

# THE TRICKSTER: INTEGRAL TO A DISTINCTIVE CULTURE

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The trickster is alive and well. The Supreme Court of Canada illustrated this in the cases of *R. v. Van der Peet*,<sup>1</sup> *R. v. Gladstone*,<sup>2</sup> *R. v. N.T.C. Smokehouse Ltd.*<sup>3</sup> and *R. v. Pamajewon*.<sup>4</sup> First Nations have an intellectual tradition that teaches people about ideas, principles and behaviours that are partial and incomplete. These traditions are taught through a character known as the trickster. S/he has various persona in different cultures. The Anishinabe (Ojibway) of Central Canada call the trickster Nanaboozhoo; the First Nations people of Coastal British Columbia know him as Raven; s/he is known as Glooscap by the MicMac of the Maritimes; and as Coyote, Crow, Wakajesig, Badger, or Old Man among other First Nations people in Canada. The trickster offers insights through encounters which are

simultaneously altruistic and self-interested. In her adventures the trickster roams from place to place and fulfils her goals by using ostensibly contradictory behaviours such as charm and cunning, honesty and deception, kindness and mean tricks. Lessons are learned as the trickster engages in actions which in some particulars are representative of the listener's behaviour, and on other points uncharacteristic of their comportment. The trickster encourages an awakening of understanding because listeners are compelled to interpret and reconcile the notion that their ideas may be partial. As such, the trickster assists people in conceiving of the limited viewpoint they possess. The trickster is able to kindle these understandings because her actions take place in a perplexing realm that partially escapes the structures of society and the order of cultural things.<sup>5</sup> The trickster's interaction with the Supreme Court of Canada demonstrates these insights.

## SEEGWUN

Seegwun — spring. Nanaboozhoo is walking up a stream. Around his ankles the water breaks free and flows to the Nottawasaga River. Imprisoned as ice for too long it hurries its escape towards Georgian Bay and Lake Huron. He notices the water's rush is met by travellers going the opposite direction. Fish run into and through the water's swollen charge. In the midst of the collision there are periods of rest. In a shallow pool Nanaboozhoo spots a solitary rainbow trout. He breaks the walls of a downstream beaver dam. He waits.

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<sup>1</sup> S.C.C. No. 23803, [1996] S.C.J. No. 77. In *Van der Peet* the accused was charged under s. 61(1) of the Fisheries Act with selling salmon caught under the authority of an Indian food fishing license, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, which prohibited the sale or barter of fish caught under such a licence.

<sup>2</sup> S.C.C. No. 23801, [1996] S.C.J. No. 79. In *Gladstone* the accused was charged under s. 61(1) of the Fisheries Act with attempting to sell herring spawn on kelp caught under the authority of an Indian food fish license, contrary to the same regulations used to charge *Van der Peet*, and of attempting to sell herring spawn on kelp caught without a license, contrary to s. 20(3) of the Pacific Herring Fishery Regulations.

<sup>3</sup> S.C.C. No. 23800, [1996] S.C.J. No. 78. In *Smokehouse* the accused was an incorporated company which owns and operates a food processing plant. They were charged under s. 61(1) of the Fisheries Act with selling and purchasing fish not caught under the authority of a commercial fishing license, contrary to s. 4(5) of the British Columbia (General) Regulations, and of selling and purchasing fish contrary to s. 27(5) of these same regulations.

<sup>4</sup> S.C.C. No. 24596, [1996] S.C.J. No. 20. In *Pamajewon* the accused were charged under sections 201(1) and 206(1) of the Criminal Code with the offence of keeping a common gaming house and conducting a scheme for the purposes of determining the winners of property.

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<sup>5</sup> See B. Babcock Adams, "A Tolerated Margin of Mess: The Trickster and His Tales Reconsidered" (1975) 11 *Journal of Folklore Institute* 147; A. Wiget, *Critical Essays on Native American Literature* (Boston: G.K. Hill & Co., 1985) at 21; J. Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 1 *U.B.C. Law Review* 6-10; G. Vizener, *The Trickster of Liberty: Tribal Heirs to a Wild Baronage* (Minneapolis: University of Minnesota, 1988).

Within a few minutes the water in the pool goes down. Trapped, the fish has nowhere to go. Another prisoner caught on life's precarious road. He walks towards it, slowly puts his fingers under its belly, and feels the weight of life within. Nanaboozhoo lifts the fish into the next pool and watches it swim away.

## NEEBIN

Neebin — summer. Chief Justice Antonio Lamer is asked to consider the meaning of Aboriginal rights in the context of criminal charges laid against Aboriginal people for exchanging fish for money. He steps into court. He notices that Aboriginal rights are “held by aboriginal people because they are aboriginal.”<sup>6</sup> With this as his starting point, in order to define Aboriginal rights he is going to have to tell us what Aboriginal means. How is he going to do this? Maybe he knows what it means to be Aboriginal. He writes:<sup>7</sup>

The Court must define the scope of section 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

He will define Aboriginal by “capturing” the Aboriginal and the right? How is he going to do this? What will he do once he captures it? He searches for a purpose that might help him. In the jurisprudential stream behind him, he sees a purposive rationale and a foundation to explain “the special status that aboriginal peoples have within Canadian society.”<sup>8</sup> He pulls the sticks of this structure, a deluge ensues. Aboriginal rights in section 35(1) exist “because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”<sup>9</sup>

The Chief Justice is nearly washed away by this flood. When he pulled the sticks, he was standing on the wrong side of the weir and could have been knocked over. If Aboriginal peoples have prior rights to land and participatory governance, how did the Crown and Court gain their right to adjudicate here? He has to stem the flow. He has to regain his footing. He plants a flag: “Aboriginal rights recognized and affirmed by section 35(1) must be directed towards their reconciliation with the sovereignty of the Crown.”<sup>10</sup> He now has a purpose

with which to capture both the Aboriginal and the right — “the reconciliation of pre-existing claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory.”<sup>11</sup> The assertion of British sovereignty provides familiar ground from which to define Aboriginal.<sup>12</sup>

Now comes the clairvoyant moment when he will tell us what Aboriginal means. He reaches his fingers into the cold stream of past decisions, but there is only one judgment he relies on to define Aboriginal. At his feet, in a shallow pool of reasoning, the Chief Justice finds the *Sparrow* Court’s acknowledgement that the Aboriginal right to fish for food was considered to “have always constituted an integral part of their distinctive culture.”<sup>13</sup> From this solitary line, where the Aboriginal right to fish for food was never in doubt, the Chief Justice tells us what Aboriginal means, and by extension what Aboriginal rights are. Aboriginals, at least those who have Aboriginal rights, are those whose activities are “integral to the distinctive culture of the aboriginal group claiming the right.”<sup>14</sup> But what is integral to being Aboriginal, and claiming rights? He takes another step, and sets out to explain what is integral to Aboriginal people.<sup>15</sup>

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

Integral thus means central, significant, distinctive, defining; “a practical way of thinking about this problem is to ask whether, without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it *was*” [emphasis mine].<sup>16</sup>

As promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospec-

<sup>6</sup> *Van der Peet*, *supra* note 1 at para 19, per Lamer C.J.

<sup>7</sup> *Ibid.* at para. 20.

<sup>8</sup> *Ibid.* at para. 27.

<sup>9</sup> *Ibid.* at para. 30.

<sup>10</sup> *Ibid.* at para. 31.

<sup>11</sup> *Ibid.* at para. 36.

<sup>12</sup> See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 572-574 and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) 542-43 & 559 in *ibid.* paras. 35-37. See also *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 at 404: “there was from the outset, never any doubt, that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown.”

<sup>13</sup> *Sparrow*, *ibid.* at 398.

<sup>14</sup> *Van der Peet*, *supra* note 1 at para. 46, per Lamer C.J.

<sup>15</sup> *Ibid.* at para. 44.

<sup>16</sup> *Ibid.* at paras. 55-59.

tive. It 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. His test invites stories about the past.<sup>17</sup>

These stories will be about whether a protected Aboriginal right has its "origins pre-contact,"<sup>18</sup> "prior to the arrival of Europeans."<sup>19</sup> This is because:<sup>20</sup>

it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by section 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

Aboriginal means a long time ago; pre-contact. Aboriginal rights protect only those customs which have continuity with practices existing before the arrival of Europeans. Aboriginal rights do not sustain central and significant Aboriginal practices which developed solely as a result of their contact with European cultures.<sup>21</sup> The jurisprudential dam is now back in place. What will become a stagnant pool is again filling in behind it. With this judgment Chief Justice Lamer lifts the Aboriginal right and gently places it back in this pool, behind some of its centuries long, common law encumbrances. As he set out to do, he has captured both the Aboriginal and the right.

## TAHWAHGI

Tahwahgi — Fall. The Couchiching Narrows, Orillia, Ontario. Nanaboozhoo has recently presided over the opening of the casino on the Chippewas of the Rama reservation. Confined for over a century, Anishinabe self-government has escaped federalism's cells and now spills into the surrounding communities. Over one-hundred thousand people travel to Rama and drop quarters in the Casino's well. The Woodland art of its outer walls encloses the interaction of mean tricks

and kindness, help and neglect, charm and cunning. The rush to get into self-government's outward flow has its periods of rest too. Nanaboozhoo takes the three minute walk to the Lake. On the water the boat's sails hang loosely. For 4000 years an Aboriginal weir raked these Narrows to trap fish behind its wooden bars. Now behind the Lake's shores the fingers of a new presence reach out. Nanaboozhoo looks back towards it; thinks about how he placed it perfectly. Buses disgorge their contents. Cars and trains arrive every few minutes; the people of the reserve are also swept into this flow — its grasp is extensive.

North of Rama, Chief Justice Antonio Lamer presides over the fate of two casinos on the Shawanaga and Eagle Lake reservations. It is the *Pamajewon* case. The communities have risked asking the Court to rule that Aboriginal rights to self-government include high-stakes gambling. The outward rush into these communities is just beginning to build. The land is cleared for a new gaming hall and hotel, and signs on the highway announce the arrival of monster bingo. The Chief Justice takes a thirty-two paragraph stroll around the place. With *Van der Peet* as a companion — a "legal standard against which the appellants' claim must be measured"<sup>22</sup> — he will tell us the character of Aboriginal rights. Once again he gets to decide character traits. He will define not just the character of an Aboriginal, he will define the character of an entire Aboriginal community. How is he going to do this? Can he identify the character of another culture? He consults his companion. *Van der Peet* has some words of advice: change the characterization of what the Aboriginal people are claiming. The Chief Justice agrees; that should make it easier. He confides:<sup>23</sup>

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish that right.

The Chief Justice has provided three factors to consider in developing the correct characterization of a claim, but there is no mention of standards by which these factors should be judged. What principles will guide judgments about the characterization of these factors? Should Aboriginal claims be characterized in a "large,

<sup>17</sup> This test has the potential to reinforce stereotypes about Indians. In order to claim an Aboriginal right, these determinations of Aboriginal will become more important than what it means to be Aboriginal today. The notion of what was integral to Aboriginal societies is steeped in questionable North American cultural images. See D. Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992).

<sup>18</sup> *Van der Peet*, *supra* note 1 at para. 62, per Lamer C.J.

<sup>19</sup> *Ibid.* at para. 61.

<sup>20</sup> *Ibid.* at para. 60.

<sup>21</sup> *Ibid.* at para. 73.

<sup>22</sup> *Pamajewon*, *supra* note 4 at para. 23, per Lamer C.J.

<sup>23</sup> *Ibid.* at para. 26.

liberal and generous manner,”<sup>24</sup> with sensitivity to the “aboriginal perspective on the meaning of the rights at stake.”<sup>25</sup> Nope. No mention of that here. With that out of the way, the Chief Justice can provide his own characterization of what is being claimed.

He walks on. The people want him to see how the band participates in deciding who lives where on the reserve, and under what conditions. He is invited to tour the band council office, read their governing by-laws, see how the people depend on them. He declines. He stays out near the road. The Chief Justice turns his attention to the empty casino land, sees the monster being advertised. In the next breath he states: “when these factors are considered in this case it can be seen that the correct characterization of the appellants’ claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activity.”<sup>26</sup> His short promenade side-steps claims about Aboriginal rights to self-government.<sup>27</sup>

The appellants themselves would have this Court characterize their claim as a broad right to manage the use of their respective reserve lands. To so characterize the appellants’ claim would be to cast the Court’s inquiry at a level of excessive generality.

This is a comfortable pace. One needs to get a little exercise, but no use over-extending yourself. “The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants’ claim at the appropriate level of specificity; the characterization put forward by the appellants’ would not allow the Court to do so.”<sup>28</sup> It is too high a level of generality to think that Aboriginal people would actually have a broad right to manage the use of their own lands.

The Chief Justice is almost through with his visit. It is getting dark. He just has something to dispose of before he leaves — whether Shawanaga and Eagle Lake’s “participation in, and regulation of, gambling on reserve lands was an integral part of their distinctive culture.” The evidence “does not demonstrate that gambling was of central significance to the Ojibway people.” Prior to contact informal gambling activities took place on a “small scale.” The Chief Justice refers to a prior visitor.<sup>29</sup>

I agree with the observation made by Flaherty Prov. Ct. J ... commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which these societies were traditionally sustained or socialized.

Done. End of the trail. The claim is defeated since Anishinabe gambling, prior to contact, was not done on a twentieth-century scale. Hardly surprising that this standard of evidence could not be met. Not many activities in any society, prior to this century, took place on a twentieth-century scale. It is a good thing the rights of other Canadians do not depend on whether they were important to them two to three hundred years ago. What would it be like for Canadians to have their fundamental rights defined by what *was* integral to European peoples’ distinctive culture prior to their arrival in North America?<sup>30</sup>

The door slams. The Chief Justice drives away. Self-government will serve more time in isolation, locked within federalism’s cells. Very few people will visit Shawanaga and Eagle Lake, even fewer will leave their money behind. The people of Shawanaga and Eagle Lake will not spend the rest of their lives, and that of their children’s children, caught inside a casino. The fresh October wind is brisk. Clear. Orange and yellow leaves dance in this breeze, and mimic the setting autumn sun. A walk to shore reveals Indian fishers pulling in their nets. Whitefish and trout will be served tonight. Lake Huron has witnessed this activity for centuries. No buses, trains or cars crowding the life out of the community. No new presence — no grasping; quiet settles back into the familiar rhythms of activity.

## PEEBON

Peebon — Winter. Frozen rights. Peebon’s return always brings hardship, decay and dissolution. His perpetual defeat of Neebin withers the plants, hardens the ground and sends white beings through the skys. With his approach the animals sleep, and fish return to deep lakes escaping the rivers’ congealing arteries. To the north, the ancient grandfathers retreat to their lodges. Their fires reflect on the sky — blue, white and

<sup>24</sup> *R. v. Sioui* (1990), 70 D.L.R. (4th) 427 at 453.

<sup>25</sup> *Sparrow*, *supra* note 12 at 404.

<sup>26</sup> *Pamajewon*, *supra* note 4 at para. 26.

<sup>27</sup> *Ibid.* at para. 27.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at para. 29.

<sup>30</sup> Unfortunately, some Canadians may know exactly what it is like to have fundamental rights defined by what was integral to European culture prior to its arrival in North America. People disadvantaged on the basis of sex, class or race, etc., may well feel their rights depend on what was defining European culture 200-300 years ago.

cold red, and illuminate the path of souls for those travelling to the land of the dead. It will be some time before the grandfather's voices again accompany the clouds and let their fire fall across the earth. For now, they remain in their lodges, protect their fires, and await the return of Neebin. Peebon and Neebin's perpetual quest for supremacy continually enforces this cycle on the Anishinabe. While Peebon is in the ascendancy, Nanaboozhoo looks for ways to steal fire from the grandfathers, to bring it back to the Anishinabe and keep them warm.

Peebon's frigid sovereignty has wide dominion. Aboriginal practices that developed solely as a response to European culture are now frozen, courtesy of the "integral test." How can this be reconciled with the Chief Justice Antonio Lamer's own observation that Aboriginal rights developed from the "peculiar meeting of two vastly different legal cultures."<sup>31</sup> Nanaboozhoo stalks the land and looks for ways to steal fire. He approaches the common law warily. With suspicion that comes from experience, he knows the danger of trying to take something of value from that which can harm him so greatly. Yet he is both brave and foolish, so he tries.

Nanaboozhoo reasons that if Aboriginal rights emerged through the meeting of two legal cultures, then Aboriginal rights must be litigated by reference to both societies' laws. The Chief Justice would appear to agree:<sup>32</sup>

[T]he law of aboriginal rights is neither English or aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.

Yet, despite this endorsement of Aboriginal law, in developing the "integral to a distinctive culture" test Nanaboozhoo observes that the Chief Justice did not consult or apply Sto:lo, Nu-Chah-Nulth, Heiltsuk or Ojibway law in defining Aboriginal rights under section 35(1) of the Constitution.<sup>33</sup> While the Court asserted that Aboriginal rights are based on "traditional laws and customs ... passed down and arising from the pre-

existing culture and customs of aboriginal peoples,"<sup>34</sup> nowhere in these cases does the Chief Justice use the laws of the people charged, or the laws of any other Aboriginal people, to arrive at the standards through which he will define these rights. As such, the Court does not use "intersocietal" law in developing its test for Aboriginal rights. In so observing, Nanaboozhoo has peered into the fire and found a branch sufficiently dense in its grain to keep a flame burning while he brings it back home to his people.

Nanaboozhoo reaches in through the smoke and observes that the Chief Justice engaged in a very abstract and theoretical approach to define Aboriginal rights. He did not fully reference the "long-standing practices linking the various communities" in defining Aboriginal rights. Vacuous reasons about section 35 (1) reconciling Crown assertions of sovereignty with the fact that Aboriginal peoples were here first, may at the most elementary level qualify as an application of intersocietal law. However, the idea that this reconciliation should take place *upon contact* finds no support in either Aboriginal or non-Aboriginal law. It is the Chief Justice's invention. Nanaboozhoo has firmly grasped the branch and taken it from the fire. The smoke is clearing. Nanaboozhoo then finds a confederate, quoting from Justice McLachlin's dissent in *Van der Peet*, he states:<sup>35</sup>

Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question.... One finds no mention in the text of section 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right.

Nanaboozhoo finds in this statement a more substantial basis upon which to define Aboriginal rights. A "morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives."<sup>36</sup> The development of the "integral to a distinctive culture" test does not incorporate either legal perspective because neither the common law nor Aboriginal laws held that the "moment of European contact" was the "definitive" time for establishing an Aboriginal right.

It is now time for Nanaboozhoo to run for home. The fires of his people are almost extinguished. What

<sup>31</sup> *Van der Peet*, *supra* note 1 at para. 42, per Lamer C.J.

<sup>32</sup> *Ibid.*

<sup>33</sup> These communities have laws relating to selling fish and gambling that the Court could receive and consider in developing its *sui generis* Aboriginal rights jurisprudence. The laws "may be helpful by way of analogy" in defining and interpreting aboriginal rights. See *R. v. Simon* (1985), 24 D.L.R. (4th) 390 at 404.

<sup>34</sup> *Ibid.* at para. 40.

<sup>35</sup> *Ibid.* at para. 247, per McLachlin J.

<sup>36</sup> *Ibid.* at para. 42, per Lamer C.J.

he has found may rekindle them. The common law's recognition of Aboriginal ancestral laws and customs, and their continual evolution and interaction with the Crown, is to be preferred as a basis for defining Aboriginal rights because it is more in line with the existing case law and the "time honoured methodology of the common law."<sup>37</sup> This methodology follows a "golden thread" of case law which defines the nature and incidents of Aboriginal rights by reference to the laws and customs of indigenous people.<sup>38</sup> This methodology also fans the embers of Aboriginal law and encourages its development as a greater source of authority for Aboriginal and non-Aboriginal Canadians.<sup>39</sup> With this basis for defining Aboriginal rights the purpose of section 35(1) becomes truly "intersocietal." It also strengthens the continued interaction of these laws because constitutional protection of the existing customary laws and rights of Aboriginal peoples ensures that such customs and rights remain in the Aboriginal people until extinguished or surrendered by treaty. Since Aboriginal rights rest on Aboriginal laws, section 35(1) must define these rights by reference to these pre-existing laws.<sup>40</sup>

While Nanaboozhoo steals fire, Peebon's chilling pervasiveness is felt all around. Nanaboozhoo's solitary actions may not be enough to help the thaw. The "integral to a distinctive culture" test freezes the protection of practices which may have developed solely as response to European cultures. Yet, the adoption of new practices, traditions and laws in response to new influences is always integral to the survival of any community in its relations with another. Reconciliation should not require Aboriginal peoples to

concede those practices which allow them to survive as a contemporary community. However, the Court's new test threatens Aboriginal cultures precisely on this point, since in adapting to new situations they do not have protection for the practices devised in meeting challenges solely as a result of European influence.<sup>41</sup> Such a restriction is contrary to the Chief Justice's assertion that "equal weight" be placed on Aboriginal law by rendering it in terms "cognizable to Canadian law."<sup>42</sup> The "integral to a distinctive culture" test does not place equal weight on traditional Aboriginal law,<sup>43</sup> and denies legal equality to Aboriginal peoples in their relationship with Canada.<sup>44</sup>

The trickster has played his role. Peebon remains ascendant. His icy embrace chills. Dissolution and decay continue. Throughout the land Aboriginal practices are coldly suspended. Have to wait for the thaw again. It may be a long winter. □

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<sup>37</sup> *Ibid.* at para. 261, per McLachlin J.

<sup>38</sup> *Ibid.* at para. 265.

<sup>39</sup> For supporting argument see J. Borrows, "With or Without You: First Nations Law in Canada" (1996) 41 McGill L.J. 629.

<sup>40</sup> Justice McLachlin further stated that the integral test was too broad a characterization of the rights, too indeterminate and too categorical (*ibid.* at paras. 256-260). She first criticized the test as being too broad because "integral is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did." Furthermore, the integral test may be found to be too indeterminate because "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." Finally, the integral to a distinctive culture test may be too categorical because "whether something is integral is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the grounds of justification."

<sup>41</sup> If reconciliation is to be used to define Aboriginal rights at all, a better approach to reconciliation would have made 1982 the effective date for the definition of rights. The *Constitution Act* recognized and affirmed those rights which were existing in 1982, NOT at the date when Europeans asserted sovereignty in what is now Canada.

<sup>42</sup> *Ibid.* at para. 59-60.

<sup>43</sup> The downgrading of Aboriginal rights is even more apparent in the greater power given to Canadian governments to infringe Aboriginal rights in these cases. For further comment see K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified" (1997) 8 Constitutional Forum 33.

<sup>44</sup> For an argument which develops the equality of peoples as central to reconciling Crown/aboriginal relationships see Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government (1995) 21 Queen's L.J. 173; Patrick Macklem, "Distributing Sovereignty: Indian Nations and the Equality of Peoples" (1993) 45 Stanford Law Review 1311.