

The Van der Peet Test Constitutional Recognition or Constitutional Restriction?

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Abstract: This article uses the case of *R. v. Van der Peet* to critically analyze the role of language in Section 35(1) of the Canadian Constitution in perpetuating asymmetrical power dynamics within the framework of colonialism. In defining which practices are protected in the form of Indigenous rights under Section 35(1), the courts have imposed a two-stage test called the Integral to a Distinctive Culture Test or Van der Peet Test. This test stipulates three criteria; the practice must: originate from “pre-contact”, be “distinctive”, and conform or “reconcile” with state sovereignty. This article demonstrates how these criteria hinder the development of Indigenous rights, restrict the scope of such rights, and marginalize Indigenous peoples in Canadian society. Analyzing the role of the deliberative wording of this constitutional order reveals a foundation for contemporary colonialism and oppression, whereby colonial power relations are facilitated and secured by antiquated, ethnocentric ideals upheld by the Judiciary. Exposing the illegitimacy embedded within the State’s uninhibited, exclusive sovereignty directs this discussion to the suggestion that the State lacks the authority to grant Indigenous rights. This article concludes with the argument that, as the original inhabitants of this land, Indigenous Nations possess the inherent extra-constitutional right to self-determination that can only be achieved through self-affirmation.

Key Terms: Van der Peet; Stó:lō First Nation; Indigenous Rights; Constitution; Resistance

Introduction

Canada’s Constitution and Judiciary allegedly protect the rights of citizens in an ethical and inclusive manner within the framework of a liberal democracy. However, these institutions derive from a state that asserts exclusive, uninhibited sovereignty and exercises a monopoly of power in an oppressive way. The subjugation of Indigenous peoples is naturalized within hegemonic political and legal discourses ingrained in the Constitution; Indigenous peoples across the nation face insuperable constraints on their liberties as “subjects” of a colonial state. What

is more, this power dynamic is unjustified in its origins, yet remains unquestioned and thus unhindered. The dominant position of the colonizing authority is secured through imperial ideals upheld by the Canadian State and Judiciary. A deplorable reality is exposed in analyzing the deliberate suppression of Indigenous peoples fostered by Canada's constitutional order. This colonial reality is evident in the pivotal legal case *R.v. Van der Peet*, which demonstrates the imperial applications of Section 35 (1) of Canada's Constitution.

This article deconstructs the Integral to a Distinctive Culture Test developed as a product of *Van der Peet* in order to expose the fallacious and antiquated logic used to limit Indigenous rights. This test outlines three criteria used to determine the definition of Indigenous rights pertaining to Section 35 (1) of the Constitution, including: "pre-contact", "distinctive", and "reconciliation with state sovereignty". Using such standards simultaneously suppresses the inherent rights of Indigenous peoples and secures the dominant position of the State. First, I critique the use of "pre-contact", which situates Indigenous practices in a historical context and disregards the dynamic and adaptive nature of customs and traditions. Second, I argue that the requirement of being a "distinctive" practice is an arbitrary and asymmetrical standard which imposes excessive limitations on cultural preservation. Third, I contest the need for Indigenous rights to be "reconciled" with the State's sovereignty, which, in fact, is illegitimately derived from a unilateral assertion. Altogether, these criteria hinder the development of Indigenous rights, restrict the scope of such rights, and subjugate Indigenous peoples in society. Demonstrating the intrinsic faults in the Integral to a Distinctive Culture Test, I propose that constitutional recognition is not the appropriate forum for the assertion of Indigenous rights; rather, as sovereign entities, Indigenous Nations must embrace their inherent extra-constitutional right to self-determination. Applying these arguments against the Integral to a Distinctive Culture Test, with reference to *Van der Peet*, substantiates the injustice fostered by the Court's interpretation of the Constitution.

Background

In 1996, Dorothy Van der Peet of Stó:lō First Nation was charged with the illegal sale of ten salmon caught under a fishing license strictly limited to the purpose of personal consumption and ceremonial use as outlined by the Fisheries Act. Van der Peet argued that as an Indigenous person she is entitled to certain rights, including exemption from certain fishing regulations, under Section 35(1) of the Constitution,

which states, “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (R.v. Van der Peet, 1996, para. 128). Albeit, the judges disagreed with Van der Peet’s interpretation, ruling that Section 35(1) defined Indigenous rights more restrictively and thus did not account for commercial sales of fish. This case introduced a new convention for determining the extent of Indigenous rights: the Van der Peet Test or Integral to a Distinctive Culture Test, which established specific criteria to limit the extent of the Constitution’s protection of Indigenous rights. It was determined that Section 35 (1) only upheld the protection of customs and traditions which conformed to the State’s standards of “pre-contact” and “distinctive”, while also “reconciling” with the fact of state sovereignty (Van der Peet, 1996). Critically analyzing the colonial implications of this test renders doubt in the genuineness of the fiduciary relationship between the State and Indigenous Nations. Moreover, we must ask ourselves what empowers the State to retain this degree of control over Indigenous Nations, which are sovereign entities; and also, whether Indigenous peoples must comply with State institutions, which lack legitimacy.

I situate my own position in this discussion as a settler born and raised in Stó:lō territory; however, I consider my position to be untraditional in the context of colonialism. On the one hand, I acknowledge that by embodying an identity as a relatively wealthy, white female, I contribute to colonialism as a beneficiary of the dispossession and subjugation of Indigenous Nations. I can relate to Richard Day who admits, “because it’s those normal-superior Canadians— myself among them— who keep colonialism going, who always have and always will, be absolutely necessary to this particular form of governmentality” (Day, 2010, p.264). On the other hand, I also relate with the people of Stó:lō First Nation. I have close personal connections to several people whom have been directly affected by the State’s efforts to destroy Indigenous culture. I am also a student studying Indigenous Studies and Indigenous Governance in order to expand my understanding of colonialism and Indigenous-State relations. I am in the process of adopting a new perspective, from which I am able to critique both my own role in colonialism and that of the State.

I acknowledge that I am situating my work in a body of pre-existing literature on the subject of Van der Peet, the Integral to a Distinctive Culture Test, as well as Section 35 (1) of the Constitution. The antiquated logic surrounding the criteria of “pre-contact” and “distinctive” is criticized by legal scholars such as John Borrows and by anthropologists such as Michael Asch. Borrows argues that the emphasis on

customs that defined Indigenous societies prior to European contact minimizes the practices that are essential to cultural continuity in a modern context. Furthermore, “pre-contact” dismisses anything that was learned from Europeans, restricting contemporary cultural development (2002). Likewise, Asch claims that the “cultural distinctiveness” model is flawed and is an inappropriate frame for determining Aboriginal rights. He states that the antiquated concepts used by the State and Judiciary “[rely] on invalid, Eurocentric logic” (2000, p.127). Both Borrows and Asch provide foundational arguments for my own deconstruction of the criteria presented in the Integral to a Distinctive Culture Test, which I analyze within the context of Van der Peet.

Additionally, Asch (1999) and Avigail Eisenberg (2005) present essential arguments against the State’s sovereignty, of which Indigenous rights are expected to be reconciled with. Asch highlights the power imbalance that exists in policies and legal practice, demonstrating the exclusive, uninhibited, and unquestioned jurisdiction of the State. He suggests that the State deliberately avoids and ignores the question of legitimacy in relation to state sovereignty: “the state [assumes] legitimate authority over Indigenous peoples and their lands without questioning how this came to pass or dealing with the consequences” (1999, p.441). Eisenberg elaborates on the State’s freedom to interpret Indigenous rights in such a way that favors their colonial dominance in the power relations. She describes the Canadian courts as institutions of the colonial state which are designed to accommodate their own interests, thus lacking political legitimacy as “arbiters of rights” (2005, para. 6). Again, these arguments support my argument against the domineering colonial power ingrained in the Constitution.

Furthermore, Russel Lawrence Barsh and James Youngblood Henderson (1997) as well as Leonard Rotman (1997) discuss the colonial context which facilitates the subordination of Indigenous rights in Canadian courts and politics. Barsh and Henderson identify a fundamental issue in the Van der Peet Test: “[it] entrenches European paternalism because the courts of the colonizer have assumed the authority to define the nature and meaning of Aboriginal cultures” (1997, p.1002). They critique the naturalized colonial discourse which exists within the Canadian legal system and the Canadian State. Rotman presents a complimentary argument, claiming that the State has failed to uphold its role in its fiduciary relationship with Indigenous Nations. He suggests that this duty is nothing more than “empty rhetoric”, and in fact, the State perpetuates a paternalistic relationship (1997, p.6). I use these authors as key references as I proceed with exposing the

dishonest nature of the Canadian State's colonial relationship with Indigenous Nations, using Van der Peet as an illustrative case.

I am approaching this discussion from a theoretical standpoint that counters conventional theories constructed by the State in order to justify colonial power structures. In particular, I reject the state's unilateral claim to exclusive sovereignty. James Tully (1999) offers important insight for the critique of political theories which reinforce colonial powers. He describes the legal fiction that the State has constructed to justify its underlying title to Indigenous land: "the reigning ideology of the superiority of the European-derived societies and the inferiority of Indigenous societies served as the taken-for-granted justification for... [settler's] exclusive and legitimate exercise of sovereignty... as the unquestionable basis of their society" (p.44). Like Tully, I reject the idea that Indigenous peoples were "primitive" upon contact; furthermore, I refuse to acknowledge this myth as a premise supporting the State's claim to sovereignty over stolen land. The counterfeit nature of this claim is evident in the fact that the State avoids defending its sovereignty on the basis of underlying title, instead placing the onus on the claimant to prove otherwise in court cases; Tully asserts, "Like the court, the federal State has never questioned the legitimacy of the unilateral exercise of sovereignty over Indigenous peoples and their territories" (p.50). While the assumption of state sovereignty often underlies colonialism's myths, it is imperative to understand that this claim is fallacious in order to pursue the truth behind Canada's Indigenous-State relationship. Throughout my article, I return to this idea and elaborate on the illegitimacy of the State's claims to exclusive sovereignty, eventually raising the ultimate question of whether Indigenous Nations have to comply with State authority.

The Van der Peet Test

According to the Court, as stipulated in the Van der Peet case, in order for an Indigenous practice to receive constitutional protection, it must pass a two-stage test referred to as the Integral to a Distinctive Culture Test, or the Van der Peet Test. The first stage requires that the practice be integral to pre-contact Indigenous culture of the particular community at hand (Eisenberg, 2005, para. 3). From this, I isolate two key criteria: first, that it emphasizes "pre-contact"; and second, the condition that it be an "integral" or "distinctive" aspect of that culture. The second stage of the test mandates "reconciliation" with state sovereignty, by "render[ing] Aboriginal perspectives 'cognizable to the non-Aboriginal legal system'"

(Eisenberg, 2005, para. 3). This formula employs three decisive factors which must be met by the State's standards in order for Indigenous practices to be recognized and protected by the constitution. Using the Van der Peet case, I demonstrate how each of these constructs—"pre-contact", "distinctive", and "reconciliation"—are derived from Eurocentric logic which aims to perpetuate colonial power relations to the detriment of the preservation of Indigenous cultures.

"Pre-Contact"

In outlining the basis for defining Indigenous rights in Van der Peet, the court specified that "The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society" (Van der Peet, 1996, Preface). This suggests that in order to remain "authentic", Indigenous groups must remain stuck in time. In the context of Van der Peet, this entailed that the sale of fish must be proven [by the claimant] to originate from before European arrival (1996, para. 60). Van der Peet defended Stó:lō peoples' cultural rights, arguing that selling and trading fish was an integral aspect of their ancestors' culture. However, the Court sought to undermine this claim with evidence supporting antiquated theories that suggest that Indigenous Nations were too "primitive" to engage in commercial sales before European settlers introduced economy and "civilization" to the New World (Asch, 2000, p.130). The Supreme Court (Van der Peet, 1996, para. 90) declared:

That the Stó:lō were at a band level of social organization rather than at a tribal level. As noted by several experts, one of the central distinctions between a band society and a tribal society relates to specialization of labour... The absence of specialization in the exploitation of fishery is suggestive... that the exchange of fish was not a central part of Stó:lō culture.

As this excerpt suggests, specialization of labour is one of the main differences between bands and tribes; but the two forms of social organization are further distinguished based on bands' smaller size, simple lifestyles, and lack of hierarchical structure. This ascribed logic exemplifies the State's colonial mindset and parallels antiquated theories of justification for colonialism. In effect, the Court is naturalizing the same discourse which constructs a "gap in civilization" between

the Settlers and the Indigenous peoples (Asch, 2000). By imposing Eurocentric standards of social organization, the court is subjugating Indigenous Nations and maintaining colonial structures of dominance which paint European society as “superior”. Furthermore, by basing Indigenous rights on this outsider perspective, the State oppresses Indigenous Nations’ capacity to develop. Borrows quotes Justice Beverly McLachlin: “[The Integral to a Distinctive Culture Test] freeze[s] Aboriginal societies in their ancient modes and den[ies] to them the right to adapt, as all peoples must, to the changes in the society in which they live” (2002, p.64). Imposing “pre-contact” as a criterion disregards the dynamic nature of cultures; it is not realistic to assume that any culture can persist in an evolving society without adapting its practices in the face of contemporary factors. Yet these precepts enable the State to maintain its power. By delegating Constitutional rights in a restrictive manner, the State suppresses Indigenous Nations within imposed Eurocentric institutions and legal structures. This reflects Kiera Ladner’s model of “frozen rights” or “permafrost” which restricts Indigenous cultures’ contemporary practice of traditions and customs to those which the State/ Court consider “traditional” (2009, p.284). Yet, it is evident from the Court’s ruling in *Van der Peet*, that the state’s understanding of “traditional” is congruent with their description of pre-contact Indigenous culture as “primitive”.

The State’s unilateral imposition of standards is unjustifiable. It fails to take into account the perspective of Indigenous Nations, rather relying on Eurocentric forms of knowledge to define the central aspects of Indigenous cultures before arrival. This is illogical given the fact that Europeans were not present at that time. Nonetheless, the Court denies Indigenous accounts of their ancestors—who, of course, were there—on the grounds that their history and knowledge is in the form of myth and oral narratives, which are deemed as inferior to the empirical evidence provided by science. In the pivotal court case *Delgamuukw v. British Columbia* (1997), Justice McEachern ruled that oral tradition could not stand on its own as historical evidence, because “they [are] full of myth, romance, metaphor, and other unreliable elements” (Lambert, 1998, p.253). Returning again to *Van der Peet*, in using anthropological explanations to define Stó:lō as a “band society”, the Court undermined Stó:lō peoples’ versions of their own history. It is commonly accepted that Stó:lō identity is grounded in their relationship with their territory and resources, particularly fishing the Fraser River, as implied by the translation of Stó:lō: “people of the river” (Palys and Victor, 2007, p.15). As mentioned above, however, the Court in *Van der Peet* refused to acknowledge commercial sale of fish

as part of this essential practice. Yet, Indigenous oral narratives suggest otherwise. Kimberly Linkous Brown articulates the significance of fishing not only to Stó:lō diet, but also to their economy; she asserts, “sale, exchange, and gifting of salmon are all intrinsic aspects of a Stó:lō fishery” (2010, p.21). Contrary to theories of band-organization designated by anthropologists, she notes that prior to contact, social structure and labour specialization did in fact exist within most Stó:lō communities, with the division of three distinct classes. Fishing played a crucial role in determining these classes, as it was the skilled hunters and fishers, known as “siya:m” that held the high class status (p. 23). Furthermore, wealth accumulated through trading fish afforded ascension to a higher class (p.27). It is understandable— though illegitimate— why the Court would disregard these histories. For, if the Court acknowledged Stó:lō’s practice of commercial fishery as existing before European settlement, it would undermine the State’s theories which suggest that Indigenous cultures were primitive and thus incapable of holding title to sovereignty. Moreover, it would expose the illegitimacy of the State’s claim to exclusive sovereignty. By unilaterally imposing the “pre-contact” test in determining what qualifies as an Indigenous right, the Court reinstates the State’s position of dominance and suppresses Indigenous peoples’ ability to vouch for their own history.

“Distinctive”

In addition to stipulating “pre-contact” as a criterion for the continuing practice of Indigenous customs and traditions, the Court in *Van der Peet* specified that the practice must also be “distinctive” or “integral” to the culture, prior to contact. The Supreme Court of Canada defined integral as practice “of central significance to the aboriginal society in question—one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that... are only incidental or occasional to that society” (1996, Preface). In ruling that the commercial sale of fish did not count as an entrenched right, the Court established that selling or trading fish was merely “incidental or occasional”. The judges acknowledged that before the British declared sovereignty, Stó:lō ancestors engaged in trade of salmon with the Hudson Bay Company; yet they determined that this practice was opportunistic and only occurring on a rare basis (para. 84). Again, this information is based on the findings of anthropologists and does not reflect the understandings of Stó:lō peoples.

The Integral to a Distinctive Culture Test is both unilateral, in that it is imposed upon Indigenous Nations by the State, and asymmetrical, in that it only has application to Indigenous cultures and does not place similar restrictions on non-Indigenous cultures. The Court and the State have the exclusive power to determine on behalf of Indigenous peoples what is significant to their culture— at least in legal and political discourse. Indigenous Nations are denied the right to define their own culture in rights discourse; this maintains a paternalistic relationship that enables the State to limit Indigenous rights to basic traditions, diminishing all other aspects intrinsically connected to the culture at hand. Eurocentric standards are imposed upon groups asserting rights, creating barriers and excessive restrictions on the preservation of cultural heritage. Furthermore, these restrictions only apply to Indigenous rights. Eisenberg highlights the “ironic implication that if equitably applied the test would similarly insist that only [integral] European cultural practices that developed pre-contact are eligible for [protection]” (2005, para. 5). Canadian law accommodates the multifaceted nature of Euroamerican culture within a liberal democratic state; yet Indigenous cultures are expected to conform to rigid regulations and limitations. Like all societies, Indigenous cultures are comprised of a multitude of qualities and cannot be reduced to just a few token traditions.

Moreover, the Integral to a Distinctive Culture Test is “utterly incompatible with Aboriginal philosophies, which tend to regard all human activity— and indeed all of existence— as inextricably inter-dependent” (Barsh and Henderson, 1997, p. 1000). Returning again to the case study of Van der Peet, analyzing the significance of commercial fishery within Stó:lō communities according to community members instills an understanding of Stó:lō culture as interconnected, whereby traditions, values, and practices all play crucial roles in defining their culture’s identity. From the Stó:lō perspective, the exchange of fish is no less important than the practice of fishing itself. Although the Courts distinguish between fishing for consumption, ceremonial purpose, and commercial sale; Stó:lō peoples rarely made any distinctions. In their traditional social systems, the same techniques were used and the same social practices took place no matter what the purpose was (Macleod, 2010, p. 41). With this in mind, suggesting that certain practices held more cultural value than others is inconsistent with Indigenous worldviews. All customs and traditions have inherent significance because they link cultures and peoples to their heritage. The Court disregards this essential principle by discriminating between the worth of different practices’ continuity as prescribed by State standards.

“Reconciliation”

Finally, the Courts determined that, even if Indigenous practices passed the first two tests of “pre-contact” and “distinctive”, in order for customs and traditions to be constitutionally protected, they have to be compatible with the Constitution; essentially, it must conform to a legal system with which it conflicts. The State expects that the practices be rendered “cognizable to the non-aboriginal legal system” through a reconciliation process (Eisenberg, 2005, para. 3). Furthermore, this reconciliation process is understood as reconciling Indigenous societies with the sovereignty of the crown (Van der Peet, 1996, para. 31). This assumes that both the State’s sovereignty and its connected legal system are natural facts. In Van der Peet, this stage of the test was never reached because, once the Court determined that the sale of fish did not meet the first two criteria, it was no longer necessary to apply any more tests. Even so, this stage of the Integral to a Distinctive Culture Test is inherently fallacious, stemming from antiquated logic and historical myths.

As I briefly mentioned earlier, the unilateral assertion of state sovereignty is illegitimate in its foundation. Throughout history, the state has attempted to justify its dominant position with claims that suggest that state sovereignty is defensible, essential, inevitable, or irreversible. Among the most notorious of these justifications is Terra Nullius, which McMillan and Yellowhorn describe as a “legal fiction [that] was once a powerful instrument that legitimated the European claim to land already held by Aboriginal people” (2004, p.26). Essentially, Terra Nullius means “empty land”, which is what Europeans falsely alleged Indigenous territory as upon arrival. It is not that settlers blatantly disregarded Indigenous presence, but rather they imposed Lockean concepts of land ownership to assert that because Indigenous peoples did not work the land, they therefore did not possess title to the land. By applying the European concept of Terra Nullius, settlers avowed their “legitimate right” to the land. This theory imposes European-constructed concepts in a patronizing manner for the purpose of validating their control of stolen land. Even though the State and the Court no longer apply this obsolete logic as defense for exclusive sovereignty, they do not question it as a flawed source of title, thus maintaining illegitimate power relations (Tully, 1999). This strategy contributes to the legal fiction which establishes that state sovereignty is a fact within which Indigenous rights must be reconciled.

Relying on European perspectives and European forms of knowledge to establish title to sovereignty subordinates Indigenous voices. Moreover, Indigenous

versions of history are oftentimes discredited and dismissed as folklore and myth because they are transmitted through oral tradition (Deloria, 1997, p. 25). Yet these accounts of history serve as the core basis for proving Indigenous peoples' rightful jurisdiction of land and resources. Sharon Venne asserts that the source of Indigenous title was established before Europeans arrived, based on pre-existing governmental structures and democratic principles. Chiefs, headmen, war chiefs, and women all shared the responsibility to govern Indigenous lands and resources (1997, p.180). The lands belonged to the Indigenous peoples and were never sold to Europeans, only loaned; Europeans unilaterally claimed ownership of Indigenous land without their informed consent (p. 205). This understanding undermines the unquestioned legal fiction which secures the State's claims to exclusive sovereignty, and thus is deliberately excluded from legal and political discourses. Of great significance to Van der Peet, Indigenous title establishes a key argument for the protection of the Indigenous right to sell fish, which was never taken into consideration due to dismissal after review of the first to criteria. Lambert (1998, p. 258) persuasively presents the argument as follows:

So I ask this question. Mrs. Van der Peet sold the ten fish to Mrs. Lugsdin on the Stó:lō reserve. That sale was not carried out in accordance with any aboriginal right, according to the Supreme Court of Canada, but we know that it was carried out on land subject to aboriginal title. Also, a measure of self-government must follow aboriginal title. Would aboriginal title have been a defense for Mrs. Van der Peet, where an alleged aboriginal right to trade in fish was not a defense?

By dismissing this significant component of Indigenous rights, the Court demonstrated once again that it retains the exclusive power to decide on behalf of Indigenous peoples what is most relevant to their rights, which are defined purely in terms of constitutional provisions and without due acknowledgement for their inherent rights. Conspicuously, the very act of ignoring the question of aboriginal title is essential in maintaining this power dynamic.

Constitutional Recognition

Through this discussion of these three critical implications of the Van der Peet Test, it is apparent that Section 35 (1) of the Constitution does not serve the interests of Indigenous peoples who are concerned about the transmission of their

culture to future generations; but rather, it supports former State initiatives to eradicate Indigenous cultures by diminishing their ties to their heritage. The Constitution is supposed to protect the rights of Canadian citizens; albeit, the inherent rights of Indigenous peoples as the original inhabitants of this land are infringed upon by a legal system which was illegitimately imposed with the assertion of State sovereignty. In the framework of the Canadian State, Indigenous Nations are subjected to oppression under the power of the State and Judiciary. The State does this by limiting the recognition of Indigenous rights to only those rights which are afforded by the Constitution—rights which were determined by and in the interests of the colonial power. Collaboratively, the State and the Court endeavor to “extinguish whatever rights Indigenous peoples might have independent of the Canadian legal system” (Tully, 1999, p. 50). This rights discourse is inextricably intertwined with dominant political and legal structures, however; and just as unilateral State power is illegitimate in its origin, so too is the assumed reliance on State recognition through the granting of rights in a state-formulated constitution.

Glen Coulthard (2007) poses a fundamental argument against the “politics of recognition”, questioning whether or not the State’s jurisdiction is the legitimate source of authentication of aboriginal rights. He affirms that dependence on recognition from a colonizing power only serves to instill the State’s position of dominance which is used to implement legal, political, and economic constraints. Consequently, Indigenous-State power relations are perpetuated in a vicious cycle, and Indigenous identities are defined solely in relation to their colonial relationship with the State (p.452). Rather than relying on the State to grant recognition, Indigenous communities are empowered with the task of recognizing their own true identity as well as the rights that are attached to that identity. Indigenous rights, along with freedom and self-worth, need to be understood as inherent, not bestowed. Indigenous nations need to turn away from hegemonic political power and engage in a self-affirmative process by recognizing their inherent capacity as self-determining agents. Coulthard quotes Fanon: “the colonized must struggle to critically reclaim and reevaluate the worth of their own histories, traditions, and cultures against the subjectifying gaze and assimilative lure of colonial recognition” (p. 453). This process of self-affirmation is an act of resistance that rejects the pattern of colonial dominance in political and legal discourses.

Applying Coulthard’s argument to Van der Peet would critically undermine the application of the Integral to a Distinctive Culture Test. While I have sought to

prove that Stó:lō practices do, in fact, satisfy the criteria established by the Court, complying with these standards reinforces the State's authority to impose its will upon Indigenous Nations. For instance, Brown's argument, which asserts that Stó:lō's "pre-contact" fishing involved social structure and labour specialization (2010, p.23), conforms to Eurocentric categories of societal hierarchy and relies on constitutional recognition. As sovereign entities, Indigenous Nations do not need to conform to conventions imposed upon them by a foreign power. Under Coulthard's framework of self-determination, Indigenous rights, including the right to sell fish, could be exercised independent of constitutional restrictions dictated by the State. The Court would have no authority to decide on behalf of Indigenous peoples which customs and traditions they were entitled to practice. Eurocentric standards would not be imposed upon Indigenous rights. Furthermore, Stó:lō Nation and other Indigenous Nations could reclaim control over their territories, resources, and ways of life. An extension of this resistance would entail the freedom to fish in their rivers at their own discretion and sell their catch as a means of livelihood. While Indigenous Nations do not need the Constitution to recognize their inherent right to self-determination, the principle of self-determination is historically established in a treaty relationship with the State.

The Indigenous right to exercise self-determination is outlined by the exchange of Two Row Wampum belts at the Treaty of Niagara (1764). The wampum belts were exchanged as a symbol of a promised relationship of peaceful co-existence, mutual respect and recognition of sovereignty, as well as non-interference between the Crown and Indigenous nations (Borrows, 1997). John Borrows quotes Robert A. Williams, Jr.'s description of the metaphor of the Two Row Wampum: "two vessels, travelling down the same river together... side by side, but in our own boat. Neither of us will try to steer the other's vessel" (p. 164). This represents a mutual recognition of dual sovereignty within the Canadian state—notably, it represents state recognition of Indigenous self-determination. Dual sovereignty, peaceful co-existence, and non-interference are paramount principles in Indigenous-State relations because they form a basis of mutual understanding and respect; yet, these principles have been asymmetrically dishonored by the State. Indigenous sovereignty has been undermined by paternalistic state control over Indigenous peoples and their lands in a framework of constitutional recognition and restriction; furthermore, peaceful relations and non-interference have been debased by state violence. The State exploits its monopoly of force in violation of the mutuality of the agreement. This is especially true when it comes to the practice of

Stó:lō fishing rights, whereby reports of fishery officers stealing nets and equipment, engaging in “paddle battles,” and physically assaulting Stó:lō fishers, reveal the stark violence sanctioned by the State (Macleod, 2010, p. 92). This violence makes resistance challenging and even dangerous, but it will not prevent Stó:lō Nation and other Indigenous Nations from fighting for their rights.

The principles of the Two Row Wampum can be reactivated through active resistance and Indigenous self-affirmation. Rather than allowing the Courts and the State to continually oppress Indigenous rights through exclusive and uninhibited power, Indigenous Nations must reawaken their inherent extra-constitutional right to self-determination. Stó:lō Nation has a longstanding history of engaging in active resistance to the State’s illegitimate authority, especially in regards to their ongoing fight for their fishing rights. Brown argues that resistance is not limited to outlaw fishing or illegal sale of fish, but resistance fundamentally entails cultural transmission through the protection of livelihoods and social identity. She emphasizes, “Stó:lō responses to regulation and government interference into their way of life have ranged from overt acts of rebellion to the simplest act of feeding one’s family” (2010, p.22). As much as traditional fishing practices define Stó:lō identity, engaging in these cultural practices in defiance to government regulations affirms their autonomy. Indigenous self-affirmation returns to the principle of self-determination and sovereignty, as represented by the Two Row Wampum. Likewise, Non-Indigenous Canadians, like myself, need to engage in the treaty relationship, supporting Indigenous resistance by acknowledging and respecting Indigenous self-determination, as well as critically questioning the legitimacy of state authority. In this way, settlers can contribute to delegitimizing the state’s exclusive sovereignty and re-introducing a relationship founded on mutual respect. It is up to Indigenous and Non-Indigenous Canadians, alike, to reject hegemonic power dynamics and pressure the State to restructure the Indigenous-State relationship, which needs to be transformed in order to reflect the Two Row Wampum’s principles of peaceful co-existence, respect, dual-sovereignty, and non-interference.

Conclusion

Section 35 (1) of the Constitution contradicts its purpose of recognizing and protecting Indigenous rights by adhering to state standards which restrict Indigenous practices using the Integral to a Distinctive Culture Test. The criteria of “pre-contact”, “distinctive”, and “reconciliation with state sovereignty” set

excessive limitations on the practice of Indigenous customs and traditions. First, “pre-contact” sentences Indigenous cultures to a state of “permafrost”, where they are denied the ability to adapt in a changing society. Second, “distinctive” confines the exercise of rights to central practices, disregarding Indigenous philosophies which endorse the holistic interconnection of all aspects of culture. Third, “reconciliation with state sovereignty” blindly assumes exclusive state sovereignty to be a fact, ignoring the illegitimacy of state claims and overlooking Indigenous title. In suppressing the capacity of Indigenous cultures to flourish within Canadian society, the State reinforces its position of dominant power in the colonial relationship. Indigenous Nations can resist hegemonic power by reclaiming their inherent right to self-determination, demanding— with the support of settler Canadians— a reawakening of the treaty relationship based on the Two Row Wampum.

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