Indigenous Cultural Rights and Identity Politics in Canada[1]

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This paper explores how the recognition and protection of Indigenous cultural practices became one of the central ways in which courts use the Constitution Act, 1982 *to recognize and protect Indigenous rights. It considers the Court's 1996 "distinctive culture test" as a response to issues about cultural identity and citizenship raised in Canadian politics and scholarship in the 1970s and 1980s. Whereas serious challenges and risks can develop when judges attempt to assess the cultures of Indigenous people, these challenges are a conventional part of coexistence in diverse societies, to which there are effective responses. Public institutions are obligated to address these challenges in order to develop just and fair relations between Indigenous peoples and the Canadian state. That they have not done so effectively is uncontested, but that they do not have the capacity to do so, I argue, is mistaken and can be misleading in seeking a solution to problems found in the jurisprudence. The key problem with the distinctive culture test is the specific message it conveys — that Indigenous culture can be protected by courts without the state recognizing the right to self-determination — rather than the fact that it sanctions the legal interpretation of Indigenous cultural practices.*

L'auteure de cet article examine comment la reconnaissance et la sauvegarde des pratiques culturelles indigènes sont devenues une des façons essentielles dont les tribunaux utilisent la Loi constitutionnelle de 1982 *pour reconnaître et sauvegarder les droits indigènes. Elle examine le « critère d'une culture distinctive » de la Cour (1996) comme réponse aux questions liées à l'identité culturelle et la citoyenneté soulevées en politique et dans les recherches universitaires effectuées au Canada dans les années 1970 et 1980. Alors que des défis et des risques importants peuvent se présenter lorsque les juges tentent d'évaluer les cultures des peuples autochtones, ces défis sont une partie classique de la coexistence dans les sociétés diverses auxquels il existe des réponses efficaces. Ces défis devraient être envisagés comme des défis que les institutions publiques doivent aborder afin d'établir des relations justes et équitables entre les peuples autochtones et l'État canadien. Qu'elles ne l'ont pas fait efficacement est incontesté mais qu'elles n'ont pas la capacité de le faire, soutient l'auteure, est erroné et peut être trompeur lorsqu'on cherche une solution aux problèmes rencontrés dans la jurisprudence. Le problème clé avec le critère d'une culture distinctive est le message précis qu'il communique, soit que la culture indigène peut être sauvegardée par les tribunaux sans que l'État reconnaisse le droit à l'autodétermination, plutôt que le fait qu'il approuve l'interprétation juridique des pratiques traditionnelles indigènes.*

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In 1982, those who advocated for a renewed relationship between Indigenous peoples and Canada were understandably ambivalent about the entrenchment of Aboriginal rights in the *Constitution Act, 1982*.[2] Indigenous peoples had not been full participants in the amendment process leading to entrenchment. They were instead relegated to "observer status" during first minister's talks and largely left on the defensive, trying to ensure, through lobbying efforts in Ottawa and the United Kingdom, that the deal forged amongst the provinces and Federal Government would not supersede treaty obligations or have a negative impact on state recognition of Aboriginal status.[3] This was not the first time Indigenous peoples were implicated in Canadian constitutional politics and, based on past experiences, including the recent (at the time) 1969 White Paper,[4] they had good reasons to be skeptical that sections 25 and 35 would transform relations with Canada in a manner consonant with aspirations for self-determination. Indeed the White Paper, the Berger Inquiry into the Mackenzie Pipeline, and the residential school experience all amplified a legacy of exclusion and subjugation suffered by Indigenous peoples in relation to the Canadian state. Few if any scholars or activists thought the Constitution would undo this legacy. Indeed, several legal scholars expressed skepticism about the progressive potential of the new constitutional guarantees and argued that the Constitution did little to recognize the nation-to-nation relation between Indigenous people and Canada or to acknowledge the existence of Aboriginal constitutional orders that predate the settler state.[5]

Yet little doubt exists that the entrenchment of the Constitution signaled the beginning of a new constitutional order in Canada. Although the Constitution was developed and entrenched without adequate participation or consent of Indigenous peoples, Quebec, or indeed any group except the nine

2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Constitution*].

3 For a comprehensive discussion of the participation of Indigenous organizations in the constitutional reform and patriation process, see Russel Lawrence Barsh & James [Sákéj] Youngblood Henderson "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'" (1982) 17 Journal of Canadian Studies 55 at 73-80 [Barsh and Henderson 1982].

4 Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, (Ottawa: no publisher, 1969), online: Government of Canada <http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191#chp1>.

5 See e.g. Barsh and Henderson 1982, *supra* note 3; Roger Gibbins, "Citizenship, Political and Intergovernmental Problems with Indian Self-Government" in J Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 369; Kent McNeil, "The Constitutional Rights of Aboriginal Peoples of Canada" (1982) 4 Sup Ct L Rev 255; Keira L Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 263 [Ladner and McCrossan 2009].

provincial executives, it was negotiated at the height of what has come to be known as an era of identity politics, during which a diverse array of groups had become mobilized and politicized on the basis of features of identity such as gender, race, ethnicity, indigeneity, religion, disability, and sexuality. Even though identity groups were not participants in the official negotiations leading to the 1982 agreement,[6] political struggles involving identity groups and their claims were reflected in the very terms set in the Constitution, for instance, in its provisions to protect against discrimination on the basis of race, religion, gender, disability, and so forth, to recognize multiculturalism, and to guarantee Aboriginal rights.[7] Whereas the mobilization of groups on the basis of identity is not new to Canada, the late 1970s witnessed an increase and intensification of struggles throughout the world by national and cultural minorities, many of which advanced claims for the recognition and protection of their cultural identity, language, customs, traditions, and resources. Indigenous peoples in Canada, the United States, and Latin America were key actors in these struggles and mobilized on the basis of Indigenous identity to advance claims for the recognition of their distinctive cultures and to secure land and other resources needed to protect their ways of life. In Canada, their mobilization was especially intense in reaction to the assimilationist politics of the White Paper in 1969,[8] the politics leading to the Berger Inquiry,[9] and the constitutional reform processes throughout the 1970s. During this time Indigenous people reasserted their treaty rights, reminded Canada of its obligations under international law, and advanced claims for the recognition and protection of customs, traditions, and resources as constitutionally protected Aboriginal rights.

This paper explores how the assessment of Indigenous cultural practices became one of the central ways in which courts recognize and protect Indigenous rights under the Constitution. The first part of the paper looks at the historical background and context from the 1970s until the early 1990s, in which legal protections for Indigenous culture became a primary means to protect Indigenous rights; the second part examines the legal test, which

6 The 1981-2 processes are well known for the elite driven and executive style of decision making.

7 *Supra* note 2 at ss 15, 25, 27, 35.

8 See, for example, Harold Cardinal's visceral reaction to what many Indigenous people now view as a proposal that would have nearly eliminated Aboriginal rights from the Canadian legal landscape in Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: MG Hurig, 1969).

9 Thomas Berger was commissioned for the Inquiry in 1974 and reported in 1977. See Thomas R Berger, *Northern Frontier, Northern Homeland : The Report of the Mackenzie Valley Pipeline Inquiry* (Vancouver: Douglas & McIntyre, 1988).

came to be known as the distinctive culture test, that was eventually adopted by the courts in 1996 to assess claims for the recognition and protection of Aboriginal cultural practices. The distinctive culture test sent two messages about the protection of Aboriginal rights. First, the court presented the test as a way to ensure that important features of Indigenous ways of life are constitutionally protected. Second, the test entrenched the power of the Canadian state to shape Indigenous ways of life by allowing courts to decide, in the current context, which cultural practices merit constitutional protection.

Here, the distinctive culture test is considered a response to the issues raised in the Canadian politics and scholarship about cultural rights in the 1970s and 1980s. The aim of the Supreme Court's test is to protect Indigenous ways of life but only by de-linking this protection from the recognition of Indigenous claims for sovereignty and self-determination. The paper considers two objections to the test and to the project it represents of allowing Canadian courts to assess Indigenous culture as a means to interpret Aboriginal rights in the Constitution. First, the *criteria objection* is that the specific criteria proposed by the judges in the test are narrow and constrain the kinds of claims that can be made. Second, the *general objection* is that the general project endorsed by the test, to allow the court to interpret Indigenous cultural practices, is deeply if not irrevocably flawed. According to the general objection, the legal assessment of cultural practices is a futile and excessively dangerous project.

After considering the test in its historical context, I argue that the general objection is mistaken. Whereas the challenges and risks that can result when judges or other state actors assess the cultures of Indigenous people are both real and serious, they are also a conventional part of and an effective response to coexistence in diverse societies. Canadian public institutions are obligated to address these challenges and risks in order to develop just and fair relations between Indigenous peoples and the Canadian state. That they have not done so effectively is uncontested, but that they do not have the capacity to do so, I argue, is mistaken and misleads us in considering feasible responses to problems found in the jurisprudence. The key problem with the distinctive culture test is the contextually situated message it conveys that Indigenous culture can be adequately protected without the state recognizing the right to self-determination, rather than the general project sanctioned by the test that allows for the legal interpretation of Indigenous cultural practices.

Background and context

In 1990, the Supreme Court of Canada's decision in *R v Sparrow* temporarily allayed some of the skepticism Aboriginal rights scholars and activists initially expressed about the constitutional revisions.[10] In *Sparrow*, the Court held that customs, traditions, and practices that predate European contact could be a basis for Aboriginal rights that were not extinguished by state sovereignty.[11] Moreover, the Court held that the Constitution called for a new "just settlement" for Aboriginal peoples and renounced "the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[12] With these words, the Supreme Court seemed to embrace an understanding of sections 25 and 35 at least somewhat consistent with an Indigenous vision — that constitutional rights ought to guarantee a basis for recognizing the pre-existing claims and legal orders of Indigenous peoples — and, as some have suggested, appeared to provide an opportunity to establish a postcolonial order in Canada.[13]

It was during this time and in the decade subsequent to the *Sparrow* decision that a large and growing scholarly literature emerged in normative legal and political theory that explored a more general, albeit related, philosophical question, namely, how claims to cultural recognition and the accommodation of identity relate to broader principles of justice, freedom, human rights, and democratic citizenship.[14] The leading scholars on the subject, some of whom are Canadian, offered a wide range of arguments to explain why people have a strong sense of identification with their languages, culture, territories, and religions and how this identification can generate legitimate claims that have often been unjustly ignored or suppressed in contemporary nation-states. [15] In their view, these claims can be seen as advancing principles of freedom and equality by remedying the unjust forms of disadvantage or oppression that

10 *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 (QL) [*Sparrow*].

11 *Ibid* at paras 43-44.

12 Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall LJ 95 cited in *Sparrow, ibid* at para 54.

13 Gordon Christie, "Aboriginal Rights, Aboriginal Culture and Protection" (1998) 36 Osgoode Hall LJ 447 at 471-473 [Christie]; Ladner and McCrossan 2009, *supra* note 5 at 272.

14 See e.g. Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005); Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003); Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) [Kymlicka 1995]; Charles Taylor, *Multiculturalism and the 'Politics of Recognition'* (Princeton: Princeton University Press, 1994) [Taylor]; James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully].

15 Kymlicka, *ibid.;* Taylor, *ibid*.; Tully, *ibid*.

have historically limited the freedom and equality of members of these groups. Identity has the potential to be a helpful and revealing way to track social exclusion and institutional bias. The recognition of identity came to be considered an important means to accord respect to others[16] and identity claims were considered a means by which groups could advocate for a change in the terms by which they had been incorporated into the state. In several cases, historical injustice towards Indigenous people was the leading "real-world" example that these scholars used to illustrate their arguments.[17] In these ways, the normative literature reflected the view that, in real-world struggles, a politics sensitive to considerations of identity can promote justice and emancipation.

Just as the normative scholarship drew inspiration from real world examples of group oppression, including the experience of Indigenous peoples, in the decades following constitutional entrenchment, constitutional scholars drew on this normative scholarship in developing arguments to advance Indigenous claims for renewed and just relations with Canada. Many were optimistic that the aims of the normative theories could inform legal arguments and constitutional guarantees for Indigenous people. Some argued that the Constitution invited the courts to recognize Indigenous identity, or what Patrick Macklem termed "Indigenous difference."[18] As Macklem observed, in the past, cultural difference had served to deny Aboriginal people the right to exercise jurisdiction on their ancestral territories, to vote, and to educate their children in traditional ways, amongst other injustices.[19] However, in the Constitution, "Aboriginal cultural difference, in particular, can serve as a constitutional category that protects everything from ancient customs, practices and traditions to Aboriginal territory and sovereignty."[20] Macklem noted that if the courts narrowly interpreted cultural difference as only referring to culture in a static and isolated form, the potential for positive change was limited: "… the protection of Aboriginal cultural practices captures only a small part of the constitutional relationship between Aboriginal people and the Canadian state."[21] Kymlicka expressed a similar concern about the narrow-

16 David Copp, "Social Unity and the Identity of Persons" (2002) 10 Journal of Political Philosophy 365; Margaret Moore, "Identity Claims and Identity Politics: A Limited Defence" in Igor Primoratz & Aleksandar Pavković, eds, *Identity, Self-Determination and Secession* (London: Ashgate, 2006) 27; Taylor, *ibid*.

17 See especially Kymlicka 1995, *supra* note 14; Tully, *supra* note 14.

18 Avigail Eisenberg, "The Politics of Individuals and Group Difference in Canadian Jurisprudence" (1994) 27 Canadian Journal of Political Science 3 at 12; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Macklem].

19 Macklem, *ibid* at 56.

20 *Ibid.*

21 *Ibid* at 62.

ness of arguments based on cultural difference and claimed that those who defend Indigenous rights solely on the basis of radical cultural difference may unintentionally encourage paternalistic attitudes towards Indigenous people by implying that Indigenous peoples cannot safely be exposed to other ways of life or that, given their differences, they are incapable of making informed judgements about external influences. On his view, arguments that use the cultural distinctiveness of a people as a principle justification for recognizing special rights can lead to policies that seek to preserve and isolate communities rather than recognize their self-determination.[22] In contrast, to abandon arguments for Indigenous rights based on radical cultural difference is to connect Indigenous rights to traditional norms of human rights and therefore, at least in this sense, to suggest that Indigenous values are not starkly different from Western values.

In the 1980s and 1990s, as normative scholars were debating cultural rights and theories of multicultural citizenship, Indigenous peoples were engaged in political struggles against the state. In the context of these struggles, Indigenous leaders and scholars often referred to the cultural distinctiveness of Aboriginal societies in presentations, speeches, and briefs intended to mobilize their communities and to explain their opposition to state policies.[23] At the same time, in Canada, most Indigenous actors criticized the state for failing to be faithful to the treaties and not recognizing the Indigenous right to sovereignty and self-determination. For instance, Michael Asch underlined the importance of sovereign nation status to Indigenous goals by framing the argument in *Home and Native Land* in terms of rights to self-determination and self-government rather than rights to hunt, fish, trap, or follow customary practices.[24] In Asch's view, Indigenous peoples are nations and Canada is a multinational state akin to Switzerland and Belgium. Asch explains that the Aboriginal peoples' view on their rights embraces sovereignty first.[25] A consensus view amongst several leaders, he reports, is that

22 Will Kymlicka, "Theorizing Indigenous Rights" (1999) 49 UTLJ 281 at 290-291.

23 See e.g. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1990) 3 Can Hum Rts YB 3 and Menno Boldt & J Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt and J Anthony Long, eds. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 333. Despite the emphasis in both papers on cultural distinctiveness as a basis for Aboriginal rights and the argument that cultural difference is the leading reason why the *Charter of Rights and Freedoms* imposes foreign and potentially destructive values on Indigenous communities, in neither case do their arguments preclude the right to self-determination.

24 Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Vancouver: UBC Press, 1984) at 1.

25 *Ibid* at 26.

"aboriginal rights is founded on the fact of 'original' sovereignty" that has not been extinguished through the subsequent occupation by European settlers.[26] The rights of Indigenous peoples to survive and develop as distinct nations and peoples flow from this primary right to sovereignty; Asch notes that the objective that unites native organizations is "limited to insuring that the aboriginal peoples continue to survive and develop as distinct nations."[27] This goal requires restructuring the Canadian political system in a manner that guarantees Aboriginal people the exclusive legislative authority deemed "necessary for…survival and development as a distinct people (or peoples)."[28] In Asch's view, the cultural distinctiveness and survival of Indigenous communities are the leading but not the only reasons why the state should recognize the Aboriginal right to self-determination. Indigenous leaders identify other compelling reasons for the state to recognize Aboriginal rights, such as the existence of self-determining Indigenous societies prior to European settlement, the establishment of treaties, and the absence in these agreements of consent by Indigenous people to cede their rights of self-government and self-determination. Cultural distinctiveness and survival are important values in the context of these broader arguments for self-determination.

Similar views that tie cultural distinctiveness and survival to self-determination are found in numerous official statements of Indigenous organizations in the 1980s and 1990s. In Boldt and Long's 1985 edited collection *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, Indigenous leaders including Oren Lyons, David Ahenakew, Fred Plain, Peter Ittinuar, Clem Chartier, Bill Wilson, and Chief John Snow all argue that cultural survival is a central element of the right to self-determination.[29] Legal and political scholarship by Indigenous[30] and non-

26 *Ibid* at 29.

27 *Ibid* at 35.

28 *Ibid* citing the Rt Honourable Pierre Elliot Trudeau, Opening Statement (Speech delivered at the Constitutional Conference of First Ministers' on the Rights of Aboriginal Peoples, Ottawa, 15 March 1983), Government of Canada.

29 See especially David Ahenakew "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 24 at 25 and see also Fred Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press) 31 at 32.

30 For instance, Barsh and Henderson 1982, *supra* note 3 at 70, make this point by drawing a comparison between Pierre Trudeau's universalist perspective on rights and Rene Levesque's perspective which is based on a "cultural of respect" and equitable division of sovereignty: "This is not Mr Trudeau's utopia in which men are joined by pure reason and abstract political principles, but at once a pragmatic and idealistic appreciation that cultural diversity is real, is unlikely to go

Indigenous scholars,[31] as well as presentations and statements by the Dene, the Metis, the AFN, the Inuit and other organizations during the constitutional conferences discuss cultural distinctiveness alongside the right to self-determination.[32] Nearly all of these accounts frame Indigenous claims as demands for sovereign authority or at least for the recognition of Indigenous peoples as national minorities with the right to self-determination. In much of the scholarship at the time, the right to self-determination is understood as a right to survive as distinct societies with particular ways of life, cultures, and values that are unlike Western values in fundamental respects. In this way, cultural difference was fused to self-determination, and the picture that emerges from this Indigenous discourse during and directly after constitutional change is one that illustrates that Indigenous sovereign authority over certain territories and aspects of life is what it means for distinctive Indigenous ways of life to survive and develop.

Constitutional protection for Indigenous cultures

In 1996, against the background of these debates, the Supreme Court of Canada began to interpret Aboriginal rights as entitlements that protect the distinctive cultures of Indigenous people and, in *R v Van der Peet*, devised the distinctive culture test to determine when an Aboriginal practice (e.g., to hunt, fish, trade, etc.) constitutes a right protected under s35 of the Constitution.[33] The Court's approach can be understood as part of the growing trend in political and legal decision-making to interpret rights through the lens of different dimensions of identity — culture, nation, language, indigeneity, gender, and so on. Canada was not the first to adopt constitutional provisions designed to recognize and protect individual and group identity.[34] Yet the

away without a struggle, and can be harnessed as an asset rather than deplored as a curse, if built upon rather than marked for destruction…. Recognize these communities as substates within a competitive national union, and enjoy the synergy of many cultures loyal to the constitution that entrenches and preserves their right to self-determination."

31 Sally Weaver, "Federal Difficulties and Aboriginal Rights Demands," in Boldt & Long eds. *supra* note 29, 139 at 140-1.

32 See, especially, *supra* note 24

33 [1996] 2 SCR 507, [1996] SCJ No 77 (QL) at paras 48-75 [*Van der Peet*].

34 In the last 30 years, explicit commitments to protect cultural rights or "indigenous identity" have been written to the constitutions of Argentina, Belize, Bolivia, Brazil, Bulgaria, Canada, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Slovakia, Slovenia, Venezuela, as well as statutes passed by regions in Italy, Spain (Catalunya), and Germany (Lander). At the international level, protections for identity have been written into EC, *The Charter of Fundamental Rights of the European Union,* [2000] OJ C 364/1, *The Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, (2007) 1, *The International Labour Organization Convention No. 169*, ILO, (1989),

Canadian test was unique partly because it included such narrow criteria and because it included the "pre-contact requirement," which stipulated that, to be eligible for protection, practices must be traced to a time before contact between Indigenous people and European settlers. The test attracted two types of objections: the *criteria objection*, which focuses on the specific and narrow criteria stipulated in the test, and the *general objection*, which focuses on the general project of cultural interpretation, of which the test is one example.

The criteria objection

According to the *criteria objection*, the legal test developed by the Court is excessively narrow and includes requirements that unfairly limit the kinds of claims Indigenous communities can make. With respect to narrowness, the test requires that claimants define the practice they wish to protect and show that it is jeopardized by specified state regulations,[35] that it is distinctive and integral to the Indigenous culture of their community,[36] and "a defining characteristic"of their culture.[37] These criteria alone invited strong criticism of the test. Some critics charged that the court was essentializing Indigenous culture by reducing complex ways of life to mere practices.[38] Another concern was that the specificity required by the test would dissuade claimants from arguing cases for constitutional protection because, in order to do so, they must submit something like a predefined script, which would then be assessed by outsiders to determine whether it is central to the culture as a whole (which

online: International Labour Organization <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>, *Convention on the Rights of the Child*, UNCRCOR, 51st Sess, UN Doc CRC/C/GC/12, (1990), as well as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UNGAOR, 92d Plen Mtg, UN Doc A/RES/47/135, (1992), to name a few.

35 *Supra* note 33 at paras 51-54.

36 *Ibid* at para 55.

37 *Ibid in Summary of Reasons.* More precisely, the distinctive culture test requires that claimants 1) define the practice they wish to protect precisely and show that it is jeopardized by specific state regulations; 2) show that the practice is of central significance to the culture in question in the sense that it "makes that culture what it is" (Ibid para 85) 3) show that practices have "pre-contact" origins, which means that the practice (in its original form) was central to the distinctive Indigenous culture of the community before Europeans made contact; 4) balance the practice with the legal system with which it conflicts. The Court's job is to render Aboriginal perspectives "cognizable to the non-Aboriginal legal system" through a reconciliation process that places equal weight on each perspective.

38 John Borrows, "Frozen rights in Canada: constitutional interpretation and the trickster" (1997-1998) 22 Am Indian L Rev 37 at 59 [Borrows 1997-1998]; Russel Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet trilogy: Naive imperialism and ropes of sand" (1997) 42 McGill LJ 993 [Barsh and Henderson 1997]; David Murphy, "Prisons of Culture: Judicial Constructions of Indigenous rights in Australia, Canada, and New Zealand" (2008) 87 The Canadian Bar Review 357 [Murphy].

implies that a whole can be delimited) and whether it is distinct in the sense that it alone distinguishes the culture from other cultures.[39] Several critics argued that this requirement was an impossibly tall order. Practices that are adaptable, executed in diverse ways, or whose importance changes over time and circumstances might not pass this test. Indeed, the number of practices that would fit the criteria is likely to be small and the more claimants try to press their claims by presenting their practices to fit the criteria, the more likely they will be inclined to define their practices statically and narrowly.[40] As one litigator describes the problem, the more successful claimants are at passing the test, the more likely they will win constitutional protection for practices that are too narrow to be of real value to them.[41]

A second dimension of the criterion objection is that the "pre-contact requirement" unfairly limits the claims that communities can make. The pre-contact requirement states that only practices central to the community before Aboriginal-European contact, and which remain central today, qualify for protection under s. 35 constitutional guarantees. This criterion operationalizes one of the key aims of the test, which is to protect Canadian sovereign authority by stipulating that the presence of settlers, who eventually established settlements and founded a sovereign state, marks a constitutional change in the terms by which peoples on the territory of Canada can protect their identities and ways of life. Any practice that arose as a result of relations between Aboriginal and settler communities, whether central and culturally distinctive or not, is not eligible for constitutional protection. Practices that are symbolic today but had important functions before contact are more likely to pass the test than practices that are crucial to a community's present way of life but arose mainly as means to help Aboriginal communities survive in the midst of colonization.

Therefore, the distinctive culture test has been criticized for essentializing Indigenous cultures because it entrenches in law and policy stereotypes based on static, narrow, and nostalgic views of a group's cultural identity. It has also been criticized for co-opting Indigenous peoples by incentivizing the defense of narrow and static practices and for rendering a problem about subjugation and colonial domination into a matter of cultural difference.[42] As

39 Barsh and Henderson 1997, *ibid* at 1000-1003.

40 The Court will redescribe claims if it finds that disputed practices have been defined opportunistically or in an overly cautious manner in order to meet the criteria.

41 Michael Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005).

42 Jean LeClair, "'Il faut savoir se méfier des oracles': Regards sur le droit et les autochtones" (2011) 41 Recherches Amérindiennes au Québec 102.

Borrows put it, the test "is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today…"[43] Finally, the test uses Indigenous-European contact as the definitive event to determine what counts as a constitutionally protected cultural practice. Whereas the *Sparrow* decision held out some promise for renewed postcolonial relations between the state and Indigenous people, in *Van der Peet* the court retracts this promise not only by recognizing the Crown as the ultimate sovereign power but also, through the pre-contact requirement, by recognizing the mere presence of European colonists on Aboriginal occupied land as determinative of what counts as distinctive to Aboriginal culture for constitutional purposes.[44]

The general objection

Apart from concerns about the criteria found in this particular legal test, several critics also object to the overall project of cultural assessment as a means to guaranteeing rights. These objections connect concerns about the approach adopted in *Van der Peet* to criticisms of the broader normative project of using cultural and other kinds of identity-based rights as a means to advance freedom and justice for marginalized and oppressed groups. In the case of *Van der Peet*, several critics rejected the very possibility that the courts' interpretation of culture could advance freedom and equality for Indigenous peoples. According to one view, culture cannot be protected by laws that focus on protecting particular practices deemed important to the group; as Gordon Christie argued, practices are manifestations of culture rather than culture itself. In order to protect Aboriginal cultures, courts would have to protect core principles and values that go into structuring the worldview of the people in question, which is not a project credibly undertaken by the court or, for that matter, any outsider to the community in question.[45] Rather than promoting cultural rights, a better way to protect culture is to recognize Indigenous law as having authority over the appropriate practice of Indigenous customs and traditions except where this authority has been surrendered by treaty or legiti-

43 Borrows 1997-1998, *supra* note 38 at 43.

44 Whereas Canadian sovereignty is used as the standard in cases about establishing Aboriginal title, settler–Indigenous contact is used as the standard in cases about cultural practices. See Christina Godlewska & Jeremy Webber "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a" in Hamar Foster, Jeremy Webber, & Heather Raven, eds, *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 1 at 20-21 and Murphy, *supra* note 38 at 363.

45 Christie, *supra* note 13 at 484.

mately extinguished by the Crown.[46] Another concern related to the general objection is that to determine the centrality of a practice to a culture is futile because practices are usually interdependent so that none is more central than any other and centrality changes over time as circumstances demand.[47] Judgments regarding what is distinctive, specific, or central to a culture are bound to be subjective and pluralistic within a community. To use such subjective judgments as markers for legal rights, as John Borrows points out, is "to permit the determination of rights to be colored by the subjective views of the decision maker."[48]

These are just some ways in which critics questioned the broader enterprise of cultural interpretation and cultural rights. As a means to establish legal rights, the cultural approach of the distinctive culture test seemed deeply flawed not merely because the Court hit on the wrong criteria but also more generally because culture is too subjective, fluid, complex and indeterminate to be interpreted by courts let alone used to establish human rights entitlements.[49] The risk is that a cultural test would "freeze" Indigenous rights and thereby deny to Indigenous people the very kind of protections that they were claiming.[50]

In defense of cultural rights

As the discussion above shows, the objections to *Van der Peet* are twofold. On one hand, the specific criteria of the test were criticized for being narrow, essentialist, and for providing incentives for claimants to expend resources defending practices that may be of little use to them in ensuring the survival of their cultures and communities. On the other hand, several critics objected to the general project of cultural assessment sanctioned by the distinctive culture test. The general objection holds that, broadly speaking, cultural approaches

46 See Barsh and Henderson 1997, *supra* note 38 at 1008. Another way to proceed is for courts to protect key aspects of culture, such as language, that are less open to misinterpretation by outsiders. For consideration of this view in relation to *Van der Peet* and several other cases see Neil Vallance, "The Misuse of 'Culture' by the Supreme Court of Canada" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97.

47 Barsh and Henderson 1997, *ibid* at 1000-1001.

48 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 69. Here Borrows is concurring with the argument given by Justice Beverly McLachlin in her dissenting opinion in *Van der Peet, supra* note 33 at para 247.

49 These concerns have generally been raised by numerous critics across a broad range of scholarly disciplines.

50 Borrows 1997-1998, *supra* note 38; Murphy, *supra* note 38 at 361, 366-376.

carry with them risks that are so great — even insurmountable — that they outweigh any advantages to be gained by groups using them.

It is the second objection, i.e. the general objection, that I argue is mistaken and misleading in ways that distort the understanding of cases such as *Van der Peet* and the determination of ways in which Indigenous-state relations may be improved through the law in the future. A practical and immediate problem is that the general objection makes little sense of the Court decision in *Van der Peet*. Despite the Court's efforts in this case to develop a comprehensive test to assess the centrality of cultural practices, in the end the decision largely rests on one specific criterion, namely the pre-contact requirement that has little to do with interpreting culture. Dorothy Van der Peet lost her case to have salmon trade for the Sto:lo people recognized as an Aboriginal right under the Constitution because the Court decided that this trade became an important part of Sto:lo culture only after Sto:lo contact with European people. In this and several subsequent decisions that employ the distinctive culture test, the main issue is not that the claimants' Aboriginal culture is misinterpreted, but that the pre-contact requirement imposes unfair constraints on Aboriginal rights.[51] As *Van der Peet* showed, the intention of the pre-contact criterion is to ensure that Canadian sovereignty, not culture, is the determining feature for interpreting Aboriginal rights. On this matter, the Court was divided. The dissenting opinions of Justices McLachlin and L'Heureux-Dubé point to the controversial nature of pre-contact. Both suggested that not only does contact have nothing to do with what counts as an important cultural practice, but the criterion limits the breadth and scope of Aboriginal rights as

51 The pre-contact requirement is not the only criterion by which courts have denied claims. In some cases, courts have denied commercial practices, such as the right to fish for commercial purposes (*R v NTC Smokehouse Ltd*, [1996] 2 SCR 672) or to harvest trees to build and sell furniture for commercial purposes (*R v Sappier*; *R v Gray,* [2006] 2 SCR 686, 2006 SCC 54 [*Sappier*]), sometimes by arguing that the practice did not exist in commercial form. They have denied that practices, as defined by claimants, were ever central to communities (e.g. high stakes gambling in *R v Pamajewon*, [1996] 2 SCR 821, [1996] SCJ No 20) and, in *Mitchell v MNR*, 2001 SCC 33, [2001] 2 SCR 911 [*Mitchell*], they ruled that the importance of a practice has to be defined specifically and, in this case, geographically. In *Mitchell*, the Mohawk community claimed that trade of goods across the border between Canada and the US was a distinctive and integral practice that should be recognized as an Aboriginal right. The court held that "The importance of trade — in and of itself — to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the intregality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised … rather than in the abstract" (*Mitchell* at para 55). My claim is not that the pre-contact requirement is the only reason why courts deny Aboriginal claims using the distinctive culture test but rather that it is one of the key reasons. The question of whether the court has misinterpreted culture in denying the claims at issue in these other cases is not explored here and, to my knowledge, no consensus on this question exists in the scholarship.

they would have been interpreted had the Court displayed fidelity to interpreting rights on the basis of what is important to cultural identity.

Since the general objection to cultural interpretation does not help make sense of the Court's substantive decision in *Van der Peet*, it cannot offer a good sense of the significance of the decision. After all, the Canadian State hardly needs a legal test to essentialize or co-opt Indigenous peoples. For over 100 years policymakers have used views of Indigenous people as childlike, savage, and uncivilized to justify coerced assimilation by banning cultural practices such as the potlatch and winter dances, by removing children to residential schools and thereby destroying family and kinship systems, and by prohibiting Indigenous peoples from voting or hiring lawyers unless they abandoned their reserves and thereby gave up their claim to status in their communities. In these and many other respects, courts and legislatures justified their policies on the basis of essentialist interpretations of Indigenous ways of life, sometimes with the help of expert anthropologists and educators, well before a time when culture rights were recognized, let alone constitutionally recognized. Because of this history, in which cultural difference has been used against Indigenous people to justify disadvantage and subjugation, efforts today to recognize cultural difference as a source of respect and thereby a resource rather than a liability are viewed as attractive and promising by scholars and social movements throughout the world.

Of course, many critics of cultural rights have argued that the best response to historical legacies such as Canada's — namely, treating cultural difference as a liability — is to avoid recognition of any kind of group-based rights or the protection of cultural or other forms of difference.[52] However, one potential consequence of policies that ignore group-based differences in favour of a universalistic ideal of the individual and her rights is the privileging of the majority's culture and a preference for policies that encourage assimilation into a common, usually majoritarian, norm. Canada's historical approach to Indigenous people is once again instructive in this respect. The attempt in 1969 to extend individual rights to Aboriginal people in the White Paper was built on a philosophy of ignoring cultural difference in favour of the rights of universal individual citizens. The White Paper promised equal rights of citizenship and in return would rescind Indigenous entitlements to land, rights, and other claims for jurisdictional sovereignty. The White Paper thereby ignored cultural rights and in doing so threatened to erase a history of

52 For an elaboration of this position see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass: Harvard University Press, 2001).

imperialism that characterized settler-Aboriginal relations. Critics feared that universal individual rights would obscure the real power differences between Aboriginal and non-Aboriginal groups and, for the next ten years, Indigenous people emphasized the importance of their cultural survival in part to remind the state of its misguided White Paper. This experience illustrates perhaps better than any other that, in real-world contexts, a commitment to ignore cultural difference need not make public officials immune from distorting group identities in essentialist ways or from using these distorted views to obscure policies of assimilation. Instead, failure to respect cultural difference can lead to the domination of a minority by a majority.

The failure to take cultural difference seriously as a human rights issue led to the mobilization of a large number of identity-based groups throughout the world in the 1970s and 1980s, to the development of normative approaches to human rights that recognize the strong attachments people have to their cultures, languages, genders, religions, and so forth, and to laws and policies at the national and international level that encourage public decision-makers to take minority identity claims seriously. Unsurprisingly, some of these policies have led to concerns similar to those raised in relation to Canada's distinctive culture test, that public decision-makers can essentialize cultures, co-opt communities, and freeze their rights. However, these are not new kinds of problems; they often arise in diverse societies and have acted as the impetus for developing principles of democratic legitimacy and accountability, norms of publicity and consent, collective rights, mechanisms of dialogue, and obligations for consultation. On the basis of these norms and principles, many democratic states are constitutionally obligated to address these problems as a requirement of fair governance. Unsurprisingly, policymakers and courts have fallen short of doing so well in all cases, as is well-illustrated by the narrow and constraining criteria of the distinctive culture. Yet it is difficult to conclude on this basis that the assessment of culture per se leads to minority subjugation, as some critics suggest, because to believe this view is to discount the power that courts and other public institutions have to interpret cultural rights generously and fairly.[53] In other words, the risk of accepting the general objection in cases like *Van der Peet* is that doing so discounts the power and capacity of courts to decide differently and more fairly. The reason why Canadian courts are interpreting Indigenous cultures in a distorted and narrow way is not

53 For example, international bodies have offered much broader and more generous interpretations of Indigenous culture claims. See Avigail Eisenberg, "Domestic and International Norms for Assessing Indigenous Identity" in Avigail Eisenberg & Will Kymicka, eds, *Identity Politics in the Public Realm* (Vancouver: UBC Press, 2011) 137 for a comparison of domestic and international norms of assessing Indigenous cultures.

because cultural interpretation is inevitably unsuccessful but rather because of the failure of courts, legislatures, and other state institutions to adhere to norms of democratic accountability, legitimacy, consent, and dialogue in their decision making. It seems highly unlikely that it is the court's mistaken interpretation of culture that explains their unwillingness to adopt more expansive, future-oriented, and generous interpretations of culture.

A better understanding of the significance of *Van der Peet* requires considering this decision and the distinctive culture test in the context of ongoing debates at the time. With the distinctive culture test, the court takes a well-discussed problem — namely, how best to protect the distinctiveness of Indigenous cultures and the survival of Indigenous ways of life, which has been the subject of discussion amongst scholars and Indigenous leaders throughout the 1970s and 1980s, many of whom have couched that problem specifically in terms of Indigenous sovereign authority and self-determination — and it creates a test that sets aside the self-determination of Indigenous peoples and focuses instead on guaranteeing cultural rights. The message of the Court in 1996 is that the Aboriginal rights protected in s35 of the Constitution are rights to cultural protection and not sovereign authority.

The Court's message that the cultural rights of Indigenous people exist apart from the right to self-determination stands against two decades of discussion and dialogue with Indigenous leaders. And it is this message which best explains the Court's approach and why the distinctive culture test is problematic. This message is also the thread that unites a court decision that is otherwise split by two seemingly strong dissenting opinions. In one dissent, Chief Justice Beverly McLachlin recognizes the potential distortion of cultural rights created by the pre-contact requirement, stating that "[a] practice need not be traceable to pre-contact times to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact."[54] However, according to McLachlin, the problem created by the pre-contact restriction is solved not by recognizing the right of Indigenous peoples to determine their own cultural protections, but rather by replacing the pre-contact requirement with a "pre-state" requirement which directs the court to determine instead "what laws and customs held sway before the superimposition of European laws and customs."[55] In another dissenting opinion, L'Heureux-Dubé is also aware of the pitfalls of the majority's test and criticizes the "frozen rights approach," which she distinguishes from her preferred "dy-

54 *Supra* note 33 at 8.
55 *Ibid* at para 248.

namic rights approach." She argues that twenty to fifty years is sufficient to determine which practices count as distinctive and integral, but she fails to question the overall project of assessing cultural rights in the absence of recognizing Indigenous self-determination. Whereas both dissenting opinions find fault with the specific terms of the distinctive culture test, neither challenges the basic point of the decision, which is to assert State sovereignty and thereby place the Court in a position of deciding what is distinctive to Indigenous cultures rather than understanding the survival of distinctive ways of life as tied to the constitutional recognition of Indigenous self-determination. After at least two decades of debates in normative political theory and constitutional scholarship, against the background of a surge in Indigenous mobilization brought about, in part, by the exclusion and marginalization of Indigenous peoples in key policy debates and political struggles, in 1996 cultural distinctiveness rather than self-determination becomes the constitutional right protected in section 35.

Why defend cultural rights?

Despite the optimism amongst some normative theorists that cultural rights could be used to advance the claims for justice and emancipation of marginalized groups, some, perhaps especially those who struggled to see Aboriginal rights entrenched in the Constitution, saw the 1996 *Van der Peet* decision and the use of the distinctive culture test in subsequent cases as a defeat.[56] The test imposes narrow and constraining criteria — key amongst these is the pre-contact requirement — that make it difficult for claimants to use section 35 to protect their cultural wellbeing and ensure the survival of their communities. Moreover, despite calls from within the Court for generous and purposive interpretations of section 35 rights,[57] the Supreme Court of Canada further constrains what Indigenous people might gain by excluding commercial activities from protection using the legal test and limiting access to resources for cultural practices at the level communities would have enjoyed in pre-contact times.[58] These restrictions scuttled what David Murphy

56 See e.g. Asch's discussion of *Van der Peet* in Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*," (2000) 2 Rev Const Stud 119.

57 See *Van der Peet, supra* note 33 at paras 23, 24, 142.

58 For instance, the claim of Mi'kmaq and Maliseet communities in Nova Scotia to cut timber on Crown land without state permission in order to build furniture was accepted by the Court using the distinctive culture test, but limits were placed on the amount of timber they could harvest according to what they needed for domestic use within the community, not accounting for selling furniture outside the community. The majority decision reasoned that the amount of timber allowed depended on what was needed for the survival of the Mi'kmaq and Maliseet communities

describes as the noble aims of section 35 rights, to acknowledge the existence of pre-existing Indigenous societies as a source of Indigenous rights and to carve out a legal space for Indigenous worldviews and practices to inform the scope of those rights. The criteria of the distinctive culture test together with the Court's interpretation of those criteria "renders indigenous right more vulnerable to the impact of colonialism, … [and] places discriminatory restrictions on the capacity of indigenous peoples to translate those rights into employment and development opportunities in the modern economy."[59] For these reasons, Murphy concludes, the pre-contact requirement "seems almost custom-designed to frustrate the judicial objective."[60]

I have distinguished between the *criteria objection* to the distinctive culture test which focuses on the Court's interpretation of test's criteria and the *general objection* to the interpretation of Indigenous culture by Canadian courts. Whereas the distinctive culture test is indeed flawed in numerous ways, including those explored above, the general objection to Canadian courts interpreting Indigenous cultures for the purposes of adjudicating rights is mistaken and misleading. The problem with *Van der Peet*, according to the advocates of the general objection, is that it invites Canadian courts to interpret Indigenous culture, which is a project doomed to fail because culture cannot be reliably interpreted for the purpose of establishing rights. I have argued that cultural difference has long been used by state courts and policymakers to establish policies about Indigenous people and so, in this respect at least, the distinctive culture test is not new. Instead, what is new is that the test is presented as a way to treat Indigenous cultural difference as an advantage, rather than as a disadvantage — to carve out a legal space for Indigenous worldviews and practices — and is situated in a context of scholarly debates about the role of culture and people's attachments to their culture in advancing human rights. This context does not diminish the flaws of the Canadian test, but it indicates that the larger project that informs the test might nevertheless be a valuable one. Perhaps more importantly, these factors should lead us to ask why the courts have abandoned the aims of this larger project in favor of the narrow criteria reflected in the Canadian jurisprudence.

As we have seen, the answer to this last question points to another project that has informed the court decision in *Van der Peet*, namely to respond to Indigenous arguments for self-determination by de-linking the protection of

today according to standards similar to those that existed before contact. See *Sappier, supra* note 51 at para 25.

59 Murphy, supra note 38 at 377.

60 *Ibid*.

Indigenous culture from the recognition of self-determination and sovereign authority. This second project has had a greater impact on Indigenous rights in Canada than the human rights aims of cultural approaches.

I have argued that the general objection to interpreting Aborigional culture makes little sense of the Court's decision in *Van der Peet* and obscures its significance. The impact of "contact" on the assessment of cultural rights is diminished when the "real" problem with the decision is diagnosed to rest on the confounding qualities of culture as subjective, fluid, circumstantial, and ephemeral and thereby on the futility of cultural interpretation. The substantive positions of Indigenous leaders, scholars, and activists throughout the political struggles of the 1970s and 1980s are obscured when the general objection is taken as the principal explanation for what is wrong with *Van der Peet*. Indeed, their message, with its emphasis on "cultural survival" and the existence of "cultural difference" (albeit within a context of Indigenous sovereignty), may appear, from the vantage created by the general objection, to be misguided and even dangerous. As the general objection tells us, there is no single "culture" or one stable kind of cultural difference worth saving without risking essentializing, stereotyping, and coopting people.

Thus the general objection is misleading, both in its understanding of the Court's decision and its perspective on the significance of that decision. To accept this objection is to diminish the responsibility of the Court to engage in cultural assessments generously and in a manner that is informed by democratic principles. Moreover, the general objection misleads us about what might be expected in the future and how to get there. In this respect, it is worth considering that attempts by one group to change its laws and policies in order to recognize, respect, and protect the distinctive practices of another group can be both a necessary and just move. If, in Canada, jurisdiction over territory, wildlife, industry, and law is shared, the obligation to interpret the constitutional protections of Indigenous rights as mandating protection for cultural practices may be appropriately understood as a step that could improve just and fair relations between Indigenous people and the State. In other words, something like the distinctive culture test, without the pre-contact requirement, may be a beneficial and necessary feature of a legally pluralistic postcolonial regime in Canada.

That being said, there are good reasons to be concerned about recent Supreme Court decisions that have become narrow and restrictive in how they assess Aboriginal rights. However, it is possible that the narrowness of these decisions has less to do with the risks and constraints associated with

the distinctive culture test and more to do with the influence on the Court of a set of State interests that are guided by the legislative agendas of provincial and federal political leaders who respond to business and corporate interests in ensuring access to lucrative resources and lands. Many of the cases in which the distinctive culture test has been employed involve disputed claims to scarce resources — for example, trade in salmon on the west coast[61] or harvesting trees for commercial purposes in New Brunswick[62] — where competition exists between Indigenous and non-Indigenous communities for access to these natural resources. Unsurprisingly, these disputes become more intense as resources become threatened by the effects of climate change and environmental degradation, and in the case of the Northern Gateway pipeline, where generating regional and industrial wealth are likely to place communities at risk. Depleted resources and threatened wildlife in most places in Canada often have a direct and measurable impact on the cultural survival of Indigenous communities and so, unsurprisingly, Indigenous peoples repeatedly voice concerns about the survival of their communities in presentations before legislators and judges, at environmental review boards, and during protests and community meetings. At the same time, there is pressure to limit the scope of Aboriginal rights and to negotiate settlements that ensure continued access for industry to exploit resources. The clash between these political interests today, and the question as to whether governments are willing to use robust principles of democratic accountability and fair governance to find solutions, likely provide a better explanation than the Court's interpretation of Indigenous cultural practices for why several high profile Indigenous cases have been decided in the narrow and restrictive ways that they have.

61 *Supra* note 33.

62 *Sappier*, *supra* note 51.