

Rethinking *R v Van Der Peet*: Western Metaphysics,
Deconstruction, and Hospitality

by

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Abstract

This thesis explores the metaphysical structure underlying the Supreme Court of Canada's approach, developed in *R v Van der Peet*, to recognizing and affirming Aboriginal rights under s 35(1) of the *Constitution Act, 1982*. Drawing on the work of philosopher Jacques Derrida, particularly his strategy of deconstruction, I demonstrate how the Court adopts an approach that relies on metaphysical conceptions of history and culture. Specifically, the Court reduces these concepts to essential features, which elide their irreducible complexity. This study finishes with tentative solutions for better addressing that complexity. In particular, this project encourages a two-way engagement between the Court and the Aboriginal peoples of Canada that is characterized by mutual hospitality. This project also encourages continued self-reflection on the part of the Court, particularly through the use of deconstruction. Hence, this thesis promotes an approach that moves from theory to practice to theory.

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Chapter 1 Introduction

1 Overview

The enactment of s 35(1) of the *Constitution Act, 1982*,¹ initiated a dramatic shift in the way the Supreme Court of Canada (the “Court”) approached the issue of Aboriginal rights.² Section 35(1) reads: “The existing Aboriginal and treaty right of the Aboriginal people of Canada are hereby recognized and affirmed.”³ At a series of constitutional conferences from 1983 to 1987, participants proved unable to agree on a definition for “existing Aboriginal and treaty rights” under s 35(1).⁴ The task of interpreting the phrase was therefore left up to the Court.

It was not until the 1996 decision of *R v Van der Peet*⁵ that the Court addressed this issue. An enormous amount of scholarship has been generated in the wake of that case. Yet, little attempt

¹ Schedule B to the Canada Act 1982 (UK), 1982, c 11.

² Jonathan Rudin, “One Step Forward, Two Steps Back: The Political and Institutional Dynamic Behind the Supreme Court of Canada’s Decision in *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia*” (1998) 13 *JL & Social Pol’y* 68 [Rudin, “One Step Forward”].

³ *Constitution Act, 1982 supra* note 1, s 35(1).

⁴ Kent McNeil and David Yarrow, “Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?” (2007) *SCLR* (2d) 177 [McNeil and Yarrow, “Aboriginal Rights Adversely Affected”].

⁵ [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]. *Van der Peet* was actually the second decision in which the Supreme Court of Canada was faced with a section 35(1) claim. The first case was *Sparrow infra* note 12 in which the Court laid out the general framework for approaching a section 35(1) claim. However, in that case, the Court did not set out the analysis for determining the existence of an Aboriginal right, as the existence of a right in that case was not a serious point of contention. Hence, the question of how to determine whether an Aboriginal right exists was left to *Van der Peet*.

Van der Peet should also be distinguished from other tests for determining the existence of rights under section 35(1). The case of *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 established the test for determining the existence of Aboriginal title. The case of *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513 laid out the approach for determining whether a treaty right exists. *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 created the test for recognizing Métis rights under s 35(1). *Van der Peet* is thus limited to non-treaty and non-title rights of non-Métis Aboriginal peoples in Canada.

has been made thus far to inquire into the metaphysical presuppositions underlying the Court's methodology.

What I am referring to when I use the term "metaphysics" are presuppositions about the basic or fundamental nature of concepts like history and culture. More specifically, I am adopting Jacques Derrida's use of the term metaphysics as "the determination of Being as presence in all senses of this word."⁶ As Derrida explains, "[i]t could be shown that all the names related to fundamentals, to principals, or to the center have always designated an invariable presence – eidos, arché, telos, energeia, ousia, (essence, existence, substance, subject) alétheia, transcendental, consciousness, God, man, and so forth."⁷ According to Derrida, such determinations of Being as presence invariably result in oppositional hierarchies in which "[o]ne of the two terms governs the other (axiologically, logically, etc.) or has the upper hand."⁸ This project will explore the metaphysical assumptions underlying the Court's account.

In particular, this project will examine the metaphysical assumptions underlying the Court's conceptions of history and culture. As I will demonstrate, the Court's metaphysics reduces history to a continuous succession of present moments past by focusing its analysis on Aboriginal practices that developed prior to European contact. The Court thereby emphasizes presence over absence in characterizing the past. I will further illustrate how the Court's metaphysics reduces culture to a core of essential features, surrounded by incidental features, by requiring that a practice must be integral to the distinctive culture of an Aboriginal people to

⁶ Derrida, "Structure" *infra* note 143 at 279.

⁷ *Ibid.*

⁸ Derrida, *Positions infra* note 150 at 39.

warrant constitutional protection. To put it another way, the Court's concept is based on the hierarchy that prioritizes the core over the periphery.

Further, I will demonstrate how the very metaphysical structure adopted by the Court provides important insights about the shortcomings of its methodology. Specifically, I will show how many of those shortcomings are the unavoidable consequence of that structure. In order to do so, I will adopt Derrida's "general strategy of deconstruction."⁹ One begins the strategy by upsetting the metaphysical hierarchy at play and finishes by adopting a position that both exceeds and explains the hierarchy.¹⁰ The end goal is to reveal the so-called "general economy" of the metaphysical structure at play.¹¹

To put it another way, the result of a deconstructive reading is an understanding of the conditions and limits of the metaphysical structure at issue. With regard to history, I will demonstrate how the present moment cannot be fully present to itself and how there therefore can be no continuous succession of present moments past. Respecting culture, I will show how there can be no ultimate core to culture. Such observations are generally absent in the current scholarship on *Van der Peet*.

This thesis seeks to rectify that gap in the scholarship through a deconstructive reading of the *Van der Peet* line of cases. Moreover, this project seeks to chart a new direction for the approach to s 35(1). What will emerge from this analysis is a very different understanding of s 35(1) than the one that has dominated both the jurisprudence and the scholarship to date.

⁹ *Ibid* at 38.

¹⁰ *Ibid* at 38-40.

¹¹ *Ibid* at 38.

There are several sections to this introductory chapter. First, an overview of the *Van der Peet* decision and its jurisprudential context will be provided. Second, the scholarship on *Van der Peet* will be discussed. Third, the theoretical framework employed throughout this project will be discussed in more detail. Fourth, an overview of how that framework will be employed is provided. Finally, a brief introduction to the substantive chapters will be given.

2 The *Van der Peet* Line of Cases

The first time that the Court considered the scope of Aboriginal rights under s 35(1) was in the *R v Sparrow* decision.¹² A member of the Musqueam Indian Band was charged with fishing with a net that exceeded the length permitted under the Band's Indian food fishing license.¹³ In defense, he asserted that the Musqueam had an Aboriginal right to fish for food in the Band's traditional territory.¹⁴ While there was no relevant treaty, the Musqueam had been fishing in that territory prior to the arrival of Europeans.¹⁵ At issue was whether the net length restriction violated s 35(1).¹⁶

The judgment of the Court was delivered by Dickson CJC and La Forest J, who characterized s 35 as a "solemn commitment"¹⁷ and a "constitutional promise," requiring the Court to "give a

¹² [1990] 1 SCR 1075, 70 DLR (4th) 385, at para 1 [*Sparrow*].

¹³ *Ibid* at para 3.

¹⁴ *Ibid*.

¹⁵ *Ibid* at para 4.

¹⁶ *Ibid* at para 2.

¹⁷ *Ibid* at para 60.

meaningful interpretation for recognition and affirmation.”¹⁸ To that end, the justices set out the general interpretive framework for s 35(1). They explained that such a framework must be rooted in the “general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision.”¹⁹ Accordingly, Dickson CJC and La Forest J held that s 35(1) must be interpreted in a purposive manner.²⁰

With that in mind, the justices set out a four-step analysis for s 35(1) claims, which can be summarized as follows:

1. Is there an Aboriginal right?
2. If so, has the Aboriginal right been extinguished?
3. If not, has the Aboriginal right been infringed?
4. If so, was the infringement justified?²¹

The focus of the *Sparrow* decision was on the last three stages of the analysis as the existence of a right was not a serious point of contention.²²

With that said, the Court gave some general direction as to how to characterize Aboriginal rights. Dickson CJC and La Forest J endorsed the view that s 35(1) “is not just a codification of the case law on aboriginal rights that had accumulated by 1982.”²³ Doing so, they argued, would amount to freezing Aboriginal rights in 1982.²⁴ As they explained:

¹⁸ *Ibid* at para 77.

¹⁹ *Ibid* at para 55.

²⁰ *Ibid* at para 56.

²¹ *Van der Peet supra* note 5 at para 2.

²² *Sparrow supra* note 12 at para 30.

²³ *Ibid* at para 54.

²⁴ *Ibid* at para 23.

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigor". Clearly, then, an approach to the constitutional guarantee embodied in s 35(1) which would incorporate "frozen rights" must be rejected.²⁵

The importance of the contemporary context was further highlighted by the justices' emphasis on the importance of approaching such rights on a case-by-case basis.²⁶

With that said, Dickson CJC and La Forest J gave some general hints as to how to determine the content of Aboriginal rights. They stressed the collective nature of such rights, explaining that they "are rights held by a collective and are in keeping with the culture and existence of that group."²⁷ Moreover, they stressed the importance of considering the "aboriginal perspective" when determining the content of those rights.²⁸ After considering the anthropological evidence in the case, the justices concluded that, "the salmon fishery has always constituted an integral part of [the Musqueam's] distinctive culture."²⁹ Beyond these remarks, the Court left open the question of the nature and extent of Aboriginal rights under s 35(1).

²⁵ *Ibid* at para 27.

²⁶ *Ibid* at para 66.

²⁷ *Ibid* at para 68.

²⁸ *Ibid* at para 69 (where the justices explained that "it is possible, and indeed, crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake").

²⁹ *Ibid* at para 40.

That question was directly at issue in *Van der Peet*. A member of the Sto:lo First Nation was charged with selling fish caught under an Indian food-fishing license.³⁰ In defense, she argued that she had sold the fish pursuant to an existing Aboriginal right protected under s 35(1).³¹ The Court was asked to determine how to define such a right.³²

In answering that question, Lamer CJC, for the majority, built upon the interpretive framework set out in *Sparrow* by articulating the purposes underlying s 35(1).³³ He explained that s 35(1) had two purposes:

1. To recognize “the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies”; and,
2. To reconcile that prior occupation with the Crown’s assertion of sovereignty over that land.³⁴

It was in light of these purposes that Lamer CJC developed the test for defining Aboriginal rights under s 35(1).

With those purposes in mind, Lamer made history and culture the central themes of the test. He explained that the test “must... aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.”³⁵ Drawing on this aim and the wording used in *Sparrow*, Lamer decided:

the following test should be used to identify whether an applicant has established an aboriginal right protected by s 35(1): in order to be an aboriginal right an activity must be

³⁰ *Van der Peet supra* note 5 at para 5.

³¹ *Ibid* at para 6.

³² *Ibid* at para 15.

³³ *Ibid* at para 22.

³⁴ *Ibid* at para 43.

³⁵ *Ibid* at para 44.

an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.³⁶

The test has, accordingly, become known as the Integral to a Distinctive Culture Test.

The first step of the test “requires the court to identify the precise nature of the appellant’s claim.”³⁷ In identifying the nature of the claim, Lamer explained that a “court must take into account the perspective of the aboriginal people claiming the right.”³⁸ He qualified that requirement, holding that this, “perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.”³⁹ When considering that perspective, a “court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the government regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.”⁴⁰ The relevant activities should be characterized at a general, rather than specific level.⁴¹ Furthermore, the Court must be aware that the activities may be modern manifestations of pre-contact practices, customs or traditions.⁴²

³⁶ *Ibid* at para 46.

³⁷ *Ibid* at para 76.

³⁸ *Ibid* at para 49.

³⁹ *Ibid* at para 49.

⁴⁰ *Ibid* at para 51.

⁴¹ *Ibid* at para 54.

⁴² *Ibid*.

The second step is to determine whether the practice, custom or tradition was an integral part of the distinctive culture prior to European contact.⁴³ As the Chief Justice explained: “[i]t is precisely those present practices, customs and traditions which can be identified as having continuity with the practices customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s 35(1).”⁴⁴ He offered several points of guidance regarding this step.

The focus should be on the specific practice, customs, and traditions of the particular Aboriginal group claiming the right.⁴⁵ Again, the perspective of the Aboriginal group claiming the right must be considered in terms that are comprehensible to the Canadian legal system.⁴⁶ The onus is on the claimant to show that the practice, custom or tradition at issue “was a central and significant part of the society’s distinctive culture.”⁴⁷ The practice, custom or tradition must be of integral, not incidental, significance to the Aboriginal culture.⁴⁸ Further, the practice, custom, or tradition needs to be distinctive – that is, something that makes the culture what it is – not distinct – that is, something that is unique to that culture.⁴⁹ The impact of European culture is only relevant to the analysis in one respect: “where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the

⁴³ *Ibid* at para 80.

⁴⁴ *Ibid* at para 63.

⁴⁵ *Ibid* at para 69.

⁴⁶ *Ibid* at para 49.

⁴⁷ *Ibid* at para 59.

⁴⁸ *Ibid* at para 70.

⁴⁹ *Ibid* at para 71.

standard for recognition of an aboriginal right.”⁵⁰ By contrast, the relationship of Aboriginal peoples to the land is relevant, although not necessarily determinative.⁵¹

Lamer CJC also offered guidance regarding the evidence used in adjudicating Aboriginal rights claims. With regard to the specific issue of continuity, Aboriginal groups are not required “to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact.”⁵² More generally, the Chief Justice held that the rules of evidence are to be relaxed in the Aboriginal rights context:

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims... a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private tort law case.⁵³

Nevertheless, Lamer CJC confirmed that the considerable deference accorded by appellate courts to the findings of fact of trial judges would remain intact.⁵⁴

In applying the test, Lamer CJC rejected the appellant’s characterization of the claim as a right “to sufficient fish to provide for a moderate livelihood,” characterizing the right instead as a

⁵⁰ *Ibid* at para 73.

⁵¹ *Ibid* at para 74.

⁵² *Ibid* at para 65.

⁵³ *Ibid* at para 68.

⁵⁴ *Ibid* at para 81.

right to “exchange fish for money or other goods.”⁵⁵ He concluded that, based on the trier of fact’s findings, the exchange of salmon for money or other goods was not an integral part of the Sto:lo’s distinctive culture.⁵⁶ While the evidence indicated that “fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture,” “the exchange of salmon was not widespread in Sto:lo society” prior to contact.⁵⁷ Thus, Lamer CJC held that the appellant had not satisfied the Integral to a Distinctive Culture Test.⁵⁸

His judgment prompted two dissents. L’Heureux-Dubé J criticized the Chief Justice’s approach to culture for:

1. placing the perspective of the common law on equal footing with the perspective of aboriginal groups;
2. separating the specific practices, customs and traditions from the general culture of aboriginal groups; and,
3. defining the culture of aboriginal groups in opposition to non-aboriginal cultures.⁵⁹

The justice favored a more generic approach, arguing:

s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the ‘distinctive culture’ of which aboriginal activities are manifestations. Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves.⁶⁰

⁵⁵ *Ibid* at paras 76-9.

⁵⁶ *Ibid* at para 85.

⁵⁷ *Ibid* at para 86-9.

⁵⁸ *Ibid* at para 91.

⁵⁹ *Ibid* at paras 145-56.

⁶⁰ *Ibid* at para 157.

For L’Heureux-Dubé J: “[t]he practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people.”⁶¹ Yet, the justice was not finished there.

She also took issue with the Chief Justice’s designation of the pre-contact period as the relevant time period for defining Aboriginal rights. She criticized Lamer CJC’s “frozen rights” approach for:

1. freezing Aboriginal culture in pre-contact times;
2. overstating the impact of the influence of Europeans on Aboriginal cultures;
3. positing an arbitrary date;
4. disregarding the Aboriginal perspective regarding the influence of European contact;
5. imposing a harsh burden of proof on Aboriginal claimants; and,
6. overlooking the fact that the Métis people of Canada, who fall under the scope of s 35, did not exist prior to European contact.⁶²

L’Heureux-Dubé J favored a “dynamic rights” approach.

Under that approach, Aboriginal culture “would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world.”⁶³ Accordingly, “the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture – i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group – for a substantial continuous period of time.”⁶⁴ What constitutes such a period of time “will depend on the circumstances and on the nature of the aboriginal right claimed. However... in the context of aboriginal title, ‘in most cases a period of some twenty to fifty years

⁶¹ *Ibid* at para 160.

⁶² *Ibid* at paras 165-70.

⁶³ *Ibid* at para 173.

⁶⁴ *Ibid* at para 175.

would seem adequate’.”⁶⁵ In light of this modified Integral to a Distinctive Culture Test, L’Heureux-Dubé J held: “the Sto:lo possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.”⁶⁶ McLachlin J, as she then was, reached a similar conclusion in her dissenting opinion.⁶⁷

McLachlin J accused the Chief justice of conflating the specific exercises of rights, which vary in their form across time and place, with the broad, general rights themselves, which maintain their form.⁶⁸ In order to properly determine whether a modern practice may be characterized as the exercise of a right, that right must be characterized in general terms to begin with.⁶⁹ For example, an Aboriginal group might have a right to fish for livelihood or sustenance. They might exercise that right in the contemporary context by selling fish. If the Court fails to proceed in this manner, it may overlook the link between the modern and traditional manifestations of that general right.⁷⁰ Although, McLachlin J did acknowledge that “[t]here is only the right of a particular aboriginal people to take from the course the modern equivalent of what by aboriginal law and custom it historically took.”⁷¹ Moreover, such a right is necessarily subject to conservation objectives as its very existence depends on the maintenance of the land and waters.⁷²

⁶⁵ *Ibid* at para 177.

⁶⁶ *Ibid* at 222.

⁶⁷ *Ibid* at paras 282-3 (finding that the Sto:lo had a right to fish for a moderate livelihood).

⁶⁸ *Ibid* at para 238.

⁶⁹ *Ibid* at para 239.

⁷⁰ *Ibid*.

⁷¹ *Ibid* at para 279.

⁷² *Ibid* at para 280.

For McLachlin J, “[t]he question is whether [an] activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized.”⁷³ In defining the question in this way, she rejected the Integral to a Distinctive Culture Test.

Indeed, McLachlin J criticized the opinion of both of her colleagues for focusing on the concept of integrality. She argued that the *Sparrow* case, where the word originated from, never intended integrality to serve as a test for Aboriginal rights.⁷⁴ Moreover, she criticized both variations of the test for being:

1. too broad in conflating integral with not incidental;
2. too subjective in using concepts like distinctive; and
3. too categorical in adopting an all or nothing test.⁷⁵

McLachlin J put forth a test, which she argued, “possesses its own internal limits and adheres more closely to the principles that animated *Sparrow*.”⁷⁶

She summarized her approach, which she calls the “Empirical Historical Approach” as follows:

Rather than attempting to describe a priori what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, ‘Is this like the sort of thing which the law has recognized in the past?’ This is the time-honored methodology

⁷³ *Ibid* at para 243.

⁷⁴ *Ibid* at para 255.

⁷⁵ *Ibid* at paras 255-8.

⁷⁶ *Ibid* at para 259.

of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.⁷⁷

Hence, McLachlin J presented a very different approach than Lamer CJC and L'Heureux-Dubé J.

Nevertheless, the approach developed by the Chief Justice has remained the test for determining the nature and extent of Aboriginal rights to this day. In fact, *Van der Peet* was released contemporaneously with *R v NTC Smokehouse*⁷⁸ and *R v Gladstone*,⁷⁹ two cases in which a majority of the Court endorsed and applied the Integral to a Distinctive Culture Test. Later that same year, the Court released three further decisions applying the *Van der Peet* framework: *R v Pamajewon*,⁸⁰ *R v Adams*,⁸¹ and *R v Côté*.⁸² In *Adams*, Lamer CJC, for the majority, clarified that s 35(1) rights did not necessarily have to accompany title rights, even

⁷⁷ *Ibid* at para 261.

⁷⁸ [1996] 2 SCR 672, 137 DLR (4th) 528 [*NTC Smokehouse*] (where Lamer CJC, for the majority, held that the Sheshaht and Opectchesaht peoples, from whom the appellant corporation purchased fish caught pursuant to an Indian food fishing license, did not have an Aboriginal right to exchange fish for money or other goods).

⁷⁹ [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*] (where Lamer CJC, for the majority, held that the Heilsuk people had an Aboriginal right to fish herring spawn on kelp for commercial purposes which had not been extinguished).

⁸⁰ [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*] (where Lamer CJC, for the majority, held that neither the Shawanga, nor the Eagle Lake First Nations had an Aboriginal right to participate in and regulate gambling activities on reserve lands).

⁸¹ [1996] 3 SCR 101, 138 DLR (4th) 657 [*Adams*] (where Lamer CJC, for the majority, held that the Mohawks had a free-standing right to fish for food in Lake St. Francis, notwithstanding that they had ceded their title to the area to the Crown).

⁸² [1996] 3 SCR 139, 138 DLR (4th) 385 [*Côté*] (Lamer CJC, for the majority, held that members of the Desert River Band had an Aboriginal right to fish for food within the Bras-Coupé-Desert controlled harvest zone, which encompasses accessing said area for the purpose of teaching younger band members traditional Algonquin fishing techniques).

where the former was site specific.⁸³ Further, with regard to the burden of proof, the Chief Justice made clear that, “where there is evidence that at the point of contact a practice was a significant part of a group’s culture... then the aboriginal group will have demonstrated that the practice was a significant part of the aboriginal group’s culture prior to contact.”⁸⁴ In the companion case to *Adams, Côté*, Lamer CJC explained that an Aboriginal right generally encompassed a corollary right to teach a practice, custom or tradition to the young members of the group holding the right.⁸⁵

The 2000s saw two further cases in which *Van der Peet* was refined. In *Mitchell v Canada (Minister of National Revenue)*,⁸⁶ McLachlin CJC, for the majority, shed light on the Integral to a Distinctive Culture Test, explaining:

[t]he practice, custom or tradition must have been ‘integral to the distinctive culture’ of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples’ identity... This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society’s cultural identity.⁸⁷

In *R v Sappier*,⁸⁸ Bastarache J, for the majority, rejected the use of the notion of “core identity” in *Mitchell*, which he understood as referring to “the single most important defining character.”⁸⁹

⁸³ *Adams supra* note 81 at para 26-8

⁸⁴ *Ibid* at para 46.

⁸⁵ *Côté supra* note 82 at para 56.

⁸⁶ 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*] (where McLachlin CJC, for the majority, held that the Mohawk of Akwesane did not have a right to bring goods across the Canada-United States boundary at the St. Lawrence River for the purposes of trade).

⁸⁷ *Ibid* at para 12. The Chief Justice also took the opportunity to review the principles relating to s 35(1) cases in detail in *ibid* at paras 27-39.

⁸⁸ 2006 SCC 54, [2006] 2 SCR 686 [*Sappier*] (where Bastarache J, for the majority, found that the Maliseet and Mi’kmaq had an Aboriginal right to harvest wood for domestic purposes).

Bastarache J also explained that s 35(1) does not give rise to rights to a particular resource.⁹⁰

Rather, “Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people.”⁹¹ Bastarache J also elucidated a number of points relating to culture.

He explained that the goal of the *Van der Peet* test is “to provide cultural security and continuity for the particular aboriginal society.”⁹² He also clarified what was meant by “culture” in *Van der Peet*:

What is meant by ‘culture’ is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word ‘distinctive’ as a qualifier is meant to incorporate an element of aboriginal specificity. However, ‘distinctive’ does not mean ‘distinct,’ and the notion of aboriginality must not be reduced to ‘radicalized stereotypes of Aboriginal peoples.’⁹³

In light of such pronouncements, it was unclear whether *Sappier* altered *Van der Peet*.

However, in the more recent case of *Lax Kw'alaams Indian Band v Canada (Attorney General)*,⁹⁴ Binnie J made clear that he “did not read *Sappier* as departing from *Van der Peet*

⁸⁹ *Ibid* at para 40.

⁹⁰ *Ibid* at para 21.

⁹¹ *Ibid* at para 40.

⁹² *Ibid* at para 33.

⁹³ *Ibid* at para 45.

⁹⁴ 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*] (where Binnie J, for the Court held that the *Lax Kw'alaams* did not have an Aboriginal right to a general commercial fishery).

and its progeny.”⁹⁵ Specifically, he held that, “the reference in *Sappier* to a pre-contact ‘way of life’ should not be read as departing from the ‘distinctive culture’ test set out in *Van der Peet*.”⁹⁶ The case was the first s 35(1) claim raised in the context of a civil claim, as opposed to a regulatory or criminal defense.

Binnie J also took the opportunity to speak to the rules of civil procedure, explaining that such rules, including the rules regarding pleadings, must be respected.⁹⁷ In civil cases, the justice explained that a court must characterize a claim as follows: “identify the precise nature of the First Nation’s claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.”⁹⁸ In light of this approach, the Court upheld the trial judge’s decision not to address the claimant’s claim to a more limited commercial fishery and a food, social and ceremonial fishery on the basis that the pleadings focused on a broader claim to a commercial fishery.⁹⁹

3 Scholarship

The Integral to a Distinctive Culture Test has faced numerous criticisms in addition to the dissents of L’Heureux-Dubé J and McLachlin J in *Van der Peet*. Many critics of *Van der Peet* have focused on the overly narrow, uncertain, and descriptive nature of the test. Some have characterized the test as being unpredictable because it simply leaves too many questions

⁹⁵ *Ibid* at para 44.

⁹⁶ *Ibid* at para 54.

⁹⁷ *Ibid* at para 11.

⁹⁸ *Ibid* at para 46.

⁹⁹ *Ibid* at para 44.

unanswered.¹⁰⁰ Rosanne Kyle, for example, has argued that the Court has engendered uncertainty by adopting a case-by-case approach with regard to Aboriginal rights.¹⁰¹

Other scholars have criticized the Court for using this leeway to unduly limit the scope of Aboriginal rights.¹⁰² Among them are Kent McNeil and David Yarrow, who argue that the focus on specificity, integrality, and historicity limit the scope of Aboriginal rights so much that they fail to protect the Aboriginal peoples of Canada.¹⁰³ Underlying the concerns about uncertainty and specificity is a concern about normativity. Certain critics have argued that, in emphasizing the factual specificity of each individual case, the Court has elided the normativity of Aboriginal

¹⁰⁰ See eg David W Elliott, “Fifty Dollars of Fish: A Comment on *R. v. Van Der Peet*” (July 1997) 35 *Alta L Rev* 759 (arguing that the Integral to a Distinctive Culture Test is indeterminate because what counts as distinctive is invariably subjective); Senwung Luk, “Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self Government in Canada” (2009-2010) 41 *Ottawa L Rev* 101 [Luk, “Confounding Concepts”] (criticizing the Court for giving itself too much latitude in framing the nature of the right being claimed); and Kerry Wilkins, “Whose Claim is it, Anyway? (Case Comm)” (2013) 11 *Indigenous LJ* 73, at 74 (criticizing the Court for leaving numerous questions unanswered, particularly: “who gets to decide, and on what basis, what claim of Aboriginal rights is before the courts for adjudication, and why?”).

¹⁰¹ Rosanne Kyle, “Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-Sparrow Era” (1997) 31 *UBC L Rev* 293. With that said, Kyle believes that this uncertainty may be fruitful, arguing that the government may be more inclined to negotiate rather than litigate when it is unable to reliably predict the outcome of a given case. *Contra* Jonathan Rudin, “One Step Forward” *supra* note 2 (arguing that the government has been reluctant to negotiate with Aboriginal peoples regarding the recognition of Aboriginal rights).

¹⁰² See eg Jennifer Dalton, “Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21 *Can JL & Society* No 1, 11 [Dalton, “Aboriginal Self-Determination”] (criticizing the Court for framing Aboriginal rights so narrowly as to impede the expansion those rights, particularly with regard to the issues of self-government and self-determination); Gordon Christie, “Judicial Justification of Recent Developments in Aboriginal Law” (2003) 17 *Can JL & Society* No 2, 41 (arguing that the Court has limited Aboriginal rights by unjustifiably balancing Aboriginal and non-Aboriginal interests); and Anna Zalewski, “From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights (Case Comm)” (Spring 1996) 55 *UT Fac L Rev* 435 [Zalewski, “From Sparrow to Van der Peet”] (demonstrating how the focus on practices that are integral to a people’s distinctive culture has resulted in an emphasis on specific over general claims). *Contra* Melvin H Smith, “Some Perspectives on the Origin and Meaning of Section 35 of the Constitution Act, 1982” (Sept 2000) 58 *Advocate (Van)* 677 (arguing that the Court has actually taken an overly expansive approach to defining Aboriginal rights).

¹⁰³ McNeil and Yarrow, “Aboriginal Rights Adversely Affected” *supra* note 4.

rights.¹⁰⁴ Brian Slattery, for his part, has argued that the Court's overly descriptive, historical, and static approach has obscured the abstract, normative, and generative aspects of Aboriginal rights.¹⁰⁵

Given the accusations that the Court has failed to confront the prescriptive dimension of Aboriginal rights, it is unsurprising that some scholars accuse the Court of failing to address the political dimensions of those rights.¹⁰⁶ One such scholar, Michael Asch, argues that, in emphasizing the cultural aspects of Aboriginal rights, the Court obscures political issues, such as the justifiability of the Crown assertion of sovereignty over First Nations.¹⁰⁷ Correspondingly,

¹⁰⁴ See e.g. Chilwin Chienhan Cheng, "Touring the Museum (Case Comm)" (Spring 1997) 55 UT Fac L Rev 419 [Cheng, "Touring the Museum"] (arguing that, in interpreting Aboriginal rights as contingent, the Court overlooked the inherent nature of those rights); and Ronald Niezen, *The Rediscovered Self: Indigenous Identity and Cultural Justice* (Montreal: McGill-Queen's University Press, 2009), esp at 74-80 [Niezen, *The Rediscovered Self*] (arguing that, in limiting the scope of Aboriginal rights to particular species of, for instance, fish, the Court has placed unnecessary emphasis on specificity).

¹⁰⁵ Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Sup Ct L Rev (2d) 595 [Slattery, "The Generative Structure"].

¹⁰⁶ See eg Larry N Chartrand, "Reconceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 Windsor YB Access Justice 243 [Chartrand, "Reconceptualizing Equality"] (criticizing the Court for failing to recognize the political equality that First Nations are entitled to as founding nations of Canada); André Lajoie, Éric Gélineau, Isabelle Duplessis, et Guy Rocher, "L'Intégration des valeurs et des intérêts autochtones dans le discours judiciaire et normative canadien" (Spring 2000) 38 Osgoode Hall LJ 143 (criticizing the Court for ignoring the political claims, notably those for sovereignty, of Aboriginal peoples); Doug Moodie, "Thinking Outside of the 20th Century Box: Revisiting 'Mitchell': Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government" (2003-4) 35 Ottawa L Rev 1 (criticizing the Court for only accommodating Aboriginal interests to the extent that they can be subsumed within the concept of Crown sovereignty); and Grace Li Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver, BC: UBC Press, 2011) at 139 [Woo, *Ghost Dancing*] (arguing that "the Court suffered from selective blindness, especially when it came to protecting traditional Indigenous concepts of jurisdiction, territorial authority, and self-determination).

¹⁰⁷ Michael Asch, "From Calder to Van der Peet: Aboriginal Rights and Canadian Law, 1973-1996" in Paul Haverman, ed, *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (New York: Oxford University Press, 1999) 428 [Asch, "From Calder to Van der Peet"].

many commentators have criticized the Court for its reluctance to address the issues of Aboriginal sovereignty, self-government, and self-determination.¹⁰⁸

The issues of sovereignty, self-government, and self-determination are intimately linked to that of reconciliation. In *Van der Peet*, Lamer CJC identified the “reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” as a key goal of s 35(1).¹⁰⁹ However, academics have observed how the Court’s approach to the section is in tension with that goal.¹¹⁰ Kathryn Kickbush argues that the Court’s presupposition that the relationship between Aboriginal and non-Aboriginal peoples is one of conflicting interests is at odds with the goal of reconciliation, which seeks to harmonize those interests.¹¹¹

Other scholars have sought to understand the shortcomings of the *Van der Peet* methodology by examining the Court’s assumptions more explicitly. A large point of focus has been the

¹⁰⁸ See eg Dalton, “Aboriginal Self-Determination” *supra* note 102 (criticizing the Court for refusing to address the issues of Aboriginal self-government and self-determination); Luk, “Confounding Concepts” *supra* note 100 (criticizing the Court for failing to articulate a systematic approach to the Aboriginal right to self-government); and Bradford W Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*” (September 1997) 42 McGill LJ 1011 [Morse, “Permafrost Rights”] (criticizing the Court’s refusal in *Pamajewon* to seriously engage with the assertion of an Aboriginal right to self-government, notwithstanding the historical independence of the Aboriginal peoples of Canada). *Contra* Michael Murphy, “Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada and New Zealand” (2008) 87 Can Bar Rev 355 (arguing that Aboriginal sovereignty is actually unrealistic).

¹⁰⁹ *Van der Peet supra* note 5 at para 31.

¹¹⁰ See eg Douglas C Harris, “Territoriality, Aboriginal Rights and the Heiltsuk Spawn-On-Kelp Fishery” (2000) 34 UBC L Rev 195 (arguing that the Supreme Court of Canada undermined the goal of reconciliation in *Gladstone* by assuming the territoriality of the Canadian state and ignoring that of the Aboriginal Peoples of Canada); Peter W Hutchins and Angeli Choksi, “From Calder to Mitchell: Should the Courts Patrol Cultural Borders?” (2002) 16 Sup Ct L Rev (2d) 241 [Hutchins and Choksi, “From Calder to Mitchell”] (arguing that true reconciliation would involve, not reconciling contemporary Canadian society with pre-contact Aboriginal societies, but reconciling contemporary Canadian society with contemporary Aboriginal societies); and Slattery, “The Generative Structure” *supra* note 105 (arguing that the Court undermines the goal of reconciliation by emphasizing the need to recognize historical rights, at the expense of accommodating contemporary interests).

¹¹¹ Kathryn L Kickbush, “Can Section 35 Carry the Heavy Weight of Reconciliation?” (July 2010) 68 Advocate (Van) 503.

Court's colonial assumptions. Numerous scholars have argued that the *Van der Peet* jurisprudence has perpetuated archaic colonial assumptions about Aboriginal and Western cultures.¹¹² James (Sákéj) Youngblood Henderson argues that the Supreme Court of Canada has largely failed to overcome a colonial ideology that views European law and culture as superior and Aboriginal law and culture as inferior.¹¹³ Michael Asch maintains that the Court perpetuates such assumption by, for example, ignoring the question of how Canada could have asserted sovereignty over the Aboriginal peoples of Canada and their land without their consent.¹¹⁴

The cloud of these colonial assumptions lingers over the Court's conception of culture. A number of critics have highlighted how that conception is based on an antiquated understanding of culture.¹¹⁵ In particular, Patrick Macklem has written of the Court's "tendency to speak erroneously of cultures as self-contained sets of practices that exclusively inform individual and

¹¹² See eg John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 264 (arguing that the Court's approach "can lead to the potentially dangerous stereotypes and caricatures of Indigenous peoples as past tense cultures, with no right to expect protection for religious beliefs developed since Europeans arrived"); and Brent Oltius, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982" (Spring 2009) 54 McGill LJ 1 (showing how the Court caricatures Aboriginal peoples in focusing on the superficial differences between Aboriginal and non-Aboriginal communities).

¹¹³ James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (Spring 2002) 1 Indigenous LJ 1.

¹¹⁴ Asch, "From Calder to Van der Peet" *supra* note 107. See also eg Russel Binch, "'Speaking for Themselves': Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (Feb 2002) 13 NJCL 245 [Binch, "Speaking for Themselves"] (arguing that, by filtering Aboriginal traditions through the lens of Western history, the Court perpetuates colonial assumptions).

¹¹⁵ See eg Michael Asch, "The Judicial Conceptualization of Culture After Delegamuukw and Van der Peet" (2000) 5 Rev Constit Studies 119 [Asch, "The Judicial Conceptualization of Culture"] (criticizing the Court for basing its conception of culture on an antiquated distinction between center/periphery, which conflicts with contemporary conceptualizations of culture); Russell Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand" (Sept 1997) 42 McGill LJ 993 [Barsh and Henderson, "Naïve Imperialism"] (criticizing the Court's requirement that an activity be central to a pre-contact Aboriginal culture on the basis that cultural elements are actually interdependent and amorphous); and Cheng, "Touring the Museum" *supra* note 104 (arguing that the *Van der Peet* test has a narrow and static understanding of culture, which fails to account for the complex and dynamic elements of culture).

collective identities.”¹¹⁶ Legal anthropologist Ronald Niezen argues that this approach conflicts with contemporary scholarship, which defines culture as inherently unstable and subjective.¹¹⁷

In light of the Court’s colonial assumptions, it is not surprising that many more academics have criticized the Court for obscuring and diminishing the perspectives of Aboriginal peoples.¹¹⁸ Chilwin Cheng holds that the Integral to a Distinctive Culture Test obscures the perspectives of Aboriginal peoples, by forcing them “to undertake the nearly impossible task of justifying their traditional rights and practices within an alien system.”¹¹⁹ Related to this impossible task is the Court’s refusal to consider Aboriginal oral traditions on their own terms.¹²⁰ Similarly, others have noted how the Court’s approach has effectively silenced the perspective of Aboriginal women.¹²¹

¹¹⁶ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 52 [Macklem, *Indigenous Difference*].

¹¹⁷ Roald Niezen, “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada” (2003) 18 *Can JL & Society* No 2, 1. See also Niezen, *The Rediscovered Self* *supra* note 104 at 66-77.

¹¹⁸ See eg Peggy J Blair, “Prosecuting the Fisher: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases (Spring 1997) 20 *Dalhousie LJ* 17 [Blair, “Prosecuting the Fisher”] (criticizing the *Van der Peet* test for unjustifiably favoring the observations of European traders over those of Aboriginal people); Dale Turner, “Perceiving the World Differently” in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57, at 57 [Turner, “Perceiving the World Differently”] (maintaining that “Aboriginal peoples have had no say in determining the content and character of their rights in Supreme Court decisions”); and Zalewski, “From Sparrow to Van der Peet” *supra* note 102 (arguing that, despite the Court’s professed respect for the perspectives of Aboriginal people, it has obscured those perspectives by narrowly focusing on practices that developed prior to contact).

¹¹⁹ Cheng, “Touring the Museum” *supra* note 104 at 434.

¹²⁰ See eg Binch, “Speaking for Themselves” *supra* note 114 (arguing that, in evaluating Aboriginal oral traditions from the perspective of Western history, the Court obscures the perspectives of Aboriginal peoples); Brian Grover and Mary Locke Macaulay, “Snow Houses Leave No Ruins: Unique Evidence Issues in Aboriginal and Treaty Rights Cases” (1996) 60 *Sask L Rev* 47 (criticizing the Court for giving little weight to oral traditions, despite the fact that those traditions often occupy a central position in a claimant’s case); and Turner, “Perceiving the World Differently” *supra* note 118 at 58 (arguing that the Supreme Court “fails to justly engage Aboriginal intellectual traditions, in particular, the oral traditions (traditional philosophies)”).

¹²¹ See eg John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (Winter 2013) 50 *Osgoode Hall LJ* 699 (arguing that the Court’s approach is incapable of addressing the issue of violence against Aboriginal women largely because it overemphasizes the historical in its analysis); Emily Luther, “Whose ‘Distinctive

This omission might be explained, at least in part, by the Court’s emphasis on the pre-contact historical period. This aspect of the Integral to a Distinctive Culture Test has faced the “frozen rights” criticism since its inception, as reflected in the dissenting opinion of L’Heureux-Dubé J.¹²² The scholarship has echoed this criticism.¹²³ As John Borrows argues, in limiting Aboriginal rights to pre-contact practices, the Court impedes the ability of Aboriginal cultures to adapt to changing circumstances.¹²⁴ For Borrows, this impediment is reflected in the Court’s reluctance to recognize commercial Aboriginal rights. This unjustified emphasis on pre-contact practices can be linked to the Court’s emphasis on Western history over Aboriginal oral tradition.¹²⁵

Culture?': Aboriginal Feminism and R v Van der Peet" (2010) 8 Indigenous LJ 27 (arguing that the *Van der Peet* test has largely favored practices and traditions that benefit Aboriginal men, thereby contributing to the oppression of Aboriginal women); and Val Napoleon, "Aboriginal Discourse: Gender, Identity and Community" in Benjamin Richardson, Shim Imai and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233 (arguing that the jurisprudence has effectively deleted Aboriginal women from the law by focusing almost exclusively on Aboriginal men and their traditional activities).

¹²² *Van der Peet supra* note 5 at paras 164-179.

¹²³ See e.g. Niezen, *The Rediscovered Self supra* note 104 at 74 (explaining that "[t]he judicial approach to culture is 'frozen in time' in the truest sense of the term: it sets limits on change, even in response to challenges to the prosperity and survival of distinct cultures as a whole"); Hutchins and Choksi, "From Calder to Mitchell" *supra* note 110 at 276 (criticizing the Court for "defining and dissecting Aboriginal society virtually to the vanishing point in contemporary terms" while allowing Crown sovereignty "to evolve, flourish and reflect contemporary relativity"); Morse, "Permafrost Rights" *supra* note 108 (arguing that the court has created "permafrost rights" because it does not permit constitutionally protected activities to evolve); and Mackelm, *Indigenous Difference supra* note 116 at 170 (arguing that the Court adopts "a frozen rights approach [that] ignores the dynamic nature of cultural identity and the fact that cultures undergo deep transformations over time").

¹²⁴ John Borrows, "Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada" (Dec 1996) 50 CR (4th) 230.

¹²⁵ See eg Binch, "Speaking for Themselves" *supra* note 114 (demonstrating how the Court evaluates Aboriginal oral traditions through the lens of Western history); Blair, "Prosecuting the Fisher" *supra* note 118 (illustrating how the Court favors the observations of European traders over those of Aboriginal people); and John Borrows, "Listening for a Change: The Courts and Oral Tradition" (Spring 2001) 39 Osgoode Hall LJ 38 (showing how oral traditions and written history are not placed on equal footing in the case law).

For some, this refusal to look beyond the pre-contact era and the Western perspective has resulted in the obscuring of the legal roots of Aboriginal rights. Certain scholars take issue with the Court for disregarding common law tradition.¹²⁶ For example, Richard Ogden observes how the Court has neglected the common law precedent for recognizing Aboriginal rights that have no prior existence, a principle that he argues has been constitutionalized by s 35(1).¹²⁷

Other scholars attack the Court for completely ignoring the Indigenous legal traditions that inform Aboriginal rights.¹²⁸ Larry Chartrand demonstrates how Canada is actually a multi-juridical state in which many people live according to Aboriginal legal traditions.¹²⁹ Still others emphasize how Aboriginal rights are actually rooted in a *sui generis* form of inter-societal law.¹³⁰

¹²⁶ See eg Barsh and Henderson, “Naïve Imperialism” *supra* note 115 (demonstrating how the Court has overlooked the common law doctrine of continuity, which holds that Aboriginal people retained their rights under their own laws following contact); Kent McNeil, “Continuity of Aboriginal Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) 127 (highlighting the common law rules regarding proof of custom, which presumes that a custom existed pre-contact if it was in existence as far back as living witnesses can remember).

¹²⁷ Richard Ogden, “‘Existing’ Aboriginal Rights in Section 35 the Constitution Act, 1982” (2009) 88 *Can Bar Rev* 51.

¹²⁸ Borrows, *Canada’s Indigenous Constitution* *supra* note 112 (criticizing the Court for almost completely overlooking Indigenous legal traditions); and James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) 67 (showing how the *Van der Peet* case law fails to account for the pre-contact Aboriginal jurisprudences that are at the source of Aboriginal rights). See also James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, Sask, Native Law Center, University of Saskatchewan, 2006).

¹²⁹ Chartrand, “Reconceptualizing Equality” *supra* note 106.

¹³⁰ John Borrows and Leonard Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (Dec 1997) 35 *Alta L Rev* 9 (criticizing the Court for largely characterizing Aboriginal rights in common law terms, thereby failing to properly account for the *sui generis* aspect of those rights, that is the aspects of those rights that are rooted in non-canonical, including Aboriginal, sources of law); Michael Murphy, “Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?” (Mar 2001) 34 *Can J Pol Sc* 109 (arguing that *Van der Peet* represents a departure from the Court’s previous case law, which recognized the *sui generis* nature of Aboriginal rights); Slattery, “The Generative Structure” *supra* note 105 (arguing that the Court obscures the inter-societal law that developed following contact); and Mark D Walters, “The ‘Golden Thread’ of Continuity:

The Court certainly has made efforts to respond to its critics, most notably in *Sappier*.¹³¹ In that case, after considering a number of criticisms regarding the Court's approach to culture,¹³² Bastarache J, for the majority, stated:

The focus of the Court should therefore be on the nature of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples".¹³³

In light of such pronouncements, certain scholars have argued that *Sappier* has changed *Van der Peet* for the better.¹³⁴

Yet, in *Lax Kw'alaams*, Binnie J made clear that *Sappier* had not substantively altered *Van der Peet*.¹³⁵ Moreover, *Sappier* appears to have done little to quell the tide of criticism.¹³⁶ In fact, *Sappier* itself has faced harsh criticism.

Aboriginal Customs at Common Law and Under the Constitution Act, 1982 (Nov 1999) 44 McGill LJ 711 (argues that the Court has neglected how the common law itself is actually a form of inter-societal law).

¹³¹ *Sappier supra* note 88.

¹³² *Ibid* at paras 42-5.

¹³³ *Ibid* at para 45.

¹³⁴ Guy C Charlton, "Letting Go of Culture: A Comment on R v Sappier; R v Gray" (2007-2008) 39 Ottawa L Rev 317; and John P McEvoy, "Aboriginal Activities and Aboriginal Rights: A Comment on R v Sappier; R v Gray" (2007) 6(2) Indigenous LJ.

¹³⁵ *Law Kw'alaams supra* note 94 at para 44.

¹³⁶ See eg McNeil and Yarrow, "Aboriginal Rights Adversely Affected" *supra* note 4.

In particular, Grace Li Woo has taken issue with the decision. Granted, she too acknowledges that, “[a]s of 2006, the members of the Supreme Court were obviously sensitive to some of the troubling dilemmas presented by Canada’s colonial heritage.”¹³⁷ Nevertheless, she is adamant that, “many Indigenous people remain unconvinced that there has been real change” in the wake of *Sparrow*.¹³⁸ She links this discontent to, *inter alia*, the Court’s continuation of the view that it “can impose its views and Canadian concepts of legality on Indigenous peoples.”¹³⁹ The failure of the critics to affect significant change despite the Court’s apparent receptiveness to criticism raises important questions.

Is there something more deep-seated in the Court’s approach that contributes to its shortcomings? If so, is that something common to the dissents of L’Heureux-Dubé J and McLachlin J, as well as the scholarship? The literature to date has done a laudable job in pointing out the shortcomings with the Court’s approach. Yet, the scholarship has not generally examined the deeper philosophical assumptions underlying that approach. Specifically, no scholars have systematically examined the Court’s metaphysical assumptions.

This oversight is important because such assumptions concern the most fundamental aspects of thought. By consequence, the Court’s thinking is invariably grounded on its metaphysics. Determining the contours, limits, tensions and implications of that metaphysics are thus indispensable to understanding what the Court has done and what it ought to do.

¹³⁷ Woo, *Ghost Dancing supra* note 106 at 199.

¹³⁸ *Ibid* at 10.

¹³⁹ *Ibid* at 199.

There is, to be sure, scholarship that notes certain of the metaphysical features of the Court's thinking. Michael Asch and Patrick Macklem have both noted how the Court's conception of culture depends on a core/periphery distinction.¹⁴⁰ Further, Grace Li Woo observes how the Court's thinking operates within a colonial/ post-colonial paradigm.¹⁴¹ There is even one commentator who purports to "deconstruct" the Integral to a Distinctive Culture Test.¹⁴²

Yet, there are two things that the commentators have failed to do in this regard. First, there is no systematic analysis of the metaphysical system shaping the Court's overall approach. Second, there has been no examination of the theoretical tensions inherent within that very system. More particularly, there has been no deconstruction of this system in the Derridean sense. Rectifying these two omissions constitutes the bulk of this project's focus. The way in which I approach these issues is discussed in detail in the next section.

4 Deconstruction and the Metaphysics of Presence

Recall that, for Derrida, "[t]he history of metaphysics, like the history of the West, ... is the determination of Being as *presence*."¹⁴³ Derrida is referring to presence "in all senses of the word."¹⁴⁴ On this interpretation, presence is expressed as "presence of the thing to the sign as

¹⁴⁰ Asch, "The Judicial Conceptualization of Culture" *supra* note 115; and Macklem, *Indigenous Difference* *supra* note 116 at 59 and 168.

¹⁴¹ Woo, *Ghost Dancing* *supra* note 106.

¹⁴² Alexandra Kent, "The Van der Peet Test: Constitutional Recognition or Constitutional Restriction?" (2012) 3 *The Arbutus Review* 20 at 21 and 23. Notwithstanding this claim, Kent does little more than reiterate earlier criticism of the test. She makes no use of Derrida's "strategy of deconstruction." Rather, she appears to conflate the term "deconstruction" with critique or criticism. But, as we have seen, deconstruction, as a method of reading, actually entails its own particular strategies.

¹⁴³ Jacques Derrida, "Structure, Sign and Play in the Discourse of the Human Sciences" in *Writing and Difference*, translated by Alan Bass (London: Routledge, 1978) 278 [Derrida, "Structure"], at 279.

¹⁴⁴ *Ibid.*

eidos, presence as substance/essence/existence [*ousia*], temporal presence as point [*stigmè*] of the now or of the moment [*nun*], the self-presence of the cogito, consciousness, subjectivity, the phenomenon of the ego, and so forth.”¹⁴⁵ This expansive understanding encompasses “all the names related to fundamentals, to principles, or to the center.”¹⁴⁶ These names include: origin, end, essence, existence, substance, subject, transcendental, consciousness, God and man.¹⁴⁷ Derrida accordingly calls this metaphysical tradition, the “metaphysics of presence.”¹⁴⁸ This tradition attempts to reduce concepts to pure presence; it correspondingly attempts to suppress non-presence or absence.¹⁴⁹

This suppression produces a “violent hierarchy” in which “[o]ne of... two terms governs the other (axiological, logically, etc.), or has the upper hand.”¹⁵⁰ Terms associated with presence are “held to be simple, intact, normal, pure, standard, self-identical.”¹⁵¹ Terms associated with absence are, consequently characterized “in terms of derivation, complication, deterioration, accident, etc.”¹⁵² As Derrida explains:

¹⁴⁵ Jacques Derrida, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore: The Johns Hopkins University Press, 1997) [Derrida, *Of Grammatology*] at 12.

¹⁴⁶ Derrida, “Structure” *supra* note 143 at 279.

¹⁴⁷ *Ibid* at 279-280.

¹⁴⁸ Derrida, *Of Grammatology supra* note 145 at 22. Throughout this piece, Derrida uses a number of other terms and phrases more or less synonymously, including: “logocentrism” (at 3); “the metaphysics of the proper” (at 26); and “the logic of identity” (at 61).

¹⁴⁹ Derrida, *Of Grammatology supra* note 145 at 167.

¹⁵⁰ Jacques Derrida, *Positions*, translated by Alan Bass (London: Continuum, 2004) [Derrida, *Positions*] at 39.

¹⁵¹ Jacques Derrida, *Limited Inc.*, translated by Samuel Weber and Others (Evanston, IL: Northwestern University Press, 1988) [Derrida, *Limited Inc.*] at 93.

¹⁵² *Ibid.*

All metaphysicians, from Plato to Rousseau, Descartes to Husserl, have proceeded in this way, conceiving good to be before evil, the positive before the negative, the pure before the impure, the simple before the complex, the essential before the accident, the imitated before the imitation, etc. And this is not just *one* metaphysical gesture among others, it is *the* metaphysical exigency, that which has been the most constant, most profound and most potent.¹⁵³

Thus, the subordination of absence to presence defines the metaphysics of presence. This tradition, in turn, shapes the worldview and language of the West.¹⁵⁴

Notwithstanding its dominance, Derrida shows how this tradition is erroneous. He insists that there are no “*metaphysical concepts in and of themselves.*”¹⁵⁵ He demonstrates this point by questioning “the frontier between the two” terms in the metaphysical hierarchy.¹⁵⁶ He focuses on “the limit of every attempt to totalize, to gather... the limit of this unifying, uniting movement, the limit that it had to encounter, because the relationship of the unity to itself implies some difference.”¹⁵⁷ This project has come to be known as deconstruction.

Derrida talks of “a kind of *general strategy of deconstruction.*”¹⁵⁸ This strategy aims “at a certain relationship, unperceived by the writer, between what he commands and what he does not command in the patterns of language that he uses.”¹⁵⁹ To begin, therefore, one must first look to

¹⁵³ *Ibid.*

¹⁵⁴ Derrida, *Of Grammatology* *supra* note 145 at 8 and Derrida, *Positions* *supra* note 150 at 18-9.

¹⁵⁵ Derrida, *Positions* *supra* note 150 at 50.

¹⁵⁶ Jacques Derrida, *Paper Machine*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2005) at 143.

¹⁵⁷ Derrida, “The Villanova Roundtable” *infra* note 212 at 13.

¹⁵⁸ *Ibid* at 38.

¹⁵⁹ *Ibid* at 158.

what the text commands by exploring “the conscious, voluntary, intentional” aspects of the text.¹⁶⁰ This stage thus involves following the conventions of reading to outline the ostensible language and logic of the text. Tease out the philosophical structures at work in the text. Identify the stated and assumed hierarchical opposition at work in the text.¹⁶¹

For example, in *Van der Peet*, Lamer CJC held that, “in order to be an aboriginal right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹⁶² As I show in greater detail in Chapter 3, this quote presupposes that culture consists of integral and marginal features. In other words, the Integral to a Distinctive Culture Test assumes a hierarchy between the core and margins of a given culture. The core is supposed to be central to the culture, but unaffected by the margins of the culture.

Once such structures are identified, we need to inhabit them. Inhabiting those structure entails: “[o]perating necessarily from the inside, borrowing all the strategic and economic resources of subversion from the old structure, borrowing them structurally.”¹⁶³ To do so, one must first overturn the binary hierarchy at play.¹⁶⁴ This movement involves “demonstrating the

¹⁶⁰ *Ibid.*

¹⁶¹ Jack Balkin, “Deconstruction's Legal Career” (2005) 27 *Cardozo L Rev* 719 [Balkin, “Deconstructions Legal Career”] at 723 (where he explains: “[o]ne looks for the ‘privileging of one pole of an opposition over the other. This privileging can occur in a text, an argument, or a social or historical tradition. It can be presupposed or stated overtly. Given a conceptual opposition between *A* and *B*, *A* is privileged over *B* if *A* is the general case and *B* the special case, if *A* is privileged over *B* if *A* is the general case and *B* the special case, if *A* is primary and *B* is secondary, if *A* is normal and *B* is deviant, if *A* is of higher status and *B* is of lower status or if *A* is central and *B* is marginal. *A* can also be privileged over *B* if *A* is considered more true, more relevant, more important, or more universal than *B*”). See also eg Jack Balkin, “Deconstructive Practice and Legal Theory” (1987) 96 *Yale L. J.* 743 [Balkin, “Deconstructive Practice and Legal Theory”] at 747.

¹⁶² *Ibid* at para 46.

¹⁶³ Derrida, *Of Grammatology supra* note 145 at 24.

¹⁶⁴ See eg Derrida, *Positions supra* note 150 at 39.

systematic and historical solidarity” of the opposing terms at issue.¹⁶⁵ We achieve this demonstration by identifying the “‘theoretical’ morsels... tattooed, incised, inlaid into the bodies of the two colossi or the two bands which are stuck on and woven into each other, at the same time clinging to each other and sliding one over the other in a dual unity without any relation to self.”¹⁶⁶ We look to those aspects of the text that the conventional reading tends to elide: rhetorical structures, contradictions, ambiguities, tangents, etc.¹⁶⁷ In doing so, it is helpful to ask the following: is there something in the marginal term that actually gives rise to the possibility of the dominant term?¹⁶⁸

Returning to our example, the core cannot conceptually be both part of a culture and independent of that culture’s margins. Every attempt to delineate a core independent of the margins will inevitably encounter this problem. The reason that this dilemma arises is because

¹⁶⁵ Derrida, *Of Grammatology supra* note 145 at 13-4. See also eg Derrida, *Positions supra* note 150 at 3.

¹⁶⁶ Jacques Derrida, *Points... interviews 1974-1994*, edited by Elizabeth Weber, translated by Peggy Kamuf and others (Stanford: Stanford University Press, 1995) at 84 [*Points*]. See also eg Derrida *Positions supra* note 150 at 58.

¹⁶⁷ Culler, *On Deconstruction infra* note 168 at 86 and 109; John D Caputo, “A Commentary: Deconstruction in a Nutshell” in in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 31 at 76-7; and Simon Critchley, “Derrida the Reader” in Simon Glendinning and Robert Eaglestone, eds, *Derrida’s Legacies* (New York: Routledge, 2008) 1 [Critchley, “Derrida the Reader”] at 4.

¹⁶⁸ Derrida, *Of Grammatology supra* note 145 at 307 (“Rousseau’s text must constantly be considered as a complex and many-leveled structure; in it, certain propositions may be read as interpretations of other propositions that we are, up to a certain point and with certain precautions, free to read otherwise. Rousseau says A, then for reasons that we must determine, he interprets A into B. A, which was already an interpretation, is reinterpreted into B. After taking cognizance of it, we may, without leaving Rousseau’s text, isolate A from its interpretation into B, and discover possibilities and resources there that indeed belong to Rousseau’s text, but were not produced or explored by him, which, for equally legible motives he preferred to cut short by a gesture neither witting nor unwitting.”). See also eg Jonathan Culler, *On Deconstruction: Theory and Criticism After Structuralism* (Ithaca, NY: Cornell University Press, 2007) [Culler, *On Deconstruction*] at 213 (“The question for the critic is whether the second term, treated as a negative marginal, or supplementary version of the first, does not prove to be the condition of possibility of the first. Along with the logic that asserts the preeminence of the first term, is there a contrary logic, covertly at work but emerging at some crucial moment or figure in the text, which identifies the second term as the enabling condition of the first?”); and Balkin, “Deconstructions Legal Career” *supra* note 161 at 723 (“So, the deconstructor can ask whether the reasons why A is privileged over B actually apply to B as well, or the reasons why B is thought subordinate to A are actually also true of A. Alternatively, one can try to show that A is a special case of B or that A’s existence or conceptual coherence depends on the thing it excludes or subordinates, namely, B”).

the core and margins by definition are both part of the structure of culture. Given that this is the case, the core cannot be independent of the margins. It follows that there can be no ultimate justification for classifying one thing as part of the core of that structure and another thing as part of the margins. In this sense, the margins anchor the core in much the same way as the core is said to anchor the margins.

Reversals of this nature are essential to understanding the structure of the metaphysical oppositions at work. According to Derrida:

To neglect this phase of reversal is to forget that the structure of the opposition is one of conflictual and subordination and thus to pass too swiftly, without gaining any purchase against the form opposition, to a *neutralization* which *in practice* leaves things in their former state and deprives one of any way of intervening effectively.¹⁶⁹

With that said, the reversal “stage” alone is inadequate. A mere reversal simply “reproduces and confirms through inversion what it has struggled against.”¹⁷⁰ In other words, stopping at the reversal stage would inevitably reinstitute the metaphysics of presence, this time associating the formerly subordinated term with presence and the formerly prioritized terms with absence.

Accordingly, deconstruction moves on to another phase. At this phase, one must mark the interval between the two terms in the hierarchical opposition. The interval is “the movement by means of which the text exceeds its meaning, permits itself to be turned away from, to return to, and to repeat itself, outside its self-identity.”¹⁷¹ Hence, the interval permits a transgression or

¹⁶⁹ Derrida, *Positions supra* note 150 at 38-9.

¹⁷⁰ Derrida, *Points supra* note 166 at 84.

¹⁷¹ *Ibid* at 65. See eg also Derrida, *Of Grammatology supra* note 145 at 4.

displacement of the opposition to take place.¹⁷² For that reason, Derrida calls the interval the “decisive moment” in a text.¹⁷³

The difficulty with marking this moment or interval is precisely that it exceeds the oppositions that it makes possible. In marking the interval, we are therefore forced to “borrow [our] resources from the logic [we] deconstruct.”¹⁷⁴ We must employ these resources strategically in order to mark the interval. Videlicet, Derrida adopts strategic nicknames.¹⁷⁵ In order to do so, Derrida often adopts paleonyms, which are old terms given new meaning, as well neologisms, which are new terms.¹⁷⁶

Arguably the best example of such a strategic nickname is Derrida’s word *différance*, which according to Gayatri Spivak is the closest thing Derrida has to a master-word.¹⁷⁷ *Différance* derives from the French verb *différer*, which has two senses: to defer and to differ.¹⁷⁸ The word is a play on the French noun *différence*, which does not convey all of the meanings of the verb.¹⁷⁹ First, *différence* does not encompass deferral.¹⁸⁰ Second, while the noun refers to

¹⁷² *Ibid.* See also Derrida, *Points supra* note 166 at 100; and “Signature Event Context” in *Margins of Philosophy*, translated by Alan Bass (Chicago: The University of Chicago Press, 1984) 307 at 329.

¹⁷³ Derrida, *Of Grammatology supra* note 145 at 269. See also eg Derrida, “Différance” in *Margins of Philosophy*, translated by Alan Bass (Chicago: The University of Chicago Press, 1984) 1 [Derrida, “Différance”] at 12.

¹⁷⁴ Derrida, *Of Grammatology supra* note 145 at 314.

¹⁷⁵ *Ibid* at 93.

¹⁷⁶ Jacques Derrida, “Outword” in *Dissemination*, translated by Barbara Johnson (Chicago: The University of Chicago Press, 1981) 3 at 3-5.

¹⁷⁷ Spivak, *Of Grammatology supra* note 145 at OG, xliii.

¹⁷⁸ Derrida, “Différance” *supra* note 173 at 8.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

differences among things, it does not refer to differences of opinion.¹⁸¹ In order for all of the meanings of the verb to be invoked, Derrida must create a new noun.

As a result, Derrida substitutes the second e in *différence* for an a, resulting in *différance*.¹⁸² He calls this neologism a “neographism” because “this graphic difference (*a* instead of *e*), this marked difference between two apparently vocal notations, between two vowels, remains purely graphic: it is read, or it is written, but it cannot be heard.”¹⁸³ With the letters exchanged, Derrida can gather the meanings of the verb *différer* under one noun.¹⁸⁴

Thus, unlike *différence*, “[*d*]ifférance (is) (simultaneously) spacing (and) temporization.”¹⁸⁵ The first sense of the new “word,” to defer, is temporal. Deferring is:

the action of putting off until later, of taking to account, of taking account of time and of the forces of an operation that implies an economical calculation, a detour, a delay, a relay, a reserve, a representation – concepts that I would summarize here in a word I have never used but that could be inscribed in this chain: *temporization*. *Différer* in this sense it to temporize to take recourse, consciously, or unconsciously, in the temporal and temporizing mediation of a detour that suspends the accomplishment or fulfillment of ‘desire’ or ‘will,’ and equally effects this suspension in a mode that annuls or tempers its own effect. And... this temporization is also temporalization and spacing, the becoming-time of space and the becoming space of time, the ‘originary constitution’ of time and space...¹⁸⁶

¹⁸¹ *Ibid.*

¹⁸² *Ibid* at 3.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid* at 8.

¹⁸⁵ *Ibid* at 13.

¹⁸⁶ *Ibid* at 8.

The second sense of the “word,” to differ, is spatial. Differing means “to be not identical, to be other, discernable, etc.”¹⁸⁷ In this sense, “an interval, a distance, *spacing*, must be produced between the element’s other, and be produced with a certain perseverance in repetition.”¹⁸⁸ Derrida sums up the “two apparently different values of *différance*” nicely: “to differ as discernibility, distinction, separation, disatem, *spacing*; and to defer as detour, relay, reserve, *temporization*.”¹⁸⁹ These values move together at the interval between the philosophical opposition.

Derrida describes this movement as “the systematic play of differences, of the traces of differences, of the *spacing* by means of which elements are related to each other.”¹⁹⁰ To put it another way, *différance* (is) “the displaced and equivocal passage of one different thing to another, from one term of an opposition to the other.”¹⁹¹ Oppositions are relational. Terms can only be opposed to each other if they differ from each other. Certain spacing is required between the two terms. Further, each term of the opposition must defer to the other term to mark that difference. In this manner, the play of *différance* makes metaphysical oppositions possible.¹⁹²

At the same time, *différance* makes the pure opposition impossible. Neither term can be original or present: “[t]he play of differences supposes, in effect, syntheses and referrals which forbid at any moment, or in any sense, that a simple element be *present* in and of itself, referring

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid* at 18.

¹⁹⁰ Derrida, *Positions supra* note 150 at 24.

¹⁹¹ Derrida, “Différance” *supra* note 173 at 17.

¹⁹² See eg Derrida, *Positions supra* note 150 at 7; and Derrida, *Of Grammatology supra* note 145 at 65 and 143.

only to itself.”¹⁹³ Thus, nothing “is anywhere ever simply present or absent.”¹⁹⁴ Rather, an element in a philosophical opposition “must appear as the *différance* of the other, as the other different and deferred in the economy of the same.”¹⁹⁵ Yet, while *différance* constitutes the presence/absence distinction, it cannot be subsumed thereunder.¹⁹⁶

Différance marks what has been “lost, reserved, put aside” by metaphysics.¹⁹⁷ The term “occupies the middle point between total absence and total presence”; it “fills and marks a determined lack.”¹⁹⁸ Therefore, *différance* “cannot be governed by or distributed between the terms of this opposition.”¹⁹⁹ Rather, “[d]ifférance... exceeds the alternative of presence and absence.”²⁰⁰ What we are left with is an “irreducible complexity within which one can only shape or shift the play of presence or absence.”²⁰¹ It is clear that we are not dealing with a pure and simple origin.

Saying that *différance* – spacing and temporization – is the absolute origin of metaphysics, “amounts to saying... that there is no absolute origin.”²⁰² Metaphysics “was never constituted

¹⁹³ *Ibid* at 23; Derrida, “Différance” *supra* note 173 at 26.

¹⁹⁴ *Ibid* at 24.

¹⁹⁵ Derrida, “Différance” *supra* note 173 at 17.

¹⁹⁶ *Ibid* at 6; and Derrida, *Positions supra* note 150 at 24.

¹⁹⁷ *Ibid* at 24. See also Derrida, *Of Grammatology supra* note at 167 (explaining that “metaphysics cannot think” of *différance*); and Derrida, “Différance” *supra* note at 12 (arguing that *différance* can only be “understood beyond the metaphysical language”).

¹⁹⁸ Derrida, *Of Grammatology supra* note 145 at 157.

¹⁹⁹ Derrida, *Positions supra* note 150 at 24.

²⁰⁰ Derrida, “Différance” *supra* note 173 at 20.

²⁰¹ Derrida, *Of Grammatology supra* note 145 at 167.

²⁰² Derrida, *Of Grammatology supra* note 145 at 65.

except reciprocally by a nonorigin, ... which thus becomes the origin of origin.”²⁰³ Another way to phrase this result is that *différance* constitutes the metaphysics of presence by breaching it.²⁰⁴ As Derrida states: “[d]ifférance produces what it forbids, makes possible the very thing that it makes impossible.”²⁰⁵ *Différance* thus marks both the possibility and impossibility of the metaphysics of presence. Possibility in the sense that *différance* permits an opposition to be constituted. Impossibility in the sense that *différance* forbids either term in that opposition from ever expressing pure presence or absence.

What then (is) *différance*? According to Derrida, *différance* (is) “neither a word nor a concept.”²⁰⁶ As he explains:

différance has no name in our language... not because our language has not yet found or received this *name*, or because we would have to seek it in another language, outside the finite system of our own. It is rather because there is no *name* for it all, not even the name of essence or of Being, not even that of ‘*différance*,’ which is no name, which is not a pure nominal unity, and unceasingly dislocates itself in a chain of differing and deferring substitutions.²⁰⁷

Nevertheless, Derrida admits that even “if it is unnamable, it is not provisionally so.”²⁰⁸

But, “[s]ince it cannot be elevated into a master-word or a master-concept,... *différance* finds itself enmeshed in the work that pulls it through a chain of other ‘concepts,’ other ‘words,’ other

²⁰³ *Ibid* at 61.

²⁰⁴ *Ibid* at 198.

²⁰⁵ *Ibid* at 143.

²⁰⁶ Derrida, “Différance” *supra* note 173 at 3. See also Derrida, *Positions supra* note 150 at 38.

²⁰⁷ *Ibid* at 26.

²⁰⁸ *Ibid*. See also *ibid* at 3; and Derrida, *Positions supra* note 150 at 38.

textual configurations.”²⁰⁹ Hence, “*différance* lends itself to a certain number of nonsynonymous substitutions.”²¹⁰ These words are “nonsynonymous” because each choice of term is made “within a topic [an orientation in space] and an historical strategy.”²¹¹ Nevertheless, they function as “substitutions” as each one can be put in the place of the other in order to name the nameless. Some of the non-synonymous substitutes that will be used in this thesis include iterability and supplementarity, both of which will be explained further on.

With respect to our culture example, the relationship between the core and margins is characterized by *différance*. Because the core cannot be independent of the margins, it cannot ultimately ground the structure of culture. As a result, the structure must seek another core. Yet, every new core faces the same dilemma: a core cannot be independent of the margins. The process thus repeats itself *ad infinitum*. What we are left with, then, is a series of contingent cores. The current core in the series differs from, but also defers to, the next core. And so on. The consequence is that the Court can never determinately carve out an integral or core aspect of a given culture.

What is the end result of a deconstructive reading? Deconstruction exposes “the limit of every attempt to totalize, to gather... the limit of this unifying, uniting movement, the limit that it

²⁰⁹ Derrida, *Positions supra* note 150 at 38.

²¹⁰ Derrida, “*Différance*” *supra* note 173 at 12.

²¹¹ Derrida, *Of Grammatology supra* note 145 at 70.

had to encounter, because the relation of the unity to itself implies some difference.”²¹² Because these limits are so pervasive and indispensable, the project of deconstruction will never end.²¹³

5 Deconstruction and Legal Theory

As my brief example of the Court’s conception of culture suggests, deconstruction is not limited to philosophical discourses. Deconstructive readings must take place wherever metaphysics is at work. Hence, Derrida is adamant that: “[d]econstruction is not, should not be only an analysis of discourses, of philosophical statements or concepts, of a semantics; it has to challenge institutions, social and political structures, the most hardened traditions.”²¹⁴ Derrida defines institutions broadly, as discourses that establish norms and rules.²¹⁵ Norms and rules, by definition, involve hierarchy and *a fortiori* the metaphysics of presence. Institutions are thus necessarily susceptible to deconstruction. He argues how, “the life of an institution implies that we are able to criticize, to transform, to open the institution to its own future.”²¹⁶ In this regard, the law is no different than any other institution.

Derrida explains:

that the law could be deconstructed. There is a history of legal systems, of rights, of laws, of positive laws, and this history is a history of the transformation of laws. That is why they are there. You can improve law, you can replace one law by another one. There are

²¹² Jacques Derrida, “The Villanova Roundtable: A Conversation with Jacques Derrida” in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 3 at 13 [“The Villanova Roundtable”].

²¹³ *Ibid* at 10. Derrida, *Positions supra* note 150 at 65.

²¹⁴ Derrida, *Points supra* note 166 at 213.

²¹⁵ *Ibid* at 28.

²¹⁶ Derrida, “The Villanova Roundtable” *supra* note 212 at 6.

constitutions and institutions. This is a history, and a history, as such, can be deconstructed. Each time you replace one legal system by another one, one law by another one, or you improve the law, that is a kind of deconstruction, a critique and deconstruction. So, the law as such can be deconstructed and has to be deconstructed. This is the condition of historicity, revolution, morals, ethics, and progress.²¹⁷

It is not surprising, then, that Derrida undertakes deconstructive readings of the law.²¹⁸ In addition, a number of legal scholars have employed deconstructive strategies in their work.²¹⁹

6 Deconstructing *Van der Peet*

This project is part of the broader scholarship that adopts deconstruction in analyzing legal issues. Particularly, this project will situate the *Van der Peet* line of cases within its theoretical context. I will demonstrate how that line of cases is shaped by the metaphysics of presence. In exploring the metaphysical aspects of the case law, I will focus on two key concepts: history and culture. In the process of doing so, I will undertake a deconstructive reading of the Court's metaphysical concepts of history and culture.

²¹⁷ *Ibid* at 16.

²¹⁸ See eg Jacques Derrida, "Before the Law" in *Acts of Literature*, edited by Derek Attridge (New York: Routledge, 1992) 181; Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 [Derrida, "Force of Law"]; Jacques Derrida, *Specters of Marx: The State of Debt, The Work of Mourning and the New International* (New York: Routledge, 2006); Jacques Derrida, *Rogues: Two Essays on Reason*, translated by Pascale-Anne Brault and Michael Naas (Stanford: Stanford University of Press, 2005); and Jacques Derrida, *The Beast and the Sovereign, Volume 1*, translated by Geoffrey Bennington (Chicago: The University of Chicago Press, 2009). For investigations of the relationship between deconstruction and law, see eg Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992); Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992); and Jacques De Ville, *Jacques Derrida: Law as Absolute Hospitality* (New York: Routledge, 2011) [De Ville, *Jacques Derrida*].

²¹⁹ See eg Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1984) 94 Yale LJ 997; Gerald E Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv L Rev 1276 ; Girardeau A Span, "Deconstructing the Legislative Veto" (1984) 68 Minn L Rev 1276; Mark Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1984) 36 Stan L Rev 623; and KC Worden, "Overshooting the Target: A Feminist Deconstruction of Legal Education" (1985) 34 Am UL Rev 1141.

By way of an example, Chapter 2 explores the limits of the Court's interpretation of the phrase "hereby recognized and affirmed" under s 35(1). The Court emphasizes the descriptive structure of s 35(1). Namely, s 35(1) is seen as a provision that simply states the fact that Aboriginal rights exist. However, on closer analysis, the provision is not that straightforward.

Section 35(1) does not merely describe those rights, but produces them. Yet, the section still points to the existence of those rights. Section 35(1) thus produces a paradox: it inaugurates something and continues something. The section neither completely inaugurates, nor continues rights. There is therefore a relationship of *différance* that structures these two aspects at play in the section. Hence, when the Court claims that it is simply identifying an existing right, it obscures its own role in constructing that right. Following my deconstructive reading of the case law, I will discuss how, in light of these insights, the Court might move forward.

7 Summary of Chapters

This project consists of three substantive chapters. In Chapter 2, "The Court's Metaphysical Concept of History," I provide a deconstructive reading of the understanding of history informing the jurisprudence. The Chapter seeks to illustrate why the Court's understanding of history is particularly metaphysical and why it is problematic. I do so by drawing on a few key works by Derrida: *Archive Fever: A Freudian Impression*, *Specters of Marx: The State of Debt, the Work of Mourning and the New International, Limited Inc.*, and "Declarations of Independence."²²⁰

²²⁰ Jacques Derrida, "Declarations of Independence" (1986) 15 *New Political Science* 7. Jacques Derrida, *Archive Fever: A Freudian Impression*, translated by Eric Prenowitz (Chicago: University of Chicago Press, 1996); Jacques Derrida, *Limited Inc.*, edited by Gerald Graff (Evanston, IL: Northwestern University Press, 1988); and Derrida, *Specters of Marx supra* note 218.

In Chapter 3, “The Court’s Metaphysical Concept of Culture,” I undertake a similar discussion of the Court’s understanding of cultural identity. I do so, with particular focus on Derrida’s works *Monolingualism and the Other*, *On Hospitality*, *The Other Heading* and “Structure, Sign and Play in the Discourse of the Human Sciences.”²²¹ I will also explore Gayatri Spivak’s seminal essay “Can the Subaltern Speak?”²²²

Chapter 4, the last substantive chapter, aims to explore the ways in which the Court might confront some of the metaphysical problems with its approach. Drawing on the deconstructive reading advanced in Chapters 2 and 3, I put forward some general suggestions for moving forward. These suggestions stem from the *Sparrow* decision, as well as from the Derridean works discussed herein. Moreover, I draw on other scholarly suggestions, incorporating them into the deconstructive framework with which I operate.

In the end, however, I make clear that these suggestions are provisional. Each time the law is operationalized in context, it reinstates metaphysical hierarchy. Hence, my key recommendation is that we perpetually deconstruct the Aboriginal rights jurisprudence in Canada.

²²¹ Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2000); Jacques Derrida, *Monolingualism and the Other or the Prosthesis Origin*, translated by Patrick Menah (Stanford: Stanford University Press, 1998); Jacques Derrida, *The Other Heading: Reflections on Today’s Europe*, translated by Pascal-Anne Brault and Michael B Naas (Indianapolis: Indiana University Press, 1992); Derrida, “Structure” *supra* note 143.

²²² Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” C Nelson and L Grossberg, eds, *Marxism and the Interpretation of Culture* (Basingstoke: MacMillan Education, 1988) 66.

Chapter 2

The Court's Metaphysical Conception of History

1 Overview

Although Derrida is not often recognized as a philosopher of history, much of his work concerns history.¹ In particular, much of his work concerns what he calls the “metaphysical concept of history.”² What he means by this concept is: history as “linear scheme of the unfolding of presence, where the line relates the final presence to the ordinary presence according to the straight line of the circle.”³ Yet, “[t]he metaphysical character of the concept of history is not only linked to linearity, but to an entire *system* of implications (teleology, eschatology, elevating and interiorizing accumulation of meaning, a certain type of traditionality, a certain concept of continuity, of truth, etc.”⁴ Briefly put, the metaphysical concept of history consists of “attempting to ontologize remains, to make them present.”⁵ In other words, history is

¹ See eg Jacques Derrida, *Archive Fever: A Freudian Impression*, translated by Eric Prenowitz (Chicago: University of Chicago Press, 1996), at 17 [*Archive Fever*] (arguing that “archivization produces as much as it records the event”); and Jacques Derrida, *Specters of Marx: The State of Debt, the Work of Mourning and the New International*, translated by Peggy Kamuf (New York: Routledge Classics, 2006), at 211 [*Specters of Marx*] (arguing that “[a] heritage is never natural, one may inherit more than once in different places and at different times”). For discussion of the relevance of Derrida’s work to history, see eg Hugh Rayment-Pickard, “Derrida and Fidelity to History” (2002) 38 *History of European Ideas* 13; “Robert M Stein, “Derrida and Deconstruction: Challenges to the Transparency of Language” in Nancy Partner and Sarah Foote, eds, *The Sage Handbook of Historical Theory* (Los Angeles: Sage, 2013) 136; and Keith Jenkins, *Refiguring History: New Thoughts on an Old Discipline* (New York: Routledge, 2003), at 9-32.

² See eg *Spectres of Marx* *supra* note 1 at 88; Jacques Derrida, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore: Johns Hopkins University Press, 1997) at 4; and Jacques Derrida, *Positions*, translated by Alan Bass (London, Continuum, 2002) at 45.

³ *Of Grammatology* *supra* note 2 at 85.

⁴ *Positions* *supra* note 2 at 50.

⁵ *Specters of Marx* *supra* note 1 at 9.

seen as a vehicle for making the past present or bring the past into the present. It is not surprising, then, that this concept of history can be deconstructed.⁶

The deconstruction of that concept is precisely the aim of this chapter. Specifically, this chapter will deconstruct the Court's concept of history, drawing on a number of Derrida's relevant texts. The first two parts of this chapter will sketch the Court's concept of history, emphasizing its metaphysical character. The third section will specifically examine the Court's understanding of the past. That discussion will lead into the fourth section, which analyzes the Court's view on temporality. The fifth section investigates the Court's understanding of tradition. The subsequent sections will examine the way the Court looks at historical evidence. Section eight will explore the Court's ideas about how traditions are inherited.

In all, this chapter will demonstrate how there is no ultimate ground for the Court's metaphysical conception of history. The Court attempts to emphasize the presence of the past, at the expense of its absence. However, presence and absence do not have a relationship characterized by hierarchy; rather, they have a relationship characterized by *différance*: that is, of differing and deferral. As a result, the Court inevitably roots its conception in political or ideological considerations. Let us begin with a review of the Court's treatment of history in the *Van der Peet* jurisprudence.

⁶ Jacques Derrida, "The Villanova Roundtable: A Conversation with Jacques Derrida" in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 3 at 16 ["The Villanova Roundtable"].

2 Case Law

In *R v Sparrow*,⁷ Dickson CJC and La Forest J, for the Court, acknowledged that, “[t]he word ‘existing’” makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect.”⁸ Yet, the Court rejected the view that the word “‘existing’ means being in actuality in 1982.”⁹ Rather, they endorsed the view that the word “existing” under s 35(1) “means ‘unextinguished’ rather than exercisable at a certain time in history.”¹⁰ What the Court meant is that a s 35(1) right must be “affirmed in a contemporary form.”¹¹ With that in mind, Dickson CJC and La Forest J “emphasize[d] the importance of context and a case-by-case approach to s. 35(1).”¹² In other words, a court must define Aboriginal rights vis-à-vis the particular factual matrix of the case at hand.

In somewhat tension with *Sparrow*, *R v Van der Peet*¹³ focused more on the historical, as opposed to contemporary, aspects of Aboriginal rights. Lamer CJC, for the majority, explained that, “the doctrine of aboriginal rights exists and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”¹⁴ The Chief Justice went on to suggest that the word “ancestraux” in the French

⁷ [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

⁸ *Ibid* at para 23. See also eg para 54.

⁹ *Ibid*.

¹⁰ *Ibid* at para 24.

¹¹ *Ibid* at para 27.

¹² *Ibid* at para 66.

¹³ [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

¹⁴ *Ibid* at para 30.

version of s 35(1) “suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence – the ancestry – of aboriginal peoples in North American.”¹⁵ After finding support for this position in Canadian, American and Australia jurisprudence, he stated:

Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.”¹⁶ There is a further limit to that inquiry: a court should look at “the specific history of the group claiming the right.”¹⁷

In order for a contemporarily exercised right to be temporally rooted at that date, there must be some sort of continuity between then and now.

As Lamer CJC explained, “[i]t is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1).”¹⁸ This requirement for continuity appears to be related to the Chief Justice’s understanding of tradition: “[t]raditional laws’ and ‘traditional customs’ are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word ‘tradition’ -- that which is “handed down [from ancestors] to

¹⁵ *Ibid* at para 32.

¹⁶ *Ibid* at para 60.

¹⁷ *Ibid* at para 69.

¹⁸ *Ibid* at para 63.

posterity", The Concise Oxford Dictionary (9th ed. 1995).”¹⁹ Yet, a practice, custom or tradition is not “handed down” in a static manner.

Rather, a practice, custom or tradition, while rooted in the pre-contact period, can be exercised in a contemporary form. Lamer CJC recognized the difficulty in tracing a link between modern and historical practices. Accordingly, he relaxed the continuity requirement as follows:

the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to be engaged in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom and tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right.²⁰

Similarly, Lamer CJC found that the rules of evidence needed to be relaxed in the context of s 35(1).

As he explained:

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims... a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply

¹⁹ *Ibid* at para 40.

²⁰ *Ibid* at 65.

because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private tort law case.²¹

In so explaining, the Chief Justice intimated a prejudice against Aboriginal oral tradition inherent in the rules of evidence.

Like Lamer CJC, L'Heureux-Dubé J rooted Aboriginal rights in the past, arguing that, "the definition of aboriginal rights as to their nature and extent must be addressed in the broader context of the historical aboriginal reality."²² She maintained that Aboriginal rights derive from the fact that, "prior to the first contact with the Europeans, the native people of North American were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs."²³ Hence, "aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society."²⁴ Notwithstanding this similarity, L'Heureux-Dubé claimed that her historical root varied from that of the Chief Justice in its evolutive character.²⁵

For instance, she recognized that:

Aboriginal people's occupation and use of North American territory was not static, nor as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to events such as war, epidemic, famine, dwindling game reserves, etc.

Aboriginal practices, traditions and customs also changed and evolved, including the

²¹ *Ibid* at 68.

²² *Ibid* at para 105.

²³ *Ibid* at para 106.

²⁴ *Ibid* at para 145.

²⁵ *Ibid* at para 171.

utilization of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and developments, bringing novel opportunities, technologies and means to exploit natural resources... Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.²⁶

She criticized the Chief Justice for arbitrarily freezing Aboriginal culture “in some sort of ‘aboriginal time’ prior to the arrival of Europeans.”²⁷ By contrast, she favored an approach that allows Aboriginal rights to “evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world.”²⁸ For her, “the determining factor should only be that the aboriginal activity has... been sufficiently significant and fundamental to the culture and social organization of the aboriginal group – for a substantial continuous period of time.”²⁹ What constitutes a “substantial continuous period of time” will inevitably vary. Yet, the justice suggested that a period of 20-50 years will generally suffice.³⁰

In offering yet another approach, McLachlin J, as she then was, noted that: “s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment.”³¹ She also commented that, “[o]ne finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as

²⁶ *Ibid* at para 113.

²⁷ *Ibid* at para 165.

²⁸ *Ibid* at para 173.

²⁹ *Ibid* at para 175.

³⁰ *Ibid* at para 177.

³¹ *Ibid* at para 230.

the definitive all-or-nothing time for establishing an aboriginal right.”³² Hence, she argued that, “Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question.”³³ These laws and customs have been historically recognized by the common law.³⁴

Hence, McLachlin argued that the Court should adopt “the time-honored methodology of the common law.”³⁵ She described this approach as follows:

we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, ‘Is this like the sort of thing which the law has recognized in the past?’. This is the time-honored methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.³⁶

In a nutshell, her approach involves, “reasoning from the experience of decided cases and recognized rights.”³⁷ While different than the approaches of Lamer CJC and L’Heureux-Dubé J, McLachlin J’s approach is firmly rooted in history. Indeed, as I will demonstrate, although

³² *Ibid* at para 247.

³³ *Ibid* at para 247.

³⁴ *Ibid* at para 261.

³⁵ *Ibid* at para 261.

³⁶ *Ibid* at para 261.

³⁷ *Ibid* at para 262.

McLachlin J emphasizes legal over cultural traditions in her methodology, she employs the same basic understanding of history as her colleagues.

The subsequent case law has focused heavily on the evidentiary issues arising in Aboriginal rights litigation. In *R v Adams*,³⁸ Lamer CJC indicated that, “where there is evidence that at the point of contact a practice was a significant part of a group’s culture... then the aboriginal group will have demonstrated that the practice was a significant part of the aboriginal group’s culture prior to contact.”³⁹ The point of contact is, effectively, the moment that courts will look to in defining Aboriginal rights. In *R v Côté*,⁴⁰ the companion case to *Adams*, Lamer CJC also clarified that, “to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice custom or tradition to a younger generation.”⁴¹

Although *Delgamuukw v British Columbia*⁴² related specifically to the nature and scope of Aboriginal title under s 35(1), the case clarified a number of points regarding the principles of evidence in Aboriginal rights litigation. Lamer CJC, writing for the majority, reflected on the standard of appellate review regarding findings of fact: “[u]nless there is a ‘palpable and overriding error,’ appellate courts should not substitute their own findings of fact for those of the trial judge... The same deference must be accorded to the trial judge’s assessment of the

³⁸ [1996] 3 SCR 101, 138 DLR (4th) 657 [*Adams*].

³⁹ *Ibid* at para 46.

⁴⁰ [1996] 3 SCR 139, 138 DLR (4th) 385 [*Côté*].

⁴¹ *Ibid* at para 56.

⁴² [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

credibility of expert witnesses.”⁴³ The policy rationale underlying this deferential attitude is the view, “that the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility.”⁴⁴ Yet, Lamer also made clear that an appellate court could overturn a finding of fact where, among other things, the trial judge fails to appreciate the evidentiary difficulties inherent in adjudicating Aboriginal rights claims.⁴⁵

Indeed, the Chief Justice emphasized that, “aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples... in a manner which does not strain ‘the Canadian legal and constitutional structure.’”⁴⁶ He explained why this “unique approach” is necessary:

Many of the features of oral histories would count against both their admissibility and their weight as evidence of prior events in court that took a traditional approach to rules of evidence. The most fundamental of these is their broad social role not only ‘as a repository of historical knowledge for a culture’ but also as an expression of the ‘values and mores of [that] culture... The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court

⁴³ *Ibid* at para 78-9.

⁴⁴ *Ibid* at para 79.

⁴⁵ *Ibid* at para 80.

⁴⁶ *Ibid* at para 82.

statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.⁴⁷

For those reasons, “the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that the courts are familiar with, which largely consist of historical documents.”⁴⁸ On the basis of this approach, Lamer CJC went on to hold that the trial judge erred in his failure to give independent weight to the oral histories adduced at trial.

The discussion of the evidentiary issues in *Delgamuukw* was taken up again in *Mitchell v Canada (Minister of National Revenue)*.⁴⁹ McLachlin CJC, for the majority, expanded upon the evidentiary concerns related to the proof of Aboriginal rights:

Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection.⁵⁰

The Chief Justice also provided a in-depth overview of the principles relating to the admissibility of evidence in Aboriginal rights litigation.⁵¹

In particular, she discussed how and why the Court should accommodate oral histories:

⁴⁷ *Ibid* at para 86.

⁴⁸ *Ibid* at para 87.

⁴⁹ [*Mitchell*]

⁵⁰ *Ibid* at para 27.

⁵¹ *Ibid* at paras 29-39.

The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honored principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned: see R. L. Barsh and J. Y. Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993, at p. 1000, and J. Woodward, *Native Law* (loose-leaf), at p. 137. Also see *Sparrow*, *supra*, at p. 1103; *Delgamuukw*, *supra*, at paras. 82-87, and J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997), 8 *Constitutional Forum* 27.

The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, Delgamuukw cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.⁵²

In light of these principles, she held that the trial judge did not err in finding that Grand Chief Mitchell's testimony was credible and reliable as the Chief had been thoroughly trained in his people's history and his testimony had been corroborated by the archaeological and historical records.⁵³

Finally McLachlin CJC made the following comments regarding the weighting of such evidence:

The second facet of the Van der Peet approach to evidence, and the more contentious issue in the present case, relates to the interpretation and weighing of evidence in support of

⁵² *Ibid* at paras 30-34.

⁵³ *Ibid* at paras 29-35.

aboriginal claims once it has cleared the threshold for admission. For the most part, the rules of evidence are concerned with issues of admissibility and the means by which facts may be proved. As J. Sopinka and S. N. Lederman observe, "[t]he value to be given to such facts does not ... lend itself as readily to precise rules. Accordingly, there are no absolute principles which govern the assessment of evidence by the trial judge" (*The Law of Evidence in Civil Cases* (1974), at p. 524). This Court has not attempted to set out "precise rules" or "absolute principles" governing the interpretation or weighing of evidence in aboriginal claims. This reticence is appropriate, as this process is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard. Moreover, weighing evidence is an exercise inherently specific to the case at hand.

...

There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the Van der Peet approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at

para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.⁵⁴

Mitchell remains the most detailed discussion of the rules of evidence in the *Van der Peet* line of cases.

With that said, further guidance was offered in the subsequent case of *R v Sappier*.⁵⁵ Specifically, Bastarache J, for the majority, addressed the issue of adducing evidence regarding pre-contact practices: “[t]he importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.”⁵⁶ Nevertheless, courts should not lose sight of the relaxed evidentiary approach set forth in *Van der Peet*. With respect to proof of pre-contact practices, “courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.”⁵⁷ As mentioned in the introduction, the *Lax Kw'alaams Indian Band v Canada (Attorney General)*,⁵⁸ made it clear that *Sappier* did not alter the *Van der Peet* test.⁵⁹

⁵⁴ *Ibid* at paras 36 and 39.

⁵⁵ 2006 SCC 54, [2006] 2 SCR 686 [*Sappier*].

⁵⁶ *Ibid* at para 22.

⁵⁷ *Ibid* at para 33.

⁵⁸ 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*].

⁵⁹ *Ibid* at para 44.

3 The Court’s Metaphysical Conception of History

In light of the above overview, we can trace the Court’s metaphysical conception of history. Perhaps the most revealing comment comes from Lamer CJC in *Van der Peet*, where he insisted that s 35(1) rights “must be *temporally rooted* in the *historical presence* – the ancestry – of aboriginal peoples.”⁶⁰ On this account, the past is seen as something that was once fully present with itself. The past present or historical root is the “pre-contact period.”⁶¹ L’Heureux-Dubé argued that this focus froze Aboriginal culture “in some sort of ‘aboriginal time’ prior to the arrival of Europeans.”⁶² Similarly, McLachlin J, as she then was, called this root the “magic moment of European contact as the definitive all-or-nothing time.”⁶³ *Adams* fixed the root more precisely at “the point of contact.”⁶⁴

The requirement that Aboriginal rights “be *temporally rooted* in the *historical presence* – the ancestry – of aboriginal peoples”⁶⁵ also reflects the Court’s view of temporality. The use of the word “root” signals that history is a temporal chain. That is, there is continuity throughout history between the past and present. The use of the term “historical presence” suggests that history allows us to re-experience the presence of the past. In this view, history is seen as a continuous chain of fully present past moments. In this sense, history has a continuous link to the presence of the past.

⁶⁰ *Van der Peet supra* note 13 at para 32 [my emphasis].

⁶¹ *Ibid* at para 60. Even L’Heureux-Dubé J in her dissent at para 106 agreed that the root of Aboriginal rights is in moment prior to contact.

⁶² *Ibid* at para 165.

⁶³ *Ibid* at para 247.

⁶⁴ *Adams supra* note 38 at para 46.

⁶⁵ *Van der Peet supra* note 13 at para 32.

This understanding is reflected in Lamer CJC's comment that s 35(1) protects "those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact."⁶⁶ Granted, he did not require that "aboriginal groups provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact."⁶⁷ At first blush, this caveat seems to suggest that the Court does not demand a continuous historical chain linking to the presence of the past.

However, the fact that a group "ceased to engage in a practice, custom or tradition" for a period of time is not fatal if it "resumed the practice, custom or tradition at a later date." The condition of resumption reinstates the requirement for continuity. The actual practice, custom or tradition need not be continuously exercised; however, there must be an unbroken chain between the points of exercise throughout history. To wit, there can be an interruption in the actual practice, but not in the link between past and contemporary practices. In other words, a people need not have continually exercised a practice from the time of contact until now. However, if a contemporary practice is to be protected, it must correspond to a pre-contact practice.

This interpretation is also reflected in the dissenting opinions from *Van der Peet*. L'Heureux-Dubé J asserted that, "the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time."⁶⁸ Indeed, she preferred

⁶⁶ *Ibid* at para 63.

⁶⁷ *Ibid* at para 65.

⁶⁸ *Ibid* at para 113.

an approach that allowed, “aboriginal practices, traditions and customs [to] maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world.”⁶⁹ To that end, all that was necessary was “a substantial continuous period of time,”⁷⁰ possibly 20-50 years.⁷¹

Similarly, McLachlin J, spoke of how Aboriginal rights find their “source” in “the traditional laws and customs of the aboriginal people,”⁷² which persist throughout time.⁷³ She favored an approach that allows rights to “evolve on an incremental, pragmatic basis.”⁷⁴ Thus, the dissenting opinions shared a view that history consists of a continuous chain linking back to the source or presence of the past. This chain can be traced, notwithstanding fluctuations, changes and evolutions. In other words, there are no radical changes that break with the presence of the past.

Underlying this notion of continuity is a particular understanding about context. In *Sparrow*, Dickson CJC and La Forest J stressed the importance of the context of the case at bar in adjudicating s 35(1) claims.⁷⁵ L’Heureux-Dubé J echoed this concern in *Van der Peet*, arguing that Aboriginal rights “must be addressed in the broader context of the historical aboriginal

⁶⁹ *Ibid* at para 173.

⁷⁰ *Ibid* at para 175.

⁷¹ *Ibid* at para 177.

⁷² *Ibid* at para 247.

⁷³ *Ibid* at para 230.

⁷⁴ *Ibid* at para 261.

⁷⁵ *Sparrow supra* note 7 at para 66.

reality.”⁷⁶ In referring to “*the broader context*,” L’Heureux-Dubé J suggests that there is an absolutely determinable historical context that remains constant throughout history. In particular, the context of the point of contact is presumed to be exhaustively determinable. Were it not, the point of contact could not be made present through a tracing of the historical evolution of a practice, custom, or tradition.

The issue of continuity also figures prominently in the Court’s conception of tradition. In *Van der Peet*, Lamer CJC talks of “the historical presence,”⁷⁷ “the ancestry,”⁷⁸ and “the specific history,”⁷⁹ of the group claiming the right. Likewise, L’Heureux-Dubé J also spoke of the “the historical aboriginal reality”⁸⁰ and “the history... of the specific aboriginal society.”⁸¹ These phrases presume a tradition to be singular, homogeneous and transparent.

As Lamer CJC explains:

‘Traditional laws’ and ‘traditional customs’ are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word ‘tradition’ -- that which is "handed down [from ancestors] to posterity", The Concise Oxford Dictionary (9th ed. 1995)”⁸² In *Coté*, Lamer CJC explained that, “to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right

⁷⁶ *Van der Peet supra* note 13 at para 105. See also *ibid* at para 145.

⁷⁷ *Van der Peet supra* note 13 at para 32.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* at para 69.

⁸⁰ *Ibid* at para 105.

⁸¹ *Ibid* at para 145.

⁸² *Ibid* at para 40.

will normally include the incidental right to teach such a practice custom or tradition to a younger generation.⁸³

In *Delgamuukw*, Lamer CJC described oral traditions as being “passed on through an unbroken chain across the generations of a particular aboriginal nation to the present day.”⁸⁴ The tradition is simply something that is left there for subsequent generations. The only choice or decision involved for the contemporary generation is whether to practice the tradition or not.⁸⁵

The Court has very particular ideas about the evidence to be used in tracing that evolution. In *Van der Peet*, Lamer CJC spoke of the “evidentiary difficulties in proving a right which originates in times where there were no written records.”⁸⁶ In *Delgamuukw*, he elaborated his concern, explaining how oral history is seen, “not only ‘as a repository of historical knowledge for a culture’ but also as an expression of the ‘values and mores of [that] culture... The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of historical truth.”⁸⁷ He also expressed concern that oral histories conflict with the rule against hearsay statements because they “largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a

⁸³ *Coté supra* note 40 at para 56.

⁸⁴ *Delgamuukw supra* note 42 at para 86.

⁸⁵ *Ibid* at 65. Contra eg para 113 (where L’Heureux-Dubé J, dissenting, argued that traditions change and evolve over time); and para 261 (where McLachlin J, dissenting, argued that traditional laws and customs evolve incrementally).

⁸⁶ *Van der Peet supra* note 13 at para 68. See also *Mitchell supra* note 49 at para 27 (where McLachlin CJC explained how “[c]laimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records”) and at 32 (where McLachlin CJC noted how “Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question”).

⁸⁷ *Delgamuukw supra* note 42 at para 86.

particular aboriginal nation to present day.”⁸⁸ Lamer indicated how, practically speaking, these concerns could negatively impact the admissibility and weight of oral history evidence.⁸⁹

Given these concerns, he stressed the need to place oral history on an “equal footing with the types of historical evidence that the courts are familiar with, which largely consist of historical documents.”⁹⁰ Moreover, in *Mitchell* McLachlin CJC warned: “judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions.”⁹¹ Yet, notwithstanding these admonitions, the Court’s own approach reflects a bias in favor of written history.

In differentiating oral history on the basis that it expresses cultural values that are peripheral to “the determination of historical truth,” the Court presupposes that written history simply conveys historical truth: i.e. the pure presence of the past. Similarly, in suggesting that the Court must elevate oral history to the same level as written history, it is implying that the latter is inferior to the former. The same implication can be drawn from the fact that the Court developed its unique approach to oral history in view of the paucity of written history in Aboriginal rights cases.

Yet, while the Court sees oral history as problematic evidence, it sees oral testimony as paradigmatic evidence. Lamer makes this view overt where, for example, he affirms that deference should be given to the trial judge’s findings of fact and assessments of credibility on

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at para 87. See also *Mitchell supra* note 49 at para 39.

⁹¹ *Mitchell supra* note 49 at para 34.

the basis that, “the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility.”⁹² One might be tempted to say that this view is incommensurable with the Court’s view of oral history.

However, these views can be reconciled when one looks at them from the perspective of the metaphysics of presence. The Court’s views about oral testimony, oral history, and written history all reflect a desire for presence. Oral testimony is the paramount form of evidence because the trial judge has direct contact with, or is present to, the ostensible source of the evidence: the witness. Documentary evidence is considered second best because it is assumed to be a permanent record of the presence of a past event. Oral history, by contrast, is seen as potentially unreliable because it lacks the direct presence of oral testimony and the permanence of documentary evidence. In this way, the Court’s understanding of speech and writing boils down to presence.

In light of the foregoing, it is clear that the Court has a metaphysical conception of history. This understanding sees history as a continuous chain of present moments. The chain is rooted in a final presence in history, which under the Integral to a Distinctive Culture test is the point of contact. This point is presumed to have a determinable historical context that remains constant throughout history. On this account, history makes the past present again. As a result, traditions are passed consistently from one generation to the next. Documentary evidence is seen as the most effective way to make the past present and thus to preserve a tradition because it is supposed to provide a permanent record of the past present.

⁹² *Delgamuukw supra* note 42 at para 78-9. See also *Mitchell supra* note 49 at para 36.

In summary, the Court reduces the past, history, tradition, and historical evidence to presence. As we saw in the introduction, the reduction of concepts to the determination of presence is what characterizes the metaphysics of presence. Such moves are inherently open to deconstruction.

Alun Muslow has described this approach to history the “empirical-analytical-representationalist” view of history.⁹³ According to this model, history is an “empirical reconstruction process.”⁹⁴ The historian (or, in our case, judge) supposedly perceives the past using historical sources (empirical), infers the, or the most probable, meaning of that past based on his or her perception (analytical), and re-presents the meaning of that past transparently through his or her historical narrative (representationalist).⁹⁵ Muslow explains how, under this model, the goal is to “*represent the past pretty much as it was*” in the present day and in our presence.⁹⁶ Implicit in this goal is the presumption that the past has “‘in it’ some sort of electric charge that means it is alive and which allows it to surface in the present. The past is a site (or sites) of memory.”⁹⁷ Courts have come under fire for adopting this view of history in adjudicating Aboriginal rights claims.

A number of scholars take issue with the judiciary’s reluctance to engage with debates about the nature of history. Some have called on the bench to more closely examine such debates in the Aboriginal rights context. Joel Fortune notes how “objects, events, and even writings from past

⁹³ Alun Munslow, *A History of History* (New York: Routledge, 2012) at 2.

⁹⁴ *Ibid* at 5-6.

⁹⁵ *Ibid* at 2.

⁹⁶ *Ibid* at 5 [my emphasis].

⁹⁷ *Ibid* at 3.

societies do not possess voices of their own. It... requires the creation of meaning by the human mind.”⁹⁸ Similarly, Arthur Ray comments that, “our perceptions of the past are linked to the present because they are socially constructed and connected to current concerns.”⁹⁹ Moreover, Alex Reilly and Ann Genovese, explain how “the past is knowable only through *interpretation* of historical sources.”¹⁰⁰ It is argued that judges need to confront these issues as they ultimately inform the determination of Aboriginal rights.¹⁰¹

Reilly and Genovese have suggested a solution for helping judges better appreciate the insights of historical theory: using historians as theoretical experts. They explain:

Historians, could, we believe, play a more constructive role in the claims process by further emphasizing their expertise as theorists of the relationship between the past and the present, as opposed to being used as experts, within an empiricist framework... Historians need to use their expertise as interpreters of the relationship between the past and present to unpack the methods and assumptions in the law’s understandings of the past and its use of the past to resolve present rights.¹⁰²

⁹⁸ Joel Fortune, “Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History” (Winter 1993) 51 UT Fac L Rev 80 at 83-4 [Fortune, “Construing Delgamuukw”].

⁹⁹ Arthur J Ray, *Telling it to the Judge: Taking Native History to Court* (Montreal, QC: McGill-Queen’s University Press, 2011) at 152 [Ray, *Telling it to the Judge*].

¹⁰⁰ Alex Reilly and Ann Genovese, “Claiming the Past: Historical Understandings in Australian Native Title Jurisprudence” (Fall 2004) 3 Indigenous LJ 19 at 40 [Reilly and Genovese, “Claiming the Past”].

¹⁰¹ See eg Reilly and Genovese, “Claiming the Past” *supra* note 100 at 42 (explaining that, “if the law is challenged by an alternative metahistory, the courts will be better equipped to manage the extremely difficult empirical assessments the law requires of them”); Fortune, “Construing Delgamuukw” *supra* note 98 at 115 (arguing that “[t]he reason why the courts should critically examine the assumptions that underlie an unproblematic conception of historical knowledge is that these assumptions, as we have seen, inform the law”) and Ray, *Telling it to the Judge* *supra* note 99 at xxx (explaining that, “[t]he courts must have in hand a sophisticated diagnosis of the present malady through an understanding of the past – not a snapshot but a full-length feature with plot, characters, context, a quest, and good and evil at play – an understanding that also includes movement, evolution, adaptation, deterioration, and renewal”).

¹⁰² Reilly and Genovese, “Claiming the Past” *supra* note 100 at 41. See also eg Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (Sydney: University of New South

In other words, Courts should use historians, not as mere technicians who aggregate historical data from the archive, but as theoretical experts who complicate that archive.

This solution, however, seems to impute a greatly exaggerated level of theoretical or philosophical expertise to the average historian. Most historians are not philosophers or theoreticians of history. Indeed, as Munslow argues, most historians still adhere to a variant of the “empirical-analytical-representationalist” view of history.¹⁰³ Nevertheless, the theoretical underpinnings of the Court’s approach to history, particularly the metaphysical ones, need to be examined. In the sections that follow, I will provide a deconstructive reading of the Court’s metaphysical concept of history, drawing extensively on certain key Derridean texts.

4 The Past-Present

In *Specters of Marx*, Derrida speaks of the “*non-contemporaneity with itself of the living present*.”¹⁰⁴ To reiterate, according to the metaphysical conception of history, “historical temporality is made up of the *successive* linkings of presents identical to themselves and contemporary with themselves.”¹⁰⁵ The problem is that a present that is self-identical and self-contemporary “is at once singular, total and uneffaceable.”¹⁰⁶ That is, “the singularity of any *first time*, makes of it also a *last time*. Each time it is the event itself, a first time is a last

Wales Press Ltd, 2008) at 224 (arguing “that historians have a valuable and particular role to play in complicating that archive, contextualizing the past for Indigenous peoples whose place within it is often problematic”).

¹⁰³ Munslow, *A History of History* *supra* note 93 at 1.

¹⁰⁴ *Specters of Marx* *supra* note 2 at xviii.

¹⁰⁵ *Ibid* at 87. See also *Of Grammatology* *supra* note 2 at 72.

¹⁰⁶ *Ibid* at 113.

time.”¹⁰⁷ What Derrida means is that if there were a purely singular event or living present, the experience of time would not be possible.¹⁰⁸

Derrida writes:

But the present is never fully present with itself: “The present is what passes, the present comes to pass [*se passé*], it lingers in this transitory passage, in the coming-and-going, *between what goes* and what *comes*, in the middle of what leaves and what arrives, at the articulation between what absents itself and what presents itself. This-in-between articulates conjointly the double articulation according to which the two movements are adjoined. Presence is enjoined, ordered, distributed in the two directions of absence, at the articulation of what is no longer and what is not yet. To join and enjoin. This thinking of the jointure is also a thinking of injunction.”¹⁰⁹

Hence, “there is no purity of the living present.”¹¹⁰ Rather, there is a “disjuncture in the very presence of the present this sort of non-contemporaneity of present time with itself (this radical untimeliness or this anachrony).”¹¹¹ Derrida also calls this disjuncture, “the originary corruption of the day of today.”¹¹² The corruption is hence both what makes the present moment possible and makes the pure presence of that moment impossible.

¹⁰⁷ *Ibid* at 10.

¹⁰⁸ *Ibid* at 193.

¹⁰⁹ *Ibid* at 30.

¹¹⁰ Jacques Derrida, “Freud and the Scene of Writing” in *Writing and Difference*, translated by Alan Bass (New York: Routledge, 2005) 246 at 266. See also *Of Grammatology supra* note 2 at 309-11.

¹¹¹ *Specters of Marx supra* note 2 at 29.

¹¹² *Ibid* at 25.

In addition to a present moment, this analysis has implications for the past moment. If a present moment cannot be present, *a fortiori*, the present past could not have been present.¹¹³ As a result, the past cannot “be understood in the form of a modified presence, as a present-past.”¹¹⁴ What we have is “a past without a present past.”¹¹⁵ Applying these insights to the *Van der Peet* test, the point of contact, or any other point in history for that matter, cannot serve as an ultimate ground for the analysis; the reason being that any such point in history could not have been self-grounding.

The Court was able to decide in, for instance, *Sappier* that the practice of harvesting wood for domestic uses was integral to the distinctive culture of the Maliseet and Mi'kmaq, prior to contact with the Europeans, because the very practice was divided from the beginning. Oral traditions suggested that the Mi'kmaq used wood to construct things such as ropes, canoes, baskets, paddles, drums, carvings, pots, and so on.¹¹⁶ The expert on Mi'kmaq oral tradition told the trial judge that, “as far back as I can read in history or the oral tradition that has been passed down to me, it's been -- we've been always gathering and we've been always using wood as a way of life.”¹¹⁷ The only reason such practices could be passed down was because, from a metaphysical perspective, they were divided or corrupted. Otherwise, the practice would be so unique that it would be unrepeatable.

¹¹³ *Positions supra* note 2 at 26.

¹¹⁴ *Of Grammatology supra* note 2 at 66.

¹¹⁵ Jacques Derrida, *Paper Machine*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2005) at 144.

¹¹⁶ *Sappier supra* note 55 at para 30.

¹¹⁷ *Ibid* at para 31.

Were this not the case, that is, were the practices singular, total, and uneffaceable, they could not have been repeated. Accordingly, no tradition(s) as such could emerge. I will return to this example in the following section, where this point will become clearer.

5 Iterability and Temporality

Even if one were able to locate a pure present-past, the unbroken chain of continuity from that moment to the present would not be possible. This point is made by reference to Derrida's deconstruction of the speech/writing distinction. The classical conception of speech is "a full speech that [is] *fully* present (present to itself, to its signified, to the other, the very condition of the theme of presence in general)."¹¹⁸ In *Limited Inc.*, Derrida explains how writing is characterized as a means of "*extending* enormously, if not infinitely, the domain of oral or gestural communication."¹¹⁹ On this account "writing will follow in a line that is direct, simple and continuous... [without ever having] the slightest effect on either the structure or the contents of the meaning (the ideas) that it is supposed to transmit."¹²⁰ Given that speech is self-present, writing is the "(ontological) modification of presence."¹²¹ Hence, "what supposedly distinguishes writing from speech is the 'permanence of the text.'"¹²² The continuity assumed by the classical conception of writing mirrors that found in the Court's conception of temporality.

However, Derrida demonstrates how such pure continuity is structurally impossible. As he explains, in order for writing to maintain,

¹¹⁸ *Ibid* at 8.

¹¹⁹ Jacques Derrida, *Limited Inc.*, edited by Gerald Graff (Evanston, IL: Northwestern University Press, 1988) at 3.

¹²⁰ *Ibid* at 4.

¹²¹ *Ibid* at 7.

¹²² *Ibid* at 50.

its readability, it must remain readable despite the absolute disappearance of any receiver, determined in general. My communication must be repeatable – iterable – in the absolute absence of the receiver or of any empirically determinable collectivity of receivers. Such iterability... structures the mark of writing itself, no matter what particular type of writing is involved... A writing that is not structurally readable – iterable – beyond the death of the addressee would not be writing.¹²³

Similarly, “[f]or a writing to be a writing it must continue to ‘act’ and be readable” even when the author is temporarily absent, dead, “or more generally because he has not employed his absolutely actual and present intention or attention.”¹²⁴ A written communication can thus break with the present intentions of its author.

This insight holds true even when the author and receiver are actually present. To illustrate this point, Derrida offers the example of a shopping list one writes to oneself:

*At the very moment ‘I’ make a shopping list, I know... that it will only be a list if it implies my absence, if it already detaches itself from me in order to function beyond my ‘present’ act and if it is utilizable at another time, in the absence of my-being-present-now, even if this absence of the simple ‘absence of memory’ that the list is meant to make up for, shortly, in a moment, but one which is already the following moment, the absence of the now of writing... The sender of the shopping list is not the same as the receiver, even if they bear the same name and are endowed with the identity of a single ego. Indeed, were this self-identity or self-presence as certain as all that, the very idea of a shopping list would be rather superfluous or at least the product of a curious compulsion... [E]ven in the extreme case of my writing something in order to be able to read (reread) it *in a moment*, this moment is constituted – i.e. divided – by the very iterability of what produces itself *momentarily*. The sender and the receiver, even if they were the self-same *subject*, each*

¹²³ *Ibid* at 7.

¹²⁴ *Ibid* at 8.

relate to a mark they experience as made to do without them, from the instant of its production or of its reception on; and they experience this not as the mark's negative limit but rather as the positive condition of its possibility. Barring this, the mark would not function and there would be no shopping list, for the list would be impossible.¹²⁵

Thus, “[t]he *written* list is made to supplement an absence that is always possible.”¹²⁶ Even in the presence of the sender and receiver, absence is implied.

The structural condition of writing – iterability – thus ruptures the continuous modification of presence.¹²⁷ What this means is that iterability is both the condition of the possibility of written communication and also the condition of impossibility of the purity of that communication.¹²⁸ By a pure communication, I mean a communication that would fully express the intention of the author. Derrida demonstrates how this structure applies equally to oral communication.

As he notes, spoken language,

only constitutes itself by virtue of its iterability, by the possibility of its being repeated not only in the absence of its ‘referent,’ which is self-evident, but in the absence of a determined signified or of the actual signification, as well as of all intention of present communication. This structural possibility of being weaned from the referent or from the signified (hence from communication and from its context) seem to me to make every mark, including those which are oral.¹²⁹

¹²⁵ *Ibid* at 49. See also *ibid* at 50 (where Derrida provides the example of people passing notes while sitting next to each other).

¹²⁶ *Ibid* at 51.

¹²⁷ *Ibid* at 8.

¹²⁸ *Ibid* at 20.

¹²⁹ *Ibid* at 10.

For example, the oral utterance “the sky is blue” is intelligible even if the receiver and/or sender do not see the sky well or at all, if the sender is mistaken, or if the sender wishes to mislead the receiver.¹³⁰ Likewise, the oral utterance “the circle is squared” lacks a referent and a signified, but not meaning.¹³¹ Also, the utterance “*le vert est ou*” (in English, “the green is either”) is aurally the same as, among others, the utterance “*le vert est où*” (in English, “the green is where”).¹³² These examples point to the iterability of all communication.

Because all communication is iterable, all communication, whether written, oral, or otherwise, “can break with every given context, engendering an infinity of new context in a manner which is absolutely illimitable.”¹³³ What this means is that “there are only contexts, that nothing *exists* outside of context.”¹³⁴ Moreover, “the limit of the frame or border of the context always entails a clause of nonclosure.”¹³⁵ Since context can never be absolutely determined, no form of communication can transmit pure presence, intention or meaning.¹³⁶

Per Derrida, the ability of language, “to function beyond this moment – namely the possibility of being repeated in *another* time – breaches, divides, expropriates the ‘ideal’ plenitude or self-presence of intention, of meaning (to say) and, a fortiori, of all adequation

¹³⁰ *Ibid* at 11.

¹³¹ *Ibid* at 12.

¹³² *Ibid* at 12.

¹³³ *Ibid*.

¹³⁴ *Ibid* at 152.

¹³⁵ *Ibid*.

¹³⁶ *Ibid* at 20.

between meaning and saying.”¹³⁷ Something that is fully present need not and cannot be repeated.¹³⁸ Therefore, something that is repeatable is already a divided and thus altered presence.¹³⁹ Accordingly, iteration cannot simply repeat pure presence.¹⁴⁰

As Derrida explains:

Through the possibility of repeating every mark as the same it makes way for an idealization that seems to deliver the full presence of ideal objects..., but this repeatability itself ensures that the full presence of a singularity thus repeated comports in itself the reference to something else, thus ending the full presence that it nevertheless announces. This is why iteration is not simply repetition.¹⁴¹

Rather, iteration is repetition and alteration:

Iterability alters contaminating parasitically what it identifies and enables to repeat ‘itself’: it leaves us no choice but to mean (to say) something that is (already, always, also) other than what we mean (to say), to say something other than what we say *and* would have wanted to say, to understand something other than... etc... Limiting the very thing it authorizes, transgressing the code or the law it constitutes, the graphics of iterability inscribes alteration irreducibly in repetition (or in identification).¹⁴²

Hence, while iterability makes communication possible, it makes the communication of the self-presence of intention impossible.¹⁴³

¹³⁷ *Ibid* at 62.

¹³⁸ *Ibid* at 129.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at 62.

¹⁴³ *Ibid* at 71 and 129.

While context is never absolutely determinable, it can be relatively stable.¹⁴⁴ Derrida explains: “If I speak of great stability, it is in order to emphasize that this semantic level is neither originary, nor ahistorical, nor simple, nor self-identical in any of its elements, nor even entirely semantic or significant. Such stabilization is relative, even if it is sometimes so great as to seem immutable and permanent.”¹⁴⁵ Indeed, even,

the norms of minimal intelligibility are not absolute and ahistorical, but merely more stable than others. They depend upon socio-institutional conditions, hence upon nonnatural relations of power that by essence are mobile and founded upon complex conventional structures that in principle may be analyzed, deconstructed, and transformed.¹⁴⁶

To put it another way, something that is relatively stable can be destabilized.¹⁴⁷

But what does this all mean for historical temporarily? Well, in order for a historical event to take place, the event must be repeatable and thus iterable.¹⁴⁸ As Derrida puts it, “there must have been a certain play in all these structures, hence a certain instability or non-self-identity, nontransparency.”¹⁴⁹ This play marks the conditions of history¹⁵⁰ because, as mentioned above,

¹⁴⁴ *Ibid* at 144 and 151.

¹⁴⁵ *Ibid* at 145.

¹⁴⁶ *Ibid* at 147.

¹⁴⁷ *Ibid* at 145.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

an event that is self-present “is at once singular, total and uneffaceable.”¹⁵¹ If past events were purely self-present, there would be no history.¹⁵² Historical temporality would grind to a halt.

The iterability of the event is what “[prevents] it from being fully present to itself in the actuality of its aim, or of its meaning.”¹⁵³ Thus, “[w]hat makes the (eventual) possibility possible is what makes it happen even before it happens as an actual event (in the standard sense) or what prevents such an event from ever entirely, fully taking place (in the standard sense).”¹⁵⁴ The original event “is itself divided and multiple.”¹⁵⁵ Therefore, each time the original event is referenced by the historian, judge, lawyer, claimant, etc., the event cannot be simply repeated. Rather, the meaning of the event is invariably altered. The alteration of an event each time it is repeated calls into question the possibility of continuity throughout history.

The issue of context raises similar questions. Given that the historical event can never be fully self-present, it has no absolute context. As a result, like with communication, history cannot exist outside of the context in which it is repeated. Granted, a context can be relatively stable. But without an absolutely determinable, stable context, there can be no direct, simple and continuous line between a historical event or tradition and a contemporary context. The following sections of this chapter bolster these observations.

¹⁵¹ *Specters supra* note 1 at 113.

¹⁵² *Limited Inc supra* note 119 at 129.

¹⁵³ *Ibid* at 57.

¹⁵⁴ *Ibid* at 57.

¹⁵⁵ *Ibid* at 33.

Let us return to the example of the traditional Mi'Kmaq uses for wood discussed in *Sappier*. Recall that the oral traditions passed down through the generations indicated that wood was central to the Mi'Kmaq way of life.¹⁵⁶ As we discussed above, in order for the Mi'Kmaq to have developed a tradition emphasizing the uses of wood, the relevant practices would, in a metaphysical sense, have to be divided. This necessity becomes clearer in light of the discussion of iterability.

For a practice to become a tradition, that is to endure past the present moment, it must be repeatable beyond the present moment. But, because the context of repetition necessarily changes as we move from one moment to the next, the repetition necessarily alters the tradition, even if only slightly. What this means is that each time the practice is repeated, it changes. The observation holds true each time the practice is referenced by the historian, elder, judge or lawyers. This is not to say that such practices cannot and do not remain relatively stable for periods of time. What this observation does suggest is that those practices carry within them the possibility of radically breaking with tradition. The following sections of this chapter will explore this point in greater detail.

But before we move on to those sections, it is important to note that a number of scholars criticize *Van der Peet's* reliance on pre-contact culture, while still clinging to the idea of continuity. Russel Lawrence Barsh and James Youngblood Henderson argue that the Court should employ the common law doctrine of continuity, which presumes that Aboriginal people

¹⁵⁶ *Sappier supra* note 55 at paras 30-1.

retained their rights under their own laws following contact.¹⁵⁷ Kent McNeil promotes the adoption of English proof of custom laws, which would introduce the rebuttable presumption that a tradition existed prior to contact if it was in existence as far back as living witnesses can remember.¹⁵⁸ Mark Walters favors emphasizing the continuity of common law legal principles.¹⁵⁹ The problem is that these perspectives, like the perspective of the Court, presupposes a direct, continuous line between the past and the present. They fail to recognize the potential for a tradition to be altered when it is repeated in the present.

To be sure, some scholars have recognized the role played by the present context in shaping traditions. The problem is that they still rely on the idea of continuity with the past. John Borrows advocates a “living tree” approach, which views Aboriginal rights as living traditions, capable of growth.¹⁶⁰ Similarly, Brian Slattery adopts a generative approach, which understands Aboriginal rights as “rights that, although rooted in the past, have the capacity to renew themselves, as organized entities that grow and change.”¹⁶¹ The metaphor of growth employed by these scholars assumes a point of origin of the organism, such as roots or seeds, from which the organism grows. As a result, despite their acknowledgement that growth and change is

¹⁵⁷ Russel Lawrence Barsh and James Yougblood Henderson, “The Supreme Court’s Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand” (Sept 1997) 42 McGill LJ 993. See also eg Kent McNeil and David Yarrow, “Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?” (2007) 37 Sup Ct L Rev (2d) 177 [McNeil and Yarrow, “Aboriginal Rights Adversely Affected”].

¹⁵⁸ Kent McNeil, “Continuity of Aboriginal Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) 127.

¹⁵⁹ Mark D Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982 (Nov 1999) 44 McGill LJ 711.

¹⁶⁰ John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 Sup Ct L Rev (2d) 351.

¹⁶¹ Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Sup Ct L Rev (2d) 595 at 595.

possible, Borrows and Slattery do not allow for a radical break with the past, the possibility of which is ingrained in the very structure of a tradition by virtue of its iterability.

6 Inheritance and Institution

In “Declarations of Independence,”¹⁶² Derrida analyzes the founding act of an institution. He relies on a distinction between constative utterances, which describe facts, and performative utterances, which accomplish things.¹⁶³ He notes how the declarative act that founds an institution does not ostensibly “come back to a constative or descriptive discourse. It accomplishes, it does what it says it does: that at least is its intention structure.”¹⁶⁴ In the United States of America’s *Declaration of Independence*, the “ ‘good people’... declare themselves free and independent.”¹⁶⁵ However, on closer analysis, “[o]ne cannot decide... whether independence is stated or produced by this utterance.”¹⁶⁶ As Derrida explains:

But this people does not exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, not *as such*. If it gives birth to itself, as free and independent subject, as possible signer, this can hold only in the act of the signature. The Signature invents the signer. The signer can only authorize him- or herself to sign once he or she has come to the end... if one can say this, of his or her own signature, in a sort of fabulous retroactivity. That first signature authorizes him or her to sign.¹⁶⁷

The declaratory act thus results in a paradox.

¹⁶² Jacques Derrida, “Declarations of Independence” (1986) 15 *New Political Science* 7.

¹⁶³ *Limited Inc supra* note 119 at 13.

¹⁶⁴ “Declarations of Independence” *supra* note 162 at 8.

¹⁶⁵ *Ibid* at 9.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid* at 10.

Derrida writes:

The paradox in the instituting moment of an institution is that, at the same time that it starts something new, it also continues something, is true to the memory of the past, to a heritage, to something we receive from our predecessors, from the culture. If an institution is to be an institution, it must to some extent break with the past, keep the memory of the past, while inaugurating something absolutely new.¹⁶⁸

This impasse is no accident. Rather, “[t]his obscurity, this undecidability between, let’s say, a performative structure and a constative structure, is *required* in order to produce the sought-after effect.”¹⁶⁹ This undecidability structures the declaratory act. The only way forward is force or violence, in the sense that no decision can be ultimately grounded.

Generally speaking,

the paradox is that the instituting moment in an institution is violent in a way, violent because it has no guarantee. Although it follows the premises of the past, it starts something absolutely new, and this newness, this novelty, is a risk, is something that has to be risky, and it is violent because it is guaranteed by no previous rules. So at the same time, you have to follow the rule to invent a new rule, a new norm, a new criterion, a new law. That’s why the moment of institution is so dangerous at the same time. One should not

¹⁶⁸ “The Villanova Roundtable” *supra* note 6 at 6.

¹⁶⁹ “Declarations of Independence” *supra* note 162 at 9-10. See *Limited Inc* *supra* note 119 at 148 (where Derrida defines undecidability as follows: “undecidability is always a *determinate* oscillation between possibilities (for example, of meaning, but also of acts). These possibilities are themselves highly *determined* in strictly *defined* situations (for example, discursive – syntactical or rhetorical – but also political, ethical, etc.). They are *pragmatically* determined... I say ‘undecidability’ rather than ‘indeterminacy’ because I am interested more in relations of force, in differences of force, in everything that allows, precisely, determination in given situations to be stabilized through a decision of writing (in the broadest sense I give to the word, which also includes political action and experience in general). There would be no indecision or *double bind* were it not between *determined* (semantic, ethical, political) poles, which are upon occasion terribly necessary and always irreplaceably singular. Which is to say that from the point of view of semantics, but also of ethics and politics, ‘deconstruction’ should never lead either to relativism or to any sort of indeterminism”). See also Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’” in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 at 24 [“Force of Law”].

have an absolute guarantee, an absolute norm; we have to invent the rules. I am sure that the responsibility that is taken by my colleagues and by the students, implies that they have given themselves the new rule. There is no responsibility, no decision, without this inauguration, this absolute break.¹⁷⁰

With regard to the Declaration, “a signature gives or extends credit to itself, in a single coup of force, which is also a coup of writing, as the right to writing. The coup of force makes right, founds right or the law, gives right, *brings the law to the light of day, gives both birth and day to the law.*”¹⁷¹ These observations have profound implications for the interpretation of s 35(1).

Recall, the text of s 35(1) reads: “[t]he existing Aboriginal and treaty right of the Aboriginal people of Canada are hereby recognized and affirmed.”¹⁷² In *Sparrow*, the Court held that the word “existing” meant “unextinguished,” rather than not “being in actuality in 1982.”¹⁷³ Notwithstanding this distinction, the Court’s focus on the word “existing” presupposes that s 35(1) is a constative or descriptive provision, which merely states the fact that Aboriginal rights exist.

The Court ignores the word “hereby,” which suggests that, as a result of s 35(1), Aboriginal rights are created. In short, the Court obscures a paradox in the very wording of s 35(1): the section continues the tradition of Aboriginal rights, while creating new Aboriginal rights. This paradox is structural, as well as semantic. In order for s 35(1) to function, it necessarily produces this undecidability between its constative and performative aspects.

¹⁷⁰ “The Villanova Roundtable” *supra* note 6 at 6.

¹⁷¹ “Declarations of Independence” *supra* note 162 at 10.

¹⁷² *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35(1).

¹⁷³ *Sparrow supra* note 7 at para 23-4.

Moreover, this undecidability extends to the Court's interpretation and application of the provision. The paradoxical structure of the instituting moment is repeated when the Court renders a decision on s 35(1). The only way forward is force or violence, in the sense that no decision can be ultimately grounded.

As John D Caputo remarks:

the judge 'invents' the law for the first time, or, better, 'reinvents' the law, not by beginning absolutely *de novo* but by making a 'fresh judgment' ... in a new situation. Such a decision, then, is both regulated (by law) and not regulated (responsive to justice), stretching constrains of the law to include the demands of justice in a new, different, and singular situation. For every 'case' is different; every case is more than a case, a *casus* – a falling from or declension of universality. The situation is not a case but a singularity. Otherwise, the judge is not a judge but a calculating machine, and we do not need a judge but a computer, and we do not ensure justice but mere conformity to law. Still, neither is the judge free to improvise and lease aside the law.¹⁷⁴

This is what Derrida means when he says that iterability alters. Each time the Court makes a new judgment regarding s 35(1), it continues the existing jurisprudence, but it also re-inaugurates or reinvents the jurisprudence.¹⁷⁵

The controversy that ensued in the wake of the *Sappier* decision offers a good example.

Recall that some scholars argue that *Sappier* has changed *Van der Peet* for the better.¹⁷⁶

¹⁷⁴ John D Caputo, "A Commentary: Deconstruction in a Nutshell" in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 31 at 137. See also Derrida, "Force of Law" *supra* note 169 at 23-4.

¹⁷⁵ "The Villanova Roundtable" *supra* note 6 at 28.

¹⁷⁶ See Guy C Charlton, "Letting Go of Culture: A Comment on R v Sappier; R v Gray" (2007-2008) 39 Ottawa L Rev 317; and John P McEvoy, "Aboriginal Activities and Aboriginal Rights: A Comment on R v Sappier; R v Gray" (2007) 6(2) Indigenous LJ.

However, in *Lax Kw'alaams*, Binnie J was blunt that *Sappier* had not substantively altered *Van der Peet*.¹⁷⁷ Moreover, “many Indigenous people remain unconvinced that there has been real change” in the wake of *Sparrow*.¹⁷⁸ There have been other scholars who have continued to critique the *Van der Peet* approach in the wake of *Sappier*.¹⁷⁹ In this example, each time the *Sappier* decision is revisited, it is given new meaning.

This analysis also extends to the Court’s understanding of tradition. Derrida discusses the issue of tradition and inheritance in *Specters of Marx*.¹⁸⁰ He argues that traditions are multiple and heterogeneous.¹⁸¹ As he explains:

Let us consider, first of all, the radical and necessary *heterogeneity* of an inheritance, the difference without opposition that has to make it, a ‘disparate’ and a quasi-juxtaposition without dialectic... An inheritance is never gathered together, it is never one with itself. Its presumed unity, if there is one can consist only in the *injunction to reaffirm by choosing*. ‘One must’ means *one must* filter, sift, criticize, one must sort out several different possibilities that inhabit the same injunction. And inhabit in a contradictory fashion around a secret. If a readability of a legacy were given, natural, transparent, univocal, if it did not call for and at the time from it. We would be affected by it as by a cause – natural or genetic. One always inherits from a secret – which says ‘read me, will you ever be able to do so?’ The critical choice called for by any reaffirmation of the inheritance is also, like memory itself, the condition of finitude. The infinite does not inherit, it does not inherit (from) itself. The injunction itself (it always says ‘choose and decide from among what you

¹⁷⁷ *Law Kw'alaams supra* note at 58 at para 44.

¹⁷⁸ Woo, *Ghost Dancing infra* note 205 at 10.

¹⁷⁹ See eg McNeil and Yarrow, “Aboriginal Rights Adversely Affected” *supra* note 157.

¹⁸⁰ *Supra* note 1.

¹⁸¹ *Ibid* at 95.

inherit') can only be one by dividing itself, tearing itself apart, differing/deferring itself, by speaking at the same time several times – and in several times – and in several voices.¹⁸²

Since traditions are multiple and heterogeneous, one must select among them.

For Derrida, “[a] heritage is never natural, one may inherit more than once in different places and at different times, one may choose to wait for the most appropriate time, which may be the most untimely – write about it according to different *lineages*, and sign thus more than one *import*.”¹⁸³ Thus,

the principle of selectivity which will have to guide and hierarchize among the ‘spirits’ will fatally exclude in its turn. It will even annihilate by watching (over) its ancestors rather than (over) certain others... this watch will engender new ghosts. It will do so by choosing already among the ghosts, its own from among its own, thus by killing the dead: law of finitude, law of decision and responsibility for finite existences, the only living-mortals for whom a decision, a choice, a responsibility has meaning and a meaning that will have to pass through the ordeal of the undecidable.¹⁸⁴

In choosing among traditions, one must, to adopt a quote from above, “to some extent break with the past, keep the memory of the past, while inaugurating something absolutely new.”¹⁸⁵ What Derrida means is that traditions, like constitutions and judgments, have both constative and performative structures. As a result of this paradoxical structure, the choice among traditions is violent, in a sense, because it is groundless.

¹⁸² *Ibid* at 18.

¹⁸³ *Ibid* at 211.

¹⁸⁴ *Ibid* at 109.

¹⁸⁵ “The Villanova Roundtable” *supra* note 6 at 6.

Jack Balkin provides a helpful explanation of the violence underlying this paradoxical structure in his article “Tradition, Betrayal, and the Politics of Deconstruction.”¹⁸⁶ The article examines the United States Supreme Court decision of *Michael H v Gerald D.*¹⁸⁷ Balkin examines the divergent interpretations of tradition at play in the decision.

Justice Scalia, for the majority, argued that in order to define “liberty” under the due process clause of the fourteenth amendment, reference needed to be made to tradition. In order to give content to the word “liberty,” Scalia focused on “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”¹⁸⁸ As Balkin points out, this interpretation relies on a distinction between specific and general.¹⁸⁹ He explains that, for Scalia, “specific traditions are more reliable guides to the contours of liberty than are general traditions because they are more easily identifiable, and because they involve less danger of countermajoritarian value choices by the judiciary.”¹⁹⁰ Balkin demonstrates how, however, this logic can be inverted.

As he puts it, “our most specific historical traditions may often be opposed to our more general commitments to liberty or equality.”¹⁹¹ Indeed, in his dissenting opinion, Justice Brennan argued that tradition must be defined in the abstract.¹⁹² In order to explain these

¹⁸⁶ (1989-1990) 11 Cardozo L Rev 1613 [Balkin, “Tradition”].

¹⁸⁷ 109 S Ct 2333 (1989).

¹⁸⁸ Balkin, “Tradition” *supra* note 186 at 1641.

¹⁸⁹ *Ibid* at 1615.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid* at 1618.

¹⁹² *Ibid* at 1624.

divergent readings of tradition, Balkin notes how the etymology of the word tradition leads to the latin verb *tradere*, which means both to transfer and to betray.¹⁹³ As Balkin explains, both Scalia and Brennan invoke tradition and betrayal:

Justice Scalia seeks to enforce his view of ‘tradition,’ establishing hegemony of his vision of culture, thus betraying other values and other traditions in the process. But Justice Brennan is equally a betrayer. For he seeks to use a general concept of tradition to subvert tradition, thus betraying it. If Scalia’s use of tradition is a betrayal, Brennan’s use of tradition against itself is a betrayal of a betrayal.¹⁹⁴

Balkin’s point is that enforcing a particular view of tradition risks betraying another. In focusing on the inheritance aspect of tradition, as opposed to the betrayal aspect, the Court obscures its role in reinventing tradition.

The characterization of the impugned tradition in *Van der Peet* offers an excellent example. The appellant claimed that, “that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo.”¹⁹⁵ The trial judge held that “the Sto:lo people clearly fished for food and ceremonial purposes, but that any trade in salmon that occurred was incidental and occasional only.”¹⁹⁶ The summary appeal judge stated that the Sto:lo “had no stricture or prohibition against the sale of fish, with the result that ‘when the first Indian caught the first salmon he had the 'right' to do anything he wanted with it -- eat it, trade it

¹⁹³ *Ibid* at 1619-20.

¹⁹⁴ *Ibid* at 1625.

¹⁹⁵ *Van der Peet supra* note 13 at 85.

¹⁹⁶ *Ibid* at para 7.

for deer meat, throw it back or keep it against a hungrier time.”¹⁹⁷ The majority of the British Columbia Court of Appeal held that “[t]he evidence, while indicating that surplus fish would have been disposed of or traded, did not establish that the ‘purpose of fishing was to engage in commerce.’”¹⁹⁸ The lone dissenting justice found that the salmon trade that developed between the Sto: lo and the Hudson’s Bay Company post-contact represented, not a break with tradition, but a continuation of that tradition in new circumstances.¹⁹⁹ The justice thus held that the Sto: lo had the “right to fish for a moderate livelihood.”²⁰⁰ Lamer CJC, for the majority of the Supreme Court of Canada, found that “the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto: lo culture.”²⁰¹ In dissent, L’Heureux-Dubé J concluded, “that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes.”²⁰² The above illustrates the diversity of views on the Sto: lo’s tradition of fishing.

Indeed, the above views reveal a diversity of perspectives on what purposes the Sto: lo’s traditional fishery encompassed. At the broad end of the spectrum, the fishery was used for any purposes the Sto:lo saw fit. At the narrow end of the spectrum, the fishery was limited to ceremonial and food purposes. In between, suggested purposes included livelihood, support, sustenance and commerce. The key point is that the claimant, trial judge, summary appeal judge, Court of Appeal justices and Supreme Court of Canada justices were all purporting to describe a

¹⁹⁷ *Ibid* at para 8.

¹⁹⁸ *Ibid* at para 9.

¹⁹⁹ *Ibid* at para 10.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* at para 86.

²⁰² *Ibid* at para 221.

tradition that, at least at an essential level, remained constant throughout history. However, rather than produce a unified perspective on what the tradition was, they produced a controversy.

This example serves to illustrate how, in emphasizing one vision of Sto:lo tradition, courts tend to obscure other visions in the process. By saying that the pre-contact Sto:lo primarily fished for food and ceremonial purposes, Lamer CJC was making a choice among such visions. In doing so, he was, on the one hand keeping the Sto:lo tradition alive: that is, insofar as the tradition encompassed fishing for ceremonial and food purposes. On the other hand, he was betraying the tradition: the tradition of the Sto:lo doing as they wished with their fish, of making a livelihood, and of trading with the Hudson's Bay Company. This dilemma is further complicated when we consider how the Court limited the window through which we view Sto:lo tradition to the pre-contact era. In other words, the diversity of tradition would become even more pronounced were we to look throughout the history of the Sto:lo people.

Other scholars have pointed out the Court's betrayal of certain Aboriginal traditions. Patrick Macklem puts it nicely when he explains that, "traditions alone cannot ground the constitutional significance of Aboriginal cultural difference."²⁰³ He continues: "[c]onstitutional law is partly concern with determining which traditions possess constitutional significance; grounding constitutional protection of Aboriginal cultural difference tradition presupposes a point of reference that requires evaluation."²⁰⁴ Grace Li Woo echoes this sentiment when she states: "the

²⁰³ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 64.

²⁰⁴ *Ibid* at 65.

Court must choose which parts of Canada's legal heritage to accept and which to reject."²⁰⁵

Other scholars have pointed to the particular aspects of tradition that have been forgotten in the process of choosing which aspects of tradition warrant constitutional significance.

Dale Turner argues that the Court "fails to justly engage Aboriginal intellectual traditions, in particular, oral traditions (traditional philosophies)."²⁰⁶ John Borrows observes how the *Van der Peet* test has almost completely disregarded Indigenous legal traditions.²⁰⁷ Borrows also demonstrates how the Court neglects Aboriginal traditions developed solely in response to European contact. Robert Morse shows how the Court ignores the fact that First Nations were traditionally self-governing.²⁰⁸ Similarly, Grace Li Woo maintains that the Court disregards traditional Aboriginal concepts regarding "jurisdiction, territorial authority, and self-determination."²⁰⁹ Moreover, Emily Luther emphasizes how the Court's approach tends to favor the traditions of Aboriginal men, at the expense of those of Aboriginal women.²¹⁰ Thus, in

²⁰⁵ Grace Li Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver, BC: UBC Press, 2011) at 241 [Woo, *Ghost Dancing*].

²⁰⁶ Dale Turner, "Perceiving the World Differently" in David Kahane and Catherine Bell, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57, at 58 [Turner, "Perceiving the World Differently"]. See also Russel Binch, "'Speaking for Themselves': Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (Feb 2002) 13 NJCL 245 [Binch, "Speaking for Themselves"].

²⁰⁷ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). See eg Larry N Chartrand, "Reconceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 Windsor YB Access Justice 243-258; James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (Spring 2002) 1 Indigenous LJ 1; and Michel Morin, "Quelques réflexions sur le rôle de l'histoire dans la détermination des droits ancestraux et issus de traits" (2000) 34 RJT 329.

²⁰⁸ Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*" (September 1997) 42 McGill LJ 1011.

²⁰⁹ Woo, *Ghost Dancing supra* note 205 at 139.

²¹⁰ Emily Luther, "Whose 'Distinctive Culture?': Aboriginal Feminism and *R v Van der Peet*" (2010) 8 Indigenous LJ 27. See also eg Val Napoleon, "Aboriginal Discourse: Gender, Identity and Community" in Benjamin Richardson, Shim Imai and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233, at 241 (explains how, "[r]eliance on the jurisprudence alone

emphasizing certain Indigenous traditions, the Court is obscuring others. This observation undermines the idea that any given Aboriginal group has a unified perspective, tradition or culture. I will return to this point in the following chapter. For the time being, it suffices to say that Aboriginal traditions, like any traditions, are multiple and heterogeneous. Thus, in affirming one tradition, the Court risks betraying another.

7 Iterability and Evidence

The above discussion also has implications for the way in which the Court approaches evidence in s 35(1) cases. In fact, Derrida argues that his work on iterability calls into question “evidence together with its entire system of associated values (presence, truth, immediate intuition, assured certitude, etc.).”²¹¹ In the context of the *Van der Peet* test, that work particularly undermines the distinction between oral and written evidence. The Court appears to share much of the traditional bias about speech and writing that Derrida undermines.

As discussed, the Court favors direct oral testimony because it allows the trial judge to be in the ostensible presence of the witness. Documentary evidence is also favored because it is believed to offer permanent records of the past. Oral history is mistrusted because it is believed that, without the direct contact of oral testimony and the permanence of documentary evidence, it is at risk of being contaminated by tangential cultural values.

might excuse one for concluding that women did not have an important or active presence on the land. The literature and images of aboriginal peoples focus almost entirely on males and their activities – fishing, hunting and trapping”).

²¹¹ *Limited Inc supra* note 119 at 41.

This bias towards written records loomed in the two relevant cases in which oral traditions figured prominently. In *Van der Peet*, while oral histories were admitted, it was made clear that they were corroborated by expert evidence.²¹² Similarly, in *Mitchell* McLachlin CJC, for the Court, stated:

In this case, the parties presented evidence from historians and archaeologists. The aboriginal perspective was supplied by oral histories of elders such as Grand Chief Mitchell. Grand Chief Mitchell's testimony, confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence credible and relied on it. He did not err in doing so and we may do the same.”²¹³

While the passage suggests that the oral history was useful on its own, it implies that it was reliable because it was “confirmed by archeological and historical evidence.” Certain critics also note the Court’s preference for written over oral history.

Bruce Granville Miller explains that the Court “implies a subordination of oral materials to written and historical ones.”²¹⁴ Accordingly, he argues “the idea of oral narratives as evidence, and oral historians as experts, faces considerable resistance because of our society’s marked bias for the visual or written against other sensory practices.”²¹⁵ Similarly, Russell Binch maintains that “[m]ost Canadians live in a predominantly literate and visual-oriented culture and their

²¹² *Van der Peet supra* note 13 at para 212.

²¹³ *Mitchell supra* note 49 at para 35.

²¹⁴ Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver, BC: UBC Press, 2011) at 9.

²¹⁵ *Ibid* at 170.

courts reflect this focus in their dependence on written proof and eyewitness testimony.”²¹⁶ As a result of this bias, Binch argues that the Court tends to favor Western conceptions of history and evidence. In light of Derrida’s deconstruction of the speech/writing distinction, however, these beliefs appear to be ill founded.

Iterability is the condition of possibility of these forms of evidence. Yet, iterability also makes the communication of pure presence or intention impossible because each time any type of communication is repeated, it is also altered. These reflections undermine the presupposition that oral testimony or documentary histories are any more unadulterated than oral tradition.²¹⁷ Why then does the Court still show a bias towards written history?

8 Evidence and the Archive

In *Archive Fever*, Derrida talks of,

the classical norms of knowledge, of scholarship, and of epistemology which dominate in every scientific community: here, the objectivity of the historian, of the archivist, of the sociologist, of the philologist, the reference to stable themes and concepts, the relative exteriority in relation to the object, particularly in relation to an archive determined as *already given, in the past* or in any case only *incomplete*, determinable and thus terminable

²¹⁶ Russel Binch, “ ‘Speaking for Themselves’: Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation” (Feb 2002) 13 NJCL 245 at 251.

²¹⁷ The Court also neglects the artificial nature of oral evidence. See Jacques Derrida, *Points... interviews 1974-1994*, edited by Elizabeth Weber, translated by Peggy Kamuf and others (Stanford: Stanford University Press, 1995) at 133 (where he makes the following comments, equally applicable to Court testimony, about an interview, which he says “is totally artificial. These things have to be said, one must not pretend to believe that interviews published in the newspapers are real interviews; it is an extremely artificial device, one that I tried to get through, while adhering to the rules of the genre, so as to put across what you said you heard, that is, the voice, a certain ‘spontaneity,’ which, I think, is most audible in the little remarks I made about the malaise I felt in that situation.”)

in a future itself determinable as future present, domination of the constative over the performative, etc.²¹⁸

The classical view presupposes the “constative and theoretical neutrality” of the archive.²¹⁹ This approach also presumes “the *full and effective actuality* of the taking-place, the reality, as they say, of the archived event.”²²⁰ Hence, this approach reflects “a painful desire for a return to the authentic and singular origin.”²²¹ In this sense, the classical approach views the “archive as data.”²²² The idea is that history simply lets the past speak for itself.²²³ The Court’s metaphysical concept of history clearly fits within this classical understanding.

Derrida demonstrates how this perspective obscures the performative aspect of the archive. As he explains, the “archivist institutes the archive as it should be, that is to say, not only in exhibiting the document, but in *establishing* it. He reads it, interprets it, classes it.”²²⁴ Further, “the interpretation of the archive... can only illuminate, read, interpret, establish its object, namely a given inheritance, by inscribing itself into, that is to say, by opening it and by enriching it enough to have a rightful place in it. There is no meta-archive.”²²⁵ Hence, “the technical structure of the *archive* also determines the structure of the *archivable* content even in its very coming into existence and its relationship to the future. The archivization produces as much as it

²¹⁸ *Archive Fever supra* note 1 at 51.

²¹⁹ *Ibid* at 55.

²²⁰ *Ibid* at 66.

²²¹ *Ibid* at 85.

²²² *Ibid* at 53.

²²³ *Ibid* at 70.

²²⁴ *Ibid* at 55.

²²⁵ *Ibid* at 67.

records the event.”²²⁶ Archives, hence, like constitutions, judgments and traditions, rest on the dual and paradoxical foundations of the constative and performative.

The archive is always divided by these forces.²²⁷ As a result, there can be no absolute foundation to the archive. Or, as Derrida puts it, “[t]here is no meta-archive.”²²⁸ Hence, the archive rests on a type of violence. Records “are only kept and classified under the title of the archive by a privileged topology.”²²⁹ In other words, the privileging of some records over others has no other grounds but violence. This revelation is significant because the authority over the archive is a necessary condition of political power.²³⁰ When one privileges some archival materials over others, one is therefore making a political or ideological, rather than an epistemological, choice.

This analysis is highly relevant to the *Van der Peet* methodology. As Arthur Ray explains, the Aboriginal rights claims process effectively involves moving the archive into the courtroom.²³¹ Yet, the process is not as passive as Ray suggests. In determining what is admitted as evidence and what is not, the judge actually takes on the role of archivist.

For example, in *Van der Peet*, the trial judge was presented with conflicting historical evidence regarding whether the Sto:lo were a band or tribal culture. The judge ultimately had to prefer the interpretation of one set of experts to another. What this example illustrates is that the

²²⁶ *Ibid* at 17.

²²⁷ *Ibid* at 29.

²²⁸ *Ibid* at 67.

²²⁹ *Ibid* at 3.

²³⁰ *Ibid* at 4.

²³¹ Ray, *Telling it to the Judge supra* note 99 at 149.

judge does not simply collect the documents into a judicial archive; rather, the judge is actually establishing the archive by admitting, excluding and weighing evidence.

In doing so, the judge is actually making a political or ideological choice. As Russell Binch demonstrates, courts tend to favor Western conceptions of history in the Aboriginal rights claims process.²³² The reason for that bias is that Aboriginal oral traditions are evaluated against Western evidentiary norms. As Fortune argues, however, “Western notions of history cannot be preferred before a court of law on the ground that they deliver a more truthful account of the past.”²³³ What his statement suggests is that Western history is no more epistemologically reliable than Aboriginal oral tradition. Hence, in preferring the former to the latter, the Court is reflecting an unfounded bias.

Ronald Niezen has suggested what he calls “therapeutic history” as a way of correcting this bias. What he means is “the use of knowledge as a means of recovery from the abuses of colonial domination or as a spiritually elevating reconnection with a collective self that had been largely, but not entirely expunged or forgotten.”²³⁴ For Niezen, the benefit of this approach is that “[i]t provides an epistemology that privileges collective self-knowledge and self-recognition over forms of knowledge associated with the imperialist strivings of the West.”²³⁵ In essence, what Niezen is advocating is an inversion of the violent hierarchy that is currently in place i.e. he is advocating the prioritization of, for instance, the oral over the written within the judicial archive.

²³² Binch, “Speaking for Themselves” *supra* note 206.

²³³ Fortune, *Construing Delgamuukw* *supra* note 98 at 116.

²³⁴ Ronald Niezen, *The Rediscovered Self: Indigenous Identity and Cultural Justice* (Montreal: McGill-Queen’s University Press, 2009) at 14.

²³⁵ *Ibid.*

The problem with this move is that it halts the deconstruction at the reversal stage. As a result, Niezen's suggestion risks reproducing the metaphysics of presence, this time elevating the formerly subordinated terms and lowering the formerly prioritized terms. His suggestion would therefore perpetuate the totalizing tendency already implicit in the Court's approach to history.

9 Summary

To sum-up, underlying the *Van der Peet* test is a metaphysical conception of history. This conception views history as a continuous succession of present moments past. The origin or beginning of the chain, under the Integral to a Distinctive Culture test, is the point of European-Aboriginal contact. This point is presumed to have a determinable historical context that remains absolutely stable throughout history. If we follow the chain backwards, we arrive at the pure presence of the past moment of contact. In this view, traditions can be passed consistently from one generation to the next. Moreover, documentary evidence provides a permanent record of the pure presence of the moment of contact. The archive is merely a repository for such documents. In summary, the Court reduces the past, history, tradition, and historical evidence to presence. In other words, the Court adopts an "empirical-analytical-representationalist" view, which sees history as something that re-presents the past as it really happened.

These concepts are therefore open to deconstructive readings. The present moment cannot be fully present or contemporaneous with itself. Because the present comes to pass, it necessarily entails absence. As a result of this divided presence, the present past is divided. Therefore, every time the historian, judge, lawyer or claimant repeats the event, they also reinvent it. The same holds true for traditions. This also means that no evidence can provide a link to the pure presence of the past. Hence, when the Court favors a certain historical moment, tradition or piece of

evidence, it is inevitably making a choice that is rooted in nothing more than political or ideological considerations. This is a limitation that the *Van der Peet* case law has failed to even consider, let alone come to terms with. This is also a limitation reflected in the Court's conception of culture, which will be discussed in the next chapter.

Chapter 3

The Court's Metaphysical Conception of Culture

1 Overview

According to Derrida: “All culture is originally colonial... Every culture institutes itself through the unilateral imposition of some ‘politics’ of language. Mastery begins, as we know, through the power of naming, of imposing and legitimating appellations.”¹ Culture attempts to master by emphasizing unity over difference. In Derridean terms, the essence of culture is expressed in terms of presence. Culture is therefore the very type of concept that deconstruction is concerned with. Thus, Derrida devotes a considerable body of work to culture.²

This chapter will draw on that body of work in deconstructing the Court's concepts of culture, cultural identity and representation. To begin, this chapter will explore the Court's discussion of these concepts in the case law. Next, the chapter will attempt to outline the Court's understanding of those concepts based on that jurisprudence. Part three will deconstruct the basic structure underlying the Court's concept of cultural identity. The fourth part examines that concept in somewhat less abstract terms. Part five examines the Court's understanding of representation as a re-presentation of the perspective of Aboriginal people as it really is. The last section explores the Court's concepts of culture, cultural identity and representation in relation to

¹ Jacques Derrida, *Monolingualism and the Other of The Prosthesis Origin*, translated by Patrick Mensah (Stanford: Stanford University Press, 1996) at 39 [*Monolingualism and the Other*].

² See eg *Ibid*; Jacques Derrida, *The Other Heading: Reflections on Today's Europe*, translated by Pascale Ann-Braut and Michael B. Naas (Indianapolis: Indiana University Press, 1992) [*Other Heading*]; Jacques Derrida, *Of Hospitality: Anne Dufourmatelle Invites Jacques Derrida to Respond*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2000) [*Of Hospitality*].

the notion of hospitality. In the final analysis, this chapter demonstrates how the Court's view that there are homogenous cultural identities that can be transparently presented is misguided.

2 Case Law

In *R v Sparrow*,³ Dickson CJC and La Forest J, for the Court, stressed the collective nature of Aboriginal rights, explaining that they “are rights held by a collective and are in keeping with the culture and existence of that group.”⁴ Moreover, they stressed the importance of considering the “aboriginal perspective” when determining the content of those collective rights.⁵ These issues were taken up again in *R v Van der Peet*.⁶ In that case, Lamer CJC, for the majority, echoed the collective nature of Aboriginal rights.

He explained how liberal enlightenment rights are reflected in the *Charter of Rights and Freedoms*,⁷ on the basis that those “rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the ‘inherent dignity’ of each individual in society is respected.”⁸ By contrast, Aboriginal rights “are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal.”⁹

³ [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

⁴ *Ibid* at para 68.

⁵ *Ibid* at para 69 (where the justices argued that “it is possible, and indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake”).

⁶ [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

⁸ *Ibid* at para 18.

⁹ *Ibid* at para 19. See also para 69 (where Lamer CJC stated that, “the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right...”).

Accordingly, the “intended focus” of s 35(1) is the “aboriginal people and their rights in relation to Canadian society as a whole.”¹⁰ It is the fact that the Aboriginal peoples occupied Canada before the arrival of the Europeans, “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.”¹¹ As a result of that fact,

the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.¹²

Hence the test: “in order to be an aboriginal right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹³ There are two steps to follow in applying this test.

First, a court must identify the exact nature of the claim.¹⁴ In identifying the nature of the claim, a “court must take into account the perspective of the aboriginal people claiming the right.”¹⁵ That perspective must, however, “be framed in terms cognizable to the Canadian legal

Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis... The existence of the right will be specific to each aboriginal community”).

¹⁰ *Ibid* at para 21.

¹¹ *Ibid* at para 30.

¹² *Ibid* at para 44.

¹³ *Ibid* at para 46.

¹⁴ *Ibid* at para 76.

¹⁵ *Ibid* at para 49.

and constitutional structure,” which Lamer CJC also calls the “non-aboriginal legal system.”¹⁶ In so framing the claim, a court is to “consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the government regulation, statute or action being impugned, and the practice, custom, or tradition being relied upon to establish the right.”¹⁷ The relevant action should be characterized at a general, rather than specific level.¹⁸ Furthermore, the Court must acknowledge that the action may be a modern manifestation of pre-contact practices, customs, or traditions.¹⁹

Second, a court must determine whether the practice, custom, or tradition was an integral part of the distinctive culture prior to European contact.²⁰ As with the first stage, the court must consider the Aboriginal perspective, defined in terms understandable to the non-Aboriginal legal system, at the second stage.²¹ Lamer CJC offered a number of insights for determining whether a practice, custom or tradition was an integral part of the distinctive culture.

First,

The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society’s distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture

¹⁶ *Ibid.*

¹⁷ *Ibid* at para 51.

¹⁸ *Ibid* at para 54.

¹⁹ *Ibid.*

²⁰ *Ibid* at para 80.

²¹ *Ibid* at para 49.

of the society distinctive – that it was one of the things that truly made the society what it was.²²

Second:

A practical way to think about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is... whether or not a practice, custom or tradition is a defining feature of the culture in question.²³

Third,

a practice, custom or tradition... must be of independent significance to the aboriginal culture in which it exists... The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society.²⁴

Fourth, the practice, custom or tradition must be distinctive, not distinct: “distinctness is... a claim relative to other cultures or traditions... distinctive... is a claim that his tradition or custom makes the culture what it is.”²⁵ Fifth, the influence of the arrival of Europeans is only relevant and fatal to a s 35(1) claim where a practice, custom or tradition arose exclusively in response to that arrival.²⁶

L’Hereux-Dubé J criticized Lamer CJC for focusing on particular Aboriginal practices, customs, and traditions independently apart “from the general culture in which they are

²² *Ibid* at para 55.

²³ *Ibid* at para 59.

²⁴ *Ibid* at para 70.

²⁵ *Ibid* at para 71.

²⁶ *Ibid* at para 73.

rooted.”²⁷ She also attacked the Chief Justice for presupposing a dichotomy between Aboriginal and non-Aboriginal practices, customs, and traditions.²⁸ Doing so, she argued, “amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.”²⁹ That is not to say that L’Heureux-Dubé J completely rejected the Integral to a Distinctive Culture Test.³⁰

Rather, the justice adopted a modified version of the test, stating: “[t]he practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to culture and social organization of a particular group of aboriginal people.”³¹ In other words, “the aboriginal practices and custom which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1).”³² To put it yet another way, “all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1).”³³ In light of the foregoing quotes, it is clear that L’Heureux-Dubé J remained committed to some form of the Integral to a Distinctive Culture Test.

²⁷ *Ibid* at para 150.

²⁸ *Ibid* at para 154.

²⁹ *Ibid*.

³⁰ See eg *ibid* at para 157.

³¹ *Ibid* at para 160.

³² *Ibid* at para 161.

³³ *Ibid* at para 162.

While she endorsed the consideration of Aboriginal perspectives, she criticized the Chief Justice's approach for doing so.³⁴ For her, "what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations."³⁵ Put differently, "proper consideration [must be] given to the perspective of aboriginal people on the meaning of their existing rights."³⁶ This approach, according to L'Heureux-Dubé J, accords with the general principle that courts must take the perspectives of the parties into account when framing the issues of a case.³⁷

While she focused largely on the common law methodology, McLachlin J, as she then was, commented on the issue of culture. Like the Chief Justice, the Justice held that courts should account for the legal perspectives of both European and Aboriginal cultures.³⁸ She also agreed that Aboriginal rights were by nature collective rights.³⁹ Yet, she criticized the Integral to a Distinctive Culture Test for a number of reasons.

She argued that the *Sparrow* case never intended the phrase "integral to a distinctive culture" to serve as a test for Aboriginal rights.⁴⁰ Moreover, she criticized the test for being:

1. too broad in conflating integral with not incidental;
2. too subjective in using concepts like distinctive; and,

³⁴ *Ibid* at para 145.

³⁵ *Ibid* at para 162.

³⁶ *Ibid* at para 179.

³⁷ *Ibid* at para 195.

³⁸ *Ibid* at para 232.

³⁹ *Ibid* at para 274.

⁴⁰ *Ibid* at para 255.

3. too categorical in adopting an all or nothing test.⁴¹

A number of post-*Van der Peet* cases have elaborated on the issue of culture under the Integral to a Distinctive Culture Test.

In *Mitchell v Canada (Minister of National Revenue)*,⁴² McLachlin CJC had this to say about the Integral to a Distinctive Culture Test:

the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been ‘integral to the distinctive culture’ of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples’ identity... This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society’s cultural identity.⁴³

The above quote recalls not only the opinion of Lamer CJC, but also that of L’Heureux-Dubé J.

Those comments were, however, reviewed in the subsequent decision in *R v Sappier*.⁴⁴

In that case, Bastarache J noted that the goal of the Integral to a Distinctive Culture Test is:

to determine how the claimed right relates to aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal

⁴¹ *Ibid* at paras 255-8.

⁴² 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*].

⁴³ *Ibid* at para 12.

⁴⁴ 2006 SCC 54, [2006] 2 SCR 686 [*Sappier*].

community. The importance of leading evidence about the pre-contact practice upon which it is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.⁴⁵

Yet, the absence of direct evidence is not fatal, as the Court will draw inferences as needed.⁴⁶

The Justice also reminded us that “[a]lthough the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of *right* must be determined in light of present circumstances.”⁴⁷ In addition to pre-contact practices, Bastarache also spoke of the reference to “core identity” in *Mitchell*.

In response to the confusion created by the *Mitchell* reference, he stated:

Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival. Although this was affirmed in *Sparrow*, *Adams* and *Coté*, the courts below queried whether a practice undertaken strictly for survival purposes really went to the core of a people’s identity. Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a ‘core identity’ may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it is necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society’s identity i.e. the single most important defining character. This has never been the test for establishing an

⁴⁵ *Ibid* at para 22.

⁴⁶ *Ibid* at para 33.

⁴⁷ *Ibid* at para 48.

aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture.⁴⁸

Bastarache J was not, therefore, outright rejecting the notion of a core of cultural identity. Rather, he was rejecting the idea that such a core can be reduced to a single defining characteristic.

Bastarache J also took the opportunity to shed light on the meaning of the word "culture" under the *Van der Peet* test. He acknowledged that, "the concept of culture is itself inherently cultural."⁴⁹ Yet, he maintained the use of the concept of culture, explaining:

What is meant by 'culture' is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word 'distinctive' as a qualifier is meant to incorporate an element of aboriginal specificity. However, 'distinctive' does not mean 'distinct,' and the notion of aboriginality must not be reduced to 'racialized stereotypes of Aboriginal peoples.'⁵⁰

As mentioned, it was initially unclear whether these pronouncements were meant to clarify or alter the *Van der Peet* test.

In *Lax Kw'alaams Indian Band v Canada (Attorney General)*,⁵¹ Binnie J, for the Court, made clear that he "did not read *Sappier* as departing from *Van der Peet* and its progeny."⁵² More specifically, "the reference in *Sappier* to a pre-contact 'way of life' should not be read as

⁴⁸ *Ibid* at para 40.

⁴⁹ *Ibid* at para 44.

⁵⁰ *Ibid* at para 45.

⁵¹ 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*].

⁵² *Ibid* at para 44.

departing from the ‘distinctive culture’ test set out in *Van der Peet*.⁵³ Given that *Lax Kw’alaams* was the first civil case that the Court decided under s 35(1), Binnie J also made the following comments: “at the characterization stage, identify the precise nature of the First Nation’s claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.”⁵⁴ It remains to be seen whether the Court will be more deferential to the perspective of the claimant in civil, rather than criminal or regulatory, cases.

3 The Court’s Metaphysical Concept of Cultural Identity

Despite the Court’s attempts to overcome the difficulties posed by the concept of culture in the *Van der Peet* test, it continues to espouse a metaphysical concept of culture. The right must be rooted in a practice, custom, or tradition that is integral to the distinctive culture. In addition to the terms “integral” and ‘distinctive,’ the Court also uses such terms as “crucial,” “central,”⁵⁵ “significant,”⁵⁶ “fundamental,” “defining,”⁵⁷ and “essential.”⁵⁸ Rights that are “marginal”⁵⁹ and “incidental”⁶⁰ do not make the grade. This is why McLachlin J, as she then was, criticized the Integral to a Distinctive Culture Test for conflating “integral” with “not incidental.” That criticism points to the metaphysical underpinnings of the Court’s concept of culture.

⁵³ *Ibid* at para 54.

⁵⁴ *Ibid* at para 46.

⁵⁵ *Van der Peet supra* note 6 at para 44.

⁵⁶ *Ibid* at para 51.

⁵⁷ *Ibid* at para 55.

⁵⁸ *Mitchell supra* note 42 at 12.

⁵⁹ *Ibid*.

⁶⁰ *Van der Peet supra* note 6 at para 70.

The structure of that concept is familiar. There is a center or core that contains the essential features of cultural identity. The marginal or incidental features of that culture surround the core.⁶¹ The former part of the structure is presupposed to be independent of the latter part of the structure. The core thus governs the structure.

This structure is reflected in the Court's broad differentiation between Aboriginal and non-Aboriginal culture in Canada. Aboriginal rights are specific, collective rights held by particular Aboriginal groups.⁶² *Charter* rights are general, individual rights that are universal to all Canadians.⁶³ This view is reinforced by the very structure of the *Constitution Act, 1982*, which separates the *Charter* from the *Rights of the Aboriginal Peoples of Canada*.⁶⁴ L'Heureux-Dubé J attacked this move for "defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away."⁶⁵

On this view, the essence of non-Aboriginal culture is seen as general and universal and, therefore, standard, while the essence of Aboriginal culture is seen as specific and particular and, therefore aberrant. Non-Aboriginal culture thus becomes the norm against which Aboriginal

⁶¹ See also eg Michael Asch, "The Judicial Conceptualization of Culture After Delgamuukw and Van der Peet" (2000) 5 Rev Constit Studies 119 (demonstrating how the Court employs a distinction between what is central and peripheral to culture, which conflicts with contemporary understandings of culture); and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 59 [Macklem, *Indigenous Difference*] (explaining that the Court "relies on a core-periphery distinction that excludes from the ambit of constitutional recognition practices that are not 'integral' to the cultural identity of an Aboriginal community").

⁶² *Sparrow supra* note 3 at para 68.

⁶³ *Van der Peet supra* note 6 at para 18.

⁶⁴ *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁶⁵ *Van der Peet supra* note 6 at para 154.

culture is judged.⁶⁶ To put it another way, non-Aboriginal culture is seen as central or integral to Canadian culture, while Aboriginal culture is seen as peripheral or incidental. In adopting this view, the Court prioritizes unity and subordinates difference.

This structure is also reflected in the time period adopted by the Court. In adopting European contact as the key moment for identifying Aboriginal rights, the Court was, by implication, adopting very particular views about Aboriginal and European culture. A significant passage, in that regard, comes from Lamer CJC in *Van der Peet*:

The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.⁶⁷

This passage makes several assumptions regarding European and Aboriginal culture.

⁶⁶ See also eg Chilwin Chienhan Cheng, “Touring the Museum (Case Comm)” (Spring 1997) 55 UT Fac L Rev 419 [Cheng, “Touring the Museum”] (arguing that, under the Integral to a Distinctive Culture Test, Aboriginal culture is presumed to be inferior to European culture); James (Sákéj) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (Spring 2002) 1 Indigenous LJ 1 (arguing that *Van der Peet* is rooted in a colonial ideology that views European law and culture as superior and Aboriginal law and culture as inferior); and Brent Oltius, “The Constitution’s Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982” (Spring 2009) 54 McGill LJ 1 [Oltius, “The Constitution’s Peoples”] (criticizing the Court for focusing on superficial differences between Aboriginal and non-Aboriginal culture).

⁶⁷ *Van der Peet supra* note 6 at para 73.

This passage suggests that Aboriginal cultures had an original, primitive innocence that was corrupted by the influence of Europeans. The point of contact was therefore a point of degradation. The passage also suggests that Aboriginal culture was incapable of adapting without European influences.⁶⁸ Only European culture is sophisticated enough to evolve. The only way to identify pure Aboriginal culture is to reach back to the golden age of pre-contact times.

This view informs the Court's approach to Aboriginal perspectives. Recall, Lamer CJC held that, in identifying the nature of the claim, a "court must take into account the perspective of the aboriginal people claiming the right."⁶⁹ However, the Aboriginal perspective must "be framed in terms cognizable to the Canadian legal and constitutional structure."⁷⁰ McLachlin J, dissenting, echoed this view in asserting that courts should account for both the legal perspectives of European and Aboriginal cultures.⁷¹ The Court seemed to continue this approach in the civil case of *Lax Kw'alaams* where Binnie J held that, notwithstanding the pleadings, the Court could "refine the characterization of the right claimed."⁷² There are two significant assumptions at play in this approach.

⁶⁸ See also eg Ronald Niezen, *The Rediscovered Self: Indigenous Identity and Cultural Justice* (Montreal: McGill-Queen's University Press, 2009) at 74 (explaining that "[t]he judicial approach to culture is 'frozen in time' in the truest sense of the term: it sets limits on change, even in response to challenges to the prosperity and survival of distinct cultures as a whole"); Peter W Hutchins and Angeli Choksi, "From Calder to Mitchell: Should the Courts Patrol Cultural Borders?" (2002) 16 Sup Ct L Rev (2d) 241-283.at 276 (criticizing the Court for "defining and dissecting Aboriginal society virtually to the vanishing point in contemporary terms" while allowing Crown sovereignty "to evolve, flourish and reflect contemporary relativity"); and Mackelm, *Indigenous Difference supra* note 61 at 170 (arguing that the Court adopts "a frozen rights approach [that] ignores the dynamic nature of cultural identity and the fact that cultures undergo deep transformations over time").

⁶⁹ *Ibid* at para 49.

⁷⁰ *Van der Peet supra* note 6 at para 49.

⁷¹ *Ibid* at para 232.

⁷² *Ibid* at para 46.

First, the Court assumes that an Aboriginal group has a unified, identifiable perspective. Second, the Court seems to assume that said perspective can be represented in a straight forward manner by the Canadian legal perspective. L'Heureux-Dubé J expressed skepticism in that regard, arguing that a case should be “examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.”⁷³ For all her skepticism, however, she implicitly endorsed the Court’s view that there is an identifiable, unified aboriginal perspective that can be re-presented as is. This repeated emphasis on unity exposes the metaphysical nature of the Court’s understanding of culture, which I will now interrogate.

4 The Basic Structure of the Court’s Metaphysical Concept of Culture

In “Structure, Sign and Play in the Discourse of the Human Sciences,”⁷⁴ Derrida notes how the concept of structure always entails a fixed center, origin, or end, the function of which is to limit the *play* – the repetition, permutation, transformation or substitution – of the contents of the structure.⁷⁵ Hence, center is the standard term, which governs the aberrant term play. However, Derrida reverses this hierarchy, noting how, since the center is fixed, it must be independent of play.⁷⁶ Given that play forms part of the structure, the center must, paradoxically, be both inside and outside of the structure.⁷⁷

⁷³ *Ibid* at para 162.

⁷⁴ Jacques Derrida, “Structure, Sign and Play in the Discourse of the Human Sciences” in *Writing and Difference*, translated by Alan Bass (London: Routledge, 1978) 278.

⁷⁵ *Ibid* at 278-9.

⁷⁶ *Ibid* at 279.

⁷⁷ *Ibid*.

But if the center is beyond the structure, it cannot be the center of the structure, meaning the structure must seek another center.⁷⁸ However, every attempt at identifying a center will encounter this dilemma. The structure thus, “must be thought of as a series of substitutions of center for center, as a linked chain of determinations of the center.”⁷⁹ The result is, that “there [is] no center,” but simply “an infinite number of sign-substitutions” in play.”⁸⁰ In other words, there can be no center that escapes play. Derrida gives this process of infinite play the strategic nickname *supplementarity*.

Like its nonsynonymous substitute *différance*, *supplementarity* has two meanings. In the case of the supplement, those meanings are: to add and to substitute.⁸¹ Derrida summarizes this movement thusly:

this movement of play, permitted by the lack or absence of a center or origin, is the movement of *supplementarity*. One cannot determine the center and exhaust totalization because the sign which replaces the center, which supplements it, taking the center’s place in the absence – this sign is added, occurs as a surplus, a *supplement*. The movement of signification adds something which results in the fact that there is always more, but this addition is floating one because it comes to perform a vicarious function, to *supplement a lack* on the part of the signified.⁸²

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid* at 280.

⁸¹ Jacques Derrida, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore: Johns Hopkins University Press, 1997) at 145.

⁸² Derrida, “Structure” *supra* note 74 at 289.

The end result of Derrida's reading is an unsettling of the metaphysical oppositions underlying the concept of structure. For the structure, there can be no ultimate center.⁸³

Derrida's analysis of structure clearly applies to the basic structure underlying the Court's concept of culture. Under that concept, the integral and incidental aspects form part of the same structure. The function of the integral aspects of cultural identity is to anchor the incidental aspects.

The problem is that, in order for the integral aspects to anchor the incidental aspects, they must be separate from those aspects. Hence, a paradox: the integral aspects are both inside and outside the structure of cultural identity. Insofar as the integral aspects are outside of that structure, they cannot function as the center. The result is that there must be a different center for the structure. But, every subsequent proposed anchor will invariably fall trap to the same paradoxical logic. Consequently, there can be no ultimate integral aspects to cultural identity. Such aspects can, at best, be only provisional.

Take the example of the *Van der Peet* case. The appellant claimed "that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo."⁸⁴ Lamer CJC acknowledged that "the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture."⁸⁵ The

⁸³ Jacques Derrida, *Points... Interviews 1974-1994*, translated by Peggy Kamuf and others (Stanford: Stanford University Press, 1995) at 83.

⁸⁴ *Van der Peet* *supra* note 6 at para 85.

⁸⁵ *Ibid* at para 86.

evidence also established that the Sto:lo exchanged salmon in order to maintain family and kinship relationships.⁸⁶

However, in reviewing the trial judge's findings, Lamer CJC agreed that the "[e]xchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods."⁸⁷ The justice also found that the absence of a regularized trading system and specialized labor force suggested that the exchange of salmon was integral to the Sto:lo culture.⁸⁸ Moreover, he endorsed the trial finding that the salmon trade between the Hudson Bay Company and the Sto:lo was "qualitatively different from that which was typical of the Sto:lo culture prior to contact."⁸⁹ Although, he did imply that said trade was integral to the Sto:lo culture during the early *post*-contact period.

In her dissenting opinion, L'Heureux-Dubé J noted how the summary appeal judge, contrary to the trial judge, held that the "the evidence demonstrated that the Sto:lo's relationship with the fishery was broad enough to include the trade of fish since the Sto:lo who caught fish in their original aboriginal society could do whatever they wanted with that fish."⁹⁰ She also noted how, at the "British Columbia Court of Appeal, the majority framed the issue as being whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the

⁸⁶ *Ibid* at para 87.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at para 88-90.

⁸⁹ *Ibid* at para 89.

⁹⁰ *Ibid* at para 102.

fish.”⁹¹ However, she illustrated how “there is an important distinction to be drawn between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes.”⁹² Armed with that distinction, she concluded “that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes.”⁹³ Before she did so, however, she made the following prescient observations: “[i]t appears from the foregoing review of the judgments that the conclusions on the findings of fact relating to whether the Sto:lo possess an aboriginal right to sell, trade and barter fish varied depending on the delineation of the aboriginal right claimed and on the approach used to interpreting such right.”⁹⁴ These observations speak to the mutability of what is and is not integral to a given culture.

Whether or not fishing for trade is defined as being integral, as L’Heureux-Dubé noted, is variable. The Justice, as well as the summary appeal judge, had no trouble holding that the trade of salmon was integral to the Sto:lo culture: the summary appeal judge did so by focusing on the importance of the salmon fishery, rather than on the importance of trade;⁹⁵ L’Heureux-Dubé did so by distinguishing between trade for livelihood and trade for commerce.

⁹¹ *Ibid* at para 182.

⁹² *Ibid*.

⁹³ *Ibid* at para 221.

⁹⁴ *Ibid* at para 205

⁹⁵ Another way of understanding the summary appeal judge’s decision is in terms of the Sto:lo having a property right to the fish once caught. This approach can be contrasted with that of the majority of the Court of Appeal, which viewed the commercial fishery as something beyond the purview of any property right to the fish that the Sto:lo might have. I would like to thank Douglas Sanderson for raising this point.

Lamer CJC's finding that trade was not integral depended, in part, on disregarding the evidence that the Sto:lo relied on trading salmon to maintain their family and kinship relationships. The British Columbia Court of Appeal similarly conflated trading fish with trading fish for commercial purposes. Lamer CJC also presupposed that there was nothing latent in the Sto:lo culture that impelled them to start trading salmon with the Hudson's Bay Company as soon as a market became available. He assumed that the trade with the Hudson's Bay Company was purely the result of European influences. Moreover, the Hudson's Bay Company example highlights the fact that the Chief Justice's determination depended on taking a snapshot in time, a prerequisite that emphasizes the historical contingency of the integral aspects of culture. The example of the *Van der Peet* case shows how any determination regarding the integral aspects of culture is, at best, provisional. For this reason, no aspect of culture can be said to be fundamentally integral or marginal.

5 The Self-Difference of Cultural Identity

Derrida looks at the issue of cultural identity more specifically in *The Other Heading*.⁹⁶ There, Derrida takes aim at the notion of a unified cultural identity that is self-identical or self-present. Such a culture would be unable to relate to other cultures because it would be completely one with itself and thus impenetrable.⁹⁷ For this reason, there can be no unified identity.

⁹⁶ *Supra* note 2.

⁹⁷ Jacques Derrida, "The Villanova Roundtable: A Conversation with Jacques Derrida" in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 3 at 14 ["The Villanova Routable"].

Identity must be self-different.⁹⁸ As Derrida explains: “*what is proper to a culture is not to be identical to itself... there is no culture or cultural identity without the difference with itself... a difference at once internal and irreducible.*”⁹⁹ To revisit the concept of the structure, this difference “would gather and divide... [the] center, relating to itself, only to the extent that it would open it up to this divergence.”¹⁰⁰ The center of culture and identity, as discussed above, is thus always in flux.¹⁰¹ Or, as Derrida puts it: “identification is itself always cultural and never natural, for it is nature’s way out of itself in itself, nature’s difference *with itself.*”¹⁰² In other words, self-identity implies a divided self because one could not identify with one’s self unless one were, in a sense, separate from that self. Neither culture, nor cultural identity, can therefore be determined conclusively.

Insofar as a culture of cultural identity is held to be conclusive, it involves violence. As Derrida reminds us that, “[t]he Latin words *culture* and *colonization* have a common root, there where it is precisely a question of what happens to roots.”¹⁰³ As noted at the outset of this chapter, this commonality is not simply etymological: “All culture is originally colonial... Every culture institutes itself through the unilateral imposition of some ‘politics’ of language. Mastery begins, as we know, through the power of naming, of imposing and legitimating appellations.”¹⁰⁴ This mastery is characterized by violence.

⁹⁸ Derrida, *Of Grammatology supra* note 81 at 340.

⁹⁹ Derrida, *Other Heading supra* note 2 at 10-11.

¹⁰⁰ *Ibid.*

¹⁰¹ Derrida, *Of Grammatology supra* note 81 at 70.

¹⁰² Derrida, *Other Heading supra* note 2 at 27.

¹⁰³ *Ibid* at 7.

¹⁰⁴ Derrida, *Monolingualism and the Other supra* note 1 at 39.

Derrida states:

gathering into itself of the One is never without violence... As soon as there is the One, there is murder, wounding, traumatism... The One guards against/keeps some of the other. It protects *itself* from the other, but, in the movement of this jealous violence, it comprises in itself, thus guarding it, the self-otherness or self-difference (the difference from within oneself) which makes it One. The ‘One differing, deferring from itself.’ The One as the Other. At once, at the same time, but in a same time that is out of joint, the One forgets to remember itself to itself, it keeps and erases the archive of this injustice that it is. Of this violence that it does... The One makes itself violence. It violates and does violence to itself but it also institutes itself as violence. It becomes what it is, the very violence – that it does to itself. Self-determination as violence... because it makes itself violence and *so as* to make itself violence.¹⁰⁵

This violence is perpetuated each time the One, the unified identity, is reiterated.¹⁰⁶

This analysis seriously undermines the Court’s understanding of culture. As mentioned above, in *Van der Peet*, Lamer CJC explained how the “intended focus” of s 35(1) was the “*aboriginal people* and their rights in relation to *Canadian society as a whole*.”¹⁰⁷ That statement assumes that “aboriginal people” and “Canadian society as a whole” represent insular groups. Each group is assumed to have some sort of mastery over who is or is not a member. In Derridean terms, each consists of a unified identity that is identical with itself. However, in light

¹⁰⁵ Jacques Derrida, *Archive Fever: A Freudian Impression*, translated by Eric Prenowitz (Chicago: University of Chicago Press, 1996), at 78.

¹⁰⁶ See also Derrida, *Other Heading* *supra* note 2 at 6 (where Derrida reminds us that theoretical violence can lead and has led to physical violence: “in the name of identity, be it cultural or not, the worst violence, those that we recognize all too well without having thought them through, the crimes of xenophobia, racism, anti-Semitism, religious or national fanaticism, are being unleashed, mixed up, missed up with each other...”).

¹⁰⁷ *Van der Peet* *supra* note 6 at para 21 [emphasis added].

of Derrida’s work on the concept of a unified identity, we realize that such an understanding is untenable.

The Court is only able to construct the identity of “aboriginal people” or “Canadian society as a whole” by violently erasing the diversity of perspectives among the members of those cultures. In doing so, the Court avoids important questions. Val Napoleon asks: “Who qualifies as an authentic aboriginal person, and who has the authority to make this determination?... How does gender factor into a decision about who is ‘in’ and who is ‘out’? Who has power? Whose voices are heard?”¹⁰⁸ In ignoring these questions, the Court, in turn, neglects certain perspectives.

Specifically, some scholars have noted how the Court has passed over the perspective of Aboriginal women in the *Van der Peet* jurisprudence.¹⁰⁹ Napoleon, for her part, argues that the jurisprudence has effectively erased Aboriginal women from the legal landscape by focusing almost exclusively on Aboriginal men and their traditional activities.¹¹⁰ What the experience of Aboriginal women teaches us is that, in order to construct a unified Aboriginal culture, it must ignore the diversity of culture, gender, language, ethnicity, religion, and so on, within Aboriginal

¹⁰⁸ Val Napoleon, “Aboriginal Discourse: Gender, Identity and Community” in Benjamin Richardson, Shim Imai and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233 at 244 [Napoleon, “Aboriginal Discourse”]. See also eg Oltius, “The Constitution’s Peoples” *supra* note 66 at 74 (asking, “exactly which groups’ rights are recognized and affirmed by section 35?”); and Kerry Wilkins, “Whose Claim is it, Anyway? (Case Comm)” (2013) 11 at 74 *Indigenous LJ* 73 [Wilkins, “Whose Claim is it?”] (asking, “who gets to decide, and on what basis, what claim of Aboriginal rights is before the courts for adjudication”).

¹⁰⁹ See eg John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (Winter 2013) 50 *Osgoode Hall LJ* 699 (arguing that the Court’s approach is incapable of addressing the issue of violence against Aboriginal women largely because it overemphasizes the historical in its analysis); Emily Luther, “Whose ‘Distinctive Culture?’: Aboriginal Feminism and *R v Van der Peet*” (2010) 8 *Indigenous LJ* 27 (arguing that the *Van der Peet* test has largely favored practices and traditions that benefit Aboriginal men, thereby contributing to the oppression of Aboriginal women);

¹¹⁰ Napoleon, “Aboriginal Discourses” *supra* note 108 at 241.

culture. The same holds true for “Canadian society as a whole,” which is defined by the exclusion of, *inter alia*, “aboriginal people.” This totalizing tendency is reflected in the Court’s views on representation.

6 Representation

Through the course of “Structure, Sign and Play in the Discourse of the Human Sciences,”¹¹¹ Derrida applies his insights regarding the concept of structure to structural linguistics. In particular, he focuses on the notion of the linguistic sign, which differentiates between a signifier, the form of the sign, and the signified, the meaning of the sign.¹¹² Both of these concepts are distinct from the referent, the thing to which the sign refers. On this account, the signified is accorded a higher status than the signifier.

But Derrida shows how, given that there can be no center or origin to a structure, “the central signified, the original transcendental signified, is never absolutely present outside a system of differences.” The absence of the transcendental signified extends the domain and the play of signification infinitely.¹¹³ Every signified becomes a signifier in this endless chain of supplementarity. Hence, there can be no transcendental signified or ultimate meaning.¹¹⁴

This analysis has profound implications for our understanding of representation. In fact, Derrida explained that his insights regarding the sign also reign true for representation.¹¹⁵ He

¹¹¹ *Supra* note 74.

¹¹² *Ibid* at 281.

¹¹³ *Ibid* at 280.

¹¹⁴ See generally Derrida, *Of Grammatology supra* note 81.

¹¹⁵ Jacques Derrida, *Positions*, translated by Alan Bass (London: Continuum, 2004) at 68.

explores this observation in depth in his seminal work *Of Grammatology*.¹¹⁶ There, Derrida notes how the idea of representation presupposes the original presence of the thing itself.¹¹⁷ A representation is seen as merely a re-presentation of that thing.¹¹⁸ To put it another way, a representation re-represents the self-presence of the thing itself.¹¹⁹ Or, as Derrida puts it: “[i]t supposes at once that representation follows a first presence and restores a final presence.”¹²⁰ Not surprisingly, Derrida questions the accuracy of this view.

The logic of supplementarity impacts representation in much the same way that it impacts the sign and the structure. Derrida explains:

Representation mingles with what it represents, to the point where one speaks as one writes, one thinks as if the represented were nothing more than the shadow or reflection of the representer. A dangerous promiscuity and a nefarious complicity between the reflection and the reflected which lets itself be seduced narcissistically. In this play of representation, the point of origin becomes ungraspable. There are things like reflecting pools, and images, and infinite reference from one to the other, but no longer a source, a spring. There is no longer a simple origin. For what is reflected is split in *itself* and not only as an addition to itself of its image. The reflection, the image, the double, splits what it doubles. The origin of the speculation becomes a difference.¹²¹

¹¹⁶ *Supra* note 81.

¹¹⁷ *Ibid* at 49.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* at 97.

¹²⁰ *Ibid* at 296.

¹²¹ *Ibid* at 36.

Hence, “[t]he play of the supplement is indefinite. Reference refers to reference.”¹²² As a result, “the selfsameness [*proper*] of presence has no longer a place: no one is there for anyone, not even for himself; one can no longer dispose of meaning; one can no longer stop it, it is carried into an endless movement of signification. The system of the sign has no outside.”¹²³ Namely, “there is no thing itself.”¹²⁴ These observations have important implications for *Van der Peet*.

The Court falls trap to Derrida’s criticisms. Recall that Lamer CJC holds that the Court must frame “the perspective of the aboriginal people claiming the right... in terms cognizable to the Canadian legal and constitutional structure”¹²⁵ There are a few assumptions implicit in this holding; namely that “the perspective of the aboriginal people claiming the right” is:

1. homogenous;
2. re-presentable as it really is; and
3. re-presentable as it really is “in terms cognizable to the Canadian legal and constitutional structure.”

The Court’s assumption that “the perspective of the aboriginal people claiming the right” is re-presentable as it really is deeply flawed.

Take the example of the *Van der Peet* case. The appellant, Dorthy Van der Peet, was a member of the Sto:lo first nation. Van der Peet does not appear to have testified herself at her trial.¹²⁶ Though, she did have a number of witnesses testify on her behalf. Tilly Guitterez

¹²² *Ibid* at 298.

¹²³ *Ibid* at 223-4.

¹²⁴ *Ibid* at 292.

¹²⁵ *Van der Peet supra* note 6 at para 49.

¹²⁶ *R v Van der Peet*, [1990] BCJ No 3013, [1991] 3 CNLR 155 (Prov Ct).

recounted the oral history of the Sto:lo as she had learned from her grandmother.¹²⁷ Francis Philips and Edna Douglas had both fished in the relevant area with relatives while growing up.¹²⁸ Anthropologist Dr. Richard Daly was called to speak to the Sto:lo social structure and culture.¹²⁹ Historian Jamie Morton spoke to the relevant historical record.¹³⁰ Furthermore, Van der Peet's case was presented by her lawyers. And these are simply those who were involved on Van der Peet's side.¹³¹

In simply reviewing the amount of people tasked with presenting the “perspective of the aboriginal people claiming the right,” it is easy to see how quickly the Derridean problematic arises. Who or what is the source of the Aboriginal perspective that the Court seeks to represent? Is it Van der Peet, as the party who is actually claiming the right? Is Guitterez, or perhaps her grandmother who told her the Sto:lo oral tradition? Is it Philips and Douglas who actually partook in the impugned fisheries? Or, is it Morton and Daly due to their expertise on the Aboriginal experience? Moreover, who gives any of these individuals the authority to represent the Sto:lo? Contrary to the Court's assumptions, there does not appear to be a clear origin of the Aboriginal perspective. This dilemma is further complicated by the Court's own role in the process of representation.

¹²⁷ *Ibid* at paras 16-17.

¹²⁸ *Ibid* at paras 18-19.

¹²⁹ *Ibid* at paras 20-22.

¹³⁰ *Ibid* at paras 23-4.

¹³¹ One should also note the counsel for the crown, the crown witnesses, the judges from the four levels of courts, as well as the six interveners at the Supreme Court of Canada.

In “Can the Subaltern Speak,”¹³² Gayatri Spivak draws on Derrida’s work in exploring the role of the intellectual in representing the oppressed. In particular, she critiques the work of Michel Foucault and Giles Deleuze. She focuses on these two scholars because, while they critique the impulse to reduce identity to unity, they fall trap to that impulse in purporting to represent the oppressed.¹³³ She accuses them of adopting a “representational realism.”¹³⁴ They do so in supposing that they can represent the oppressed as they really are.¹³⁵

Spivak takes this presupposition to task. Foucault and Deleuze assume that they represent the oppressed in the sense of “representation as ‘re-presentation,’ as in art or philosophy,” not “as ‘speaking for,’ as in politics.”¹³⁶ They also presuppose a distinction between the production of theory and the action of practice.¹³⁷ The representation of the oppressed is viewed as a practice of re-presenting the oppressed.¹³⁸ The oppressed know and speak for themselves and the intellectuals simply re-present what they say.¹³⁹

Thus, “the intellectuals represent themselves as transparent.”¹⁴⁰ “[T]hey merely report on the nonrepresented” oppressed.¹⁴¹ Spivak summarizes this position as that of “the first world

¹³² Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in C Nelson and L Grossberg, eds, *Marxism and the Interpretation of Culture* (Basingstoke: MacMillan Education, 1988) 66 [Spivak, “Can the Subaltern Speak?”].

¹³³ *Ibid* at 69.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid* at 70.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid* at 71-4.

¹⁴⁰ *Ibid* at 70.

¹⁴¹ *Ibid* at 74.

intellectual masquerading as the absent nonrepresenter who lets the oppressed speak for themselves.”¹⁴² She shows how these assumptions obscure the productive and political aspect of representation. To wit, in representing the oppressed, the intellectual speaks for and produces the oppressed.¹⁴³ To use Derrida’s terminology, Foucault and Delueze elide the performative aspect of representation. As a result of iterability, each time the intellectual represents the oppressed, he or she constructs the oppressed. The intellectual appropriates and reinscribes the oppressed as the Other.¹⁴⁴

Derrida relates this analysis to the context of judging. He states: “[w]hen a single judge, no matter what one may think of his or her particular talents, is entrusted somewhere with a monopoly of evaluation, of screening, of exhibiting in full daylight, he or she determines sales in the supermarkets of culture.”¹⁴⁵ In this statement, he is highlighting the performative role judges play in the construction of culture.

The Court supposes that it is merely a transparent re-representer in this process. Although, Lamer CJC undermines this assumption when he explains that he will frame the Aboriginal perspective “in terms cognizable to the Canadian legal structure.”¹⁴⁶ Nevertheless, after making this admission, he continues on as if he is simply re-presenting that perspective. L’Heureux-Dubé J questions this last assumption, talking of a “distorting lens.”¹⁴⁷ Yet, she implicitly

¹⁴² *Ibid* at 87.

¹⁴³ *Ibid* at 75.

¹⁴⁴ *Ibid* at 84.

¹⁴⁵ Derrida, *Other Heading supra* note 2 at 101.

¹⁴⁶ *Van der Peet supra* note 6 at para 49.

¹⁴⁷ Spivak, “Can the Subaltern Speak?” *supra* note 132 at para 162.

endorses Lamer CJC's approach when she says that, "what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people."¹⁴⁸ Both justices therefore neglect the productive and political aspect of representation.

The Court has faced criticism for this oversight. Some scholars have noted how the Court tends to favor Western documentary histories over Aboriginal oral traditions.¹⁴⁹ Others have emphasized how the Court has almost completely overlooked Aboriginal legal traditions in the case law.¹⁵⁰ Additional commentators have pointed to the Court's avoidance of the issues of self-government, self-determination and sovereignty, in spite of the perspectives of Aboriginal claimants.¹⁵¹ Nowhere can the Court's role in actively shaping the Aboriginal perspective be seen more clearly than in its manipulation of the claims made.

The most striking example comes in the *Pamajewon* case, where it was claimed that the Shawanaga First Nation did not need a provincial gambling license because it had an inherent

¹⁴⁸ *Ibid* at para 162.

¹⁴⁹ See eg . Russel Binch, " 'Speaking for Themselves': Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (Feb 2002) 13 NJCL 245 (demonstrating how the Court evaluates Aboriginal oral traditions through the lens of Western history); and Peggy J Blair, "Prosecuting the Fisher: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases (Spring 1997) 20 Dalhousie LJ 17 (illustrates how the Court favors the observations of European traders over those of Aboriginal people).

¹⁵⁰ See eg John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) (criticizing the Court for almost completely overlooking Indigenous legal traditions); and James (Sákéj) Youngblood Henderson, "Aboriginal Jurisprudence and Rights" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) 67 (showing how the *Van der Peet* case law fails to account for the pre-contact Aboriginal jurisprudences that are at the source of Aboriginal rights). See also James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, Sask, Native Law Center, University of Saskatchewan, 2006).

¹⁵¹ See eg Jennifer Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21 Can JL & Society No 1, 11 (criticizing the Court for framing Aboriginal rights narrowly so as to impede the expansion those rights, particularly with regard to the issues of self-government and self-determination); and Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self Government in Canada" (2009-2010) 41 Ottawa L Rev 101 (criticizing the Court for failing to articulate a systematic approach to the Aboriginal right to self-government).

right to self-government.¹⁵² Lamer CJC drastically changed the nature of the claim. He explained that, “the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation.”¹⁵³ The move from self-government to regulating high stakes gambling makes clear that the Court is not merely a passive re-presenter. Rather, Lamer CJC’s re-characterization of the claim demonstrates the productive role the Court plays in the act of representing the perspective of the Aboriginal peoples involved.

Some critics have suggested that this distortion may be attributable to the fact that the Supreme Court of Canada is an all-white panel. They argue that the appointment of Aboriginal judges would help to overcome many of the problems arising in the *Van der Peet* jurisprudence.¹⁵⁴ Dale Turner argues that “there should be more indigenous judges deciding indigenous cases.”¹⁵⁵ For him, such judges would help “protect the dignity and integrity of indigenous worldviews.”¹⁵⁶ However, in light of the foregoing, it is imperative to ask whether Aboriginal judges could better represent the perspective of the Aboriginal group claiming the right.

Spivak makes clear that her critique also applies to intellectuals who belong to oppressed groups. She states: “the postcolonial intellectuals learn that their privilege is their loss. In this

¹⁵² *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204, at para 6.

¹⁵³ *Ibid* at para 26.

¹⁵⁴ See eg Larry N. Chartrand, *Reconciliation and Transformation in Practice: Aboriginal Judicial Appointments to the Supreme Court* (Mar 2008) 51 Can Pub Adm 143-153; and Wilkins, “Whose Claim is it?” *supra* note 108.

¹⁵⁵ Dale Turner, “Perceiving the World Differently” in David Kahane and Catherine Bell, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57, at 65.

¹⁵⁶ *Ibid* at 67.

they are a paradigm of the intellectuals.”¹⁵⁷ In other words, as judges, they occupy a different standpoint than other Aboriginal peoples. Although, she suggests that such privilege can be systematically unlearned by critiquing the privileged discourse.¹⁵⁸

Moreover, as discussed above, the idea that there is one, say Sto:lo perspective is misguided. The idea that there is one Aboriginal perspective in Canada is even more circumspect. At the end of the day, an Aboriginal judge would, like any other judge, have to determine which diverse set of opinions about a particular culture win the day.¹⁵⁹

I would like to make one last point on this issue. Even if it were possible for Aboriginal peoples to present their perspectives through their own eyes, they would still be doing so within the artificial Court process, which dictates how, when and where they do so. As Chilwin Cheng observes, Aboriginal peoples are forced “to undertake the nearly impossible task of justifying their traditional rights and practices within an alien system.”¹⁶⁰ The court process itself thus also plays a role in constructing the perspective of the Aboriginal group claiming a right.

¹⁵⁷ *Ibid* at 82.

¹⁵⁸ *Ibid* at 91.

¹⁵⁹ To be clear, I am not saying that there would be no use in appointing Aboriginal judges. Nor am I saying that Aboriginal judges would do an equally bad job of defining the perspectives of Aboriginal claimants. What I am saying is that the decisions of Aboriginal judges would represent simply one of a plethora of possible perspectives. I will return to this issue in the next chapter.

¹⁶⁰ Cheng, “Touring the Museum” *supra* note 66 at 434.

7 Hospitality

Derrida observes how, “there is no culture or form of social connection without a principle of hospitality.”¹⁶¹ But the principle of hospitality is not as straightforward as one would assume.¹⁶² Rather, the principle entails two forms of hospitality, which are heterogeneous, but not straightforwardly contradictory.¹⁶³

Derrida explores this relationship in detail in *Of Hospitality*.¹⁶⁴ He talks of traditional or classical hospitality as “hospitality by right” or “conditional hospitality.”¹⁶⁵ You receive the foreigner; “you begin by asking his name; you enjoin him to state and to guarantee his identity, as you would a witness before a court.”¹⁶⁶ Yet, this form of hospitality is not as straightforward as it seems.

As Derrida notes, the word hospitality has “two Latin derivations: the foreigner (*hostis*) welcomed as guest or as enemy. Hospitality, hostility, *hostpitality*.”¹⁶⁷ The latter word, *hostpitality* is ostensibly a neologism that Derrida is using to describe the paradox at play.

He describes that paradox as follows:

¹⁶¹ Jacques Derrida, *Paper Machine*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2005) at 66.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Supra* note 2.

¹⁶⁵ *Ibid* at 25.

¹⁶⁶ *Ibid* at 27.

¹⁶⁷ *Ibid* at 45.

Paradoxical and corrupting law: it depends on this constant collusion between traditional hospitality, hospitality in the ordinary sense, and power. This collusion is also power in its *finitude*, which is to say the necessity, for the host, for the one who receives, of choosing, electing, filtering, selecting their invitees, visitors, or guests, those to whom they decide to grant asylum, the right of visiting, or hospitality. No hospitality, in the classic sense, without sovereignty of oneself over one's home, but since there is also no hospitality without finitude, sovereignty can only be exercised by filtering, choosing, and thus by excluding and doing violence. Injustice, a certain injustice, and even a certain perjury, begins right away, from the very threshold of the right to hospitality. This collusion between the violence of power or the force of law (*Gewalt*) on one side, and hospitality on the other, seems to depend, in an absolutely radical way, on hospitality being inscribed in the form of a right... But since this right, whether private or familial, can only be exercised and guaranteed by the mediation of a public right or State right, the perversion is unleashed from the inside. For the State cannot guarantee or claim to guarantee the private domain (for it is a domain), other than by controlling it and trying to penetrate it to be sure of it. Of course, in controlling it, which can appear negative and repressive, it can claim by the same token, protect it, to enable communication, to extend information and openness.¹⁶⁸

To put it succinctly, the paradox is that, while hospitality is due to the foreigner, it can only be exercised through conditions, exclusions, and therefore violence.

Hence, Derrida characterizes this classical hospitality in terms of “the laws (in the plural), those rights and duties that are always conditioned and conditional.”¹⁶⁹ This form of hospitality must be contrasted with the other form.

He calls this other form, “*the* law of absolute, unconditional, hyperbolic hospitality.”¹⁷⁰

Whereas under the laws of condition hospitality, one questions the foreigner, asks for his or her

¹⁶⁸ *Ibid* at 57.

¹⁶⁹ *Ibid* at 77.

name, under “[t]he law of unlimited hospitality, one “[gives] the new arrival all of one’s home and oneself, to give him or her one’s own, our own, without asking a name, or compensation, or the fulfillment of even the smallest condition.”¹⁷¹ Derrida states:

absolute hospitality requires that I open up my home and that I give not only to the foreigner (provided with a family name, with social status of being a foreigner, etc.), but to the absolute, unknown, anonymous other, and that I *give place* to them, that I let them come, that I let them arrive, and take place in the place I offered them, without asking of them either reciprocity (entering into a pact) or even their names. The law of absolute hospitality commands a break with hospitality by right, with law or justice as right, with law or justice as rights. Just hospitality breaks with hospitality by right; not that it condemns or is opposed to it.¹⁷²

There is an apparent conflict here between the two forms of hospitality.

Derrida describes this conflict as “the collision between two laws.”¹⁷³ He describes the contradiction as follows:

It’s between these two figures of hospitality that responsibilities and decisions have to be taken in practice. A formidable ordeal – while these two hospitalities are not contradictory, they remain heterogeneous even as, perplexing, they share the same name. Not all ethics of hospitality are the same, of course, but there is no culture or form of social connection without a principle of hospitality. This ordains, even making it desirable, a welcome without reservations or calculation, an unlimited display of hospitality to the new arrival.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid* at 25.

¹⁷³ *Ibid* at 77.

But a cultural or linguistic community, a family or a nation, cannot fail at the very least to suspend if not to betray this principle of absolute hospitality: so as to protect a ‘home’, presumably, by guaranteeing property and ‘one’s own’ against the unrestricted arrival of the other; but also so as to try to make the reception real, determined, and concrete – to put into practice. Hence, the ‘conditions.’¹⁷⁴

In light of this apparent contradiction, as well as the ostensible violence of classical hospitality, why do we not simply embrace unconditional hospitality?

Well, Derrida shows how, although these two forms of hospitality are in tension, they depend on each other. He explains:

The antinomy of hospitality irreconcilably opposes *The* law, in its universal singularity, to a plurality that is not only a dispersal (laws in the plural), but a structured multiplicity, determined by a process of division and differentiation: by a number of laws that distribute their history and their anthropological geography differently...

There is a strange hierarchy in this. *The* law is above the laws. It is thus illegal, transgressive, outside the law, like a lawless law, *nomos anomos*, law above the laws and law outside the law... But even while keeping itself above the laws of hospitality, *the* unconditional law of hospitality needs the laws, it *requires* them. This demand is constitutive. It wouldn’t be effectively unconditional, the law, if it didn’t *have to become* effective, concrete, determined, if that were not its being as having-to-be. It would risk being abstract, utopian, illusory, and so turning over into its opposite. In order to be what it is, *the* law thus needs the laws, which, however, deny it, or at any rate threaten it, sometimes corrupt or pervert it. And must always be able to do this.

For this pervertibility is essential, irreducible, necessary too. The perfectibility of laws is at this cost. And therefore their historicity. And vice versa, conditional laws would cease to

¹⁷⁴ Derrida, *Paper Machine supra* note 161 at 66.

be laws of hospitality if they were not guided, given inspiration, given aspiration, required, even, by the law of unconditional hospitality. These two regimes of law, of *the* law and the laws, are thus both contradictory, antinomic, *and* inseparable. They both imply and exclude each other, simultaneously. They incorporate one another at the moment of excluding one another, they are dissociated at the moment of enveloping one another, *at the moment* (simultaneously without simultaneity, instant of impossible synchrony, instant of impossible synchrony, moment without moment) when, exhibiting themselves to each other, one to the others, the others to the other, they show they are both more and less hospitable, hospitable and inhospitable, hospitable *inasmuch as* inhospitable.¹⁷⁵

In summary, there is no “straightforward opposition between the ‘unconditional’ and the ‘conditional.’ The two meanings of hospitality remain irreducible to one another.”¹⁷⁶ By consequence, we have to straddle the unconditional and conditional forms of hospitality.¹⁷⁷

How does this figure in the Court process? Derrida recalls Plato’s account of a speech given by Socrates at the trial at which he would ultimately be sentenced to death.¹⁷⁸ Derrida recounts how Socrates,

¹⁷⁵ Derrida, *Of Hospitality supra* note 2 at 79-81.

¹⁷⁶ Derrida, *Paper Machine supra* note at 66-7. See also *ibid* at 147-9 (where Derrida states: “We will always be threatened by this dilemma between, on the one hand, unconditional hospitality that dispenses with law, duty, or even politics, and, on the other, hospitality circumscribed by law and duty. One of them can always corrupt the other, and thus capacity for perversion remains irreducible. It *must* remain so” (OH 135); “the distinction between unconditional hospitality and, on the other, hand, the rights and duties that are the conditions of hospitality. Far from paralyzing this desire or destroying the requirements of hospitality, this distinction requires us to determine what could be called, in Kantian language... intermediate *schemas*. Between an unconditional law or an absolute desire for hospitality on the one hand and, on the other, a law, a politics, a conditional ethics, there is distinction, radical heterogeneity, but also indissociability. One calls forth, involves, or prescribes the other. In giving a right, if I can put it like that, to unconditional hospitality, how can one give *place* to a determined, limitable, and delimitable - in a word, to a calculable - right or law?”).

¹⁷⁷ *Ibid* at 135-9.

¹⁷⁸ See Plato, “The Apology of Socrates” in Thomas G. West and Grace Starry West, eds, *Four Texts on Socrates* (Ithaca: Cornell University Press, 1998).

declares that he is ‘foreign’ to the language of the courts, to the tribune, to the tribunals: he doesn’t know how to speak this courtroom language, this legal rhetoric of accusation, defense, and pleading; he doesn’t have the skill, he is *like* a foreigner. (Among the serious problems we are dealing with here is that of the foreigner who, inept at speaking the language, always risks being without defense before the law of the country that welcomes or expels him; the foreigner is first of all foreign to the legal language in which the duty of hospitality is formulated, the right to asylum, its limits, norms, policing, etc. He has to ask for hospitality in a language which by definition is not his own, the one imposed on him by the master of the house, the host, the king, the lord, the authorities, the nation, the State, the father, etc. This personage imposes on him translation into their own language, and that’s the first act of violence.¹⁷⁹

Elsewhere, Derrida explains how there is a violence involved such imposition of the dominant language:

It is unjust to judge someone who does not understand the language in which the law is inscribed or the judgment pronounced, etc... the violence of an injustice has began when all the members of a community do not share the same idiom throughout... The violence of this injustice that consists of judging those who don’t understand the idiom in which one claims... is not just any violence, any injustice.¹⁸⁰

This violence is compounded when we are dealing minority groups.¹⁸¹ In light of these comments, it is not difficult to draw a comparison between the language of the Courts and the classical concept of hospitality.

¹⁷⁹ Derrida, *Of Hospitality supra* note 2 at 15.

¹⁸⁰ Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’” in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 at 18.

¹⁸¹ See also *ibid* at 21 (where Derrida states: see notes how “one founding violence of the law or the imposition of state law has consisted in imposing a language on national or ethnic minorities regrouped by the state”).

This emphasis of conditional hospitality can be located in s 35(1), which can be seen as an invitation to certain segments of the Canadian population to assert their claims in Court. In this sense, the section is being hospitable. Yet, the section names that segment of the population – “the Aboriginal peoples of Canada” – and, in so doing, begins to set conditions on that hospitality.

The Court expands upon those conditions. Granted, Lamer CJC, among others, insists that the Court inquire into the perspective of the Aboriginal group claiming a right. As soon as he does this, however, he imposes another condition: that the perspective must be presented in the language of the Canadian legal system. This move is underpinned by violence: the violence of excluding the language, broadly speaking, of the Aboriginal group claiming a right. This violence is that of certain members of the community being forced to express themselves in language that they do not share.

8 Summary

The Court clearly adopts a metaphysical concept of culture. The structure of this concept is anchored by its core. That core consists of the essential features of cultural identity. Surrounding the core are the incidental features of the cultural identity. The core is presumed to remain independent of these incidental features. However, the core cannot be both central to the structure and independent of the incidental features, as the latter form part of the structure. As a result, there can be no ultimate core of a culture. In the Court’s terms, there can be no truly integral elements of a distinctive culture.

This paradoxical structure is reflected in the Court’s broad differentiation between Aboriginal and non-Aboriginal culture in Canada. In this view, the essence of non-Aboriginal

culture is seen as general and universal and, therefore, standard, while the essence of Aboriginal culture is seen as specific and particular and, therefore aberrant. Aboriginal culture is seen as innocent and stagnant, while Non-Aboriginal culture is seen as sophisticated and evolving. Non-Aboriginal culture is the norm against which Aboriginal culture is judged. Both Aboriginal and non-Aboriginal cultures are seen as self-contained identities that are completely separate from each other. This view, however, obscures the fact that these seemingly unified identities are actually constituted by arbitrarily aggregating cultural differences. Certain differences are deemed central, while others are deemed incidental. We thus encounter the same structure discussed above. As there can be no center, there can be no purely distinctive culture. At best, distinctiveness is relative.

Nonetheless, the Court assumes that a given Aboriginal group has a unified, identifiable perspective. Furthermore, the Court assumes that perspective can be represented in a straightforward manner by the Canadian legal perspective. A representation is seen as merely a re-presentation of that thing. The judge, in representing the perspective of Aboriginals, is a transparent conduit through which Aboriginals speak. However, these assumptions obscure the productive and political aspects of representation. The representer actually produces the thing represented each time a representation is made.

Not only does the Court obscure the performative structure underlying the s 35(1) analysis, it also obscures the underlying unconditional structure of hospitality. The Court emphasizes the conditional aspect of hospitality, particularly in requiring that the Aboriginal perspective be placed in the terms of the non-Aboriginal legal system. Such conditions are necessarily steeped in exclusion and therefore violence. In considering these issues, the next chapter attempts to better address the tensions highlighted by deconstruction.

Chapter 4

Rethinking *Van der Peet*: The Promise, The Affirmation, The Future to Come, Hospitality, and Deconstruction

1 Overview

At the beginning of *R v Sparrow*,¹ Dickson CJC and La Forest J, for the Court, indicated s 35(1)'s "strength as a *promise* to the aboriginal peoples of Canada."² They also agreed with scholars who characterize "s. 35(1) [as] a solemn commitment."³ They elaborated on the nature of that commitment, explaining that s 35(1) involves "a different constitutional promise that asks this Court to give a meaningful interpretation to recognition and affirmation."⁴ To this, I would add that s 35(1) involves hospitality because it requires that the Canadian legal system play host to the "Aboriginal peoples of Canada." This chapter will explore the promise, affirmation and hospitality implicit in s 35(1). In particular, it will examine the ways in which a greater focus on these aspects can better attend to the tensions highlighted by a deconstructive reading of the Court's approach.

This chapter has four parts. The first part looks at the concept of the promise. Part 2 analyzes the notion of affirmation. The third part examines, once again, the concept of hospitality, as well as the strategy of deconstruction. In the final part, Part 4, I explore some practical suggestions that might be drawn from my theoretical insights. In all, this Chapter

¹ [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]

² *Ibid* at para 1. See Andrea Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal (1995), 53 Toronto Fac L Rev 1) (which discusses the promise of *Sparrow*).

³ *Ibid* at para 60.

⁴ *Ibid* at para 77.

advocates for an approach to s 35(1) that is open to the promise highlighted in *Sparrow*. I shall argue that the tensions highlighted in the previous chapters are best addressed by an approach that embraces perpetual hospitality and deconstruction.

However, one might object that, given the problems with the *Van der Peet* jurisprudence, it is fruitless to work within the litigation process at all. Indeed, some scholars have suggested that the litigation process is ill suited to the task of recognizing and affirming Aboriginal rights.⁵ Yet, it is debatable whether the litigation process is as unworkable as claimed.

In fact, a number of scholars are convinced that the current regime itself can be transformed. For example, Borrows and Rotman argue that the Supreme Court of Canada can make a positive difference by adopting a more expansive approach to s 35(1).⁶ Similarly, Chilwin Cheng argues that s 35(1) has the radical potential to change our existing constitutional arrangements.⁷

Regardless, the ability to abandon the litigation process at this junction, without far reaching systematic, including constitutional change, seems uncertain at best. For one thing, part of the reason that litigation has emerged as the preferred choice for deciding questions regarding Aboriginal rights is that the Crown has been reluctant to negotiate with Aboriginal peoples.⁸ For another thing, as Ann Curthoys, Ann Genovese and Alexander Reilly explain, judges “are

⁵ Catherine Bell, “New Directions in the Law of Aboriginal Rights” (Mar 1998) 77 Can Bar Rev 36; Gordon Christie, “Aboriginal Rights, Aboriginal Culture, and Protection” (1998) 36 Osgoode Hall LJ 447; and Brian Gover and Mary Locke Macaulay, “Snow houses leave no ruins: unique evidence issues in aboriginal and treaty rights cases” (1996) 60 Sask L Rev 47.

⁶ John Borrows and Leonard Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (Dec 1997) 35 Alta L Rev 9.

⁷ Chilwin Chienhan Cheng, “Touring the Museum (Case Comm)” (Spring 1997) 55 UT Fac L Rev 419.

⁸ Jonathan Rudin, “One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada’s Decision in *R v Sparrow*, *R v Van der Peet* and *Delgamuukw v British Columbia*” (Spring 1998) 13 JL & Social Pol’y 67.

constrained by the substantive law and procedural rules in hearing and determining claims.”⁹
 Many of these constraints are constitutionally entrenched.

For instance, Thomas Isaac has argued that the actual text of s 35(1) itself is a source of many of the problems with the *Van der Peet* jurisprudence.¹⁰ Added to this problem is the fact that the courts are constitutionally charged with interpreting the Constitution. The failure of the last two major attempts to make constitutional amendments in Canada – the Meech Lake and Charlottetown Accords – suggests any attempts at change would be difficult at best. Moreover, the inability of participants at a series of constitutional conferences from 1983 to 1987 to agree on a definition of “existing Aboriginal and treaty rights” under s 35(1)¹¹ points to the difficulty that would be faced in attempting to make changes to the constitutional protections afforded to Aboriginal rights specifically. As a result, the current regime is not likely to go anywhere soon. For the above reasons, I want to explore the ways in which we can improve upon the Court’s approach in a way that takes into account the foregoing deconstructive analysis.¹²

⁹ Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (Sydney: University of New South Wales Press Ltd, 2008) at 226.

¹⁰ Thomas Isaac, “The Power of Constitutional Language: The Case Against Using ‘Aboriginal Peoples’ as a Referent for First Nations” (Fall 1993) 19 *Queen’s LJ* 415.

¹¹ Kent McNeil and David Yarrow, “Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?” (2007) *SCLR* (2d) 177 [McNeil and Yarrow, “Aboriginal Rights Adversely Affected”].

¹² See eg Douglas Sanderson, “Overlapping Consensus, Legislative Reform and the Indian Act” (2014) 39 *Queen’s LJ* 511 [Sanderson, “Overlapping Consensus”] (arguing for change within the existing *Indian Act* framework in light of the unlikelihood of introducing sweeping legislative reform in the short-term).

2 The Promise

In *Monolingualism and the Other*,¹³ Derrida explains how every act of writing is a promise.¹⁴ This promissory character does not depend on the intentional structure of a piece of writing: “[w]hether I like it or not: here, the fatal precipitation of the promise must be dissociated from the values of the will, intention, or meaning-to-say that are reasonably attached to it.”¹⁵ In other words, the promise arises whether or not the author intended it. Hence, the promise is imminent in the structure of writing: “[t]his performative of this promise is not one speech act among others. It is implied by any other performative, and this promise heralds the uniqueness of a language to come.”¹⁶ In doing so, the performative aspect of the promise actually threatens the promise itself.

As Derrida states: “it can only promise and promise itself by threatening to dismember itself.”¹⁷ This statement relates to the tension between the constative and performative aspects inherent in every act of writing. Because iterability is both repeatability (constative) and alterability (performative), each time the promise is re-iterated, there is a risk that the promise will radically break from itself; hence the threat of the promise. Yet, this tension is also what

¹³ Jacques Derrida, *Monolingualism and the Other of The Prosthesis Origin*, translated by Patrick Mensah (Stanford: Stanford University Press, 1996) [*Monolingualism and the Other*].

¹⁴ *Ibid* at 67. See also Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’” in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 at 38 [*Force of Law*] (where Derrida states that “[a] foundation is a promise... iterability inscribes the promise as a guard in the most irruptive instant of foundation”).

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid* at 22.

allows the promise to herald something new. This is why the promise is also “a structural opening” for Derrida.¹⁸ That opening is the promise of the promise.

As a written text, s 35(1) necessarily entails a promise. The section specifically makes a promise to “the Aboriginal people of Canada” that their rights will be “recognized and affirmed.” The Court in *Sparrow* held that the word “existing” was constative, being synonymous with the meaning word “unextinguished.”¹⁹ However, there is a tension implicit in the text, which I explored in greater detail in Chapter 2, between the constative and the performative. Recall that s 35(1) does not merely state the fact of the rights that it recognizes and affirms; rather, the section creates those rights. Specifically, the word “hereby” suggests that s 35(1) itself creates the Aboriginal rights it recognizes and affirms. Further, the judges themselves, in making fresh judgments pursuant to the section, create those rights too. The performative aspect, which the Court obscures, therefore leaves an opening for new rights.

3 Inheritance and Affirmation

In “Ulysses Gramophone: Hear Say Yes in Joyce,”²⁰ Derrida explores “[t]he yes of affirmation.”²¹ Derrida explains that, “[y]es can be implied without the word being said or written.”²² Specifically, “[a] promise... always implies a yes.”²³ The yes of affirmation,

¹⁸ *Ibid* at 68.

¹⁹ *Sparrow supra* note 1 at paras 23-4.

²⁰ Jacques Derrida, “Ulysses Gramophone: Hear Say Yes in Joyce,” translated by Francois Rafoul, in Andrew J Mitchell and Same Slote, eds, *Derrida and Joyce: Texts and Contexts* (Albany: State of New York Press, 2013) [“Ulysses Gramophone”].

²¹ *Ibid* at 56.

²² *Ibid* at 72.

²³ *Ibid* at 73.

according to Derrida, “must reaffirm itself immediately.”²⁴ To put it another way, “[y]ou cannot say ‘yes’ without saying ‘yes, yes.’”²⁵ Derrida explains:

I promise to keep the memory of the first ‘yes.’ ... This mean that the ‘yes’ keeps in advance the memory of its own beginning, and that is the way traditions work. If, tomorrow, you do not confirm that today you have founded your program, there will not have been any inauguration... So ‘yes’ has to be repeated.”²⁶

Like the promise that presupposes it, the affirmation or yes has a paradoxical structure in that it implies both a promise and a threat.²⁷

Derrida describes that paradox thusly:

at the moment which the woof such a signature sets to work the most competent and efficient machine of production and reproduction – others would say when it submits to this, or in any case relaunches it *for itself* so that it can come back to itself – it also simultaneously ruins the model. At least it threatens to ruin it.²⁸

As Derrida explains, this paradox,

is what [he calls] iterability. It implies repetition of itself, which is also threatening, because the second ‘yes’ may be simply a parody, a record, or a mechanical repetition... a threat to the living origin of the ‘yes.’ The second ‘yes’ will have to reinaugurate to reinvent, the first one. If tomorrow you do not reinvent today’s inauguration you will be dead. So the inauguration has to be reinvented everyday.²⁹

²⁴ *Ibid* at 56.

²⁵ Jacques Derrida, “The Villanova Roundtable: A Conversation with Jacques Derrida” in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 3 at 27 [“The Villanova Routable”].

²⁶ *Ibid*. See also Derrida, “Ulysses Gramophone” *supra* note 20 at 56 and 77-8.

²⁷ Derrida, “Ulysses Gramophone” *supra* note 20 at 56.

²⁸ *Ibid* at 60.

²⁹ Derrida, “The Villanova Roundtable” *supra* note 29 at 28.

So the affirmation implies repetition and alteration; that is, iterability.

Inheritance itself entails reaffirmation.³⁰ The way in which this reaffirmation is shaped is by “the radical and necessary *heterogeneity* of an inheritance.”³¹ As a result, the inheritance necessarily consists of “the injunction to reaffirm by choosing.”³² In other words, in reaffirming the inheritance, “one must filter, sift, criticize, one must sort out several different possibilities that inhabit the same injunction.”³³ This injunction “always says ‘choose and decide from among what you inherit.’”³⁴ By consequence, inheritance occasions responsibility.³⁵

As Derrida explains, “[a] faithful heir should... interrogate the inheritance... Submit it to reevaluation and constant selection – at the risk... of being faithful to more than one.”³⁶ Furthermore, “[i]nheritance would here consist in remaining faithful to that which one receives..., while also breaking with any figure of that which is received. One must always break off out of fidelity – and in the name of inheritance that is necessarily contradictory injunction.”³⁷ Thus, a faithful heir must, “to some extent break with the past, keep the memory of the past, while inaugurating something absolutely new.”³⁸ In inaugurating this something new, the

³⁰ Jacques Derrida, *Specters of Marx: The State of Debt, the Work of Mourning and the New International*, translated by Peggy Kamuf (New York: Routledge Classics, 2006), at 114 [*Specters of Marx*].

³¹ *Ibid* at 18.

³² *Ibid*.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Ibid* at 114.

³⁶ Jacques Derrida, *Paper Machine*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2005) at 139 [*Paper Machine*].

³⁷ *Ibid* at 95.

³⁸ Derrida, “The Villanova Roundtable” *supra* note 25 at 6.

inheritance must be transformed “as radically as will be necessary.”³⁹ The inheritance must be “transformed and adapted to new conditions and to a new thinking.”⁴⁰ That is not to say that such a radicalization is purely performative; rather, it is also constative for it “is always indebted to the very thing it radicalizes.”⁴¹ Remember that, in *Van der Peet*, Lamer CJC defined traditions as “those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples.”⁴² The Court thus elides the performative aspect in assuming that tradition is something that is simply passed down from one generation to the next.

4 The Future to Come

The affirmation and thus promise point to the future.⁴³ They do not, however, point to a knowable future present, consisting of pure presence.⁴⁴ Rather, they point to what Derrida calls the “future-to-come.”⁴⁵ This “future of what is coming” is unknown.⁴⁶

As he explains, the,

injunction that orders one to summon the very thing that will never present itself in the form of full presence, is the opening of this gap between an infinite promise... this

³⁹ Derrida, *Specters of Marx supra* 30 at 67.

⁴⁰ *Ibid* at 73.

⁴¹ *Ibid* at 116.

⁴² *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289, at para 40 [*Van der Peet*].

⁴³ *Ibid* at 92.

⁴⁴ *Ibid* at 81.

⁴⁵ *Ibid* at 92.

⁴⁶ *Ibid* at 112.

undetermined messianic hope at its heart, this eschatological relation to the to-come of an event *and* of a singularity, of an alterity that cannot be anticipated.⁴⁷

He continues:

This future is not described, it is not foreseen in the constative mode; it is announced, promised, called for in a performative mode... it does not consist in merely foreseeing (a gesture of the constative type) but in calling for the advent, in the future, of a manifesto of the communist party which, precisely in the performative form of the call, will transform the legend of the specter not yet into the reality of communist society but into that other form of real event.⁴⁸

The affirmation and thus the promise are underscored by an irreducible heterogeneity that remains open to the singular future to come.⁴⁹ This heterogeneity is what necessitates selectivity and precludes conclusiveness.

We must continually choose what we inherit, despite the irreducible heterogeneity of the affirmation, promise, and inheritance. Yet, because of the heterogeneity, we must, to reiterate, “interrogate the inheritance... Submit it to reevaluation and constant selection – at the risk... of being faithful to more than one.”⁵⁰ For this reason, we need to continually take this heterogeneity into account. That is, we must remain open to the heterogeneity and the future to come.⁵¹

Otherwise, we fall trap to the unfounded metaphysical thinking that plagues the *Van der Peet* line of cases. We naively assume that there is one correct characterization of a tradition. In doing

⁴⁷ *Ibid* at 81.

⁴⁸ *Ibid* at 128.

⁴⁹ *Ibid* at 112.

⁵⁰ Derrida, *Paper Machine supra* note 36 at 139.

⁵¹ Derrida, *Specters of Max supra* 30 at 45.

so, we create hierarchies by, for example, preferring: specific over general traditions; male over female traditions; and Western over Aboriginal traditions. But how can we ensure that we account for this heterogeneity?

5 Deconstruction and Hospitality

Derrida's work on hospitality is instructive in this regard. In particular, the notion of absolute hospitality affirms the future to come.⁵² James Taylor rejects this approach to hospitality, which he characterizes thusly: "we should... continue to strive for... perfection... even though we can never accomplish this goal."⁵³ Instead, he favors the approach of Paul Ricoeur, which rejects the desire for perfect hospitality altogether.⁵⁴ Per Taylor, Ricoeur argues that one must "do his best to accommodate" the requests of the other.⁵⁵ We must "refuse the urge to privilege one language over the other."⁵⁶ But, at the same time, Ricoeur insists that we "must be willing to inflict this violence."⁵⁷ Taylor explains why he prefers Ricoeur's approach as follows:

this recognition that such pure hospitality is impossible will lead us not to intensify and redouble our efforts to reach this impossible *ideal*, but to relinquish the desire to opt instead for an imperfect but genuine relationship to another *real* human being... [W]e must

⁵² *Ibid* at 211.

⁵³ James Taylor, "Western Hospitality to Eastern Thought" in Richard Kearney and James Taylor, eds, *Hosting the Stranger: Between Religions* (New York: Continuum, 2011) 11, at 14 [Taylor, "Western Hospitality"].

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at 15.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 16.

surrender one world in order to gain access to two, and in order to be able, finally, to affirm that two is better than one, and that it is not good for man to be alone.⁵⁸

I submit that Taylor is mistaken in his reading of Derrida. Derrida does not, in fact, suggest that we should strive for unconditional hospitality like it is some sort of regulative ideal.

In fact, Derrida stresses how absolute hospitality cannot be separated from conditional hospitality.⁵⁹ As he explains,

it is the pure and hyperbolic hospitality in whose name we should always invest the best dispositions, the least bad conditions, the most just legislation, so as to make it as effective as possible. This is necessary to avoid the perverse effects of an unlimited hospitality whose risks I have tried to define. Calculate the risks, yes, but don't shut the door on what cannot be calculated, meaning the future and the foreigner – that's the double law of hospitality. It defines the unstable place of strategy and decision. Of perfectibility and progress. It is a place that is being sought today, in the debates about immigration for instance.

We often forget that it is in the name of unconditional hospitality, the kind that makes meaningful any reception of foreigners, that we should try to determine the *best* conditions, namely particular legal limits, and especially any particular implementation of law.⁶⁰

Yet, try as we might, there can never be absolutely best conditions. There can only be, as Derrida puts, “the least bad conditions.”⁶¹ The determination of these conditions is, for Derrida,

⁵⁸ *Ibid* at 17.

⁵⁹ Derrida, *Paper Machine* *supra* note 36 at 67.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

contingent. Every such determination necessarily depends upon context. For, as we have seen, conditions necessarily involve exclusions and thus violence.⁶²

Derrida's approach thus cannot be characterized as idealistic. His approach is strategic: to the extent that he emphasizes unconditional hospitality, he does so strategically in order to achieve the best *possible* conditions. He is in no way giving metaphysical priority to unconditional hospitality.

Doing so would be an anathema to the deconstructive project. The deconstruction of the conditional/unconditional dichotomy, on Taylor's reading, would stop at the reversal stage, thereby reinstating the metaphysics of presence. However, Derrida's approach does not stop there. He continues, recognizing the relationship of *différance* at play between the conditional and unconditional: each differing from and deferring to the other. For instance, he notes how "the unconditional law of hospitality needs the laws [of conditional hospitality], it *requires* [the laws]... which, however, deny it, or at any rate threaten it, sometimes corrupting or perverting it."⁶³ Derrida is demonstrating how the unconditional is tainted by the conditional from the outset. He therefore, *contra* Taylor, does not reinstitute a metaphysical preference for one form of hospitality over another.

It is Taylor's version of Ricoeur that adopts a metaphysical stance. Taylor talks of achieving "an imperfect but *genuine relationship* to another *real* human being."⁶⁴ In so doing, he suggests

⁶² *Ibid* at 57.

⁶³ Jacques Derrida, *Of Hospitality: Anne Dufourmatelle Invites Jacques Derrida to Respond*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2000) at 25.

⁶⁴ Taylor, "Western Hospitality" *supra* note 53 at 17 [my emphasis].

that there is some kind of “real” or “genuine”, that is, some kind of metaphysical character to the type of relationship achieved. But as Derrida makes clear, any relationship achieved is invariably divided as a result of the paradoxical structure of hospitality: it at once shows hospitality and hostility to the stranger.

There is another objection that I would like to consider at this juncture: rather than introduce the paradoxical principle of hospitality, we should emphasize a principle that is already present in the case law: reconciliation. Michael Murphy argues that the best way to overcome the problems inherent in the *Van der Peet* approach is to assume a more liberal approach to the doctrine of reconciliation.⁶⁵ Reconciliation implies making two different perspectives compatible with one another. In so doing, the doctrine of reconciliation naively assumes that, on the one hand, each perspective that it seeks to reconcile is a self-contained unity. On the other hand, it presupposes that both of those perspectives can be made compatible. There is an inherent tension in the idea that two self-contained perspectives can be brought together. Furthermore, as we have seen in Chapter 3, any attempts to bring harmony within and among perspectives is doomed to fail because perspectives are also multiple and heterogeneous. These insights are concealed by the doctrine of reconciliation.

By contrast, the principle of hospitality recognizes the violence that necessarily arises when two perspectives clash. In other words, hospitality better accounts for the lessons that deconstruction teaches us about these issues. This point brings us back to the need to continually

⁶⁵ Michael Murphy, “Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada and New Zealand” (2008) 87 Can Bar Rev 35. See also Mark Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka and Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 (arguing that reconciliation is an inbuilt aspect of legality, which provides a critical standpoint from which to evaluate the judicial approach to Aboriginal rights).

interrogate – to deconstruct. Deconstruction exposes the limits of such conditions. In doing so, it highlights the irreducible heterogeneity that underlies concepts like history and cultural identity. Moreover, it sheds light on the violence implicit in those concepts.⁶⁶ Deconstruction remains open to the future to come.⁶⁷ What might an approach that combines deconstruction and hospitality look like in the context of Aboriginal rights litigation?

6 “From Theory to Practice to Theory”⁶⁸

It should be obvious by now that I am not offering a unified theory of how to approach Aboriginal rights. Such an approach would be at odds with my deconstructive project. What I have endeavored to do is to use deconstruction to problematize the theoretical framework presupposed by the Court in its jurisprudence. As Taylor says of hospitality: “the most important and difficult task is to come to terms with our limitations as hosts, and specifically with the fact that we are incapable of offering perfect hospitality to the stranger... the challenge is to acknowledge these limitations.”⁶⁹ Acknowledging such limitations is precisely the aim of this paper.

With that said, I do believe that there are some provisional strategies that may be useful in approaching Aboriginal rights depending on the context. As Natalie Oman explains, “in every particular case, [such an] approach will be implemented differently, and even within a single

⁶⁶ This point also arguably highlights the violence inherent in the law itself. My thanks to Lisa Austin for raising this point.

⁶⁷ Derrida, *Specters of Marx* *supra* 30 at 112.

⁶⁸ Kahen, “What is Culture?” *infra* note 71 at 45.

⁶⁹ Taylor, “Western Hospitality” *supra* note 53 at 11.

case, the techniques employed to build intercultural understanding will change over time.”⁷⁰

David Kahane adds that, “there are no a priori answers even about proper procedures for defining cultural identity and membership.”⁷¹ Rather, one “works though specific cases, paying careful attention to detail and resisting the tendency to see each example as a potential archetype.”⁷²

Kahane calls this process “[w]orking from theory to practice to theory.”⁷³

In the context of this project, working from theory entails deconstructing the metaphysical assumptions underlying the *Van der Peet* approach. In what follows, I will move on to practice, exploring some provisional strategies that might help the court come to terms with those deconstructive insights. However, as Derrida demonstrates, deconstruction is never done because the paradoxical structures underlying the metaphysics of presence are unresolvable. This is precisely why I talk of provisional strategies. We must continually return to theory from practice, deconstructing the strategies we employ, because there is no one-size-fits-all approach.

6.1 Self-Understanding and Deconstruction

In beginning with theory, my project has sought to generate self-understanding for judges working on Aboriginal rights claims. Specifically, I have focused on the fundamental

⁷⁰ Natalie Oman, “Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus” in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 70, at 88 [Oman, “Intercultural Understanding”].

⁷¹ David Kahane, “What is Culture? Generalizing About Aboriginal and Newcomer Perspectives” in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 28, at 45 [Kahane, “What is Culture?”]. For a discussion of the rules governing Aboriginal membership, particularly for the purposes of the Indian Act, see Sanderson, “Overlapping Consensus” *supra* note 12.

⁷² *Ibid.*

⁷³ *Ibid.*

assumptions underlying the relevant jurisprudence. In order for judges to come to terms with the limitations of their assumptions, they need to engage in self-reflection.

Self-reflection obviously encompasses examining one's own cultural assumptions.⁷⁴ The judge should question his or her values.⁷⁵ As professionally trained lawyers, the judge should also question his or her professional training.⁷⁶ The goal is for the judge to gain "insight into her or his own lenses and patterns."⁷⁷ Yet, the interrogation should not end with personal and professional self-reflection.

There are also systemic assumptions that need to be interrogated. Catherine Bell points to "the Eurocentric origins of adjudicative tribunal and court processes and the need for these institutions to change."⁷⁸ Relatedly, David Kahane discusses the, "asymmetries of power that shape cultural conflict."⁷⁹ These asymmetrical power relations shape the dispute itself, as well as the relations among the parties to the dispute.⁸⁰

Accordingly, Bell promotes an interrogation of "the cultural foundations of dispute resolution" and "the mechanisms for making dispute resolution processes more inclusive of

⁷⁴ Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 11, at 22 [LeBaron, "Learning New Dances"].

⁷⁵ *Ibid* at 17.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at 18.

⁷⁸ Catherine Bell, "Indigenous Dispute Resolutions Systems in Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 241, at 264 [Bell, "Indigenous Dispute Resolution Systems"].

⁷⁹ Kahane, "What is Culture?" *supra* note 71 at 32.

⁸⁰ *Ibid* at 38-9.

Aboriginal values and practices.”⁸¹ Similarly, Michelle LeBaron states: “[a]ssumptions underlying our processes and our way of exchanging in them must be examined if we are to develop ways to truly create deep change and durable solutions.”⁸² More particularly, Bell encourages us to “ask questions that take into account the influence of culture.”⁸³ She asks, for example: “[f]or who do our processes work? How do our processes accommodate conversations about what is important, how it is important, and for whom? Whose values do our processes mirror and whose do they exclude?”⁸⁴ She continues: “[h]ow is the existing regime of Canadian law undermining the cultural survival of Aboriginal communities?”⁸⁵ She also asks: “[d]o politics, rules, and regulations for the resolution of disputes complement traditional minds and narratives?”⁸⁶ Scholars have begun the process of questioning the influence of culture in the context of *Van der Peet*.

A good example is the scholarship on Aboriginal oral traditions. In that context, Val Napoleon comments that, “it is important to be mindful of how indigenous legal traditions are interpreted in western legal constructs.”⁸⁷ Bruce Granville Miller explains how the adversarial

⁸¹ Bell, “Indigenous Dispute Resolution Systems” *supra* note 78 at 261.

⁸² LeBaron, “Learning New Dances” *supra* note 74 at 12.

⁸³ Bell, “Indigenous Dispute Resolution Systems” *supra* note 78 at 255.

⁸⁴ *Ibid* at 243.

⁸⁵ *Ibid* at 245.

⁸⁶ *Ibid* at 247.

⁸⁷ Val Napoleon, “Aboriginal Discourse: Gender, Identity, and Community” in Ben Richardson, Shin Imai, & Kent McNeil, eds., *Indigenous Peoples and the Law* (London: Hart Publishing, 2009) 233, at 237 [Napoleon, “Aboriginal Discourse”].

system, expert evidence rules, cross-examination process, hearsay rule, best evidence rule and parole evidence rule all contribute to the tendency to disregard Aboriginal oral traditions.⁸⁸

From my perspective, deconstruction has an important role to play in this exercise of self-reflection. As we have seen, the Court's approach to s 35(1) in *Van der Peet* is characterized by a totalizing metaphysical tendency. Deconstruction exposes the limits of this tendency, showing what has been obscured by it: namely, irreducible complexity. It also demonstrates how, in concealing these limits, the Court is engaging in an act of metaphysical violence because it has no ultimate grounds for revealing some things and obscuring others. Because there can be no ultimate grounds, only irreducible complexity, deconstruction is an interminable project. Deconstruction must perpetually guard against the totalizing tendencies in the jurisprudence. Hence, each time the jurisprudence is iterated in a new context, a deconstructive analysis must be employed.

Yet, I submit that deconstructive self-reflection is not enough. This is why I employ David Kahane's phrase "from theory to practice to theory."⁸⁹ The point is to work from the insights of deconstruction to develop tentative practical solutions, moving from theory to practice. This practical step itself has the potential to contribute to the process of self-reflection.

⁸⁸ Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver, BC: UBC Press, 2011) at 5-8. See also eg Russell Binch, "'Speaking for Themselves': Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (Feb 2002) 13 NJCL 245.

⁸⁹ *Ibid* at 45.

Polly O Walker explains how a “worldview can be brought to consciousness through a comparison with and awareness of our own and others’ beliefs and behaviors.”⁹⁰ Taylor talks of allowing “one’s own tradition to be shaken up, made questionable, interrogated and reworked by the other.”⁹¹ Oman explains that, “as I question the hegemony of my culture-specific standards of value, and the form of recognition that is bestowed through my own interaction comes to be informed by the self-understanding of my interlocutor.”⁹² These statements reflect the idea that, in extending hospitality to the other, I learn something about myself. This insight should be kept in mind as we move through the following discussion, which examines the ways in which hospitality might be operationalized in the Aboriginal rights jurisprudence.

6.2 “Jagged Worldviews Colliding”⁹³

While deconstruction demonstrates the multiplicity and heterogeneity within cultures, it does not deny the differences among cultures. Granted, Derrida rejects the idea that there is something inherent within a given culture. Yet, as discussed in Chapter 3, he does not deny that there can be relatively stable elements of such a culture. While no element can remain absolutely the same from context to context, an element can remain relatively so.

There are indeed relatively stable differences between Aboriginal and Western perspectives. Dale Turner notes how it is more or less uncontroversial that “there are differences between

⁹⁰ Polly O Walker, “Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization” (2004) 28 (3&4) *American Indian Quarterly* 527, at 529.

⁹¹ Taylor, “Western Hospitality” *supra* note 53 at 19.

⁹² Oman, “Intercultural Understanding” *supra* note 70 73.

⁹³ Little Bear, “Jagged Worldviews Colliding” *infra* note 95.

indigenous and Western European worldviews.”⁹⁴ Leroy Little Bear, for one, explains how, on the one hand, Aboriginal worldviews, particularly those of the Plains Indians, are “holistic and cyclical or repetitive, generalist, process-oriented, and firmly grounded in a particular place.”⁹⁵ On the other hand, he describes Western worldviews “as being linear and singular, static, and objective.”⁹⁶ There have also been more particularized analyses of the differences among Western and Aboriginal worldviews.

For example, Jim Cheney and Lee Hester explain how Western epistemology focuses on absolute truth, assuming a correspondence between the map (knowledge) and the territory (reality).⁹⁷ By contrast, Aboriginal epistemology is agnostic towards the relationship of knowledge and reality, seeing the map as a mere guide towards responsible truth.⁹⁸ Anne Waters contrasts Western and Aboriginal metaphysics, demonstrating how the former is binary and the latter is non-binary. These relatively stable differences in worldviews highlight the importance of extending cultural hospitality in the Aboriginal rights claims process.

⁹⁴ Dale Turner, “Perceiving the World Differently” in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57, at 59 [Turner, “Perceiving the World Differently”].

⁹⁵ Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Ann Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver, UBC Press, 2000) 77 at 78 [Little Bear, “Jagged Worldviews”]

⁹⁶ *Ibid* at 82.

⁹⁷ Lee Hester and Jim Cheney, “Truth and Native American Epistemology” (2001) 15(4) *Social Epistemology* 319.

⁹⁸ See also eg Brian Yazzie Burkhart, “What Coyote and Thales Can Teach Us: An Outline of American Indian Epistemology” in Anne Walters, ed, *American Indian Thought: Philosophical Essays* (Malden, MA: Blackwell Publishing Ltd, 2004) 15 (contrasting Western and Aboriginal epistemologies by explaining how the former have traditionally focused on the grounds for knowing, equating knowledge with justified true belief, and how the latter have traditionally focused on the quest for knowing, asking what cannot or should not be known); and Willie Ermie, “Aboriginal Epistemology” in Marie Battiste and Jean Barman, eds, *First Nations Education in Canada: The Circle Unfolds* (Vancouver: UBC Press, 1995) 101 (describing Aboriginal epistemology as holistic and inward looking and Western epistemology as fragmentary and outward looking).

6.3 Mutual Hospitality

To be clear, I am not adopting a one-sided perspective of hospitality, which sees the Aboriginal peoples of Canada as the guest or stranger and the Court as host. Rather, I see hospitality as reciprocal idea. Indeed, Catherine Cornille talks of “mutual hospitality that empowers mutual transformation.”⁹⁹ For her, hospitality “involves openness and transparency and a willingness of both host and guest to reveal themselves.”¹⁰⁰ Yet, hospitality is even more than that:

This type of hospitality places one in the role of the guest as much as that of the host. It involves moving out of one’s area of comfort and predictability, entering the... world of the other, and, as a guest, learning from the... beliefs and practices of the other. And the guest becomes again the host when the teachings or practices of the other... are welcomed within one’s own [teachings and practices] and allowed to enrich one’s own... beliefs and practices.¹⁰¹

It is in this sense that the Aboriginal rights jurisprudence entails a reciprocal notion of hospitality.

6.4 Considering Aboriginal Traditions

As Oman explains, intercultural understanding “can be achieved only on the basis of some insight into the background understandings that are specific to the cultural groups involved.”¹⁰² Respect for and understanding of Aboriginal perspectives is thus important. Adopting a stance of

⁹⁹ Catherine Cornille, “Interreligious Hospitality and its Limits” in Richard Kearney and James Taylor, eds, *Hosting the Stranger: Between Religions* (New York: Continuum, 2011) 35 at 36 [Cornille, “Interreligious Hospitality”].

¹⁰⁰ *Ibid* at 37.

¹⁰¹ *Ibid* at 40.

¹⁰² Oman, “Intercultural Understanding” *supra* note 70 at 87.

intellectual modesty by recognizing one's own perspectives as being merely one set of perspectives, is also important.¹⁰³ Bell discusses the importance of giving "traditional knowledge full and fair consideration."¹⁰⁴ Catherine Cornille talks of developing "deeper knowledge of the tradition of the other, and respect for its teachings and practices."¹⁰⁵ Bell advocates emphasizing, "arguments based on customary practice or the oral history of elders."¹⁰⁶ Oman discusses engaging with "modes of interaction beyond argument, such as greeting, rhetoric, and storytelling."¹⁰⁷ More specifically, Bell talks about looking at "historical practices, spiritual leaders, creation stories, ceremonies, and other sources as a way to bring traditional values back into contemporary life."¹⁰⁸ In practice, that examination might entail allowing parties to freely "tell stories of past traditions in the community, communicate information they have received from others not present at the hearing, and rely on documents which may not hold up under judicial scrutiny."¹⁰⁹ In all, giving full and fair consideration to traditional Aboriginal knowledge involves openness to modes of interaction that differ from Western legal argumentation.

Scholars have already begun the work of developing more particular strategies for doing so. For instance, Michael Asch has proposed favoring Aboriginal oral traditions over Western documentary histories at points of impasse in order to counteract the Court's bias in favor of the

¹⁰³ See John O'Leary, "Western Hospitality to Eastern Thought" in Richard Kearney and James Taylor, eds, *Hosting the Stranger: Between Religions* (New York: Continuum, 2011) 23, at 30 [O'Leary, "Western Hospitality"] (discussing "the way [Heidegger] cites the Greek question of being as just one of the [great] beginnings").

¹⁰⁴ Bell, "Indigenous Dispute Resolution Systems" *supra* note 78 at 266.

¹⁰⁵ Cornille, "Interreligious Hospitality" *supra* note 99 at 42.

¹⁰⁶ Bell, "Indigenous Dispute Resolution Systems" *supra* note 78 at 268.

¹⁰⁷ Oman, "Intercultural Understanding" *supra* note 70 at 80.

¹⁰⁸ Bell, "Indigenous Dispute Resolution Systems" *supra* note 78 at 247.

¹⁰⁹ *Ibid* at 268.

former.¹¹⁰ James (Sákéj) Youngblood Henderson argues that judges need to respect and incorporate Aboriginal legal traditions into the Aboriginal rights jurisprudence.¹¹¹ Moreover, John Borrows argues that the Court ought to consider traditions that have developed post, as well as pre-contact.¹¹²

Tradition is certainly important to hospitality in the context of Aboriginal rights. John Borrows explains how tradition:

is present within indigenous communities because ancient values inform how they see the world today. It infuses their feasts, songs, ceremonies, stories, and other community events; tradition is manifest in family relations, personal motivations, and material representations. Tradition influences a great deal of indigenous thought and action.¹¹³

Yet, Borrows also notes how, “strong modernist and postmodernist trends also permeate their lives.”¹¹⁴ Tradition, modernism, and postmodernism thus all “exert their pull on indigenous peoples.”¹¹⁵ It is therefore imperative not to limit the investigation to traditional Aboriginal perspectives. Contemporary Aboriginal perspectives must also be considered.

¹¹⁰ Michael Asch, “The Judicial Conceptualization of Culture After Delegamuukw and Van der Peet” (2000) 5 Rev Constit Studies 119.

¹¹¹ James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) 67.

¹¹² John Borrows, “Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada” (Dec 1996) 50 CR (4th) 230.

¹¹³ John Borrows, “A Separate Peace: Strengthening Shared Justice” in David Kahane and Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 343, at 348 [Borrows, “A Separate Peace”].

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at 349.

However, in considering Derrida's insights on tradition, discussed in Chapter 2, the contemporary perspective cannot be simply seen as a present manifestation of tradition.¹¹⁶ Rather, we must recognize that traditions are multiple and heterogeneous. As a result, each time that we affirm one tradition, we betray another. Hence, carrying on tradition does not simply entail passive inheritance. Rather, carrying on a tradition also involves active invention. The consequence is that each time a tradition is re-iterated, there is the radical potential to break with the past. Because of this radical potential, hospitality cannot completely shut the door on one tradition or another.

The reality is that the Court must nevertheless reach a decision, that is choose which traditions to affirm and which to betray. The best the Court can do therefore is to try to determine the least bad conditions or the least bad legal limits. There are no *a priori* guidelines for making such a determination. Any strategy adopted is necessarily contingent. In other words, we are left with the following unsatisfying guideline: what constitutes a least bad condition depends on the circumstances.

Determining the least bad conditions also entails leaving the door open as much as possible. In other words, the Court should refrain from setting legal limits where it is not necessary to do so. The reason for exercising such restraint is that legal limits necessarily exclude. Insofar as the Court does place legal limits, its decision can be deconstructed. This brings us back to the point

¹¹⁶ See eg Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Sup Ct L Rev (2d) 595, at 595 (arguing that Aboriginal rights should be understood as generative rights: "rights that, although rooted in the past, have the capacity to renew themselves, as organic entities that grow and change"); and John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 Sup Ct L Rev (2d) 351 (arguing that the Court should adopt an approach that views Aboriginal rights as living traditions).

that the deconstruction of the *Van der Peet* jurisprudence, notwithstanding any supposed improvements that we make, is an interminable task.

6.5 Letting Aboriginal People Speak for Themselves

Hospitality involves not just considering the traditional and contemporary perspectives of Aboriginal peoples. Rather, hospitality requires that the Court allow the Aboriginal peoples claiming rights to communicate those perspectives themselves. Part of the reason for this requirement is the need to acknowledge “that my interlocutor has an irreducible perspective born of particular experiences, that must, in part, remain unknowable to me.”¹¹⁷ As Bell explains, one “cannot ‘borrow a perspective.’”¹¹⁸ As such “the only way to ensure consideration of Aboriginal perspectives is for Aboriginal people to be involved.”¹¹⁹ Accordingly, Kahane talks of an “elicitive approach” in which “one takes the lead from participants.”¹²⁰ There are some practical steps that can be taken in eliciting the perspectives of Aboriginal participants.

To begin, Kerry Wilkins argues that Aboriginal participants, not the Court, should formulate the Aboriginal rights claim being made.¹²¹ Further, Larry Chartrand advocates expanding the Court Challenges Program, which offers financial assistance for language and equality claims under the Constitution of Canada, to accommodate the s 35(1) claims of Aboriginal peoples.¹²²

¹¹⁷ Oman, “Intercultural Understanding” *supra* note 70 at 73.

¹¹⁸ Bell, “Indigenous Dispute Resolution Systems” *supra* note 78 at 273.

¹¹⁹ *Ibid.*

¹²⁰ Kahane, “What is Culture?” *supra* note 71 at 47.

¹²¹ Kerry Wilkins, “Whose Claim is it, Anyway?” (2013) 11 *Indigenous LJ* 73.

¹²² Larry N Chartrand, “Reconceptualizing Equality: A Place for Indigenous Political Identity” (2001) 19 *Windsor YB Access Justice* 243.

However, Oman, criticizes the process of appellate review as being monological.¹²³ She explains: “the process of appellate review does not allow for direct exchanges between litigants and appeal judges, but instead relies (traditionally) upon factums provided by the litigant’s legal counsel and transcripts of the trial court proceedings, in addition to relevant legislation.”¹²⁴ It is unlikely that this problem can be entirely corrected without broad systemic change. Yet, there are a number of steps that I believe can help to mitigate the issue.

6.6 Engaging with Aboriginal Languages

One such step relates to language. The issue of permitting Aboriginal peoples to express their perspectives in their own language will not always arise. As Turner explains, “many communities have lost their language to the point where it is no longer spoken in the everyday.”¹²⁵ Where no such loss has occurred, however, language should figure prominently. Anne Walters shows how worldviews are deeply embedded within language.¹²⁶ It is therefore important for Aboriginal peoples to use their own language when presenting their perspective on Aboriginal rights.¹²⁷

This choice brings us to the issue of translation. O’Leary talks of the problem of untranslatability: “texts of classic depth and complexity are fundamentally *untranslatable*... their horizons are *incommensurable* with the horizons of the translating communities, and ... there is

¹²³ *Ibid* at 79.

¹²⁴ *Ibid* at 76-7.

¹²⁵ Turner, “Perceiving the World Differently” *supra* note 94 at 65.

¹²⁶ Anne Walters, “Language Matters: Nondiscrete Nonbinary Dualism” in Anne Walters, ed, *American Indian Thought: Philosophical Essays* (Malden, MA: Blackwell Publishing Ltd, 2004) ...

¹²⁷ See eg Napoleon, “Aboriginal Discourse” *supra* note 87 at 237 (arguing that “it is preferable to use aboriginal people’s own language when referring to law and legal concepts”).

in consequence an *irreducible pluralism* written into” them.¹²⁸ To that extent, until one reads texts “in the original languages they have not really read them at all.”¹²⁹ With that said, O’Leary also talks of the benefits of learning “to traffic in translations,” using texts and commentaries in English in order to “enter quite deeply” into other intellectual traditions.¹³⁰ Translations should not simply be relied on in an uncritical way. Rather, as Turner states: “[b]y being more aware of the translation process, especially when normative language is translated from an indigenous language into English, non-indigenous negotiators can begin to appreciate the differences in the ways of understanding the world.”¹³¹ There is one notable case in which a judge has tried to confront the issue of language.

The *Xeni Gwet’in First Nations v British Columbia*,¹³² was a 339 day Aboriginal title and rights trial, which spanned five years. The trial decision was a whopping 1382 paragraphs. Over the course of the trial, with the assistance of a number of Tsilhqot’in Interpreters and Word Spellers, as well as a Tsilhqot’in dictionary, Vickers J directly engaged with the Tsilhqot’in language.¹³³ To this approach, I would add some additional suggestions.

One possibility is, as Bell suggests, giving “interpreters a free hand to explain what is happening... [To] convey intended meanings.”¹³⁴ In other words, the Court would benefit from

¹²⁸ O’Leary, “Western Hospitality” *supra* note 103 at 23.

¹²⁹ *Ibid* at 23.

¹³⁰ *Ibid* at 24.

¹³¹ Turner, “Perceiving the World Differently” *supra* note 94 at 66.

¹³² 2007 BCSC 1700, 65 RPR (4th) 1 [*Xeni Gwet’in*].

¹³³ See eg *ibid* at paras 10-11 and Appendix B.

¹³⁴ Bell, “Indigenous Dispute Resolution Systems” *supra* note 78 at 272.

using the expertise of a translator by having that translator explain the limits of the translation, such as in instances where there is no one-to-one translation available. Another possibility is having trial and appellate judges work with translators to publish annotated decisions in the language of the Aboriginal people claiming the right, in addition to English and/or French.¹³⁵

These suggestions can be roughly converted to the appellate context. Allowing claimants to prepare and tender factums, in addition to the ones prepared and tendered by their lawyers, which explain their perspective using their own cultural frame and language, may be useful. Similarly, it may be useful to allow claimants to present orally in their own language, alongside their lawyers, through modes of communication other than legal argument, such as creation stories and oral traditions. Obviously both of these proposals would likely require the active assistance of translators. In the case of factums, detailed annotations or translators' notes explaining points of untranslatability and procedures of translation would be helpful. In the case of oral submissions, the translator may need to accompany the claimant to the podium, playing an active role in communicating the claimant's meaning.

6.7 Reconsidering the Location of the Hearing

In addition to language, place is important when it comes to adjudicative hospitality. Ted Jojola explains how Aboriginal peoples have land-based worldviews that see identity and community as being intimately linked to place.¹³⁶ Bell suggests introducing “the requirement

¹³⁵ I am drawing this suggestion from Bell *ibid* at 252 (discussing the requirement in Nunavut “that all laws be enacted in Inuktitut”).

¹³⁶ Ted Jojola, “Notes on Identity, Time, Space, and Place” in Anne Walters, ed, *American Indian Thought: Philosophical Essays* (Malden, MA: Blackwell Publishing Ltd, 2004) 87.

that hearings” be “held on traditional lands,”¹³⁷ “in the community affected and in surrounding family to indigenous parties.”¹³⁸

In *Xeni Gwet'in*, Vickers J did just that. As the Supreme Court of Canada explained on the appeal, “[t]he trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used.”¹³⁹ He also “heard extensive evidence from elders, historians and other experts” while there.¹⁴⁰ In the later fall and early winter of 2003, the justice convened court at a school within the Tsilhqot'in’s traditional territory.¹⁴¹ Given the importance of land to Aboriginal worldviews, both trial and appellate courts, including the Supreme Court of Canada, would be wise to consider holding part or all of a relevant hearing within the traditional territory of the Aboriginal people claiming a right.

6.8 Appointing Aboriginal Judges

While the appointment of Aboriginal judges is obviously beyond the power of the Courts, it is pertinent to the discussion in this chapter. Grace Li Woo reminds us how “[t]he experience, education, and culture of judges on the Supreme Court can... be expected to affect their reasoning in profound and significant ways.”¹⁴² With that in mind, LeBaron argues “the suitability of a third party does not depend on communication skills, or awareness alone. As well as intercultural competence, third-party effectiveness depends on identity, gender, status and

¹³⁷ Bell, “Indigenous Dispute Resolution Systems” *supra* note 78 at 267.

¹³⁸ *Ibid* at 271.

¹³⁹ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 7 WWR 633, at para 61.

¹⁴⁰ *Ibid* at para 7.

¹⁴¹ *Xeni Gwet'in supra* note 132 at para 11.

¹⁴² Grace Li Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver, BC: UBC Press, 2011) at 143.

role.”¹⁴³ These comments are particularly incisive given that the Supreme Court of Canada is composed exclusively of white, upper-middle class (or higher) men and women. Many scholars have echoed that sentiment in advocating for the appointment of more Aboriginal judges to the bench generally, and to the Supreme Court of Canada specifically.

One such scholar is Turner, who suggests that if “more indigenous judges [could decide] indigenous cases” the Aboriginal intellectual community could have “a greater influence on the way courts interpret and implement Aboriginal rights.”¹⁴⁴ Bell echoes that sentiment, explaining that the “[s]election of an indigenous judge is intended to result in serious and consistent consideration of more traditional dispute resolution processes offered by the peacemaker component of the court.”¹⁴⁵ Bell discusses the Tsu T’ina First Nation who call, not just for any judge, but for a judge “who has ‘an innate understanding of the cultural sensibilities of First Nations people through direct personal involvement with the culture, [has] resided on a reserve and [has] worked with Aboriginal people.’”¹⁴⁶ When it comes to appellate panels, appointments of such judges would create what LeBaron calls “intercultural teams.”¹⁴⁷ Such teams she argues will “make it more likely that a variety of perspectives will inform intervention.”¹⁴⁸ It seems uncontroversial that the appointment of Aboriginal judges would at least increase the likelihood that the judiciary would give the Aboriginal perspective full and fair consideration.

¹⁴³ LeBaron, “Learning New Dances” *supra* note 74 at 24.

¹⁴⁴ Turner, “Perceiving the World Differently” *supra* note 94 at 65.

¹⁴⁵ Bell, “Indigenous Dispute Resolution Systems” *supra* note 78 at 252.

¹⁴⁶ *Ibid.*

¹⁴⁷ LeBaron, “Learning New Dances” *supra* note 74 at 22.

¹⁴⁸ *Ibid.*

It is less clear that Aboriginal judges could, themselves, represent the perspectives of the Aboriginal groups claiming a rights in an unproblematic way. As we discussed in Chapter 3, there is no unified Aboriginal perspective. Rather, Aboriginal perspectives are multiple and heterogeneous. The consequence is that no judge, Aboriginal judges included, can represent a singular Aboriginal perspective. Even if they could, Aboriginal judges, insofar as they are judges, occupy a position of privilege that places them in a different standpoint than other Aboriginal peoples.

Not to mention, there are a plethora of Aboriginal perspectives in Canada. It is preposterous to assert that a judge who is say, Cree, can fully represent the perspective of a Mohawk claimant. At the end of the day, any judge, be he or she Aboriginal, or otherwise, must make a decision that prioritizes certain perspectives over others.

6.9 Accounting for the Multiplicity and Heterogeneity of Aboriginal Perspectives

The inability of any one judge to fully represent the perspective of an Aboriginal group claiming a right is obvious if we recall from Chapters 2 and 3 that both cultures and traditions are multiple and heterogeneous. In presenting cultures and traditions as singular and homogenous, the Court unjustifiably prioritizes certain perspectives and obscures others. Leroy Little Bear echoes these problems when he talks of the paradox of how “shared worldviews [are] always contested.”¹⁴⁹ What he means is that there are a diversity of perspectives even within particular cultures.

¹⁴⁹ Little Bear, “Jagged Worldviews” *supra* note 93 at 85.

Given this diversity of perspectives, Courts need to, to quote Kahane, recognize “the importance of acknowledging internal contest, and the contingency of any particular characterization of Aboriginal ways.”¹⁵⁰ Moreover, Kahane encourages us to “emphasize the importance of vibrant debate within communities over the character of their culture, the nature of their traditions, and the legitimacy of existing structures of representation.”¹⁵¹ To that end, Napoleon talks of creating space “for diverse voices and challenges to the norms.”¹⁵² Similarly, LeBaron talks of an “elicitive approach,” which “allows for and invites individual and subgroup input.”¹⁵³ These suggestions can be incorporated into the Aboriginal rights court process.

One possibility might be to relax the rules of evidence at trial so as to allow broad input from individuals and subgroups within the Aboriginal community claiming the right. For example, in light of the criticisms that the perspectives of Aboriginal women have been marginalized in the Aboriginal rights jurisprudence, courts might encourage submissions from Aboriginal women. At the appeals stage, courts might solicit broader input from interveners. As above, it may be useful to encourage Aboriginal peoples to make oral and written submission in their own language, from their own frame reference. At the appeals stage, solicit broader input from interveners within community itself. Encourage interveners to submit in their own words and terms without the mediating lens of legal counsel.

¹⁵⁰ Kahane, “What is Culture?” *supra* note 71 at 39.

¹⁵¹ *Ibid* at 50.

¹⁵² Napoleon, “Aboriginal Discourse” *supra* note 87 at 246.

¹⁵³ LeBaron, “Learning New Dances” *supra* note 74 at 20.

6.10 Engaging the Discourses of the Dominant Culture

While I have discussed a number of ways to assist Aboriginal peoples in presenting their perspectives on their own terms, they must also, to some extent, do so in the terms of the Canadian legal system. Indeed, Turner does “not see how [Aboriginal peoples] have a choice but to engage the discourses of the dominant culture.”¹⁵⁴ He argues that Aboriginal peoples “have to articulate their arguments within the already existing legal and political discourses of the dominant culture.”¹⁵⁵ He is convinced that Aboriginal peoples “must generate explanations that make sense to people who possess the power to enforce them.”¹⁵⁶ Nevertheless, he is adamant about the need “to protect the dignity and integrity of indigenous worldviews.”¹⁵⁷ Hence, he argues that Aboriginal peoples must present arguments in the discourses of the dominant culture “guided by [their] own intellectual traditions.”¹⁵⁸ Specifically, he advocates explaining “traditional philosophies in the discourses of the dominant culture.”¹⁵⁹ Turner’s seemingly contradictory position can be better understood if we consider the reciprocal aspect of hospitality.

Recall that Cornille talks of “mutual hospitality that empowers mutual transformation.”¹⁶⁰ For her, “[hospitality] requires a willingness to leave one’s level of comfort and familiarity and

¹⁵⁴ Turner, “Perceiving the World Differently” *supra* note 94 at 60.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* at 64.

¹⁵⁷ *Ibid* at 67.

¹⁵⁸ *Ibid* at 64.

¹⁵⁹ *Ibid* at 65.

¹⁶⁰ Cornille, “Interreligious Hospitality” *supra* note 99 at 36.

venture into a world of unfamiliar and at times threatening views and practices.”¹⁶¹ Hence Turner’s position: Aboriginal peoples must still engage the dominant discourse in the process of asserting their claims.

7 Summary

This chapter explored the promise, affirmation and hospitality implicit in s 35(1). The section promises to “the Aboriginal people of Canada” that their traditional rights will be “recognized and affirmed.” This promise must be reaffirmed if it is to be a promise at all. Yet, the injunction to reaffirm precipitates choice. Traditions are multiple and heterogeneous. In reaffirming a tradition, the Court must choose one of several different possibilities. Given this choice, it is important that we subject the chosen tradition to interrogation, particularly to deconstruction.

Section 35(1) also necessarily entails hospitality insofar as it involves receiving “the Aboriginal peoples of Canada.” This hospitality arises each time that the promise of s 35(1) is reaffirmed. In practical terms, each time that the Court is asked to consider s 35(1) it hosts the “Aboriginal peoples of Canada” in a sense. As Derrida shows, perfect hospitality is impossible because hospitality simultaneously involves the conditional and unconditional.

When the host places conditions on his or her hospitality to the guests, he or she is necessarily engaging in exclusions and therefore violence. As a result, hospitality should leave the door open to the incalculable future as much as possible. To the extent that conditions must be used, we should use the least bad conditions that we possibly can. Moreover, bearing in mind

¹⁶¹ *Ibid* at 42.

that such conditions can never be perfect, we must, to reiterate, continually deconstruct those conditions.

Borrowing from Kahane, I have called this process of working from deconstruction to hospitality to deconstruction “working from theory to practice to theory.” In the context of this thesis, this process involved deconstructing the Court’s approach and, in light of that deconstruction, exploring provisional strategies designed to help the Court find the least bad solutions. Yet, this process also involves an appreciation that these solutions should also be deconstructed, recognizing that there can be no perfect one-size-fits-all approach that will resolve the issue of Aboriginal rights once and for all. With that in mind, this Chapter presented a number of modest suggestions.

One suggestion involves encouraging judges to interrogate their personal, professional, and cultural frames of reference. Investigations of this nature should consider the asymmetrical power relations engendered by these frames of reference. From my perspective, deconstruction has an important role to play in this exercise of self-reflection. An engagement with the frames of reference of Aboriginal peoples also plays a role in this process.

While Derrida rejects the idea that there can be a unified culture, identity, or tradition, he does not deny that these things can be relatively stable. Indeed, there are relative differences among the worldviews of Western and Aboriginal peoples. In considering these differences, a hospitable response that avoided placing unnecessary conditions would consider Aboriginal worldviews. Giving full and fair consideration to both traditional and contemporary Aboriginal perspectives could aid this cause; as could showing openness to modes of interaction that differ from Western legal argumentation, such as creation stories and ceremonies.

These perspectives should be communicated by the Aboriginal peoples themselves. Aboriginal claimants should be permitted to frame the claim being made themselves. Moreover, representatives of the Aboriginal group claiming the right should be able to express themselves in their everyday language, particularly since worldviews are deeply embedded within language. To that end, judges need to learn to “traffic in translations” by using interpreters to explain intended meanings. Annotated decisions might be published in the language of the group claiming the right. Members of that group might be invited to testify, present oral arguments, and/or written arguments in their own language, on their own terms. Moreover, the hearings themselves might be held within the traditional territory of the people claiming the right.

The appointment of more Aboriginal judges could also be fruitful because it would introduce more variety to the perspectives on the bench. With that said, we must not expect too much of Aboriginal judges because they themselves cannot represent the multiplicity and heterogeneity within and among Aboriginal groups in Canada. To account for this diversity of perspective, courts might invite broader input from more individuals and subgroups with the Aboriginal community claiming the right.

While it is certainly incumbent on the Court to consider the perspective of the “Aboriginal peoples of Canada,” this responsibility is not a one-way street. There is a type of “mutual hospitality” inherent in s 35(1). The Aboriginal rights claims process, to some extent, requires the Aboriginal people claiming a right to enter the world of the Court and openly engage with its beliefs and practices.

Chapter 5 Conclusion

As noted, history and culture were two dominant themes in the *Van der Peet* case law. The critics of that jurisprudence have devoted a considerable amount of work to critiquing, among other things, those themes. Yet, those critics focused largely on the content of the Court's concepts of history and culture. This focus is interesting considering how the Court made genuine efforts, particularly in the *Sappier* decision, to address many of its critics, but failed to affect significant changes.

This project makes a novel contribution to the scholarship by explaining the relative consistency in the Court's approach in terms of the metaphysical structure underlying its conceptions of history and culture. By metaphysical, I mean that the Court conceived of these concepts as concepts in and of themselves. Or, to put it another way, the Court assumed that both history and culture could be reduced to a fundamental essence or presence.

Drawing on the work of Jacques Derrida, I have demonstrated how pure metaphysical concepts do not exist. Rather, such concepts operate in *différance* – differing and deferring – with each other. The concepts of history and culture are both possible in the relative purity and impossible in their absolute purity because of that relationship. I have sought to highlight this *différential* relationship by evaluating the Court's approach using Derrida's general strategy of deconstruction. In doing so, I follow a long list of scholars, including Derrida himself, who have used deconstruction to analyze legal issues.

In Chapter 2, I demonstrated how the Court adopted a metaphysical concept of history. This concept reduces the past, history, tradition, and historical evidence to presence. History is seen as

a continuous succession of present moments past. The key moment in that regard is the point of European contact, which is presumed to maintain an absolutely determinable context throughout history. The idea is that, if we follow the chain of history backwards, we will eventually arrive at the pure presence of the past present moment of contact. In this view, traditions can be passed consistently from one generation to the next. Moreover, documentary evidence provides a permanent record of the pure presence of the moment of contact. The archive is merely a repository for such documents. Essentially, the Court sees history as a re-presentation of the past as it really was.

As concepts rooted in the metaphysics of presence, the Court's concepts of the past, history, tradition, and evidence are susceptible to deconstruction. The present moment, for starters, is necessarily divided. Each present moment entails absence as it both comes and goes throughout time. Because of this originary divide, there can be no pure continuity throughout history. In fact, history itself is iterable, repeatable, and therefore alterable.

What this means is that every time the historian, judge, lawyer, or claimant repeats the historical event, he or she also reinvents it. The same holds true for traditions and those who inherit those traditions. Histories and traditions are necessarily multiple and heterogeneous.

When the Court marshals and judges historical evidence, therefore, it invariably plays a productive role. Such actions are, however, ungrounded. There is therefore an exclusionary violence inherent in decisions regarding history and tradition. When the Court favors one characterization of an Aboriginal tradition over another, it is simultaneously continuing and betraying tradition. The Court thereby perpetrates violence.

In Chapter 3, I demonstrated how the Court also adopts a metaphysical concept of culture. This concept is presupposed to have a fixed center, which encompasses the essential features of a given culture. The concept also involves incidental features, which surround that center. The center is assumed to be independent of the incidental features. However, the center cannot be both part of the structure and independent of certain features of that structure. Consequently, there can be no ultimate center to culture. As a result, culture is made up of incidental features or differences.

The Court elides these structural features in defining Aboriginal culture. A distinction is drawn between Aboriginal and non-aboriginal culture in Canada. The essence of non-Aboriginal culture is seen as general and universal and, therefore, standard, while the essence of Aboriginal culture is seen as specific and particular and, therefore aberrant. Aboriginal culture is seen as innocent and stagnant, while Non-Aboriginal culture is seen as sophisticated and adaptive. Non-Aboriginal culture is the norm against which Aboriginal culture is judged. Both Aboriginal and non-Aboriginal cultures are seen as self-contained identities that are completely separate from each other. This view, however, obscures the fact that these seemingly unified identities are actually constituted by differences. Certain differences are arbitrarily deemed central, while others are deemed incidental.

This reductive understanding of culture is reflected in the Court's conception of representation. The Court assumes that an Aboriginal group has a unified, identifiable perspective. Furthermore, the Court assumes that said perspective could be represented in a straightforward manner by the Canadian legal perspective. A representation is seen as merely a re-presentation of that thing. The judge is a transparent conduit through which Aboriginal peoples speak. However, these assumptions obscure the productive and political aspects of

representation. This approach also elides the unconditional structure of hospitality, which underlies cultural relations. In requiring that the Aboriginal perspective be cognizable to the non-Aboriginal legal system, the Court adopts a highly conditional form of hospitality. In doing so, the Court's approach invariably results in exclusions and violence.

Chapter 4 attempted to begin laying the theoretical groundwork for more inclusive approach to s 35(1). In particular, the Chapter did so by drawing on the idea from *Sparrow* that s 35(1) entails a promise. I demonstrated how that promise is implicit in the structure of the provision itself. However, the promise is not straight forward: each time it is repeated, there is a risk that it will break from itself, but there is also a corresponding potential that it will herald something new. The promise is therefore heterogeneous.

As a result, when reaffirming the promise, we must continually evaluate what it is we are reaffirming. On this account, the best way forward is to adopt an approach that emphasizes the unconditional structure of hospitality. We must, however, keep in mind that completely unconditional hospitality is impossible. Hospitality necessarily involves conditions. The best we can do is to impose conditions sparingly. Moreover, we must strive to impose the least bad conditions possible. In the final chapter I made some modest, provisional suggestions as to what some of those conditions might look like.

At the same time, we must remain vigilant, by incessantly deconstructing the conditions that we impose. In this sense, my approach moves from theory to practice to theory. First, the existing legal conditions were deconstructed. Second, new, less bad conditions were tentatively produced. The third and next step would involve deconstructing any new conditions that the Court were to adopt.

While this approach will not completely avoid the tensions inherent in the *Van der Peet* jurisprudence, as no approach can, it will bring these tensions to the fore. In doing so, my approach will allow us to make self-reflexive decisions about what traditions should be reaffirmed. Moreover, my approach will help judges to be aware of the inevitable tensions associated with those decisions.

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