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Brian Slattery
Osgoode Hall Law School of York University, slattery@yorku.ca

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The Generative Structure of Aboriginal Rights

Brian Slattery*

I. INTRODUCTION

Are aboriginal rights *historical rights* -- rights that gained their basic form in the distant past? Or are they *generative rights* -- rights that, although rooted in the past, have the capacity to renew themselves, as organic entities that grow and change? Section 35(1) of the *Constitution Act, 1982*[1] provides little guidance on the point, referring ambiguously to "existing aboriginal and treaty rights".[2] In the *Van der Peet* case,[3] decided in 1996, the Supreme Court of Canada characterized aboriginal rights primarily as historical rights, moulded by the customs and practices of aboriginal groups at the time of European contact, with only a modest ability to evolve. However, as a brief review of the Court's reasoning reveals, this approach left much to be desired.

In his majority opinion, Chief Justice Antonio Lamer holds that s. 35(1) is animated by two main purposes: *recognition* and *reconciliation.*[4] With respect to the first, he argues that the doctrine of aboriginal rights exists because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact that distinguishes aboriginal peoples from all other groups in Canadian society and mandates their special legal and constitutional status. So a major purpose of s. 35(1) is to recognize the prior occupation of aboriginal peoples.[5]

However, recognition is not the sole purpose of the section, which also aims to secure reconciliation between indigenous peoples and the Crown. Lamer C.J. notes that the essence of aboriginal rights lies in their bridging of aboriginal and non-aboriginal cultures, so that the law of aboriginal rights is neither entirely English nor aboriginal in origin: it is a form of intersocietal law

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* Professor of Law, Osgoode Hall Law School, York University, Toronto. During the lengthy evolution of this paper, I have incurred many debts, not least to the long-suffering members of audiences who listened to earlier versions and made numerous helpful comments and suggestions. However, I would like to acknowledge in particular my gratitude to John Borrows, Willy Fournier, Shin Imai, Kent McNeil, Tom Marshall and Jeremy Webber for their generous advice.

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

[2] The full provision states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[3] *R. v. Van der Peet* [1996] 2 S.C.R. 507 (S.C.C.).

[4] *Id*., at paras. 26-43.

[5] *Id*., at paras. 30, 32.

that evolved from long-standing practices linking the various communities together.[6]

In light of these two fundamental goals, the Lamer C.J. proceeds to craft the following test for aboriginal rights. In order for an activity to qualify as an aboriginal right, it must be an element of a practice, custom or tradition that was integral to the distinctive culture of a particular aboriginal group in the period prior to European contact.[7] If a practice only arose after the critical date of contact, it cannot be an aboriginal right. Although pre-contact practices are capable of evolving and adapting somewhat to modern conditions, they must maintain continuity with their ancient roots.[8] Applying this test to the case at hand, Lamer C.J. holds that the pre-contact practice of fishing for food and ceremonial purposes, with limited exchanges of fish in the familial and kinship context, cannot evolve into a modern aboriginal right to exchange fish for money or other goods.[9]

Several features of this approach merit comment. First, the *Van der Peet* test assumes that aboriginal rights are shaped entirely by factors particular to each indigenous group -- that they are specific rights rather than generic rights. Lamer C.J. rejects the notion that aboriginal rights make up a range of abstract legal categories with normative underpinnings, opting instead for the view that aboriginal rights assume a myriad of particular forms, as moulded by the distinctive customs of the specific groups in question.[10] In effect, the test suggests that identifying aboriginal rights is a largely *descriptive* matter -- an exercise in historical ethnography. The judge plays the role of ethnohistorian, attempting to discern the distinctive features of aboriginal societies in the distant reaches of Canadian history. He need not trouble himself with normative questions -- such as whether these features merit recognition as constitutional rights and, if so, what basic purposes they serve.

Second, the *Van der Peet* test looks exclusively to conditions prevailing in the remote past --

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[6] *Id*., at para. 42, quoting M. D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350), at 412-13, and 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), at 120-21. For discussion of the intersocietal character of aboriginal law, see J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629; J. Borrows & L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 736-41, 744-45; B. Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255; M. D. Walters, "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711; J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.

[7] *Van der Peet*, *supra*, note 3, at paras. 44-46, 55-56, 60-62.

[8] *Id*., at paras. 63-64, 73.

[9] *Id*., at paras. 76-91.

[10] *Id*., at para. 69.

the era prior to the critical date of European contact -- which may be as much as five hundred years ago.[11] The test excludes many activities that became central to the lives of aboriginal peoples in the post-contact period and that linked them socially and economically to neighbouring settler communities. Not surprisingly, it tends to yield rights that have a limited ability to serve the modern needs of Aboriginal peoples and may also fit uneasily with third-party and broader societal interests.

Third, the test makes no reference whatever to the extensive relations that developed between indigenous peoples and incoming Europeans in the post-contact period, or to the legal principles that informed those relations. While the Court pays lip-service to the view that aboriginal rights are grounded in an intersocietal law that bridges aboriginal and non-aboriginal cultures, it does not assign this idea any real role in the *Van der Peet* test, which looks entirely to the period before settlers arrived and intersocietal relationships were formed.

So, while Lamer C.J. identifies both recognition and reconciliation as the underlying goals of s. 35(1), in practice he focuses mainly on the goal of recognition – the identification of the central attributes of aboriginal societies in the period before European contact. He does not take into account the historical modes of reconciliation that occurred when the Crown established relations with indigenous peoples, nor does he consider the need for new modes of reconciliation today. The result is that aboriginal rights are identified in an almost mechanical manner, without regard to the contemporary needs of aboriginal peoples, the rights and interests of other affected groups, or the welfare of the body politic as a whole.

Nevertheless, in the decade since the *Van der Peet* case was decided, the Supreme Court has shown mounting signs of discomfort with the test laid down there. In a series of important decisions, it has quietly initiated the process of reshaping the test's basic tenets. This process has taken place on three fronts. First, the Court has relaxed its exclusive focus on specific rights -- rights distinctive to particular aboriginal groups -- and allowed for the existence of generic rights -- uniform rights that operate at an abstract level and reflect broader normative considerations. Second, the Court has recognized that the date of European contact is not an appropriate reference point in all contexts and looked increasingly to the period when the Crown gained sovereignty and effective control. Finally, the Court has placed ever-greater emphasis on the need for aboriginal rights to be defined by negotiations between the parties, tacitly signalling that aboriginal rights are flexible and future-oriented, rather than mere relics of the past. Here I take stock of the matter and argue that these trends presage the birth of a new constitutional paradigm, in which aboriginal rights are viewed as generative and not merely historical rights.[12]

III. SPECIFIC AND GENERIC RIGHTS

[11] This would be true of the portions of Eastern Canada encountered by early English and French explorers and adventurers. See, e.g., B. Slattery, "French Claims in North America, 1500-59" (1978) 59 Canadian Historical Review 139.

[12] The following sections draw on B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 211-15; and B. Slattery, "A Taxonomy of Aboriginal Rights", in H. Foster, H. Raven, & J. Webber, eds., *Let Right Be Done: Calder, Aboriginal Title, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, forthcoming).

As just noted, in *Van der Peet* the Supreme Court expressed the view that all aboriginal rights are specific rights -- rights whose nature and scope are determined by the particular circumstances of each individual aboriginal group.[13] However, this generalization proved to be premature. No more than a year was to pass before it was quietly discarded by the Court. The occasion was the *Delgamuukw* case,[14] in which the Gitksan and Wet'suwet'en peoples claimed aboriginal title over their traditional homelands in northern British Columbia. In contesting the claim, the governmental parties maintained that there was no such thing as "aboriginal title" in the sense of a uniform legal estate with fixed attributes. Rather, aboriginal title was just a bundle of specific rights, whose contents varied from group to group. Each component in a group's bundle had to be proven independently. In effect, the group had to show that the particular activity in question was an element of a practice, custom or tradition integral to its culture at the time of European contact. This argument was a logical extension of the approach taken in *Van der Peet*. Nevertheless, the Supreme Court rejected the argument and held that aboriginal title gives an indigenous group the exclusive right to use and occupy its ancestral lands for a broad range of purposes, which do not need to be rooted in the group's historical practices.[15] So, a group that originally lived by hunting, fishing and gathering would be free to farm the land, raise cattle on it, exploit its natural resources or use it for residential, commercial or industrial purposes, subject to the limitation that the group cannot ruin the land or render it unusable for its original purposes.

The crucial point to note is that *Delgamuukw* treats aboriginal title as a uniform right, whose dimensions do not vary significantly from group to group according to their historic patterns of life. Aboriginal title is not a specific right of the kind envisaged in *Van der Peet*, or even a bundle of specific rights. It is a *generic right* -- a right of a standardized character that takes the same basic form wherever it occurs. The fundamental contours of the right are determined by the common law rather than the distinctive circumstances of each group.

How can this discrepancy in approach between *Van der Peet* and *Delgamuukw* be explained? As we will now see, the conflict is more apparent than real.

IV. THE PANOPLY OF GENERIC RIGHTS

Recall that in *Van der Peet* the Court holds that aboriginal groups have the right to engage in

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[13] *Van der Peet*, *supra*, note 3, at para. 69.

[14] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.). For discussion of aboriginal title, see K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 58-160; K. McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L. Rev. 282; P. Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125; B. Slattery, "Understanding Aboriginal Rights", *supra*, note 6; B. Slattery, "The Metamorphosis of Aboriginal Title", *supra*, note 6.

[15] *Delgamuukw*, *id*., at paras. 116-32.

practices, customs and traditions that are integral to their distinctive historical cultures. To be "integral" to a particular culture, a practice must be a central and significant part of the culture, one of the things that makes the society what it is. If we consider this holding in the light of *Delgamuukw*, we can see that *Van der Peet* also recognizes a generic right -- namely *the right of aboriginal peoples to maintain and develop the central and significant elements of their ancestral cultures*.

In the abstract, this right has a fixed and uniform character, which does not change from one aboriginal group to another. Each and every group has the same right -- to maintain and develop the central elements of their ancestral culture. Of course, what is "central and significant" varies from society to society in accordance with their particular circumstances, so that at the concrete level the abstract right blossoms into a range of distinctive rights -- a matter to be discussed later. The point to grasp here is that the abstract right itself is uniform. Like aboriginal title, it constitutes a generic right -- what we may call the *right of cultural integrity*.[16]

So now we have two generic rights: aboriginal title and the right of cultural integrity. Are there still others? A little reflection shows that the answer is yes.[17] Here is a tentative list of generic aboriginal rights, which includes the two just considered:

- *the right to an ancestral territory (aboriginal title)*
- *the right of cultural integrity*
- *the right to conclude treaties*
- *the right to customary law*
- *the right to honourable treatment by the Crown*
- *the right of self-government*

While this list is not necessarily definitive or complete, it represents a fair estimate of the current state of the jurisprudence. I will say a few words about the last four rights, not yet discussed.

It has long been recognized that aboriginal peoples have the right to conclude binding treaties with the Crown, a right reflected in the wording of s. 35 itself.[18] Under Canadian common law, the treaty-making capacity of aboriginal groups has a uniform character, which does not vary from group to group. The capacity of the Saanich Nation is the same as that of the Huron Nation. As such, the right to conclude treaties qualifies as a generic aboriginal right.

Aboriginal peoples also have the right to maintain and develop their systems of customary law.[19] The introduction of French and English laws did not supersede indigenous laws, which

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[16] For discussion of the right of cultural integrity in international law, see S. J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), at 98-104.

[17] For fuller discussion, see B. Slattery, "A Taxonomy of Aboriginal Rights", *supra* note 12, which the following account summarizes.

[18] The treaty-making power is reviewed in *R. v. Sioui* [1990] 1 S.C.R. 1025 (S.C.C.) at 1037-43.

[19] See *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.); *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.); *Van der Peet*, *supra*, note 3, at paras.

continued to operate within their respective spheres. As Justice Beverley McLachlin observed in *Van der Peet*:[20]

> The history of the interface of Europeans and the common law with aboriginal peoples is a long one. ... Yet running through this history, from its earliest beginnings to the present time is a golden thread -- the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement.

The right of aboriginal peoples to maintain their own laws is a generic right, whose basic scope is determined by the common law doctrine of aboriginal rights. The abstract right does not differ from group to group, even though the particular legal systems protected by the right obviously differ in content.

Aboriginal peoples also have the right to honourable treatment by the Crown. As the Supreme Court stated in the *Sparrow* case:[21]

> ... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Although the Court was referring here to s. 35(1) of the *Constitution Act, 1982*, subsequent Supreme Court decisions have confirmed that the Crown's responsibility is not confined to this context but accompanies and controls the discretionary powers that the Crown historically has assumed over the lives of aboriginal peoples.[22]

At the most abstract level, the right to honourable treatment by the Crown is a generic right, which vests uniformly in aboriginal peoples across Canada. The point was underlined in the *Haida Nation* case,[23] where McLachlin C.J. held that the honour of the Crown is always at stake in its

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38-40; *Delgamuukw*, *supra*, note 14, at paras. 146-48; *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333 (B.C.S.C.), at paras. 83-136; *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 (S.C.C.), at paras. 9-10, 61-64, 141-54.

[20] *Van der Peet*, *supra*, note 3, at para. 263. Justice McLachlin was dissenting, but not on this point.

[21] *R. v. Sparrow* [1990] 1 S.C.R. 1075 (S.C.C.), at 1108. See also *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.); *Van der Peet*, *supra*, note 3, at paras. 24-25; *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245 (S.C.C.).

[22] *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 (S.C.C.), at para. 9; *Wewaykum Indian Band*, *supra*, note 21, at paras. 79-80.

[23] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 (S.C.C.), at paras. 16-25.

dealings with aboriginal peoples. The Court explained that the Crown has the general duty to determine, recognize and respect the rights of aboriginal peoples over whom it has asserted sovereignty. This binds the Crown to enter into treaty negotiations in order to reconcile aboriginal rights and achieve a just settlement. Pending the conclusion of such treaties, the Crown is obliged to consult with aboriginal peoples before doing things that may affect their asserted rights, and to accommodate these rights where necessary. In situations where the Crown has assumed discretionary control over specific aboriginal interests, the honour of the Crown gives rise to fiduciary duties, which require the Crown to act with reference to the aboriginal group's best interests in exercising its discretion.[24] In effect, then, the abstract right to honourable treatment gives rise to a range of more precise rights and duties that attach to specific subject-matters in particular contexts.

Finally, Aboriginal peoples have the right to govern themselves as a third order of government within the federal constitutional framework of Canada.[25] This right finds its source in the Crown's recognition that it could not secure the amity of indigenous nations without acknowledging their right to manage their own affairs. As Justice Lamer noted in the *Sioui* case,[26] the Crown treated Indian nations with generosity and respect out of the fear that the safety and development of British colonies would otherwise be compromised:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. *It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.*[27]

It is submitted that the right of self-government is a generic right, which recognizes a uniform set of governmental powers held by aboriginal peoples as a distinct order of government within the Canadian federal system. At the same time, it allows aboriginal groups to establish and maintain their own constitutions, which take a variety of forms. There are parallels here with the provinces, which are vested with a uniform set of governmental powers, but also have distinctive constitutions, which they have the power to amend.[28]

It might be argued that the aboriginal right of self-government is not a generic right but a

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[24] *Id*., at para. 18. See also *Wewaykum Indian Band*, *supra*, note 21, at paras. 72-85.

[25] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996), Vol. 2, at 163-244; *Campbell*, *supra*, note 19; B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261, at 278-87.

[26] *Sioui*, *supra*, note 18, at 1054-55.

[27] *Id*., at 1055, emphasis added.

[28] See s. 92, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; and s. 45, *Constitution Act, 1982*.

collection of specific rights, each of which has to be proven separately under the *Van der Peet* test.[29] In the *Pamajewon* case,[30] the Supreme Court viewed the question through the lens of *Van der Peet* and held that the right of self-government would have to be proven as an element of specific practices, customs and traditions integral to the particular aboriginal society in question. According to this approach, the right of self-government would be a collection of specific rights to govern particular activities rather than a generic right to deal with a range of abstract subject-matters. However, the *Pamajewon* case was decided prior to the Court's decision in *Delgamuukw*, which expanded the horizons of aboriginal rights and recognized the category of generic rights. In the light of *Delgamuukw*, it seems more sensible to treat the right of self-government as a generic aboriginal right, on the model of aboriginal title, rather than as a bundle of specific rights. On this view, the right of self-government is governed by uniform principles laid down by Canadian common law. The basic scope of the right does not vary from group to group; however its concrete application differs depending on the circumstances.

V. THE UNIVERSALITY OF GENERIC RIGHTS

Generic rights are not only *uniform* in character, they are also *universal* in distribution. They make up a set of fundamental rights held by all aboriginal groups in Canada. There is no need to prove in each case that an aboriginal group has the right to occupy its ancestral territory, to maintain the central attributes of its way of life, to conclude treaties with the Crown, to enjoy its customary legal system, to benefit from the honour of the Crown, or to govern its own affairs. It is presumed that every aboriginal group in Canada has these fundamental rights, in the absence of treaties or valid legislation to the contrary. This situation is hardly surprising, given the fact that the doctrine of aboriginal rights applies uniformly throughout the various territories making up Canada, regardless of their precise historical origins or their former status as French or English colonies.[31]

The generic rights held by aboriginal peoples resemble the set of constitutional rights vested in the provinces under the general provisions of the Constitution Act, 1867. Just as every province presumptively enjoys the same array of rights and powers regardless of its size, population, wealth, resources or historical circumstances, so also every aboriginal group, large or small, presumptively enjoys the same range of generic aboriginal rights.

However this conclusion could be disputed. For example, it could be argued that the generic right of aboriginal title is not a universal right. Some aboriginal peoples, it is said, never had sufficiently strong or stable connections with a definite territory to hold aboriginal title, as opposed to specific rights of hunting, fishing and gathering. Certain musings of the Supreme Court seem to

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[29] The following discussion draws on B. Slattery, "Making Sense of Aboriginal and Treaty Rights", *supra*, note 12, at 213-14.

[30] *R. v. Pamajewon* [1996] 2 S.C.R. 821 (S.C.C.), at paras. 23-30.

[31] See *R. v. Côté* [1996] 3 S.C.R. 139 (S.C.C.), at paras. 42-54; *R. v. Adams* [1996] 3 S.C.R. 101 (S.C.C.), at paras. 31-33; B. Slattery, "Understanding Aboriginal Rights", *supra*, note 6, at 736-41.

entertain such a possibility.[32] However, the better view is that every aboriginal group holds aboriginal title to an ancestral territory, the only question being its location and scope.

VI. A HIERARCHY OF RIGHTS

What is the relationship between generic and specific rights? The answer should now be clear. *Specific rights are concrete instances of generic rights*. So, for example, the generic right to honourable treatment by the Crown operates at a high level of abstraction and harbours a range of intermediate generic rights relating to various subject-matters, such as the creation of new Indian reserves, or the protection of existing ones. These intermediate generic rights, in turn, engender myriad specific fiduciary rights, whose precise scope is determined by the concrete circumstances. Similarly, the abstract right of cultural integrity fosters a range of intermediate generic rights relating to such matters as language, religion and livelihood. These intermediate rights give birth to specific rights, whose character is shaped by the practices, customs and traditions of particular aboriginal groups.

The interplay between generic and specific rights is reflected in the terms of treaties concluded by aboriginal peoples with the Crown. Consider, for example, the following document signed by Brigadier General James Murray in 1760, which provides:

> THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.[33]

In the *Sioui* case,[34] Justice Lamer held that the document constituted a treaty and that it gave the Hurons the freedom to carry on their customs and religious rites over the entire territory that they frequented in 1760, so long as this freedom was not incompatible with the particular uses of the territory made by the Crown.

What is interesting about this brief treaty is its reference to a large array of generic and specific rights. It opens by recognizing the Hurons as an autonomous people under the protection of the British Crown. So doing, it endorses their right to honourable treatment by the Crown, and

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[32] See *Adams*, *id*., at paras. 27-28; *R. v. Marshal/R. v. Bernard* [2005] 2 S.C.R. 220 (S.C.C.) at paras. 58-59, 66. For discussion, see B. J. Burke, "Left Out in the Cold: The Problem with Aboriginal Title Under Section 35(1) of the *Constitution Act, 1982* for Historically Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall L.J. 1; B. Slattery, "The Metamorphosis of Aboriginal Title", *supra*, note 6.

[33] Reproduced in *Sioui*, *supra*, note 18, at 1031.

[34] *Id*., esp. at 1060, 1070.

perhaps also by implication recognizes their right to govern themselves under the Crown's aegis. The treaty allows the Hurons the free exercise of their religion, which, as just noted, is an intermediate generic right falling under the right of cultural integrity. The treaty also guarantees Huron customs, thus reflecting the generic right to a distinct legal system. The document further promises the liberty of trading with the English, which is a specific application of the intermediate generic right to gain a livelihood, which, as we will see shortly, falls under the right of cultural integrity. Finally, of course, the very existence of the document bears witness to the generic right to conclude treaties.

The precise nature of the relationship between generic and specific rights varies with the generic right in question. Consider, for example, the generic right of self-government. This right arguably confers the same set of governmental powers on all aboriginal peoples in Canada. Nevertheless, this abstract homogeneity does not mean that aboriginal peoples possess the same internal constitutions or that they exercise their governmental powers up to their full theoretical limits. The generic right of self-government gives an aboriginal group the power to establish and amend its own constitution within the overarching framework of the Canadian federation. So, the abstract right engenders a range of specific governmental powers detailed in particular aboriginal constitutions.

Likewise, the generic right to conclude treaties empowers aboriginal groups to enter into binding agreements with the Crown. As such, the right spawns an array of particular agreements differing in subject-matter and scope. Of course, it does not follow that each such treaty is a "specific right" or that the rights embodied in the treaty are "specific rights". Rather, the generic right gives the aboriginal parties to a treaty a specific right *to its performance*, and the nature and scope of that right and the remedies it engenders are shaped by the over-arching generic right. Similarly, the generic right to customary law harbours a host of distinct legal systems enjoyed by particular aboriginal groups. Although these systems are concrete manifestations of the overarching generic right, it would seem an excess of legal logic to characterize them as "specific rights". Rather, we may say that an aboriginal group has a specific right to *possess* its own legal system to the extent determined by the generic right that governs it.

Just as all generic rights give birth to specific rights, all specific rights are the offspring of generic rights. There are no "orphan" specific rights. In effect, generic rights provide the fundamental normative structure governing specific rights. This structure determines the existence of specific rights, their basic scope and their potential for evolution. The significance of these points is illustrated by the right of cultural integrity, which we will now consider in detail.

VII. THE RIGHT OF CULTURAL INTEGRITY

As noted earlier, the right of cultural integrity shelters a host of specific rights that differ from group to group in accordance with their particular ways of life, such as the right to hunt in a certain area, the right to fish in certain waters, the right to harvest certain natural resources, the right to conduct certain religious rites, the right to speak a certain language, and so on. Despite their differences, these specific rights fall into a number of broad categories relating to such subjects as religion, language and livelihood. These categories constitute cultural rights of intermediate generality -- for short, *intermediate generic rights*.

For example, *the right to practice a religion* arguably qualifies as an intermediate generic

right because spirituality and the performance of religious rites have always been central to indigenous societies, a matter acknowledged in relations between the Crown and aboriginal peoples, notably in the ceremonies attending diplomacy and treaty-making. As Professor Oren Lyons, a Peace-Keeper with the Six Nations, has written:

> The primary law of Indian government is the spiritual law. Spirituality is the highest form of politics, and our spirituality is directly involved in government. As chiefs we are told that our first and most important duty is to see that the spiritual ceremonies are carried out. Without the ceremonies, one does not have a basis on which to conduct government for the welfare of the people. This is not only for our people but for the good of all living things in general. So we are told first to conduct the ceremonies on time, in the proper manner, and then to sit in council for the welfare of our people and of all life.[35]

Viewed in the abstract, the right to practice a religion has a uniform scope, which does not vary from one aboriginal people to another. However, the particular activities, rites and institutions protected by the right differ from group to group, depending on their specific religious outlooks. In effect, then, the generic right of cultural integrity harbours an intermediate generic right to religion, which in turn shelters a range of specific religious rights vested in particular aboriginal groups.

Consider another example. Aboriginal peoples arguably have the right to use and develop their ancestral languages and to enjoy the educational and cultural institutions needed to maintain them. Language is normally an integral feature of a group's ancestral culture and an important means by which that culture is manifested, nurtured and transmitted. As Elder Eli Taylor from the Sioux Valley First Nation explained:

> The Aboriginal languages were given by the Creator as an integral part of life. Embodied in Aboriginal languages is our unique relationship to the Creator, our attitudes, beliefs, values and the fundamental notion of what is truth. Aboriginal language is an asset to one's own education, formal and informal. Aboriginal language contributes to greater pride in the history and culture of the community: greater involvement and interest of parents in the education of their children, and greater respect for Elders. Language is the principal means by which culture is accumulated, shared and transmitted from generation to generation. The key to identity and retention of culture is one's ancestral language.[36]

So *the right to use and develop an aboriginal language* has a strong claim to qualify as an

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[35] O. Lyons, "Spirituality, Equality, and Natural Law", in L. Little Bear, M. Boldt, and J. A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984), at 5-6.

[36] Assembly of First Nations, *Towards Rebirth of First Nations Languages* (Ottawa: AFN, 1992), at 14; quoted in Canada, Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize Indian, Inuit and Métis Languages and Cultures* (Ottawa: Department of Canadian Heritage, 2005), at 21 (available online at www.aboriginallanguagestaskforce.ca).

intermediate generic right. The abstract dimensions of this right are identical in all aboriginal groups, however it gives rise to a spectrum of specific rights relating to particular languages and linguistic institutions.

Another important intermediate right is what may be called *the right of livelihood*. A fundamental principle informing the Crown's assumption of sovereignty was that aboriginal peoples could continue to gain their living in their accustomed ways. Justice McLachlin identified this right in her dissenting opinion in the *Van der Peet* case.[37] Citing the terms of treaties and the *Royal Proclamation of 1763,*[38] she observed:

> These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding -- the *Grundnorm* of settlement in Canada -- was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them.[39]

A similar viewpoint subsequently attracted the Supreme Court's support in the *Marshall* case.[40] In the course of interpreting a Mi'kmaq treaty of 1760, Justice Ian Binnie referred to the objectives of the British and Mi'kmaq in their negotiations, which were aimed at reconciliation and mutual advantage.[41]

> It is apparent that the British saw the Mi'kmaq trade issue in terms of peace, as the Crown expert Dr. Stephen Patterson testified, "people who trade together do not fight, that was the theory". Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent. The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. [42]

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[37] *Supra*, note 3.

[38] R.S.C., 1985, App. II, No. 1. The most accurate printed text is found in C. S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Mass.: American Antiquarian Society, 1911), at 212.

[39] *Van der Peet*, *supra*, note 3, at para. 272, emphasis in original.

[40] *R. v. Marshall* [1999] 3 S.C.R. 456 (S.C.C.).

[41] *Id*., at para. 3.

[42] *Id*., at para. 25.

In light of this policy, Binnie J. interpreted the treaty as recognizing the right of the Mi'kmaq parties to continue to obtain necessaries through hunting and fishing and by trading the products of those traditional activities. What the treaty contemplated, he emphasized, was not a right to trade generally for economic gain, but rather a right to trade for "necessaries". The concept of "necessaries" was equivalent to what may be described as a "moderate livelihood", which extends to such day-to-day needs as food, clothing and housing, supplemented by a few amenities, but not the accumulation of wealth.[43]

To recapitulate, the generic right of cultural integrity forms a pyramid with three levels. At the top is the abstract right itself, which takes the same form in all aboriginal groups. Beneath this summit lies a tier of intermediate generic rights that relate to distinct subject-matters such as religion, language and livelihood. At the bottom rests a broad range of specific rights that differ from group to group in accordance with their particular cultures and ways of life.

In many respects, the middle tier of the pyramid is the most important of the three. Intermediate generic rights serve several crucial functions. First, they determine which concrete aspects of aboriginal societies rise to the level of constitutional significance and merit recognition as specific cultural rights. In other words, they speak to the *identity* of aboriginal rights. Second, intermediate rights determine the way in which specific practices are characterized for constitutional purposes, speaking to the *scope* of aboriginal rights. So doing, intermediate rights also determine the *generative potential* of these rights. We will consider these points in turn.

1. The Identity of Rights

One of the shortcomings of the *Van der Peet* test is that it does not provide a reliable basis for distinguishing between indigenous practices that are constitutionally significant and those that are not.[44] In its ethnohistorical bias, the test obscures the fact that identifying aboriginal rights cannot simply be a descriptive exercise, that it has deep normative dimensions. The court's role is not to reconstruct the internal dynamics of long-vanished aboriginal lifestyles. Rather it is to determine what general constitutional norms underpin s. 35, and the kind of modern rights these norms support.

Recall that, in *Van der Peet*, Chief Justice Lamer says that aboriginal rights represent practices that are truly "integral" to an aboriginal society, in the sense of being "central and significant". However, "integrality" is an unsure guide to constitutional import. There are certain practices that obviously cannot qualify as aboriginal rights no matter how "integral" they may be from a purely anthropological perspective. Otherwise there might be aboriginal rights to sleep, to flirt, to tell jokes, to gamble, to make love, and so on. Lamer C.J. struggles with this fact in observing that "eating to survive" does not qualify as an aboriginal right because it is "true of every human society" and so is not sufficiently "distinctive".[45] However, with respect, this puts the emphasis in the wrong place. The question is not what is *distinctive* but what is *constitutionally*

[43] *Id*., at paras. 56-59.

[44] See McLachlin J.'s apt remarks in *Van der Peet*, *supra*, note 3, at para. 242.

[45] *Id*., at para. 56..

significant. And indeed, later in his opinion, Lamer C.J. obliquely concedes the point in recognizing that "fishing for food" can constitute an aboriginal right, notwithstanding the fact that it is practised by most societies around the world.[46] So, near-universal prevalence is no bar to recognition as an aboriginal right.

The reason why such practices as eating, joking and gambling fail to qualify as aboriginal rights is not because they are not integral features of aboriginal societies (they may well be) but because they do not rise to the level of constitutional significance. How do we know that? The answer, in part, lies in the historical relations between aboriginal societies and the Crown and the principles that underpin those relations -- what we have called intersocietal law.[47] There is little evidence that intersocietal law ever supported a right to sleep or joke, but much that attests to a right to gain a livelihood. Take another example. From a purely ethnographic point of view, the practice of bearing arms was a central feature of most aboriginal societies in early times, because it was essential to their ability to defend themselves and ultimately to survive. However, that fact does not support a modern aboriginal right to bear arms. The reason does not lie in any paucity of ethnohistorical evidence but in the fact that fundamental constitutional norms do not support such a right.

2. The Scope and Generative Potential of Rights

Intermediate generic rights play another function, closely related to the first. Not only do they determine the range of practices capable of constituting aboriginal rights, they also shape the way those practices are *characterized*. This in turn influences the extent to which the concrete rights are capable of evolving and adapting to modern conditions without breaking the link to their historical progenitors -- in effect determining the extent to which these rights are *generative*.

The *Van der Peet* test assumes that the character and scope of aboriginal rights are matters determined simply by the historical and anthropological evidence. However, such evidence does not speak for itself. Social practices may be characterized in any number of different ways and at varying levels of abstraction. Ultimately, the question of characterization is normative as well as factual. The trick is to strike the right balance between the two.

The point is illustrated by the argument advanced by McLachlin J., in her dissenting opinion in *Van der Peet*. She maintains that, under s. 35(1), aboriginal peoples have the right to sustain themselves from the land or waters upon which they have traditionally relied for sustenance. In her view, this includes the right to trade in the resource to the extent necessary to maintain traditional levels of sustenance.[48] So, where an aboriginal group can show that traditionally it sustained itself by fishing in the river or sea, then it has the right to continue to do so today. And if it further demonstrates that the modern trade in fish is the only way to gain the equivalent of what it traditionally took, it has the right to trade in the resource to the extent necessary to provide

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[46] *Id*., at para. 72..

[47] For the sources of this law, see B. Slattery, "Making Sense of Aboriginal and Treaty Rights", *supra*, note 12, at 198-206.

[48] *Van der Peet*, *supra*, note 3, at para. 227.

replacement goods and amenities. In this context, she says, "trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised."[49]

Nevertheless, McLachlin J. argues that such a right to trade is not unlimited. It does not extend beyond what is required to provide reasonable substitutes for what was traditionally obtained from the resource -- in most cases, basic housing, transportation, clothing and amenities, in addition to what is needed for food and ceremonial purposes. In effect, where the aboriginal group historically drew a moderate livelihood from the fishery, it would have an aboriginal right to obtain a moderate livelihood from the fishery today. However there is no automatic entitlement to a moderate or any other livelihood from a particular resource. The right exists only to the extent that the aboriginal group can show historical reliance on the resource. For example, if the evidence indicates the group used the fishery only for occasional food and sport fishing, it would not have a right to fish for the purposes of sale, much less to provide a moderate livelihood.

> There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took.[50]

In McLachlin J.'s view, the aboriginal right of traditional sustenance is subject to two limitations. First, it must be exercised in a manner that respects the need for conservation, because use of the resource cannot be sustained over the long term unless the product of the lands and adjacent waters is maintained. Second, any right by its nature carries with it the obligation to use it responsibly. So, for example, the right cannot be used in a way that harms people, aboriginal or non-aboriginal.[51]

In effect, then, McLachlin J. holds that aboriginal peoples have *an intermediate generic right to sustain themselves from the land or waters upon which they traditionally relied for sustenance, subject to the requirements of conservation and responsible use*. The existence and basic scope of this intermediate generic right are matters of law. However, the specific resources to which the right attaches and the level to which the right rises are determined, not by general norms governing the generic right, but by the particular historical practices of each group. So, for example, there is no generic right of commercial fishing as such; the matter turns on the evidence relating to the specific group in question. Nevertheless, where a group can show that traditionally it drew a moderate livelihood from the fishery, it has a specific aboriginal right to do so today, and this right includes the right to trade in fish in order to obtain the equivalent of what it traditionally got, even where there is no evidence of significant trade at the critical historical date. Justice McLachlin's approach, then, represents an effort to strike the balance between normative and historical considerations in a way that favours the generative potential of livelihood rights, so as to support the modern welfare and prosperity of aboriginal peoples.

Compare this approach with that taken by the Supreme Court in the recent *Sappier/Gray*

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[49] *Id*., at para. 278.

[50] *Id*., at para. 279.

[51] *Id*., at para. 280.

decision.[52] The case concerns a claim by members of the Maliseet and Mi'kmaq peoples of New Brunswick to an aboriginal right to harvest timber for personal uses. In a seminal judgment, the Court unanimously adopts the view that section 35(1) protects the means by which an aboriginal society traditionally sustained itself.[53] So doing, the Court effectively accepts the existence of an intermediate generic right of livelihood. Speaking for the majority, Justice Michel Bastarache holds that s. 35 seeks to protect the integral elements of the way of life of aboriginal societies, including their traditional means of survival.[54] He cautions, nevertheless, that there is no such thing as an aboriginal right to *sustenance* as such, the right being confined to traditional *means of sustenance*, to wit the pre-contact practices relied upon for survival.[55]

As for the precise characterization of the right, Bastarache J. holds that the respondents' claim of "a right to harvest timber for *personal* uses" is too general. The practice should be characterized as the "harvesting of wood for *domestic* uses", including such things as shelter, transportation, tools and fuel.[56] He notes that, so characterized, the right has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the purpose is to finance the building of a dwelling. In other words, although the right permits the harvesting of timber to be used in the construction of a dwelling, the wood cannot be sold to raise money to purchase or build a dwelling.[57]

Turning to the generative potential of the right, Justice Bastarache holds that "[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means".[58] So, the right to harvest wood for the construction of temporary shelters may evolve into a right to harvest wood by modern means for the construction of a modern dwelling. Any other conclusion would freeze the right in its pre-contact form. Justice Bastarache notes the Crown's argument that the construction of large permanent dwellings from multi-dimensional wood, obtained by modern methods of extraction and milling, could not constitute an aboriginal right or a proper application of the "logical evolution" principle. However, he rejects this argument in strong terms, noting that under the established jurisprudence aboriginal rights must be interpreted flexibly so as to permit their evolution over time.[59] In a striking passage, he explains:

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[52] *R. v. Sappier/R. v. Gray* [2006] 2 S.C.R. 686 (S.C.C.).

[53] *Id*., at paras. 37-40, 45. Binnie J. dissented on the precise scope of the aboriginal right in question, however otherwise he agreed with the majority reasons.

[54] *Id*., at para. 40.

[55] *Id*., at para. 37.

[56] *Id*., at para. 24; emphasis added.

[57] *Id*., at para. 25.

[58] *Id*., at para. 48, quoting McLachlin C.J. in *Marshall/Bernard*, *supra*, note 32, at para. 25.

[59] *Id*., at para. 49, quoting Dickson, C.J., in *Sparrow*, *supra*, note 21, at 1093, and B. Slattery, "Understanding Aboriginal Rights", *supra*, note 6, at 782.

> In *Mitchell*, McLachlin C.J. drew a distinction between the particular aboriginal right, which is established at the moment of contact, and its expression, which evolves over time (para. 13). L'Heureux-Dubé J. in dissent in *Van der Peet* emphasized that "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live" (para. 172). If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless. Surely the Crown cannot be suggesting that the respondents, all of whom live on a reserve, would be limited to building wigwams. If such were the case, the doctrine of aboriginal rights would truly be limited to recognizing and affirming a narrow subset of "anthropological curiosities", and our notion of aboriginality would be reduced to a small number of outdated stereotypes.[60]

In summary, then, in *Sappier/Gray*, the Supreme Court effectively recognizes what we have described as an *intermediate generic right of livelihood*. The existence and basic scope of the right are established by general legal norms -- so that, for example, the Court construes the right as extending to traditional means of sustenance, rather than to sustenance generally. However, in other respects, the character of the right is governed by the evidence relating to the particular group in question -- such as, for example, the question whether a resource can be sold in order to raise money. The specific right at issue in the case is characterized at a fairly high level of generality, which in turn allows considerable scope for its evolution over time. However, the Court does not explore in any depth the normative underpinnings of the generic right of livelihood. Had it done so, it might have adopted a position closer to that of McLachlin J. in *Van der Peet.*

The point to be drawn from this analysis is simple. The assessment of claims to aboriginal rights has two complementary dimensions: historical and normative. A court has to consider not only the historical evidence mounted to support the specific claim, but also the underlying rationale of the generic right invoked. While the Supreme Court has finally acknowledged the normative dimensions of the question, it still has some distance to go yet.

VIII. THE CRITICAL DATE

As a matter of Anglo-Canadian law, aboriginal rights came into existence when the Crown gained sovereignty over an indigenous people. Before that time, the relations between an indigenous people and the Crown were governed by international law and the terms of any treaties. Although aboriginal peoples held rights under international law prior to the change of sovereignty (and continue to hold such rights today), it was only upon the advent of the Crown that aboriginal rights arose in Anglo-Canadian law.[61]

Consider for a moment the generic right of honourable treatment by the Crown. This right clearly did not come into existence at the point of European contact -- for mere physical interaction could not vest an aboriginal group with rights under Anglo-Canadian law, any more than it could

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[60] *Sappier/Gray*, *id*., at para. 49.

[61] For the status of indigenous rights in international law, see S. J. Anaya, *supra*, note 16.

burden the Crown with duties. The Crown's honour was engaged only when the Crown assumed sovereignty over the aboriginal group in question. As McLachlin C.J. says in *Haida Nation*:[62]

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" ...

In other words, under Anglo-Canadian law (as distinct from international law), the Crown has no legal responsibilities for indigenous peoples until such time as it assumes sovereignty over them. At that point, the principle of the honour of the Crown takes hold and imposes basic standards governing the Crown's conduct. However, the same observation holds true of the other generic aboriginal rights. It seems implausible that any one of them could come into force simply at the point of contact. As a matter of Anglo-Canadian law, they all accompany and control the Crown's assumption of governmental responsibility over indigenous peoples. So, it seems natural to think that the critical historical date for establishing the existence of aboriginal rights is the time of sovereignty. However, the matter is not so straightforward. We have to distinguish between generic and specific rights.

As seen earlier, when an aboriginal people passes under the Crown's sovereignty, it automatically gains a basic set of generic rights -- the right to an ancestral territory, the right of cultural integrity, and so on -- as well as a range of intermediate generic rights arising under their auspices. These rights come into existence at the time of sovereignty and possess a uniform character. Nevertheless, generic rights have specific aspects or applications, many of which originate at later dates and change over time. For example, the principle of the honour of the Crown takes effect at the date of sovereignty, however specific fiduciary rights and duties generally arise from events occurring well after sovereignty, for example upon the conclusion of treaties sharing aboriginal lands with the Crown, or the creation of particular reserves. In such cases the critical date for proving the specific fiduciary right is clearly the date of the event that triggered it, not the date of sovereignty.

Likewise, the generic right to customary law arises at the time of sovereignty, however the particular bodies of customary law protected by the right are not static but continue to evolve and adapt to keep pace with societal changes. It follows that the relevant date for determining the existence of a particular rule of customary law is not the date of sovereignty but the date of the activity or transaction whose legality is in question. So, for example, the validity of a customary adoption that took place in southern Québec in 1980 would be governed by the customary rules prevailing at that date, rather than in the year 1763, when New France was ceded to the British Crown. Of course, the customary rules must have existed for an appreciable period of time before they can gain the status of law. However, there is no need to show they existed at the time of sovereignty.

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[62] *Supra*, note 23, at para. 17; the quotation is from *Delgamuukw*, *supra*, note 14, at para. 186, which quotes in turn *Van der Peet*, *supra*, note 3, at para. 31.

The right of cultural integrity poses more difficult and complex questions. As with other generic rights, the abstract right comes into existence at the time of sovereignty, and the same holds true of the intermediate generic rights that shelter under its auspices, relating to such subjects as language, religion and livelihood. What, then, of the specific rights that occupy the bottom tier in the pyramid? In principle these cannot date from a period *earlier* than the time of sovereignty, because Anglo-Canadian law (as distinct from international law or indigenous law) did not apply prior to that date. So, presumably they must arise at the time of sovereignty or at some later period, depending on the precise nature of the right in question.

The question is bedevilled by the fact that indigenous cultures (like all cultures) are organic entities that change constantly over time. After Europeans arrived in North America, aboriginal societies responded in dynamic and creative ways to the new opportunities, circumstances and influences that presented themselves.[63] Just as European cultures quickly adopted many products of American origin, such as tomatoes, corn and potatoes (to say nothing of tobacco), so also native American cultures swiftly absorbed many items of European origin, such as horses, metal artefacts and firearms. Trade in furs, skins and fish transformed the economies of aboriginal societies and helped sustain the economies of settler colonies. Religious ideas born in the crucible of the Middle East had a notable impact on aboriginal spirituality, as did aboriginal conceptions of personal freedom and federalism on European political thought. On the negative side, European-borne diseases such as smallpox decimated many aboriginal societies and caused important changes in lifestyle, political organization and outlook, while venereal syphilis (often thought to be of American origin) took a lesser toll in Europe.[64]

So the question arises, given the dynamic nature of aboriginal cultures and the fact that they underwent significant changes both before and after sovereignty, what date is "critical" for determining the existence and content of specific cultural rights? The answer has two facets. First, the critical date cannot normally be *earlier* than the date of Crown sovereignty, because, except in unusual situations, it does not make sense for the content of a right to be fixed by reference to a period prior to the time that the right itself came into existence. Second, it seems possible that the critical date may vary depending on the kind of cultural right at issue and the underlying purposes it serves. The date appropriate for language rights may not serve well for livelihood rights. It follows that the matter should be determined on a category by category basis, so that the considerations appropriate to each context may be thoroughly assessed.

Nevertheless, as seen earlier, the Supreme Court held in *Van der Peet*[65] that the critical date for determining the content of specific cultural rights was the time of initial European contact -- normally well before Crown sovereignty -- and that this date held true for aboriginal rights across

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[63] For a good survey, see C. G. Calloway, *New Worlds for All: Indians, Europeans, and the Remaking of Early America* (Baltimore, Md.: John Hopkins University Press, 1997).

[64] See B. G. Trigger & W. R. Swagerty, "Entertaining Strangers: North America in the Sixteenth Century", in B. G. Trigger & W. E. Washburn, eds., *The Cambridge History of the Native Peoples of the Americas, Vol. 1: North America, Part 1* (Cambridge: Cambridge University Press, 1996), at 363. Syphilis was probably carried back to Europe as early as 1493.

[65] *Supra,* note 3.

the board. The Court apparently thought that the right of cultural integrity was designed to preserve the central aspects of aboriginal cultures as these existed in their "pristine" form, prior to the advent of European influence. So, while aboriginal rights themselves only came into existence at the time of sovereignty (for they could not arise earlier under Anglo-Canadian law), the concrete content of these rights was determined by social conditions prevailing at a much earlier period, when Europeans first arrived. This means, for example, that, when the indigenous nations of New France fell under British rule in 1763, they gained the right to maintain their antique way of life *as it existed as much as three centuries previous*, when French adventurers sailed up the St. Lawrence River. The result is somewhat puzzling, since it is not clear why the Crown or indigenous nations would have any interest in reviving or protecting long-vanished modes of life.

However, *Van der Peet* was not to be the last word on the matter. When the Supreme Court took up the question of aboriginal title in the *Delgamuukw* case, it beat a partial retreat. It held that the critical date for establishing the existence of aboriginal title (as distinct from other aboriginal rights) was the time the Crown *asserted sovereignty* rather than the date of first contact.[66] The Court said that this difference was justified for three reasons. First, aboriginal title represented a burden on the Crown's underlying title. However, the Crown did not gain this underlying title until it asserted sovereignty over the lands in question. It did not make sense, argued the Court, to speak of a burden on the underlying title before that title existed. So aboriginal title only crystallized at the time sovereignty was asserted.[67] The Court's reasoning, with respect, is impeccable. However, the underlying logic is not limited to aboriginal title but extends to other generic aboriginal rights. Like aboriginal title, they all pose legal limitations or burdens on the Crown's sovereign rights under Anglo-Canadian law -- limits that only arose at the time of sovereignty. Consider the right of cultural integrity, which binds the Crown to respect the integral elements of an indigenous culture. In the Court's words, it does not make sense to speak of such a limit on the Crown's sovereignty before sovereignty itself existed.

The Court mounts a second argument. Aboriginal title "does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact." Under common law, it says, the act of occupation or possession is sufficient to ground aboriginal title, and it is not necessary to prove that the land was an integral part of the aboriginal society before the arrival of Europeans.[68] With respect, this reasoning is somewhat self-serving. Aboriginal title does not raise the problem of distinguishing between pre-European aboriginal practices and those introduced by European contact because the Court has (correctly) *defined* aboriginal title as a generic right, whose character and scope are not determined by the practices of specific aboriginal groups, either before or after contact However, the same observation holds true of all the other generic rights. For example, the right of cultural integrity does not *itself* arise from aboriginal cultures, nor is the scope of the abstract right shaped by traditional aboriginal practices. The right arises from an intersocietal body of law governing relations between the Crown and aboriginal peoples. As such, it comes into existence at the point of sovereignty, just like aboriginal title.

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[66] *Delgamuukw*, *supra*, note 14, at para. 144.

[67] *Id*., at para. 145.

[68] *Id*.

The Court gives a third reason for choosing a distinctive critical date for aboriginal title. From a practical standpoint, it says, the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine "the precise moment that each aboriginal group had first contact with European culture."[69] However, once again, the Court's logic has a broader application. The difficulty of determining the date of contact is no greater or less for aboriginal title than for aboriginal rights generally. What is sauce for the aboriginal goose is sauce for the aboriginal gander.

Carried to its natural conclusions, then, *Delgamuukw* makes a convincing case for rejecting the time of European contact as the critical date for aboriginal rights and for choosing a date *no earlier* than the time of sovereignty. However, this conclusion does not take us much further than the position arrived at earlier. As we have seen, generic aboriginal rights arise at the time of Crown sovereignty, however specific rights often come into existence at later dates or have aspects that change over time. So, the critical date for determining the existence and scope of a specific right varies depending on the kind of generic right at issue and its underlying rationale. In effect, as suggested earlier, the courts ought to deal with each generic right separately, so that the appropriate considerations may be weighed in their context.

The need for an incremental approach is shown by the *Powley* decision,[70] where the Supreme Court determined the critical date governing the aboriginal rights of the Métis people.[71] As entities of mixed European and indigenous descent, Métis groups only came into existence in the post-contact period, so that a critical date of European contact is clearly problematic for determining their rights. Realizing this difficulty, Lamer C.J. in *Van der Peet* explicitly postponed the question to a later day.[72] In *Powley*, the Court finally grasped the nettle and held that the critical date for the Métis is the time when Europeans established effective political and legal control in a particular area -- what we may call *the date of effective control*. The Court rejected the argument that the rights of Métis groups must be grounded in the pre-contact practices of their aboriginal ancestors, arguing that this approach would deny to Métis their full status as distinctive rights-bearing peoples.[73]

Once again, the Court's logic is persuasive, and once again it undermines the approach taken in *Van der Peet*. Take the case of two modern aboriginal groups -- one Métis, the other Indian -- that live side by side in a certain area. The groups have common ancestors on the indigenous side; they are both the descendants of an Indian nation that occupied the area when Europeans first arrived. By the time the Crown gained effective control over the area, a Métis community had grown up alongside the Indian one, and both groups had become heavily involved in the commercial fur trade -- something absent from the culture of their Indian forefathers at the time of contact.

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[69] *Id*.

[70] *R. v. Powley* [2003] 2 S.C.R. 207 (S.C.C).

[71] Section 35(2) of the *Constitution Act, 1982*, provides: "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

[72] *Van der Peet*, *supra*, note 3, at para. 67.

[73] *Powley*, *supra*, note 70, at paras. 15-18, 36-38.

Under the *Powley* test the Métis group would gain an aboriginal right to trade in furs, while under the *Van der Peet* test the Indian group would not. For the rights of the Métis would be ascertained by reference to their practices at the time of effective control, while the rights of their Indian neighbours would be determined by their practices at the time of contact. The result, needless to say, is paradoxical. The group of mixed aboriginal-European descent is credited with an aboriginal right that is denied to their Indian neighbours, despite the fact that both groups were engaged in the fur trade at the time of effective control, and both are the descendants of an Indian nation that did not trade in furs at the time of contact. A similar problem arises in dealing with claims to aboriginal title advanced by the two groups, because, at the time of sovereignty, the Indian group may well have occupied lands that, by the time of effective control, were occupied by the Métis. What these conundrums show is the need for uniform critical dates for all aboriginal peoples, at least in the context of livelihood rights and aboriginal title.

IX. FROM RECOGNITION TO RECONCILIATION

At the start of this paper, we noted that in the *Van der Peet* case Lamer C.J. held that s. 35(1) was animated by the twin goals of recognition and reconciliation. However, in practice, the test he enunciated gave almost exclusive priority to the goal of recognition. For it mandated that aboriginal rights should be identified on a purely descriptive basis, by reference to indigenous customs and practices existing in remote historical periods. No thought was given to the question of how far these primordial practices, reified as rights, might serve the cause of reconciliation at the present day. The doctrine of generic rights goes a long way toward resolving this deficiency. In focussing attention on the underlying rationales of various categories of aboriginal rights, it provides a bridge between the historical groundings of aboriginal rights and their modern-day incarnations, as living rights that serve the on-going needs of indigenous peoples.

However, reconciliation is a complex and multi-faceted objective. While the doctrine of generic rights gives aboriginal peoples a strong legal basis for achieving reconciliation with the larger society, it may in certain cases be insufficient to attain that goal. For in focussing (necessarily) on the rights of aboriginal groups, the doctrine has difficulty taking proper account of the competing interests of third parties and indeed the body politic as a whole. So, for example, while the new approach supports a broader interpretation of aboriginal livelihood rights regarding resources such as fish, game and timber, it does not provide an adequate basis for determining how these limited resources should shared with other user groups, whose welfare may be gravely affected. Again, the straightforward application of the legal criteria governing recognition of aboriginal title may have far-reaching effects on the interests of innocent third parties and indeed society as a whole, interests that the law may have trouble accommodating.

In certain cases, of course, the resolution of such problems may safely be left to legislation, which in turn is subject to judicial review under s. 35(1).[74] However, in other instances, the external interests affected by aboriginal claims may be so important or deep-seated that the mere fact of judicial recognition may risk precipitating a crisis in relations between aboriginal and non-aboriginal peoples, thus setting back the cause of reconciliation. On the other hand, for a court to give routine priority to third-party interests would be to ignore the promise of s. 35(1) and the demands of

[74] See *Sparrow*, *supra*, note 21, at 1101-19.

historical justice. What is the way out of this dilemma?

The answer, interestingly enough, is suggested by the wording of s. 35(1) itself. The provision states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby "recognized and affirmed." The use of two terms -- "recognized" and "affirmed" -- is an obvious but little-discussed feature of the section. Indeed, at first blush, the two words may seem to say more or less the same thing. Yet closer examination suggests that their orientation is actually somewhat different. In saying that aboriginal rights are "recognized", the section seems to focus on rights in their original, historically-based forms. The word "affirmed", by contrast, seems more concerned with the way these rights are to be treated in contemporary times – as living rights that serve the modern interests of aboriginal peoples and at the same time promote reconciliation with the larger society.

What this suggests, then, is that the process of identifying of aboriginal rights under s. 35(1) is governed by two distinct but complementary sets of constitutional principles, which we may call Principles of Recognition and Principles of Reconciliation.[75] Principles of Recognition govern the identification of generic aboriginal rights and the specific rights that arise under their auspices, based on a mix of historical and normative considerations. In a word, they encompass the set of basic principles set out in earlier sections of this paper. These principles provide the point of departure for any modern inquiry into the existence of aboriginal rights and a benchmark for assessing the historical scope of indigenous dispossession and deprivation. By contrast, Principles of Reconciliation govern the legal effects of aboriginal rights in modern times. They take as their starting point the historically-based rights of the aboriginal group concerned, as determined by Principles of Recognition, but they also take into account a range of other factors, such as the modern condition of the lands or resources affected, the aboriginal group's contemporary needs and interests, and the interests of third parties and society at large. So doing, Principles of Reconciliation posit that certain aboriginal rights cannot be implemented in their entirety by the courts but require the negotiation of modern treaties.

Unless we distinguish between these two sets of principles, we may fall into the trap of assuming that historical aboriginal rights automatically give rise to modern rights, without regard to societal changes that have occurred in the interim. Such an assumption fosters twin judicial tendencies. The courts may be led to identify historical aboriginal rights in a highly restrictive way -- as by imposing an artificially early critical date -- in the effort to minimize conflicts with third party interests. Alternately, a restrictive view may be taken of ability of an aboriginal right to evolve and adapt, so as to curtail its modern effects. These tendencies, if left to operate unchecked, will diminish the possibility of reconciliation ever occurring. For the successful settlement of aboriginal claims must involve the full and unstinting recognition of the historical reality of aboriginal rights, the true scope and effects of indigenous dispossession and exclusion, and the continuing links between an aboriginal people and its traditional culture, lands and resources. However, by the same token, the recognition of historical rights, while a necessary precondition for modern reconciliation, is not always in itself a sufficient basis for reconciliation, which may have to take into account a range of other factors. So, for example, to suggest that historical aboriginal rights gives rise to modern rights that automatically trump third-party interests represents the attempt to remedy one

[75] See B. Slattery, "The Metamorphosis of Aboriginal Title", *supra*, note 6, at 281-86, from which the following discussion draws.

injustice by committing another.

The point is nicely captured in the *Mikisew* case,[76] where Justice Binnie affirms that the "fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." Nevertheless, he observes, the management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. As Binnie J. emphasizes, the process of reconciliation requires the courts to take account of the claims and interests of both aboriginal and non-aboriginal peoples. Neither side can be left out of the equation. However, the process takes place in the wake of historical injustices and grievances that cannot be minimized or ignored. In effect, reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate the full range of contemporary interests. On the one hand, unless the modern law provides appropriate standards (in the form of Principles of Recognition) for understanding the true nature and scope of historical aboriginal rights, there can be no proper basis for modern reconciliation. On the other hand, if historical rights are taken to give rise to modern rights *tout court*, without regard to their effects in present-day society, the cause of reconciliation will be equally ill-served.

What form do Principles of Reconciliation take? It would be a mistake to attempt an answer on the basis of *a priori* reasoning. The matter can only be settled by detailed discussion in the context of actual cases. Indeed, it seems likely that these principles take a variety of forms, depending on the kind of aboriginal right in question. Subject to this caution, nevertheless, I suggest that Principles of Reconciliation must have the following basic features:

(1) They should acknowledge the historical rights of aboriginal peoples, as determined by Principles of Recognition, as the essential starting point for any modern settlement.

(2) They should take account of how historical aboriginal rights have been affected by changes in the circumstances of indigenous peoples and the rise of third-party and other societal interests.

(3) Where appropriate, they should distinguish between the "inner core" of aboriginal rights, which may be implemented by the courts without need for negotiation, and a "penumbra" or "outer range" that needs to be defined in treaties negotiated between the aboriginal people concerned and the Crown.[77]

(4) They should provide guidelines governing the accommodation of rights and interests held by other affected groups, both aboriginal and non-aboriginal.

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[76] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 (S.C.C), at para. 1.

[77] For the distinction between an inner core and a negotiated penumbra as applied to aboriginal governmental rights, see Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at 36-48; *Report of the Royal Commission on Aboriginal Peoples*, *supra*, note 25, Vol. 2, at 213-24.

(5) Where appropriate, they should create strong incentives for negotiated settlements to be reached within a reasonable period of time.[78]

(6) They should provide for judicial remedies where negotiations fail to yield a settlement.

The constitutional basis for this approach has already been identified by the Supreme Court in the path-breaking *Haida Nation* and *Taku River* decisions.[79] The Court effectively portrays s. 35 as the basis of a generative constitutional order -- one that mandates the Crown to negotiate with indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with those of the broader society.

According to these decisions, when the Crown claimed sovereignty over Canadian territories, it did so in the face of pre-existing indigenous sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship that requires the Crown to deal honourably with aboriginal peoples. The fundamental principle of the "honour of the Crown" obliges the Crown to respect aboriginal rights, which in turn requires it to negotiate with aboriginal peoples with a view to identifying those rights. It also obliges the Crown to consult with aboriginal peoples in all cases where its activities affect their asserted rights and, where appropriate, to accommodate these rights by adjusting the activities.[80] Chief Justice McLachlin sums up the matter as follows:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[81]

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[78] For helpful discussion, see S. Lawrence & P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252, esp. at 270-72; S. Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgoode Hall L.J. 587; S. Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*'s Potential Effect on Dispute Resolution" (2003) 22 Windsor Y.B. Access Just. 309.

[79] *Haida Nation*, *supra*, note 23; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 (S.C.C.). For fuller discussion, see B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Supreme Court L.R. 433.

[80] *Haida Nation*, *id*., at para. 32; *Taku River*, *id*., at para. 24.

[81] *Haida Nation*, *id*., at para. 25.

The Chief Justice emphasizes that the Crown has the legal duty to achieve a just settlement of aboriginal claims by negotiation and treaty. So doing, she attributes a generative role to s. 35. In effect, she holds that the Crown, with judicial assistance, has the duty to foster a new legal order for aboriginal rights, through negotiation and agreement with the aboriginal peoples affected. This approach views s. 35 as serving a dynamic function -- one that does not come to an end even when treaties are successfully concluded. As she states:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a *process* flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[82]

In other words, s. 35 does not simply recognize a body of historical rights, whose contours are ascertained by the application of general legal criteria to particular historical circumstances. Rather, the section envisages aboriginal rights as flexible and future-oriented rights, which need to be adjusted and refurbished from time to time through negotiations with the indigenous peoples concerned.

X. CONCLUSION

Over the past decade, the Supreme Court has reshaped the *Van der Peet* test in several important respects. First, the Court has moved toward accepting the fact that aboriginal rights are not just specific rights, particular to each individual group, but rather are grounded in a range of generic rights recognized by the common law of aboriginal rights. Second, in certain contexts, the Court has adopted critical dates that effectively undermine the view that aboriginal rights crystallized at the time of European contact, pointing rather to the time of Crown sovereignty and effective control. Third, the Court has increasingly emphasized the fact that aboriginal rights are not just historical in nature; they are also generative rights that need to accommodate the full range of modern interests, both aboriginal and non-aboriginal, and as such may require articulation in agreements with the Crown.

This evolution in the jurisprudence should come as no surprise. It is a distinctive feature of common law systems to shun absolute principles conceived *a priori* in favour of flexible principles fleshed out in concrete cases. The *Van der Peet* decision was handed down at a time when there was a dearth of judicial authority on the aboriginal rights recognized in s. 35(1). The Supreme Court set out a comprehensive approach to the matter, with the aim, no doubt, of providing guidance to lower courts, which were struggling to apply the section's somewhat enigmatic terms. While the test served its purpose at the time, inevitably it has needed revision and amendment. As McLachlin J. observed in *Van der Peet*, there is much to commend the pragmatic approach adopted by the common law -- reasoning from the experience of decided cases and recognized rights -- all the more

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[82] *Id*., at para. 32, emphasis added.

so given the complexity and sensitivity of the task of defining aboriginal rights.[83] The Court's jurisprudence in the decade since *Van der Peet* shows the wisdom of this approach.

[83] *Van der Peet*, *supra*, note 3, at para. 262.