Charting Unknown Waters: Indigenous Rights and the *Charter* at Forty

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This article reflects on the past role and the future potentialities of the Charter of Rights and Freedoms *for Indigenous rights in Canada. While the* Constitution Act, 1982 *has exercised significant influence on the evolution of Indigenous rights, there are important distinctions within the* Act. *Section 35 was largely conceived by Indigenous leaders as a means of protecting the distinct collective rights of Indigenous peoples, whereas the philosophically liberal worldview of the* Charter *was perceived more as a threat to such rights — hence the addition of the non-derogation clause in section 25. Section 35 has also been the primary tool used by the courts in defining the contours of treaty rights, Aboriginal rights, and Aboriginal title. While the section 35 case law is embedded with sources of indeterminacy and flexibility that allow the courts to obviate or limit Indigenous rights claims, the* Charter *case law concerning Indigenous peoples is less developed and even more haphazard. This indeterminacy, taken together with what Turpel-Lafond has called the culturally-bound "interpretive monopolies" in Canadian legal and constitutional analysis, underscores the potential risk the* Charter *poses to Indigenous rights as distinct collective rights.*[1] *With this in mind, this article ends by examining two recent cases involving the relationship between the* Charter *and Indigenous rights, highlighting some elements of concern.*

Cet article propose une réflexion sur le rôle passé et les potentialités futures de la Charte canadienne des droits et libertés *pour les droits autochtones au Canada. Bien que la* Loi constitutionnelle de 1982 *ait exercé une influence considérable sur l'évolution des droits des autochtones, elle comporte également des distinctions importantes. L'article 35 a été largement conçu par les dirigeants autochtones comme un moyen de protéger les droits collectifs distincts des peuples autochtones, alors que la vision philosophique libérale de la* Charte *était plutôt perçue comme une menace pour ces droits, d'où l'ajout de la clause de non-dérogation à l'article 25. L'article 35 a également été le principal outil utilisé par les tribunaux pour définir les contours des droits issus de traités, des droits ancestraux et du titre ancestral. Alors que la jurisprudence relative à l'article 35 comporte des sources d'indétermination et de flexibilité qui permettent aux tribunaux d'écarter ou de limiter les revendications de droits autochtones, la jurisprudence relative à la* Charte *concernant les peuples autochtones est moins développée et encore plus aléatoire. Cette indétermination, combinée à ce que Turpel-Lafond a appelé le monopole d'interprétation des tribunaux, souligne le risque potentiel que la* Charte *pose aux droits autochtones* en tant que droits collectifs distincts. *Dans cette optique, l'article se termine par l'examen de deux affaires récentes impliquant la* Charte *et les droits autochtones, en soulignant certains éléments préoccupants.*

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1 Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-1990) Can Hum Rts YB 3 at 3 [Turpel, "Aboriginal Peoples and the Canadian *Charter*"].

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I. The Complicated Question of How to Protect Indigenous Rights

On July 7, 1963, Clifford White and David Bob of the Snuneymuxw (Saalequun) nation were charged, under British Columbia's game laws, with hunting deer out of season. At trial, the Crown argued that the agreement the Snuneymuxw had signed with Governor James Douglas in 1854 did not create any hunting rights for the defendants and that, even if it had created or recognized rights, the agreement was *not* a treaty. The Crown arguments dealt with significant points of law for the court because, since 1951, section 87 of the *Indian Act* had stated that provincial laws of general application applied to status Indians — with the exception that they were "subject to the terms of any treaty."[2] In other words, if the nineteenth century agreement signed between Douglas and the Snuneymuxw was in fact a treaty, then section 87 should offer the terms of that treaty protection against the province's game laws. The case climbed to the British Columbia Court of Appeal (BCCA), with the majority of the appellate justices finding in favour of the two men and affirming that the agreement was a treaty.[3] The Supreme Court of Canada, for its part, promptly affirmed the decision of the BCCA without commentary the next year.

This case was a huge win for the Snuneymuxw, and perhaps for all treaty peoples, in that it was an early signal of the appellate courts' shift away from a legal positivist era in which courts so often felt comfortable dismissing treaty claims out of hand.[4] But it was a victory haunted by a certain ambivalence as well, given that the Snuneymuxw nation's right to hunt in their own territory was essentially being protected from provincial law by the *Indian Act* — the very piece of federal legislation that outlined the state's assimilationist and (arguably) genocidal goals. In addition, as simple legislation, the "saving clause" of the *Indian Act* could be removed just as easily as it had been added in 1951 — its existence was subject to the vicissitudes of the electoral cycle and political whim.

2 *Indian Act*, RSC 1952, c 149, s 87 as it appeared in 1952. The contemporary version of this clause is found in the *Indian Act*, RSC 1985, c I-5, s 88.

3 *R v White & Bob*, [1964] 50 DLR (2d) 613, 52 WWR (NS) 193 (BCCA), aff'd [1965] 52 DLR (2d) 481, 1965 Carswell BC 249 (SCC) [*White and Bob*].

4 See, for example, *Attorney-General of Ontario v Attorney-General of Canada: Re Indian Claims*, [1897] AC 199 at 213 (PC) [*Re Indian Claims*]; *R v Syliboy* (1928), [1929] 1 DLR 307 at 312, 50 CCC 389 (NS CoCt); *R v Sikyea* (1964), 43 DLR (2d) 150, 46 WWR (NS) 65 (NWT CA), aff'd [1964] SCR 642, 50 DLR (2d) 80 [*Sikyea*]. Justice Johnson, who authored the decision for *Sikyea*, remarked on the passage from *Re Indian Claims* that dismissed treaty terms as mere injusticiable promises from colonial governors: "While this refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing" (*Sikyea* at 154).

This ebb and flow of politics was of serious concern for Indigenous peoples. Several years later, in 1969, in an attempt to bring a "final solution" to Canada's so-called "Indian problem," the federal government of Pierre Trudeau introduced its *White Paper on Indian Policy*, which called for the elimination of the *Indian Act*, the disbanding and dismemberment of reserves, the termination of "special status," privileges, and rights, and the unilateral cession of treaties. Trudeau's plan backfired, in that it ignited a movement and mobilized Indigenous peoples against the *White Paper* and his Eurocentric liberalist vision of a nation purged of any recognition of Indigenous sovereignty, rights, or difference. More importantly, it mobilized Indigenous peoples in a quest to secure recognition of Indigenous rights and to protect those rights from the settler state.

For Indigenous peoples, this was the backdrop to the patriation of the Constitution in 1982. Indigenous nations and the Indigenous rights movement that had mobilized in 1969 quickly turned their attention to the Constitution in an attempt to secure recognition and protection of their treaties, their homelands, and their sovereignty — in the form of the rights and responsibilities vested in their own legal and constitutional orders. Indigenous peoples used every possible means, domestic and international, of influencing the constitutional talks and the myriad adjacent legal and political disputes in an attempt to force the settler state to recognize Indigenous rights within the Canadian Constitution.[5] As a result of these varied efforts, Aboriginal and treaty rights were entrenched in section 35 of the *Constitution Act, 1982*.

The opening of the Constitution presented a unique window of opportunity for Indigenous peoples to achieve rights recognition. Multiple rights seeking groups across the country realized this and availed themselves of the opportunity as well. But, unlike others from civil society who were seeking rights recognition within the *Charter of Rights and Freedoms*, Indigenous peoples were pursuing rights recognition outside of the *Charter* — even seeking to shield and protect their distinct, collective rights from the *Charter* and from the liberal nationalism that it embodied.[6] Needless to say, in the lead-up to the passage of the *Constitution Act, 1982*, many Indigenous leaders were wary of the idea of

5 See Louise Mandell & Leslie Hall Pinder, "Tracking Justice: The Constitutional Express to Section 35 and Beyond" in Steve Patten & Lois Harder, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015).

6 Kiera L Ladner & Michael McCrossan, "The Road Not Taken: 25 Years After the Reimagining of the Canadian Constitutional Order" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 263 [Ladner & McCrossan, "Road Not Taken"].

a *Charter of Rights and Freedoms*. Mindful of its liberal philosophical underpinnings, with a simultaneously individualizing and universalizing worldview,[7] these leaders perceived the *Charter* as incompatible with Indigenous political and legal traditions and the recognition and preservation of distinct collective rights for Indigenous peoples. The section 25 non-derogation clause was accordingly demanded and created to ensure that the *Charter* would not be used *against* Aboriginal or treaty rights. It begins by stating that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."[8]

As we pause to reflect upon the *Charter* after four decades of maturation, we note that there was reason to be leery. The case law concerning Indigenous peoples and the *Charter* is more haphazard and varied than the jurisprudence of section 35. *Charter* claims have been used as legal arguments by all manner of litigants (Indigenous and non-Indigenous) and against all manner of defendants (Indigenous governments, Crown governments, etc.). This article's contention is that while the section 35 jurisprudence is not exempt from criticisms from Indigenous rights advocates — including accusations of indeterminacy and flexibility that allow the courts (and thereby the Crown) to obviate Indigenous rights when desired — its relative degree of maturation and definition offer, to some extent, a limited element of consistency and predictability. The *Charter* case law concerning Indigenous peoples, on the other hand, is less unified, less consistent, and even less predictable. This inconsistency — rooted in the uniquely liberal philosophical underpinnings of the *Charter* and its complicated relationship to Indigenous peoples, and considered together with what Turpel-Lafond has referred to as the *interpretive monopoly* of the courts[9] — suggests a continuing potentiality of *Charter* case law as a source of danger to Indigenous rights *as collective rights*.

With this in mind, the article ends by examining two recent cases decided by the Supreme Court of Canada (SCC) involving the *Charter* and Indigenous rights. From an Indigenous rights perspective, these cases raise several elements of concern. Firstly, like section 35 jurisprudence, *Charter* jurisprudence concerning Indigenous peoples contains a generous measure of the arbitrary

7 Jeremy Patzer & Kiera L Ladner, "Forty Years On and Still Fishing for Rights" in Kate Puddister & Emmett Macfarlane, eds, *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (Vancouver: UBC Press, 2023) [Patzer & Ladner, "Forty Years On"].

8 *Canadian Charter of Rights and Freedoms*, s 25, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

9 Turpel, "Aboriginal Peoples and the Canadian Charter", *supra* note 1.

and the indeterminate, giving courts notable latitude in their interpretations. Secondly, following its "managerial" ethos in defining, protecting, and even limiting section 35 Aboriginal rights claims, the SCC has alluded to a conception of the *Charter*'s section 25 non-derogation clause as less of a shield and more of an interpretive framework implying a *balancing of rights* approach. This suggests an interest in eroding bright lines of protection in favour of promoting greyer areas of juridical governance that can offer an opening to the non-Indigenous politics of resentment of Indigenous rights.

Looking at the bigger picture, what this suggests is that the *Charter* has the potential to represent multiple modalities of threat to the distinct, collective rights of Indigenous peoples. Indigenous leaders forty years ago were cognizant and apprehensive about the *Charter* being used as a weapon *against* Indigenous rights, with equality-through-sameness discourses serving as the primary vehicle for this. Indigenous leaders of the early 1980s were not entirely incorrect in this perception — indeed, one of the recent cases that we examine represents exactly this type of challenge to Indigenous fishing.

With the limitations that this article detects in the SCC's recent ruminations on the relationship of the *Charter* to Indigenous peoples, however, it is becoming more apparent that contemporary threats to Indigenous rights may not manifest simply as equality arguments *against* the existence of those rights, but can instead find their entry into Canadian law via interpretive weaknesses embedded into the *Charter* protections *sought by* Indigenous rights holders. In short, this much-celebrated portion of Canada's Constitution evidences a profoundly equivocal potentiality, bringing Indigenous litigants to variously seek, depending upon their circumstances, the protections *of* or protections *against* the *Charter.* Recent developments allude to potential weakness along both these lines of defence.

II. Section 35 and the *Charter*

Many political leaders in the era leading up to the negotiation and passage of the *Constitution Act, 1982* might have been content to continue ignoring Indigenous demands for rights recognition and a new Crown-Indigenous relationship, had those issues not been pushed to the forefront for them. While there was no universal agreement among Indigenous peoples on the vision, the value, or the predicted consequences of section 35, its incorporation into the new *Act* was due in large part to the tireless activism and advocacy of Indigenous leaders who sought to protect the collective rights, interests, and self-determination of Indigenous peoples from the liberal philosophical ten-

dencies of a settler state reticent to recognize any collective governmental or constitutional authority other than its own.

Higher courts in Canada had also given some prodding to governments in the decade or two prior to patriation. The 1964 decision of *White and Bob* can be seen as the first volley in a series of decisions that would help to form the *modern principles of treaty interpretation*, alongside the 1981 treaty case of *R v Taylor and Williams*,[10] in which the Ontario Court of Appeal outlined several principles concerning treaty interpretation, including the need for the Crown to maintain its honour in its dealings with Indigenous peoples.

At the same time, questions and conflicts concerning the rights of Indigenous peoples *in the absence of treaties* were finally being raised in the courts after decades of political and legislative efforts on the part of federal and provincial governments to keep them from ever making it onto the docket. The major turning point came with the 1973 SCC decision in *Calder v British Columbia (Attorney General)*.[11] The Nisga'a of Northwestern BC, who had never signed a treaty surrendering their territory, had brought suit against the province seeking a declaration that they still held an unextinguished title over it. The Nisga'a lost on a technicality, but the groundbreaking significance of the *Calder* decision lay in the details: six out of seven Supreme Court justices agreed that the common law recognized an *inherent* Aboriginal title, meaning that it was sourced simply in the prior occupation of Indigenous peoples rather than in statutes, treaties, or proclamations from the Crown. This judicial recognition of inherence helped spur Pierre Trudeau's government into launching the comprehensive claims process in the 1970s in an effort to settle issues of title and tenure across unceded territories in Canada. Early literature put out by the newly formed Indian Claims Commission even cited Pierre Trudeau as stating shortly after the *Calder* case, to a delegation from the Union of British Columbia Indian Chiefs, "[p]erhaps you have more legal rights than we thought you had when we did the White Paper."[12]

And yet, if Indigenous advocates and the courts helped to spur the politics that forged section 35, this constitutional recognition and affirmation of Aboriginal and treaty rights largely returned that energy to the legal field. In effect, as we have argued elsewhere,[13] the courts have had an amplified role,

10 *R v Taylor and Williams*, (1981) 62 CCC (2d) 227 at 235, [1982] 34 OR (2d) 360 (ONCA).

11 *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, [1973] 4 WWR 1 [*Calder*].

12 Indian Claims Commission, *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings* (Ottawa: Research Resource Centre, 1975) at 25.

13 Patzer & Ladner, "Forty Years On", *supra* note 7.

post-1982, in defining rights and title and setting the parameters for the constitutional protection from which those rights benefit. By contrast, when the *Constitution Act* was passed, the content of the Indigenous rights it protected was originally meant to be resolved through political negotiations at a series of subsequent constitutional conferences, but a lack of consensus between federal, provincial, territorial, and Indigenous leaders at these conferences left those details largely up in the air. In short, then, the new *Constitution Act* recognized, affirmed, and protected Aboriginal and treaty rights, but there was no consensus on the definitions, nature, or extent of these categories of rights. The natural streaming of specific disputes and conflicts — such as Indigenous fishers and hunters being charged under provincial fish and game acts, treaty disputes, or continued claims related to unceded territory — to the courts would ultimately put appellate courts (and the Supreme Court of Canada in particular) in the position of giving shape and definition to those rights. Canadian courts have therefore developed, since the late twentieth century, bodies of case law that address: treaty rights; inherent Aboriginal title over unceded territory; inherent Aboriginal rights (to discrete practices and activities that are not sourced in treaties); and various forms of Crown obligation toward Indigenous peoples who hold these rights (such as the duty to consult, for example).

As this article suggests, a broad distinction between section 35 and the *Charter* is that, in their origins, while the former was by and large scrutinized by Indigenous leaders for its potential to *protect* Indigenous rights and self-determination, the latter was commonly scrutinized as a potential *source of danger* to the distinct, collective rights of Indigenous peoples. Another salient distinction between the *Charter* and section 35 for Indigenous peoples, however — and one less seized upon — lies in the shape, definition, and coherence of their overall effect on Indigenous rights. Over the past five to six decades — and especially in the forty years since the passage of the *Constitution Act, 1982* — the higher courts in Canada, led by the SCC, have worked diligently to weave an elaborate tapestry of legal doctrines in the hopes of offering a modern resolution to the disputes arising from colonial dispossession. However, they have done this with the loom of section 35 far more than they have with that of the *Charter of Rights and Freedoms*.[14]

To be sure, even though the section 35 case law has had a much more defined and consciously directed evolution than that of the *Charter* case law for

14 See Celeste Hutchison, "Case Comment on *R v Kapp*: An Analytical Framework for Section 25 of the Charter" (2007) 52:1 McGill LJ 173; Amy Swiffen, "Constitutional Reconciliation and the *Canadian Charter of Rights and Freedoms*" (2019) 24:1 Rev Const Stud 85.

Indigenous peoples, it maintains, at its core, elements of the arbitrary, elastic, and indeterminate that aid the courts in preserving a certain managerial flexibility over Indigenous rights.[15] Puisne Justice McLachlin's (as she then was) prescient dissent in the seminal 1996 case of *R v Van der Peet* — in which the SCC first outlined the "integral to a distinctive culture" test for defining Aboriginal rights — admits as much when she argues that:

> … one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right .[16]

In addition, as Patzer has argued,[17] many of the contemporary doctrinal shifts in Aboriginal law in Canada suggest that Canadian courts are ill at ease with doctrines and legal principles that represent categorical frameworks of legal obligation toward Indigenous peoples, evidencing a preference for more flexible and conditional doctrines.

The observation that the case law for section 35 is more developed than *Charter* Indigenous case law is pertinent for this analysis in the sense that it can help highlight reasons for apprehension regarding the *Charter* case law and its future. In effect, while much of the criticism of the section 35 case law is directed at its many weaknesses in giving shape to Indigenous rights,[18] Indigenous scholars have also rendered trenchant critiques of the lost promise of section 35.[19] In essence, embedding Indigenous rights in the Constitution has provided Canadian governments and the courts with the opportunity to recognize the continued existence of shared sovereignties with Indigenous nations and the transformation of Canadian federalism and legal traditions that this would entail. Judicial interpretation has largely steered Canada away

15 Patzer & Ladner, "Forty Years On", *supra* note 7.

16 *R v Van der Peet*, [1996] 2 SCR 507 at 639, [1996] 9 WWR 1 [*Van der Peet*].

17 Jeremy Patzer, "Indigenous Rights and the Legal Politics of Canadian Coloniality: What Is Happening to Free, Prior and Informed Consent in Canada?" (2019) 23:1/2 Intl JHR 214 [Patzer, "Indigenous Rights"].

18 See, for example, John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701; Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42:2 Osgoode Hall LJ 271; Patzer, "Indigenous Rights", *supra* note 17.

19 See, for example, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019); James (Sákéj)Youngblood Henderson, "Postcolonial Ledger Drawing: Legal Reform" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 161; Kiera Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can J Political Science 923.

from this course, however, and toward a doctrinal approach that is generally more domesticating, normalizing, and "obscurative of fundamental questions concerning Indigenous sovereignties and constitutional orders."[20] In examining recent developments for *Charter* case law involving Indigenous rights, the interpretive limitations employed by the SCC therefore present themselves as canaries in the coal mine, raising concerns that *Charter* jurisprudence will lead Canada down a similar path as the section 35 jurisprudence.[21]

III. The *Charter of Rights and Freedoms*

Whereas the hopes pinned on section 35 were of defending distinct collective rights and the self-determination of Indigenous peoples, the hopes pinned on section 25 were of shielding Indigenous rights from the *Charter* and its distinctly liberal philosophical project. This suggests the development of differing purposes. While section 35 was used for the recognition, affirmation, and, ultimately, the definition of Aboriginal and treaty rights, section 25 was meant to shield and protect those distinct collective rights from any latent, potential threats that could be embedded in the *Charter*'s philosophically liberal cosmology.[22] In this respect, section 25 is distinct from most other provisions of the *Charter* in that most other sections operatively *recognize* and *create* rights (as well as creating a rights-bearing citizenry and the means for remedying inequalities).

But why a shield and not a reiteration of rights? Given the policy goals of the 1969 *White Paper*, Indigenous peoples and their leadership were most definitely opposed to Trudeau's brand of liberalism and his commitment to *Charter* nationalism as a means of unifying a rights-bearing citizenry and destabilizing Quebec sovereigntists. This assimilationist vision and Trudeau's continued commitment to integration (which was so very evident in the Aboriginal constitutional conferences held in 1983 pursuant to section 37) was dangerous for Indigenous nations in the sense that it threatened their very existence as nations, and their existence as distinct societies with their own cultures, languages, political traditions, laws, and constitutional orders (or at least, the elements thereof that had survived colonialism and its genocidal intent).

20 Patzer & Ladner, "Forty Years On", *supra* note 7 at 349.

21 While Green deals with another, more specific, issue (gender inequity in the context of First Nation band membership and self-government), we would be remiss not to cite, as partial inspiration for the canaries metaphor, Joyce Green, "Canaries in the Mines of Citizenship: Indian Women in Canada" (2001) 34:4 Can J of Political Science 715.

22 Kiera L Ladner, "An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat" in Steve Patten & Lois Harder, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 267 at 272.

However, the need for section 25 and its shield was far greater than Trudeau's constitutional vision, or the universalizing intent of liberalism and the *Charter* itself. Indigenous peoples needed protection from the law, in the sense that their newly affirmed rights needed protection from the interpretive monopoly held by Canadian courts.

In her oft-cited 1989 article, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences," Turpel-Lafond writes of constitutional normativity[23] and of law's "insensitivities to cultural difference"[24] in both text and interpretation:

> Clearly, both textual insensitivities and the one-dimensional cultural images suggested by the texts of the constitution are informed by a more complex web of cultural and social reinforcements. It is easy to forget the extent to which the constitutional system, both institutionally and imaginatively, is a system of a particular history and cultural set of circumstances and interests. Moreover, it is too quickly overlooked that the entire process and substance of constitutional development and interpretation is the construct of a highly legalistic, adversarial, and abstract set of doctrines and theories which was developed according to the needs of the predominantly Anglo-European colonists.[25]

Berger's work on law's religion, and the relationship between law and religion in Canadian law, resonates with Turpel-Lafond's notion of interpretive monopolies and unacknowledged cultural foundations. As he puts it, his analysis:

> … yields a story about the contemporary relationship of law and religion that denies us the comfort of law's conceit of its distance and autonomy from culture … [It also] insists that the constitutional rule of law is an engaged and forceful actor within the domain of culture, which is traditionally cast as the object of law's concern in models of multiculturalism, interculturalism, or secular legalism. The argument advanced … seeks to knock law from its managerial or curatorial perch, from where it administers and assesses cultural claims, and to understand it, instead, as itself a cultural form — that is an interpretive horizon composed of sets of commitments, practices, and categories of thought, that both frames experience and is experienced as such.[26]

In essence, both authors challenge the law's pretensions to being philosophically and culturally neutral, suggesting that even the driest legal formalism or the most scientific of jurisprudence risks reading Indigenous issues through

23 Turpel, "Aboriginal Peoples and the Canadian *Charter*", supra note 1 at 5.
24 *Ibid* at 6.
25 *Ibid*.
26 Benjamin L Berger, *Law's Religion: Religious Differences and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 17.

a liberal lens which is constituted by, and which reifies, whitestream settler culture. In a legal context, this culture is an "interpretive horizon" experienced and reproduced by the courts wielding a monopoly of power, in turn creating an "interpretive monopoly" in all of its multiple dimensions and possibilities.

Moreover, there is a fundamental disjuncture between the Canadian rights tradition and the multiple rights traditions of Indigenous peoples — a tension rooted in the incommensurability of their respective intellectual, philosophical, cultural, and legal traditions — so much so that "they could never be interpreted to co-exist under the *Charter*."[27] And yet, the assumption that a *Charter of Rights and Freedoms* can offer the final word on all questions of rights and justice in a settler state such as Canada is pervasive. Denis has therefore used precisely this sort of example — of a *Charter*-based clash between competing Indigenous and non-Indigenous legal orders and traditions — to challenge the modern liberalist assumption "that society's political self-making can and will bring about fundamental human emancipation."[28]

In effect, while idealized notions often associate the law with justice, fairness, equity, and order, many contemporary thinkers have challenged this image of the law. Derrida encourages us to recognize the violence inherent in the imposition of one legal order (code/language) on the irreducible *other*, arguing that "the violence of an injustice has begun when all the members of a community do not share the same idiom throughout."[29] In this regard, Derrida concedes that "[t]o address oneself to the other in the language of the other is, it seems, the condition of all possible justice."[30] Centering on the incommensurability of the other, he immediately adds that this:

> … is not only impossible (since I cannot speak the language of the other except to the extent that I appropriate it and assimilate it according to the law of an implicit third) but even excluded by justice as law (droit), inasmuch as justice as right seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms.[31]

With concepts such as *symbolic violence* and *miscognition* — concepts that are geared toward denaturalizing our social practices — Bourdieu also argues that

27 Ladner & McCrossan, "Road Not Taken", *supra* note 6 at 270; see also Turpel, "Aboriginal Peoples and the Canadian Charter", *supra* note 1 at 33.

28 Claude Denis, *We Are Not You: First Nations and Canadian Modernity* (Peterborough: Broadview Press, 1997) at 14.

29 Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'" (1990) 11 Cardozo L Rev 920 at 951.

30 *Ibid* at 949.

31 *Ibid*.

the particular social power borne by law and the juridical field shores up a symbolic domination that encourages us to misrecognize the violence embedded within the law.[32] In this sense, both Derrida[33] and Bourdieu[34] extend their critiques of the law to the originary or foundational violence embedded within constitutive legal moments, such as the birth of a legal system or the founding of new legal orders through constitutions. Contemporary academics have brought these theoretical critiques to bear on constitutions and constitutional law in Western countries,[35] and even specifically on constitutive and constitutional forms of legal violence exercised on Indigenous peoples.[36] Ultimately, seeking to avoid the colonialist and assimilatory thrust that inevitably comes with the imposition of outside legal institutions, Turpel-Lafond argues that "Aboriginal rights should never be subject to the conceptual frameworks, philosophical paradigms, and legal traditions of the other's rights discourse."[37]

With this in mind, numerous scholars have argued against subjecting Indigenous and treaty rights to the *Charter* or using the *Charter* to advance Indigenous rights.[38] However, this did not happen; the *Charter* has been used by and against Indigenous peoples and their nations. Thankfully, acknowledging the probability of its use, some scholars had thought their way through the *Charter*, legal theory, and juridical ruminations, and were prepared to offer up a means to interpret and approach section 25, or to critique and propose a retooling of the courts' approach to section 25 and Indigenous constitutional rights in general. For instance, scholars such as McNeil and Saunders argued from the very outset that section 25 shielded Aboriginal and treaty rights from the courts such that those rights could only be modified by constitutional amendment.[39] Meanwhile, in circumstances where the application of

32 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38:5 Hastings LJ 814 [Bourdieu, "Force of Law"].

33 Jacques Derrida, "Declarations of Independence" (1986) 7:1 New Political Science 7.

34 Pierre Bourdieu, *Pascalian Meditations*, translated by Richard Nice (Stanford: Stanford University Press, 2000) at 168.

35 Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601; Judith Pryor, *Constitutions: Writing Nations, Reading Difference* (Abingdon: Birkbeck Law Press, 2007).

36 Kiera L Ladner & Michael McCrossan, "Narrative Forms of Legal Violence & Processes of Constitutional Recognition" (unpublished presentation delivered at the International Studies Association Annual Convention, 9 April 2021).

37 Ladner & McCrossan, "Road Not Taken", *supra* note 6 at 270, summarizing Turpel, "Aboriginal Peoples and the Canadian *Charter*", *supra* note 1 at 33.

38 Kiera L Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 Australian Indigenous L Rev 62; Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 142-152; Turpel, "Aboriginal Peoples and the Canadian *Charter*", *supra* note 1.

39 Ladner & McCrossan, "Road Not Taken", *supra* note 6 at 263-283; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61:1 Can Bar Rev 315; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 SCLR 255.

the *Charter* would infringe on the rights of Indigenous peoples, Pentley posited that section 25 would act as an "interpretive prism,"[40] but only to the extent that this "interpretive flexibility allows rights to be reconciled" — otherwise the *Charter* would apply.[41]

The Royal Commission on Aboriginal Peoples, on the other hand, suggested that "Aboriginal Charter(s)" be developed to provide the courts with interpretive tools that could help bridge the cultural divide[42] and provide the courts with a means of understanding Indigenous rights without obfuscating or "reconciling" these rights through a western lens. Building on this, Milward tries to reconcile the tension between sections 25, 35, and the *Charter* by suggesting that the *Charter* be subject to a "culturally sensitive interpretation" through which "*Charter* rights would be limited and modified by Aboriginal rights."[43] Most recently, Swiffen has concluded that "a plurinational *Charter*" is required, or that section 25 necessitates a plurinational understanding of the *Charter* which "allows for communication between legal cultures"[44] in a non-hierarchical manner, achieved through the development of a separate Aboriginal Charter Court.[45] In this regard, it is important to note that RCAP, Milward, and Swiffen have all moved towards creating a means of "communication between legal cultures" — not only to affording Indigenous rights a shield from the *Charter*, but also to according Indigenous people protections as individuals from the state and from their own communities within the purview of Indigenous legal traditions.[46]

While scholars vary greatly as to their approach to section 25 and its relationship to the *Charter*, one thing is certain: most of the literature views the *Charter* as having the potential to do great harm to Aboriginal and treaty rights. The potential for danger lies in the courts' interpretive monopoly, since section 25 and the *Charter* bring the courts to preside not only over the balancing of collective and individual rights, but also over the balancing of different — even incommensurable — rights traditions. In short, the potential for juridical violence in this situation is tremendous. Despite this reality, and the

40 William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*: Part One: The Interpretive Prism of Section 25" (1988) 22:1 UBC L Rev 21 at 57.

41 Swiffen, *supra* note 14 at 90.

42 René Dussault & Georges Erasmus, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 266-267.

43 Swiffen, *supra* note 14 at 96; see also David Milward, *Aboriginal Justice at the Charter: Realizing a Culturally Sensitive Interpretations of Legal Rights* (Vancouver: UBC Press, 2012) at 62-71.

44 Swiffen, *supra* note 14 at 116.

45 *Ibid* at 118-121.

46 *Ibid.*

continued warnings of numerous Indigenous scholars, Indigenous peoples are increasingly picking up the *Charter*. As we have suggested, the potential threats posed by the *Charter* to Indigenous collective rights manifest via multiple modalities. In the last 40 years, Indigenous peoples have invoked the *Charter* in litigation against both the state and Indigenous communities — sometimes to claim collective Indigenous rights, and other times to invoke universalized individual rights.[47] Non-Indigenous claimants, for their part, have also invoked the *Charter* in an attempt to challenge the distinct, collective rights of Indigenous peoples.[48]

In contrast with the evolution of section 35, the case law concerning the *Charter* and Indigenous peoples lacks development and definition. While the section 35 jurisprudence has its own measure of the arbitrary and indeterminate — and is not immune from the criticisms of Indigenous rights advocates — the *Charter* jurisprudence gives marked evidence of persistently *indeterminate potentialities*. Although nothing is certain, lines are still drawn and many continue to hash out their arguments both in the courts and in the academy. Some contend that the *Charter* should be applied liberally so as to provide Indigenous peoples with access to the same rights as settler Canadians[49] and the ability to bring governments into line, while others contend that section 25 should shield Indigenous rights from the *Charter* given that the *Charter* continues to be weaponized against Indigenous people and their rights. [50] In short, while non-Indigenous commentators might construe the section 35 case law as a remarkable "winning streak" for Indigenous peoples[51] — but again, this must be tempered with Indigenous critiques of the case law's shortcomings — no such claim can be made about the *Charter* case law. It is with this wariness that we signal worrisome elements in two recent *Charter* judgments concerning Indigenous peoples issued by the SCC.

47 See, for example, *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1. Non-resident members of the Batchewana Indian Band used the *Charter*'s equality provision to argue for the right to vote in band elections. *Cf Lovelace v Ontario*, 2000 SCC 37, where Indigenous groups not registered under the *Indian Act* unsuccessfully sought inclusion in a "First Nations Fund" distribution of gaming proceeds to bands registered under the *Indian Act*.

48 See, for example, *Campbell et al v AG BC/AG & Nisga'a Nation et al*, 2000 BCSC 1123, 189 DLR (4th) 333. Former BC Premier Gordon Campbell (then leader of the opposition) sued on the basis that the Nisga'a Treaty violated the section 3 electoral *Charter* rights of non-Nisga'a citizens.

49 Thomas Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor YB Access Just 431.

50 D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice" (2009) 40:2 Ottawa L Rev 225.

51 Bill Gallagher, *Resource Rulers: Fortune and Folly on Canada's Road to Resources* (Waterloo: Bill Gallagher, 2012).

IV. Charting Troubled Waters Ahead: *Ktunaxa* and *Kapp*

There is, perhaps to a certain extent, a seeming paradox in our characterization of the section 35 case law. When comparing it with the *Charter* case law concerning Indigenous peoples, we describe the section 35 jurisprudence as more developed, defined, and mature on the one hand — such that legal counsel, for example, might benefit from a more assured predictability on how the courts would likely frame a given Indigenous rights conflict — but as embedded with elements of the arbitrary and indeterminate on the other hand. This seeming contradiction disappears, however, when one considers the fact that embedding mechanisms and sources of elasticity into the jurisprudence is part and parcel of juridical work. As Bourdieu has argued:

> [J]urists and judges have at their disposal the power to exploit the polysemy or the ambiguity of legal formulas by appealing to such rhetorical devices as *restrictio* (narrowing), a procedure necessary to avoid applying a law which, literally understood, ought to be applied; *extensio* (broadening), a procedure which allows application of a law which, taken literally, ought not to be applied; and a whole series of techniques like analogy and the distinction of letter and spirit, which tend to maximize the law's elasticity, and even its contradictions, ambiguities, and lacunae.[52]

In short, *Charter* principles are not the most common path of argumentation followed when it comes to the rights of Indigenous peoples and the law. Indeed, we have seen that the *Charter* can be just as easily used as a vehicle of argumentation *against* the rights, practices, or policies of Indigenous peoples or governments. On this front, this article's key contention is that the persistent and indeterminate potentiality of the *Charter* for Indigenous peoples, when combined with what Turpel-Lafond calls the *interpretive monopoly* of the courts, amplifies the risk inherent in that indeterminacy for the collective rights of Indigenous peoples. Insofar as techniques of legal reasoning are concerned, however, the wheel is not reinvented with each new case.

With this wariness in mind, the remainder of this section will focus on two recent *Charter* cases concerning Indigenous peoples — *Ktunaxa Nation v BC (Forests, Lands and Natural Resource Operations)*, and *R v Kapp* — both of which display elements of limitation and management seen in the Supreme Court's section 35 jurisprudence. To begin with, the very premise of the Indigenous legal arguments in *Ktunaxa Nation v BC* announces itself with a sort of optimism, in that the Indigenous claimants representing the Ktunaxa Nation saw in the *Charter of Rights and Freedoms* a possible basis for defending Indigenous

52 Bourdieu, "Force of Law", *supra* note 32 at 827.

rights, unceded Ktunaxa territory, and Ktunaxa spiritual and legal orders.[53] The context is that Glacier Resorts Ltd sought government approval to build a year-round ski resort in an area of unceded Ktunaxa territory called Qat'muk. Qat'muk is a place of great spiritual significance to the Ktunaxa because it is home to Grizzly Bear Spirit. In seeking to fulfil the Crown's duty to consult, the Minister of Forests, Lands and Natural Resource Operations engaged in consultation with the Ktunaxa. At a certain point, Ktunaxa representatives expressed that no form of accommodation arising from the duty to consult would make the project acceptable for them, since developing Qat'muk would drive Grizzly Bear Spirit out of the area permanently.

Ultimately, faced with a core irreconcilability between the two sides, the Minister declared the Crown's constitutional duty to consult fulfilled and approved the project. In effect, this was in-sync with the Court's 2004 decision in *Haida Nation v BC (Minister of Forests)*[54] — in which the SCC gives its first full outline of the duty to consult — which states that "the commitment is to a meaningful process of consultation" and perhaps accommodation, but "there is no duty to agree."[55] Patzer has thus argued that the duty to consult, when brought to such a conclusion, is essentially coterminous with the doctrine of justified infringement, in that it can provide for the override of constitutionally protected Aboriginal rights and title.[56] That said, from the perspective of the Ktunaxa, who were faced with a forced incursion on their unceded territory that would bring about permanent consequences, this could be considered closer to extinguishment than infringement — a permanent erasure of Indigenous rights that the SCC had declared impossible after the passage of the *Constitution Act, 1982*.[57]

In opposition to the plans, the Ktunaxa asserted both a section 35 right "to exercise spiritual practices which rely on a sacred site and require its protection"[58] and a *Charter* right, in that the project would violate their constitutional right to freedom of religion under section 2(a). It is interesting to note how much the majority opinion of the SCC seems to perseverate on the timing of the Ktunaxa claim about the irreconcilability of the proposed development to their spiritual concerns. Throughout the majority reasons for judgment, the claim of the Ktunaxa is given the attention and significance of a proper noun, namely the

53 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*].

54 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

55 *Ibid* at para 42.

56 Patzer, "Indigenous Rights", *supra* note 17 at 223.

57 *Van der Peet*, *supra* note 16 at 538.

58 *Ktunaxa Nation*, *supra* note 53 at para 90.

"Late-2009 Claim." The subtext concerning the "Late-2009 Claim" is that it came suspiciously late in the process of consultation, with the attention given to it subtly accentuating the categorical, irresolvable, or even "unreasonable" nature of the demands made by the Ktunaxa,[59] as well as suggesting skepticism regarding the authenticity of the Ktunaxa's claim about the inevitable spiritual ramifications of such a project. Relatedly, two decades before the *Ktunaxa* case, and after having served as an expert witness in a number of cases in which Indigenous peoples in both Canada and the United States were seeking to protect sacred sites, Bruce Miller noted several challenges commonly faced by Indigenous claimants, one of which was the common reception of Indigenous discourses of the sacred as being of dubious credibility and authenticity, or even "as part of a 'faked culture.'"[60] Given this context, it is perhaps not surprising that the SCC found that the minister's conclusion, that the government had fulfilled its duty to consult and accommodate, was reasonable. As such, there was no recourse for the Ktunaxa through the framework of section 35 Aboriginal rights.

As for the aspect of the Ktunaxa's claims that invoked their *Charter* right to freedom of religion, the majority's engagement with this claim is particularly illustrative of the juridical capacity for elasticity and indeterminacy. Looking to the case law involving section 2(a) of the *Charter*, the decision states that a claimant "must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief."[61] With hair-splitting particularity, the majority opinion holds that "the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship."[62] Or, more pointedly, "the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s[ection] 2(a)."[63] In this respect, the majority opinion deployed the technique that Bourdieu terms *restrictio* — the narrowing of applicability of legal principles — demonstrating the elasticity embedded within legal reasoning that ultimately allows the majority to parse out the Ktunaxa *Charter* claim and neutralize its merit with almost absurd casuistry.

59 "The Minister made efforts to continue consultation, but, not surprisingly, they failed." *Ibid* at para 43.

60 Bruce Miller, "Culture as Cultural Defense: An American Indian Sacred Site in Court" (1998) 22:1/2 American Indian Q 83 at 89.

61 *Ktunaxa Nation*, *supra* note 53 at para 68.

62 *Ibid* at para 71.

63 *Ibid*.

By contrast, the minority opinion of Moldaver and Côté accepted the Ktunaxa's arguments concerning section 2 of the *Charter*, and critics have since bolstered this stance. Williams[64] and Robinson[65] both point out that the United Nations Declaration on the Rights of Indigenous Peoples — endorsed by Canada in 2016 — has provisions that recognize the cultural importance of Indigenous peoples' land and place, their spiritual relationship to their lands, and their spiritual and religious traditions in general. Williams additionally argues that international jurisprudence has moved steadily toward valorizing Indigenous rights in relation to spiritually significant lands. John Gailus and Christopher Devlin, who represented two First Nations and who intervened in the SCC appeal, have called the majority's ruling that the Ktunaxa's freedom of religion was not engaged a "worrisome development."[66] They pointed out that "[t]here is no dispute that the destruction of a church, synagogue or mosque would constitute an unjustified infringement of the freedom of religion. The desecration of a sacred mountain should attract similar considerations."[67] In effect, by interpretively narrowing the application of a key *Charter* protection for Indigenous peoples, the SCC's majority opinion in *Ktunaxa Nation* serves as an instantiation of Berger's claim that we should be disabused of the notion that Canada's liberal legal order stands outside of and autonomous from dominant societal cultural and religious forces.[68]

In addition to the flexibility supplied by a court's ability to eliminate or broaden its principles of legal reasoning on command, courts also possess the ability to deduce new forms of legal reasoning out of nearly thin air in exigent circumstances. Given the reluctance of the courts to be seen assuming "prophetic poses and postures"[69] — and the difficulty they have owning up to the "creative dimension" within their work[70] — the spontaneous deduction of new legal principles is most often within the domain of the higher courts, especially the Supreme Court of Canada. On this front, the fact that the Court's most

64 Kent Williams, "How the *Charter* Can Protect Indigenous Spirituality; or, the Supreme Court's Missed Opportunity in *Ktunaxa Nation*" (2019) 77:1 UT Fac L Rev 1.

65 Andrew M Robinson, "Governments Must Not Wait on Courts to Implement UNDRIP Rights Concerning Indigenous Sacred Sites: Lessons from Canada and *Ktunaxa Nation v British Columbia*" (2020) 24:10 Intl JHR 1642.

66 John Gailus & Christopher Devlin, "Case Brief: *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54", online: *DGW Barristers and Solicitors* <www.dgwlaw.ca/case-brief-ktunaxa-nation-v-british-columbia-forests-lands-and-natural-resource-operations-2017-scc-54/> [perma.cc/246X-85E7].

67 *Ibid*.

68 Berger, *supra* note 26.

69 Bourdieu, "Force of Law", *supra* note 32 at 823.

70 Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L Rev 5 at 6.

likely watchword would be *sui generis* is indicative of the fact that Aboriginal law in Canada is replete with creative forms of legal reasoning. One of the most salient of these areas of creative legal reasoning in recent years concerns forms of section 35 Indigenous rights that provoke a particularly acute politics of resentment from non-Indigenous society and industries.

In effect, the flurry of criticism surrounding Aboriginal rights jurisprudence after the release of the *Van der Peet* trilogy of cases centred on the SCC's creation of a formula defining Aboriginal rights that was seen to be indeterminate,[71] arbitrary,[72] void of a proper basis in any common law principle,[73] and outmoded in its restriction of Indigenous peoples' rights to precontact cultural practices.[74] What is particular about those first three test cases that provoked the SCC to devise the restrictive cultural rights formula, however, is the fact that all three represented Indigenous claims to an Aboriginal right that was *commercial in nature*. Despite centuries of European colonial powers encouraging Indigenous peoples to engage in trade, the late modern culturalist and romanticized approach to Indigenous peoples prefers to define "authentic" Indigeneity in opposition to characteristics associated with the "modern" or "Western." Niezen therefore argues that the Supreme Court's Aboriginal rights jurisprudence is calibrated to recognize and affirm "simple subsistence economies, comparatively simple technologies, rudimentary social organization, in other words, those qualities that make them 'distinct' from the dominant society."[75]

Claims to commercial Indigenous rights not only challenge romanticized, Eurocentric notions of authentic Indigenous culture, however — they also touch upon raw political and economic issues of instrumental self-interest. Of the three cases in that first trilogy, the SCC held that the historical cultural practices of the claimants in *R v Van der Peet*[76] and *R v NTC Smokehouse*[77] did not merit the recognition of an Aboriginal right that was commercial in nature. The Heiltsuk claimants in *R v Gladstone*,[78] however, perhaps surprised the Court with an established precontact history of widespread trade in goods

71 Turpel, "Aboriginal Peoples and the Canadian Charter", *supra* note 1.

72 Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*" (2000) 5:2 Rev Const Stud 119.

73 Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79:2 Can Bar Rev 196 at 217.

74 John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22:1 Am Indian L Rev 37.

75 Ronald Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18:2 CJLS 1 at 7.

76 *Van der Peet*, *supra* note 16.

77 *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672, 137 DLR (4th) 528 [*NTC Smokehouse*].

78 *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*].

from their fishery, such as herring spawn on kelp. In response to the *NTC Smokehouse* and *Gladstone* claims to large scale commercial rights, the decisions authored by Chief Justice Lamer admit outright that such claims invite a more onerous burden of proof.[79] For *Gladstone*, the SCC also elected to define the right on a species-specific basis, in contradiction to the broader approaches that other Aboriginal rights cases endorsed.[80] Most notably, however, in dealing with an Indigenous claim to a commercial right in a region with non-Indigenous fishing interests (established and fostered for generations on unceded Heiltsuk territory), the SCC decision in *Gladstone* immediately sets about developing a basis for recalibrating the "priority allocation" principle that had been recognized for Aboriginal rights in relation to non-Indigenous interests in the same resource:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.[81]

Lamer's rationale for this approach is that, while non-commercial Aboriginal rights have a natural, internal limit in that they are for subsistence purposes and are therefore readily satiated, there is no similar internal limit to a commercial enterprise. In this regard, the politics of "economic and regional fairness" becomes all the more telling when paired with its alternative description as "the reconciliation of aboriginal societies *with* the rest of Canadian society."

The jurisprudential basis for the non-Indigenous politics of resentment expanded shortly thereafter when the Mi'kmaq on the east coast made a successful treaty rights case for a commercial fishery in the case of *R v Marshall*.[82] In the case of the Mi'kmaq, however, the hostility of the non-Indigenous fishery and the surrounding non-Indigenous communities was tangible, physical, and dangerous. In awarding the Mi'kmaq the recognition of their treaty right to engage in commercial fishing, the SCC pulled an obscure phrasing from a dissenting opinion in the *Van der Peet* case when it had been heard and decided by

79 *NTC Smokehouse*, *supra* note 77 at 687.
80 *Gladstone*, *supra* note 78 at 747.
81 Gladstone, *supra* note 78 at 775 [emphasis in original].
82 *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513.

the British Columbia Court of Appeal: the Mi'kmaq would have recognition of a treaty right to engage in commercial fishing only to seek out a "moderate livelihood," which the Court described as including "such basics as 'food, clothing and housing, supplemented by a few amenities' … but not the accumulation of wealth … It addresses day-to-day needs."[83]

This section 35 context serves as an ominous backdrop for a reading of suggestive and laden *obiter dicta* in the SCC's 2008 decision in the *Charter* case of *R v Kapp*.[84] There were dozens of appellants alongside John Michael Kapp, primarily non-Indigenous fishers, who had engaged in a protest fishery in the mouth of the Fraser River during one period of 24 hours that had been set aside for three First Nation bands. They sought to protest the very fact that the Aboriginal Fisheries Strategy developed by the federal government was allowing for a day of commercial fishing exclusive to the several local bands, in order to enhance Indigenous involvement in the commercial fishery. The defence employed by Kapp and his colleagues was that the special licence granted to the three bands amounted to race-based discrimination and was a breach of the appellants' equality rights under section 15(1) of the *Charter of Rights and Freedoms*. The original trial judge agreed and stayed the charges, but subsequent appeals found against Kapp and the other protest fishers.

The majority opinion from the SCC decided against Kapp and the others on the basis of section 15(2) of the *Charter*, which makes an exception to section 15(1) to allow for laws, programs, or activities that have as their goal "the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[85] In essence, the SCC recognized that this aspect of the Aboriginal Fisheries Strategy was precisely such an ameliorative program, and thus was protected by section 15(2). Concurring in the result, but with separate reasons, Justice Bastarache deployed section 25 of the *Charter* from the outset, finding that the *Charter* cannot "be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."[86] For this reason, Bastarache found it unnecessary to engage section 15(2) of the *Charter*.

The *Kapp* case touches upon a complex and inchoate area of Aboriginal *Charter* law in Canada, and Amy Swiffen outlines the complexity, the compet-

83 *Ibid* at para 59.
84 *R v Kapp*, 2008 SCC 41 [*Kapp*].
85 *Charter*, *supra* note 8, s 15(2).
86 *Ibid*, s 25.

ing analyses, the stakes, and the unanswered questions that define this area effectively.[87] Needless to say, given the lesser degree of definition in the *Charter* case law when compared to the section 35 case law, there remain many unanswered questions concerning the application of section 25 in a variety of different contexts. To map out this uncertain terrain, Swiffen characterizes the scholarly debate on the quality of protection offered to Indigenous rights by section 25 as spanning from the idea of section 25 as a robust *shield* (a characterization used by Bastarache in *Kapp*) to the idea of section 25 as a much less robust *interpretive prism*. This latter notion conceptualizes the relationship between Aboriginal rights and the *Charter* as "a hierarchy that prioritises *Charter* rights over Aboriginal rights in the sense that the latter can be justifiably infringed by the former, but not the other way around."[88]

Much like the section 35 case law concerning hotly contested Aboriginal and treaty rights that are commercial in nature, the equivocality and vacillation around the interpretation of section 25 now seems positioned to be taken up as a new modality of threat to Indigenous rights — in essence, providing a point of entry for the non-Indigenous politics of resentment toward Indigenous rights. A brief passage of *obiter dicta* in *Kapp* that carries inordinate significance in this respect is the SCC majority's engagement with Justice Bastarache's characterization of section 25 as a shield for Aboriginal and treaty rights. After expressing skepticism that the special licence granted through the Aboriginal Fisheries Strategy would qualify as an Aboriginal right within the ambit of section 25, the entirety of the Court, other than Bastarache, then took the time to call into question the latter's characterization of section 25 as a shield. Namely, they question "whether, even if the fishing licence does fall under s[ection] 25, the result would constitute an absolute bar to the appellants' s[ection] 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights."[89]

Bearing in mind the juridical management and curtailment of Indigenous rights claims embedded within the section 35 case law, however, the most telling and inauspicious aspect of the majority's *dicta* on section 25 occurs when they allude to the underlying basis and rationale for challenging their colleague. Conjuring those thinly veiled politics of resentment toward Indigenous rights, and charged with the loaded language of "entitlements," the majority argues that "[t]hese issues raise complex questions of the utmost importance

87 Swiffen, *supra* note 14.
88 Swiffen, *supra* note 14 at 91.
89 *Kapp*, *supra* note 84 at para 64.

to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians."[90] The Supreme Court of Canada's decision in *Kapp* — despite its defence of the Aboriginal Fisheries Strategy — therefore inspires little confidence in the future of section 25 protections of Indigenous rights when contending with the *Charter of Rights and Freedoms*.

V. Conclusion

The essence of Turpel-Lafond's concept of interpretive monopoly speaks to both the generation and interpretation of law in Canada, and the fact that Canadian courts benefit from both creativity *and* control when it comes to *Charter* doctrines affecting Indigenous peoples.[91] This article's contention is that the indeterminate potentialities of the *Charter* — in other words, its ability to be harnessed both *for* and *against* Indigenous rights as collective rights, by both Indigenous and non-Indigenous actors, and by both individuals and collectivities — pose challenges to Indigenous peoples through multiple modalities. These indeterminate potentialities combine with the interpretive monopoly of the Canadian courts to present an ongoing, unpredictable danger to the collective rights of Indigenous peoples.

In effect, recent case law involving Indigenous peoples seeking both the *protections of* and *protections against* the *Charter* give credence to this circumspection. The *Ktunaxa* case demonstrates *par excellence* the courts' capacity to capitalize on arbitrary and indeterminate distinctions when faced with irreconcilable Indigenous claims against unwanted development on their territory, obviating the utility of a category of religious *Charter* protection pertinent to land- and place-based peoples. The Supreme Court's decision in *Kapp*, on the other hand, suggests that mechanisms such as section 25 may not always provide the durable protection from philosophically liberal deployments of the *Charter against Indigenous rights* that Indigenous leaders had sought to secure when they lobbied, demonstrated, fought for, and negotiated sections 25, 35, and 37 of the *Constitution Act, 1982*. Consequently, there is a risk that the SCC has opened a jurisprudential door to the non-Indigenous politics of resentment — similar to what has occurred in the section 35 case law — when considering collective Indigenous rights through a *Charter* lens. If, after forty years, the *Charter of Rights and Freedoms* still represents unknown waters for Indigenous rights in Canada, these indicators signal, at the very least, their turbulent potential.

90 *Ibid* at para 65.

91 Turpel, "Aboriginal Peoples and the Canadian *Charter*", *supra* note 1 at 45.