and incomprehensibility of the criteria for aboriginality in *Van der Peet*, guarantee the proliferation of disputes. As a result, First Nations will bear even greater uncertainty as to the extent of their resources, and the scope of their political authority. More community resources will be devoted to defensive litigation, and the volatility and unpredictability of First Nations' rights and jurisdiction will deter investment on reserves.⁵⁰ Reserves may turn to higher-risk investments, including those on the edge of legality such as casino gambling, simply because they generate sufficiently large profits to pay the costs of defending the right to pursue them.⁵¹ We submit that this scenario is not what the drafters of section 35(1) contemplated.

Indeed, section 35(1) is not just any law. It forms part of the constitution and, like the *Charter of Rights and Freedoms*,⁵² aims at providing greater security for vulnerable groups in Canadian society. Rules designed to operate as barricades against oppression

⁴⁷ See R.L. Barsh, "Is There any Indian 'Law' Left? A Review of the Supreme Court's 1982 Term" (1984) 59 Washington L. Rev. 863.

⁴⁸ Compare Canada's current policy of "Indian self-government", derived from an American precedent which has been criticized for perpetuating dependency. For a review, see R.L. Barsh, "The Challenge of Indigenous Self-Determination" (1993) 26 U. Mich. J. L. Ref. 277 at 293-307.

⁴⁹ R.M. Dworkin, "The Model of Rules" (1967) 35 U. Chicago L. Rev. 14. See also his "Social Rules and Legal Theory" (1972) 81 Yale L.J. 855. (We apologize to students of international law who, like ourselves, were taught to equate "convention" with what is written, while British practice equates convention with unwritten customary practices.)

⁵⁰ For conceptual models of the relationship between legal complexity, legal certainty and reserve development, see R.L. Barsh, "Indian Resources and the National Economy: Business Cycles and Policy Cycles" (1988) 16:4 Policy Studies J. 799, and R.L. Trospen, "American Indian Relative Ranching Efficiency" (1978) 68:4 Am. Economic Rev. 503.

⁵¹ See D.A. Cozzetto, "The Economic and Social Implications of Indian Gaming: The Case of Minnesota" (1995) 19:1 Am. Indian Culture & Research J. 119.

⁵² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 5.

should presumably be applied less flexibly and more consistently than other branches of our legal system, lest they fail in their purpose.

III. What Is the Alternative?

An alternative basis upon which *Van der Peet* could have been decided, as suggested by both dissenting Justices,⁵³ is the “doctrine of continuity”. This doctrine stands for the proposition that the common law absorbs (or “receives”) the *lex loci* of a territory at the moment of its conquest or annexation to the Crown.⁵⁴ Local law remains intact unless and until it is clearly altered by the Crown in the exercise of its prerogative jurisdiction or, today, by Parliament. The doctrine of continuity was first expressed by Lord Coke in a case involving the fate of land rights in Scotland following its annexation to England,⁵⁵ and was subsequently applied generally to overseas territories acquired by the Empire.⁵⁶ The Chief Justice’s failure to adopt this approach in *Van der Peet* is particularly troubling in light of the fact that the Dickson Court relied upon it as grounds for concluding that the Royal Proclamation of 1763⁵⁷ had merely *confirmed* Native title, rather than creating or conferring Aboriginal rights to unsundered lands.⁵⁸

This was precisely the paradigm adopted by the High Court of Australia in *Mabo v. Queensland [No. 2]*, in which Brennan J. observed that “[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.”⁵⁹ We do not perceive any basis for distinguishing in this respect between Aboriginal rights associated with land and other kinds of claims to Aboriginal rights.

In *Van der Peet*, Chief Justice Lamer quoted the foregoing passage from *Mabo* with approval but completely misconstrued its significance.⁶⁰ He advanced it as support

⁵³ *Van der Peet*, *supra* note 2 at 599-600 (L’Heureux-Dubé J.), 642-44 (McLachlin J.).

⁵⁴ See *Re Southern Rhodesia*, [1919] A.C. 211 at 233, affirmed and interpreted in *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407, 90 L.J.P.C. 236, and *Oyekan v. Adele*, [1957] 2 All E.R. 785 at 788. A similar principle is found in articles 4, 5 and 8 of the *Convention on Indigenous and Tribal Peoples*, 27 June 1989, 28 I.L.M. 1382, and ratified thus far by seven states. Canada is not among them.

⁵⁵ *Calvin’s Case* (1608), 7 Co. Rep. 1a at 17b, 77 E.R. 377 at 398 (K.B.).

⁵⁶ *Campbell v. Hall* (1774), 1 Cowp. 204 at 209-10, 98 E.R. 1045 at 1047-48 (K.B.).

⁵⁷ *Royal Proclamation, 1763* (U.K.), 3 Geo. 3, reprinted in R.S.C. 1985, App. II (Constitutional Acts and Documents).

⁵⁸ *Guerin*, *supra* note 32 at 378. Also, as noted below, the Chief Justice referred with approval to *Mabo v. Queensland [No. 2]*, *infra* note 59, which in turn relied on the continuity doctrine.

⁵⁹ *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 at 58, [1992] 5 C.N.L.R. 1 at 49 [hereinafter *Mabo*]. We take it that Brennan J. referred to indigenous law as a “question of fact” in the same sense that any issue of the content of foreign law is ordinarily regarded as a question of fact to be adduced through the testimony of legal scholars who qualify as experts within those legal systems.

⁶⁰ *Supra* note 2 at 545-46. To its credit, the British Columbia Supreme Court concluded that “aboriginal rights” must be determined in accordance with First Nations’ own legal systems, hence

for the proposition that rights should be regarded as "aboriginal" only if they are rooted in antiquity, emphasizing the use of the adjective "traditional" by the High Court while disregarding entirely the noun ("laws") to which that adjective was attached.

According to the alternative model, however, what section 35(1) entrenched was the *lex loci* of Aboriginal nations, to the extent that their own laws had not clearly been extinguished prior to 1982. To state the proposition somewhat differently, section 35(1) is a choice-of-law rule. Moreover, under section 52 of the *Constitution Act, 1982*, this choice-of-law rule has become part of "the supreme law of Canada" and overrides any ordinary legislation inconsistent with it.⁶¹

We believe that the Dickson Court was groping, tentatively, in this direction, as were many legal commentators. In *Guerin*, Chief Justice Dickson observed that past efforts to characterize "Indian title" had been confounded by a failure to appreciate its "unique" or *sui generis* nature, which is to say that its source rests outside general British or Canadian law.⁶² In *Sparrow*, the Dickson Court extended this analysis to "aboriginal rights" as a whole.⁶³ If the source of First Nation rights is not to be found in the legal system imported from the British Isles, what source could they have other than the legal systems that are indigenous to North America?⁶⁴ The logical conclusion of this line of reasoning would be the adoption of a principle of deference to the *lex loci*, absent unambiguous evidence of a surrender of the right by treaty, or a legitimate extinguishment by the Crown.

Rather than deferring to First Nations' laws, however, the Supreme Court in *Van der Peet* has assumed authority to determine from extrinsic evidence — and centuries after the fact — what made each Aboriginal society what it was.⁶⁵ By this means, the Court has discarded the traditional British Commonwealth framework, whereby Aboriginal peoples retained the rights defined by their own laws (unless subsequently ex-

Dorothy Van der Peet was entitled to do whatever lay within her rights in Sto:lo law (*R. v. Van der Peet* (1991), 58 B.C.L.R. (2d) 392, [1991] 3 C.N.L.R. 161 (Selbie J.)).

⁶¹ Indeed, sections 35(1) through 52 override any inconsistent provisions of the *Charter* itself, in accordance with s. 25 of the *Constitution Act, 1982*, *supra* note 5. It escapes us how the Chief Justice came to the conclusion that the *strongest* provision in the *Constitution Act, 1982* (strong enough to override the *Charter*) is to be given the weakest and least consistent application.

⁶² *Supra* note 32 at 382. See also *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 678, [1989] 1 C.N.L.R. 47; B. Slattery, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 117.

⁶³ *Supra* note 16 at 1111-12.

⁶⁴ See J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; J.Y. Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask. L. Rev. 241. A careful distinction must be made between the scope of "aboriginal rights" as defined by the Supreme Court and what we refer to here as "First Nation rights", meaning what is defined and preserved as part of First Nations' own legal systems. Compare P. Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 131-168, on the inadequacy of the term "aboriginal rights" from an Aboriginal perspective.

⁶⁵ *Supra* note 2 at 561.

tinguished by Parliament), replacing it with a doctrine of *ex post facto* judicial extinguishment.

Is this all so much judicial flatulence,⁶⁶ or a dangerous change of direction for Canadian constitutional law? We fear the latter. A constitution worthy of the name must entrench the most sacred principles upon which a country is founded, and upon which its elected representatives dare not trespass. In 1982, Canadian leaders negotiated a *Charter of Rights and Freedoms* for the express purpose of clarifying what it means to be Canadian. A core of shared rights and values was supposed to bind Canadians together and inoculate them against the centrifugal forces of language and, secondarily, the bitter legacy of colonialism. In *Van der Peet*, however, the Supreme Court has shown First Nations that section 35(1) is not an iron shield but a rope of sand. Can a constitution made of sand unite a country?

⁶⁶ With apologies to Professor Glanville Williams ("Language and the Law — II" (1945) 61 L.Q. Rev. 179 at 179: "Philosophy stands out as the striking example of the flatulencies that may gather round the unacknowledged puns of language").