UBC Law Review

Volume 49 | Issue 2 Article 12

8-2016

Van der Peet Turns 20: Revisiting the Rights Equation and Building a New Test for Aboriginal Rights

VAN DER PEET TURNS 20: REVISITING THE RIGHTS EQUATION AND BUILDING A NEW TEST FOR ABORIGINAL RIGHTS

KENJI TOKAWA[†]

I. INTRODUCTION

Twenty years after the Supreme Court of Canada (SCC) authored the test for Aboriginal rights in *R v Van der Peet*, the test is no longer viable.[1] Although it has gone through different iterations in the jurisprudence, the test still reserves that only "practices" that were "integral to the distinctive culture" of the claimant group can be characterized as Aboriginal rights.[2] The stream of jurisprudence and shifting public opinion has steadily eroded the foundations of the test over the last two decades. Criticisms of the test are diverse and persistent, and range from the dissenting judgments of McLachlin and L'Heureux Dubé JJ to critiques by Indigenous legal scholars and Aboriginal law experts. These criticisms point to the ruinous effects of the test, the freezing of rights, and the reliance on outsider constructions of what is meaningful, distinctive, and integral to any given Indigenous group,

---

† JD, University of Ottawa, Faculty of Law, English Common Law Section with an option in Aboriginal Law and Indigenous Legal Traditions, 2015. The author would like to acknowledge Professor Sarah Morales, Randy Schliemann, Alisa Lombard, Scott Franks, and the anonymous peer reviewers for their invaluable feedback.

1 See *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

2 See *ibid* at paras 45–46 [*Van der Peet*]; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 42, [2011] 3 SCR 535; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 15, [2014] 2 SCR 27.

among other things.[3] Rather than repeating these criticisms, this paper simply means to excavate the basis of the test to see why it was so easily eroded, and to outline an equation for establishing a stronger, more principled replacement test to build and support Canada's relationships with Indigenous nations going forward.

The way this paper constructs a new test is as follows. First, the paper examines how Lamer CJC, writing for the majority crafted the original test and suggests that the Court missed the purpose of rights: to provide protection to interests in need of protection. To show this, the paper first explores the factors at the Court's disposal for creating the test: 1) the definition of constitutional rights in the non-Aboriginal rights context; and 2) the reason the Aboriginal rights context creates a *sui generis* situation. The second factor also requires an examination of the role of reconciliation. Throughout, the paper juxtaposes the resulting rights equation against the majority's reasoning in *Van der Peet* to expose why the test was so easily eroded. Finally, the paper adds these factors to arrive at a principled and coherent test for determining the existence of Aboriginal rights. The paper concludes by outlining the diminished role of *stare decisis* for *Van der Peet*.

The application of the proposed test avoids the problems that *Van der Peet* has been criticized for: the test's inapplicability to Métis rights, the freezing of rights, the stereotyping of Indigenous people, and the impracticality of the highly contested term "culture" central to determinations in the current test, leading to the ensuing battle among anthropologists.[4] The proposed test does not preclude practices that arose

---

3 See e.g. *ibid* at paras 162, 257; John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 Const Forum Const 27; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

4 For a discussion on the inappropriateness of basing the test in "culture", see Neil Vallance, "The Use of the Term 'Culture' by the Supreme Court of Canada: A Comparison of Aboriginal and Non-Aboriginal Cases Since 1982" (MA Thesis: University of Victoria, 2003) (ProQuest Dissertations Publishing); Paul LAH Chartrand, "Defining the 'Métis' of Canada: A Principled Approach to Crown-Aboriginal Relations" in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown*

in resistance to European encroachment, but rather embraces them as an aspect of reconciliation. The test does not confine its concern to separating out discrete parts of an entire way of life.[5] It avoids basing itself on a misapprehension of *R v Sparrow*, in which the phrase crucial to the *Van der Peet* test—"integral to distinctive culture"—originates.[6] Rather, this paper will demonstrate that the proposed test is securely rooted in well-settled legal principles. In some ways, the proposed test more closely resembles the test for Aboriginal title, which does not hinge on establishing that the interest in land is contingent on culture.[7] As for rights that have already been established under the old test, the new test would preserve the integrity of those rights since their existence would inevitably contain the proposed test's prerequisite elements: an interest, a threat, and the *sui generis* basis for protection by virtue of the dispute from which the original litigation arose. The new test is simply more inclusive than the old test.

Relations: Rights, Identity, Jurisdiction, and Governance (Toronto: Irwin Law, 2008) 27 at 41–44.

5 *Van der Peet, supra* note 1 at para 150, L'Heureux-Dube J dissenting, lamenting the effects of the test.

6 *R v Sparrow*, [1990] 1 SCR 1075 at 1099, 70 DLR (4th) 385 [*Sparrow*].

7 See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 150–51, 153 DLR (4th) 193.

V. RIGHTS[8]

This section aims to provide a framework for understanding the SCC's discourse on the nature of constitutionally entrenched rights outside of the Aboriginal rights context.[9] To do so, this section attempts to establish three distinct but interrelated features of rights. First, rights are the protections of interests. Rights are not the interests themselves. Second, the protection afforded by rights cannot exist without the correlative existence of threats to whatever interests the right protects. In other words, rights require an interest + the existence of a threat, since rights fulfil no purpose in the absence of the risk of encroachment on the interests they are said to protect. Third, protections cannot exist without a principled basis for establishing protections. If they could, all interests upon which an external entity could infringe would also be rights. These features clarify that rights are not

---

8 In this paper, "rights" refer to the general western conception of positive rights, which, as Taiaiake Alfred points out, are conceived of "only in the context of a sovereign political authority because the law that defines and protects them depends on the existence of a single sovereign": *Peace, Power, Righteousness: An Indigenous Manifesto*, 2nd ed, (Oxford: Oxford University Press, 2009) at 176. This limited use is intentional and necessary to illustrate how the Western reasoning upon which the SCC operates is itself incongruent with the Court's definition of "Aboriginal rights". Thus, the use of "rights" here is not meant to reflect any Indigenous definitions of the term; however, in the Court's discussion on reconciliation, it accepts a clear need to value those definitions in context. See *Van der Peet*, *supra* note 1 at paras 29, 30. Assessing whether the Court is effective in doing so is beyond the scope of this paper. This paper engages in this limited analysis under the presumption that there is utility to establishing a coherent Aboriginal rights doctrine within Canadian jurisprudence. For Indigenous perspectives on the concept of rights and sovereignty, see e.g. Wub-e-ke-niew, *We Have the Right to Exist: A Translation of Aboriginal Indigenous Thought: The first book ever published from an Ahnishinahbæó'jibway Perspective* (New York: Black Thistle Press, 1995); Treaty 7 Elders and Tribal Council et al, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996); Gisday Wa & Delgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia 1987–1990* (Gabriola Island, BC: Reflections, 1992).

9 Although some rights are protections against other persons or rights-holders, because the Aboriginal rights context arises from the relationship between the Crown and Indigenous peoples, analogizing these rights to the rights as against persons would be misleading for the purposes of this paper.

stand-alone entitlements; rather, they are contingent on the existence of these three elements.

A. The Three Characteristics Of Rights

1. The Protection Of Interests

As the SCC first stated in *R v Big M Drug Mart*, "[t]he meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in light of the interests it was meant to protect."[10] Rights are not merely the interests associated with them. For example, the SCC noted that "it is clear that one of the purposes of the right to counsel under s. 10(*b*) is to safeguard the liberty interests of detainees".[11] Similarly, the right to be free from unreasonable search and seizure protects privacy interests.[12] Further, the singular right of section 7 does not translate into a singular interest in life, liberty, and security of the person; it is the protection of the life interest, liberty interest, or security of the person interest.[13] Rights are separate and distinct from those interests and can be identified as the protections of those interests.

2. The State's Threat On The Interests

There is no need for protection, and thus no right, if nothing exists that could threaten the interest. Since a right is the sum of the interest and its

---

[10] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 334, 18 DLR (4th) 321 [emphasis in original] [*Big M*]. This statement was most recently affirmed in *Divito v Canada (Minister of Public Safety and Emergency Preparedness)* 2013 SCC 47 at para 19, [2013] 3 SCR 157.

[11] *R v Prosper*, [1994] 3 SCR 236 at 273, 118 DLR (4th) 154.

[12] See e.g. *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 73, 148 DLR (4th) 385.

[13] See e.g. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 (where the Court undertook separate analyses of each of the three interests at stake under the singular section 7 right).

protection, defining a right necessitates determining what the interest is being protected from. Early American political and judicial thought identified the state and its power as the threat against which rights protect.[14] Canadian lawmakers have also recognized that rights protect in this way. Subsection 52(1) of the *Charter* constrains legislators in their exercise of power by declaring that any law inconsistent with the rights contained in the *Charter* is invalid.[15] This section recognizes the threat as the ability of the legislature to regulate individual's lives in a way that could infringe on the interests protected by the *Charter*. To be clear, the rights in the *Charter* and the text in subsection 52(1) nod to infringement of protected interests in a way that is anticipatory rather than accusatory, in that they recognize merely the possibility that the state could exercise its power in an infringing way. Subsection 52(1) does not name a specific infringement of a specific individual's rights and impugn it directly. Similarly, section 7 acknowledges the state's ability to deprive people of life, liberty, and security of their person, and anticipates the state's exercise of such power, but does not point to an actual infringement of a person's interest in liberty, such as the imprisonment of a specific individual.[16] Rights protect interests against the state by placing a duty on the state to limit its powers, but not necessarily powers that are actually exercised by the state—only powers that the right acknowledges and anticipates could be exercised by the state in a way that would deprive rights-holders of their protected interests.[17]

---

[14] See e.g. *Barron v The Mayor and City Council of Baltimore*, 32 US (7 Pet) 243, 8 L Ed 672 (1833) (as per Marshall CJ on the rights in the amendments as "limitations on power" at 247); *Palko v Connecticut*, 302 US 319, 82 L Ed 288 (1937) (per Cardozo J on the rights contained in the first 10 amendments); Letter from Thomas Jefferson to James Madison (20 December 1787) cited in Roger E Salhany, *The Origin of Rights* (Toronto: Carswell, 1986) (stating "a bill of rights is what the people are entitled to against every government on earth, general or particular" at 3).

[15] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 52(1) [*Charter*].

[16] *Charter*, *supra* note 15 at s 7.

[17] For a discussion of duty as correlative to right, see John Chipman Gray, *The Nature and Sources of the Law*, 2nd ed (New York: The MacMillan Company, 1921).

3. THE BASIS FOR PROTECTION[18]

While the existence of a right needs an interest and the anticipation of a threat against which to protect that interest, it also needs a reason for affording protection to that particular interest. Otherwise, every interest over which the state can exercise power would be considered a right. These reasons are usually derived from moral standards or principles thought to unify those subject to the law. For example, the preamble to the *Charter* invokes religion and respect for a legal tradition: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[19] Similarly, the preamble to the UN *Universal Declaration of Human Rights* references the liberal ideals of freedom, justice, peace, dignity, and the conscience of mankind.[20]

B. THE LOGICAL EXTENSION TO ABORIGINAL RIGHTS

Thus, rights are the sum of several parts. Rights are not merely the interests they protect. They are the protections afforded by the state's duty to constrain itself in its exercise of power over particular interests. Rights can be expressed in the form of an equation (the "rights equation"): $I + P = R$. Interest + protection from the exercise of state power = right. P in this equation is itself the sum of two parts: the anticipated threat the state power presents to the interest (T), and the basis for protection of that interest against that threat (B). The rights equation may be more clearly stated as $I + (T + B) = R$.

---

[18] To be clear, the protection aspect is not to be confused with the test for whether a right is violated. Whether something is in need of protection and whether that protection has been justifiably violated are two different questions. At issue in the former is the ability to exercise power over the interest in a way that threatens the interest. In the latter, that risk needs to materialize to actually limit the rights-holder's interest. This threat of state power is distinct from an actual exercise of state power that limits the interest.

[19] *Supra* note 15.

[20] See *Universal Declaration of Human Rights*, 10 December 1948, GA Res 217A, UNGAOR, 3d Sess, UN Doc A/810 (1948).

Given this rights equation, Aboriginal rights logically ought to mean the protection of interests from the state's ability to exercise power over those interests. The existence of an Aboriginal right is then properly established by answering these questions in the affirmative:

1. Whether the Indigenous claimant has an interest (*I*, the interest aspect); and
2. Whether
    a. the state has a legal or de facto ability to exercise power over that interest in a way that would preclude the claimant from realizing that interest (*T*, the threat to the interest aspect); and
    b. the interest is one that ought to be afforded protection against that threat. In other words, whether the interest is one to which the state's duty of self-restraint should attach (*B*, the basis for protection aspect).

An application of this test for establishing the existence of a right could proceed as follows:

1. Interest:
    a. The claimant identifies the selling of fish as an activity in which she claims to have an interest
2. Protection:
    a. Threat to the interest: The claimant establishes the state's ability to exercise power over the interest through the 1867 constitutional enactments conferring jurisdiction on the federal government to regulate trade and commerce, as well as sea coast and inland fisheries.[21]
    b. Basis for protection: The claimant establishes some widely accepted moral principle which justifies the protection of

[21] See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(2), 91(12), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

> her interest in selling fish against the 1867 constitutional powers.[22]

However, this is not the test the SCC adopted for establishing the existence of an Aboriginal right. The Court maintained on numerous occasions that Aboriginal rights are *sui generis* and cannot be defined on the same basis as other rights.[23] Yet the Court continued to apply the method of rights interpretation prescribed in a *Charter* context. Citing from *Big M* that a constitutional provision must be understood in the light of the interests it was meant to protect, Lamer CJC for the majority explicitly recognized that this principle applied equally to the interpretation of the *Charter* and to subsection 35(1) of the *Constitution Act, 1982*.[24] The interest element (*I*) and the protection element (*P*) are thus integral to determining rights in both an Aboriginal rights context and *Charter* context.

VI. *SUI GENERIS* NATURE OF ABORIGINAL RIGHTS AND THE RELEVANCE OF RECONCILIATION

The following section details how the *Van der Peet* majority deals with each of the three elements in the rights equation and suggests the weaknesses of the test. First, this section examines the majority's treatment of the interest element (*I*) and the basis for protection element (*B*). Second, this section discusses the majority's treatment of the *sui generis* nature of Aboriginal rights.

The majority determines the interest in the rights equation by using the *sui generis* nature of Aboriginal rights. If *S* is added into the rights equation to represent that which is *sui generis*, the assumption of a reader may be that the rights equation would look like something this: $I^S + (T + B) = R^S$. Interests that are *sui generis* (I^S) + a threat of anticipated state-exercised

---

22 I will return to what this principle is in the next section.

23 See e.g. *R v Sappier,* 2006 SCC 54, [2006] 2 SCR 686; *Delgamuukw*, *supra* note 7; *Sparrow, supra* note 6.

24 *Van der Peet*, *supra* note 1 at para 3.

power infringing on the interest (T) + a basis for protection against such an anticipated infringement (B) = rights that are *sui generis* (R^S). The basic structure of the equation does not change due to the fact that, as the majority recognized, the principle for understanding rights from *Big M* applies equally to subsection 35(1) and to the *Charter*.

However, I submit that the *sui generis* aspect should be shifted from where Lamer CJC originally inserted it in the analysis. Under this analysis, the majority sought to determine the interests by identifying "the basis for the legal doctrine of aboriginal rights".[25] The majority goes on to suggest that this basis is also what distinguishes the legal status of Indigenous people from others.[26] The majority continues, saying that this basis for difference is simply the existence of Indigenous peoples prior to European arrival in North America: "It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[27] The majority suggests that this is the *sui generis* factor, and that it is properly applied when identifying the interest.

Relying on this approach, the majority completely neglects the protection aspect (recall: Protection (P) = anticipated threat to the interest (T) + basis for protection of that interest (B)) and instead collapses the basis for the protection into defining the interest itself:

> When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives.[28]

The majority impoverishes the rights equation so that interests with a basis for protection = rights that are *sui generis* ($I^B = R^S$). What is missing here is the acknowledgement of the state's ability to threaten that interest through

---

25 *Van der Peet*, *supra* note 2 at para 29.

26 *Ibid* at paras 29, 30.

27 *Ibid* at para 30.

28 *Ibid* at para 27.

some legal or de facto power it possesses. In the application of this test someone could claim an interest, show that it is a practice integral to the distinctive Indigenous society that existed prior to European contact with North America, and the interest would thus become a right. This test could mean that an Indigenous claimant with an interest in thinking about a particular subject could establish a *right to think* about the particular subject, even in the absence of the state's ability to exercise any kind of power that would threaten that act of thinking. So long as that act of thinking was "integral to the distinctive culture" it passes muster with the majority's test.[29] Obviously, the right to think would never be the subject of litigation, but this example illustrates how the majority has missed the point of rights as protection of interests against state power that could threaten such interests. Making sense of this test requires acknowledging what the majority is actually implying in its characterization of interests: the basis for protection is *sui generis*, not the interest itself. After all, it is not the basis for protection that defines an interest. An interest is a stand-alone concept that exists whether or not there is also a basis for protection. Not all interests are protected, since not all interests have a basis for protection. Once there is a basis, combined with something to be protected against, the interest becomes a right. The rights equation follows as $I + (T + B^S) = R^S$. An interest (I) + a threat to that interest in the way of some state legal or de facto power (T) + a *sui generis* basis for protection of that interest (B^S) = a right that is *sui generis* (R^S). By positioning interests as the element that is *sui generis*, the majority puts the burden on Indigenous claimants to show how their interests are different merely because they are Aboriginal. But Indigenous peoples' interests are not different because of their cultural identity. Cultural difference is no longer notable, as many people in Canada come from minority cultures. Indigenous peoples' interests are different because of the relationship they have with the Canadian state. Without an acknowledgement of the relationship between the Canadian state and Indigenous peoples, this exercise necessitates an element of stereotyping as to what "Aboriginal" really means culturally—a practice that has been

[29] *Van der Peet*, *supra* note 1 at para 46.

highly criticized by judges, counsel, and scholars, both Indigenous and non-Indigenous.[30] Rights that fail to identify the threat cannot set the direction that the protections must face, since they do not acknowledge the source of the threat and state responsibility for putting those interests in peril.

The problems with the Lamer CJC's stated test do not end there. The majority's description of the *sui generis* characteristic itself is not in line with our understanding of Canada's relationships with Indigenous peoples. While the majority is correct in saying that the existence of Indigenous peoples prior to European arrival in North America is a characteristic that separates Indigenous people from every other minority in Canada, this is not also the basis for their special legal and constitutional status. The majority touches on, but does not apply, the correct reason: the reconciliation of Indigenous existence with the assertion of Crown sovereignty.[31] The majority seems to construe the basis behind Indigenous peoples' special legal and constitutional status as a two-part concept: 1) the mere fact of their pre-existence; and 2) that this needs to be reconciled with Crown sovereignty.[32] I will examine the *Van der Peet* treatment of each and their accompanying errors.

A. THE *SUI GENERIS* BASIS FOR PROTECTION

1. PRE-EXISTENCE

In dealing with the first aspect, the majority maintains that in examining pre-existence, it must limit its focus to activities integral to the distinctive culture of the claimant group.[33] Yet no precedent exists for this approach. The majority attempts to justify its reliance on this narrow focus by citing

---

30 See e.g. McLachlin J's (as she was then) dissent in *Van der Peet*, *supra* note 1 at para 162; Vallance, *supra* note 4; Chartrand, *supra* note 4.

31 Lamer CJC mentions this in *Van der Peet*, *supra* note 1 at para 31, again at paras 36–39 citing US and Australian decisions, and further at paras 42–43, 50, 57.

32 *Ibid* at para 43.

33 *Ibid* at para 45.

Sparrow.[34] However, the majority here has misapprehended what in *Sparrow* was merely the Court's reference to the anthropological description of the evidence. At page 1099 of the *Sparrow* decision, the same quote cited by Lamer CJC in *Van der Peet* in creating the test, the *Sparrow* Court notes that:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggest that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions.[35]

For context, this quote comes immediately after the Court concluded that the Crown failed to prove extinguishment and immediately before the discussion of whether the right to fish was for food or for ceremonial purposes. Nothing in the *Sparrow* decision suggests that the Court found that the right existed because of the particular personality with which the anthropologist imbued the evidence: that fishing was integral to a distinctive culture. In fact, the word "distinctive" does not appear at any other point in the decision. "Integral" appears merely one other time, as a description of the anthropological evidence and nothing more.[36]

2. RECONCILIATION

In dealing with the second aspect, the *Van der Peet* majority dispenses with the need to reconcile Indigenous existence with Crown sovereignty by hinging this not on the historical circumstances that created the irreconcilability of the two in the first place, but on an assertion of "perspective" balancing:

> However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time

---

[34] *Ibid.*

[35] *Sparrow*, *supra* note 6 at 1099.

[36] *Ibid* at 1094.

> taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[37]

Paragraph 57 is the closest the majority gets to applying the historical circumstances that created the need to reconcile the two. There, the majority states:

> To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.[38]

However, rather than identify what had previously been irreconcilable, the majority simply reverts back to the "integral to a distinctive culture" test, and elaborates that it is the significance of a practice, custom, or tradition that will identify whether it is integral.[39] Yet reconciliation implies there are at least two things being considered, and that those things are at odds with each other. The majority, however, speaks only of one thing—Indigenous "culture". Whether a practice, custom, or tradition is significant enough to be sufficiently integral to a culture speaks nothing of the assertion of Crown sovereignty. How such a practice or such significance interacts with the assertion of Crown sovereignty is not addressed by Lamer CJC, writing for the majority.[40]

---

37 *Van der Peet*, *supra* note 1 at para 50.

38 *Ibid* at para 57.

39 *Van der Peet*, *supra* note 1 at para 58.

40 It appears the majority attempts to address this in *Van der Peet* at para 61. The majority states that the practices to be examined are those operating prior to the assertion of Crown sovereignty. Even here, reconciliation seems an odd principle with which to frame this examination: no conflict is explicitly stated or acknowledged by the majority. To make sense of the Court's use of reconciliation as a unifying concept for the rights analysis, one may infer that the Court presumes the assertion of Crown sovereignty *is itself* a conflict with all practices, traditions and customs, and indeed the very existence of Indigenous nations prior to European arrival in North America. However, in the same paragraph Lamer CJC allays any assumptions about the correctness of this presumption by noting "[i]t is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed *prior to the arrival of Europeans in North America*": *ibid* [emphasis in original].

We are left with a test for identifying the existence of a right that neglects to consider the purpose of a right: protection from the threat of the state's exercise of power over the interest. Instead, the test is solely concerned with identifying the interest. The test claims to depart from the traditional characterization of rights because of the specific nature of the basis for protection at issue in Aboriginal rights—reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty—but fails to incorporate this basis into the test.

VII. THE NEW TEST

The logical extension of the principles stated by the *Van der Peet* majority, both about the nature of non-Aboriginal rights and about the *sui generis* nature of Aboriginal rights, would amount to a test for establishing an Aboriginal right along these lines:

1. Whether the Indigenous claimant has an interest (the interest aspect); and
2. Whether
    a. the state is able to exercise power over that interest that precludes the claimant from realizing that interest (the anticipated threat to the interest aspect); and
    b. the interest is one that is at odds with the assertion of Crown sovereignty and thus needs to be reconciled with it. In other words, reconciliation mandates that the interest ought to be afforded protection (the *sui generis* basis for protection aspect).

Taking the facts in the example stated in the earlier application of the $I + (T + B) = R$ test, an application of this new test would proceed as follows:

1. Interest:
    a. The claimant identifies the selling of fish as an activity in which she claims to have an interest
    b. The claimant establishes she has an interest by showing she is part of a collective which practices the selling of fish

2. Protection:
    a. Threat to the interest: The claimant establishes the state's ability to exercise power over the interest through the 1867 constitutional enactments conferring jurisdiction on the federal government to regulate trade and commerce, as well as sea coast and inland fisheries.[41]
    b. *Sui generis* basis for protection: The claimant establishes that Crown sovereignty is at odds with her interest, and thus needs to be reconciled. The claimant establishes that the exercise of Crown sovereignty is the Crown's regulation of her interest in selling fish and that this would preclude her from realizing this interest.[42]

Granted, the reconciliatory basis for protection is necessarily nuanced and varies from nation to nation. The effects of, and thus the mode of reconciling the Crown's assertion of sovereignty on a treaty nation, are different than the effects on and reconciliation needed with a non–treaty nation. The reconciliation that must be done with nations whose governance practices came directly under attack by *Indian Act* prohibitions is different than that which must be done with peoples who did not fall under the scope of the *Indian Act*. The form of reconciliation with nations whose lands have been decimated in the wake of Crown assertions of sovereignty will not be the same as the form needed to reconcile the interests of nations who have managed to retain some of their lands. There are nations for whom the assertion of Crown sovereignty has meant the wholescale removal of children for generations and the ensuing loss of family, language, and leadership, among other

---

41 *Constitution Act, 1867*, *supra* note 21.

42 Here the infringement seems to be embedded in the right itself, contrary to my assertion at note 8. However, what the last part of the test expresses is only *an infringement in principle*. This is distinct from *an infringement in practice*. Crown sovereignty is, *in principle*, at odds with the claimant's interest, and this tension in need of reconciliation creates the basis for the protection. The Crown's choice to actually exercise its power over the claimant's interest by charging her for selling fish is *an infringement in practice* and is separate.

things. In short, the Crown's assertion of sovereignty needs to reconcile itself with many varied factors, and there can be no one-size-fits-all approach. Any rights equation where the basis for protection hinges on reconciliation must account for these differences in order to adequately address them.

VIII. CONCLUSION

In light of the *sui generis* nature of Indigenous–Crown relations and in light of the nature of rights, the *Van der Peet* test is in sore need of updating. A new test needs to account for both these elements. I place here one final note in favour of rejecting the old test for the new. In *Van der Peet*, Lamer CJC avoided having to acknowledge the very reason driving the need for reconciliation: the injustice wrought on Indigenous peoples by the assertion of Crown sovereignty, disrespect for their jurisdiction, and the very real, very material consequences that have brutalized and impoverished Indigenous peoples for generations. His judgment instead characterizes Indigenous peoples as simply another minority, albeit a minority that is first in line. As Dickson CJC noted in *R v Simon*, just because a judgment has precedent does not mean that "the biases and prejudices of another era in our history" embodied in it are still acceptable in Canadian law.[43] Due to the grassroots efforts of Indigenous peoples themselves, the Royal Commission on Aboriginal Peoples, and the work of the Truth and Reconciliation Commission, Canadian society is becoming aware of the injustices and that this "minority-plus" concept is a mischaracterization of Indigenous peoples. The time is ripe for a change in the law.

[43] [1985] 2 SCR 387 at 399, 24 DLR (4th) 390.