THE POLITICAL DIMENSION OF ABORIGINAL RIGHTS

BY

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Abstract

This thesis critically examines the Supreme Court of Canada's interpretation of s.35 of the *Constitution Act, 1982*. In particular, the author examines the Court's legal tests for interpreting the meaning of "Aboriginal rights". The author focuses his critique on the Court's inability to understand that each Aboriginal right claimed includes a jurisdictional quality (political dimension). This is true not only for claims that on their surface involve a jurisdictional element such as an Aboriginal right to control gaming, but is also true for all Aboriginal claims including claims for hunting moose.

This jurisdictional quality is present in all Aboriginal rights claims because of the collective nature of the right enjoyed by the community as a whole. Any right possessed by a collective must by its very nature include an authority to control the exercise by the collective of how the right will be managed. Otherwise, the right would no longer be considered collective in nature. The author criticizes the Court's failure to understand the collective nature of Aboriginal rights and the implications of recognizing such rights.

In addition, the author makes the argument that the courts have exceeded their jurisdiction when they apply the "justification test" formulated by *Sparrow* to the context of a recognized Aboriginal right. Once an Aboriginal right is recognized as being possessed by an Aboriginal collective (political society) under s.35 of the *Constitution*, the courts are no longer free to interfere in how conflicts between the exercise of the right, including the jurisdictional aspect of the right, and federal or provincial government's interests are accommodated. This is so because the *Quebec Reference* case has held that when two equal constitutional powers possessed by independent political authorities come into conflict, the matter is a political matter requiring good faith negotiations. The courts are ill-equipped and do not have authority to interfere in the resolution of disputes of such a nature. Likewise, the same power relationship exists between an Aboriginal authority exercising power under s.35 and the federal or provincial governments exercising authority under s.91 and s.92 of the *Constitution*. Consequently, the *Sparrow* justification test which allows for one party to infringe a right as between two equal but conflicting constitutional authorities is inconsistent with the principles set out in the *Quebec Reference* case. The author concludes that the same result should apply to the Aboriginal context as well as the Quebec secession context.

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Introduction

In 1982, the Canadian Constitution was amended to include the recognition and affirmation of Aboriginal and treaty rights. To most, this represented a new beginning of Aboriginal - Canadian relations. Such recognition of Aboriginal peoples in the highest law of the land was seen by many Aboriginal and non-aboriginal people as a promise of future respect to the original peoples of this land by Canadians and their governing institutions.

But the constitutional amendment dealing with Aboriginal rights is vague and broadly worded. Section 35 reads as follows:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[1]

It was intended that the wording would be subsequently defined more precisely by scheduled First Ministers Conferences to be held in the future.[2] However, these constitutionally mandated First Ministers conferences failed to clarify the meaning of the broadly worded protections. As a result, the decision-making forum for defining section 35 transferred from the political negotiation table to the courtroom table. The 1990s saw the courts grapple, unhappily at times, with the task of defining the meaning of section 35 of the Constitution. However, by the end of the decade the Supreme Court of Canada had set out the blue print for interpreting the meaning of this fundamental provision of the Canadian Constitution.[3]

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[1]. *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982*, (U.K.) 1982, c. 11; R.S.C. 1985, App. II, No.44, as am. by the *Constitution Amendment Proclamation, 1983*, (SI/84-102), s 35. (hereinafter *Constitution Act, 1982)*.

[2]. *Ibid.* s. 35.1. For a concise overview of the events leading up to the inclusion of s.35(1) see James Frideres, *Aboriginal Peoples in Canada: Contemporary Conflicts*, 5th ed. (Scarborough: Prentice Hall Allyn and Bacon Canada, 1998) at 360.

[3]. A by-product of the arguments presented in this thesis will likely prompt us to consider whether Aboriginal peoples would have faired better in achieving their objectives if the courts remained on the side lines and the First Ministers Conference were successful.

Unfortunately, as I shall argue in this thesis, the Supreme Court of Canada has failed to define section 35 in a way that is consistent with Aboriginal peoples existence as distinct and independent political collectivities. Hence, the primary focus of this thesis is based on the observation that the Supreme Court of Canada has failed to truly understand the collective nature of Aboriginal rights. By this I mean that the doctrine of Aboriginal rights has yet to include any meaningful recognition of the political dimension in defining the meaning of an Aboriginal right.

Aboriginal rights, and to a lesser degree Aboriginal title, have been defined by the courts primarily in relation to physically observable phenomena such as the acts of hunting and fishing. There is generally no corresponding recognition by the courts of the Aboriginal collective's political interest in the "act of hunting". There is no acknowledgment of the ability of the "owner" of the right, the Aboriginal collective, to have any degree of control and management over the exercise of the hunting right. The courts often assume that the non-Aboriginal governments have this responsibility and jurisdiction over the allocation and management of the right to the exclusion of the Aboriginal rights holder.[4]

The purpose of this thesis is to argue that the lack of recognizing a corresponding jurisdictional "space" belonging to the Aboriginal collective to manage the Aboriginal right once it is recognized to exist is contrary to an understanding of Aboriginal rights as "collective rights" and therefore contrary to an understanding of Aboriginal peoples as political communities. In other words, the courts must recognize that an activity, custom or tradition is more than simply upholding a right of an Aboriginal individual to continue to practice the custom. The definition of the right must also incorporate the right of the

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[4]. For example, in the leading decision of *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.) at 187 [hereinafter *Sparrow*], the Court stated that the Aboriginal right to fish for food must be given priority after the interests of conservation of the resource have been determined. In subjecting the constitutional right of the Musquem Band to the interests of conservation, the Court assumed that the federal government had the sole responsibility to manage the resource thereby implicitly denying any meaningful role of the Band itself in the management of the resource. Although the Court noted the Band's "history of conservation-consciousness and interdependence with natural resources", all this required of government was that it inform the band "regarding the determination of an appropriate scheme for the regulation of the fisheries."

Aboriginal community to have a meaningful "collective" voice over how the right will be exercised. For the purposes of this thesis, I shall refer to this collective decision-making responsibility as the "political dimension" of Aboriginal rights.

However, the courts have thus far failed to seriously include the political dimension of Aboriginal rights in their analysis. There are several reasons why the courts have been unable to complete the circle of Aboriginal rights analysis in this way. Prominent among them is the tendency of non-Aboriginal institutions, including the courts, to perceive of Aboriginal peoples strictly within a race/cultural perspective. This approach to understanding Aboriginal peoples contributes to the idea of Aboriginal peoples as different from non-Aboriginal peoples in the sense that they have "interesting" cultures that should be protected from assimilation, but that they are nonetheless no different in terms of their fundamental political status in Canada from any other Canadian citizen. They are regarded as an integral part of the Canadian polity, albeit with some special legal considerations to ensure their survival as distinct cultures. Aboriginal peoples are often not perceived as distinct political communities in their own right with an autonomous political status separate and apart from the political status of other Canadians.

At the outset, I do not want the reader to assume that I am necessarily arguing for Aboriginal sovereignty or self-government in the sense of a broad general right to govern. Such a concept of self-government regards specific subject matter powers such as the right to control health matters as a discrete incident or manifestation of a larger, broader right to self-government. For the purposes of this thesis, I assume that *Pamajewon*[5] has for the most part foreclosed such an avenue under the current domestic Aboriginal rights jurisprudence.[6] Thus, for the purposes of this thesis, I am not arguing for an Aboriginal right to self-government or sovereignty in this larger sense.

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[5]. *R. v. Pamajewon*, [1996] 4 C.N.L.R. 164 (S.C.C.) [hereinafter *Pamajewon*].

[6]. *Ibid.* at 172. The Court said that to make a claim for a right to "self-government" as such is to "cast the Court's inquiry at a level of excessive generality."

What I am arguing, however, is that for every claim to a specific Aboriginal right, (whether it is hunting moose or fishing for salmon) there should be a corresponding political dimension or component integral to the definition of the Aboriginal right that would involve a degree of jurisdictional space over the "governance" of this specific contextualized right by the Aboriginal collective. Otherwise, as I shall more fully explain later, the possession of such a right would be meaningless to the collective beneficiary because it would have no recognized means to direct its collective mind to the proper exercise of this right.

In addition to making the argument that the courts must interpret all Aboriginal rights claims as including a "jurisdictional" element to them, I will also argue that the exercise of this Aboriginal right-defined jurisdiction by the Aboriginal collective is by virtue of s.35 of the *Constitution* equal in nature to the powers set out in s. 91 and 92 of the *Constitution* and therefore cannot be interfered with by the exercise of federal and provincial legislation. This is because the management of the right within the prerogative of the Aboriginal collective's governing authority under section 35, properly interpreted, does not allow either the federal or provincial governments to interfere in the exercise of the right, including that element of the right which provides the Aboriginal collective a degree of governing authority to manage the right for the collective benefit of the community as a whole. Moreover, I will argue that when there is conflict between the Aboriginal collective and non-Aboriginal governments, that conflict must be addressed in the political forum and not in the judicial forum. Consequently there ought to be no legitimate role for the courts to "justify" interference of an Aboriginal right by the Crown as is currently the case.[7] In this regard, the constitutional rights of Aboriginal peoples are no different from the rights of Quebec if a clear majority of the population wished to succeed from Canada. As the Supreme Court of Canada stated in the *Quebec Reference*[8] case, the courts have a monitoring role to play in ensuring fairness of procedure, but they

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[7]. *Sparrow*, *supra* note 4 at 183.

[8]. *Quebec Reference*, [1998] 2 S.C.R. 217 at ¶ 80.

have no right to determine how the equal, but competing constitutional rights will be ultimately resolved on substantive issues.

Chapter One will provide an analysis of the current doctrine of Aboriginal rights and why I characterize it as "lifeless and empty". Chapter Two will attempt to identify some of the key factors that have led the courts to an inability to breathe life into the recognition of Aboriginal rights. Chapter Three will then examine how Aboriginal rights doctrine has been affected by these factors. In particular, I will focus on the race/cultural-based approach to defining Aboriginal rights that the courts have standardized. In this chapter, the logical and analytical weaknesses of a race/cultural approach will be highlighted. Chapter Four will provide a discussion of principles that could be relied upon to establish a theory of Aboriginal rights that is inclusive of the political dimension. Finally, I will argue that not only is inclusion of the political dimension necessary, so too, is a realignment of the Aboriginal rights "justification test" necessary to ensure that Aboriginal peoples are not unfairly prejudiced in the reconciliation process.

Chapter One: Judicial Blindness of the Political Dimension in Aboriginal Rights Doctrine

The every day reality in Canada for Aboriginal peoples is that "outsiders" make most of their decisions for them. To many, Indian Affairs in Ottawa is often seen as not only physically distant, but philosophically distant. The application of federal and provincial laws and institutions to Aboriginal peoples represents the imposition of a foreign system without respecting the fact that the Aboriginal peoples already have their own institutions and ways of doing things.[9] Such is the reality of the colonial enterprise. Aboriginal peoples do not view such a relationship as appropriate. They have responded to the shackles of colonialism by making claims to control their own affairs without interference from "outside" authorities. Assertions of sovereignty and self-government have been made from time to time as a means to achieve greater autonomy over their own affairs. This thesis is not about examining the legal arguments that support or deny the validity of such claims. Rather, it is about the legal arguments that support the existence of "political authority" when Aboriginal rights are asserted and recognized.

The distinction between such concepts of self-government, sovereignty and political authority is not automatically apparent. It is therefore necessary to first address the differences between these related but distinct concepts before I deal with the deficiencies of the doctrine of Aboriginal rights and its current failure to acknowledge Aboriginal peoples as political communities.

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[9]. Report of the Royal Commission on Aboriginal Peoples, *Looking Back, Looking Forward. Vol. I* (Ottawa: Canada Communication Group, 1996) at 272. This volume of the Report provides an excellent historical overview of Imperial and federal relations with Indigenous peoples in Canada.

Sovereignty, Self-government and Political authority

Much of this thesis is concerned with the integration of the political dimension in the recognition of Aboriginal rights. The concept of "political dimension" that I refer to is not the same thing as a claim for sovereignty or self-government. Sovereignty has been defined as the right of States to be free from interference from other States.[10] Sovereignty implies the fullest possible control of a nation over its own institutions and legal system, particularly in relation to a defined territory.[11] The achievement of sovereignty can be seen as the end product. Whereas, self-determination is a broader concept more appropriately viewed as the means to an end. It includes the notion of being able to make decisions free from the coercive authority of others. It is an international concept that means that all peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development."[12] Through the exercise of self-determination, peoples can become sovereign.

Whether Aboriginal peoples are entitled to enjoy the full extent of the principle of self-determination that might lead to sovereignty is a topic of considerable debate at the present time. Part of the debate revolves around the question as to whether indigenous peoples are "peoples" as the concept is applied in international law. Professor Berg has identified three broad characteristics that United Nations' practice has adopted to define "a people". They are:

1. The group is a social unit with a clear identity and characteristics of its own,
2. The group has a relationship with a territory, even if that group has been wrongfully expelled from that territory, and

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[10]. Jean-Gabriel Castel, et. al., *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: Emond Montgomery Publications Ltd., 1987) at 819.

[11]. Michel Youssef, *The Survival of Native Territorial Sovereignty in Canadian Land Claims Law* (LL.M Thesis, Université d'Ottawa, 1994) at 13-52.

[12]. Article 3 of the *Draft Declaration as Agreed Upon by the Members of the Working Group at its Eleventh Session* in Sharon Venne, *Our Elders Understand Our Rights* (Penticton, Theytus Books, Ltd., 1998) at 207.

3. The group has a claim to something more than simply status as an ethnic, linguistic or religious minority.[13]

It is trite law to acknowledge that the various Aboriginal peoples in Canada would each qualify as a "people" in the application of the above criteria.[14] Professor Bell has examined the application of the definition of people in international law to the domestic Aboriginal law context. She explains that:

> [People] is a term which was used frequently in international political discourse at the time s.35 was negotiated to distinguish colonized indigenous populations from nation states and ethnic minority immigrant populations within those states. The identification as colonized peoples carried with it potential recognition of land rights sourced in original occupation of colonized territories as well as human rights sourced in existence as a people. The main distinction drawn between the human rights of ethnic minority populations and indigenous peoples was the existence of political rights arising from the injustices perpetrated by the project of colonization.[15]

The more troublesome question for United Nations authorities and existing nation-states is whether indigenous peoples can exercise the right of self-determination and to what extent. This debate is currently being played out in the Working Group on the *Draft Declaration of Indigenous Rights*.[16] Fifty-three nation-states are currently reviewing the draft. One of the most contentious issues is the right to self-determination and the extent to which the right can be exercised by indigenous peoples. Many scholars, including the author, are of the view that Aboriginal peoples are no less entitled than other peoples on

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[13]. B. Berg, "Introduction to Aboriginal Self-Government in International Law: An Overview" (1992) 56 Sask. Law Rev. 375.

[14]. In the *Quebec Reference, supra* note 8 at ¶ 154 , the Supreme Court of Canada had the opportunity to define "peoples" for the purpose of whether the people of Quebec had an international law right to secede, but neglected to do so because the Court held that the criteria for secession were not met even if the people of Quebec were a "people" for the purposes of international law.

[15]. Catherine Bell, "Métis Constitutional Rights in Section 35(1)" (1997) Alta. L. Rev. 180 at 185.

[16]. "Draft Declaration on the Rights of Indigenous Populations", United Nations, E/CN.4/SUB.2/1994/2/Add.1 (1994). For an excellent overview of the status of drafting minimum principles that States must comply with regarding indigenous peoples at international law see Marie

earth to enjoy the full extent of the right to self-determination.[17] However, various State parties to the Working Group resist such recognition. They are concerned about the potential threat to their territorial sovereignty if indigenous peoples possessed a full right to self-determination. Some States, such as Canada, are prepared to accept a limited right of self-determination for indigenous peoples that would fall short of a right to secede from the State that they are within.[18] The application of such a claim to indigenous peoples has been fully addressed by others.[19] Such claims generally fall outside the domestic law of Aboriginal rights, as the Canadian judiciary currently understands it,[20]

Battiste and James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 6.

[17]. For an excellent overview of these issues see Paul Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec" (2000) 45 McGill L.J. 155 at ¶ 66, wherein he states that as "recommended by the UN Human Rights Committee, approaches are needed that are compatible with Aboriginal peoples' right of self-determination. In addition, judicial interpretation of Aboriginal land title and rights should not be artificially separated from Aboriginal jurisdiction. To date, Canadian courts have not yet addressed Aboriginal peoples' right of self-government in any comprehensive manner. Aboriginal peoples possess this inherent right to self-government, as an essential political component of their right to self-determination. This right should be appropriately recognized under s.35(1) of the Constitution Act, 1982. These conclusions are even more compelling if the status of Aboriginal peoples and their collective human rights are accorded full and sensitive consideration." See also Venn, *supra* note 12 and Battiste and Henderson, *ibid.*

[18]. Battiste and Henderson, *supra note* 16 at 8. Arguably such a limitation on the right to self-determination would make the right resemble the right to self-government as currently advocated in Canada.

[19]. In particular, see Youssef, *supra* note 11 and Grand Council of the Crees, *Sovereign Injustice* (Nemaska: Grand Council of the Crees, 1995).

[20]. Aboriginal rights are traditionally viewed as flowing from principles of the common law. See *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 at 193 [hereinafter *Van der Peet*] where Chief Justice Lamer, speaking for the majority, stated that "s.35(1) did not create the legal doctrine of Aboriginal rights; Aboriginal rights existed and were recognized under the common law." However, this is not to say that international law is entirely irrelevant to the question of Aboriginal rights. Arguably the principles of international law as they relate to the rights of indigenous peoples ought to provide guidance to domestic courts since they are said to represent minimum human rights standards. Justice Brennan in the celebrated *Mabo v. Queensland*, [1992] 107 A.L.R. 1 at 29 (H.C.) expressly acknowledged the influence of such standards on domestic law. "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights". In the Canadian context, one commentator has argued that in the context of interpreting s.35, international law ought to have a more prominent place. Peter Hutchins noted that "with the increasing efforts at the level of the United Nations ... to codify the appropriate standards of state behaviour and political and territorial rights of indigenous peoples, could it not be argued that once Canada has negotiated such instruments, made solemn undertakings towards the international community and ratified those undertakings they could be said to be incorporated into Canadian domestic law through section 35?" Peter Hutchins, "In the Spirit of the Times:

whereas the arguments I raise about the political dimension of Aboriginal rights can be fully addressed within the domestic framework of Canadian law.

Moreover, this thesis is not concerned with claims to self-government as an Aboriginal right in the broader sense of the concept. Depending on one's perspective, self-government can mean different things to different people. I would argue, however, that the concept of self-government could be categorized into two distinct ideas.

Firstly, self-government is often seen as a single broad right to govern. From this perspective, if a right to self-government were recognized, that right would include jurisdiction to govern in relation to a number of discrete subject matters. The exact boundary of Aboriginal self-government jurisdiction would depend on other factors such as the nature of the Aboriginal – Crown relationship. Under this concept of self-government, individual subject matters are regarded as manifestations or incidents of a broader general right to govern. Both the Federal government's inherent right to self-government policy and the Royal Commission on Aboriginal Peoples report represent this perspective of self-government.[21] Although the federal policy and the Royal Commission represent a broader understanding of Aboriginal self-government, they differ in terms of the scope of the jurisdiction that would be included within the concept.[22]

The other perspective on self-government is narrow and subject matter specific. Self-government is perceived as a collection of individual powers or jurisdictions over specific subjects. The extent of an Aboriginal collective's self-government would depend on the

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International Law before the Canadian Courts" (Paper presented to the Canadian Bar Association, 1995) at 13-14.

[21]. Canada, *Aboriginal Self-Government* (Ottawa: Minister of Public Works, 1995) and Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2, (Ottawa: Canada Communication Group, 1996) at 22 – 50.

[22]. For example, under the federal policy, the jurisdiction to control criminal justice matters is not considered to fall within the scope of the inherent right to self-government whereas the Royal Commission is of the view that criminal law making power does fall within the scope of the inherent right to self-government. *Ibid.*

extent to which individual subject matter jurisdictions have been individually recognized. This is the perspective that the Supreme Court of Canada has taken. This approach is exemplified in the *Pamajewon* decision itself. The case involved the Shawanaga and Eagle Lake First Nations claims to an Aboriginal right of self-government so they could regulate gambling activities on their respective reserve lands. Band authorities from each reserve enacted band by-laws regulating gambling on their reserves. Consequently both reserves under the authority of these Band by-laws established a high stakes Bingo and a Casino. Subsequently authorities from both bands were charged under the *Criminal Code* with operating a gambling establishment without a licence. The defendants argued that the *Criminal Code* provisions were unconstitutional because they interfered with the Aboriginal right to self-government contained in s. 35 (1) of the *Constitution*.

The Court held that claims to Aboriginal self-government are to be treated no differently from "other claims to the enjoyment of Aboriginal rights and must be measured against the same standard."[23] The decision that set out the test for proving Aboriginal rights is *R. v. Van der Peet.*[24] In *Van der Peet*, the court stated that for an Aboriginal right to exist, it must be a "tradition, custom or practice, integral to the distinctive culture of the Aboriginal group".[25] Secondly, the practice, custom or tradition must have existed prior to European contact.[26] In addition, the significance of the practice, custom or tradition could not be the result of European influence or it will not be regarded as an "Aboriginal" practice, custom or tradition.[27] The analysis is essentially confined to identifying discrete particular "activities". Chief Justice Lamer stated:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so

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[23]. *Pamajewon, supra* note 4 at 171.

[24]. *Van der Peet, supra* note 20.

[25]. *Ibid.* at 201.

[26]. *Ibid.* at 200.

[27]. *Ibid.* at 209.

> characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the Aboriginal group claiming the right.[28]

The Court then re-characterized the claim in order to meet this required level of specificity. The appropriate claim is not for self-government, but rather for the more narrowly defined right to participate and regulate high stakes gambling. In applying the *Van der Peet* test, Lamer C. J. stated that the evidence does "not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations."[29]

The judgment is 10 pages long (including a 3 page concurring judgment by Justice L'Heureux-Dube). It is remarkable that the court would deal so quickly and summarily with the issue of self-government, involving a claim that is the most important claim Aboriginal people have been making for 100s of years. A claim for self-government was the subject of four First Ministers Constitutional meetings and a vital component of the Charlottetown Accord. It is often the central preoccupation of Aboriginal peoples and their advisors. It continues to be the subject of ongoing negotiations between Aboriginal nations and the federal and provincial governments throughout Canada. One would have thought with an issue so important, the Supreme Court of Canada would have dealt with it more thoroughly.

The decision can be criticized for a variety of reasons.[30] It is beyond the scope of this thesis to go into a detailed discussion of the myriad problems with the decision. Despite

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[28]. *Pamajewon*, *supra* note 5 at 172.

[29]. *Ibid.* at 173.

[30]. Firstly, given previous direction to the contrary in *Van der Peet*, it seems inappropriate for the court to *unilaterally* re-classify the right claimed by the defendants from that of a general claim to self-government, where regulating gambling is only one incident of this larger broader right, to a limited and more specific right to participate, or regulate high states gambling. Secondly, it is not unusual for the Court to interpret broadly-phrased rights such as the right to liberty in the *Charter*. To argue that the right to self-government is too general to interpret is an excuse to avoid doing so. For an excellent overview of the

these criticisms, we are nonetheless faced with the principle that claims for self-government as an Aboriginal right under s. 35 (1) of the Constitution are no different from any other Aboriginal right claimed under the section. From the judicial perspective, Aboriginal people, if they want to control their own destinies, must comply with the bit by bit, piece by piece approach required by *Van der Peet* if they are to acquire any assemblage of governing powers sufficient enough to make it worth their while. This thesis starts with this limitation in mind.

The concept of "political dimension" that I use in this thesis is closely related to the concept of Aboriginal rights recognized in *Pamajewon* in terms of those claims which expressly support a community power over a subject matter in addition to the recognition of the right to engage in a certain practice or activity. In *Pamajewon*, the appellants framed their claim as including both the right to engage in the activity of gambling and the right of their respective Bands to regulate gambling in their communities. The Court denied both claims due to a lack of sufficient evidence to meet the *Van der Peet* test. The Court said:

> Given this evidentiary record, it is clear that the appellants have failed to demonstrate that gambling activities in which they were engaged, and their respective Band's regulation of those activities, took place pursuant to an Aboriginal right recognized and affirmed by s.35(1) of the *Constitution Act, 1982*.[31]

By implication, the Court left open the possibility that under the right facts, it is possible to argue for an Aboriginal right to control gambling activities as well as the right to simply engage in the act of gambling.[32] The right to control gambling is qualitatively different from recognizing a right to simply engage in the activity of gambling. A right to regulate gambling would expressly recognize the political authority or decision –

Pamajewon case see Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court of Canada in *R. v. Pamajewon*" (1997) 42 McGill L. J. 1011.

[31]. *Pamajewon, supra* note 5 at 173.

[32]. *Ibid.*

making power of the Aboriginal collective to manage the activity. In a sense, such an Aboriginal right can be characterized as a narrowly construed context-specific form of "self-government".

Thus, there are examples of cases where the political dimension has been considered in an Aboriginal rights claim. In such a case it is not necessary to require the court to turn its mind to the political dimension of the Aboriginal right since it is already an integral part of the claim as framed by the Aboriginal party. Curiously, however, the Supreme Court of Canada seemed to have treated the claims as two distinct and separate matters. In other words, given the Court's approach, it would be possible for the Band to have succeeded on only one of the two claims. For example, on the right evidence, the Band could have succeeded on a claim of an Aboriginal right to regulate gambling and not on the right to engage in the activity of gambling. The potential absurdity of such a conclusion is obvious. How is it that an Aboriginal community can possess a right to regulate an activity, but not have the actual activity itself be recognized as a valid collective right protected from legislative interference by federal or provincial governments? Such a result is suggestive of the illogical nature of separating the Aboriginal right from the community's ability to control the exercise of the right.

The recognition of an Aboriginal right to regulate gaming by its very nature must necessarily include a corresponding right of the collective to engage in the activity of gambling. Otherwise the existence of the right to regulate would be rendered entirely meaningless. However, most Aboriginal rights cases to date have not raised the "regulatory" aspect and have focused exclusively on the right of the Aboriginal party to engage in the physical activity or custom.

The courts have thus far assumed there is a qualitative difference between cases where the court has declared the existence of an Aboriginal right such as the right to hunt moose and cases such as an Aboriginal right to control gambling, which they recognize as involving two aspects to the Aboriginal right; there is the activity itself such as gambling and there is the jurisdictional space to manage the activity. In the case of a claim for an

Aboriginal right to hunt moose, however, the courts have limited the issue to an analysis that focuses solely on protecting the "activity" of hunting moose. A corresponding Aboriginal right to manage and regulate moose hunting by the proper governing authority of the collective has not been addressed in the conventional analysis of such claims.

I intend to argue that this traditional analysis of Aboriginal rights such as in case of a right to hunt is only partially complete. In order for the definition of an Aboriginal right to be complete, all Aboriginal rights found to exist must necessarily include a corresponding and integral degree of governing authority to manage the right by the collective. *All* Aboriginal rights, including those that do not expressly include a governing aspect must by necessity be conceptualized as including such an aspect. Often this political dimension that exists in relation to all Aboriginal rights claims has been ignored by the courts

Why use the term "political dimension" to describe the concept of an Aboriginal collective having the exclusive jurisdiction to manage an Aboriginal right that has been recognized? Why not call the concept "Aboriginal right-specific sovereignty" or "Aboriginal self-government"? Does not the term "political" confuse the issue with the ideas of politics and political parties? I deliberately risk the confusion because my thesis involves the argument that once the Aboriginal right has been held to belong to a particular Aboriginal collective, that collective has not only an exclusive right to manage the resource, it can do so without interference from the courts. I will argue that when there is a conflict between the management of the right by the Aboriginal collective and federal or provincial governments, the resolution of the conflict is beyond the proper role of a court. When the conflict occurs, the relationship becomes purely political and not judicial. Thus, part of the reason I use the term "political" is to distinguish it from matters that can be resolved judicially. Any reconciliation that must take place between Aboriginal and non-Aboriginal governments must be decided in the political and not the judicial arena. In other words, when two different but equal constitutional rights come into conflict and *when the rights holders are distinct political groups, such as an Aboriginal collective, with governing institutions internal to the group,* then there is no

substantive role for the courts. It becomes a political issue between two or more autonomous but equal rights holders. In such a context, reconciliation must be achieved by negotiation. As we shall see in Chapter Four, the reasons for this are explained in the recent *Quebec Reference* case and I shall argue that those reasons are equally applicable to the context of Aboriginal- Canadian relations as they are to Quebec-Federal relations.

The Invisible Nature of Aboriginal Authority

This more complete analysis of Aboriginal rights that I advocate must be undertaken by the courts in its interpretation of s.35 because Aboriginal peoples are political communities. More importantly, they are political communities that have their existence separate and apart from the Euro-Canadian political communities that are responsible for the development and implementation of the federal and provincial colonial-based governing structure. As such, they have an independent existence and interest in the management of their collective welfares. Their source of authority as a political collective is not dependent on the legislative will of either Parliament or the Legislatures. This understanding of the doctrine of Aboriginal rights and the source of Aboriginal governing authority has been advanced by the Royal Commission on Aboriginal peoples. After a lengthy analysis of the Aboriginal law jurisprudence, the Commission concluded that:

> In our view, the common law doctrine of Aboriginal rights includes the right of Aboriginal peoples to govern themselves as autonomous nations within Canada... This right is inherent in that it originates from the collective lives and traditions of these peoples themselves rather than from the Crown or Parliament. [33]

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[33]. See Royal Commission, *supra* note 21 at 192.

The Commission's conclusions have recently received judicial affirmation in the *Campbell* case from British Columbia.[34] In *Campbell*, the plaintiff challenged provisions of the Nisga'a Agreement that provided for paramount governing authority to the Nisga'a government over certain specified subject matters. The provisions state that in the case of a conflict between Nisga'a law and federal or provincial law the Nisga'a law would prevail. The plaintiffs argued that such a provision is unconstitutional because it essentially transfers legislative powers that belong exclusively to either the federal and provincial governments as the case may be under s.91 and 92 of the *Constitution Act, 1867*. The integrity of the Constitution, they argued, would be defeated if the court found that the Nisga'a possessed its own independent source of legislative making powers. Justice Williamson, after relying on the same authorities canvassed by the Royal Commission and on the dicta in the *Quebec Reference* case affirming the existence of unwritten fundamental principles of the Canadian Constitution, held that:

> The *Constitution Act, 1867*, did not purport to, and does not end, what remains of the royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982. Section 35 of the *Constitution Act, 1982*, then, constitutionally guarantees, among other things, the limited form of self-government, which remained with the Nisga'a after the assertion of sovereignty.[35]

As political communities, there is a need to ensure the orderly control of the community's assets so that everyone can benefit in a fair and equitable way. If an Aboriginal right to hunt is found to belong to the collective without a corresponding ability of the collective to effectively manage the right for the benefit of the community as a whole, then the right is potentially meaningless. Indeed, the right could even be detrimental to the long-term interests of the community, as in the case where a court has upheld the right of a defendant to hunt for commercial trade. The Aboriginal collective might be helpless to implement conservation strategies if individual members of the collective were unwilling to comply with their own community's plans to manage the resource. Even in a society

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[34]. *Campbell v. British Columbia (Attorney General)* [2000] B.C.J. No. 1524 (B.C.S.C.).

[35]. *Ibid.* at ¶180-181.

that traditionally holds the principles of sharing and cooperation in high regard, the interest of individual members is not always co-existent with the interests of the collective. To not interpret the Aboriginal right as including an element of governing authority (and hence authority to enforce laws relating to the right) could potentially undermine the collective interest in management and protection of valuable community resources.

In response, one might argue that such authority possessed by the Aboriginal collective is not necessary since the long term interests of the community such as conservation of the resource could be protected by the federal or provincial governments in any event. This may be true, but to ignore the Aboriginal collective's legitimate interest in managing the Aboriginal right is akin to denying the very existence of the Aboriginal collective as a collective. The legal relationship would be fundamentally altered to one between the federal or provincial government and the individual Aboriginal person thereby by-passing the collective altogether. This concern might be countered by arguing that the collective is not completely by-passed because the justification analysis of the *Sparrow*[36] test requires consultation with the Aboriginal group that possesses the right if there is going to be an interference with the right. However, this is only a partial answer since the Aboriginal group would only have a voice if the federal or provincial governments are found to be interfering in the exercise of the right. Consultation is not triggered if it is the Aboriginal collective itself that would like to limit the exercise of the right by its own members.

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[36]. *Sparrow*, *supra* note 4 at 187. There are three factors listed in *Sparrow* that the court will consider in addressing whether the Crown has justified an infringement of an Aboriginal right. Firstly, the court will look at whether there has been as little infringement as possible, secondly, whether there has been fair compensation and thirdly, whether the Aboriginal group has been consulted. In *Delgamuukw v. British Columbia*, [1996] 1 C. N. L.R. 14 at 70 at 79 (S.C.C.) the Court held that consultation will always be required by the Crown to justify interference. However, the degree of consultation will vary "with the circumstances". The court explained:

> In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title... In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands."

To fully appreciate the failure of the courts to acknowledge the inherent political aspect of Aboriginal rights it is necessary to examine in greater detail cases which have acknowledged the existence of an Aboriginal right but at the same time refused or ignored the right of the Aboriginal collective to manage the right. There are two cases that I would argue exemplify the Supreme Court of Canada's failure to account for the political dimension of Aboriginal rights. They are *R. v. Nikal*[37] and *R. v. Gladstone.*[38] At the same time, there are recent cases that have been, for one reason or another, unable to avoid dealing with the political dimension. They are *Delgamuukw v. British Columbia*[39] and *R. v. Marshall.*[40] However, the treatment given to the political dimension in both cases is, as we shall see, nothing to cheer about. In fact, they have reinforced a hierarchical relationship of power by federal and provincial governments over Aboriginal governing responsibilities.

Nikal and Gladstone

Mr. Nikal was charged with fishing without a license contrary to s.4(1) of the *British Columbia Fishery (General) Regulations.* At the time of the charge, he was a member of the Moricetown Band of the Wet'suwet'en nation. He was charged when he decided to fish salmon in the Bulkley River that passes through the middle of the Moricetown Band Indian reserve. Mr. Nikal argued that he had an Aboriginal right to fish salmon and that a requirement to obtain a licence from the provincial government was a violation of his Aboriginal right to fish. Justice Cory speaking for the majority summarized the position of the defendant in the following passage.

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[37]. *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.) [hereinafter *Nikal*].

[38]. *R. v. Gladstone*, [1996] 4 C.N.L.R. 65. (S.C.C.) [hereinafter *Gladstone*].

[39]. *Delgamuukw*, *supra* note 36.

[40]. *R. v. Marshall*, [1999] 4 C.N.L.R. 301 (S.C.C.) (Judgment on motion for rehearing and stay) [hereinafter *Marshall 2*].

> With respect to licensing the appellant [Aboriginal accused] takes the position that once his rights have been established, anything that affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a license by its very existence is an infringement of the aboriginal rights since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.[41]

In the case, the defendant wished to avoid having any restriction placed on his actions to fish. However, if that was not possible, he then desired that his own Band be the "governing" authority to the exclusion of the federal or provincial governments. Thus the defendant, perhaps reluctantly, acknowledged the broader political dimension of the Aboriginal right to fish salmon. However, Justice Cory not only ignored this governing role of the Moricetown Band to manage the salmon fishery, he regarded the Moricetown Band as simply a "collective" with no qualitative difference from the interest of Nikal, as an individual, in the potential exploitation of the resource. In other words, Justice Cory viewed Aboriginal individuals and Aboriginal groups as no different from each other. Both Aboriginal individuals and groups are perceived as single-mindedly concerned with the exploitation of the resource. This perception is characteristic of a failure by the Court to acknowledge the Moricetown Band as a responsible political authority in the management of the resource. Moreover, such a characterization of the Moricetown "group" has the drastic effect of making the political nature of the Moricetown community essentially invisible. This view of the Band's lack of any meaningful role is clear in Justice Cory's response to the defendant's assertions:

> [Nikal's] position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group is necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this

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[41]. *Nikal, supra* note 37 at ¶ 91.

> principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society.[42]

This passage is perhaps the most damaging of all statements made by the Supreme Court of Canada towards the effort to define Aboriginal rights in a holistic way as including an inherent political dimension. It implicitly denies that Aboriginal peoples are political societies with their own forms of social control. Justice Cory promotes this view by establishing a false dichotomy between rights in a vacuum (chaos) and rights that are governed responsibly. He argues that to not allow the "government" the ability to regulate the Aboriginal right would be tantamount to the recognition of an absolute right. The problem with Justice Cory's understanding of Aboriginal rights, however, is that the alternative to responsible regulation is not anarchy as he would seem to suggest, but rather Aboriginal government control by the collective that "owns" the right. The fallback position is not chaos, but regulation by the Moricetown Band.[43]

Similarly in *Gladstone*, the ignorance of Aboriginal political responsibility is reflected in Chief Justice Lamer's insistence on weakening the rights of the Heiltsuk people to fish for commercial purposes. In *Gladstone*, the Court acknowledged the Heiltsuk people have an Aboriginal right to fish on a commercial basis.[44] According to the priority doctrine held in *Sparrow* this would normally mean that after conservation needs are met, Heiltsuk fishing would take priority over the interests of others. However, Lamer was concerned that, if unchecked, such a commercial right would literally translate into an "exclusive" right over the fisheries given the commercial nature of the right protected in this case.[45] He characterised the right as possibly leading to unlimited exploitation of the herring spawn on kelp fishery by the Heiltsuk to the exclusion of all other vested

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[42]. *Ibid.* at ¶ 92.

[43]. Ironically, the Moricetown Band had a Band by-law that dealt with matters concerning fishing including the times and manner of fishing. However, in *Nikal* the Supreme Court of Canada held that the by-law did not extend to the location where Mr. Nikal was fishing when he was charged by provincial wildlife officers.

[44]. *Gladstone, supra* note 38 at 78.

[45]. *Ibid.* at 90.

interests. Unless the market is saturated, the Heiltsuk could continue to fish for trade up to the point where conservation is threatened, thereby effectively excluding all other users of the fishery.[46] Under *Sparrow* if the government allowed others to fish, this would be seen as an infringement of the Heiltsuk's priority to the fishery. This unfair result, Lamer argues, is due to the fact that such a right to fish has no internal limitations, unlike the right to fish for food which once satisfied is used up and others can then freely enjoy the fishery without infringing on the Aboriginal right to fish for food. Because there is no internal limitation of a commercial right to fish, the government must be able to interfere in the exercise of the Heiltsuk's right so others with legitimate interests in the fishery are not completely shut out of the fishery. Thus, Lamer modifies the *Sparrow* test to suit his interpretation of the unique circumstances of this case.[47] He holds that interference in the commercial fishery of the Heiltsuk by letting others fish even when the Heiltsuk have not yet used up all of its right will be justified so long as the government takes into account the existence of the right in "allocating the resource".[48] The Heiltsuk are to be given priority, but not to the point of excluding all other legitimate users of the fishery.

Like Cory in *Nikal*, Lamer does not understand or realize that Aboriginal peoples, as groups, are not a bunch of individuals bumping into each other trying to exploit a given resource in a system devoid of responsibility and the rule of law. The Heiltsuk is a political community that has a history of social and ecological harmony with its environment. The community is acutely aware of the need to protect the resource and it has its own "internal" laws for effectively managing the fishery.[49] More importantly, the Heiltsuk people realize that as a community, it is not an island unto itself. It has relationships with other Aboriginal peoples and other non-Aboriginal peoples. Indeed,

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46. *Ibid.*

47. *Ibid.* at 91.

48. *Ibid.* at 92.

49. Emily Walter, Michael M'Gonigle and Celeste McKay, *Fishing Around the Law: The Pacific Salmon Management System as a "Structural Infringement of Aboriginal Rights"* [2000] 45 McGill L.J. 263

the protected right of a commercial fishery is a manifestation of the community's interdependence on other communities and societies within its political sphere of influence. Although I am speculating, I do not think the Heiltsuk would necessarily exploit the resource to the exclusion of others because to do so would likely jeopardise their relationships with their neighbours. Having said that, if the Heiltsuk were stubborn and insisted on exercising their commercial right to fish to the effective exclusion of all others, then that would be their prerogative to do so since the right is constitutionally protected. If a conflict arose between the rights of the Heiltsuk and other political communities possessing a similarly protected constitutional right, that conflict would have to be resolved at the political negotiation table. I would argue that in such a context, the judiciary does not have a legitimate role to play.

The lack of judicial legitimacy in deciding such conflict relates to the second major point of this thesis. It involves a comparison between the outcome in the *Quebec Reference* case and the outcome in Aboriginal rights jurisprudence. In the *Quebec Reference* case, the Supreme Court of Canada held that where "self-determining" peoples hold equal, but competing constitutional rights, the courts no longer have a legitimate role to play. In the *Quebec Reference* case, the constitutional right to democracy as reflected in the will of a majority of Quebec people wishing to secede from Canada was in direct conflict with the constitutional right to rely on the rule of law that supported maintaining the structure of the existing Constitutional framework. Where a conflict arises between two fundamental principles of the Constitution, it becomes inherently a political conflict that can only be resolved by the political process. The courts may have a monitoring role to ensure that "good faith" is being employed by the parties in the negotiations, but that is the limit of their responsibilities in such a unique situation.

Likewise, insofar as the Heiltsuk peoples are considered a "self-determining" people possessing a constitutional right to control the exercise of commercial fishing by their community, such a right will conflict with the federal government's right to control the exercise of fishing by all Canadians. Both are constitutional rights that are in direct conflict with one another. There is no logical basis to distinguish the *Quebec Reference*

case from the case where Aboriginal governing powers conflict with federal government governing powers. Arguably then, the principles of the *Quebec Reference* case, should apply to this "conflict". This would mean that the court's only legitimate role is to monitor the "bargaining" between each political authority.

However, the courts have not yet seen the similarity between the *Quebec Reference* case and conflicts that arise under a proper interpretation of s.35 which includes the political dimension of Aboriginal rights recognition. Instead, the courts have played a much more active role in such conflicts by reading into s.35 an analogous s.1 justification power which allows the federal government to justify an infringement of a constitutional power possessed by an Aboriginal political authority where it conflicts with the federal government's authority. In essence, the Supreme Court of Canada has rendered what must logically be a political process into a legal one in which the settler peoples' governments have the upper hand over the Indigenous peoples' governments. To understand how this has happened it is necessary to examine how the courts and Canadians have historically viewed Aboriginal peoples and how this perception continues to inform legal thinking. Such a discussion is the topic of Chapter Two and Three. I will then examine the *Quebec Reference* case and the unconstitutional nature of the justification test in greater depth in Chapter Four. However, at this stage, I simply want to make the point that the courts in its Aboriginal rights discourse has typically ignored the existence of Aboriginal communities as polities having a legitimate role in the management of their rights, let alone recognise that they are equal in status to federal and provincial constitutional authorities.

Delgamuukw and Marshall

Recent Supreme Court of Canada cases, however, have begun to consider the political dimension of Aboriginal rights. Such consideration has not, however, been a major focus in such cases. Rather, the acknowledgement of the political dimension is only implied, as

in the case of *Delgamuukw* or expressly acknowledged but made subject to the superior political authority of the federal government as in the case of *Marshall.*

In the *Delgamuukw* decision, there is a noticeable lack of discussion regarding the relationship between the Aboriginal title that may be found to exist and the Aboriginal society as a political entity. There is some discussion regarding the use of Gitskan and Wet'suw'ten laws, as evidence, to prove occupation and use of a certain track of land.[50] However, there is no express reference to a continuing role by the Aboriginal society or its governing institutions to manage the land it has Aboriginal title over. Some commentators on the case have thought fit to imply this role. For example, Professor Slattery has argued that the recognition of Aboriginal title as a communal right which involves the ability to undertake any number of land use activities within the boundaries of the right as defined in *Delgamuukw*, means that the Aboriginal collective that possesses the title must implicitly have the authority to make decisions regulating the enjoyment of that title by their members. He explains:

> [S]ince decisions about the manner in which lands are to be used must be made communally, there must be some internal mechanism of communal decision-making. This internal mechanism arguably provides the core for the right of aboriginal self-government. That is to say, at a minimum, an Aboriginal group has the inherent right to make communal decisions about who is entitled to use the lands in question and under what conditions, about the way in which the lands are to be used, and about the manner in which any communal revenues from the land are to be gathered and disposed of. [51]

This was also the view of Justice Williamson in the recent *Campbell v. British Columbia*[52] case. He made explicit what was implied by Lamer in *Delgamuukw*:

> On the face of it, it seems that a right to aboriginal title, a communal right that includes occupation and use, must of necessity include the right of the communal

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[50]. *Delgamuukw, supra* note 36 at 53.

[51]. Brian Slattery, "The Definition and Proof of Aboriginal Title" (Paper presented to the Pacific Business and Law Institute Conference, Vancouver, 1998) at 3.6

[52]. *Campbell, supra* note 36.

> ownership to make decisions about the occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal.[53]

Such recognition of the political dimension of Aboriginal title is crucial to giving full effect to the collective nature of the right. The more the political dimension is acknowledged in Aboriginal title, the less the right will simply be regarded as a perverted form of a proprietary interest less than, but not much different in kind from that of a fee simple interest.[54] To the extent Aboriginal rights or title is divorced from any political dimension, it remains little more than a matter of civil legal entitlement, no different from the civil legal entitlements granted to *individuals*.

Interestingly, the Supreme Court of Canada expressly acknowledged the role of the Aboriginal collective in the recent *Marshall* decision.[55] Perhaps the Court was forced to acknowledge the political dimension since the case involved treaty rights. After all, treaty negotiations, by necessity, involve political entities. Only groups that are recognised as having a collective voice for the benefit of a distinct community of people are capable of having treaty relations with other groups. Consequently, the Court in *Marshall* acknowledged the internal role of the Aboriginal collective to exercise control over the treaty right: "Moreover the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs."[56]

Despite this explicit acknowledgement of "authority" to manage the right, the Court nonetheless subjects this jurisdiction of Aboriginal decision-making to the superior governing authority of the federal government. According to the Court, the determination of the scope of the treaty right to harvest for obtaining the necessaries of

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[53]. *Ibid.* at ¶ 114.

[54]. William Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw v. British Columbia*" (1998) 24 Queen's L.J. 279.

[55]. *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.).) [hereinafter *Marshall 1*], *Marshall 2*, *supra* note 40.

[56]. *Marshall 2*, *supra* note 40 at 311.

life is one which the federal or provincial governments are *prima facie* authorized to make. The Court affirms the right of the federal or provincial governments to unilaterally regulate the treaty right in the following passage:

> [R]egulations that do no more than reasonably *define* the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification.[57]

If a treaty right is a mutual agreement, how is it possible for one party to be able to unilaterally define a material term of the agreement without both parties to the agreement deciding in advance that such determinations could be validly made by one of the parties? If the precise content of a term of an agreement is ambiguous and it becomes an issue between the parties, failing agreement by the parties as to the precise content of the term, then the only redress would be to submit the matter to the courts for determination. In reviewing the matter, however, the court cannot then turn around and absolve itself of its judicial responsibilities and delegate the responsibility back to only one of the parties to the agreement to the exclusion of the other party. There is a fundamental logical inconsistency in the Court's reasoning. On the one hand it recognizes the governing authority of the Mi'kmaq to manage the treaty right to fish, and at the same time allows the federal or provincial government as the case may be to unilaterally over-rule the management decisions of the Band which are an integral part of the constitutionally recognized treaty right. The result is the ability of the federal government to unilaterally amend the Constitution. In essence, the rule of law is turned upside down. Moreover, the Court, in allowing the federal government to "define" the scope of the treaty right unilaterally is essentially allowing the government to infringe the right without having to go through the onerous requirements of the *Sparrow/Badger* justification test. This, of course, assumes that the justification test is appropriate in the treaty context in the first

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[57]. *Ibid*, at 319. The *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) case held that treaty rights were subject to the same justification test set out in *Sparrow*. For a critic of this decision and the inappropriate application of the justification test to the context of treaty rights see James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. R. 241.

place. Many would argue that it is not.[58] I would go further and argue that the justification test is not appropriate at all in the interpretation of s.35 of the *Constitution Act, 1982*. The justices that decided *Sparrow* quite simply got it wrong.

For example, Patrick Macklem has identified the incoherence of subjecting the jurisdiction of an Aboriginal collective maintained under treaty to the paramount authority of the federal or provincial governments:

> Justice Lamer's statement in *Sioui* that "[t]he very definition of a treaty ... makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians involved' ought to be taken seriously as precedential support for the proposition that federal and provincial legislation is not paramount over conflicting treaty guarantees: promises made to natives by the Crown ought to be imagined as setting the boundaries of permissible legislative activity in the future... [We should] view treaties as demarcating permissible and impermissible spheres of legislative authority as it intersects with native interests.[59]

What is clear from this selected review of case law is that the recent thinking on the Supreme Court is that even if the Court comes to terms with the collective nature of Aboriginal or treaty rights and explicitly acknowledges the internal political authority that attaches to the collective to regulate the right, the Court is not prepared to place such decision-making on an equal level with federal and provincial authority over the same subject matter. The Court affirmed the "paramount" authority of the government to act in the interests of conservation or other important government objectives including ensuring that non-Aboriginal interests in the resource are not unfairly limited.[60] The Court unfairly and in my opinion unconstitutionally undermines the treaty right by according such over-arching discretion to federal and provincial government interests. It is not surprising then that the Court in *Marshall* justifies this "colonial ordering" of authority by quoting at length the passage from Justice Cory in *Nikal* (quoted above) advocating the

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[58]. Leonard Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the *Sparrow* Justification Test" (1997), 36 Alta. L. Rev. 149.

[59]. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 443/4

[60]. *Marshall 2, supra* note 39 at 320.

need for paramount government authority otherwise, as Cory mistakenly worries, chaos would likely result.[61]

This pattern of judicial reasoning is the subject of commentary by Henderson, Benson and Findlay in their recent book on *Aboriginal Tenure in the Constitution of Canada.*[62] The authors observe:

> When faced with protecting Aboriginal or treaty rights from federal, state or provincial authority, the deep structure of the colonial legacy affirms "superior" legislative powers through ambiguous tests such as the justified infringement test, which operates through judicial discretion and interpretation, rather than the text of sections 35(1) and 52(1).... Under section 35(1) interpretative principles, courts are required to step outside the existing legal regimes and enter Aboriginal legal regimes. But judicial opinions demonstrate that courts have difficulty disentangling themselves from the existing precedents and legislative schemes, as in courts continued reliance on the federal regulatory category of the right to fish for food purposes as controlling Aboriginal rights to fish.[63]

It is now useful at this point to go into some detailed discussion as to what social and legal factors have contributed to the courts' reluctance to fully embrace a theory of Aboriginal rights that acknowledges Aboriginal peoples as inherently political societies with governing responsibilities deserving of equal status with federal and provincial governing responsibilities. Having an appreciation of the historical factors, it will then be possible to consider how the doctrine of Aboriginal rights has been influenced by such factors. Finally, in Chapter Four, an alternative theory of Aboriginal rights that does justice to their existence as political societies within the Canadian federation will be offered.

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61. *Ibid.* at 314.

62. James (Sakej) Youngblood Hendersn, Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000).

63. *Ibid.* at 317-318.

Chapter Two: Misunderstanding the Collective Nature of Aboriginal Societies

Constitutional interpretation of provisions relating to indigenous peoples has historically reflected a race/cultural differences analytical framework for defining indigenous peoples. Aboriginal peoples are perceived as culturally or racially different "individuals" from the mainstream society. All Aboriginal people are assumed to be the same by the mainstream. They are lumped under one category called "Indians". Rarely is there recognition of the cultural diversity of Aboriginal peoples let alone their political diversity. This monolithic approach to understanding Aboriginal peoples is reflected in the judicial treatment given section 91(24) of the *Constitution.*[64] As we shall see shortly, this provision has been primarily the subject of a generalized race/lifestyle interpretative approach by the courts. Only since 1982, have the courts began to grapple with a different analytical framework for defining indigenous peoples. This alternative framework is premised on the acknowledgement that Aboriginal individuals are part of political collectivities that have a relationship with Canada independent and separate from the relationship that individual members of such collectivities have with Canada. It is a reflection of a larger political and social movement of increased awareness and understanding of Aboriginal people's history, experiences and contemporary goals in Canadian society.[65]

In some respects, section 35 of the *Constitution* with its express reference to Aboriginal peoples as "peoples" ought to have influenced the courts to come full circle to a conception of Aboriginal legal status that once existed during the period of early colonial

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[64]. Section 91(24) states that the federal government has jurisdiction over "Indians and lands reserved for Indians". Note that the section does not say "Indian peoples or nations". Contrast this with the Royal Proclamation of 1763 which refers to the "several Nations or Tribes of Indians".

[65]. The birth of this "movement" is often attributed to the writings of Harold Cardinal who wrote the now classic *Unjust Society* (Edmonton: Hurtig Publishing, 1969).

contact. Yet, as the following discussion will reveal, other influences have prevented the full realization of Aboriginal peoples as distinct and independent political societies.

During the early historical period of contact between Europeans and indigenous peoples, "Indians" were often defined by European colonial authorities with reference to their identity as independent autonomous groups. "This is the approach of the Royal Proclamation of 1763, which refers to "nations or tribes" and says nothing of race or culture."[66] However, the differences between indigenous peoples' lifestyles, values and skin complexion formed the basis of an ideology "that normatively divergent 'savage' peoples could be denied rights and status equal to those accorded to the civilized nations of Europe."[67] Europeans, schooled in this ideology, generally held the view that the indigenous peoples "could never validly exercise sovereignty over land, for sovereignty, by its very definition, was a power recognized to exist only in civilized peoples whose laws conformed with the laws of God and Nature."[68] These attitudes, although held by a majority of Europeans, were not necessarily communicated to the indigenous peoples on the local and regional level, particularly in parts of North America where the military and political strength of indigenous nations prompted co-operative strategies by Europeans in their efforts to secure influence and trade relations.[69]

Thus, despite prevailing attitudes in continental Europe, there was during various periods of contact between indigenous nations and European nations a mutually recognized degree of respect given to each other as a result of noticeably comparable levels of power

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[66]. Jack Woodward, *Native Law* (Toronto: Carswell, 1990) at 6. See also Olive Dickason, *Canada's First Nations*, 2nd ed. (Toronto: Oxford University Press, 1997) where she outlines the nation to nation relationships that predominated early colonial contact in North America. It was only after the defeat of the French in 1760 that this mutually respectful relationship began to deteriorate in North America.

[67]. Robert A. Williams, *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990) at 317.

[68]. *Ibid.* at 215.

[69]. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997). See also Olive Dickason, *supra* note 66.

and resources at each nation's disposal. In the interests of avoiding protracted warfare, agreements of peace and friendship were entered into between the various indigenous nations of Turtle Island and European nations. This policy of cordial diplomatic relations was particularly pronounced in British and French efforts overseas because of the mutually reinforcing interests of the fur trade. The British and French needed a supply of furs and the indigenous nations desired the benefits derived from the trade of European manufactured goods. The negotiations of these agreements were regularly viewed by both sides as agreements between autonomous nations.[70] As such, they are rightly regarded as treaties in the full international sense of the term.[71] Thus, European nations, motivated by practical realities, perhaps reluctantly, entered into and treated with indigenous nations on a basis that recognized their equal international status.

Needless to say, this trend did not continue into contemporary times. History has witnessed that the relative power and authority of indigenous nations weakened over the course of contact. Disease, coupled with the increasing numbers of European immigrants, became overwhelming. Consequently, Europeans, consistent with their internal perception of Indians, no longer saw the need to be deceptive to their own views and continue to interact with Indians as if they were equal in status to European nations. With little physical resistance, the ideology of inferior status of uncivilized peoples could be easily asserted even where such assertions had practical and noticeable consequences for the indigenous peoples concerned – their ability to resist such assertions being increasingly weakened.

When section 91(24) was enacted as part of the *British North America Act, 1867*, there was no longer a need to deal with the indigenous peoples as representatives of autonomous political groups because by 1867 the federal policy of assimilation (based on

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[70]. When English officers, unschooled in diplomatic relations between indigenous peoples, asserted a superior English authority over the affairs of First Nations, they were quickly rebuked by their superiors and reminded of the danger and impropriety of their assumptions. Dickason, *supra* note 66.

[71]. Michel Youssef, *supra* note11. See also Mr. Miguel Alfonso Martinez, Special Rapporteur, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* (United Nations, n/d).

the assumption that Indian people were uncivilized and in need of salvation) was well entrenched. In fact, to recognize the political independence of distinct and diverse Indigenous nations would have been contrary to this stated policy. Bradford Morse and John Giokas describe the purpose of section 91(24) as an integral part of the assimilation exercise.

> The reason for conferring federal power over this "racial group" was for the purposes of protection and control as their original political and economic forms of organization were consciously being displaced or destroyed by the emerging new forms under the aegis of the British Crown.[72]

On the other hand, section 35 of the Constitution, by its very use of the plural term "peoples", mandates an approach that recognizes that Aboriginal peoples are distinct and diverse from one another and not simply one racial amalgam.[73] From a global perspective the implicit recognition of the existence of numerous Aboriginal collectivities in the language used is consistent with international developments of the right of indigenous peoples, as peoples, to possess the inherent right of self-determination.[74]

There has thus developed within the Constitution itself a potential dissonance in legal thought about the nature and status of indigenous peoples. Because of the difference in the Constitutional language, and the analytical approach that the difference in language would initially suggest one could expect the courts to react in one of several possible ways. Firstly, the courts could embrace the collective nature of section 35 rights and

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[72]. Bradford Morse and John Giokas, "Do the Métis fall within Section 91(24) of the *Constitution Act, 1867*?" in R.C.A.P. ed., *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Canada Communication Group, 1995) at 83.

[73]. The opposite tendency of ignoring the diversity between indigenous peoples is referred to by Marlee Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 2 Social and Legal Studies 45 at 119, as the "ideology of homogenous Indianness". This ideology represents First Nations as a unity across cultural variation.

> Implicit in the generic label 'Indian' was, in part, a conception of First Nations as homogenous. As Berkhofer points out, because 'the original inhabitants of the Western Hemisphere neither called themselves by a single term nor understood themselves as a collectivity, the idea and the image of the Indian must be a 'white' conception.'

[74]. See further Sharon Venne, *supra* note 12.

define Aboriginal peoples with reference to their political and social status as independent peoples and reconcile section 91(24) to fit this new paradigm of legal thought. In other words the power to legislate under s.91(24) would be limited by the existence of competing rights to govern by Aboriginal peoples under s.35. Alternatively, the courts could simply choose to ignore the inherent dissonance between section 91(24) and the interpretive framework that section 35 appears to demand. This approach is undesirable because it would lead to continued uncertainty about Aboriginal status in Canada. The third option would see the courts reconciling the dissonance by interpreting section 35 in a way that is more consistent with section 91(24)'s historical race-based approach.

The existing legal and political context of Canadian society will naturally influence the court's choice of approach. Unfortunately for Indigenous peoples, there are several strong influences that weigh heavily in the direction of a homogenous understanding of Aboriginal peoples than reinforces an interpretation that characterizes Aboriginal peoples by their racial differences rather than their political differences. Thus, s.91(24) with its traditional emphasis on a racial classification appears to be the stronger influence on the courts. So much so that the courts are interpreting s.35 within this racial and cultural framework that is reflected in the traditional understanding of s.91(24). Thus, as the *Nikal* and *Gladstone* cases illustrate, even in applying s.35 (which has language that is supportive of a conceptualization of Aboriginal peoples as political collectivities) the political reality of Aboriginal peoples existence is minimized or even ignored in the legal analysis of Aboriginal rights in Canada.

There are a number of factors that contribute to this kind of judicial thinking. Firstly, there is the policy of assimilation that the federal government adopted in order to civilize Aboriginal peoples.[75] Invariably this policy has built in assumptions of European superiority. In addition, Aboriginal peoples are often thought of as no different from other minorities. This mistaken perception gives credence to the argument that

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[75]. For an excellent summary of the development of this policy and its impact on Aboriginal peoples see Report of the Royal Commission on Aboriginal Peoples, *supra* note 9.

Aboriginal peoples should be treated no different from other minorities in Canada. Overlaying these factors is the prevailing liberal ideology of Canadian society that tends to reinforce the above factors, particularly the perception that Aboriginal peoples are only different from Euro-Canadians in terms of culture and other visibly distinct features. And as we shall see in Chapter Three, so predominate is this perception that the courts have internalized it as the underlying principle for interpreting s.35. But now, I would like to briefly discuss the impact of each of these factors and how they contribute to a judicially narrow and superficial understanding of Aboriginal rights doctrine.

The Influence of Assimilation Policy

The first influence is the fact that there already exists a long legal history of defining indigenous peoples along racial or ancestral lines. Since an important goal of the Imperial and Canadian authorities was to civilize and assimilate the indigenous inhabitants, there was no need to recognize the political structures of the indigenous inhabitants. Indeed, to do so was seen as counter-productive to the overall goal of assimilation of indigenous peoples. The policy of assimilation could not tolerate any competing identities. Only one identity could prevail: the Canadian (British colonial) identity. Hence, the 1857 *Gradual Civilization Act*,[76] marked the abandonment of respect for tribal political autonomy.

> [It] marked a clear change in Indian policy, since civilization in this context really meant the piecemeal eradication of Indian communities through enfranchisement.... [T]his new legislation set in motion the enfranchisement mechanism, through which additional persons of Indian descent and culture could be removed from Indian status and band membership. ... [The law marked] the beginning of the process of replacing the natural, community-based and self-identification approach to determining group membership with a purely legal approach controlled by non-Aboriginal government officials.[77]

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[76]. *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws Respecting Indians*. S.C. 1857, c.26.

[77]. Report of the Royal Commission on Aboriginal Peoples *supra* note 9 at 272.

Thus, at the time of Confederation, the Imperial authorities and the newly formed Dominion of Canada were already well acquainted with assimilationist thinking. This is reflected in the newly acquired power of Parliament to legislate over "Indians and Lands reserved for the Indians" in section 91(24) of the *British North America Act*. Indian nations as such were not recognized in this new dominion/provincial scheme.[78] The first legislation dealing with Indians under this new federal head of authority reinforced and expanded upon the assimilation policy of the new dominion's colonial predecessors. The *Gradual Enfranchisment Act*[79] called for reforms that were designed to replace the "irresponsible" traditional governance systems with a European model of municipal-style government.[80]

Any notion that section 91(24) incorporated a political dimension of indigenous identity was arguably put to rest in *A.G. Canada v. Canard*.[81] The decision involved whether special laws in the *Indian Act* dealing with Indian estates violated the *Canadian Bill of Rights* on the basis that they were discriminatory based on race. Justice Beetz states that the term "Indians" in the British North America Act creates a racial classification. According to Justice Beetz, Parliament could not effectively exercise this jurisdiction without recognizing the implied power of Parliament to define who is and who is not an Indian and how Indian status is acquired or lost. Thus, the term Indians became understood to mean a racial category. Beetz J. did not consider any other alternatives to defining the term "Indians". For example, the court did not consider the view that "Indians" refers to "political groupings of separate peoples who are self-determining."[82]

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78. *Ibid.* at 274.

79. *An Act for the gradual enfranchisment of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c.6.*

80. RCAP, *supra* note 9 at 275.

81. *R. v. Canard*, [1976] 1 S.C.R. 170.

82. Morse and Giokas, *supra* note 72 at 28. In particular, see pages 18 – 23 where the authors provide a very useful overview of the various approaches that have at one time or another been used to define Aboriginal group membership. They are i) blood quantum, ii) kinship, iii) culture, lifestyle or belief, iv) acceptance by an Aboriginal community, v) acknowledgement as Aboriginal by the dominant society, vi) charter designation, and vii) self-identification.

The indirect outcome of this judicial interpretation is the continued perpetuation of the myth of Indianness as a homogenous racial identity at the expense of the political and cultural diversity of indigenous peoples.[83]

Former Commissioner for the Royal Commission on Aboriginal Peoples, Paul Chartrand, has recently addressed the "myth" of race-based legal regimes and their destructive application to the circumstances of Aboriginal peoples in Canada.

> One of the most persistent red herrings dragged across the path of public debate is the myth that Aboriginal self-government proposes that special rights be accorded to "racial minorities"... This pernicious notion must be debunked if Aboriginal self-government is to be accepted in the long run as a legitimate idea based upon principles that are broadly acceptable to both Aboriginal people and the Canadian public. As long ago as 1942 Ashley Montagu had exposed the fallacy of 'race' as 'Man's Most Dangerous Myth'. Adopting Montagu's explanation that myths provide a sanction for action, we can see that opponents of Aboriginal rights create the myth of 'racial minorities' to provide a false explanation for the differences between Aboriginal peoples and others in Canada. Associating this false difference with South African apartheid and the struggle for equal civil rights by African Americans, the myth has strong public appeal. As the RCAP Final Report explains, the Aboriginal 'peoples' as such, comprise distinct historic, social and political communities, and not racial minorities.... It is a matter of community not biological descent. It is a process whereby individuals and communities nurture a sense of belonging based on history and culture, on kinship and place. It is not biological determinism foisted upon communities.[84]

There is a long legal history of thinking of indigenous peoples as one singular race of culturally similar people. Consequently, legal distinctions are justified based on defining indigenous peoples along racial and cultural grounds. In doing so, the recognition of each Aboriginal nation as a distinct independent political entity worthy of recognition as such is lost in the assumption of homogeneity that characterizes any analysis that is based

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[83]. Kline, *supra* note 73.

[84]. Paul L.A.H. Chartrand, "Speaking Notes For an Opening Address" (Toronto: A Conference on Implementing the Recommendations of the Royal Commission on Aboriginal Peoples, 1999) at 6-7. See also Paul L.A.H. Chartrand, "Aboriginal Self-Government: The Two Sides of Legitimacy" in Susan Phillips *How Ottawa Spends: A More Democratic Canada?* (Ottawa: Carleton University Press, 1993) and Ashley Montague, *Man's Most Dangerous Myth: The Fallacy of Race*, 6th ed. (London: Altamira Press, 1997).

on race or cultural differences. Thus, the totalitarian effect of using race and culture as factors to determine legal status is very effective in washing away the political distinctiveness of the many Aboriginal nations each with their own unique histories, legal systems and worldviews.

Even in *Delgamuukw*, where the court states that it will take into account the Aboriginal perspective on land, including "their systems of law", to define Aboriginal title, there persists a continued reluctance to think of Aboriginal peoples beyond the limits of racial and cultural homogeneity.[85] If Aboriginal systems of law are to be given equal weight in defining Aboriginal title, and if Aboriginal nations are each distinct in their legal systems and land management, then should not the definition of Aboriginal title be unique to each Aboriginal nation in Canada? If, for example, the M'kmaq, Blackfoot, Iroquois, Coast Salish and Métis nations have their own unique legal systems, ought not the definition of Aboriginal title vary with each different region and Aboriginal nation according to their historic conceptions of their relationship to land?

Instead, Chief Justice Lamer describes in considerable detail the nature and content of a single universal concept of Aboriginal title.[86] In doing so, he is assuming that there exists a remarkable degree of homogeneity among Aboriginal peoples throughout Canada that is not necessarily factually accurate.[87] As Professor Flanagan notes, the Chief Justice said that the Aboriginal perspective should be taken into account, however, he did not "attempt to articulate what the pre-existing systems of aboriginal law might have been."[88] Had the Chief Justice thought about it further, he might have realized that he assumed too

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[85]. *Delgamuukw, supra* note 36 at 70.

[86]. *Ibid.* at 57 – 67.

[87]. See for example, H. Driver, *Indians of North America* (Chicago: University of Chicago Press, 1968) at 246. Driver devotes a chapter of his book to property and inheritance. In this part he describes the land tenure systems of "aboriginal North America". He states that "[l]and tenure in aboriginal North America shows much variation from tribe to tribe and area to area, depending not only on the kind of exploitation of the land, but also on the political and social organization associated with it."

[88]. Flanagan, *supra* note 54 at 306.

much in his attempt to describe one uniform definition of Aboriginal title.[89] But alas, the stereotypical image of the homogenous Indian population prevailed.

The Influence of Minority Characterization

In the *Quebec Reference* case, the Supreme Court underscored the importance of protecting minority rights and specifically held that the protection of minority rights is "itself an independent principle underlying our constitutional order."[90] The Court made specific reference to s.35 of the Constitution as an example of a "long tradition of respect for minorities."[91] The Court stated:

> The "promise" of s 35, as it was termed in *R. v. Sparrow* ... recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights; so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[92]

What the Supreme Court fails to realize is that there is a big difference between a people having the status of an Aboriginal people as opposed to the status of a minority people and the kinds of claims they can respectively make. The Royal Commission on Aboriginal Peoples has described the difference in these terms:

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[89]. See also Henderson et. al, *supra* note 62 at 327/8 where the authors note that had the Court fully adopted the doctrine of continuity, instead of the definition relied upon by Lamer, the diversity of Aboriginal tenures would not have been compromised.

[90]. *Quebec Reference*, *supra* note 8 at ¶ 80.

[91]. *Ibid.* at ¶ 81.

[92]. *Ibid.* Later in the judgement at paragraph 96, the court is more explicit by expressly including Aboriginal peoples as a "linguistic and cultural minority in Canada". Consistent with this trend is the characterization by Justice L'Heureux-Dube in *Corbiere v. Canda*, [1999] 3 C.N.L.R. 19 at ¶ 67 that the issue of whether off-reserve band members ought to vote in band elections was one which pitted one minority group's interests against another's.

> Aboriginal peoples are not cultural minorities in the sense that Canadians have come to understand the term. Neither are they citizens with a slightly expanded set of rights based on their descent from the original inhabitants. Aboriginal people have historical rights. They form distinct political communities, collectivities with a continuing political relationship with the Canadian state. This is the central reality that Canadians must recognize if we are to reconstruct that relationship.[93]

Although indigenous peoples share, in common with ethnic minorities, an "ethnic self-consciousness", as well as differences in language, culture and religion, there is one trait that is

> generally viewed as distinctive of indigenous peoples, namely their historical relationship with the land, especially in former European settler colonies such as Canada – a relationship that is a fundamental component of their peoplehood. Consequently, while many Indigenous peoples happen to be numerical minorities, minorities are not necessarily Indigenous peoples.[94]

The use of Aboriginal peoples as an example of a history of constitutional respect for minorities seems inconsistent with previous statements made by the Supreme Court in *Van der Peet.* Chief Justice Lamer said that because Aboriginal peoples were already living in North America in distinctive cultures is a 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."[95] The choice of the Supreme Court to equate the existence of s.35 as consistent with the underlying constitutional principle of respect for minorities is thus not only confusing but more importantly potentially weakens support for the recognition of distinct and autonomous Aboriginal political authorities.

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[93]. RCAP, *supra* note 9 at 612. See also Paul Joffe, *supra* note 17 at ¶ 2 wherein the author lists several scholars that support the argument that it is "erroneous to view Aboriginal peoples as "racial groups" rather than "political and cultural entities".

[94]. Isabelle Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties" (1998) 2 Review of Constitutional Studies 239 at 284.

[95]. *Van der Peet, supra* note 20 at 193.

As we shall discover in the following section, the tendency by the Supreme Court of Canada to characterize Aboriginal peoples as minorities within Canada is perhaps another example of the overarching influence of liberal democracy on the Court and the negative consequences such ideology has on the recognition of Aboriginal peoples as distinct political communities. This is partly because the recognition of a limited degree of special rights for minorities does not necessarily conflict with the fundamental ideas of a liberal democracy. Whereas the recognition of Aboriginal political authority is hard to reconcile with the notion of society as a place where "people transcend their localized and particularistic concerns and participate freely in the open space of public life."[96]

The Restraints of Liberal Ideology

Another factor that contributes to a failure to fully integrate Aboriginal rights within a paradigm that acknowledges the Aboriginal political dimension is attributed to the difficulty of courts and Canadian society to appreciate collective rights; particularly in a society that has so fully embraced the liberal ideology of individual rights. Related to this hesitancy is the difficulty Canadians have with the concept of legal pluralism. The idea of *one law for all* is firmly embedded in the Canadian psyche and is manifested in judicial resistance to the idea of collective rights.[97]

Several authors have written about the erosive nature that liberal individualism has on the ability of Canadian institutions such as the legal system to accommodate Aboriginal collective rights as expressed through their own inherent political institutions. For

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[96]. Richard Sigurdson, "First Peoples, New Peoples and Citizenship in Canada" (1996) 14 International Journal of Canadian Studies 53 at 66.

[97]. Evidence of this resistant to legal pluralism can be seen in a number of cases beginning with *R. v. Shawanakiskie* (1822-26) Upper Canada, Ct. of Oyer and Terminer, Western District Assize. For an excellent overview of the origins of colonial assertion of jurisdiction within "Indian territory" see Mark Walters, "The Extension of Colonial Criminal Jurisdiction Over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie Case* (1822-26)" (1996) 46 U.T.L.J. 273.

example, Mary Ellen Turpel provides a particularly enlightening exposé of the incompatibility of liberal ideology and Aboriginal collective rights. Her article, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" explains how Canadian liberal ideology as manifested by the *Charter of Rights and Freedoms* contributes to the failure of the Canadian legal system to recognize Aboriginal cultural difference in its entirety.

> I would argue that from early colonization until the present time, no government or monarch has ever genuinely recognized Aboriginal peoples as distinct peoples with cultures different from, but not inferior to, their own. Aboriginal peoples have not been viewed by the dominant culture as peoples whose ways of life should be tolerated or respected except in the most paternalistic and oppressive terms.[98]

> Genuinely recognizing another People as an(other) culture is more than recognizing "the rights" of certain persons. Aboriginal cultures are not simply groups of persons who are culturally at a prior state of development and of different races. Race has been most often defined in terms of biology (or colour). Aboriginal cultures are the manifestations of a different human (collective) imagination.[99]

Even a more "progressive" view of liberal ideology does not provide the analytical structure for fully embracing Aboriginal peoples as autonomous political entities equal to the status of Canadian political institutions. Shulte-Tenchkhoff explains:

> One notes a strong complicity between the paradigm of domestication and what may be termed liberal culturalism, that is, the relatively uncritical use of culture factor in connection with the type of consequential individualism presently advocated to accommodate collective rights, at least temporarily, by considering these in strategic terms with the purpose of dislodging structural and institutional impediments to individual rights non-discrimination.[100]

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98. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard Devlin, ed., *First Nations Issues* (Toronto: Emond Montgomery Publications Limited, 1991) at 55.

99. *Ibid.* at 56.

100. Schulte-Tenckhoff, *supra* note 94 at 276.

Professor Richard Devlin echoes the observations by Turpel and Shulte-Tenchkhoff and concludes that recognition of Aboriginal political autonomy requires a

> profound shift from a legal philosophy that was premised upon an assumption of unity and sameness to a legal philosophy that asserts the necessity for the acknowledgment of difference and the embracing of radical heterodoxy.[101]

On occasion, judges have expressed a sense of uneasiness about the legal status of Aboriginal peoples as a collectivity in Canada and the difficulty of the judiciary to deal with such issues. For instance, in the *Dumont*[102] decision dealing with Métis claims under the *Manitoba Act*, Justice O'Sullivan, in dissent, expressed concern over the apparent lack of a mechanism for Aboriginal peoples, as a collective, to find legal redress within the current legal system. The case involves a claim by the Manitoba Métis Federation and individual Métis for a declaration that the legislature of Manitoba and the Parliament of Canada failed to properly implement the land distribution scheme contemplated in section 31 and 32 of the *Manitoba Act*. The federal Attorney General brought a motion to have the claim struck out, in part, because the plaintiffs have no standing. The Attorney General lost the motion at trial and the case was appealed to the Manitoba Court of Appeal. Such issues prompted Justice O'Sullivan to make the following remarks:

> Lawyers trained in the British tradition tend to look on rights as either private or public. If private, they must be asserted by persons who claim a property interest in the rights. If public, the rights must be asserted by an Attorney General... In extraordinary cases, it is conceded that individual persons may be granted special status to assert public rights.... It is difficult for common lawyers to understand what the rights of "a people" can mean. Indeed, at a hearing before a parliamentary committee on the 1987 Constitutional Accord (Meech Lake) held 27th August 1987, the distinguished constitutional expert, the Right Honorable Pierre Elliott Trudeau, said:
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> > In my philosophy, the community, an institution itself, has no rights. It has rights by delegation from the individuals. You give equality to the

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101. Richard Devlin, "Mapping Legal Theory" (1994) Alta. L. Rev. 602 at 618.

102. *Dumont v. The Queen*, [1988] 5 W.W.R. 193 (Man. C.A.) (per O'Sullivan J, Man. C.A.).

> individuals and you give rights to the individuals. Then they will organize in societies to make sure those rights are respected.

> It is evident since the advent of the age of nationalism and democracy world society has failed to develop satisfactory rules for the recognition of communal minority rights for the balancing of such rights with the common good of society as a whole. ... Constitutional protections have been largely ineffective because of our failure to develop a jurisprudence capable of dealing adequately with the issues.[103]

And, in arguing to dismiss the motion to have the statement of claim quashed, Justice O'Sullivan made the following remarks in his conclusion:

> I am sure the judge assigned to try the case will have a difficult time and will have to be able to adapt the process of the court to suit the nature of the case. But, in the end, in my opinion it is in the development of law to deal with claims of "peoples" that lies the best hope of achieving justice and harmony in a world full of minority groups.[104]

Justice O'Sullivan calls upon the authorities to turn their minds to such issues. It is suggested that some alternative forum would be appropriate to deal with such difficult questions of constitutional facts.[105] Currently, the adversarial court process aimed at determining facts in individual cases is ill-suited in circumstances where courts must determine constitutional facts which depend "so much on historical interpretations and social and political analysis."[106] And as we shall see in Chapter Four, these comments are echoed by Justice McLachlin in her dissent in *Van der Peet* wherein she advocates for judicial restraint in dealing with the Crown's justification test for infringing Aboriginal rights.[107] This understanding of the court's role and inherent limitations also informs the

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103. *Ibid.* at 196 – 201.

104. *Ibid.* at 202.

105. *Ibid.*

106. *Ibid.*

107. *Van der Peet, supra* note 20 at 280. In particular see page 102 *infra.*

Court's reasoning in the *Quebec Reference* case when constitutional principles come into conflict.[108]

The *Dumont* case was appealed to the Supreme Court of Canada. In an uncharacteristically short decision, the Supreme Court overturned the Manitoba Court of Appeal's decision by holding that the Métis, as represented by the Métis Federation of Manitoba, have standing to bring the action.[109] At the time of writing, the matter has yet to proceed to trial on the merits of the case.

Somewhat ironically, Justice O'Sullivan in *Dumont* equated the Métis as a "minority people" in his effort to recognize the Métis as having valid legal status before the courts notwithstanding the collective nature of their claim. As discussed previously, this is problematic because the characterization of Aboriginal peoples as minorities is another conceptual tool designed to reduce Aboriginal collectivities to a status that is divorced from their recognition as distinct political societies. This confusion between minority status and Aboriginal status is no doubt influenced by the pervasive nature of liberal ideology.

The idea of upholding group rights that fit harmoniously within liberal ideology has been referred to as "consequential individualism".[110] The consequential theory of individualism holds that there may be a need to accommodate collective rights, "at least temporarily, by considering these in strategic terms with the purpose of dislodging structural and institutional impediments to individual rights of non-discrimination".[111] If special rights are grounded in unequal circumstances, then it may be appropriate to take measures to rectify inequalities suffered collectively. As Schulte-Tenckhoff has

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108. *Quebec Reference, supra* note 8 at ¶ 101.

109. *Dumont v. Canada (Attorney General),* [1990] 2 C.N.L.R. 19 (S.C.C.)

110. Schulte-Tenckhoff, *supra* note 94 at 276.

111. *Ibid.*

observed, the theory of consequential individualism "blurs any distinction between Indigenous peoples and minorities, despite the fact that Indigenous peoples categorically reject any reference to them as minorities."[112] Arguably, it is not inconsistent with the liberal principle of individual equality to provide additional protective measures to assist groups to maintain their cultural differences in the face of assimilation pressures from the majority. The implication of such "affirmative" measures on the veracity of liberal ideology is simply the recognition of the added cost of maintaining a separate identity as a minority in such circumstances. From this perspective, there is no threat to the fundamental principles of liberal theory. On a micro level, it is analogous to the idea of "substantive equality" that forms part of the legal analysis under section 15 of the *Charter* to ensure that individuals who are part of a distinct group in society are able to have an "equal opportunity".[113] Given historical disadvantage, some groups require a boost in order to be on the same level playing field.

Hence, liberal ideology and its propensity towards thinking of equality as embodying the principle of empowering disadvantaged groups under a common political order supports a trajectory of socio-legal thinking that pulls in the direction of Aboriginal peoples as being cultural/racial minorities because such a characterization is perceived as less of a threat to liberal ideology than characterizing Aboriginal peoples as distinct political governing collectivities with their own word views and perceptions of social order. This is why the "[o]ld legal colonial and racial distinctions that should have collapsed with the constitutional reaffirmation of Aboriginal and treaty rights survive in incoherence and gray areas under the authority of equality of laws."[114]

In the *Quebec Reference* case, the court appears to have openly endorsed the liberal democracy theory of consequential individualism by suitably construing the protection that the Constitution is able to provide minorities. The court declared that a "constitution

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[112]. Ibid. at 277.

[113]. The SCC has recently affirmed that s.15 of the *Charter* incorporates the "substantive equality" principle in *Lovelace v. Ontario* 2000 SCC 37.

[114]. Henderson et. al., *supra* note 62 at 315.

may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[115]

By equating Aboriginal peoples as minorities, is the court sending us a message that Aboriginal rights will only be interpreted within the restrictive paradigm of consequential individualism? I suspect not. Imputing such a motive onto the Court assumes that the Court has consciously thought about an overall plan and direction for arriving at a coherent theory of Aboriginal rights. Professor Monture-Angus has suggested that this apparent confusion by the Supreme Court in articulating a clear theory of the nature of Aboriginal peoples' legal status within Canada may not have anything to do with a conscious "motive", to entrench liberal ideology at the expense of Aboriginal political autonomy. Rather, it may be the result of the continuing failure of the court to "articulate a comprehensive theory" of Aboriginal and treaty rights in Canadian law with the inevitable result that the prevailing status quo of liberal ideology will fill in the gaps of the few threads of Aboriginal doctrine that do manage to stay afloat above the sea of liberal hegemony.[116] It may be too early to tell but the implications of such a finding places an immediate onus on the legal academic community to articulate a vision of how Aboriginal rights, inclusive of a political dimension, can be accommodated within a liberal democracy.

Chapter Four is my attempt to articulate such a vision. However, before we look at alternatives to the existing unsatisfactory status quo, it is useful to examine how the policy of assimilation, racial and minority characterization and liberal ideology has influenced the courts' judicial reasoning of Aboriginal rights. There are two aspects of judicial analysis that I want to examine in the next chapter. Firstly, I examine how thinking about Aboriginal peoples along racial or cultural lines has resulted in the use of

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[115]. *Quebec Reference*, *supra* note 8 at ¶ 74.

[116]. Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999) at 18. Monture-Angus shows how the courts have failed to articulate a

cultural relativism as the predominate analytical starting place for interpreting Aboriginal rights. The problems with this approach and how it is inherently inconsistent with recognizing Aboriginal peoples, as political communities, will also be highlighted. Secondly, I examine from a broader perspective the courts understanding of Aboriginal society as inferior to Euro-Canadian society and how this is reflected in judicial reasoning about Aboriginal rights.

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fundamental unifying theory of the nature and status of Aboriginal peoples in Canada and as a result, Aboriginal rights doctrine is plagued with inconsistencies, arbitrariness and Euro-centric attitudes.

Chapter Three: Cultural Relativism and the Doctrine of Aboriginal Rights

It is by no coincidence that the test for defining Aboriginal rights, based on a theory of cultural relativism,[117] often involves the risk of perceiving Aboriginal societies as inferior to Euro-Canadian society. Thus, it comes as no surprise that these distinct but related concepts form the foundation of Aboriginal rights doctrine.

Arbitrary Nature of Cultural Relativism

To limit the analysis of Aboriginal rights to an artificial categorization of cultural attributes (i.e. practices, traditions and customs) separate from any political/legal authority is consistent with the views of "difference theorists" and therefore attractive to liberal-minded political thinkers.[118] Such theorists focus on the need to accord certain disadvantaged groups in society with special political and legal rights in order for them to maintain their cultural differences against the weight of mainstream society pressure to assimilate. Attention is spent on identifying those cultural differences that need protection. Such an approach is inherently an exercise of cultural comparison relative to the dominant society. Only those activities that are culturally distinct from mainstream activities need protection. This perspective arguably influenced Chief Justice Lamer's definition of what qualifies as an Aboriginal right. In *Van der Peet*, he stated:

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[117]. Cultural relativism is a concept that describes the approach used by courts to justify differential treatment in law by focusing on "cultural differences" between the target group and mainstream society. It is relative because one is comparing and contrasting one culture with another without any independent objective reference point to "measure" the validity of the cultural comparison. For an interesting discussion on the value, or lack thereof, of cultural relativism as a model of analysis see Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford Law Review, 1311 at 1335 – 1345.

[118]. David Schneiderman, "Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights", (1996) 14 International Journal of Canadian Studies 35 at 36.

> It is only by focusing on the aspects of the Aboriginal society that make that society distinctive that the definition of Aboriginal rights will accomplish the purpose underlying s.35(1).[119]

According to Lamer C.J., it is to the pre-contact period that the courts must look to identify Aboriginal rights. Thus, if an activity arose because of the influence of European culture, the activity can no longer be regarded as distinctive to the Aboriginal society itself.[120] It is no longer 'different' and therefore no longer in need of special protection.

Although the *Van der Peet* decision post-dates Professor Macklem's article, the decision is an excellent example of judicial analysis based on "cultural relativism".[121] Macklem argues that to identify Aboriginal rights from this perspective is to embrace an approach that suffers from a number of problems of logic and stability.[122] This is partly because such a comparative approach has no other independent source or point of reference to ground the analysis. Hence, the approach is inherently arbitrary. This problematic nature of the approach is well

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[119]. *Van der Peet, supra* note 20 at 204.

[120]. *Ibid* at 209. It is important to note that Lamer tries to argue that his concept of "distinctive" does not involve a comparison between Aboriginal and non-Aboriginal society. He tries to explain that the distinctive requirement of the test only requires the Aboriginal group to show that the activity "makes the culture *what it is*", not that the activity is different from the activities of another culture. However, if the court truly wanted to avoid a cultural comparison exercise, it would not have grounded its considerations to an analysis going back in time to pre-contact existence. Consequently, his reassurance that his test is not one that involves a cultural comparison is unconvincing. Justice L'Heureux-Dube, writing in dissent in *Van der Peet* captured this logical inconsistency of the Chief Justice's reasoning in this way:

> [A]n approach based on a dichotomy between Aboriginal and non-Aboriginal practices, traditions and customs literally amounts to defining Aboriginal culture and Aboriginal rights as that which is left over after features of non-Aboriginal cultures have been taken away.... The criterion of "distinctive Aboriginal culture" should not be limited to those activities that only Aboriginal people have undertaken or that non Aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to self-identity and self-preservation of organized Aboriginal societies should be viewed as deserving of protection. (at. 232, 234)

[121]. Macklem, *supra* note 117 at 1335.

[122] *Ibid.* at 1315.

illustrated in the historical judicial treatment given the question of indigenous identity regarding the Pueblo Tribe of New Mexico.

A cultural relativism approach is evident in the reasoning of the 1877 case of *U.S. v. Joseph*[123]. In this case, the United States tried to convict the defendant for violating a provision of a Congressional Act that stated that "every person who makes a settlement on any lands belonging ... to any Indian Tribe is liable to a penalty".[124] The defence argued that the Pueblo Tribe is not an Indian Tribe within the meaning of the statute. In determining whether the Pueblo Tribe was an Indian tribe, the court examined the lifestyle, habits and customs of the group. The Court focused on the fact that the Pueblo people lived in fixed communities, practiced agriculture, spoke Spanish and adopted the Catholic Religion. "In every pueblo is erected a church, dedicated to the worship of God..."[125] The court also noted the similarity between the Pueblo people and the European settlers in the everyday activities they pursued. As a result of this comparison, the court concluded:

> In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian Tribes of the country, and the equal of the most civilized thereof.... [These considerations] forbid the idea that they should be classed with the Indian Tribes for whom the Intercourse Acts were made.[126]

Forty years later the United States had an opportunity to revisit the issue of whether the Pueblo people were Indians. The issue arose in the 1913 District

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[123]. *United States v. Joseph*, 94 U.S. 295 (New Mexico Supreme Ct. 1877).

[124]. *An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontier*, Revised Statutes, 1834, s.2118

[125]. *United States v. Joseph*, *supra* note 123 at 297.

[126]. *Ibid.* at 297.

Court of New Mexico case of *United States v. Sandoval*[127] in the context of whether a Federal prohibition of intoxication provision applied to the Pueblo people. The prohibition against intoxicants would only apply if the Federal government had jurisdiction. The Federal government would only have jurisdiction if it could argue that the Pueblo people were Indians.

In *Sandoval*, the Court examined a number of factors to determine whether the Pueblo people were Indians. In this case, rather than focusing on the similarities between the Pueblo people and European settlers, the Court focused on the similarities between the Pueblo Indians and other Indians. Like other Indians, the Pueblo people lived in separate and isolated communities, "adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors."[128] The Court explained that like other Indians, the Pueblos received aide from the United States, are exempt from taxation and are excluded from voting. "They are dependent upon the fostering care and protection of the government, like reservation Indians in general."[129] The court observed that like other Indians, they are a destitute, indigent and immoral people, predisposed to practicing pagan customs and dances that promote great evil. They resist civilized pursuits such as sending their children to schools that will "draw them away from their old ways and habits."[130] Finally, the Court remarks that the Pueblos intemperance will be their greatest downfall due to their general ignorance as a people.[131] Thus, because these people are a "simple, uninformed and inferior people", they are Indians and therefore the liquor prohibition provisions of the Federal government apply to the Pueblo Indians.[132]

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127. *United States v. Sandoval*, 231 U.S. 107 (U.S. Dist. Ct., New Mexico, 1913).

128. *Ibid.* at 111.

129. *Ibid.* at 112.

130. *Ibid.* at 113.

131. *Ibid.* at 112 - 113.

In the *Sandoval* case, one of the truly dangerous aspects of the approach taken to determine whether a group is Indian is the credibility given to negative social and economic criteria such as immorality, intoxication, laxness, uneducated and dependency as attributes of "Indianness". In other words, the more a group meets these criteria the more likely the group will be labelled Indian. Thus, not only does this approach "freeze" Indians to a historical culture, it freezes them into a life of dependency and poverty. An interesting question is the extent to which these attributes have been internalized in modern Canadian society and still influence attitudes about the nature and scope of indigenous identity. I suspect the *Sandoval* case is not only a case of historical significance.

Notwithstanding the inherent racism that is implicit when a group is labelled in a way that results in social, economic and cultural isolation, cultural relativism is flawed because, as the *Joseph* and *Sandoval* cases reveal, the theory is arbitrary. The factors the courts chose to emphasize are entirely subjective. Consequently, it is paradoxically possible to have such a bizarre result; where a particular group will be labelled "white" one day and the next day labelled "Indian".

This cultural comparative approach forms the basis for defining Aboriginal peoples in contemporary Canadian legal thinking as well. To date the courts have tended to define Aboriginal peoples by reference to their cultural distinctiveness by focusing on the term "Aboriginal" instead of "peoples".[133] According to the legal discourse of cultural differences, Aboriginal peoples are Aboriginal peoples because they are racially and culturally different from European peoples not because they are peoples in and of their own right.

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[132]. *Ibid.* at 111.

[133]. Catherine Bell, *supra* note 15 at 186. Professor Bell explains that it is "people hood, not lineage, that is the source of rights to self-government and cultural institutions essential to the self-identity and preservation of distinct Aboriginal societies.

Professor Slattery reinforces the cultural differences theory when he identifies the factors that should be assessed in determining whether a group is "native" or not. In his well-known article on "Understanding Aboriginal Rights"[134] he lists four criteria that must be assessed in order for a group to qualify as indigenous. They include:

a. The self-identity of its members, as shown in their actions and statements,
b. The culture and way of life of the group,
c. The existence of group norms or customs similar to those of other aboriginal peoples, and
d. The genetic composition of the group.[135]

Two of Professor Slattery's factors involve considerations of culture. As described above, the use of culture as a factor to distinguish between peoples is problematic because of "the tendency of non-natives to hold a static view of aboriginal culture by freezing it at a particular historic moment."[136] This tendency exists because of the assessment of normative divergence that would inevitably occur whenever a decision making process involves a comparison between two cultures. The more a group is normatively divergent from European-based cultural attributes, the more likely that group will be labelled "Indigenous". Likewise, the more a group adopts European-based cultural attributes the less normatively divergent that group will appear and the more likely that group will be labelled "non-indigenous" and hence white. Professor Macklem describes the problem with cultural relativism in this way:

> Cultural relativism may only serve to protect a cultural identity that asserts difference. The more a particular culture is assimilated into dominant

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[134]. Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar. Rev. 727.

[135]. *Ibid.*

[136]. Catherine Bell, "Who are the Métis People in Section 35?" (1991), 2 Alta. Law Rev. 351 at 366. See also Marlee Kline, *supra* note 73, where she makes the argument that any principle that supports a result that "freezes" Aboriginal culture is a denial of human rights and is therefore, fundamentally racist.

> society, the less able it is to assert difference and claim protection.... The boundaries of culture are more porous than cultural relativism presupposes. A particular culture that is both similar to and different than a more dominant culture may only be able to assert its identity in terms of its difference, and not in its more subtle variations of difference and similarity.[137]

Such an analytical approach to interpreting Aboriginal rights is, of course, a source of frustration for Aboriginal peoples. For example in *Delgamuukw*, Lamer held that if an Aboriginal group that possesses Aboriginal title wished to use the land subject to such title for purposes outside of the inherent limitation of their title (which Lamer describes as a use that is "irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim"), then the group would have to extinguish their title in order to do so.[138] Such a doctrine is likely to prevent Aboriginal groups from participating in mainstream contemporary industry if such pursuits are regarded as irreconcilable with traditional activities such as hunting wildlife.

This aspect of Aboriginal rights doctrine would be doubly frustrating for the Métis since their very identity as Aboriginal could be rendered suspect. Although Professor Macklem did not explicitly refer to self-identifying mixed-blood communities when he described the problem with cultural relativism, such a problem does have profound implications for mixed communities such as the Métis of western Canada. How can a society possess Aboriginal rights if they have as the source of their very existence both indigenous and European heritage? Does not the very existence of European heritage contaminate their culture so as to render it non-indigenous?

The characterization of the Métis as Aboriginal seems to defy all logic given the "cultural distinctiveness" approach adopted by the Supreme Court of Canada in

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[137]. Patrick Macklem, *supra* note 117 at 1343 –1344.

[138]. *Delgamuukw*, *supra* note 36 at 62.

assessing the rights of Aboriginal peoples. How can the courts tolerate the European part of Métis heritage if the courts are to keep true to the analysis that Aboriginal rights are "activities, customs and traditions" which are traced back to pre-contact indigenous society and have not been the result of European influence?[139]

It is precisely because of the arbitrariness involved in using culture as a factor that Bell criticizes the conclusions reached by Professors Flanagan and Schwartz that the Métis are not Aboriginal.[140] For example Flanagan, in comparing the Métis to white settlers, emphasizes the similarities between Métis and white settler lifestyle; such as the participation in the fur trade economy and the adoption of Christianity, and therefore concludes that the Métis are not Aboriginal. However, as Bell rightly illustrates this determination is largely a function of what factors one decides to emphasize in their analysis. According to Bell:

> Extremely different pictures of the Métis culture emerge if one emphasizes their maternal native ancestry: Métis arts and crafts; unique languages such as patois, Michif and Bungi; the introduction of unleavened bread (bannock); the dependence of the community on the buffalo hunt, hunting and fishing; and the adoption of the dances of the plains Indians in the form of the Red River Jig.[141]

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[139]. The abhorrence of a mixed-blood community like the Métis being recognized as "Aboriginal" has even received judicial support in the decision of Justice Muldoon in *Sawridge Band v. Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.). For example, Justice Muldoon found it absurd that the Métis were included as an Aboriginal people in s.35(2) of the *Constitution Act, 1982*. He said of the Métis:

> This sounds curious since the Métis can hardly be thought of as "Aboriginal", having been a people only since the advent of the European people and then called "Half-breeds" because of their mixed ancestry. The constitution makers indulged in history's revision here.... It must be left to others at another time to explain how the revisionists who settled upon s-s.35(2) thought that they could honestly characterize Métis people as Aboriginal people, wielding Aboriginal rights. Nature has special blessings for hybrid people, the offspring of interracial procreation .... Only some determined revisionist would seek to regard Métis as being exemplars of only one of their inherently dual lines of ancestors. (p. 61, 78 of Q.L.)

[140]. Catherine Bell, *supra* note 136 at 367. See Thomas Flanagan, "The Case Against Métis Aboriginal Rights" (1983) 9 Canadian Pacific Policy 314 and Brian Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada*, 1982-84 (Kingston: Institute of Intergovernmental Relations, 1985).

[141]. *Ibid.* at 368.

One of the reasons that cultural relativism cannot be effectively used to decide the case of mixed-blood communities such as the Métis is because the approach tends to "totalize the concept of 'culture' – as if one single, uniform, dominant culture exists within a particular society, instead of intersecting and competing structures of belief."[142] Macklem argues that in "societies where people have conflicting or overlapping affiliations, an assertion of cultural relativism adds little insight."[143] Arguably, Macklem's observations are true for any society; however, such concerns are particularly pertinent for the Métis since the Métis are by definition a society with "overlapping affiliations".

The difficulty of using culture as a basis for explaining the nature and content of Aboriginal rights is further reinforced by the opinions of leading anthropologists. Schulte-Tenckhoff and Michael Asch have both renounced the use of cultural distinctiveness as characterized by the courts in *Van der Peet* and *Delgamuukw* as contrary to accepted anthropological evidence and scholarship. According to Asch, reliance on the notion of cultural distinctiveness will lead to arbitrary decisions. This is attributed to the "naïve and outmoded conceptualization of the nature of culture" as applied by the Supreme Court.[144] Schulte-Tenckhoff elaborates:

> [B]y and large, the anthropological culture concept is basically a holistic one as prefigured by Tylor's classic definition:
>
> > Culture or civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits, acquired by man as a member of society.

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142. Patrick Macklem, *supra* note 117 at 1343.

143. *Ibid.* at 1343.

144. Michael Asch, *The Judicial Conceptualization of Culture After Delgamuukw* (Speaking Notes for A Post-Delgamuukw Universe Conference, McGill University, Montreal, 1999) at 1.

> ... It is important to note, however, that the holistic perspective commanding it ... hardly allows one to decide with any precision 'what makes a society what it is'. It cannot credit any notion of a central culture trait removed from the realm of history as evidence admissible in court.
>
> ... From an anthropological viewpoint, the *Van der Peet* test therefore seems arbitrary and fails to account for two central features of the culture concept in its contemporary and critical meaning, namely, its systemic character and its historicity.[145]

According to Asch, the emphasis on "distinctive" is likely an attempt by the court to discover a method by which to differentiate between what is central and what is peripheral to a culture.

> Yet, we know that culture is a system and a process rather than items and arrangements. It is simply inappropriate to approach a study by attempting to ferret out whether a practice, custom or tradition is 'distinctive'.[146]

Moreover, the comparative aspect implicit in a test that focuses on cultural distinctiveness tends to focus attention on the concept of "Aboriginal" as meaning a certain socio-economic lifestyle.

> Indigenous peoples are said to be those whose modes of life differ fundamentally from modern industrial society with its sophisticated technology and consumption patterns, being based on hunting and gathering, trapping, swiden agriculture, or transhumance.[147]

Thus, from a social science perspective, it is illogical to examine the rights of a people in isolation from their existence as an autonomous organic political entity. Culture is a dynamic process.[148] It is not a product that can be captured and then displayed in the frozen-food department of your local grocery store.

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145. Isabelle Schulte-Tenckhoff, *supra* note 94 at 273.

146. Michael Asch, *supra* note 144 at 12.

147. Isabelle Schulte-Tenckhoff, *supra* note 94 at 275.

148. See generally Michael Asch, *supra* note 144 and Isabelle Schulte-Tenckhoff, *supra* note 94.

Leading Aboriginal law scholars agree with the social-scientist critic of the court's approach.

> Locating the "centrality," "integrality", or "purity" of the Lamer Court test is philosophically impossible. It cannot be objectified by reviewing courts, as the test is inescapably subjective and not static; the test wrongly presumes that fragmented, rather than holistic, Aboriginal cultures exist.[149]

Put another way, the authors note that the court's search for difference

> continues to value the 'pure' over the composite, mixed , or mosaic. Such distinctions have historically not only created the racial masks, identities, and politics of Indians, Métis and Inuit, but have also attempted to perpetuate the idea of the "pure" or integral Aboriginal law and rights before European colonization. The result is to reject the Aboriginal compromises with the colonizers and their resulting inter- and intraculturality, cross-culturality, or syncretic visions as ineligible for constitutional protection.[150]

Professor Rotman has described this limited judicial approach to defining Aboriginal rights as a tendency to compartmentalize them into such narrow and discrete categories as to make them virtually meaningless to the Aboriginal society that is to benefit from them. He explains:

> [T]he courts seem intent on separating those claims from the circumstances that initially gave rise to them. By isolating these claims from their historical, cultural, social, political and legal contexts, the court's examinations invariably take place in a jurisdictional vacuum.... By reducing broad Aboriginal and treaty rights like self-government or fishing to specific practices in such cases as *Pamajewon* and *Van der Peet*, the judiciary divorces those rights from the larger context within which they both originated and continue to exist.[151]

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[149]. Henderson, et. al., *supra* note 62 at 326.

[150]. *Ibid.* at 323.

[151]. Leonard Rotman, "Creating A Still-Life Out of Dynamic Objects: Rights Reductionism at The Supreme Court of Canada" (1997) 36 Alta. Law Review 1 at 2, 3.

The inappropriateness of separating the Aboriginal "activity" from the social context in which it has arisen is well documented in a study prepared by the Eco-Research Chair on Environmental Law and Policy at the University of Victoria Faculty of Law and School of Environmental Studies.[152] In this study, the authors describe how the activity of fishing and its communal regulation are "integrated and inextricable, one with the other."[153] They argue that it is inconsistent with the "Aboriginal perspective" of the right to fish to narrowly construe the right as concerned only with the "harvest"; "a right that is seen as separate and apart from *management* of the resource."[154] This separation of harvesting a resource from its management may be consistent with the "[w]estern approach to economic exploitation of natural resources: exploitation and management are generally seen as separate activities."[155] However, this approach differs markedly from the worldview of many Aboriginal cultures. "In contrast, the interdependence of people and nature, and the principle that people live subject to the constraints of the natural world, are more common themes among aboriginal cultures."[156]

The long-term implications of divorcing the activity to harvest from the social/political context that management of the resource entails may actually be destructive to the conservation of the resource and contribute to the ongoing powerlessness of Aboriginal society. If everyone in an Aboriginal community exercised their constitutionally protected Aboriginal right to harvest fish, there is a danger that the resource could be over-exploited. In such a scenario, the Aboriginal authority in the community would be helpless to regulate its exploitation.[157] Does it not seem odd that the legal source of such an activity is

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152. Emily Walter, Michael M'Gonigle and Celeste McKay, *supra* note 49.

153. *Ibid.* at 2.

154. *Ibid.*

155. *Ibid.*

156. *Ibid.* at 5.

based on the "collective existence" of the Aboriginal society, but that same Aboriginal society has no control over its use and exploitation? How does the constitutional protection of such a right meet the cultural and political needs of the community as a whole? The point is that it does not. The protection of Aboriginal rights, as judicially conceived, is akin to constitutionalizing the walking dead. The right is an entity that exists, (i.e. harvesting), but without consciousness, (i.e. management). It is free to wander aimlessly over the landscape like a zombie.

Aboriginal Societies as Political Societies

Strangely enough, Aboriginal peoples themselves may embrace cultural relativism to promote their "rights" as against mainstream society. The promotion of Aboriginal cultural nationalism is characteristic of a movement that involves the revival of indigenous native traditions and tribalism.[158] However, according to Professor Howard Adams, this movement may be counter-productive to the true social and political change that must occur for Aboriginal peoples to succeed in creating a space for continued survival as distinct peoples. There is an inherent danger in such a movement that parallels the inherent danger of refusing to acknowledge the political dimension in the recognition of Aboriginal rights.

> Today, in our awakening, many Indians of Canada are returning to native religion and tribal rituals. The danger in this is that it might begin to sever any links with a progressive liberation ideology. The idea that a return to traditional Indian customs and worship will free us from the shackles of colonial domination is deceptive – a return to this kind of traditional worship is a reactionary move and leads to greater oppression, rather than to liberation. Cultural nationalism is more than behaving and believing as traditional Indians; it is a return to extreme

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[157]. No doubt one could argue that this concern is tempered by the fact that the justification stage of the analysis allows the Crown to infringe the exercise of the right in the interests of conservation. However, we have all witnessed in the past century the "success" of Western approaches to fisheries management.

[158]. Howard Adams, *Prison of Grass* (Saskatoon: Fifth House Publishers, 1989).

> separatism in the hope that colonial oppression will automatically go away. The emphasis is upon worship and the performance of ritual behaviour, not upon politics and liberation. Because cultural nationalism insists on excluding political issues, Indians and Métis accept their colonized political conditions without challenging them.[159]

Thus, Aboriginal peoples may unknowingly reinforce a "cultural relativism" model of constitutional analysis because of the emphasis on cultural difference as a means to counter-act assimilation. This danger must be guarded against.

However, despite the theoretical problems with the cultural relativism analysis, courts continue to apply it when Aboriginal people make claims that they are entitled to access and benefit from Aboriginal and/or Treaty rights. For example, Métis people often find themselves promoting "cultural" claims in order to benefit from services and programs available to Indians but not Métis. Hence, if Métis can be seen as culturally Indian, the greater is the chance they will be able to argue for "Indian" benefits and services.

Such thinking has influenced the judiciary in their decisions regarding Métis legal strategies and claims as well. This is no more apparent then in the case of "Métis" trying to benefit from the protections under the various Natural Resource Transfer Agreements. In the 1930s, the federal government transferred title to the land and resources in Alberta, Saskatchewan and Manitoba to the provinces. These agreements became part of each province's Constitution.[160] When the federal government transferred the lands and resources, certain provisions pertaining to the rights of "Indians" were included to protect reserves and treaty rights to hunt and fish. There is a considerable body of jurisprudence interpreting the meaning of these provisions and in particular the provision relating to the harvesting rights provision.[161] Section 12 of the Alberta NRTA reads:

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[159]. *Ibid.* at 170.

[160]. *Constitution Act, 1930*, 20-21 George V, c.26 (U.K.), [R.S.C. 1985, App. II, No.26].

[161]. See for example *R. v. Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.) and cases cited therein.

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[162]

In 1993, Judge Goodson accepted an argument from counsel for Mr. Ferguson, who was charged with a hunting violation in Alberta, that the term "Indians" in s.12 of the NRTA should be read broadly as including non-status Indians/Métis.[163] Mr. Ferguson was a non-status Indian who was labelled "Métis" because of certain historical events that had the legal effect of denying him status as an Indian.[164] He was culturally Cree Indian, but legally white. However, since he did not identify as white, he was labelled socially as Métis and over time he became accustomed to this label. His story is not unlike many others.

There are many individuals that identify with being "Métis" or are labelled as "Métis" in circumstances where objectively they belong more to an Indian community than a Métis community.[165] There are a number of reasons why these individuals who are culturally Indians become categorized as Métis.

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[162]. *Supra*, note 160.

[163]. *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.). Affirmed by [1994] 1 C.N.L.R. 117 (Alta. Q.B.) [hereinafter *Ferguson*].

[164]. *Ibid.* at 152.

[165]. *R. v. Morin and Daigneault*, [1996] 3 C.N.L.R. 156 at 174. (Sask. Prov. Ct.) aff'd [1998] 1 C.N.L.R. 182 (Q.B. per Justice Laing) where the judge after a review of the historical evidence states that "I have come to the inescapable conclusion that the Crown, with Treaty 10 and the issuance of scrip, with no improper motive, arbitrarily divided the Aboriginal community into the two groups – Indian and Half-breeds".

Firstly, the *Indian Act* definition over time has become increasingly restrictive. For example up until 1985 the *Indian Act* forced Indian women to lose their status if they married a non-Indian man.[166] In addition, the children of such marriages also lost their status. These non-status Indian people would sometimes adopt the identity of Métis despite having more in common with their Indian relatives and communities. Part of the motivation for some to identify as Métis was likely influenced by the political associations that formed in the prairies. Non-status and Métis people had common political concerns about recognition and the need to promote their Aboriginal rights. Joint non-status and Métis associations became common in the prairies. For political reasons, these joint efforts are no longer as common, but their effects on identity remain.[167]

Secondly, during the time of treaty signing in the west (late 1800s and early 1900s), the treaty commissioners would travel with the Scrip commissioners.[168] If you were half-breed you were told to take scrip and if you were Indian you were told to take treaty. The decision would often be arbitrary. If an individual told the commissioners that they had a non-Indian relative in their ancestry, they would often be given scrip even if they lived within an Indian community, spoke the language and identified in all other respects with the Indian community.[169] *Ferguson* is illustrative of this kind of arbitrary effect of early treaty and scrip commission decisions. In his trial for a hunting violation, Ferguson identified as a Cree Indian. He spoke Cree, and he lived a Cree life-style. But because his great-grandparents accepted scrip, he was exempt from being allowed to be registered

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[166]. *Indian Act*, S.C. 1951, c.29, s. 12(1)(b).

[167]. For an overview of the historical alliance between non-status and Métis, see Joe Sawchuck, "Some Early Influences on Métis Political Organization" (1982) 3 Culture II 85.

[168]. Scrip was a document that gave the bearer a right to convert it into ownership of a certain amount of lands. For a discussion of the scrip system and its application to the Métis see Royal Commission on Aboriginal Peoples, *Perspectives and Realities, Vol. 4* (Ottawa: Minister of Supply and Services Canada, 1996).

[169]. See in particular the comments by Meagher P.C.J. in *R. v. Morin and Daigneault, supra* note 165 at 174. (Sask. Prov. Ct.)

Indian under the *Indian Act*. Thus, he was labelled as non-treaty or Métis by default, yet Ferguson was culturally and linguistically Cree Indian.

In deciding whether Mr. Ferguson was an "Indian" for the purposes of s.12 of the 1930 Natural Resource Transfer Agreement, Judge Goodson referred to the 1927 *Indian Act*[170] and applied the definition to Ferguson. The provision read:

> Section 2
>
> (d) "Indian" means
>
> (i) any male person of Indian blood reputed to belong to a particular band,
>
> (ii) any child of such person,
>
> (iii) any woman who is or was lawfully married to such person;
>
> (h) "Non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band or *follows the Indian mode of life*, even if such person is only a temporary resident of Canada; (emphasis mine)[171]

Judge Goodson reasoned that Ferguson could be an Indian within the meaning of the term used in the NRTA if he had Indian blood and "follows the Indian mode of life" as set out in s.2 of the 1927 *Indian Act*. Judge Goodson held that the first requirement of Indian blood was not contested. However, whether Mr. Ferguson follows and Indian mode of life was contested at trial and on appeal. Goodson identified several factors in order to determine whether Ferguson followed the Indian mode of life. They include the following:

- A connection with the Indian language,
- A connection with an Indian community,
- Self-identification as an Indian by the individual,
- A connection with traditional harvesting such as hunting, trapping and fishing,

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[170]. *Indian Act*, R.S.C. 1927, c.98.

[171]. This provision has since been repealed and no longer reflects Parliament's approach to defining Indian status.

- A connection with traditional Indian customs, or religion, philosophy and lifestyle.[172]

In applying these factors, Judge Goodson noted that Ferguson's first language was Cree and he lived in an entirely Cree-speaking community. He obtained food by hunting and gathering. He followed the usual Cree customs in respect to philosophy of life and lifestyle and he identified as Cree Indian. As a result, Goodson J. found that "the defendant is an Indian in terms of culture, and is at least one-half Indian racially."[173]

On appeal the Crown raised the argument that Ferguson could no longer be considered following the Indian mode of life because he was now "running tractors and building roads" and this would disqualify him as following an Indian mode of life. Justice Dixon on appeal held that this "casual or intermittent lifestyle pursuit" did not necessarily disqualify him as following the Indian mode of life.[174]

The analysis used in *Ferguson* is reminiscent of the kind of analysis employed by the United States courts in the Pueblo Tribe cases referred to earlier.[175] It is fundamentally arbitrary and superficial because of the factors used to determine the "Indian mode of life" are completely subjective. Is an Indian no longer an Indian if he or she is Catholic, wears a suit and drives a BMW? This analytical

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[172]. See generally *Ferguson, supra* note 163 at 152-154.

[173]. *Ibid.* at 153.

[174]. *Ibid.* at 120. The "Ferguson test" was applied to two "Aboriginal" non-status youth in *R. v. Desjarlais* [1996] 1 C.N.L.R. 148 (Alta. Prov. Ct. per Judge Bradley), aff'd in part [1996] 3 C.N.L.R. 113 (Alta. Q.B. per Justice Clark). In *Desjarlais*, Justice Clark applied the criteria established by Judge Goodson in *Ferguson*. Regarding one youth, Justice Clark overturned the lower court's decision acquitting the youth because there was insufficient evidence of his having "Indian blood". However, with regard to the second youth, Justice Clark upheld the lower court's acquittal because there was sufficient evidence of "Indian blood" and on a balance of all the factors used for determining whether the defendant had followed the "Indian mode of life" the court held that the defendant satisfied the test.

[175]. See discussion at pages 53-55.

approach to determining Aboriginal status is characteristic of what Marlee Kline terms the "ideology of static Indianness".

> Despite centuries of contact and the changed conditions of the lives of First Nations, "white" society constructs the "real" Indian as "the aborigine he [sic] once was, or as they imagine he once was, rather than as he is now." First Nations were defined historically by their assumed difference to "white's" and any adoption of "civilization" as defined by "white's" meant they could no longer be considered truly First Nations. [This ideology is] apparent, for example, in the judicial tendency to assume that First Nations people who live in urban environments are not "real Indians", since their way of life does not comport with stereotypical conceptions of aboriginal life prior to European contact.[176]

Interestingly, the Supreme Court of Canada, relying on the Royal Commission on Aboriginal Peoples Report, appears to now be more sensitive to the underlying racist nature of any analysis that reinforces the ideology of static Indianness. In *R. v. Gladue*[177] the court responded to an argument about the applicability of s.718.2(e) of the *Criminal Code* to a Métis woman that was denied the benefit of its application by the British Columbia Court of Appeal because she did not live within the Aboriginal community, but rather in an urban environment. The Supreme Court of Canada countered this argument by referring to passages in the RCAP report which state that Aboriginal identity is not a function of whether you live on a reserve or not. Identity is a more complex phenomenon. At its core identity involves a sense of belonging; "the bond to an ancestral community, and the accessibility of family, community [in the social sense] and elders." [178] Although this reasoning reflects an enlightened position, the SCC has yet to translate this understanding of Aboriginal identity in the Criminal justice context to the Court's analysis of Aboriginal rights doctrine. In other words, Aboriginal identity (for the purposes of s.718.2(e) of the *Criminal Code*) is not constrained to

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176. Marlee Kline, *supra* note 73.

177. *R. v. Gladue*, [1999] 1 S.C.R. 688.

178. *Ibid.* at ¶ 89-92. See also *Royal Commission*, *supra* note 168 at 521.

superficial surface differences stereotypical of Indian people, however, one's Aboriginal rights continue to be constrained to activities, customs and practices that existed prior to European contact and did not evolve as a result of European influence.

In another context, courts that have recently addressed the question of Aboriginal hunting rights of Métis charged with provincial offences, have steered away from any sort of cultural comparison analysis. In *R. v. Powley*[179], for example, the Ontario Superior Court defined a Métis person without any reference to cultural or racial factors. A Métis person, the Court held, is someone who,

> (a) has some ancestral family connection (not necessarily genetic),
>
> (b) identifies himself or herself as Métis and
>
> (c) is accepted by the Métis community or a locally-organized community branch, chapter or council of a Métis association or organized with which that person wishes to be associated.[180]

In formulating the above definition, the court relied on passages from the RCAP report and the Draft Declaration of the Rights of Indigenous Peoples that recognize as fundamental the principle of self-determination and self-identification of peoples.[181] Justice O'Neill specifically rejected any requirement that an individual must satisfy a "cultural means test." The court explains:

> Aboriginal rights are collective rights although each member of the collectivity has a personal right to exercise them. They are rights held by a collective and are in keeping with the culture and existence of that group. The aboriginal claimant must be a member of that aboriginal

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[179]. *R. v. Powley*, [1999] 1 C.N.L.R. 153 (Ont. Ct. Just. (Prov. Div.) (per Vaillancourt Prov. J.), aff'd [2000] O.J. No. 99 (Ont. Sup. Ct. Just., per O'Neill J.), aff'd [2001] O.J. No. 607 (Ont. C.A.). The Ontario Court of Appeal did not express an opinion one way or the other in terms of the definition of Justice O'Neill because the defendant's satisfied the more stringent test of the trial judge in any event and thus left the matter of what is the appropriate definition of the Métis for another day.

[180]. *Ibid.* at ¶ 70 (per Justice O'Neill)

[181]. *Ibid.* at ¶ 62-70.

> community, but each individual within that community does not have to meet an individual cultural means test. Such a test would be arbitrary and inconsistent with a purposive analysis of an aboriginal right protected within the meaning of s.35.[182]

The principles articulated for identifying who is a Métis and how Métis rights are to be proven in *Powley* were recently summarized and followed by the British Columbia Provincial Court in *R. v. Howse.*[183]

One of the recurring counter-arguments against the inclusion of the Métis as a beneficiary of the NRTA is that they are characterized both by outsiders and themselves as a separate and independent people distinct from Indians. As such, it is said then that it is quite logical for the drafters of the NRTA to treat them differently and exclude them from the provisions of the NRTA. Justice Wright in *Blais* and Justice Wakeling, in the minority judgment of *Grumbo,* emphasized this line of reasoning.[184] On reflection, this is not a compelling argument to warrant exclusion of the Métis from the benefit of the NRTA. There is no reason to question or be concerned about a threat to Métis collective identity by a finding that the Métis, as a group, are entitled to the protections under s.12 because they are "Indians" in a broad sense of the term. Likewise, the finding that the Inuit were "Indians" for the purposes of s.91(24) in *Re: Eskimos*[185] has not had any negative effect on their identity as Inuit. Inuit are proud of their separate and independent identity as

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[182]. *Ibid.* at ¶ 68.

[183]. *R. v. Howse*, [2000] B.C.J. No. 905 (Per Waurynchuck J.). In this decision, the court held that four self-identifying Métis individuals charged under provincial hunting regulations were acquitted because they possessed Aboriginal site-specific rights to hunt in the community they now belong to even though they may have come from or were raised in other parts of the country.

[184]. *R. v. Blais*, [1998] 4 C.N.L.R. 103 (Man. Q.B.) at ¶ 17-19, and *R. v.Grumbo*, [1998] 3 C.N.L.R. (Sask. C.A.) 172 at ¶ 69. For a critic of the *Grumbo* decision see Larry N. Chartrand, "Are We Métis or Are We Indians? A Commentary on *R. v. Grumbo*" (1999/2000) 31 Ottawa. L. R. 267. In this article, I argue that the Métis run the risk of losing their own identity and independence if we argue that we should be included with the meaning of the term "Indians" in the NRTA or s.91(24). However, in this thesis I argue that s.91(24) and the NRTA should be interpreted as referring to Indians as meaning Indian nations instead of as a single racial or cultural category. Consequently, if this perspective is adopted by the courts, I would no longer object to Métis inclusion within the term because the Métis would simply be one of the many Aboriginal collectives that the term "Indians" refers to and would therefore not prejudice Métis identity or independence.

[185]. *Reference Re Term "Indians"*, [1939] S.C.R. 104.

Inuit notwithstanding their constitutional inclusion as "Indians". The fact that the Métis see themselves as different from Indian peoples is no different in kind than the Cree seeing themselves as different from the Ojibway. "Indians", properly understood, refers to nations/sub-nations of peoples and not a singular "race" or "culture" of people. The Métis can properly be among those nations of peoples that are collectively referred to as "Indians" because they have similar political experiences *vis* a *vis* their interaction with the colonizers of this territory we call Canada. Their similarity with other Indian nations is essentially political and not cultural.

However, for the various reasons that I described earlier, the courts and legislatures have rarely understood the term "Indians" in the sense just described. Instead, the courts tend to view the term in a racial or cultural differences sense with an analysis that demarcates the category based on a cultural relativism model of analysis. The combined effect of this legal history on the interpretation of section 35 is profound. There is a marked hesitancy by the court to go beyond Aboriginal rights as simple manifestations of cultural activities to an appreciation of Aboriginal rights as belonging to distinct political groups of indigenous peoples. However, if Aboriginal rights are to have any relevance to Aboriginal communities, they must be protected in such a way that acknowledges the fact that the group that is benefiting from the protection is a social and political group that exists in the here and now. Although often teetering on the edge, the courts have consistently failed to go that extra step of incorporating the additional analysis of according the necessary political room for the management by the Aboriginal collective of the right. The exercise of a right is meaningless to a group if it cannot be interpreted in a manner that is consistent with the group's collective understanding of its history, language, relationship to its land and environment as expressed through subsequent generations from the past to the present

Paul Chartrand has recently observed that one of the implications of this failure to recognize a management role belonging to the community is the possibility of conflict and turmoil that may arise as competing interests vie for an increasingly

smaller part of the resource. He cites the recent *Marshal I* decision as an example of how this "vacuum of public regulation" contributes to crisis management. He explains:

> [The *Marshall* fallout] shows how critically important it is that immediate action be taken to resolve the questions of identifying the relevant rights-bearing communities and determining the legitimate and lawful source of regulatory authority over the exercise of Aboriginal group rights. The courts have not yet substantially addressed the issue, and the government seems content to sit back and manage crises.[186]

A large part of the reason for the court's inaction in dealing with the "regulatory role" of Aboriginal communities in the interpretation of Aboriginal rights is due to the "devaluation" of the political dimension that is inevitable when a cultural comparison model of analysis is employed by the courts to justify Aboriginal difference. Indeed, rather than promoting Aboriginal interests, emphasizing difference is more likely to restrain and restrict Aboriginal interests. David Schneiderman claims that the effect of relying on "theorists of difference" is the devaluation of Aboriginal claims to sovereignty or title as claims to cultural difference.[187] Such theories ignore the "Eurocentric suppositions of our colonial heritage which continues to justify Canadian sovereignty over Aboriginal peoples."[188] They fail to "to take fully into account the unwillingness of courts to invalidate the root assumption of colonization that continue to operate in the jurisprudence of Canadian Aboriginal law."[189] Thus, the hierarchical nature of Aboriginal - Canadian relations is reinforced by the judicial approach to defining Aboriginal rights that is strongly dependent on a cultural relativistic analysis. "The hierarchy of cultures and powers established at colonization remain

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[186]. Paul Chartrand, "Canada and the Aboriginal Peoples: From Dominion to Condominum" (Address to the Canadian Study of Parliamentary Group conference, 10, June, 2000) at 17.

[187]. David Schneiderman, *supra* note 118 at 36. Arguably, the same can be said of an Aboriginal rights analysis that accounts for the political dimension.

[188]. *Ibid.*

[189]. *Ibid.* at 46.

essentially intact."[190] Before we can examine alternatives to a cultural relativism model of analysis, it is useful at this point to examine further the nature of the hierarchical relationship that is now imbedded in Aboriginal rights doctrine.

The Hierarchy Imbedded in Aboriginal Rights Doctrine

In *Van der Peet,* Chief Justice Lamer made reference to the idea that Aboriginal rights doctrine is concerned primarily with "bridging" the different cultures of Aboriginal and non-Aboriginal peoples.[191] According to the Chief Justice, the process of reconciliation embodied in s.35(1) is designed to achieve this "bridging". Such a characterization of s.35 is certainly commendable if the "bridge" was level in the first place. It is not.

In order for fair and just reconciliation to take place, common sense suggests that both sides should be operating from relatively equal positions *vis* a *vis* the authority of the other. However, the Supreme Court of Canada has opted to interpret Aboriginal rights in such a way as to place Aboriginal peoples in a distinct disadvantage. This is evident not only in the ability of the Crown to justify its infringement of a Constitutional right, but it is also evident in the very test adopted by the Supreme Court in *Van der Peet* for proving Aboriginal rights in the first place.

Imagine that on one side of the bridge is the land called mainstream society. When mainstream society needs to develop certain lands, it need only demonstrate that the development is of substantial importance to the society. It is implicit in *Van der Peet,* that mainstream society's rights gain their validity in reference to its contemporary needs based on the perceived importance of the activity to mainstream society.[192] Now imagine what it is like on the Aboriginal side of the bridge. Here, the importance of an activity to

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190. *Ibid.*

191. *Van der Peet, supra* note 20at 199.

192. See generally, John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall Law Journal 537 at 567-574.

meeting the needs of a contemporary Aboriginal society is insufficient to warrant its recognition in the *Constitution*, let alone to oust any conflicting needs of the majority society. Apparently, only those "practices, traditions and customs" that can be traced to their pre-contact existence are able to warrant constitutional protection regardless of whether such "rights" meet the contemporary needs of the Aboriginal society.[193]

Such discrepancies in treatment between the needs of Aboriginal peoples and mainstream society in "reconciling" their interests is evidence of an unequal relationship. As Borrows observes:

> While Aboriginal peoples may use their title lands for a variety of purposes, the fact that this title is held by another places Aboriginal peoples in a position analogous to serfs, dependent on their lord to hold the land in their best interests.[194]

The legal relationship at present is more correctly characterized as hierarchical than level. This relationship is unlikely to change in the near future if Aboriginal peoples continue to be perceived as "distinct cultures or minorities" instead of as independent political communities entitled to the same level of respect and recognition as any other governmental authority (i.e. provincial and federal governments) that comprises the Canadian nation-state.

Section 35(1) has yet to be interpreted in such a way as to place Aboriginal peoples on an equal footing with mainstream Canadian society. The forces that prevent such a paradigm shift, however, are immense. As is evident from the forgoing discussion, colonial biases are well entrenched. These biases are manifested in the assumptions by

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[193]. *Van der Peet, supra* note 20 at 205. Professor Rotman has made the observation that to limit the definition of Aboriginal rights to "pre-contact practices prohibits the creation of new Aboriginal rights arising from the necessity to maintain the viability of distinctive Aboriginal cultures in the face of European interference with traditional Aboriginal ways of life." Leonard Rotman, *supra* note 151at 5. Professor John Borrows echoes similar concerns in a scathing account of the test adopted by the Supreme Court of Canada for proving an Aboriginal right in "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 American Indian Law Review 37.

[194]. Borrows, *supra* note 192 at 569.

the courts that the common law is the appropriate starting place for any analysis of Aboriginal rights. The courts have held that it is the common law that forms the basis of interpreting Aboriginal rights. In other words, mainstream society has a monopoly over the legal system that is to be the basis for "reconciling" Aboriginal and non-Aboriginal differences.[195]

The common law has a monopoly over interpreting section 35 because the Supreme Court of Canada has legitimized the unilateral assertion of Crown sovereignty[196] over the lands occupied by nations indigenous to North America. The idea that the English Crown could assert sovereignty without the consent of the indigenous peoples occupying the territory is a legal fiction that violates international law and the principle of equality of peoples.[197]

It is in part for these reasons that Peter Russell has argued that there are profound structural and ideological limitations on the Supreme Court of Canada as an agent of reconciliation. Firstly, the court is biased in that it is not truly independent because of the monopoly it has over decision-making. Secondly, the court does not question the

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[195]. Bruce Clark, *Eclipse and Enlightenement* (Listuguj: September 4, 1996) [unpublished legal opinion] convincingly argues that this issue was addressed as early as 1704 when Queen Anne ordered the creation of a special court, to be made up of judges who were not part of the newcomers' legal system (Order in Council, March 9, 1704). Queen Ann recognized that it would be illogical and unjust to grant jurisdiction to the courts of England over Aboriginal – newcomer legal disputes. As Clark remarked:

> [Queen Anne] held that as human beings the aboriginal people naturally have governments and dispute-resolution mechanisms, that is to say courts, of their own. And that it is false to pretend that the newcomers' court system, any more than the natives' court system, can ever be seen to be independent and impartial in a dispute between them.

[196]. Borrows, *supra* note 192.

[197]. Michel Youssef, *supra* note 11. This offensive concept has, to some extent, been lessened by the additional need for the Crown to prove "effective occupation" of territory to perfect its claim to sovereignty. Although less offensive, the acquisition of Aboriginal occupied lands by the combined requirements of overt official assertion and effective occupation remains a racist form of territorial acquisition to the extent that consent to the occupation was not given by the Aboriginal group being subjected to European colonial authority (assuming the other means of territorial acquisition under international law are not applicable). See also Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What it Didn't Have" in D. Drache and R. Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: Lorimer and Company Publishers, 1992).

assumption of sovereignty over Aboriginal peoples. "This is the hard residue of imperialism retained in the evolving jurisprudence".[198]

Thus, to argue Aboriginal rights presupposes the valid exercise of sovereignty over the territory in question by European colonial powers and their "continuators"[199]. Furthermore, this must be done within the sphere of the colonizer's legal system. This is a perspective of determining the rights of indigenous peoples that ignores the international legal personality of indigenous nations.[200] Consequently, the doctrine of common law Aboriginal rights is now arguably the only interpretative framework for assessing the merits of Aboriginal claims. As such, the indigenous peoples' laws and legal systems are not given equal status as a source of valid law in determining the rights of their peoples in relation to the settler peoples.[201] This use of "indigenous law" is not to be confused with the idea that indigenous laws are to be taken into account by the courts, but within and constrained by the dominant legal system of the Canadian State.[202] Thus, the "Aboriginal perspective" of their rights must first be filtered through the lens of the common law. Unfortunately, more often than not, this filter is not very porous - akin to filtering light through a brick wall.

Chief Justice Lamer identifies this hierarchy of legal systems in the following passage from *Van der Peet*:

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198. Peter Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence", (1998) 61 Sask. L. R. 247 at 274.

199. This term was coined by Mr. Miguel Alfonso Martinez, Special Rapporteur, *supra* note 71.

200. *Ibid.*

201. Henderson et. al., *supra* note 62 at 324.

202. Chief Justice Lamer has affirmed that the Aboriginal perspective must be taken into account. *Delgamuukw, supra* note 36 at 70. However, the Chief Justice fell short of recognizing such indigenous laws as "authoritative" in the sense that common law cases are authoritative. Instead, indigenous laws such as the "adaawk and knugax" submitted by the Gitskan and Wet'suwet'en in *Delgamuukw* were recognized only as "evidence" of the Aboriginal community's claim. Thus, indigenous laws are submerged within the dominant legal systems general law of "evidence". Their acceptance is based on a new rule within Canadian evidence law. Such laws are not given equal standing to other "rules" of Canadian law.

> Courts adjudicating Aboriginal rights must, therefore, be sensitive to the Aboriginal perspective, but they must also be aware that *Aboriginal rights exist within the general legal system of Canada.* ... The definition of Aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by Aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the Aboriginal perspective, *yet do so in terms which are cognizable to the non-Aboriginal legal system.*[203] (emphasis mine)

It is evident from this view that the legal systems of Aboriginal societies and the non-Aboriginal legal system are not to be reconciled with each other under a new and unique legal system combining legal principles from both societies into a singular logical and coherent combined source. Instead, the Aboriginal systems must do all the reconciling.[204] Aboriginal rights exist "within" the legal system of Canada and not equal to it.[205]

When section 35 of the Constitution was first enacted, there was an opportunity for the courts to go beyond the racist limitations of the common law doctrine of Aboriginal rights reflected in this superior/inferior dichotomy.[206] There is nothing

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[203]. *Van der Peet, supra* note 20 at ¶ 49.

[204]. Borrows, *supra* note 192 at 572.

[205]. Interestingly, traditional Métis justice systems are an example of how European and Indian approaches to justice can be harmonized into a separate and independent form of justice combining aspects from European and Indian concepts and processes. A well known historical example of such a development is the law and regulations established for the Métis colony of St. Laurent on the Saskatchewan. See Lawrence J. Barkwell, "Early Law and Social Control among the Métis" in Samuel Corrigan and Lawrence Barkwell, eds., *The Struggle for Recognition* (Winnipeg: Pemmican Publications, 1991) 7 at 19. A more contemporary model of Métis Justice which reflects the tendency of Métis peoples to "blend both their Aboriginal and European heritage to develop institutions that are unique to the Métis" is the "common law" rendered by the Métis Settlement Appeals Tribunal created under the *Métis Settlements Act*, S.A. 1990, c.M-14.3. See Catherine Bell, *Contemporary Métis Justice: The Settlement Way* (Saskatoon: Native Law Centre, 1999) at 113.

[206]. Robert Williams, *supra* note 67. Williams documents the colonization of North America and in particular looks at how legal principles were fashioned to justify the acquisition of territory by European states regardless of the indigenous nation's consent. Much of the law, he argues, is based on a perception of the American Indian as an inferior race, and hence incapable of understanding the moral imperatives of "civilized" society to Christianize and cultivate the land. Thus, the assumed obligation that the Europeans

in the wording of Section 35 that required the courts to adopt the pre-existing common law of Aboriginal rights (with its built-in assumptions of Aboriginal inferiority) as the framework for determining the nature and scope of rights recognized and affirmed. When s.35 was first enacted, there was a window of opportunity for the courts to adopt an interpretative paradigm that acknowledged the independent legal personality of indigenous nations within a consensual relationship of equality as between the indigenous societies and the settler societies.[207] Although the window of opportunity was *partially* closed with the introduction of the first decision to consider the ramifications of section 35 – *Sparrow*[208], it now appears that the window has been permanently shut with the subsequent decisions of *Van der Peet* and *Delgamuukw*.[209] Gordon Christie

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must "take care" of the Indigenous peoples provided the moral assurance to facilitate European expansion for economic purposes. Colonial law proved to be a most beneficial ally in this colonization effort.

[207]. Arguably, as we shall see in the next chapter, the application of the principles identified in the *Quebec Reference* case would have been appropriate to meet this level of respect for Aboriginal peoples.

[208]. The effect of section 35 on Aboriginal – Crown legal relations as paving the way for a more equitable framework was noted by Chief Justice Dickson and Justice LaForest in *Sparrow*, *supra* note 26. Indeed, they noted that section 35 came about after a considerable long and difficult struggle of negotiations between Aboriginal organizations and Canadian government politicians. In reference to this context, Dickson and LaForest quoted an essay by Professor Lyon which states:

> the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

However, later in the judgment, the two Justices seem to have forgotten this call for a more equitable and mutually respectful relationship between Aboriginal peoples and the Crown when they stated that "there was never from the outset any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown." (p. 177)

[209]. Some scholars would say that the window of opportunity to assert Aboriginal sovereignty has not yet been foreclosed. Michel Youssef, *supra* note 11, has convincingly argued that in the leading cases he examined the courts did not address the issue of competing claims to sovereignty, because to date, the Aboriginal claimants have, for the purposes of litigation, accepted the sovereignty of the Crown. Youssef concludes that the issue of an Aboriginal claim to sovereignty, rather than a common law right to title, has therefore never been judicially considered in an appellate court in Canada. And if it were, according to Youssef, the argument would have serious merit given the international and colonial law and state practice during the period of contact between indigenous peoples and Europeans.

Although recognition of full sovereignty would be the ideal position for Aboriginal peoples, much can still be achieved within a unitary concept of sovereignty possessed by the Canadian State by interpreting s.35 in the way outlined in this thesis. As Paul Chartrand recently noted, short of sovereignty, s.35 can be viewed

describes the combined impact of these later decisions as signalling the "closing of the 'post-colonial' promise held out in *Sparrow*."[210] According to Christie:

> A truly post-colonial stance would be one which recognized and accepted that Canada acted, and continues to act, as a colonial power, dispossessing peoples who had, and continue to have, prior legal and political status on the land lying within the boundaries of present-day Canada.[211]

Thus, we are constrained to apply a domesticated analysis of section 35 if Aboriginal peoples are to assert any form of collective rights. Any assertion of rights based on an equality of status between indigenous peoples and settler peoples must now be either sought outside the *Constitution*, or the courts must make a radical departure from existing assumptions about the legal status of Aboriginal collectivities. Although, Aboriginal peoples have much to gain by pursuing international remedies or sovereignty recognition domestically, this thesis is about providing an alternative framework for recognizing the "governing" role of Aboriginal communities in the interpretation of Aboriginal rights within the existing domestic Canadian constitutional structure.

The domestication of indigenous peoples' legal status may not have been all bad if the Court interpreted the nature of Aboriginal rights and title as flowing from a *whole* conception of Aboriginal legal personality which includes the political dimension (albeit within the domestic paradigm). Instead, the courts have chosen to apply legal tests for

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as the embodiment of "modern principles that require a sharing of governing authority and capacity within a condominium of Canada. These principles are derived from domestic constitutional amendments, judicial activism and also from the evolving norms in international law of human rights." See Paul Chartrand, *supra* note 186 at 17.

[210]. Gordon Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36 Osgoode Hall Law Journal 447 at 473.

[211]. *Ibid.* at 471- 472. Similar conclusions are also presented by Patricia Monture-Angus, *supra* note 116 at 109:

> I see little truly "new" in the way the Court has decided the *Sparrow* case. In fact, the decision follows very neatly the pattern that was established in early Aboriginal rights litigation. It is not revolutionary nor does it create significant constitutional space for Aboriginal aspirations to flourish. In fact, *Sparrow* creates more space for Canadian governments to continue to interfere with both constitutionally protected rights and Aboriginal aspirations.

claiming aboriginal rights that ignores the political dimension of their existence adding insult to injury. Aboriginal rights are narrowly conceived of as finding expression only in the cultural traits they traditionally exhibited and not on the basis of their existence as a dynamic socio-political society living in contemporary times.

Chapter Four: Incorporating the Political Dimension

Thus far, I have attempted to highlight the problems with the current thinking on the bench regarding the doctrine of Aboriginal rights. Cultural relativism based on racial/cultural distinctions reinforced by a colonial legacy of Euro-Canadian superiority and fuelled by liberal ideology and its difficulty to reconcile group rights with the predominate individual rights paradigm has proved to be a formidable barrier to the articulation of a theory of Aboriginal rights that respects their place in the management and control of the resources that often form the basis of Aboriginal rights. In addition, I have argued that the uncritical catergorization of Aboriginal peoples as minorities has also worked against such a holistic theory of Aboriginal rights protection.

Thus, one of the greatest obstacles for Aboriginal peoples' search for justice/equality is the lack of any legal recognition of the independent political dimension of Aboriginal existence in Canada. Recent legal analyses by various academics have consistently identified this omission as a fundamental problem with the court's current conceptualization of Aboriginal rights doctrine. These authors, although each framing the problem in slightly different ways, agree that the court's failure to acknowledge an independent political or jurisdictional quality to the Aboriginal right claimed, whether defined narrowly or broadly, remains the most serious obstacle to achieving a rational theory of Aboriginal legal status and rights in Canada.

The following are some of the implications of this continued failure:

- The denial of Aboriginal peoples' distinctiveness as independent political collectivities,
- The failure to allow Aboriginal peoples to evolve as a people which is a denial of fundamental human rights,
- An inability to realize that the current articulation of Aboriginal rights doctrine is, from a social-science perspective, an impossibility given the interdependent nature of the social and political dimension of human

societies, and that aspects of a society cannot be examined in isolation from society as a whole,

- Aboriginal rights doctrine masks colonial ideology and therefore strengthens discrimination thereby preventing the advancement of true equality for Aboriginal peoples, and
- The lack of recognition of a co-incidental authority to manage the "activities, traditions and customs" by the Aboriginal authority that is to derive benefit from the exercise of the right.

Legal academics have addressed the combined problems of race/cultural based thinking and judicial liberalism in several ways. In particular, I would like to highlight two approaches in the literature that attempt to provide alternative theories in defining Aboriginal rights in s. 35(1) of the *Constitution Act*, 1982. One approach takes a micro-level analysis of the court's omission to explicitly include the jurisdictional dimension of Aboriginal rights recognition. The other approach applies a more macro-level analysis based on the principle of equality of peoples and the inherent right of governance that accompanies the recognition of Aboriginal peoples as autonomous political entities.

The two approaches are very much like tackling the same problems but from different directions like opposite sides of the same coin. The first approach I would like to identify is that put forth by Professors Rotman and Borrows in an article entitled "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?"[212] In the article, the authors critique the development of Aboriginal rights jurisprudence. In particular they highlight the social insignificance to contemporary Aboriginal societies of "freezing" their Aboriginal rights to only include those "activities" that existed prior to contact. They also identify the problem of conceiving of Aboriginal rights narrowly, divorced from their relevance to the social and political reality of the Aboriginal society.

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[212]. John Borrows and Leonard Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference", (1997) 36 Alberta Law Review 9.

In response to the limitations of the current judicial conception of Aboriginal rights, Rotman and Borrows argue that Aboriginal rights must be conceived as having two distinct components.

> Clearly, if Aboriginal rights exist to secure physical and cultural survival, they cannot be ascertained exclusively by reference to pre-contact "Aboriginality". There are far more relevant aspects to the determination of Aboriginal rights. Aboriginal rights have two primary components, a theoretical and a material element. The theoretical element is a constant, and concerns the underlying purpose for the right in question – namely the contemporary cultural and physical survival of Aboriginal societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific. Therefore, ... rights which are integral to the distinctive cultures of Aboriginal societies are, simultaneously, universal *and* fact and site-specific.[213]

They argue that the *sui generis* principle of Aboriginal rights has the potential to provide the judiciary with a refocused vision of Aboriginal rights that includes both components of the right. Aboriginal rights are *sui generis* not because they are held by Aboriginal people, but "because Aboriginal peoples have laws, traditions, customs and practices which have developed, grown, changed - and been invented as Aboriginal people have struggled for physical and cultural survival in North America."[214] Rotman and Borrows argue that the *sui generis* principle, provided it is interpreted in the way it was originally intended, has the potential to provide the space in common law where the expression and protection of Aboriginal rights cannot be unduly interfered with by the canons of the common law.[215]

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213. *Ibid.* at 39.

214. *Ibid.* at 36.

215. *Ibid.* at 30-31.

It is no doubt a worthwhile objective by Rotman and Borrows to promote a more holistic interpretation of s. 35 by including the "theoretical component" into the test for defining an Aboriginal right. It is an approach that I strongly support and arguably one consistent with this thesis. However, even if a judge were to embrace the original intent of the *sui generis* concept, as explained by Borrows and Rotman, and follow their advice this would not necessarily address the role the courts have adopted in reconciling the Aboriginal right with the interests of Canadian society. The justification test of *Sparrow* would arguably still apply potentially limiting the Aboriginal right even though it is one that more fully incorporates the "theoretical" component advocated by Rotman and Borrows. A theoretical framework for interpreting Aboriginal rights must accomplish both the incorporation of the political dimension (theoretical component) into the definition of an Aboriginal right and also ensure that the Aboriginal claimants are not unduly prejudiced in the process of reconciliation. This second objective, I will argue later, can be addressed by the application of the principles articulated in the *Quebec Reference* case to the circumstances of Aboriginal peoples.

Professor Macklem has advocated a different approach to interpreting s. 35. To a certain extent, Professor Macklem presents an approach that addresses the shortcomings of Rotman and Borrows by placing Aboriginal peoples on an equal footing with other peoples in the distribution of sovereignty by relying on the fundamental principle of equality of peoples. He argues that the principle of equality of peoples when considered from both a formal and substantive analysis framework is essential in order to create the necessary legal space "in which a community can negotiate, construct and protect a collective identity."[216]

> [T]he justice of Indian government, in my view, rests on the justice of the distribution of sovereignty in North America, which in turn depends on whether and to what extent equality of peoples is respected. Equality of peoples refers to the outcome of a distribution among peoples of a good, in our case, sovereignty.... Formal equality supports the recognition of

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[216]. Patrick Macklem, *supra* note 117.

> Indian forms of government because it places Indian nations in the position they would have been in had they been treated as formal equals. By contrast, a justification of Indian government guided by substantive equality concerns does not look retrospectively. Instead, a focus on substantive equality looks simply to the present day material circumstances of a particular group and seeks to determine what remedy would best ameliorate those circumstances.[217]

Macklem asks the courts to inform their interpretation of s. 35 in "light of a prior more basic commitment to equality of peoples."[218] In this way, the claims of Aboriginal peoples would be rooted in the recognition of their prior sovereign status instead of their prior physical occupancy of the North American continent. This he argues would provide stronger ground for a claim to self-government. He explains:

> A claim of prior sovereignty in defense of Indian government is indeed a stronger claim than one based solely on the fact of prior occupancy because it intimates that something more than the use and enjoyment of land was lost and ought to be restored. Indigenous peoples lost the power to define and shape their identities freely. By focusing on the fact of prior control over individual and collective indigenous identities as opposed to prior occupancy, one finds a close nexus between the prior state of affairs and present Indian government. [219]

Macklem's approach does provide a theoretical basis for justifying the incorporation of the political component into the interpretation of s. 35 but from the perspective of a broad-based Aboriginal right to self-government. Unlike Borrows and Rotman, this approach would at the same time provide support against a process of reconciliation that places Aboriginal peoples in a less than equal position with mainstream society. Because Macklem's approach is based on the principle of equality of peoples, it mandates that the same level of respect be given to Aboriginal peoples as are given to governments representing mainstream interests. Indeed, adopting a broad-based all-inclusive

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217. *Ibid.* at 1335, 1362-1363.

218. *Ibid.* at 1366.

219. *Ibid.* at 1334.

Aboriginal right to governance (based on the principle of equality of peoples) would be inconsistent with the justification test that now gives the Crown a distinct advantage in balancing the interests of Aboriginal and mainstream Canadians. A true state of equality would not allow one party the opportunity to unilaterally justify an interference with the rights of the other party.

Unfortunately, the Supreme Court of Canada in the 1996 decision of *R. v. Pamajewon*[220] appears to have precluded, for the moment, any recognition of Aboriginal self-government as an independent broad-based right under s. 35.[221] We are faced with the principle, whether we agree with it or not, that claims for self-government as an Aboriginal right are no different from any other Aboriginal right claimed and therefore the same test ought to apply to claims involving a jurisdictional quality.[222]

Macklem's approach of a broad-based Aboriginal right to self-government would no doubt be the preferable approach. It would avoid the expensive and ineffective process of having to continually litigate each specific Aboriginal right that involves governance authority every time a First Nation needed to exercise authority over a given matter. It is also consistent with recognizing Aboriginal peoples as founding nations equal in status to the English and French. In this regard, it is also consistent with international developments regarding the rights of Indigenous peoples.[223] Yet, the Supreme Court of Canada is not prepared to accept anything close to resembling sovereignty because of the perceived threat

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220. *Pamajewon*, *supra* note 5.

221. Even *Campbell*, *supra* note 34 at ¶ 130 does not appear to directly challenge this conclusion. Instead, Justice Williamson distinguishes both the *Delgammukw* and *Pamajewon* claims to a broad-based right of self-government by noting that the "Nisga'a Treaty does not succumb to the failing of being 'excessively general'. Rather, it is a detailed document setting out precisely what powers and what limitations to those powers reside with each party."

222. For an excellent overview of the *Pamajewon* case see Bradford Morse, *supra* note 30.

223. Sharon Venne, *supra* note 12. The most prominent among international developments regarding Aboriginal peoples is the increasing acceptance that Aboriginal peoples are no less entitled to benefit from the right of self-determination as any other people. Although the debate is far from over, it does signal an increased acceptance by the world community of some form of international personality – whether such recognition includes a full right to self-determination or something less has yet to be decided.

to the existing status quo and the continued maintenance of a hierarchical colonial relationship.[224] Furthermore, Macklem's call for a broad-based right to governance is unlikely because of the narrow "activity or custom" specific nature of the Aboriginal rights test enunciated by the Supreme Court of Canada in *Van der Peet.*

However, the principle of equality of peoples can still inform a more narrow analysis of specific Aboriginal rights. The equality of peoples principle advocated by Macklem offers support to idea that Aboriginal rights must be viewed as concurrently comprising both a legal and a political dimension. Failure to recognize this dual aspect of Aboriginal rights doctrine is a failure to accord Aboriginal peoples with the dignity to manage their own affairs and interests. Continuing to interpret Aboriginal rights without the political dimension is to continue to perpetuate a colonial and paternalistic relationship and hence one that is fundamentally unequal.[225]

The similarity between Macklem and Rotman and Borrows is the insistence on recognizing Aboriginal peoples as first and foremost political communities and not as racial or cultural communities.[226] It is this recognition that must form the basis of any analysis dealing with Aboriginal rights. It is an approach rooted in the political authority of an independent actor. There is no need therefore to justify the Aboriginal right's existence by a cultural comparative and inherently arbitrary analysis. Based on a "political" approach, the question of rights would be based on the needs of the political entity (society) to promote itself in harmony

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224. See Borrows, *supra* note 192 and Henderson et. al, *supra* note 62.

225. Henderson, et. al., *ibid.* at 326.

226. See Macklem, *supra* note 117 at 1324-1325 wherein he refers to a number of authors such as Thomas Berger and Brian Slattery, as support for the proposition that Aboriginal peoples are political communities and not racial communities. He also refers to the Supreme Court of the United States in *Morton v. Mancari* 417 U.S. 535 at 553 (1974) wherein the court stated that a hiring preference to qualified Indians did not constitute racial discrimination because the "preference is political rather than racial in nature".

with other political entities that it must interact with. The relationship would be one that includes two or more equal, but autonomous units.

A useful analogy would be to compare the rights of independent nation states at international law. Equality is achieved between states because no one state can unilaterally compel another state to do an act against its own interests. Similarly, under the Canadian federation, the federal and provincial governments are equal as between each other in the exercise of their respective constitutional powers. The courts are vested with the power to interpret the "scope" of powers belonging to each level of government and to determine whether one government has gone beyond its jurisdiction. But the courts cannot say that, notwithstanding that the provincial government is acting within the scope of its authority, the federal government can still interfere because its interests are superior. This would be regarded as a classic example of the court going beyond its judicial role and into the political arena of re-drafting the division of powers provisions of the Constitution. This would be clearly unacceptable and in violation of the fundamental structure of the Canadian Constitution.

Likewise, if Aboriginal rights include a jurisdictional element, then the courts are restricted to interpreting the scope of the jurisdictional aspect of the right. Once the scope is determined and it is decided that the Aboriginal collective is operating within its jurisdiction, the court has no further role. It cannot subsequently justify the interference of the Aboriginal collective's authority by either the federal or provincial governments because in doing so, the court would be interfering with the political prerogative of the parties and again would be seen as re-writing the division of powers within the Constitution – in this case between s.35 and s.91 or 92 as the case may be.

The relevant difference is political not cultural or racial. The moment a group acts in concert for the collective welfare of the group, it has achieved the status of a political entity. It matters not the degree of indigenous (Ameri-Indian race) blood possessed by the group, or the extent of cultural difference between the colonizer and the colonized. The determining factor is the prior existence of the political group on a defined territory

before the unilateral acquisition of sovereignty by the colonizer. It is the existence of such a relationship that is the determining factor of whether a group is Aboriginal or not. The preferred definition of Aboriginal then is one that is based on political as opposed to racial or cultural factors.

The courts have not treated Aboriginal peoples as nations or autonomous political entities, rather, they have treated Aboriginal peoples based on cultural or racial differences. As a result, the reconciliation process has been one-sided to date. "Courts have read Aboriginal rights to land and resources as requiring reconciliation that asks much more of Aboriginal peoples than it does of Canadians."[227] This needs to change. What principles ought to guide the court to ensure that the reconciliation process is more balanced? Before we can answer that question, we need to further explore how the process of reconciliation as interpreted by the courts continues to reinforce colonial attitudes. In order to have a coherent theory of Aboriginal rights that includes the political dimension, it is also necessary that all vestiges of colonialism be removed from the definition of Aboriginal rights. The justification test first applied in *Sparrow* is clothed with the idea that the test is the means to reconcile Aboriginal interests with non-Aboriginal interests.[228] Yet, as we shall soon discover, it does more than provide a mechanism for reconciliation, it allows for the continued entrenchment of Aboriginal inferiority in decision-making about their rights and entitlements. To avoid this result, I argue that the principles of the *Quebec Reference* case must apply to interpreting Aboriginal rights in s.35 of the Constitution. Only with the application of these principles to the Aboriginal-Canadian relationship will the relationship be placed on a level bridge.

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[227]. John Borrows, *Domesticating Doctrines: Aboriginal and Treaty Rights, and the Response to the Royal Commission on Aboriginal Peoples* (Paper presented to the Conference on Building the Momentum – Implementing the Recommendations of the Royal Commission on Aboriginal Peoples, April, 1999) at 49. [unpublished]

[228]. *Sparrow, supra* note 4 at 180-181.

The Supreme Court of Canada has declared itself to be an "agent of reconciliation"[229] between Aboriginal peoples and non-aboriginal peoples in Canada. To a certain extent, this responsibility has been unwillingly foisted onto the court by the failure of past Constitutional talks to further delineate and define the meaning of section 35(1). The failure of these political negotiations has now resulted in the Supreme Court of Canada taking the leading responsibility in determining the legal and political nature of the relationship that will exist between Aboriginal peoples and Canadians.

Since *Calder*[230], Parliament has lost its leading position in the determination of important principles to guide Aboriginal and Canadian legal and political relations. With the advent of section 35(1), this leading role is now a constitutional imperative of the court. Increasingly, Parliament has, more often than not, found itself in a reactionary position as a result of court decisions. Parliament has become increasingly subject to a sort of political paralysis spending most of its energy in crisis management in response to Supreme Court decisions like *Delgamuukw* and *Corbiere*[231] and more recently, *Marshall*[232].

For some, the Supreme Court of Canada has to some extent been instrumental in protecting the collective interests of Aboriginal people from further erosion by a society that for most of its history promoted the erasure of Aboriginal peoples and their cultures. Although government no longer promotes this formal policy of assimilation of Aboriginal peoples, Aboriginal collective interests must constantly confront even greater obstacles that arise from the bedrock of liberal democratic thinking. In particular, the idea of Aboriginal peoples possessing rights distinct from the rights of Canadians as a

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229. Peter Russell, *supra* note 198 at 274.

230. *Calder v. Attorney-General of Alberta*, [1973] S.C.R. 313.

231. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 3 C.N.L.R. 19 (S.C.C.)

232. *Marshall 1 and 2, supra* note 55 and 39.

whole is often viewed as contrary to the fundamental right of equality of all individuals within society regardless of race, ethnic origin or other personal characteristics. Such ideas often come into direct confrontation with those that seek to affirm collective rights within the Canadian constitutional structure.

The Supreme Court of Canada, however, has failed to satisfactorily deal with the divisive nature of the tension between protecting collective interests and individual interests in the context of Aboriginal-Canadian relations. Not only has the Court failed to adequately deal with this tension, it has arguably magnified the tension by adopting an analytical approach to defining Aboriginal rights based on cultural differences. It is an approach that the court is no doubt comfortable with, as it has predominated judicial and government thinking for centuries. However, it is one that is logically and socially unsound and left unchecked will contribute more to inequality than equality. Its prevalence as a basis of decision-making regarding the rights of Aboriginal peoples has prevented the courts from articulating a coherent and holistic theoretical understanding of Aboriginal rights and the relationship of Aboriginal peoples and Canadians.[233] The long term implications may even result in the Court fueling the fire of social discord regarding the antagonism of certain segments of Canadian society to the idea of recognizing "special rights" for a particular "racial/cultural minority".[234]

Much of this thesis has been devoted to explaining why the court's approach to defining Aboriginal rights exemplified in *Van der Peet* and *Delgamuukw* is problematic in promoting social harmony in Canadian society. Not only is the approach taken by the Court one that is likely to increase social discord, it is also an approach that masks a continuing colonial relationship between Aboriginal peoples and the Crown. The hierarchical nature of Aboriginal – Crown relations is unquestioned by the court and has now become firmly imbedded in the interpretive structure given to section 35(1). Thus,

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[233]. Patricia Monture-Angus, *supra* note 116.

[234]. Witness the events in the Maritimes as a result of the Supreme Court upholding treaty rights to fish to make a moderate livelihood.

the doctrine of Aboriginal rights, although on its surface appears to protect Aboriginal difference and culture, may ultimately end in the destruction of these very communities.

The alternative analytical approach I argue will not only address the concerns of those people who are ideologically against treating groups of people differently because of race or ethnic background, but will also result in a leveling of the legal and political relationship between Aboriginal peoples and the Crown. At first glance, one might think that it is an impossible task to accomplish these goals because they appear to be directly opposable to each other. How can the same approach not only increase the political and legal autonomy of Aboriginal peoples and at the same time address the concerns of those who argue against any form of accommodation based on race or ethnic difference? I intend to argue that this dual goal can be achieved by an analytical approach that incorporates the political dimension of Aboriginal existence into the definition of Aboriginal and Treaty rights. It is an approach that interprets Aboriginal rights as including the recognition of an appropriate jurisdictional space for an Aboriginal political collectivity to effectively exercise and manage the activity, treaty benefit, or land entitlement that is suppose to benefit the Aboriginal group in the first place.

The approach that I advocate has the effect of reducing the significance of cultural or racial difference in the definition of Aboriginal rights and instead focuses on the need for rights that promote the continued political survival of Aboriginal peoples. To conservative minded individuals, distinctions made on the grounds of political authority instead of racial/ethnic grounds are routinely regarded as acceptable and do not offend the principles of individual equality.[235] Theoretically, the construct of political authority is devoid of any contextual relationship to racial or ethnic characteristics.[236] If Aboriginal peoples are recognized as possessing legitimate political authority, then there is no logical basis for treating such political authorities differently from any other

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[235]. See *Morton v. Mancari, supra* note 226 where the United States has acknowledged that the appropriate distinction between Aboriginal peoples and non-Aboriginal peoples is political in nature. Justice Blackburn argued that preferential treatment of Indians does not run afoul of due process and equal protection because the "preference is political rather than racial in nature".

[236] Richard Sigurdson, *supra* note 96.

political authority. Any differences in authority will arise out of the needs of ensuring harmony within a federal society and on the outcome of principled negotiations between the respective political authorities that are a part of the Canadian federation.[237]

The principles recently articulated by the Supreme Court of Canada in the *Quebec Reference* case are not only useful in guiding relations between Quebec people and the rest of Canada, they are also useful as guides in interpreting the Aboriginal and Treaty rights provisions in the Constitution. The give and take of the political actors will ultimately determine the nature of the relationship between Aboriginal peoples and Canadians and not the courts. Such principles promote respect and harmony between "peoples".

Understanding the Limits of Judicial Power in Plural Societies

It is, however, the justification test that continues to be the greatest barrier towards reaching the desired goals of respect and harmony for Aboriginal peoples. Not only is the justification test, as first declared in *Sparrow*, a reflection of the unequal relationship, the test has been expanded upon by the Lamer Court in recent years to allow for greater scope for the government to interfere with Aboriginal rights.[238]

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[237]. The principles of ensuring harmony in a federal state by the promotion of principled negotiations are part of the unwritten fundamental principles that define the Canadian Constitution. The Constitution also embraces unwritten, as well as written rules. As the court stated in the *Quebec Reference*, *supra* note 8 at ¶ 49:

> Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based... [They are]: federalism, democracy, constitutionalism and the rule of law and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

[238]. *Delgamuukw*, *supra* note 36 at 78. For a scathing criticism of this development see Borrows, *supra* note 192 at 568.

Certain members of the Supreme Court of Canada, notably Justice McLachlin, were not blind to the trend being pursued by the Chief Justice in expanding the matters that can justify interference by the government. In *Van der Peet*, Justice McLachlin wrote a very strong and bitter dissenting opinion criticizing the approach taken by the majority in regards to a number of concerns with the justification test advocated by the court.

Justice McLachlin described the Chief Justice's test as permitting the constitutionally protected Aboriginal right to essentially be "conveyed by regulation, law or executive act to non-Native fishers who have historically fished in the area in the interests of community harmony and reconciliation of Aboriginal and non-Aboriginal interests. ... The only requirement is that the distribution schemes "take into account" the Aboriginal right."[239]

In other words, the Chief Justice's proposal allows the Crown to convey a portion of an Aboriginal right to others,

> not by treaty or with the consent of the Aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard Aboriginal rights and property. But my concern is more fundamental. How, without amending the constitution, can the Crown cut down the Aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from Aboriginal to non-Aboriginals, would be to diminish the substance of the right that s.35(1) of the Constitution Act, 1982 guarantees to the Aboriginal people. This no court can do.[240]

From Justice McLachlin's perspective, it would seem that Chief Justice Lamer has taken the task of "agent of reconciliation" to lofty new heights previously unheard of in a constitutional democracy. Not only has the Chief Justice seen fit to endow the Supreme Court of Canada as an agent of reconciliation (an authority that goes beyond mere

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239. *Van der Peet, supra* note 20 at 280.

240. *Ibid.* at 283.

application of the common law to include political considerations), he has also saw fit that the court's role in reconciliation also justifies re-writing the Constitution itself!

For Justice McLachlin, the majority's approach has largely allowed the Crown to avoid a more fair and equitable process of political reconciliation by weakening the bargaining position of Aboriginal peoples. To allow the Crown to so easily over-ride Aboriginal rights by the justification test adopted gives an unfair advantage to the Crown. The Crown has little to lose in not going to the negotiation table where "reconciliation" should ideally take place.

> Traditionally, [reconciliation] has been done through the treaty process, based on the concept of the Aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests.... At this stage, the stage of reconciliation, the courts play a less important role. ... It is for the Aboriginal peoples and other peoples of Canada to work out a just accommodation of the recognized Aboriginal rights. ... Until we have exhausted the traditional means by which Aboriginal and non-Aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode Aboriginal rights seriously.[241]

The role of the court as agent of reconciliation appears to have significantly usurped the responsibilities from the parties themselves to come to some sort of mutual reconciliation of their interests. This is not a desirable or befitting role for a court of general appellate jurisdiction. As Justice McLachlin explains, the court is ill equipped to undertake such inherently political responsibilities.

> A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on

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241. *Ibid.*

> doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be expected, the Chief Justice suggests, not to be overly strict in their review; as under s.1 of the Charter, the courts should not negate the government decision, so long as it represents a "reasonable" resolution of conflicting interests. This, with respect, falls short of the "solid constitutional base upon which subsequent negotiations can take place" of which Dickson C.J. and LaForest J. wrote in Sparrow...[242]

Perhaps it is with these concerns in mind that the Royal Commission on Aboriginal Peoples opted to emphasize in its report political reconciliation rather than to place such responsibilities of societal reconciliation in the "unsteady hands of judicial interpretation"[243]

However, none of the important structural recommendations proposed by the Royal Commission have yet been implemented.[244] Thus, until such changes are implemented, judges will continue to possess considerable discretion but without any clear guidance to aide in their interpretation of section 35(1). As Professors Borrows and Rotman declare: "without more concrete interpretative tools, there is a real danger that the undefined nature of Aboriginal rights as *sui generis* creates a situation where discretion is merely shifted from one institution to another within the colonial structure."[245]

Given the socio-economic backgrounds of most judges and the historical record of the courts in defending colonial institutions, such discretion is generally not perceived as a good thing from the Aboriginal point of view. In fact, the court is often perceived as

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[242]. *Ibid.* at 281. These views also echo those of Justice O'Sullivan in *Dumont, supra* note 102.

[243]. David Schneiderman, *supra* note 118 at 46.

[244]. For example, some recommendations that call for implementing processes that will facilitate an equal partnership between Aboriginal peoples and Canada have not as yet been considered by governments. For example, the issuance of a new Royal Proclamation and companion legislation that would expressly state the fundamental principles to guide Canadian – Aboriginal relations has yet to be seriously considered by Canada. The Standing Senate Committee on Aboriginal Peoples recently commented at length about the lack of a legal framework for guiding negotiations and implementing agreements. Standing Senate Committee on Aboriginal Peoples, *Forging New Relationships: Aboriginal Governance in Canada* (Ottawa, Senate of Canada, February, 2000) (Chair: Honorable Charlie Watt) at 4-35.

[245]. John Borrows and Leonard Rotman, *supra* note 212 at 33.

having a built-in bias against Aboriginal peoples' claims.[246] On the other hand, Chief Justice Lamer has recently stated that such broad judicial discretion ought to not be seen as a cause for concern, but welcomed. He predicts that the Royal Commission Report on Aboriginal Peoples will likely influence judges in areas of judicial discretion in the same way that the Law Reform Commission's past reports and recommendations have, in other areas of law, influenced judges, "particularly in deciding difficult issues of principle under the *Canadian Charter of Rights and Freedoms*."[247] What Justice Lamer may have forgotten is that the majority of the principles advocated by the Royal Commission are not new. The principle of a true nation to nation relationship was one that served the purposes of early Aboriginal – European relations quite well.[248] This principle was reflected in numerous treaties, yet it is a principle that has been forgotten in the more recent past.

Professor Borrows has recently compared the recommendations of the Royal Commission regarding Aboriginal title with the Supreme Court of Canada's definition of Aboriginal title in *Delgamuukw*. He speculates that the Supreme Court of Canada was influenced by the Royal Commission's views on the nature of Aboriginal title because of the apparent convergence of the court to be more in line with the Royal Commission's view on Aboriginal title. There is no doubt that the Court's definition of Aboriginal title is, in some respects, substantially greater than previous cases had recognized.[249] But, at the same time, the Supreme Court stops considerably short of the mark in terms of embracing the full spirit and intent of the Royal Commission's call for a renewed relationship of equality and respect.

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246. See for example the discussion of the courts' treatment of treaties in Royal Commission on Aboriginal Peoples, *supra* note 21at 22 – 50.

247. Antonio Lamer, C.J.C., Speaking Notes (paper presented to the Conference on *Building the Momentum – Implementing the Recommendations of the Royal Commission on Aboriginal Peoples*. April 23, 1999) at 2 – 3.

248. See for example, Dickason, *supra* note 66 at 63 -137.

249. John Borrows, *supra* note 227 at 32. Professor Borrows provides an excellent overview of the difference in treatment between the Supreme Court of Canada and the Royal Commission regarding the definition of treaties and Aboriginal title.

> The Crown's tautological assumption of underlying title limits Aboriginal choice in a most profound way because it has been interpreted to require the reconciliation of Aboriginal title with the assertion of Crown sovereignty, and therefore Crown use of land. Underlying Crown title diminishes Aboriginal title ... because most Crown uses may be sufficient to displace Aboriginal use... The Royal Commission did not foresee the development of a concept of Aboriginal title that was so fully, and in my opinion unfairly, referenced to the interests of other Canadians.[250]

It might be argued that the Supreme Court of Canada really has no choice but to legislate given the broad wording of section 35(1) and the failure of the government and Aboriginal parties to mutually agree on any clarification of the meaning of the provision. In this respect, the court's active role in "creating" law is seen as necessary and is most evident in the justification analysis of the Aboriginal rights test.[251] However, failure of the parties to come to an agreement on the precise nature and scope of the rights protected in s.35 does not mean that the courts are free to provide one party with the ability to side-step the bargaining process by allowing constitutionally protected rights of one of the parties to be unilaterally diminished by the other without a provision like s.1 of the *Charter* to validate such interference. Such judicial creativity is neither warranted, necessary or desirable.

In other contexts where constitutional rights have been violated outside the *Charter*, the Supreme Court of Canada did not feel compelled to "read in" a means for the government to nonetheless justify its infringement.[252] The French language protection in the *Manitoba Act*[253] is an example of a constitutional right outside the *Charter*. A challenge was brought against the Manitoba government for violating a provision of the *Manitoba Act* that required laws to be enacted in both French and English. Manitoba had failed to comply with this provision for many years. The Court found that Manitoba had violated

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250. *Ibid.*

251. Peter Russell, *supra* note 198 at 273.

252. *Reference Re Language Rights Under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1.

this provision. In making it's finding the Court did not feel compelled to address any argument that Manitoba could *justify* its infringement of the constitutional right. Rather, the court applied s.52 to declare all laws not in French null and void. The court did not feel compelled to "read in a s.1 type clause" that would have allowed the province of Manitoba to justify its infringement of a constitutional right. According to accepted constitutional interpretation principles, such a remedy does not exist save section 1 as it applies to the *Charter of Rights and Freedoms*.

According to Professor Hogg, section 52(1) is applicable to the entire Constitution including section 35(1). Section 52(1) states as follows:

> The Constitution of Canada is the supreme law of Canada, and any law that inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[254]

Peter Hogg concludes that section 52(1) confers no discretion on the court. If a law is found to be inconsistent with the constitution, the law must be declared invalid and "gives the court no choice in the matter."[255] The remedies that a court can draw upon to deal with inconsistent legislation are limited.[256]

The authority to allow interference by the Crown in certain circumstances is not one of the remedies allowed by s. 52(1). The court has, on occasion, under the doctrine of reconstruction been asked to read into the legislation safeguards to comply with the Constitution's standards. However, in *Singh v. Minister of Employment and Immigration*[257] the power of the court to reconstruct legislation is very limited. "It is not the function of this Court to re-write the Act. There may be occasions for the court to

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253. *Manitoba Act, 1870*, 33 Victoria, c.3 (Canada).

254. Peter Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at 905.

255. *Ibid.*

256. They include to the following: Reading down, Reconstruction, Constitutional exemption, Extension, and Temporary validity. *Ibid.* at 905.

257. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

conduct 'crude surgery', but not 'plastic or re-constructive surgery'".[258] Outside the *Charter*, there certainly is no power to authorize infringement of constitutionally protected "collective" rights where the public interest is of "sufficient importance". In the words of Justice McLachlin, in *Van der Peet*:

> [T]he Chief Justice's approach might be seen as treating the guarantee of Aboriginal rights under s.35(1) as if it were a guarantee of individual rights under the *Charter*. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the *Charter*, this is appropriate because the Charter expressly states that these rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." However, in the case of Aboriginal rights guaranteed by s.35(1) of the Constitution Act, 1982, the framers of s35(1) deliberately chose not to subordinate the exercise of Aboriginal rights to the good of society as a whole. ... To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s.1 into s.35(1), contrary to the intention of the framers of the constitution.[259]

At most, if a legislative provision violated an Aboriginal right under s.35(1), the court could allow temporary validity until such time as the legislation was remedied to comply with the right or in the unique case of Aboriginal peoples, by negotiations which could incorporate any restrictions of the right as part of a treaty and thus referentially incorporated into the Constitution itself. In no other circumstances, but s.35(1), has the court found it necessary to read into the Constitution an analogous s.1 justification remedy to shelter what is otherwise clearly unconstitutional legislation.

In *Delgamuukw*, the Court seems to backtrack somewhat, perhaps in realizing the implications of *Van der Peet* of having the court become too zealous in its self-proclaimed role as agent of reconciliation - a role that more logically belongs to the parties themselves to perform. The last word by Chief Justice Lamer in *Delgamuukw* emphasizes a preference for negotiations. He states:

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[258]. *Ibid.* at 236.

> As was said in *Sparrow*, ... s.35(1) "provides a solid constitutional base upon which subsequent negotiations can take place"... Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, to be a basic purpose of s.35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.[260]

This judicial advice appears to move more in the direction originally advocated by Justice McLachlin in *Van der Peet* regarding the priority to be given political reconciliation over judicial reconciliation. As described earlier, Justice McLachlin would like to see the judiciary playing more of a back seat position. In *Delgamuukw*, Lamer C. J. seems to also imply that this is the preferred role of the court. The difference, however, between Justice McLachlin and the Chief Justice is that Justice McLachlin's opinion regarding the justification stage of analysis is more in line with the spirit and intent of s.52(1) of the Constitution. Her position would have a stronger impact in forcing the parties to negotiate in light of an Aboriginal right being infringed by the Crown. Whereas Chief Justice Lamer's justification analysis allows the Crown to justify its infringement in the interests of the public as a whole provided that the Crown has satisfied the minimum "consultation" requirements with the Aboriginal claimant. McLachlin's approach places the Aboriginal party more on an equal footing requiring the Crown to negotiate with the Aboriginal claimant if it wants to achieve its objectives. Lamer's approach ultimately only requires a degree of consultation with the Aboriginal claimant, although admittedly "in some cases" full consent may be required. Thus, Lamer's preference for negotiation is just that – a preference. McLachlin, however, would place such negotiations as a constitutional necessity if reconciliation were to take place.

According to Justice McLachlin, the role of the court should be more of a monitor of fair process, not unlike the role of the court adopted in the *Quebec Reference* case. The *Quebec Reference* case is another example where issues fundamental to the relationship

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259. *Van der Peet, supra* note 207 at 280 –281.

260. *Delgamuukw, supra* note 36 at 86.

between different peoples in Canada are addressed. Yet, in the *Quebec Reference* case, the court took a decidedly different approach in terms of the appropriate role of the court in reconciling such differences.

A close comparison between the rights of Quebec and the rights of Aboriginal peoples may seem unconvincing at first. After all, how do you compare the rights of a province, as expressed by a clear majority of the population, and the rights of Aboriginal peoples contained in the Constitution? Granted, there are significant differences between the right of Quebec to succeed and the rights of Aboriginal peoples in s.35(1). However, there are common threads between the circumstances faced by the Quebec population and Aboriginal peoples that warrant closer scrutiny.

Both Aboriginal peoples and Quebecois desire to pursue their own unique and distinctive cultures without undue interference by a government perceived as representing the interests of a foreign and culturally distinct majority population in Canada. Both the interests of Quebec and Aboriginal peoples involve questions of constitutional interpretation in regards to the collective rights of a people(s) and how those collective rights *fit* into the overall constitutional framework of Canada or not.

In the case of Quebec, when faced with the question of secession within the context of the Canadian constitution, the court has held that the underlying principles of federalism, democracy, constitutionalism and the rule of law and respect for minority rights require that good faith negotiations between the various parties must be undertaken.[261]

The rights of Quebec in the case of a clear majority wishing to secede are equivalent to the rights of the federal government under the Constitution. The right of Quebec to secede is based on the unwritten but fundamental constitutional principle of democracy and the right of the federal government to maintain the current federal composition is

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[261]. *Quebec Reference, supra* note 8 at ¶ 88.

based on constitutionalism and the rule of law. In such circumstances, the court held that:

> [N]one of the rights or principles is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require *reconciliation* of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other.[262] (emphasis mine)

In addition, the Supreme Court of Canada discussed the proper role of the court in this "reconciliation" process. The court's discussion of this role is, I believe, directly relevant to the proper interpretation that ought to be given s.35(1) of the *Constitution Act, 1982.*

> If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions that, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The *reconciliation* of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that *reconciliation* can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.[263] (emphasis mine)

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262. *Ibid.* at ¶ 93.

263. *Ibid.* at ¶ 101.

In both the context of Aboriginal peoples and Quebec, there are legitimate constitutional rights and principles being asserted that conflict with the interests of Canadians as a whole. In such comparable circumstances, how can the Supreme Court of Canada take an approach that denies the Aboriginal peoples of Canada less protection than Quebec? In the case of Aboriginal peoples, if there is a conflict between a constitutionally protected Aboriginal right and the Crown, why is it that the Crown has the authority to "trump" the Aboriginal right in the interests of Canada as a whole, while in the case of Quebec's assertion of sovereignty, the interests are equal as between Quebec and the Crown thus requiring an obligation on the parties to conduct principled negotiations?

The Supreme Court regards mere "consultation" as opposed to "negotiation" acceptable to protect the constitutional rights of Aboriginal people, whereas in the context of Quebec secession, the constitutional right gives rise to a requirement for good faith negotiations and nothing less will suffice. This ensures equal status between the parties which is not the case in the context of Aboriginal rights. Arguably, however, the same principles of federalism, democracy, rule of law and protection of minorities identified in the *Quebec Reference* case for resolving questions involving constitutional amendment should be equally appropriate for interpreting s.35(1). In answering these questions, however, the Court may have to ask the further and perhaps more troublesome question of whether Aboriginal peoples are entitled to the same level of respect as the provinces.

In my opinion they are. Certainly, applying the principles of the *Quebec Reference* case to Aboriginal-Canadian relations is an approach that is consistent with the recognition of Aboriginal political equality with Canada's other sub-national political units. Unfortunately, the Supreme Court of Canada continues to wear colonial blinders when it comes to considering issues of Aboriginal political equality.

Conclusion

Paul Chartrand recently stated that the recognition of Aboriginal self-government might come from the development and application of the *Quebec Reference* case to the doctrine of Aboriginal rights.[264] He suggested that the unwritten principles of the Constitution identified in the case "offer rich prospects for the development of the right of self-government."[265] Indeed, Chartrand predicts that the *Quebec Reference* case "might be seen in retrospect as the most important Aboriginal rights case in history."[266] It is certainly a welcome prospect if the *Quebec Reference* case can assist in the recognition of a general right to self-government. But this is unlikely given that *Pamajewon* requires a narrowly defined analysis of Aboriginal right claims involving governing authority.

Nonetheless, the principles of the *Quebec Reference* case are still important in the interpretation of fact and site-specific Aboriginal rights that, properly interpreted, include a political dimension to their recognition. Thus, what the court must come to accept is that any decision regarding Aboriginal rights must be accepted as also involving a decision about the boundaries of government control and jurisdiction regarding the protected Aboriginal activity. The right and the ability to exercise a degree of control over the right cannot be separated where the rights holder is a political community and not an individual citizen. Only in this way can the recognition of the right be true to its inherent collective nature. When dealing with rights of this nature, there is inherently a political dimension involved as there must be a determination of the jurisdictional boundaries as between the Aboriginal, federal and provincial authorities. Such determinations will involve considerations of many factors including economic circumstances, fiscal relations, internal community capacity, community identification, municipal relations, and inter-government protocols and policies to name but a few. These questions are not unlike the multitude of complex questions that would have to be

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264. Paul Chartrand, "Speaking Notes" *supra* note 84.

265. *Ibid.* at 13.

266. *Ibid.*

resolved in the face of a clear majority of people in Quebec wishing to secede from Canada. They are political questions that the judiciary, as third branch of government, has no legitimate role to play.

Once the right is recognized, the principle of equality of peoples demands that the court take a back seat to the reconciliation process. As the *Quebec Reference* case states, once a right possessed by one legitimate political entity conflicts with the rights of another legitimate political entity under the Constitution of Canada, the underlying principles of the Constitution oblige each party to enter into good faith negotiations to reconcile their differences. The court's role is limited to that of ensuring that the process is fair and nothing more. It is improper for the court to place its own views of what is in the best interests of one party or the other to achieve a reconciliation of such differences.

Such a holistic approach to interpreting s.35 need not threaten the foundations of a liberal democracy like Canada. It may mean, however, that citizenship within Canada cannot be based on any shared socio-cultural identity.[267] Richard Sigurdson, in a very interesting and thoughtful article, explains that there are two competing ideologies operating in Canada. The first he describes as liberal universalism, with its "vision of society as an agglomeration of competing individuals". It represents the idea of an "abstract individual above any collective or communal identity." The other competing ideology he refers to as the forces of "exclusivity and particularism". This ideology affirms group differences, "emphasizing that which distinguishes some people from others." According to Sigurdson, there is a need to find a "middle ground" between these two competing ideologies that all Canadians can live with.

> The hope is that there might be some way to get people to form an allegiance to a political community that avoids, on the one hand, an uncompromizing appeal to individual rights with an insistence upon absolute equality of citizenship or, on the other hand, an unbending conformity to a stifling parochialism.[268]

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[267]. Richard Sigurdson, *supra* note 96 at 73.

[268]. *Ibid.*

He argues that the middle ground or the third way as he puts it can be achieved if we all agree to consent to some form of political culture in which individuals and groups were attached to a "civic" identity and not an ethnic one. We should understand that there is no shared vision of Canada (i.e. common values, heritage and symbols), but there is a basis for an understanding of the country in terms of *staatsnation* (legal forms). Rather than focusing attention on "ethnic-genealogical" nationalism, we should focus on "civic-territorial" nationalism. This would involve "construction of a few agreed-upon processes, institutional arrangements and so on, through which we can individually and collectively filter our conceptions of who we are and who we might be".[269] Could the underlying principles of our Constitution, along with the required obligation to negotiate when faced with the legitimate interests of another political community, identified in the *Quebec Reference* case, be those "agreed-upon processes"?

Moreover, if Aboriginal rights are collective rights and that recognition of an Aboriginal right implies recognition of Aboriginal political authority over the exercise of that right then (in echoing the words of Justice McLachlin in *Van der Peet*), where in the Constitution does it say that the decisions of the federal or provincial governments should trump the decisions of the Aboriginal political authority? To recognize the authority on the one hand and then to deny its meaningful exercise on the other hand is akin to not recognizing it at all. It is a hollow right and a continuing denial of respect for Aboriginal peoples.

Of course, one might reasonably ask how it is possible to survive in a society where, in the case of substantive conflict, there is *no* ultimate decision-maker. In reply, one need only look to other "environments" where there is no ultimate decision-maker such as the international environment of nation States. Where conflicts are anticipated to arise, the parties mutually agree on the mechanisms and means of resolving disputes such as arbitration panels.

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[269]. *Ibid.*

It must be remembered that any conflict between Aboriginal and non-Aboriginal governments is a conflict between Aboriginal group rights and Canadian group rights. This is a qualitatively different conflict than those that arise between governments and individual rights. The courts, as affirmed in the *Quebec Reference* case, have no legitimate authority to interfere at this level of *political* decision-making. The limitations on the exercise of an Aboriginal right, since it includes the jurisdiction to manage the right, is internal to the Aboriginal collective and where the right conflicts with the rights of other Canadians, then the only resolution to such conflict must be by political compromise.

Only a radical reconstruction of the constitutional common law of Aboriginal rights along the lines of the principles in the *Quebec Reference* case will address the courts failure to come to terms with the political dimension of group rights belonging to Aboriginal peoples. Otherwise, the result will be the courts continuing to give lip service to the concept of collective rights through the adoption of a cultural differences/minority characterization analysis which places Aboriginal peoples in an inferior position within a liberal democracy like Canada. This approach renders less meaningful and virtually obsolete the political character of indigenous peoples as peoples, (not as mere agglomerations of individuals with similar traits) who have responsibilities and obligations to protect and govern their own society in ways that they feel will meet their contemporary collective needs. The recognition of an Aboriginal or Treaty right is not *just* the recognition of a *right*, but also the recognition of a *right* and *jurisdictional space*. Because of this dual character of s.35 rights, they are fundamentally unlike *Charter* rights.

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