

Aboriginality, Existing Aboriginal Rights and State Accommodation in Canada

by

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ABSTRACT

The central focus of this dissertation is the relationship between aboriginality, aboriginal rights and state accommodation in Canada. The work considers how the existence of a plurality of conceptions of aboriginality impacts the capacity of aboriginal rights to protect and accommodate this collective identity. This dissertation takes the position that aboriginal rights, as they are currently constructed in Canada, cannot account for the existence of this definitional multiplicity, and so impose serious limits on the degree to which aboriginality is accommodated and protected by the state. This case is built by looking at Supreme Court cases that deal with Section 35(1) of the *Constitution Act, 1982*. The investigation contained herein examines the written legal submissions of the aboriginal and non-aboriginal participants in these cases, as well as the Court's decisions, in an effort to trace the various articulations of aboriginality put forward by the parties.

The dissertation demonstrates that, even though there is a multiplicity of conceptions of aboriginality – in other words, the aboriginal litigants, the provinces, the federal government and the Supreme Court justices advance different and often competing conceptions of aboriginality – aboriginal rights are constructed to protect and accommodate a single, particular vision of this collective identity. Moreover, this version of aboriginality does not coincide with the version of this collective identity advanced by the aboriginal litigants themselves. Consequently, the work in this dissertation argues that aboriginal rights fail to accommodate and protect aboriginal peoples' collective identities and pose a substantial threat to these identities.

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CHAPTER ONE

INTRODUCTION

In contemporary Canada Aboriginal peoples find themselves in a peculiar situation, living in communities possessed of separate and unique identities immersed within a larger nation-state, itself possessed of a national identity. Can the many and varied Aboriginal communities find space for adequate expression of their collective identities?

Gordon Christie¹

An array of normative and empirical scholarship builds the case that group differentiated rights are capable of accommodating and protecting the collective identities of national minorities. To the extent that identities are constructed and socially mediated a myriad of possible meanings may exist for any given identity. In some cases, the varying conceptualizations that make up the field of possible articulations of a particular identity are irreconcilable. Aboriginality, as a collective identity, is marked by this type of identity contestation.

The central question of this dissertation is the following: What happens to the efficacy of s.35(1) rights as tools of accommodation and their protective capacity if the identity they are meant to protect and accommodate is contested? The first step in answering this question is an examination of the plurality of meanings shouldered by the term ‘aboriginality’. The dissertation demonstrates that when the term aboriginality is employed it can and does carry a number of meanings which are in many instances irreconcilable. As a consequence, in order to provide an adequate assessment of aboriginal rights in Canada it is necessary to spell out exactly what is meant when this term is employed. This dissertation introduces an approach to conceptualizing identity, the ‘modified relational approach,’ which allows for the existence of multiple

¹ Gordon Christie, “Aboriginal Citizenship”, p.482.

articulations of a collective identity and provides analytical tools to mediate between these articulations.

The second step in the analysis is to provide an account of the contestation surrounding s.35(1). Stated somewhat more plainly, what are all the critics going on about? This dissertation advances that the controversy surrounding this constitutional provision is actually comprised of two related yet separate disputes. The first dispute is a dispute about the nature and scope of the rights aboriginal peoples in Canada have (or ought to have). The second is a dispute about the very meaning of this collective identity. As a consequence, the dissertation provides a unique, multidimensional account of the contestation surrounding s.35(1).

The final step is to assess the efficacy of existing aboriginal rights in Canada – now that we have an account of the contestation surrounding s.35(1) and the various meanings of aboriginality. The analysis reveals that the constitutional tool of accommodation developed by the Supreme Court of Canada (SCC) – that is, existing aboriginal rights covered by s.35(1) – is fashioned to protect and accommodate one conception of aboriginality, the understanding put forward by the SCC. S.35(1) rights do not protect and accommodate the conception of aboriginality advanced by aboriginal peoples. In essence, the SCC has made correspondence a condition of accommodation. That is, the degree of constitutional protection and accommodation aboriginal peoples can expect to enjoy from this constitutional provision is a function of the degree to which their collective identities correspond to the conception of aboriginality advanced by the SCC. Moreover, the SCC does not provide any justification for making its version of this collective identity the object of constitutional accommodation. The absence of any such justification renders the SCC's actions biased and arbitrary. Furthermore, the SCC's

actions constitute an act of misrecognition that has resulted in aboriginal disadvantage and harm. Thus, an answer to the central question of this dissertation emerges: S.35(1) rights fail to accommodate and protect aboriginal peoples' collective identities and pose a substantial threat to these identities.

Group Differentiated Rights

This dissertation finds its genesis in an interest in the contested nature of aboriginality and the group differentiated rights encompassed by s.35(1) of the *Constitution Act, 1982* employed by the Canadian state to accommodate and protect this collective identity. There is a significant amount of scholarly support for the position that group differentiated rights can accommodate and protect collective identity. In what follows, I briefly sketch the contours of this position.

Identity related differences refer to characteristics, acquired both voluntarily and involuntarily, that define individuals as certain kinds of persons (or members of certain kinds of groups) and are constitutive parts of their self-understanding.² In the study of politics, identity related differences among the citizenry are often treated as though they pose particular challenges for the state, its institutions and its normative underpinnings. In fact, identity related differences are even, at times, referred to as the “Problem” or “Challenge” of diversity or difference. Political philosopher James Tully begins his work, *Strange Multiplicity*, by posing the following question: “Can a modern constitution recognise and accommodate cultural diversity?”³ He underscores the urgency of this task by adding that, “[t]his is one of the most difficult and pressing questions of the political

² Bhikhu Parekh, *Rethinking Multiculturalism*, p.1.

³ James Tully, *Strange Multiplicity*, p.1.

era we are entering in the twenty-first century.”⁴ Will Kymlicka and Wayne Norman echo this sentiment in their introduction to *Citizenship in Diverse Societies*. They declare that “Western liberal democracies ha[ve] not in fact met or overcome the challenges posed by ethnocultural diversity.”⁵ Paul Kelly uses similar language in his introductory chapter to *Multiculturalism Reconsidered*, arguing that “[a]ll modern states face the *problems* of multiculturalism [...] because they face the conflicting claims of groups of people who share identities and identity-conferring practices that differ from those of the majority in the states of which they are a part.”⁶ Kelly goes on to explain that “[w]here the problem of multiculturalism arises is with the claim that the ‘circumstances of multiculturalism’ challenge the ability of traditional ideological forms or political theories to accommodate themselves to these circumstances.”⁷

One reason for structuring the diversity/difference discourse in this way is a result of an increasing awareness of the serious implications of ignoring these important issues. History is replete with examples of injustices that find their origins in the state’s failure to adequately address diversity and difference, or worse, the state’s active attempts to eliminate certain identity related differences entirely. Think here of the way in which linguistic, religious and national minorities (to list only three) have been historically

⁴ James Tully, *Strange Multiplicity*, p.1.

⁵ Will Kymlicka and Wayne Norman, *Citizenship in Diverse Societies*, p.3.

⁶ Paul Kelly, “Introduction,” p.1.

⁷ Paul Kelly, “Introduction,” p.4.

treated.⁸ There is an emerging consensus that justice requires that the differences that constitute the diversity of the body-politic be both accommodated and protected.

Scholarship abounds that makes the case that the extension of group rights is one way in which the state can work to ensure that diversity and difference are accommodated and protected. Bhikhu Parekh's work on multiculturalism is anchored by the proposition that the basis of all rights is human well-being.⁹ The task, then, according to Parekh, is to select a set of rights that secures this end. This scholar explains that,

[i]n each case the nature and content of rights would vary, depending on what is required to achieve their intended purposes. Some collectivities might merit only the right to non-interference, some might merit exemption from certain general requirements, yet others might rightly claim positive support of the state and other public institutions.¹⁰

If one accepts the notion that the protection and accommodation of individual/group diversity and difference contributes to human well-being (a proposition embraced by this dissertation) then Parekh's work indicates that rights (including group differentiated rights) can be justified vis-a-vis their efficacy at accommodating and protecting this diversity/difference. Joyce Green seems to support this notion by stating that "[r]ights protection has been most meaningful when it applies to minorities in the face of majority indifference or hostility."¹¹

⁸ For example, Kymlicka cites the "rescinding of funding for minority-language schools," "abolishing traditional forms of local autonomy" and "encouraging settlers to swamp minority homelands" as three historical injustices perpetrated by the state against national minorities. Will Kymlicka, *Politics in the Vernacular*, p.124.

⁹ Bhikhu Parekh, *Rethinking Multiculturalism*, p.217.

¹⁰ Bhikhu Parekh, "Rethinking Multiculturalism," p.217.

¹¹ Joyce Green, "Canaries in the Mines of Citizenship," p.716.

This argument is furthered by turning to work that focuses specifically on group differentiated rights and their normative justifications. Kymlicka and Norman define group differentiated rights as rights that “go beyond the familiar set of common civil and political rights of individual citizenship which are protected by all liberal democracies [and] are adopted with the intention of recognizing and accommodating the distinctive identities and needs of ethnocultural groups.”¹² They advance that “it is increasingly accepted that minority rights claims cannot be dismissed as inherently unjust, and instead are sometimes consistent with, if not required by, principles of justice.”¹³ Kymlicka goes further advancing that the question of whether or not justice is compatible with group differentiated rights is, for the most part, settled. He begins by explaining that the liberal culturalist position – that is, the “view that liberal democratic states should [...] adopt various group-specific rights or policies which are intended to recognize and accommodate the distinctive identities and needs of ethnocultural groups”¹⁴ – has become the “dominant position in the literature today, and most debates are about how to develop and refine the liberal culturalist position, rather than whether to accept it in the first place.”¹⁵ Even though Kymlicka states that there is a lack of consensus among scholars regarding the normative foundations of the liberal culturalist position, he puts forward

¹² Will Kymlicka and Wayne Norman, *Citizenship in Diverse Societies*, p.2.

¹³ Will Kymlicka and Wayne Norman, *Citizenship in Diverse Societies*, p.10.

¹⁴ Will Kymlicka, *Politics in the Vernacular*, p.42. In its entirety the quote reads: “Liberal culturalism is the view that liberal-democratic states should not only uphold the familiar set of common civil and political rights of citizenship which are protected in all liberal democracies; they must also adopt various group-specific rights or policies which are intended to recognize and accommodate the distinctive identities and needs of ethnocultural groups.”

¹⁵ Will Kymlicka, *Politics in the Vernacular*, p.42. Kymlicka’s argument about a liberal culturalist consensus in the literature is far from accepted by all scholars. See, for example, Brian Barry, *Culture and Equality*, p.6-8.

that some scholars identify a concern for identity as one normative foundation for the argument that justice may require the extension of group differentiated rights. He states that some scholars “emphasize the importance of respect for identity. On this view, there is a deep human need to have one’s identity recognized and respected by others. To have one’s identity ignored or misrecongized by society is a profound harm to one’s sense of self-respect. Minority rights satisfy the need for recognition.”¹⁶ What comes to the fore, here, is that group differentiated rights can be normatively justified vis-à-vis appeals to concerns about justice that focus on identity related considerations.

The link between identity related differences and group differentiated rights discussed thus far focuses primarily on normative considerations – that is, the argument that the extension of group differentiated rights is one way to pursue the accommodation and protection of identity related differences and that under certain circumstances justice requires this course of action. The connection between identity related differences and group differentiated rights not only provides the fundamentals for the normative case for these rights but it also provides some direction regarding how to go about assessing the efficacy of these rights in practice. If, as some scholars advance, group differentiated rights are designed to protect and accommodate identity related difference, the appropriate evaluative standard is the degree to which these rights perform these functions.

The work pursued in this dissertation engages with this link between the function of group differentiated rights and their assessment. Aboriginal rights were

¹⁶ Will Kymlicka, *Politics in the Vernacular*, p.47-48. In this piece Kymlicka identifies two other normative foundations for this position cited in the literature – the instrumentalist argument (that is, that autonomy is connected in important ways to culture which can be protected vis-à-vis the extension of minority rights) and the intrinsic value argument (that is, that culture ought to be protect because it is intrinsically valuable).

constitutionalized in s.35(1) of the *Constitution Act, 1982*. Similar in kind to the normative case for other group differentiated rights outlined above, the justification offered by the SCC and the academy to explain the extension of these rights centres on the notion that they would accommodate and protect aboriginal peoples' collective identities.¹⁷ This makes these Canadian group differentiated rights prime candidates for the sort of assessment mentioned above. Arguably, Avigail Eisenberg has produced the most significant investigation of this type – that is, an analysis that focuses on the efficacy of group differentiated rights in general and aboriginal rights in particular to protect and accommodate identity related differences. An examination of Eisenberg's work presents the numerous and important advantages of conducting this type of investigation. Such an examination also reveals the limitations of applying Eisenberg's approach to s.35(1) rights. The basic weakness of her approach is that it proceeds as if the meaning of aboriginality was settled. This leaves little room for a discussion about the multiple meanings shouldered by the term aboriginality and the impacts of this definitional multiplicity on s.35(1) rights. At the same time, proceeding as Eisenberg suggests obscures the existing instances of arbitrariness and bias in aboriginal rights jurisprudence in Canada.

The Difference Perspective

In her piece, *The Politics of Individual and Group Difference in Canadian Jurisprudence*, Eisenberg challenges what she considers to be the dominant approach employed in the literature on Canadian jurisprudence and constitutionalism that deals

¹⁷ Here it is simply stated that the justification offered by the SCC and the academy to explain the extension of aboriginal rights centres on the notion that these rights would accommodate and protect aboriginal peoples' collective identities. In chapter two the actual case for this point is presented in detail.

with conflicts involving individuals, groups and rights claims. “Many commentators,” she argues, “proceed from the assumption that much of our jurisprudence is characterized by a struggle between individual and collective rights. They frame conflicts between individuals and groups in terms of this struggle, and then develop an approach that highlights putative clashes between individual and group rights.”¹⁸ According to Eisenberg, this approach is problematic for three reasons. First, the dominant approach lacks conceptual precision (collapsing identity-related claims into other types of claims), resulting in an unsatisfactory characterization of the nature of certain individual/group conflicts.¹⁹ Second, this approach relies on an “individual versus group” discourse which is substantively different than the language used by the courts.²⁰ Third, the dominant approach lends itself to the generation of a false impression of judicial inconsistency and arbitrariness that is not an accurate reflection of the existing jurisprudence.²¹ As a result, Eisenberg concludes that “this dominant perspective describes actual judicial practice poorly.”²²

Having identified the numerous problems associated with the dominant account, she goes on to outline her own approach to understanding how Canadian law deals with conflicting rights claims made by individuals and groups, which she has termed the ‘difference perspective’. The difference perspective is a purposive approach to rights and

¹⁸ Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.4.

¹⁹ Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.4.

²⁰ Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.4.

²¹ Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.4.

²² Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.4.

rights conflicts.²³ As such, it works by “translat[ing] rights into the purposes that they are meant to serve.”²⁴ “[O]ne of the purposes rights serve,” Eisenberg explains, “is to protect individual and group identity-related differences.”²⁵

The difference perspective is able to leave aside the obfuscatory ‘individual versus group’ discourse that marks the dominant perspective and instead focuses on identity-related differences. Eisenberg argues that this refocusing “provides a perspective from which to understand better how various political devices including both individual and group rights may be fruitfully interpreted as predicated upon a concern to preserve distinctive identities.”²⁶ The contention here is that if we are to understand the way in which Canadian law handles certain conflicting claims (that is, ones that include identity-related components) we must be cognizant of the fact that identity-related difference is one of the courts’ primary concerns. Eisenberg buttresses this argument by pointing to specific cases drawn from Canadian jurisprudence.²⁷ Her discussion of these cases reveals that applying the difference perspective generates an account of how conflicting claims have been settled by the courts that is more coherent and representative than the dominant ‘individual versus group’ perspective. She argues that “[t]he difference perspective retrieves the court’s reasoning and frames it in terms of the principles and values which it actually sought to protect. In each case, the identity-related differences

²³ Avigail Eisenberg, “Identity and Liberal Politics,” p.256.

²⁴ Avigail Eisenberg, “Identity and Liberal Politics,” p.256.

²⁵ Avigail Eisenberg, “Identity and Liberal Politics,” p.257.

²⁶ Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.14.

²⁷ Here, Eisenberg cites the *Sparrow* case (“The Politics of Individual and Group Difference,” p.15-17), the *Thomas v. Norris* case (“The Politics of Individual and Group Difference,” p.17-18) and the *Ford* case (“The Politics of Individual and Group Difference,” p.19-20).

are the crucial values at stake.”²⁸ Eisenberg cautions that “[w]ithout the difference perspective [...]the courts’ decisions in cases involving conflicting identity-related claims appear to be arbitrary and have been described as biased [...]. Such mistaken descriptions lead us to lose sight of the evolving jurisprudence about identity related claims.”²⁹

From this view, a distinguishing feature of Eisenberg’s approach is that it posits that particular rights are meant to protect identity. As a consequence of this approach, certain rights (both individual and collective) are normatively justified vis-a-vis their capacity to protect identity. Moreover, as Eisenberg points out, a significant amount of the appeal of this approach is its power to explain Canadian jurisprudence. Eisenberg’s work is significant because she makes a compelling case about the need for scholars of rights and the law to take identity seriously. She directs us away from discussions regarding the normative superiority of individual or collective rights and redirects us to what is in her view a more fruitful discussion – a discussion about the conditions under which identity related considerations normatively justify particular rights. In the process, Eisenberg reveals that a deeper understanding of the existing jurisprudence surrounding rights would emerge from a better account of the relationship between identity and the normative justifications of rights. This last point indicates the existence of a significant connection between identity, rights, the law and our understanding of each.

The difference perspective, however, is not without its critiques. Green in her piece, *The Difference Debate: Reducing Rights to Cultural Flavours*, raises various

²⁸ Avigail Eisenberg, “The Politics of Individual and Group Difference,” p.21.

²⁹ Avigail Eisenberg, “Using Difference to Resolve Rights-Based Conflicts,” p.163.

concerns about the application of Eisenberg's approach to the issue of aboriginal rights.

Green suggests that:

Eisenberg's "difference approach" designed to mediate between competing societal claims, reduces aboriginality to one of many presumptively equal cultural identities [...]. It dehistoricizes it, and strips it of rights potency. It places all cultural identities on the same legal footing, without regard for anteriority or constitutional location. It removes responsibility from the dominant society and the state for the subordination of indigenous peoples.³⁰

Green is critical of the difference perspective because she contends that it mischaracterizes aboriginality and the subsequent rights that stem from this collective identity by dehistoricizing them. Green is of the view that aboriginal peoples' collective identities, and so their rights, are rooted in and flow from a particular history – a history of colonization.³¹ Green argues that ignoring this historical context falsely equates aboriginality with other cultural identities and treats aboriginal rights claims as one among many minority rights claims made against the state. Moreover, she is of the view that this dehistoricization works to absolve the dominant society of its role in creating and maintaining aboriginal subordination.³² The false parallel drawn between aboriginality and aboriginal rights claims, on the one hand, and other minority identities and non-aboriginal minority claims, on the other, coupled with the minimization/elimination of the role played by the state in the ongoing subordination of aboriginal peoples are of particular interest here. These elements expose that a substantial part of Green's critique of Eisenberg's approach is that Eisenberg has "gotten aboriginality wrong" and, as a

³⁰ Joyce Green, "The Difference Debate," p.138.

³¹ Joyce Green, "The Difference Debate," p.142.

³² Joyce Green, "The Difference Debate," p.138.

consequence, has failed to provide an adequate assessment of the jurisprudence on aboriginal rights.

The problem is not so much that Eisenberg has “gotten aboriginality wrong” (though this may in fact be the case) but that she has failed to allow for the possibility that there are many ways of conceptualizing aboriginality and so there are many ways of “getting aboriginality right.” In other words, Eisenberg’s difference perspective suffers from a certain kind of conceptual myopia in that it relies on the assumption that there is one proper version of any given collective identity. Accordingly, the following questions drive a difference perspective analysis: “What is the role of the tradition or practice in the way that a group defines itself? Is this role or definition in dispute? How disputed is it? To what extent will disallowing the practice alter the group’s identity? To what extent will an external court interfering in the internal affairs of a minority community jeopardize that community’s ability to define and govern itself?”³³ All of these questions presuppose that there is agreement (or can be agreement) about the meaning of a particular collective identity. For example, we could not decide the role that a practice plays, or describe the nature of the dispute over the significance of a practice, or evaluate how disallowing a practice would impact a group’s identity – that is, we could not answer the principle questions that drive a difference perspective analysis – if we did not assume the existence of agreement about the meaning of the collective identity in question.

As a consequence, the difference perspective applies the proper focus for an investigation of the jurisprudence on aboriginal rights in Canada because it recognizes that the stated purpose of aboriginal rights is the protection and accommodation of

³³ Avigail Eisenberg, “Identity and Liberal Politics,” p.259.

aboriginal peoples' identity related differences. The difference perspective, however, does not tell us which version of this collective identity was made the object of constitutional protection/accommodation or which mechanisms were employed to make this decision or even anything about the conceptions of aboriginality that were left outside the scope of these rights. It cannot entertain these issues because these issues presuppose the existence of a plurality of conceptions of aboriginality while the difference perspective presupposes the opposite.

From this view, the problem with Eisenberg's work on aboriginal rights lies with the assumptions that underpin the difference perspective. It is these assumptions that lead her to conclude that applying the proper focus of analysis (that is, identity related difference) to Canadian jurisprudence on aboriginal rights renders claims of court bias and arbitrariness unfounded. It is the position of this dissertation that a solid defence against the very serious charges of court bias and arbitrariness would have to address the questions that fall outside of the scope of the difference perspective – that is, questions which presuppose the existence of a plurality of ways of conceptualizing this collective identity such as which version of the collective identity was made the object of constitutional protection/accommodation, which mechanisms were employed to make this decision and the like.

Accordingly, the work pursued in this dissertation corresponds to the discussion advanced by Eisenberg in that it links the normative case for rights and their evaluation with identity related considerations. This link raises a number of interesting questions regarding the manner in which group differentiated rights are normatively justified, the central role that identity plays in this process of justification and the efficacy of such rights to fulfill their normative potential (that is, to accommodate and protect collective

identities). As a consequence, the dissertation follows Eisenberg's work by applying an identity-based focus to its analysis of s.35(1). It differs, however, in that this dissertation presupposes the existence of a plurality of conceptions of aboriginality and so is able to address the important questions cited above.

Examination Pursued in this Dissertation and Chapter Outline

This dissertation takes the position that an evaluation of the efficacy of group differentiated rights in practice proceeds by, first, taking stock of the nature of the collective identity these rights aim at protecting and accommodating. There is a plurality of different and/or irreconcilable ways of defining aboriginality. This plurality of conceptions represents the field or the horizons of the contestation over the meaning of this collective identity. Accordingly, the investigation conducted in this dissertation includes both an analysis of the contested nature of aboriginality and the role that this contestation plays in the efficacy of s.35(1) rights. The investigation pursued in this dissertation is structured by the following question: What happens to the efficacy of aboriginal rights as vehicles of accommodation and their protective capacities if the identity they are meant to accommodate and protect is contested?

Chapter two lays the ground work for addressing this question. It presents the basic analytical framework for s.35(1) of the *Constitution Act, 1982* developed by the SCC. In essence, it outlines the Court's process for determining the rights that are encompassed by this constitutional provision and the purpose underlying the constitutionalization of aboriginal rights. This presentation works to demonstrate that s.35(1) rights aim at protecting and accommodating aboriginality. In this way, chapter two represents the foundation of this dissertation, for it lays out that the underlying

purpose of these Canadian group differentiated rights is the protection and accommodation of aboriginality.

Chapter three delves into the nature of this collective identity (or, the characterizations of this collective identity in the aboriginal politics literature). It proposes that scholars differ on the approaches they employ to conceptualize aboriginality and so disagree about the meaning of this collective identity. The chapter offers a tripartite typology of some of the possible ways in which scholars approach the conceptualization of aboriginality. This typology organizes the various conceptualizations of aboriginality into three approaches – the presence of traits approach, the absence of traits approach and the relational approach.

Chapter four traces a number of problems associated with the employ of each of the three approaches. It demonstrates that the presence and absence of traits approaches to conceptualizing aboriginality are vulnerable to the charge of essentialism. Relational approaches, on the other hand, tend to over-emphasize the significance of non-members in the creation and maintenance of this collective identity and suffer from some logical coherence problems. This chapter concludes by advancing that a modified relational approach – what I have termed the interactions based approach – is the most appropriate approach to employ in an investigation of the differing articulations of aboriginality found in s.35(1) jurisprudence.

Chapter five applies the interactions based approach to conceptualizing aboriginality and generates three different articulations of this collective identity – the nation to nation conception, the colonial conception and the citizen-state conception. While these three conceptions of aboriginality represent only a sample of the possible articulations that could be generated vis-à-vis the employ of the interactions based

approach, the nation to nation, the colonial and the citizen-state conceptions are the versions of this collective identity most often found in the court material surveyed.

Chapter six reveals the presence of all three versions of aboriginality (outlined in chapter five) in court material pertaining to s.35(1). The examination demonstrates that the aboriginal participants in s.35(1) cases advance a nation to nation conception of aboriginality. The federal/provincial AGs advance a colonial or citizen-state conception. For their part, SCC justices writing in majority decisions put forward a citizen-state conception. What comes to the fore in this chapter is that the parties to s.35(1) litigation do not agree about the nature of this collective identity. These findings represent a direct challenge to approaches to the study of aboriginal rights (like Eisenberg's difference perspective) that proceed as if the meaning of aboriginality is uncontested and/or settled.

Chapter seven demonstrates that the contestation surrounding s.35(1) is characterized by two related disputes: a dispute about the rights aboriginal peoples have (or ought to have) and a dispute about the nature of aboriginality itself. This chapter shows that the way in which the SCC went about settling the latter dispute (that is, the identity dispute) explains to a significant degree the resulting academic criticism of this constitutional provision as well as the ultimate failure of s.35(1) rights to protect and accommodate aboriginal peoples. Confronted with three competing definitions of aboriginality, the SCC selected its own version (that is, the citizen-state conception) of this collective identity as the object of constitutional protection and accommodation. This decision means that the version of aboriginality advanced by the aboriginal participants in s.35(1) litigation does not directly benefit from constitutional protection and accommodation. This decision creates a situation wherein correspondence (in this case the degree to which aboriginal peoples are willing to adopt the citizen-state conception of

aboriginality) is a condition of constitutional accommodation. Furthermore, the SCC does not provide any justifications for this decision rendering its actions in s.35(1) litigation bias and arbitrary. Lastly, the SCC's actions constitute an act of misrecognition which results in the disadvantage and harm of aboriginal peoples.

The concluding chapter of this dissertation begins by reviewing the central arguments presented herein and discussing some of the limitations of the work. It then goes on to raise a number of significant implications of the research presented in this thesis for the study of aboriginal politics in Canada. The failure of s.35(1) rights to protect and accommodate aboriginal peoples has led some scholars to advocate turning attention away from the SCC and its s.35(1) jurisprudence and instead focusing on political negotiations. This dissertation supports the notion that political negotiations, rather than litigation, offer the best chance of achieving aboriginal/non-aboriginal reconciliation. However, this dissertation cautions scholars interested in aboriginal/non-aboriginal reconciliation to continue to pay close attention to judicial developments lest the problems inherent in the SCC's interpretation of s.35(1) spill into the realm of political negotiations.

A Note about Terminology

Throughout this dissertation, 'Aboriginal' and 'aboriginality' are used as synonyms for 'Indigenous', 'First Nations', 'First Peoples' and the like.³⁴ The employ of these terms is not intended to imply any sort of consensus regarding the appropriateness

³⁴ Interesting debates about the meanings of these other terms are widespread in the literature. For a discussion about the meaning of 'indigenous' see Ronald Niezen, "Recognizing Indigenism," p.119-121. For an example of the debate surrounding the meaning of this term at the United Nations, see Russel Lawrence, "Indigenous Peoples," p.373-379. For a discussion about the legal evolution in Canada of the terms 'Indian' and 'aboriginal' see Joseph E. Magnet, "Who are the Aboriginal Peoples of Canada" and Michael Asch, *Home and Native Land*, p.2-5. For a discussion about the development of the use of the term 'First Nation' in Canada see Alan Cairns, *Citizens Plus*, p.70-79, 93-97.

of their use. A number of scholars in the field are either critical or reject the use of these terms. Tom Flanagan, for instance, seems to favour the term ‘Indian’. ‘Aboriginal’ and ‘aboriginality’ fall into what he calls the ‘aboriginal orthodoxy’, an orthodoxy he critiques in *First Nations? Second Thoughts*.³⁵ As a consequence of his overall project, when Flanagan uses ‘First Nations’ and ‘aboriginal’ in his work these terms are often employed in a critical fashion. For example in his discussion of ‘aboriginality’ he states that:

One of the most powerful themes in the aboriginal orthodoxy is that special rights flow from having been here first. It is implied in the phrase “First Nations” – now an almost obligatory label for Indians – as well as in the more technical term “aboriginal” derived from the Latin words *ab*, meaning “from”, and *origo*, meaning “origin.” To be the people who were here from the beginning – put here by the Creator, as Indians often say – is the basic idea of aboriginality.³⁶

By characterizing the use of the phrase ‘First Nations’ as an obligation and ‘aboriginal’ as a technical category, it seems to be the case that, for Flanagan, the term ‘Indian’ is the label that actually applies to the people in question. It is, incidentally, the only term of the three in the above passage that does not appear in quotations, which seems to single it out as the appropriate label.

In Taiaiake Alfred’s work the terms ‘aboriginal’ and ‘aboriginality’ are not simply subjected to critical scrutiny but are rejected outright. For this scholar, the adoption of these terms facilitates the Canadian state’s project of cultural, political, economic and social assimilation. He contends that:

Many Onkwehonew [Huron word for North America’s indigenous peoples] today embrace the label “aboriginal,” but this identity is a legal and social construction

³⁵ Tom Flanagan, *First Nations? Second Thoughts*, p.4. For a sketch of the aboriginal orthodoxy (including its eight main propositions) see p.6-7. For Cairns’ critique of Flanagan’s work in *First Nations? Second Thoughts* see Alan Cairns and Tom Flanagan, “Flanagan and Cairns,” p.46-50, 52-53.

³⁶ Tom Flanagan, *First Nations? Second Thoughts*, p.11.

of the state, and it is disciplined by racialized violence and economic oppression to serve an agenda of silent surrender. [...]Within the frame of politics and social life, Okwehonwe who accept the label and identity of an aboriginal are bound up in a logic that is becoming increasingly evident, even to them, as one of cultural assimilation – the abandonment of any meaningful notion of being indigenous.³⁷

Flanagan's and Alfred's concerns about the appropriate label for these communities are interesting and significant and in some senses coincide with the aims of this dissertation. In both instances, these scholars are highly critical of the version of this collective identity (and the various terms used to denote it) in circulation in the academic literature and the realm of practical politics. Similarly, both scholars base their criticisms on what they consider to be the undesirable effects of adopting this meaning – for Flanagan these effects include threats to the viability of the Canadian state and the prospects for the socio-economic progress for aboriginal peoples³⁸, while for Alfred these threats include the eventual social, cultural and political genocide of Canada's aboriginal peoples.

However, given that this dissertation focuses on the different ways in which this collective identity is constructed and expressed in s.35(1) jurisprudence, the written legal arguments submitted to the SCC in aboriginal rights cases, and the academic literature on this material, 'aboriginal' and 'aboriginality' are the selected terms because these materials primarily employ these terms. The decision to employ these terms in this dissertation, then, represents an effort to create and maintain a certain degree of consistency and clarity. Thus, the choice to use these terms is an instrumental one and is not meant to indicate any particular position regarding the existence of an aboriginal orthodoxy or whether the label 'aboriginal' facilitates assimilation and the like.

³⁷ Taiaiake Alfred, *Wasase*, p.23-24. For more of Alfred's position regarding the link between aboriginality and colonization see: Taiaiake Alfred and Jeff Cornstassel, "Being Indigenous".

³⁸ Tom Flanagan, *First Nations? Second Thoughts*, p.5.

CHAPTER TWO

S.35(1) OF THE *CONSTITUTION ACT, 1982*: ACCOMMODATING AND PROTECTING ABORIGINALITY

Aboriginal and treaty rights are Canadian examples of group differentiated rights. In Canada, these rights received constitutional status in s.35(1) of the *Constitution Act, 1982*. This constitutional provision reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”³⁹ The nature and scope of this section of the constitution was to be hashed out at four constitutional conferences that took place between 1983 and 1987, following the patriation of the constitution.⁴⁰ Settling on a meaning for s.35(1), however, proved to be a difficult task for the federal, provincial and aboriginal representatives. These conferences bore witness to the disparate concerns each party brought to the conference tables. According to Ardith Walkem and Halie Bruce, “Indigenous Peoples hoped that s.35 would create legal and political space within Canada, and serve as a positive source of protection, including for the recognition of Aboriginal Title and the right of Self-Determination.”⁴¹ Contrastingly, Walkem and Bruce outline how “[t]he Canadian government feared that s.35 might upset the established legal and political order, undermine the powers of Canadian governments, and result in the creation of a “special class” of citizens who had greater rights than ordinary Canadians.”⁴² Michael Asch offers a similar characterization

³⁹ S.35(1), *Constitution Act, 1982*.

⁴⁰ Michael D. Behiels, “Aboriginal Nationalism in the Ascendancy,” p.261. Note, these meetings were constitutionally mandated. See s.37 of the *Constitution Act, 1982*.

⁴¹ Ardith Walkem and Halie Bruce, “Introduction,” p.11.

⁴² Ardith Walkem and Halie Bruce, “Introduction,” p.11.

of the concerns plaguing the federal and provincial governments of the time. He explains that “a sufficient number of governments raised doubts about Aboriginal rights to block passage of any constitutional amendment, acknowledging that these rights included the right to self-government with the political power and autonomy sufficient for protection from legislative imposition by other orders of government.”⁴³ Binnie J., writing before his appointment to the SCC, summarizes the dynamics and the results of these differing concerns and positions in this way:

For a variety of reasons, Aboriginal leaders in the constitutional talks insisted that the federal and provincial governments acknowledge an unqualified and undefined section 35 right to self-government. This, paradoxically, made it politically possible (if morally uninspiring) for the federal and provincial governments to walk away from the process and conveniently blame the failure on “radical” Native leaders.⁴⁴

Whether it was a genuine inability to bridge the vast gulf that separated the various positions advanced by the federal, provincial and aboriginal representatives or a politically motivated strategy the ultimate result was that these negotiations failed to yield an agreement regarding the meaning of s.35(1). Thus, the courts were left with the task of defining this constitutional provision.

The Analytical Framework For S.35(1)

The 1990 case of *R. v. Sparrow* provided the SCC with the first opportunity to delineate the basic analytical framework for s.35(1) rights.⁴⁵ This case developed three

⁴³ Michael Asch, “From Calder to Van der Peet,” p.433.

⁴⁴ W. I. C. Binnie, “The Sparrow Doctrine,” p.240. For a similar and more detailed account of the reasons underlying the failure of these conferences to produce an agreement see Michael D. Behiels, “Aboriginal Nationalism in the Ascendancy,” p.272-82.

⁴⁵ Mark Stevenson, “Section 35 and Metis Aboriginal Rights” p.67. While Stevenson argues that the subsequent case law only “elaborated” on the *Sparrow* decision, others disagree holding that SCC decisions following *Sparrow* marked a significant departure from *Sparrow*. For example see Michael Murphy,

primary questions which drive s.35(1) analysis. The questions are as follows: First, is there an existing aboriginal right? Second, has there been a prima facie infringement of that right? And third, has the infringement been justified? Together these three questions make up the legal test for aboriginal rights. In what follows, each question is explained in more detail.

In terms of addressing the first question, regarding whether an aboriginal right exists, the *Van der Peet* decision, which was handed down six years after *Sparrow*, outlines a three step process for identifying an existing aboriginal right. The first step entails a characterization of the right being claimed.⁴⁶ In order to qualify as an aboriginal right, the claim advanced must centre on an aboriginal practice, custom or tradition.⁴⁷ The second step consists of settling whether the practice, custom or tradition upon which the right is based is integral to the distinctive culture of an aboriginal group.⁴⁸ Here, a fundamental concern is the centrality of the practice, custom or tradition to a pre-colonial aboriginal culture.⁴⁹ The final step in identifying an aboriginal right is satisfied by demonstrating that the practice, custom or tradition finds its source in the pre-contact period.⁵⁰ This temporal requirement is underpinned by the principle of continuity. In

“Culture and the Courts,” p.110; John Borrows and Leonard I. Rotman, *Aboriginal Legal Issues*, p.356, 380; Leonard I. Rotman, “Creating a Still-Life Out of Dynamic Object.”

⁴⁶ Mark Stevenson, “Section 35 and Metis Aboriginal Rights” p.68.

⁴⁷ Gordon Christie, “Aboriginal Citizenship,” p.483.

⁴⁸ Mark Stevenson, “Section 35 and Metis Aboriginal Rights” p.68.

⁴⁹ Russel Lawrence and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy” p.998.

⁵⁰ Mark Stevenson, “Section 35 and Metis Aboriginal Rights” p.68. The significant historical moment is different for the Metis. In their case, the establishment of Crown control is the important historical moment not pre-Contact. See SCC, *R. v. Powley*, paras. 16-18, 36-40. For academic commentary on this difference

essence, this principle holds that not only is it necessary to demonstrate that a practice, custom or tradition is integral to a particular aboriginal group, it is also necessary to demonstrate that the practice, custom or tradition both existed prior to contact with Europeans and continued to exist in some shape or form forward through time. As a result, practices, customs and traditions that resulted solely from contact and interaction with Europeans cannot be the basis of an aboriginal right. While practices, customs and traditions whose genesis was solely contingent on interactions with Europeans do not constitute a proper basis for an aboriginal right under this construction, the principle of continuity makes some headway to ensuring that post-contact considerations play a role in this process of identification. As Kent McNeil explains, “the concept of continuity [...] serves the purpose of lessening the burden of proof of Aboriginal rights by allowing Aboriginal claimants to use post-contact practices, customs, and traditions to prove the pre-contact practices, customs, and traditions necessary to establish Aboriginal rights.”⁵¹ Consequently, post-contact practices, customs and traditions may be employed to establish a link to the pre-contact period rendering them not entirely irrelevant to the process of identifying an existing aboriginal right. One last aspect of the principle of continuity remains. The aboriginal claimants must not only demonstrate that the right claimed finds its source in the pre-contact period but they must also prove that the right in question was not extinguished through surrender or by a constitutionally competent legislative body.⁵²

see Kerry Wilkins, “Conclusion,” Note: 40, p.309; Catherine Bell, “Towards an Understanding,” p.387-394, 416-424.

⁵¹ Kent McNeil, “Continuity of Aboriginal Rights” p.134.

⁵² Kent McNeil, “Continuity of Aboriginal Rights” p.134-135.

In order to address the second question of the analytical framework, regarding the issue of infringement, a number of factors come into play. These factors include “the reasonableness of the nature of the interference, imposition of undue hardship, and denial of a preferred means to exercise the right.”⁵³ As a consequence, the aboriginal claimants are charged with the responsibility to show that the offending legislation is unreasonable and/or imposes undue hardships and/or denies a preferred means of actualizing the right in question. Successfully doing so is enough to demonstrate a prima facie infringement of an existing aboriginal right.

In regards to the third question of the analytical framework (that is, the issue of justification), the Crown may attempt to demonstrate that an infringement of an aboriginal right is justified. This is accomplished vis-a-vis a two-part test. The first part of the test hinges on whether a valid objective underpins the offending legislation. Stevenson explains that:

In determining whether there is indeed a valid legislative objective it is necessary to look at the underlying purpose of s.35. In both *Gladstone* and *Delgamuukw* the court explained that the underlying purpose of s.35 are twofold: the recognition of prior occupation by the Aboriginal peoples of Canada, and the reconciliation of Aboriginal and Treaty rights with Crown sovereignty.⁵⁴

The central point in the first part of this justification test is that a valid legislative objective must be sensitive to both the historical fact of aboriginal occupation and the reconciliation of this fact with the sovereignty of the Crown. Stevenson argues that this stage of the test is tilted in favour of the exercise of Crown sovereignty. He makes this

⁵³ Catherine Bell and Robert Paterson, “Aboriginal Rights to Reparation of Cultural Property,” p.107. According to Bell and Paterson, the “threshold of proof on this issue lies somewhere between a positive response to all three questions and the significantly easier burden of demonstrating that “on its face, the legislation comes into conflict with an Aboriginal right because of its object or effects.” P.107-108.

⁵⁴ Mark Stevenson, “Section 35 and Metis Aboriginal Rights,” p.70.

case by citing the extensive list of factors – including, but not limited to, the development of agriculture, forestry, mining, general economic development, the building of infrastructure, the settlement of foreign population – that may constitute valid reasons for the Crown to act in a fashion that infringes on aboriginal rights.⁵⁵ The breadth of this list, he concludes, makes the valid legislative object threshold easy for the Crown to meet.⁵⁶

Once the Crown has demonstrated that a valid legislative objective exists it must then demonstrate that the legislation in question does not breach its fiduciary relationship with Aboriginal peoples.⁵⁷ As Rotman explains, “in appropriate circumstances, the Crown was obliged to: infringe Aboriginal rights as little as possible to effect the desired result; consult with the Aboriginal peoples; and provide compensation.”⁵⁸ This last step satisfies the two-fold test for justifying the infringement of an aboriginal right.

The analytical framework for aboriginal title, a subset of aboriginal rights, differs somewhat from the process described above. According to Lamer C.J aboriginal title is constituted by the following two propositions: “First, that aboriginal title encompasses

⁵⁵ Mark Stevenson, “Section 35 and Metis Aboriginal Rights,” p.71.

⁵⁶ Mark Stevenson, “Section 35 and Metis Aboriginal Rights,” p.71.

⁵⁷ Some scholars question the logical coherence of, on the one hand, recognizing that the Crown is in a fiduciary relationship with aboriginal peoples and, on the other, the Crown’s ability to infringe aboriginal rights. Borrows writes, “it is somewhat ironic that a doctrine, which has been used to protect Aboriginal Peoples from the arbitrary power of government (the fiduciary obligation), was turned on its head and used as a justification for infringing constitutionally protected Aboriginal Rights.” (“Measuring a Work in Progress,” p.235). Borrows goes on to explain how the SCC’s concern for social cohesion and social peace renders intelligible, to some degree, this contradiction (“Measuring a Work in Progress, p.235). McNeil offers a similar account for this apparent inconsistency: “How any infringement of Aboriginal rights can accommodate the Crown’s fiduciary duty is somewhat of a puzzle, as it seems to violate the basic principle that a fiduciary is bound to act in the best interests of the person(s) to whom the duty is owed. Perhaps the explanation is that the Crown has other obligations (e.g. to the Canadian public generally) that can conflict with the duty owed to Aboriginal people so the duty has to be tempered for that reason. This is achieved in part by describing the Crown/Aboriginal relationship as *sui generis* [...] permitting the courts to apply fiduciary principles with flexibility” (Kent McNeil, “Fiduciary Obligations”, p.319).

⁵⁸ Leonard Rotman, “Defining the Parameters,” p.150-51.

the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes [...]; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."⁵⁹ McNeil clarifies how this construction of aboriginal title makes it different from its non-aboriginal counterpart. He argues that aboriginal title is

[a]n interest in land that is in a class of its own. The fact that Aboriginal title cannot be sold or transferred is one aspect of this uniqueness. Another is the title's collective nature – it can only be held by a community of Aboriginal people, not by individuals. The source of Aboriginal title also distinguishes it from other land titles, which usually originate in Crown grants. Because the Aboriginal peoples were here before the Crown asserted sovereignty, their title is derived from the dual source of their prior occupation and their pre-existing system of law.⁶⁰

This brief overview of the analytical framework of s.35(1) developed by the SCC reveals a number of interesting points for those interested in the legal definition of the nature and scope of the rights covered by this constitutional provision. First, it exposes that aboriginal rights can only be based on particular types of claims. These claims are limited in nature in that they must be rooted in aboriginal practices, customs and traditions. They are also limited in their scope, for they must be of the pre-contact variety (or a contemporary version of a pre-contact practice, custom or tradition) and they must have survived at least until the patriation of the constitution (meaning that no surrender or extinguishment of the right occurred before 1982). Second, the analytical framework outlines the burdens placed on the Crown and the aboriginal claimants in this process. Accordingly, the former must prove justifiable infringement, while the latter must demonstrate the existence of a right and its prima facie infringement.

⁵⁹ SCC, *Delgamuukw v. B.C.*, para. 117.

⁶⁰ Kent McNeil, "Defining Aboriginal Title in the 90s," p.7-8.

Along with these important legal issues, an examination of the analytical framework indicates that identity related considerations play a significant role in the attempt to successfully pursue an aboriginal rights claim. For one thing, aboriginal rights must be based on pre-contact practices, customs and traditions. For another, denial of a preferred means of exercising a right is one factor that works to establish a prima facie case of infringement of an aboriginal right. Moreover, one part of the justification test requires that historic aboriginal occupancy must be reconciled with the sovereignty of the Crown. All of these, to varying degrees, are identity related considerations. They all speak to the issues of aboriginal culture, its maintenance and its place in Canada.

Perhaps this should not be too surprising given, first, that s.35(1) rights are Canadian manifestations of group differentiated rights and, second, that certain normative arguments regarding the justification of group differentiated rights, such as those surveyed in the introductory chapter by Parekh, Eisenberg, Kymlicka and Norman, and others (see pages 5-11), rely on identity related considerations. However, in order to make a substantial and explicit case that s.35(1) rights evidence a similar link between identity and normative principles one must move beyond the analytical framework. It is necessary to examine the judicial reasons, and thus the normative case, offered by the SCC to explain this analytical framework and the rights it generates. It is also necessary to turn to scholarly assessments of this normative case.

Constitutionalizing Accommodation and Protection

It is advanced here that, from the outset, the SCC incorporated the notion of accommodation in its interpretation of s.35(1). The *Sparrow* decision begins as follows: “This appeal requires this Court to explore for the first time the scope of s.35(1) of the *Constitution Act 1982*, and to indicate its strength as a promise to the aboriginal peoples

of Canada.”⁶¹ As one reads through the reasons provided in the *Sparrow* decision it becomes evident that the aforementioned promise was in essence a promise of accommodation. The court based a significant portion of its analysis in *Sparrow* on what it identified as the purposes underlying the inclusion of s.35(1) in the *Constitution Act, 1982*. The court stated that “the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples.”⁶² Accordingly, this provision was not meant to constitutionalize the existing state of affairs between aboriginal peoples and the state, but was meant to signal a change in the status quo – a change that would bring about “a just settlement for Canada’s aboriginal peoples”. However, the SCC also included a statement of the boundaries of this just settlement. The Court explained that:

While it [s.35(1)] does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal rights protected under s.35(1).⁶³

Here a list of factors, including modernization, economic considerations, interdependency, and the like are offered as reasons to justify the absence of a constitutional guarantee of immunity from governmental regulation. This part of the *Sparrow* decision explicitly states that the rights covered by s.35(1) and the aboriginal interests that they protect and promote are not absolute. Consequently, the manner in

⁶¹ SCC, *R. v. Sparrow*, p.11.

⁶² SCC, *R. v. Sparrow*, p.32.

⁶³ SCC, *R. v. Sparrow*, p.37-38.

which the Crown may exercise its power is altered (a result of the necessity to justify legislation that infringes on rights covered by this constitutional provision) but the ultimate scope of its power remains fundamentally unchanged. This is the just settlement envisioned by the SCC. This is the strength of the promise mentioned in *Sparrow*. It is not unfair, then, to characterize this promise as an alteration of the existing relations between the Crown and Aboriginal peoples rather than a complete replacement of these relations. In other words the promise here is for some kind of accommodation, not revolution. It is this understanding of the promise contained within *Sparrow* that underpins the argument here that the normative case for s.35(1) rights centres on the issue of accommodation.

An ancillary question that follows from this argument concerns the content of the accommodation in question. Stated differently, what exactly is being accommodated by s.35(1) rights? The existing jurisprudence on this constitutional provision demonstrates that these rights are meant, among other things, to protect aboriginal identity and/or aboriginality. In the case of *R. v. Van der Peet* Lamer C.J., writing for the majority of the Court, advances the position that aboriginal rights “arise from the fact that aboriginal people are aboriginal.”⁶⁴ Citing academics Michael Asch and Patrick Macklem he states that “aboriginal rights “inhere in the very meaning of aboriginality”.”⁶⁵ He goes on to explain that the task before the court was, “to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. [...]The

⁶⁴ SCC, *R. v. Van der Peet*, para. 19.

⁶⁵ SCC, *R. v. Van der Peet*, para. 19.

Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.”⁶⁶ The then Chief Justice reasoned that a purposive analysis represented the best way to proceed.⁶⁷ Such an analysis, he explained, revealed that aboriginal rights were constitutionalized in order to reconcile the Crown’s sovereignty with the pre-existence of aboriginal societies.⁶⁸ Lamer C.J. is clearly outlining the relationship between s.35(1) rights and aboriginality in this part of his judgment. These rights are intimately linked with this collective identity in that they owe their genesis to the existence of this collective identity. Moreover, the question of who may hold and exercise these rights is settled by identity related considerations. Lastly, these rights are portrayed as aiming to accommodate the bearers of this collective identity vis-à-vis the reconciliation of their distinctive societies with their non-aboriginal counterparts. Consequently, all of this lends credence to the view that s.35(1) rights aim at accommodating aboriginality.

Academic commentary on the *Van der Peet* and *Sparrow* cases supports this view. Citing the former Chief Justice in the *Van der Peet* decision, Lawrence Russel and James Youngblood Henderson explain that “[t]he key terms in this formula are “pre-existence” and “reconciliation”.”⁶⁹ They go on to argue that “aboriginal”, “the Chief Justice reasoned, necessarily refers to what existed on this continent before the Crown arrived. It is therefore the courts’ task to ascertain “the crucial elements of those pre-existing distinctive societies”, which is to say those elements which are “integral” to the identity

⁶⁶ SCC, *R. v. Van der Peet*, para.20.

⁶⁷ SCC, *R. v. Van der Peet*, para.21.

⁶⁸ SCC, *R. v. Van der Peet*, para.31.

⁶⁹ Lawrence Russel and James Youngblood Henderson, “The Van der Peet Trilogy,” p.997.

of each First Nation.”⁷⁰ This treatment of s.35(1) advances that identity related considerations occupy an important place in the majority’s decision in *Van der Peet*. This comes to the fore when one unpacks what these scholars mean by the terms “pre-existence” and “reconciliation”. By pre-existence, they mean those aspects that are integral to the collective identities of First Nations. By reconciliation, they mean finding a way to accommodate these elements (and by extension these identities) within the framework of the Canadian state. Consequently, on Russel and Henderson’s reading of the majority’s understanding of the underlying purposes of the constitutionalization of aboriginal rights (that is, the normative case for these rights) reveals that a central concern is the accommodation of certain aspects of aboriginal identity.

In his work, Macklem also cites aboriginal identity as an interest underlying the constitutionalization of aboriginal rights.⁷¹ Referring to the *Sparrow* case, he explains that “in the Court’s opinion, the practice [that is, fishing] deserved the status of a constitutional right because it was and is integral to Aboriginal culture and identity. The interest underlying the right to fish, in other words, is Aboriginal identity.”⁷² In the same piece, Macklem makes a similar claim regarding aboriginal title. In his view, while there is a great deal of uncertainty regarding how far the protection and preservation of aboriginal territory is an underlying interest of s.35(1), he states, quite categorically, that

⁷⁰ Lawrence Russel and James Youngblood Henderson, “The Van der Peet Trilogy,” p.997.

⁷¹ Patrick Macklem, “Aboriginal Rights and State Obligations,” p.107. In this piece, Macklem identifies aboriginal territory and aboriginal sovereignty as two other interests underpinning the constitutionalization of aboriginal and treaty rights. He cautions that his argument in this piece is speculative but subsequent jurisprudence and academic scholarship on aboriginal rights jurisprudence demonstrates that the part of his argument that advances that s.35(1) aims at protecting and accommodating aboriginal identity is no longer speculation but legal fact.

⁷² Patrick Macklem, “Aboriginal Rights and State Obligations,” p.108.

“insofar as Aboriginal identity is inextricably linked to the land, Aboriginal territory is as fundamental a value as Aboriginal identity.”⁷³

Along the same lines, Gordon Christie, commenting on the *Van der Peet* case advances that the “Supreme Court has determined that Aboriginal rights are meant to protect ‘Aboriginality’, which is understood to encompass those aspects of traditional Aboriginal cultures that define these cultures as peculiarly ‘Aboriginal’ in nature.”⁷⁴ Here, Christie is making the same point as Macklem, namely that an identified purpose of this provision of the constitution is the protection of aboriginal identity.

Consequently, there is substantive support from both the jurisprudence on aboriginal rights and the academic literature to advance the claim that s.35(1) rights, as interpreted by the SCC, aim at protecting and accommodating aboriginality. This notion corresponds to the discussion presented regarding group differentiated rights at the outset – namely that group differentiated rights can be important tools of accommodation available to the state and can protect collective identity. Accordingly, the presentation thus far exposes a situation where there is support for the normative argument that group differentiated rights can accommodate and protect collective identity and actual judicial interpretations of a Canadian constitutional provision which is significantly underpinned by this normative argument.

Central Issue of the Dissertation: Aboriginal Rights and Identity Contestation

Numerous commentators, however, express doubt about the capacity of s.35(1) to generate rights that successfully protect and accommodate aboriginality. Borrows and

⁷³ Patrick Macklem, “Aboriginal Rights and State Obligations,” p.109.

⁷⁴ Gordon Christie, “Aboriginal Citizenship,” p.483.

Rotman advance that “[t]he judiciary’s focus on aboriginal rights [..]often appear to be more on the limitation of those rights than on facilitating their understanding or protection.”⁷⁵ Lee Maracle argues that “Aboriginal Rights in cases interpreting s.35 have amounted to nothing more than the reduction of nationhood to anthropological definitions of the nature of Indigenous Peoples in pre-colonial times.”⁷⁶ Maracle goes on to caution that “accept[ing] that our rights should be defined under s.35 is to accept colonial authority.”⁷⁷ For his part, Alfred takes the position that s.35(1) and the rights contained therein are of little consequence to prescriptive work on restructuring aboriginal/non-aboriginal relations.⁷⁸

Commenting on the evolving jurisprudence on aboriginal rights (and specifically on the *Van der Peet* decision) Borrows provides some indication regarding a possible source of this skepticism of and dissatisfaction with s.35(1). He argues that “the Supreme Court of Canada developed its definition of Aboriginal rights by using a questionable definition of aboriginality.”⁷⁹ He explains that:

Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. 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. [...]In order to claim an aboriginal right, the court’s determinations of Aboriginal will become more important than what it means to be Aboriginal today.⁸⁰

⁷⁵ John Borrows and Leonard I. Rotman, *Aboriginal Legal Issues*, p.436.

⁷⁶ Lee Maracle, “The Operation was Successful, But the Patient Died,” p.312.

⁷⁷ Lee Maracle, “The Operation was Successful, But the Patient Died,” p.312-13.

⁷⁸ Taiaiake Alfred, *Wasase*, p.20-21.

⁷⁹ John Borrows, *Recovering Canada*, p.61.

⁸⁰ John Borrows, *Recovering Canada*, p.60.

These concerns expressed by Borrows are based on the way in which aboriginality is conceptualized by the SCC. Borrows builds the case that s.35(1) rights, as defined by the majority in *Van der Peet*, are only capable of protecting a certain version of this collective identity. This version of aboriginality, he insists, is backward looking and tethered to a pre-contact past making it unable to encompass the significant constitutive elements that characterize contemporary aboriginality. This last point underpins his worry that the Court's characterization of this collective identity will be accorded greater weight in aboriginal rights litigation than the determinations of those who actually bear this collective identity. What is of importance about his critique to this dissertation is that it is premised on, first, the presence of competing definitions of aboriginality and, second, on the consequences of choosing one definition over another.

If, as Russel, Henderson, Christie and Macklem advance, the SCC has determined that aboriginal rights are meant to accommodate and protect aboriginality and, as Borrows argues, the majority of the court mischaracterized aboriginality, it is possible, then, that some of the serious criticisms surrounding s.35(1) and the rights contained therein find their origins in a dissensus over the meaning of aboriginality.

This dissertation presents the case that a significant source of this dissatisfaction with s.35(1) rights and their capacity to both accommodate and protect aboriginality results from the fact that while the meaning of this collective identity is contested – that is, aboriginality is defined and understood in a multiplicity of ways – this identity contestation is not taken into account in the construction of s.35(1) rights. The SCC employs one understanding of this collective identity in the justificatory arguments it offers for s.35(1) rights and in the legal instruments it has developed for their identification and treatment. Contrastingly, the provincial and federal Crowns do not

always share this understanding. The aboriginal participants, for their part, never employ the SCC's understanding of aboriginality. All of this has amounted to rights that are limited in their ability to protect and accommodate aboriginal peoples' collective identities.

Excursus: Existing Aboriginal Rights and Treaty Rights

Before the examination of the contested nature of this collective identity and of s.35(1) can proceed it is necessary to briefly discuss the differences between the two types of rights included in this constitutional provision – that is, existing aboriginal rights (often referred to herein as simply 'aboriginal rights') and treaty rights. This discussion reveals the substantive differences that exist between these rights and acts as a justification for limiting the examination and discussion presented in this dissertation primarily to existing aboriginal rights. This way forward follows the cautions of Henderson who insists that the “framework and definition of treaty rights are different from the framework and definition of Aboriginal rights, and they should be treated differently.”⁸¹

Though similar in various respects, often discussed in tandem and recognized/affirmed in the same section of the constitution, fundamental differences make aboriginal and treaty rights irreducible.⁸² This irreducibility is reflected in, first, the different origins of these rights and, second, the fact that aboriginal and treaty rights pertain to distinctive branches of the doctrine of aboriginal rights. At this point, a brief clarification may preempt some confusion that could result from the use of the terms

⁸¹ James Youngblood Henderson, “Interpreting Sui Generis Treaties,” p.51.

⁸² Leonard Rotman, “Defining Parameter.” p.156.

‘doctrine of aboriginal rights’ and ‘aboriginal rights’. The doctrine of aboriginal rights is best thought of as the overarching legal concept that includes all of the various rights (and their justifications in law) which aboriginal peoples enjoy either at present or some time in the future (that is, rights that aboriginal peoples claim to hold but whose actualization is frustrated by the fact that they are unrecognized). Aboriginal rights form one bundle of rights within this broad legal concept. Treaty rights constitute a separate bundle.

The question of origins is the first important distinction between these two bundles of rights that are covered by the doctrine of aboriginal rights. Rotman advances that these two kinds of rights trace their origins to different sources.⁸³ He points out that “Aboriginal rights are derived from Aboriginal customary laws and traditions.”⁸⁴ Treaty rights, on the other hand, “are rights that are enshrined within the terms of various treaties entered into between the Crown and Aboriginal nations.”⁸⁵ Slattery clarifies what is meant by the term ‘treaty’. “An Indian treaty,” he explains, “typically took the form of a spoken exchange of proposals and responses, often marked by special rituals, and usually taking place in several sessions extending over a number of days, leading to a firm understanding between the parties on certain matters.”⁸⁶ From this account, an historic treaty between the Crown and an aboriginal nation consists of a number of significant elements. For Slattery, “[t]he true content of a treaty can be determined only by a comprehensive assessment of all of the available sources of information, including any written memorials or accounts, but also oral traditions, the broader social and political

⁸³ Leonard Rotman, “Defining Parameters.” p.156.

⁸⁴ Leonard Rotman, “Defining Parameters.” p.156.

⁸⁵ Leonard Rotman, “Defining Parameters.” p.157.

⁸⁶ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights,” p.208.

objectives of the parties, and the history of their relationship.”⁸⁷ Accordingly, treaty rights are rights whose content and scope find their origins in historic agreements with the Crown, the processes that led to these agreements as well as the existing broader social, economic and political considerations. In other words, treaty rights are the product of exogenous factors. Aboriginal rights, on the other hand, trace their origins to aboriginal customary law and are not reliant on exogenous factors for their existence (that is, exogenous to the aboriginal society in question).

Slattery’s presentation of the meaning and importance of the doctrine of aboriginal rights is of significance here. He advances that,

the doctrine of aboriginal rights is a body of Canadian common law that defines the constitutional links between aboriginal peoples and the Crown and governs the interplay between indigenous systems of law, rights and government (based on aboriginal customary law) and standard systems of law, rights and government (based on English and French law). The doctrine of aboriginal rights is a form of “inter-societal” law, in the sense that it regulates the relations between aboriginal communities and the other communities that make up Canada and determines the way in which their respective legal constitutions interact.⁸⁸

On this view, the doctrine of aboriginal rights is a bridge that works to reconcile aboriginal and European legal orders; it sets the framework within which aboriginal and non-aboriginal nations interact with one another; and it functions to accommodate and manage diversity within a common doctrine. The importance of this doctrine to understanding aboriginal/non-aboriginal relations is not easily overstated. According to Slattery, even though both aboriginal and treaty rights are encompassed by the doctrine of aboriginal rights, they constitute separate and distinctive branches of this doctrine.⁸⁹

⁸⁷ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights,” p.208.

⁸⁸ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights,” p.198.

⁸⁹ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights,” p.224. For more information on the particular case law of treaty rights see Kent McNeil, “The Inherent Right of Self-Government,” p.10.

Moreover, given the different origins attributed to aboriginal and treaty rights and the fact that each occupies a separate branch of the doctrine of aboriginal rights, depending on the circumstances, the legal canons employed in their interpretation may, and in fact do, differ.⁹⁰ In his work, Henderson outlines a number of important interpretive principles employed by the courts when called upon to decide an aboriginal treaty rights case. These interpretive considerations include: (1) the intersection of the treaty and the Constitution; (2) the existing historical and legal realities at the time of the treaty's genesis; (3) the signatories' intentions; and (4) the treaty language.⁹¹ These interpretive principles differ significantly from the interpretive framework for existing aboriginal rights outlined in previous sections of this chapter.

Consequently, this thesis takes these differences seriously by avoiding the analytical and conceptual collapse of aboriginal and treaty rights. As a result, this thesis deals primarily with existing aboriginal rights and their corresponding jurisprudence. When it does consider treaty rights it does so as a means to further the discussion and analysis of the former type of right. As a result, a number of important s.35(1) cases are not dealt with in this work because they do not focus on aboriginal rights but on treaty rights.

⁹⁰ Leonard Rotman, "Defining Parameters." p.158.

⁹¹ James Youngblood Henderson, "Interpreting Sui Generis Treaties," p.47.

CHAPTER THREE

ABORIGINALITY AND CONCEPTUAL CONTESTATION

In his piece “Who Are the Aboriginal People of Canada?” Joseph Eliot Magnet traces various definitions of the meaning of aboriginality arguing that the evolution of these definitions in Canadian law is reflected in, and is a reflection of, the changing relations between Aboriginal and non-Aboriginal peoples.⁹² Magnet begins his presentation by outlining the reasons why the question of aboriginal identity is of social, political and economic import.

This question, and the various criteria by which it might be answered, is important for many reasons. [...]Connection to culture and community gives life depth and meaning. It is indispensable for preservation and development of language. It is central to dignity and fulfillment. Classification as Aboriginal is a necessary requirement for access to an impressive array of Aboriginal, treaty, self-government and constitutional rights for both individuals and communities. Classification as Aboriginal is a requirement for receipt of many entitlements government has chosen to provide. Canada has special legislative jurisdiction in relation to Aboriginal peoples: Canada’s power over and responsibility to approximately 1.3 million people depends on classification as Aboriginal.⁹³

As Magnet indicates, aboriginal identity is linked to issues as diverse as the constitutive role played by group membership in the life of an individual and a community; the capacity to exercise certain constitutional rights and access government benefits; and the question of federal and provincial jurisdiction. These reasons work together to highlight the need to understand how this collective identity is constructed in Canadian law and the numerous changes that have marked its evolution. Magnet focuses on the way in which legislation (imperial, colonial and Canadian) has defined “who is aboriginal” in terms of

⁹² Eliot Magnet, “Who Are the Aboriginal People of Canada” p.25

⁹³ Eliot Magnet, “Who Are the Aboriginal People of Canada” p.25

Canadian law.⁹⁴ His work is of interest because it highlights one way in which conceptions of this collective identity intersect with the Canadian legal order and, simultaneously, it demonstrates the existence of a plurality of meanings shouldered by the term aboriginal. In terms of Canadian law, aboriginality is far from being a fixed collective identity. It has been defined and redefined, shaped by the ebb and flow of the Canadian legal order.

Scholars differ on the approaches they employ to conceptualize aboriginality and, thus, on the ultimate nature of this collective identity. As a result, to say that there is a myriad of different and competing conceptualizations of aboriginality is only the beginning of a discussion of this issue. Given the task that Magnet has set for himself in the piece cited above, his presentation need only trace a small portion of the existing multiplicity of conceptualizations of this collective identity. What follows presents a broader survey of a number of the possible ways in which scholars conceptualize aboriginality. This broader survey organizes the various conceptualizations into three approaches – the presence of particular traits approaches, the absence of particular traits approaches and the relational approaches. This tripartite typology loosely follows the way in which Bruce Granville Miller organizes conceptions of aboriginality in his work, *Invisible Indigenes: The Politics of Nonrecognition*.

Presence of Particular Traits Approaches

Miller advances that a number of conceptualizations of aboriginality rely on the presence of particular traits in order to construct a version of this collective identity. These conceptualizations work by, first, identifying significant elements that are

⁹⁴ Eliot Magnet, “Who Are the Aboriginal People of Canada.” For a discussion about how this process is gendered see Bonita Lawrence, “Gender, Race, and the Regulation of Native Identity.”

presented as constitutive of an aboriginal identity; second, justifying the significance of these elements; and third, using these traits as a litmus test for aboriginality. Aboriginality, constructed in this fashion, is conceived as an analytical category that can be described vis-à-vis certain constitutive elements. This section investigates the manner in which scholars have employed the presence of particular traits in their constructions and articulations of aboriginality. Here, articulations built on the presence of traits such as descent, an attachment to land, shared practices, common values, associative duties, and particular relations to time and space form the basis of the presentation of the presence of traits approach.

According to Miller, some conceptualizations based on the presence of particular traits advance that, “indigenous [aboriginal] people are thought to be recognizable by descent from significant historical people (such as treaty signers) or genealogically from known indigenous [aboriginal] people of an earlier period. They are thought, then, to be recognizable as those who received promises from the state [...] and their descendents.”⁹⁵ Consequently, the significant constitutive element here is the notion of a particular descent or genealogy. The question of “who is aboriginal” is settled by tracing an individual’s lineage and establishing a biological or kinship link to a particular group or people.⁹⁶

⁹⁵ Bruce Granville Miller, *Invisible Indigenes*, p.52. For an interesting discussion on the Crown’s historical use of descent as the basis for identifying aboriginal peoples in Canada, and the implications (past and present) of doing so, see Eliot Magnet, “Who Are the Aboriginal People of Canada.”

⁹⁶ Also see E.J. Dickson-Gilmore, “Iati-Onkwehonwe,” for an interesting discussion about past and present Mohawk practices of establishing who is and who is not Mohawk. (p.31-33) and Taiiaki Alfred, *Heading the Voices of our Ancestors*, p.171-72.

A subsequent constitutive element or trait commonly employed is a connection to a particular territory or homeland. In her work on nationalism and national identity Margaret Moore advances that,

a normative theory of nationalism should consider the constitutive elements of peoples' identities, and this may include the role played by the group's conception of their homeland, and the bonds of attachment to territory that they feel. In other words, nationalism is not simply based on group membership, but also has an important territorial component, involving an attachment to a homeland or area of the globe. If people *care* about their homeland, and if these feelings have developed legitimately [...] then it only seems proper that this should be taken into account to define the territory to which the group is entitled.⁹⁷

From Moore's perspective, theories of nationalism may legitimately include territorial considerations (such as a group's sense of entitlement to a specific homeland) because attachments to particular territories are at times constitutive elements of a people's national identity. What is of significance here is the claim that certain collective identities (in this case national identities) can only be adequately understood and articulated vis-a-vis reference to the existing sense of attachment a group has to particular lands. In other words, national identity and nationalism cannot be properly theorized if existing territorial dimensions are ignored.

In terms of aboriginality, a number of scholars conceptualize this collective identity in such a fashion. For them, a connection with a particular territory may be constitutive of an aboriginal identity. For example, Arthur J. Ray proposes that "[m]any of Canada's Indigenous [aboriginal] peoples define themselves in terms of the homelands that sustained their ancestors."⁹⁸ For his part, Christie explains that, "[f]or many Aboriginal people, lands and resources are thought of as inextricably connected to the

⁹⁷ Margaret Moore, *The Ethics of Nationalism*, p.176.

⁹⁸ Arthur J. Ray, *I Have Lived Here Since the World Began*, p.1.

people; indeed, this connection can be so strong, and of such a nature, that it goes into forming collective and individual identities.”⁹⁹ For both of these scholars, the presence of a particular connection to specific lands may serve as a defining feature of an aboriginal identity.

Moreover, the presence of particular traits approach to conceptualizing aboriginality may take the view that, “a community might be thought to be indigenous [aboriginal] because its members [...] have particular religious or spiritual practices in common [or may be] demonstrated by the presence of political centrality and leadership, practiced without cessation over a given length of time.”¹⁰⁰ In this case, a collection of shared cultural, spiritual or political practices would make up the constitutive traits that allow us to classify a group as aboriginal.

Practices are not the only way to base a conception of aboriginality on spiritual, cultural or political considerations. Alfred’s presentation of this collective identity is based on the notion of a commitment to a particular normative vision which includes these aforementioned considerations. According to Alfred, a set of specific normative values, beliefs and principles distinguish aboriginality. This scholar employs this formulation in his articulation of what constitutes an authentic pan-indigenous identity. He describes how a key feature of this identity is a commitment to a Native American political tradition which is characterized by the values of respect, balance and harmony.¹⁰¹ While Alfred acknowledges the existence of a vast diversity of traditions and practices within the North American aboriginal community, he accounts for this pluralism by

⁹⁹ Gordon Christie, “Aboriginal Resource Rights after *Delgamuukw* and *Marshall*,” p.241.

¹⁰⁰ Bruce Granville Miller, *Invisible Indigenes*, p.52.

¹⁰¹ Taiaiake Alfred, *Peace, Power, Righteousness*, p. xvi.

explaining that, “[t]here may be 500 different ways of expressing these values, but in our singular commitment to them we find what is perhaps the only pan-Indian commonality.”¹⁰² From Alfred’s perspective, a commitment to these values is one element that all aboriginal people share and so forms the basis of an aboriginal identity. This commitment also acts as a marker of distinctiveness. Alfred argues that this political tradition differs from other political traditions not solely as a result of the inclusion of these values (for other political traditions may advocate a similar commitment to similar values), but in “the prioritization of those values, the rigorous consistency of its principles with those values, and the pattern and procedures of government.”¹⁰³ Consequently, from this perspective aboriginality can be understood as rooted in a commitment to these values, principles and beliefs and in the prioritization of this commitment.

Along the same lines, a collective identity that fits into the presence of traits approach may also be characterized by citing special obligations or associative duties. On this account, the question of collective identity is settled by inquiring into whether a person shares the associative duties that inhere in membership in a particular group. In terms of aboriginality, a number of scholars advance that this collective identity entails a particular set of associative duties related to land and the natural world. These scholars generally characterize aboriginal peoples as stewards of certain lands and territories. Darlene Johnston states that aboriginal people “view their relationship with the land as central to their collective identity and well-being. Within the native world view, people

¹⁰² Taiaiake Alfred, *Peace, Power, Righteousness*, p. xvi.

¹⁰³ Taiaiake Alfred, *Peace, Power, Righteousness*, p.24.

and land and culture are indissolubly linked.”¹⁰⁴ She advances that “Native people regard themselves as trustees of the land for future generations.”¹⁰⁵ Here, Johnston cites an associative duty related to the land and the unborn as the basis for her articulation of this collective identity.

Ovide Mercredi and Mary Ellen Turpel include a similar notion of a special obligation in their characterization of aboriginality. “Our identities and rights as distinct peoples,” they explain, “flow from our relationship to the land, as do our Aboriginal title and treaty rights.”¹⁰⁶ They go on to characterize this relationship to the land as an associative duty of care which aboriginal peoples share.

We have always been here on this land we call Turtle Island, on our homelands given to us by the Creator, and we have a responsibility to care for and live in harmony with all of her creations. We believe that the responsibility to care for this land was given to us by our Creator, the Great Spirit. It is a sacred obligation, which means the First peoples must care for all of Creation in fulfilling this responsibility. We have carried this responsibility since long before the immigrants came to our homelands.¹⁰⁷

Mercredi’s and Turpel’s presentation of this duty of care reveals the subjects of this obligation (that is, aboriginal peoples), the object of this obligation (that is, the land) and the source of this obligation (the Creator and, more importantly for our purposes here, the fact that a group of individuals take on this responsibility as their own). Like Johnston, these scholars’ conception of aboriginality includes the notion of a set of associative

¹⁰⁴ Darlene Johnston, *Native Rights as Collective Rights*, p.32.

¹⁰⁵ Darlene Johnston, *Native Rights as Collective Rights*, p.32.

¹⁰⁶ Ovide Mercredi and Mary Ellen Turpel, *In the Rapids*, p.33.

¹⁰⁷ Ovide Mercredi and Mary Ellen Turpel, *In the Rapids*, p.16. For similar characterizations of aboriginal responsibilities to the environment also see Lawrence Courtoreille, “The Legal Origins” p.137; Rhiannon Morgan, “Advancing Indigenous Rights at the UN,” p.492-493; Leory Little Bear, “Aboriginal Paradigms” and Gordon Christie, “Aboriginal Resource Rights.”

duties which is unique to the people who bear this collective identity and is cited as a constitutive element in these scholars' definitions of this collective identity.

Samuel Scheffler sheds some light on the philosophical moorings anchoring the concept of an associative duty and highlights a number of the characteristics of such a duty. "[C]ommon-sense morality," he explains, "holds that there are additional and often much greater responsibilities that the members of significant social groups and the participants in close personal relationships have to each other. It is these additional responsibilities, which may be called 'associative duties'."¹⁰⁸ This treatment of associative duties roots their justification in common-sense morality and then points to the fact that some relationships are capable of placing individuals under special obligations that, at times, override these individuals' other obligations (for example their general obligations to all of humanity).

Once a definition is provided, Scheffler outlines that one of the consequences of holding these additional, special responsibilities is,

to be disposed in contexts which vary depending on the nature of the relationship, to see that person's needs, interests, and desires as, in themselves, providing me with presumptively decisive reasons for action, reasons that I would not have had in the absence of the relationship. By 'presumptively decisive reasons' I mean reasons which, although they are capable in principle of being outweighed nevertheless present themselves as considerations upon which I must act.¹⁰⁹

The role that presumptively decisive reasons play in a person's motivations to act (or not act as the case may be) is a serious consequence that stems from Scheffler's explanation of associative duties. His discussion is important for the purpose at hand because it links together the idea of special responsibilities and group membership. He clarifies that the

¹⁰⁸ Samuel Scheffler, *Boundaries and Allegiances*: p.48.

¹⁰⁹ Samuel Scheffler, *Boundaries and Allegiances*, p.100.

“claim is not that, in having reason to value our relationship, I have reason to perform an act which, if performed, will generate responsibilities. The claim is rather that, to value our relationship is, in part, to see myself as having such responsibilities.”¹¹⁰

“Accordingly, the seriousness with which one takes one’s special responsibilities may be seen as both a measure of one’s moral virtue and a mark of one’s success in avoiding the feeling of rootlessness and isolation.”¹¹¹ From this view, the recognition and discharge of special obligations become agents that bind – a solution for the rootlessness and isolation Sheffler speaks of. So, for example, a sense of group membership may be generated from the recognition that a group of people are influenced by the same set of presumptively decisive reasons and the recognition that a group of people share in the attempt to discharge certain associative duties. The role that these associative duties play in reflecting a sense of group boundedness is a form of identity formation and maintenance. In this way, associative duties may form the basis of a particular approach to understanding a collective identity. The question “who are we” is answered, to a significant degree, by reference to the set of associative duties we hold in common.

According to Miller, the presence of certain traits approach also includes constitutive elements that go beyond associative duties, descent, territoriality, shared cultural, spiritual, and political practices/values. Conceptions of aboriginality under this approach may be based on less concrete considerations such as a group’s relationship to time and space. This explains, to some degree, why certain scholars argue that

¹¹⁰ Samuel Scheffler, *Boundaries and Allegiances*, p.104.

¹¹¹ Samuel Scheffler, *Boundaries and Allegiances*, p.83.

aboriginality is characterized by “time depth, antiquity, and primordialism.”¹¹² In other words, this collective identity is defined vis-à-vis a group’s relations to time and space.

Niezen employs many of these aforementioned traits in his conceptualization of aboriginality. He takes the position that this concept “is based on notions of family and community, ancestral wisdom, permanent homelands, and cultural durability.”¹¹³ This underpins Niezen’s contention that aboriginality “refers to a primordial identity, to people with primary attachments to land and culture, “traditional” people with lasting connections to ways of life that have survived “from time immemorial.”¹¹⁴ Here, a number of traits – including descent, connection to land, shared practices and values, particular relations to time and space – come together to form Niezen’s definition of aboriginality. For his part, Alfred also employs a number of these traits to construct his definition of this collective identity. He advances that aboriginal peoples “themselves have long understood their existence as peoples or nations [...] as framed around axes of land, culture and community.”¹¹⁵ He goes on to explain that “[b]uilding on this notion of a dynamic and interconnected concept of Indigenous identity constituted in history, ceremony, language and land, we consider relationships (or kinship networks) to be at the core of an authentic Indigenous identity.”¹¹⁶ Given the manner in which these articulations are constructed, they fit into and are prime examples of how the presence of particular traits approach, outlined in this section, functions.

¹¹² Bruce Granville Miller, *Invisible Indigenes*, p.53.

¹¹³ Ronald Niezen, *The Origins of Indigenism* p.xvi.

¹¹⁴ Ronald Niezen, *The Origins of Indigenism* p.3.

¹¹⁵ Taiaiake Alfred and Jeff Corntassel, “Being Indigenous,” p.608.

¹¹⁶ Taiaiake Alfred and Jeff Corntassel, “Being Indigenous,” p.609.

Absence of Particular Traits Approaches

The presence of particular traits approach may also work in the reverse. In other words, aboriginality may be primarily characterized by the absence of particular traits. Miller cites a number of traits that are used by scholars that employ this version of aboriginality. Accordingly, groups might be recognized as aboriginal,

[b]ecause ancestors of members did not practice one of the world religions, especially Christianity, [...] were not organized around Western values and practices, in particular Enlightenment values of universalism, secularism, rationalism and subsequent modernist traits of bureaucratization, centralization of authority, and so on; because they are not minorities, ethnic groups, peasants, or urban proletariat.¹¹⁷

Flanagan presents just such a portrait of aboriginal peoples. His conception of aboriginality is constructed around what he believes this collective identity does not entail. Consequently, he argues that aboriginal peoples were not civilized¹¹⁸, lack sovereignty and do not meet the criteria of nationhood. In terms of civilization he puts forward that an absence of intensive agricultural practices, urbanization, a division of labour, adequate intellectual achievements (such as record-keeping and writing), technological sophistication and a state system demonstrate that aboriginal societies did not reach the level or advancement required in order to be classified as civilized.¹¹⁹ In terms of sovereignty, Flanagan contends that “sovereignty in the strict sense exists only in

¹¹⁷ Bruce Granville Miller, *Invisible Indigenes*, p.52-53.

¹¹⁸ Flanagan is careful to point out that he is not employing the term ‘civilized’ in a normatively critical sense. He explains that “the use of the term [civilization] here is a factual, not a normative concept. It describes a certain type of social organization that has gradually emerged and spread around the entire world. It is not that savagery is bad and civilization is good; both are stages of social development that have arisen sequentially in the historical process.” Tom Flanagan, *First Nations? Second Thoughts*, p.34.

¹¹⁹ Tom Flanagan, *First Nations? Second Thoughts*, p.33.

the organized states characteristic of civilized societies.”¹²⁰ From his view, since aboriginal societies were uncivilized sovereignty could not inhere in them. Lastly, in terms of nationhood, Flanagan advances that the standard notion of the term “nation” includes criteria such as an adequate level of civilization, significance (meaning the existence of a significant population and landmass), control over territory, solidarity and sovereignty.¹²¹ He argues that aboriginal societies do not satisfy these aforementioned criteria for nationhood and concludes that “the objective attributes of Indian bands are far from what nations are generally understood to be.”¹²² In sum, Flanagan’s conception of this collective identity hinges on a presentation of that which aboriginal peoples lack. From this view, to be aboriginal means to lack a certain degree of civilization, sovereignty and nationhood.

Richard J. Perry also provides an example of an absence of traits approach to conceptualizing aboriginality. He advances that this collective identity is coterminous with the absence of a state. He puts forward the idea that “the term “indigenous peoples” refers [...] to local populations that existed in place before a state system incorporated them.”¹²³ For Perry, it is the absence of a modern state that plays a decisive role. Perry’s definition of aboriginal peoples underpins his explanation of the purpose of his work. He states that his work explores “what happens when people whose ancestors have lived for centuries in small, autonomous societies find themselves encompassed within state

¹²⁰ Tom Flanagan, *First Nations? Second Thoughts*, p.59.

¹²¹ Tom Flanagan, *First Nations? Second Thoughts*, p.84-86.

¹²² Tom Flanagan, *First Nations? Second Thoughts*, p.97.

¹²³ Richard J. Perry, *From Time Immemorial*, p.8.

systems.”¹²⁴ Here, the question of aboriginality is partially answered by Perry by making reference to the absence of such a system.

Relational Approaches

An approach that relies on either the presence or absence of certain traits in the determination of aboriginality is not the only way to go about conceptualizing this collective identity. Using Thomas Hylland Eriksen’s work on ethnicity and nationalism Miller discusses an alternative approach to conceptualizing collective identity and aboriginality which he terms a relational approach.¹²⁵ In order to examine the way in which this kind of approach functions it is first necessary to turn to Eriksen’s work. Eriksen advances that “group identities must always be defined in relation to that which they are not – in other words, in relation to non-members of the group.”¹²⁶ “For ethnicity to come about,” he argues, “groups must have a minimum of contact with each other, and they must entertain ideas of each other as being different from themselves.”¹²⁷ This leads him to conclude that, “ethnicity is essentially an aspect of a relationship, not a property of a group.”¹²⁸ This treatment of ethnicity is significant here because for Eriksen aboriginality is a species of ethnicity.¹²⁹ He offers the following characterization of this collective identity:

¹²⁴ Richard J. Perry, *From Time Immemorial*, p.xi.

¹²⁵ Bruce Granville Miller, *Invisible Indigenes*, p.37.

¹²⁶ Thomas Hylland Eriksen, *Ethnicity and Nationalism*, p.9-10.

¹²⁷ Thomas Hylland Eriksen, *Ethnicity and Nationalism*, p.10-11.

¹²⁸ Thomas Hylland Eriksen, *Ethnicity and Nationalism*, p.12.

¹²⁹ Thomas Hylland Eriksen, *Ethnicity and Nationalism*, p.13-14.

“Indigenous populations” is a blanket term for aboriginal inhabitants who are politically non-dominant and who are not, or only partially, integrated into the dominant nation-state. This means that their language, customs, political practices and/or livelihood must be different from that championed by the state. Indigenous populations are defined by their being acknowledged as such by international organizations such as IWGIA (International Work Group of Indigenous Peoples) in Copenhagen. [...]The concept “indigenous people” is not an accurate analytical one, but one drawing on broad family resemblances and contemporary political issues.¹³⁰

There are two central items here that characterize Eriksen’s relational approach to aboriginality. First, aboriginality is not defined by a catalogue of identifiable traits or properties. The substantive contents of this collective identity are descriptors or markers of a particular situated position occupied by a group in relation to another group. Stated differently, the substantive contents are the relations that exist between two groups. Accordingly, Eriksen advances that aboriginal peoples are “politically non-dominant” and that their culture is not the one “championed by the state”. In both cases the important element is the subordinate position (politically and culturally) of one group in its relation to another (that is, a group’s situated position). Along the same lines, part of what it entails to be a bearer of this collective identity includes recognition by others (here, Eriksen cites international organizations such as the IWGIA) of actual occupancy of this particular situated position. Again, the position of one group relative to another is the significant factor in this articulation of aboriginality.

Even when Eriksen refers to particular traits by indicating that there are a list of features that are shared by all (if not most) aboriginal peoples¹³¹ these features work to emphasize a relational position rather than present a checklist of objective traits. His list

¹³⁰ Thomas Hylland Eriksen, *Us and Them in Modern Societies*, p.5.

¹³¹ Thomas Hylland Eriksen, *Us and Them in Modern Societies*, p.6.

includes, “(i) territorial claims not respected by governments; (ii) threats of “cultural genocide”, that is, enforced assimilation or physical extermination; (iii) a way of life requiring special measures in economic, political and/or educational matters.”¹³² An examination of this list reveals that the position of aboriginal peoples (in terms of access to and title over land, cultural difference and security, and rights) relative to the states in which they live is the central consideration. Eriksen’s conceptualization of aboriginality speaks to and of a particular situated position rather than any specific constitutive attributes that a group of individuals share.

For his part, Tim Schouls advances a relational conception of aboriginality though he uses the label ‘identification approach’. Employing Eriksen’s work on collective identity, he argues that “the identification approach to identity defines ethnicity in terms of particular kinds of relationships within and between groups.”¹³³ For Schouls, aboriginality is also a species of ethnicity. With this connection made, he argues that “because ethnicity is defined as an aspect of relations, Aboriginal identity only makes sense in the context of the presence of a non-Aboriginal “other.” [...] Seen this way, all Aboriginal peoples are products of the interrelationships between Euro-Canadian settlers and the original occupants of the land.”¹³⁴ Specifically, for Schouls, aboriginality “carries with it the idea that the group of people to whom the term applies were subordinated by the settler state, treated as outsiders, and regarded as inferiors.”¹³⁵ Schouls points out that a relational approach to aboriginality is concerned with both inter-group and intra-group

¹³² Thomas Hylland Eriksen, *Us and Them in Modern Societies*, p.6.

¹³³ Tim Schouls, *Shifting Boundaries*, p.51.

¹³⁴ Tim Schouls, *Shifting Boundaries*, p.51.

¹³⁵ Tim Schouls, *Shifting Boundaries*, p.51.

relations. He explains that “being Aboriginal is also understood to be a product of internal relations. The key here is identification.”¹³⁶ All of this leads Schouls to conclude that:

Aboriginal identity is said to exist because persons who happen to share ancestry, historical elements of culture and politics, and experiences of colonization decide that it is important to be members of the same communities. Aboriginal communities are then understood to use their rules of descent and elements of traditional culture and politics to develop points of identification within the community and boundaries between group members and the larger Canadian society. [...]It is in the light of this ongoing identity development that current Aboriginal aspects of culture and nation are situated. Those who employ the identification approach see them less as single and universal sources of Aboriginal identity than as particular expressions of that identity crafted to meet and repel external pressure applied against the boundaries of Aboriginal communities.¹³⁷

Similar in kind to the way in which Eriksen employs national and cultural elements, Schouls advances that these aspects are more fruitfully understood as tools of boundary maintenance. In other words, for Schouls cultural and national elements are constitutive elements of aboriginality not because aboriginality inheres in them, but because they serve as points of identification for the group allowing the members of the group to police the boundaries of their collective identity. Thus, these elements are instrumental in the sense that they shape and are shaped by the dynamics of inter-group and intra-group relations. Stated differently, aboriginality does not inherently rely on any particular cultural or national element (or set of elements). He sums up this last point quite well, stating that:

Conspicuously absent in this formulation of identity is any formal requirement that identification by individuals with their Aboriginal communities must be based on shared attributes of culture or nationhood. Of course, Aboriginal individuals may share one or more attributes of culture or nationhood, and these attributes

¹³⁶ Tim Schouls, *Shifting Boundaries*, p.52.

¹³⁷ Tim Schouls, *Shifting Boundaries*, p.53-54.

may well serve to differentiate them from non-Aboriginal people. But the point is that the character of the relationship and the strength of the boundaries between aboriginal communities and the Canadian state need not by definition be connected to the resiliency of cultural and national differences.¹³⁸

In her work, Green presents a relational approach to conceptualizing aboriginality that is similar in spirit to Eriksen's and Schouls' views. She puts forward that "Aboriginal identity exists as it is, not only because of precolonial practices, but also in relation to and because of the colonizer."¹³⁹ Green goes on to advance that aboriginal rights and the term aboriginal itself are products of the relationship between aboriginal peoples and the colonial powers. She explains that "Aboriginal Rights are also relational: they exist only in conditions of colonization, for it is in the unequal imposed relationship of colonialism that Aboriginality emerges as a political distinction from others. They are rights claimed against the colonial state, by virtue of political and cultural precedence to the colonial state, without which there would be no need for the concept "Aboriginal" nor for the rights guarantees."¹⁴⁰ From this view, a constitutive element of this collective identity is the relations that were created and maintained by aboriginal and non-aboriginal peoples. In other words, to be aboriginal means to be in a particular (Green would say colonial) web of relations with other non-aboriginal others.

Patricia K. Wood's discussion of the meaning of nativeness (or aboriginality) would be an example of an approach that falls into the relational category. In this case, this concept is characterized by the oppositions it denotes. For example, Wood explains that in Canada "the term 'First Nations' directly addresses and challenges the 'Two

¹³⁸ Tim Schouls, *Shifting Boundaries*, p.52.

¹³⁹ Joyce Green, "Toward Conceptual Precision" p.235.

¹⁴⁰ Joyce Green, "Toward Conceptual Precision" p.231.

Founding Nations' political mythology of the creation of Canada, and emphasizes the political organization and sovereignty of the peoples who inhabited North America before colonizers arrived."¹⁴¹ Along the same lines, "'Native' (with a capital 'N' here for distinction) is part of a similar set of categories between those who were born outside a given country (immigrants), those born there ('native'), and those claiming a collective, historical birth ('Native') preceding the colonial era."¹⁴² In this instance, aboriginality not only entails all of these oppositions but it is defined by them.

This chapter presented a tripartite typology of the ways scholars approach the conceptualization of aboriginality. This typology organizes the various conceptualizations of aboriginality in the literature into three broad categories. Each category includes conceptualizations of this collective identity that are constructed around either the presence of traits, the absence of traits or inter/intra group relations. This survey is not meant to be an exhaustive typology (though it does include many of the prominent scholars engaged in the study of aboriginal politics in Canada) but is intended to demonstrate that, depending on which approach is employed and how it is used, when scholars refer to aboriginality there is far from any guarantee that they are advancing the same understanding of this collective identity.

¹⁴¹ Patricia K. Wood, *Aboriginal/Indigenous Citizenship*, p.371.

¹⁴² Patricia K. Wood, *Aboriginal/Indigenous Citizenship*, p.372.

CHAPTER FOUR

A CASE FOR THE INTERACTIONS BASED APPROACH

The presentation in the previous chapter demonstrates that aboriginality can and does have a plethora of possible meanings and that a significant degree of this definitional multiplicity results from the approach used to conceptualize this collective identity. This, however, is not the only implication of the existence of different ways of conceptualizing aboriginality. The existence of these differing approaches raises the question of which approach is most appropriate if one aims to conduct an investigation of aboriginality and the Canadian jurisprudence on aboriginal rights (that is, the investigation pursued in this dissertation). In an effort to address this question, chapter four traces a number of the drawbacks that stem from the usage of the presence of traits approach, the absence of traits approach and the relational approach. The chapter advances that a modified relational approach – what I have termed the interactions based approach – is the most appropriate way to conceptualize this collective identity for the purposes of this dissertation. A functionalist argument is put forward in order to make this case. While chapter four takes an explicit position regarding the issue of which approach to conceptualizing aboriginality is best in this specific instance it does not make any concrete claims regarding which approach should be used in the study of aboriginal politics, broadly speaking. Even though the discussion outline in this chapter is not a definitive case for a particular approach to conceptualizing this collective identity in a general sense, it is a contribution, of sorts, to this broader debate.

Drawbacks of the Presence of Traits and Absence of Traits Approaches

A major criticism of both the presence and absence of traits approaches (in what follows these two approaches are considered in tandem) is that these approaches tend to

present collective identities as settled or fixed. This leaves them open to the charge of essentialism and vulnerable to a variety of problems that plague an essentialist conception of collective identity. In her work on essentialism, Diana Fuss describes how “[e]ssence is most commonly understood as a belief in the real, true essence of things, the invariable and fixed properties which define the “whatness” of a given entity.”¹⁴³ Fuss goes on to advance that,

essentialism is typically defined in opposition to difference; the doctrine of essence is viewed as precisely that which seeks to deny or to annul the very radicality of difference. The opposition is a helpful one in that it reminds us that a complex system of cultural, social, psychical, and historical differences, and not a set of pre-existent human essences, position and constitute the subject.¹⁴⁴

What is of import here is the notion that building a conceptualization of identity on an essentialist foundation makes it difficult to account for internal diversity as well as important contingent constitutive factors (in this case, Fuss points to social, psychical, and historical factors). S. P. Mohanty expresses a similar view of essentialist conceptions. He argues that “the essentialist view would be that the identity common to members of a social group is stable and more or less unchanging.”¹⁴⁵ “Opponents of essentialism,” Mohanty explains, “often find this view seriously misleading, since it ignores historical changes and glosses over internal differences within a group.”¹⁴⁶ Like Fuss, Mohanty is highlighting the way in which an essentialist conceptualization of identity posits a fixed identity and obfuscates important contingent factors that shape and

¹⁴³ Diana Fuss, *Essentially Speaking*, p.xi.

¹⁴⁴ Diana Fuss, *Essentially Speaking*, p.xii. In her work Fuss is not making the argument that essentialism is “bad” per se. Her focus is on how essentialism is employed and the consequences of this deployment. For a detailed outline of her project see the introductory chapter of *Essentially Speaking*.

¹⁴⁵ S. P. Mohanty, “The Epistemic Status of Cultural Identity,” p.30.

¹⁴⁶ S. P. Mohanty, “The Epistemic Status of Cultural Identity,” p.30.

sustain collective identities. For Mohanty, the cost of attempting to create this unity is the exclusion of these contingent factors and any significant intra-group differences both of which result in an inability to produce an adequate account of collective identity. He goes further, though, pointing to the futility of attempting to identify the essence or ‘whatness’ of a social group’s collective identity.

The constructed nature of experience shows why there is no guarantee that my experiences will lead me to some common core of values or beliefs that link me with every other member of my cultural group. Our experiences do not have self-evident meanings, for they are in part theoretical affairs, and our access to our remotest personal feelings is dependent on social narratives, paradigms, and even ideologies.¹⁴⁷

Here, Mohanty is arguing that not only are there serious drawbacks to providing an essentialist account of collective identity but the attempt itself is doomed to fail a priori given the nature of human cognition. For this scholar, the role played by social factors in the formation and maintenance of identity will make it difficult for a collective to settle on the ‘whatness’ of its identity and will ensure that even if such agreement could be reached it would only be tentative and highly susceptible to change. In other words, for Mohanty, no objective truth about the essence of a particular group’s collective identity exists (or if such a truth exists its knowability is in doubt) making essentialist accounts of collective identity highly problematic.¹⁴⁸

¹⁴⁷ S. P. Mohanty, “The Epistemic Status of Cultural Identity,” p.35.

¹⁴⁸ Though Mohanty is critical of an essentialist conception of collective identity he is not advancing that an anti-essentialist position of the postmodern variety is the way to proceed. In fact, he puts forward that structuring the debate over identity as if it was an either/or situation obscures our ability to produce a coherent and useful conception of collective identity. For Mohanty, a middle position, what he calls a post-positivist realist position (that is, viewing collective identity as a theoretical lens through which one interprets the social and material world) is the best way to proceed. He contends that such a position takes into account the contingent nature of collective identities while at the same time recognizing that members of identity groups may occupy similar social locations and so be subject to common experiences (“The Epistemic Status of Culture”). For a similar post-positive realist position on collective identity see Paula Moya, “Postmodernism, “Realism,” and the Politics of Identity,” and for an interesting critique of Mohanty see Brent R. Henze, “Who Says Who Says?”

Susan Pell, in her work on collective identity, concurs with Fuss and Mohanty on a number of counts. She argues that “[e]ssentialist explanations [...] provide the basis for naturalizing the group’s identity, suggesting that change is not an option because the behaviour is rooted in part in human essence.”¹⁴⁹ In terms of significance of these contingent constitutive factors, Pell advances that the “final outcome of this logic is a limited and fixed understanding of the world that masks the political and social power.”¹⁵⁰ From this view, contingent constitutive factors and power relations are connected. As a result, attempts to change the latter would seem to require sufficient attention to the former.

Pell’s work highlights a second serious consequence related to an inability to account for diversity and contingency. She puts forward that,

accompanying an essentialist identity politic are assumptions of universalism and fixity that can function to exclude and deny access to the identity and community based on definitional and behavioural disparities. This aspect of essentialism makes it possible for some people to become displaced through the tightening of the definition for the group’s membership, identity, and community.”¹⁵¹

From Pell’s view, advancing an essentialist conception of a collective identity may work to eliminate the existing internal diversity of a particular group. In the process, certain individuals, who may self-identify as members of a group, may be excluded.

In this way, Pell is exposing that an essentialist conception not only generates a number of theoretical problems but may also seriously impact individuals’ lives vis-à-vis their exclusion from particular groups. This impact may come in many forms. An obvious cost associated with this type of exclusion is denial of real material benefits

¹⁴⁹ Susan Pell, “Inescapable Essentialism.”

¹⁵⁰ Susan Pell, “Inescapable Essentialism.”

¹⁵¹ Susan Pell, “Inescapable Essentialism.”

associated with group membership. This may include such things as financial support, the sharing of skills and expertise and many other material benefits that are part and parcel of group membership. In terms of the non-material consequences of this type of exclusion, one needs only look to the literature on the importance of group membership (especially the literature on identity conferring groups) in order to appreciate the serious consequences that result from this type of exclusion. Daniel Weinstock, for example, advances the following:

Were I stripped of my membership in an identity-conferring group, I would in some sense be deprived of the reference points and self-understandings around which I organize my everyday existence. [...]Some memberships, that is, provide us with frameworks within which we lead our lives, rather than pointing towards goals that we set for ourselves in the leading of our lives.¹⁵²

This leads Weinstock to conclude that the “[l]oss of membership in an identity-conferring group [...] is an assault on the very person underlying all possible calculations of benefit and cost.”¹⁵³ This discussion is important for our purposes here because it brings to the fore that serious material and non-material costs that may result from the type of exclusion under consideration.

The general concerns raised by these scholars regarding the implications of essentialist approaches to conceptualizing collective identity are incorporated by a number of scholars working on aboriginality and aboriginal politics. In what follows I examine Schouls’ work on Canada’s aboriginal peoples and Barcham’s work on the Maori of New Zealand in order to expose the way in which these general problems

¹⁵² Daniel Weinstock, “Beyond Exit Rights,” p.235.

¹⁵³ Daniel Weinstock, “Beyond Exit Rights,” p.235.

associated with essentialist conceptualizations of collective identity manifest themselves in specific discussions about aboriginality.¹⁵⁴

For his part, Schouls is critical of those scholars that base their characterizations of aboriginality on the notion that “identity is used to refer to what is unique, peculiar or specific to a community and distinguishes it from others.”¹⁵⁵ He goes on to explain that in these cases, “the most commonly held assumption [...] is that individual identity arises ultimately from some sort of cultural or national identity.”¹⁵⁶ According to Schouls, this sort of approach to identity produces conceptualizations of aboriginality where “elements of Aboriginal identity are said to be found in the attributes associated with Aboriginal culture and nationhood.”¹⁵⁷ Stated somewhat differently, these approaches he explains “assume that individuals act because of who they are, and who they are flows from the attributes that they share with others in similar cultural and national categories.”¹⁵⁸

Schouls’ major concern with this type of approach to aboriginality is that it “assumes that for Aboriginal persons at least the terms of their identities are largely settled. [...]The object of theoretical interest then lies in analyzing how these attributes are employed by Aboriginal persons as a basis for changing the existing rules between themselves and non-Aboriginal society.”¹⁵⁹ For this scholar of aboriginal politics, then, a

¹⁵⁴ For an American example see Kathleen J. Fitzgerald’s work on the reclamation of Native American identity. Like Schouls and Barcham she argues that identity is “something that is fluid, constantly being negotiated, constructed, and reconstructed.” (Kathleen J. Fitzgerald, “*Beyond White Ethnicity*,” p.16).

¹⁵⁵ Tim Schouls, *Shifting Boundaries*, p.3.

¹⁵⁶ Tim Schouls, *Shifting Boundaries*, p.8.

¹⁵⁷ Tim Schouls, *Shifting Boundaries*, p.44.

¹⁵⁸ Tim Schouls, *Shifting Boundaries*, p.8.

¹⁵⁹ Tim Schouls, *Shifting Boundaries*, p.48. Alfred’s presentation of this collective identity in his work, *Heading the Voices of our Ancestors*, is a good example of what Schouls is describing here. Alfred

primary consequence of employing these approaches is that they presuppose a settled definition of aboriginality. As a consequence, Aboriginal/non-Aboriginal politics is reduced to efforts to (re)write the rules of engagement in order to more effectively accommodate this settled collective identity. Schouls cautions that this is quite problematic. “Unwittingly,” he says, “this approach precludes from serious discussion the fundamental and prior question of how and under what terms Aboriginal persons adopt the attributes associated with culture and nation as the principal markers of their identities in the first place.”¹⁶⁰ The end result of eliminating this line of inquiry is that this approach to aboriginality promotes a view of this collective identity that is overly tethered to the past, leaving little room for discussions about what aboriginality has meant and what it might come to mean. A significant part of Schouls’ critique of the way in which scholars have traditionally gone about conceptualizing aboriginality incorporates a number of the problems of essentialism discussed above. So, for example, Schouls demonstrates his concern about the fact that this type of approach presents aboriginality as if it were a settled identity, about how this type of approach directs scholarly attention away from the ways in which this identity has changed and how it might change (that is, its evolutionary trajectory and potential) and in the process about how this type of approach impacts the way in which we go about theorizing and engaging in aboriginal politics. Schouls advances that instead of relying on essentialist conceptions of aboriginality that base this collective identity on the presence of certain cultural and national attributes, aboriginality ought to be conceptualized in a way that incorporates

explains that: “In Native societies the various cultural, spiritual and political affiliations which comprise ethnicity are at root primordial and fixed, whereas in the general population there is a transcendence of ethnic identity.” P.14.

¹⁶⁰ Tim Schouls, *Shifting Boundaries*, p.48.

diversity, its evolutionary trajectory and potential. He argues that “[i]t is this dimension of flux and process, of ambiguity and complexity, normally associated with relationship building that is missing from the analyses.”¹⁶¹

Along the same lines, Barcham’s position on approaching the conceptualization of aboriginality also includes serious concerns about employing the logic of essentialism. Her concerns are similar in kind to those expressed by Fuss, Mohanty and Pell regarding the inability of essentialist approaches to adequately account for change and intra-group diversity. According to Barcham, serious repercussions result when “Indigeneity is taken as a ‘natural’ and unproblematic category where in reality it is, as are all identities, socially constructed and historically contingent.”¹⁶² This scholar argues that such a view proposes that “bodies (be they concrete or abstract, singular or plural) exist in an ahistorical essentialism wherein reality is collapsed into a timeless present such that what is now is the same as what was, which in turn is the same as what will be.”¹⁶³ This, in turn, “exclude[es] any chance of recognizing notions of social transformation and change.”¹⁶⁴ From Barcham’s view, the very logic of essentialism negates the inclusion of processes of social transformation and change, which are two constitutive aspects of all collective identities. Furthermore, Barcham points out that an essentialist approach works to deny the internal differences that mark the membership of a particular group resulting in the marginalization and/or exclusion of some individuals. Barcham builds this

¹⁶¹ Tim Schouls, *Shifting Boundaries*, p.48.

¹⁶² Manuhua Barcham, “(De)Constructing the Politics of Indigeneity,” p.140.

¹⁶³ Manuhua Barcham, “(De)Constructing the Politics of Indigeneity,” p.138.

¹⁶⁴ Manuhua Barcham, “(De)Constructing the Politics of Indigeneity,” p.138.

argument vis-à-vis a discussion of the Maori – a discussion which is cited at length in what immediately follows. She states that:

The atemporality of such official recognitions of difference has led to the reification of certain neotraditional Maori organizational forms to a privileged position wherein they have constituted the definitional means by which Maori are identified as ‘authentically’ indigenous. While this process has led to the creation of a voice for ‘authentic’ indigenous claims, it has also led to the coterminous silencing of the ‘inauthentic’ and the alienation of many Maori people. [...]The prioritization of identity [an essentialized conception of identity] over difference thus acts to restrict the possible forms that identity can take, as identification becomes a process structured around the recognition of fixed selves – wherein lived experience is devalued as subordinate to the idea of an ahistorical ideal of community.¹⁶⁵

In the case of the Maori, Barcham is highlighting the way in which an essentialized conceptualization of this group’s collective identity leads to the silencing and exclusion of those Maori who do not or cannot identify with the ‘authentic’ Maori way of being (which, in this instance, is the version of this collective identity put forward by the neotraditionalists).¹⁶⁶ It also highlights the possible ramifications of adopting this type of conception –namely, ignoring or dismissing real lived experiences of individuals who hold a collective identity (that is, empirical reality) in favour of an ahistorical ideal. This discussion is of import here because it outlines how the logic of essentialism can produce exclusion, marginalization and lead to empirically weak analyses.

Both Schouls and Barcham present their concerns about employing an approach to conceptualizing aboriginality that relies on the logic of essentialism – approaches like the presence and absence of traits approaches. These concerns include the risk of overlooking the fluid and contextual nature of collective identity, the generation of

¹⁶⁵ Manuhua Barcham, “(De)Constructing the Politics of Indigeneity,” p.138-39.

¹⁶⁶ For a Canadian example of a neotraditionalist position on aboriginality see Taiaiake Alfred, *Peace, Power, Righteousness*.

instances of exclusion and marginalization, the existing power relations between and within groups and an inability to focus on how a collective identity has evolved, what it may become and how all of this impacts the study of the way in which members of a particular identity group interact with each other and non-members.

Drawbacks of the Relational Approaches

Conceptualizing a collective identity around the presence or absence of traits vis-à-vis the logic of essentialism is not the only way to run into theoretical and practical trouble. Relational approaches generate three problems when employed to conceptualize collective identity. The first problem associated with the use of relational approaches is that, if the logic of these approaches is extended, their object of inquiry (that is, the collective identity) is theorized right out of existence. Stated differently, if a collective identity is defined vis-à-vis one group's relationship to another group, a definition of the former group's collective identity is only intelligible as long as the relations continue to exist. This leads to the conclusion (some would say bizarre and logically incoherent conclusion) that aboriginality would cease to have any meaning if the existing set of relations between aboriginals and non-aboriginals were substantively or completely altered. Stated differently, aside from being a referent of a particular set of inter group relations, aboriginality means very little to nothing. The second problem with these approaches is that, even if this logical coherence problem is left aside, relational approaches often present collective identity as a purely instrumental phenomenon. In these instances, collective identity is portrayed as a means to achieve particular political interests and is valuable only insofar as it facilitates this endeavor. From this view, collective identity is a descriptor for the kinds of politics pursued by a group not the nature of the group engaged in the political activity. The last problem that is associated

with relational approaches is that they tend to over-determine the role played by non-group members in collective identity formation and maintenance.

In his work, Miller discusses the first implication that arises from the use of a relational approach. He explains that “[i]n this sense [that is, aboriginality approached in a relational fashion] the dilemma over how to define the term could be said to be resolved because an argument can be made that there really were no indigenous people prior to European contact with the ancestors of the present-day indigenes.”¹⁶⁷ Here, Miller advances that a relational approach identifies inter-group relations between aboriginal and non-aboriginal peoples as the crux of the meaning of this collective identity. In fact, these relations are so integral to this approach that if they are removed it becomes impossible to advance an intelligible account of aboriginality. As Miller indicates, the dilemma over how to characterize this collective identity is resolved because the relations (and corresponding situated position, for that matter) would not exist, making reference to this collective identity nonsensical.

Green’s discussion of this collective identity, covered in chapter three, supports Miller’s concerns regarding the employ of a relational approach to conceptualizing aboriginality. She advances that “it is in the unequal imposed relationship of colonialism that Aboriginality emerges as a political distinction from others. They [aboriginal rights] are rights claimed against the colonial state, by virtue of political and cultural precedence to the colonial state, without which there would be no need for the concept “Aboriginal”.”¹⁶⁸ What is of import, here, is that a relational approach to conceptualizing

¹⁶⁷ Bruce Granville Miller, *Invisible Indigenes*, p.56.

¹⁶⁸ Joyce Green, “Toward Conceptual Precision,” p.231.

this collective identity renders inter-group relations so significant that their absence translates into the theoretical elimination of the object being defined.

A subsequent problem with relational approaches is that, even if this logical coherence problem is left aside, these approaches often portray collective identity as if it was purely instrumental in nature. Collective identity is conceptualized as a means for a particular group to secure a set of political interests. From this view, collective identity is valuable only insofar as it facilitates the achievement of these interests. Here, collective identity is a descriptor of the specific politics pursued by a group which does not say very much at all about the actual nature of the group engaged in political activity. Courtney Jung's work on this collective identity is a revealing example. Jung's position is that, "Indigenous identity arises [...] as a byproduct of politics itself. The condition of an indigenous political identity is not the prior existence of an ancient culture or language, nor is it the distinctive set of practices that bound group membership."¹⁶⁹ After having established that this collective identity is a product of politics (and unrelated to ethno-cultural considerations) Jung goes on to build the case that, in fact, this collective identity is best understood as a descriptor of a certain kind of political project. According to Jung, indigenouness is actually a label for class politics that arises out of the neoliberal re-ordering of relations between the state and other important stakeholders (in this case the rural poor).¹⁷⁰ These basic propositions lead Jung to conclude that:

The world's rural poor have employed indigenous identity in order to carve out a space for political activism at the domestic level, and have been able, by invoking their identity as indigenous people, to enter a global political dialogue. What is more, indigenous rights activists themselves recognize the strategic power of

¹⁶⁹ Courtney Jung, "Indigenouness" the New "Peasant," p.4.

¹⁷⁰ Courtney Jung, "Indigenouness" the New "Peasant," p.4-5.

indigenous identity, and the role it plays in their struggle for political voice. Although indigenous identity locates them in a distinct political space, from which they can establish new alliances and make different demands, indigenous identity plays a role that is functionally similar, in established political voice, to peasant identity in a prior era.¹⁷¹

What is of import here is the idea that aboriginality denotes the strategic deployment of a collective identity to pursue a particular set of interests that were previously pursued by a class-based identity (that is, the rural poor or peasantry). In this instance, the politics of a group is described by this term not the nature of the group itself. Now, this is not meant to imply that the politics of a group is an unimportant factor in other approaches to conceptualizing aboriginality; it is only meant to highlight that in this case, the politics of the group are the only factors of importance in establishing the meaning of this collective identity. This generates serious questions about this approach's ability to take into account important claims usually associated with aboriginality such as title to traditional territories.

The final problem that results from the use of relational approaches is that these approaches place a great deal of stock in the role played by non-members in the formation and maintenance of collective identity. For some, this role is overly determinative. In their work on aboriginality, Alfred and Cornstassel argue that this type of approach “emphasizes interaction with non-indigenous people in precipitating identity awareness and personal change, and de-emphasizes relationships with communities and families.”¹⁷² They conclude that, as a consequence, only a minimal number of scholarly conceptualizations of aboriginality are “grounded in real Indigenous community life or

¹⁷¹ Courtney Jung, ““Indigenoussness” the New “Peasant,”” p.30.

¹⁷² Taiaiake Alfred and Jeff Cornstassel, “Being Indigenous,” p.606.

perspectives.”¹⁷³ Here, the result of reserving too great a role for non-members in the process of identity formation and maintenance is decreasing the participation of the actual bearers of these collective identities in the process of group definition.

The Interactions based Approach to Conceptualizing Aboriginality

The discussion presented thus far of the various drawbacks associated with the employ of the presence of traits approach, the absence of traits approach and the relational approach is meant to provide some understanding regarding the fact that the debate about how to conceptualize aboriginality is far from settled. While there may not be, at present, an approach that is clearly superior to the others in a general sense (and if there is, that case is not made in this dissertation) this does not mean that there is no way to argue that one approach is better than its counterparts in this particular instance. The next section of this chapter presents a functionalist argument that in this specific instance (that is, an investigation into aboriginality and aboriginal rights jurisprudence in Canada) a modified relational approach is the most appropriate approach to employ.

For the purposes of this dissertation, a functionalist argument for the use of a particular approach focuses attention on the jurisprudence on aboriginal rights and the corresponding academic commentary. Specifically, it examines the place occupied by traits (both their absence and presence) and aboriginal/non-aboriginal relations in the jurisprudence and the scholarly literature. It does this in order to demonstrate that traits and relations are significant factors. As a consequence, neither a relational nor presence/absence of traits approach is sufficiently comprehensive on its own to capture these important aspects of the jurisprudence and the literature. Instead, what is required is

¹⁷³ Taiaiake Alfred and Jeff Cornstassel, “Being Indigenous,” p.605.

a way to conceptualize aboriginality that takes into account that traits and relations are constitutive elements of the jurisprudence and the literature on aboriginal rights. Accordingly, the best approach for the purposes of this dissertation is one that includes both of these factors.

In terms of the jurisprudence, the analytical framework for existing aboriginal rights outlined in chapter two advances that aboriginal rights are pre-contact practices, customs and traditions that are integral to a distinctive aboriginal group and that were not extinguished before 1982 (see page 22-28). Here, the question of whether an aboriginal right exists is related in important ways to the question of whether a group has a particular kind of trait (a pre-contact, unextinguished, practice, custom or tradition that is integral to a distinctive aboriginal group). Moreover, there are a number of aspects of the analytical framework that highlight the importance of aboriginal/non-aboriginal relations. The analytical framework outlines that aboriginal claimants are charged with the responsibility to show that legislation has infringed on an existing aboriginal right by demonstrating that the legislation is unreasonable and/or imposes undue hardships and/or denies a preferred means of actualizing the right (see page 22-28). Aboriginal/non-aboriginal relations underpin the latter two responsibilities. The question of undue hardships and the denial of a preferred way of exercising a right are fundamentally about how aboriginal peoples are treated and what aboriginal peoples are allowed to do as well as how they are allowed to do it. In this way, these aspects of the issue of infringement are primarily about the way in which aboriginals and non-aboriginals interact with one another. Perhaps the best example of the importance of aboriginal/non-aboriginal relations in the analytical framework for aboriginal rights lies in the justification test. One aspect of this test requires the Crown to demonstrate that the infringement of an

aboriginal right is reconcilable with the fiduciary relationship between the Crown and aboriginal peoples (see page 22-28). In this instance, considerations about aboriginal/non-aboriginal relations (more specifically, maintaining particular kinds of relations – ones that are reconcilable with the trust-like relationship between the Crown and aboriginals) are a key factor in determining whether infringing on a particular aboriginal right is justified. As a consequence, relations play a central role in this part of the jurisprudence on aboriginal rights.

In terms of the academic commentary on s.35(1) Russel and Henderson’s reading of the majority’s understanding of the underlying purpose behind the constitutionalization of aboriginal rights reveals that a central concern is the accommodation of certain aspects (that is, traits) of aboriginal identity. As outlined in chapter two, this comes to the fore as a result of unpacking what these scholars mean by the terms “pre-existence” and “reconciliation”. By pre-existence they mean those aspects that are integral to the collective identities of Aboriginal peoples. By reconciliation, Russel and Henderson mean finding a way to accommodate these elements within the framework of the Canadian state (see page 31-32).¹⁷⁴ The former term centres on the presence of certain traits, while the latter concerns relations between aboriginal and non-aboriginal communities. In the same chapter, it was argued that Borrows and Rotman are skeptical about the capacity of this constitutional provision to generate rights that successfully protect and accommodate aboriginality. They argue that s.35(1) is primarily concerned with establishing the limits of what aboriginal peoples can do with their rights (see page

¹⁷⁴ In the same chapter, Christie’s commentary on s.35(1) coincides with Russel and Henderson’s discussion of the importance and meaning of these integral aspects of aboriginal identity to the jurisprudence on aboriginal rights (see page 33).

33). As a consequence, it is evident that academic commentary on this constitutional provision incorporates both traits and/or relations as significant constitutive components. This lends support to the argument that an investigation of the articulations of aboriginality found within the academic commentary ought to allow for the inclusion of both traits and relations.

In deciding how to proceed (that is, how to construct an approach to conceptualizing this collective identity), Iris Young's work on rights is instructive. She argues that, "[r]ights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action."¹⁷⁵ For Young rights are, in significant ways, about relationships and so the approach used in this dissertation begins by looking at the relations between aboriginal and non-aboriginal peoples.

This dissertation employs a modified relational approach as the principal means of taking into account both relations and traits. The basic proposition of this approach is that a particular definition of what it means to be aboriginal or what aboriginality entails can be teased out by examining certain paradigms of interaction. This approach accomplishes this in three steps. First, it organizes various interactions between aboriginal and non-aboriginal peoples conceptually and categorically into three paradigms – the nation to nation paradigm, the colonial paradigm and the citizen-state paradigm. Second, from these paradigms of interaction, it extrapolates the constitutive characteristics that the parties involved must possess in order to engage in these types of interactions. Third, it

¹⁷⁵ Iris Marion Young, *Justice and the Politics of Difference*, p.25.

demonstrates that each of the three paradigms vests aboriginality with a certain set of characteristics and so generates a particular definition of this collective identity.

The interactions based approach is a relational approach because it begins by exploring the interactions between aboriginals and non-aboriginals, that is, their relations. In this sense, it reserves a significant place for relations in the process of generating a definition of aboriginality. The interactions based approach is a modified relational approach in that it also focuses on the characteristics which would be required in order to engage in a particular set of interactions. This leaves room for traits in the construction of versions of this collective identity because these characteristics can be traits. As a consequence, this approach addresses the need for sensitivity to both relations and traits.

Moreover, the interactions based approach, because it is a relational approach, overcomes the problems associated with the presence/absence of traits approaches. This is significant because the problems identified with the employ of relational approaches are generally less serious than their counterparts which result from the use of the presence/absence of traits approaches. As demonstrated above, the logic underpinning relational approaches is vulnerable to the charge that its extension can render it difficult to produce a fully coherent conceptualization of a group's collective identity, or it may present this collective identity as primarily instrumental or it may lead to too much emphasis being placed on the role of non-members in the creation and maintenance of this collective identity. However, these conceptual issues and misdirected focus do not impact the material and non-material lives of members of groups in the way that the drive to homogeneity, exclusion and a perceived settled identity (that is, the problems associated with the presence/absence of traits approaches) do. Since relational approaches focus on inter/intra-group relations they can account for diversity within

identity groups and so do not result in exclusion nor do they require intra-group homogeneity. Along the same lines, relational approaches do not ignore the significant historical, social and political factors that play a role in identity formation and maintenance because relations are a product of these factors. In short, they do not suffer from the problems inherent in essentialist conceptions of collective identity. When the advantages of a relational approach are coupled with the fact that the problems resulting from its usage are less severe than the problems associated with the usage of its two counterparts, a solid case for the employ of some type of a relational approach comes to the fore, at least for the work pursued in this dissertation.

CHAPTER FIVE

THREE VERSIONS OF ABORIGINALITY

Chapter five applies the interactions based approach to conceptualizing aboriginality and generates three different articulations of this collective identity – the nation to nation conception, the colonial conception and the citizen-state conception.¹⁷⁶ These three conceptions of aboriginality represent only a sample of the possible articulations that could be generated vis-à-vis the employ of the interactions based approach. For example, aboriginal communities in urban areas may give rise to a unique articulation of aboriginality (or a number of articulations of this collective identity) which is a product of interactions that are unique to the urban context. The nation to nation, the colonial and the citizen-state conception of aboriginality may be unable to fully account for these interactions and so would be unable to encompass a variety of versions of aboriginality. This dissertation focuses on the three versions of this collective identity listed above because they are the ones most often found in the court material on existing aboriginal rights.

Nation to Nation

There is an emerging consensus among many contemporary scholars that the various interactions between aboriginal peoples and Europeans during the Encounter era of the seventeenth and eighteenth century were conducted primarily on a nation to nation basis.¹⁷⁷ The Encounter era provides a historical example of the constitutive interactions

¹⁷⁶ A significant portion of this chapter appears in the following publication: Dimitrios Panagos, “The Plurality of Meanings Shouldered by the Term “Aboriginality”: An Analysis of the *Delgamuukw* Case.”

¹⁷⁷ See for example Kiera Ladner, “Rethinking Aboriginal Governance”; J. R. Miller, *Skyscrapers Hide the Heavens*, p.3-98; James Tully, “Aboriginal Peoples: Negotiating Reconciliation”; Wilcomb E. Washburn, *Red Man’s Land/White Man’s Law*; Robert Williams, *Linking Arms Together*.

of a nation to nation relationship. This is significant for our purposes here because these interactions form the basis upon which a definition of one meaning of aboriginality will be constructed. When aboriginality is constructed within the nation to nation paradigm of interaction it entails the recognition of self-defining and self-governing nationhood. As a collective identity it vests those individuals who bear this identity with an equivalent moral status to that enjoyed by non-aboriginals and it creates a number of moral imperatives regarding how those same individuals ought to be treated as a collective.

Identifying the kinds of interactions in the nation to nation paradigm

According to Williams' study of the Encounter era, interactions between Aboriginal peoples and Europeans were often cooperative, driven by the pursuit of group-specific interests and contingent on a particular act of recognition. In terms of group-specific interests, he describes how many aboriginal peoples "sought out these [cooperative] relationships for the valuable trade goods, military alliances and strategic advantages."¹⁷⁸ He goes on to conclude that rather than "being barriers to European expansion, Indians assume[d] essential roles as potential allies and facilitators, acting for their own reasons in concert with European colonial powers."¹⁷⁹ For their part, Europeans also had their own motives for acting cooperatively with certain aboriginal nations.

Maintaining reliable relationships with powerful tribal groups on their frontiers was essential to the financial success of many of the colonies. The frontier trading tribes controlled the fur supplies and related commerce of the regions bounding the European colonies. They acted as buffers to the expansion and penetration of rival European powers onto that frontier. They could be called on to counter and

¹⁷⁸ Robert Williams, *Linking Arms Together*, p.21.

¹⁷⁹ Robert Williams, *Linking Arms Together*, p.23.

even war against less cooperative tribes that might be causing difficulties for a colony.¹⁸⁰

The pursuit of these interests compelled Europeans to establish and maintain cooperative interactions with surrounding aboriginal nations. In many cases, the survival and success of a number of these colonies depended on the ability to establish and maintain these kinds of relations.¹⁸¹ As J.R. Miller explains, “[f]rom the time of Champlain’s voyages till the dawn of the eighteenth century, the French came for fish, fur, exploration, and evangelization. The Indian was an indispensable partner [...]. To preserve fish, to gather fur, to probe and map the land, and to spread the Christian message, cooperation by the Indians was essential.”¹⁸²

The establishment and maintenance of cooperative interactions was in many ways contingent on a particular act of recognition. Williams’ study characterizes this historical period as a situation of rough equality. According to Williams, neither group was in a position to bring the other group fully under its control and both parties recognized this reality.¹⁸³ The absence of a group in a clear position of dominance rendered coercive force as a means of structuring relations unlikely to result in success. Recognizing this situation of rough equality facilitated the realization that cooperation, based on consent, was a more efficient course of action than coercion. The reliance on treaties to structure

¹⁸⁰ Robert Williams, *Linking Arms Together*, p.25-26.

¹⁸¹ Vine Deloria and Clifford M. Lytle, *American Indians, American Justice*, p.3.

¹⁸² J. R. Miller, *Skyscrapers Hide the Sky*, p.40. For a similar view of the Encounter Era see Patrick Macklem’s summary of the RCAP’s presentation of this period in “What’s Law Got to do with it?” p.126-127.

¹⁸³ Robert Williams, *Linking Arms Together*, p.21, 25. Brian Slattery offers a similar characterization of the Encounter Era. He states that “[i]f you examine the history of European settlement in North America, you will find that relations between Aboriginal Peoples and the representatives of France and Great Britain were in many cases conducted in a spirit of rough equality, especially during the early stages of settlement in the sixteenth to eighteenth centuries.” (Brian Slattery, “The Recollection of Historic Practice,” p.78-79).

relations between aboriginal peoples and Europeans throughout this era is, among other things, a manifestation of this act of recognition.

The Constitutive Characteristics

Tully's work provides a number of important insights regarding the characteristics that would be necessary in order to engage in cooperative, non-coercive interactions that allow for the pursuit of group specific interests and are based on acts of mutual recognition. His work reveals that a party to the nation to nation relationship must possess two central features – a recognized equal moral status and the opportunity to actualize this moral status. These characteristics are derived primarily from Tully's account of the nature of the nation to nation relationship. In his account of this relationship he describes how:

Aboriginal peoples and newcomer Canadians recognize each other as equal, coexisting, and self-governing nations and govern their relations with each other by negotiations, based on procedures of reciprocity and consent, which leads to agreements that are then recorded in treaties or treaty-like accords of various kinds, to which both parties are subject.¹⁸⁴

Tully's discussion speaks of the equal moral status of each party in the nation to nation relationship. Accordingly, each party possesses the same moral entitlement to, first, exist as a self-governing nation and, second, to be recognized as such. He goes on to outline the criteria for this type of recognition. "Their status as self-governing nations," he explains, "rested on [...] the proven ability to govern themselves on a territory over time and to enter into international relations with other nations."¹⁸⁵ From this view, a party's status as a self-governing nation is the result of a proven capacity to govern both a people

¹⁸⁴ James Tully, "Aboriginal Peoples: Negotiating Reconciliation," p.415.

¹⁸⁵ James Tully, "Aboriginal Peoples: Negotiating Reconciliation," p.421.

and a territory and to engage in relations with other self-governing parties. Parties to a nation to nation relationship must recognize this status and must order their interactions in such a way as to ensure that this status is maintained. In terms of its role in ordering the parties' subsequent interactions, it takes the form of a prerequisite of sorts (or it carries an a priori status) to all other interactions in the nation to nation paradigm.

In Tully's account of the nation to nation relationship all other interactions between the parties are structured vis-à-vis the use of negotiations based on reciprocity and consent. Interactions that are a product of negotiations guided by the principles of reciprocity and consent produce significant results. First, interactions arrived at in this fashion (as opposed to coercive or non-consensual means) are a statement about each party's equal entitlement to exist and to govern its people and its territory. Second, by employing this process and its principles, each party exercises its capacity to govern these crucial elements of nationhood. This is an important way of ensuring that the moral status of the parties (i.e. their status as self-governing nations) is maintained and actualized. The method chosen by Tully to structure the interactions between Aboriginal and non-Aboriginal people in his account of the nation to nation relationship reinforces the significance he places on the recognition of the equal moral status of the parties and the opportunity of each party to actualize its status.

Mercredi's and Mary Turpel's work on Aboriginal/non-Aboriginal relations brings to the fore a subsequent characteristic that parties must possess in order to interact on a nation to nation basis – that is, in a cooperative, non-coercive fashion that allows for the pursuit of group-specific interests and relies on significant acts of recognition. On their account, self-identification or self-definition is an essential characteristic of nationhood and so of nation to nation interaction. “A people who are a nation,” they

explain, “define themselves.”¹⁸⁶ Scholars such as David E. Wilkins and K. Tsianina Lomawaima concur with Mercredi and Turpel’s position. “A sovereign nation,” they argue, “defines itself and its citizens.”¹⁸⁷ They include the consequences of not engaging or allowing a group to engage in such self-definition. They state that, “Canadians cannot speak for us because Canadians are different. To define us with Canadian heritage is to enslave us.”¹⁸⁸ Here a bondage metaphor is employed to highlight the seriousness of failing to engage or being barred from engaging in the process of self-definition. Also underscoring the seriousness of the act of self-definition, Annette Jaimes argues that this right of self-definition is axiomatic, “imbedded in international law, custom, and convention.”¹⁸⁹ In this discussion, the issue is not simply whether the parties to a nation to nation relationship ought to share an equivalent moral status (that is, that each should be regarded as a self-governing nation). Instead, the central concern is who ought to decide the substantive contents of this status. Stated differently, who ought to decide how to actualize this status and what this actualization entails. And so, according to these scholars’ conceptualization of the nation to nation relationship, each party to the relationship identifies the substantive contents of this status for itself.

The Nation to Nation Version of Aboriginality

Cooperative, non-coercive interactions which allow for the pursuit of group-specific interests and are informed by acts of mutual recognition constitute the nation to nation paradigm of interaction. In order to engage in these kinds of relations, groups

¹⁸⁶ Ovide Mercredi and Mary Ellen Turpel, *In the Rapids*, p.24-25.

¹⁸⁷ David E. Wilkins and Tsianina Lomawaima, *Uneven Ground*, p.4.

¹⁸⁸ Ovide Mercredi and Mary Ellen Turpel, *In the Rapids*, p.36.

¹⁸⁹ Annette M. Jaimes, “Federal Indian Identification Policy,” p.294.

must recognize each other as self-defining nations, morally entitled to govern their peoples and territories. Moreover, the process employed to structure the inter group interactions must take this recognition into account. This means that the principles and procedures that make up this process, and the resulting interactions they generate, may not violate this recognition. This outlines the kinds of interactions that constitute the nation to nation paradigm and the characteristics required to participate in this type of relationship. What remains to be determined is an appropriate definition of aboriginality, where appropriateness hinges on reconciling the meaning of aboriginality with the essential characteristics to engaging in nation to nation interactions.

When taken together, the various discussions regarding the essential characteristics of the parties to a nation to nation relationship generate just such a portrait of aboriginality. Aboriginality is presented as a collective identity that entails both the recognition of nationhood actualized through the governance of a people and a territory, and the acknowledgment that the source of the content of this collective identity is the aboriginal group itself. Moreover, this collective identity bestows upon its members a moral status equivalent to that held by non-aboriginals. This moral status leads to the establishment of the moral imperative that all interactions with these self-defining nations must be based on principles, such as reciprocity and consent, that are compatible with this type of recognition and moral status.

Colonial

The following discussion advances the notion that if aboriginality is constructed within the colonial paradigm of interaction it entails the rejection of self-defining nationhood. One constitutive aspect of this version of aboriginality is that it is a collective identity that is externally defined. A second constitutive aspect is that it

includes the experience of being subject to institutions and structures that are not created by those who bear the identity and whose operation lacks their consent. Ultimately, this version of aboriginality entails being defined and ruled by the will of another.

Identifying the kinds of interactions in the colonial paradigm

According to Robert Blauner, colonization begins with the involuntary incorporation of a group into a political unit.¹⁹⁰ From this view, the first interaction between the parties involved in a colonial relationship is one that is marked by a lack of consent. Tim Schouls' account of the colonial relationship that developed between aboriginals and non-aboriginals in North America also incorporates the idea of nonconsensual acts. "[T]he colonial relationship," Schouls explains, "was a dominant one in which Aboriginal peoples were unilaterally, and without their consent, subject to the superior power and influence of the settler society."¹⁹¹ In Schouls' account, a lack of consent characterizes both the initial incorporation of aboriginal peoples into the settler society's political unit and the settler society's continued dominion and control over aboriginal peoples.

In terms of dominion and control, Blauner presents the idea that one group is administered by representatives of the other group and, as a result, the former experiences being "managed and manipulated by outsiders."¹⁹² The fact that one group is managed, manipulated and administered by another reveals the inability of the members of the subordinate group to, on the one hand, structure the way in which they interact with the

¹⁹⁰ Robert Blauner, "Internal Colonialism," p.369.

¹⁹¹ Tim Schouls, *Shifting Boundaries*, p.40.

¹⁹² Robert Blauner, "Internal Colonialism," p.369.

dominant group and, on the other, shape the outcome of these interactions. This creates a situation in which interactions between the groups are unilateral in nature.

Blauner's account of colonization includes the observation that the dominant party in this relationship demonstrates a basic disrespect towards group difference. This observation is based on the dominant group's attempts to remake the subordinate group (in many cases in its own image). Blauner describes how "[t]he colonizing power carries out a policy which constrains, transforms, or destroys indigenous values, orientations, and ways of life."¹⁹³ In many cases, group difference is based precisely on such things as values, orientations and ways of life. This presentation advances that interactions which result from colonization and its end product colonialism are unilateral in nature and are marked by both a lack of consent and respect for group difference.

The Constitutive Characteristics

In order to pursue the types of interactions that make up the colonial paradigm one party must have both the capacity and the will to do so. In British North America and its successor state Canada, the will and capacity of non-aboriginal people to engage in unilateral, nonconsensual interactions that demonstrated a basic disrespect for aboriginal difference were exposed by the formation and pursuit of colonial and state policies of assimilation and colonization.

In terms of the will to engage in these interactions, Cairns provides an astute account of the mindset which underpinned the colonial interactions between the state and aboriginal peoples. He explains that "although non-Aboriginal Canadians would not have described their relation to indigenous peoples in Canada as imperialist, they – if

¹⁹³ Robert Blauner, "Internal Colonialism," p.369.

sometimes only unconsciously – had an imperial mentality.”¹⁹⁴ This imperial mentality assumed that European societies were at the pinnacle of a hierarchy of civilizations and indigenous societies were at the bottom. Ronald Niezen provides an insightful discussion of comparative studies on human societies pursued in the nineteenth century that employ this aspect of the imperial mentality. He explains that:

For nineteenth century socio-evolutionists, the culture concept answered a need to fit all human societies into a unilineal hierarchy of complexity, sophistication, development and virtue, above all in comparison with (or more precisely, -- in contrast to) the pinnacle of human achievement, “civilization.” Culture was an extremely broad, “catch-all” concept – covering the entire range of human institutions, values, customs, and practices – that allowed theorists [...] to situate human societies on a scale of development, with positive value placed on those aspects of culture that accorded well with European society.¹⁹⁵

When these assumptions regarding the hierarchical nature of societies combined with a Darwinian conception of a competition between different cultures (where superior cultures would win out at the expense of their inferior counterparts) a common sense belief developed. Cairns describes this belief in the following way: “Aboriginal peoples would die out or they would merge into and disappear into the majority population.”¹⁹⁶ The link between this type of mentality and the will to engage in colonial interactions as outlined in the previous section is clear. When non-aboriginal Canadians believed in their cultural and societal superiority they were able to justify interactions with aboriginal peoples that were disrespectful of aboriginal difference, unilateral in nature and marked by a lack of aboriginal consent. As Chartrand explains “[t]he European view that the

¹⁹⁴ Alan Cairns, *Citizens Plus*, p.26. In her work, Sherene Razack takes a similar position arguing that “[a]s Canadians we do not see ourselves in imperial history.” (Sherene Razack, *Dark Threats*, p.144). She goes further than Cairns, however, arguing that this willful blindness and/or willful forgetting underpins systemic racism in Canada. See Sherene Razack, *Dark Threats* and “Making Canada White.”

¹⁹⁵ Ronald Niezen, “Culture and the Judiciary,” p.5.

¹⁹⁶ Alan Cairns, *Citizens Plus*, p.40.

indigenous peoples of the Americas were inferior was a justification for colonialism.”¹⁹⁷

Green provides a similar account but also discusses the consequences on aboriginality of viewing the bearers of this collective identity as inferior. She outlines that:

Indian peoples were viewed by the colonial elite as axiomatically subordinate because of deficiencies in culture, morality, politics, economics and other measures of capacity for sovereignty. [...] Aboriginal identity existed as a minor impediment to be removed by the government, further to its constitutional jurisdiction, from the path of colonial progress.¹⁹⁸

In terms of capacity, the Canadian state demonstrated in a myriad of ways its ability to engage in colonial interactions. Firstly, Chartrand points out that “[t]he framers of the British North America act, 1867 felt no need to deal with indigenous peoples as representatives of autonomous political groups.”¹⁹⁹ According to Schouls, a consequence of this act of confederation was the creation of the legal order necessary to pursue colonial interactions.²⁰⁰ Along the same lines, Chartrand argues that “[t]he colonial and Canadian legal systems were not neutral in the ‘colonization project’. These legal systems were fully utilized as tools in the furtherance of colonization goals and in turn became self-justifying principles of law for the continuation and legitimization of colonialism.”²⁰¹

Schouls identifies how the doctrine of sovereignty underpinned this legal order and outlines the way in which this emerging legal system facilitated the colonization project. “Throughout the late nineteenth century,” he explains, “the doctrine of

¹⁹⁷ Lary Chartrand, “The Aboriginal Peoples’ Movement and its Critics,” p.459.

¹⁹⁸ Joyce Green, “Canaries in the Mines of Citizenship,” p.721.

¹⁹⁹ Lary Chartrand, “The Aboriginal Peoples’ Movement and its Critics,” p.456.

²⁰⁰ Tim Schouls, *Shifting Boundaries*, p.41 (?).

²⁰¹ Lary Chartrand, “The Aboriginal Peoples’ Movement and its Critics,” p.459.

sovereignty that the Canadian state adopted allowed it to constitutionalize what was by then an established political practice: the Constitution Act, 1867 (BNA Act), gave the Canadian government the juridical means to dominate in its relations with Aboriginal peoples.”²⁰² In this case, aboriginal peoples were to be governed by non-aboriginals. Schouls goes on to argue that once the state had secured these juridical means it set out on its project of assimilation.²⁰³ Niezen argues that,

It is now widely recognized that narrow evolutionist thinking was a central ideological component of policies of assimilation, such as the program of residential education that was pursued with especially disastrous results in Canada. Such policies are a direct outcome of evolutionist paradigms, especially when combined with the goals and ideals of Christian evangelism. If, according to this viewpoint, some people are lower on the scale of human development, suffering from want of religious enlightenment, ingenuity, technology and appreciation of the value of labour, it then becomes a moral duty to instruct, improve and uplift them. The sense of moral superiority that accompanied such thinking was translated into political action.²⁰⁴

This political action manifested itself as state policies of control over aboriginal peoples. Borrows cites “suppression of Aboriginal institutions of government, the denial of land, the forced taking of children, the criminalization of economic pursuits, and the negation of the rights of religious freedom, association, due process and equality,”²⁰⁵ as historical and, to a certain extent, contemporary examples of government interference and control

²⁰² Tim Schouls, *Shifting Boundaries*, p.41. Patrick Macklem also discusses the role played by the law in the colonial relationship that developed between aboriginal and non-aboriginal peoples. See Patrick Macklem, “What’s Law Got To Do With It?” p.134-137.

²⁰³ Tim Schouls, *Shifting Boundaries*, p.41-42. For a similar argument regarding colonialism, see Cairns’ discussion of the pre-White Paper relations between aboriginal peoples and the state. Of particular interest is Cairns’ account of the relations during this period which demonstrates the colonial nature of these relations. The account focuses on the fact that aboriginal peoples were always the subjects of public policy, never its practitioners, and on the active attempts of the settler state to eliminate aboriginal cultures and attachments to their particular bounded communities. (Alan Cairns, *Citizens Plus*, p.19-26). Also see Margaret Moore, “Internal Minorities,” p.284-88.

²⁰⁴ Ronald Niezen, “Culture and the Judiciary,” p.6-7.

²⁰⁵ John Borrows, “Measuring a Work in Progress,” p.224.

of aboriginal peoples, their lands, their cultures and the like. With these instruments of control in hand, Aboriginal peoples would become whatever non-aboriginals decided would be best. All of this speaks to the state's capacity to pursue colonial interactions in its dealings with aboriginal peoples.

The Colonial version of Aboriginality

Nonconsensual, unilateral, and disrespectful interactions constitute the colonial paradigm. In order to engage in these types of relations, one of the parties must believe in its own superiority. Moreover, this same party must have the capacity to act on these beliefs. When these conditions are met, and colonial interactions result, a particular version of aboriginality is constructed. Here, there is a rejection of self-defining, self-governing nationhood. Aboriginality is understood as a collective identity that is created by persons who do not belong to the group being defined. It denotes the experience of being subject to another people's institutions and structures. As a consequence, this version of aboriginality entails being ruled by the will of another.

Citizen-State

The following discussion about the citizen-state paradigm of interaction and the particular version of aboriginality it generates is based on Cairns' concept of 'citizens plus'. According to Marc Hanvelt and Martin Papillon "[c]itizens plus is [...] a proposal for an asymmetrical citizenship [where...] Aboriginal peoples should be considered as Canadian citizens first, but with a special status, a "plus" that would differentiate them from other Canadians."²⁰⁶ Green explains how Cairns' vision of citizenship can be understood as "linking citizens to state, and connecting citizens with each other via

²⁰⁶ Marc Hanvelt and Martin Papillon, "Parallel or Embedded?" p.245.

empathetic relationship.”²⁰⁷ Together, these characterizations of citizens plus present a conceptualization of citizenship that attempts to reconcile aboriginal peoples’ distinctiveness with the need for pan-Canadian unity. As Cairns explains, “[i]f the reality is that we are all – Aboriginal and non-Aboriginal alike – massively shaped by cultural and other forces outside our immediate local culture, and if we nevertheless retain separate identities while sharing common values and experiences, we then have a basis for living together and living apart at the same time.”²⁰⁸ This is of primary import, Cairns argues because “[b]oth our separateness and our togetherness need to be institutionally supported if the overall Canadian community is to survive.”²⁰⁹

Identifying the kinds of interactions in the citizen-state paradigm

Given the fact that citizens plus is a concept that is concerned with both aboriginal distinctiveness and pan-Canadian unity, the citizen-state paradigm envisions two types of interactions – interactions between individuals and their particular bounded communities and interactions between these same individuals and the broader political community. The former allow aboriginal peoples to maintain their distinctiveness, while the latter generate a sense of civic belonging.

The constitutive characteristics

Specific bonds of attachment are necessary in order to engage in these two types of interactions. Cairns’ concept of citizens plus entails a concern for membership in and attachment to both a particular bounded community (the aboriginal component of belonging) and a broader political community (the pan-Canadian dimension of

²⁰⁷ Joyce Green, “Toward Conceptual Precision,” p.228.

²⁰⁸ Alan Cairns, *Citizens Plus*, p.107.

²⁰⁹ Alan Cairns, *Citizens Plus*, p. 212.

belonging). Chartrand sums up Cairns' notion of the relationship between these bonds of attachment and the concept of citizens plus as follows:

The concept of "citizens plus" is attractive because it could serve as the vehicle for a socio-political theory and as a simplifying label for public consumption that recognizes the Aboriginal difference fashioned by history and the continuing desire to resist submergence and also recognize our need to feel that we belong to each other.²¹⁰

Even though Chartrand takes a critical view of Cairns' concept of citizens plus,²¹¹ what comes to the fore here is the importance this concept places on both bonds of attachment to particular bounded communities and to the broader pan-Canadian community.²¹² Moreover, group specific rights protect the bonds of attachment to bounded communities. A common regime of citizenship and rights facilitates bonds of empathy to the broader political community.²¹³ The latter bonds, according to Cairns, can be strengthened by the realization that aboriginal peoples are in an interdependent relationship with non-aboriginal Canadians.²¹⁴

Cairns' concept of citizens plus does not necessarily exclude the possibility of some degree of self-government for aboriginal peoples. Yet, given his rejection of parallelism/treaty federalism,²¹⁵ it is not unreasonable to conclude that citizens plus does

²¹⁰ Lary Chartrand, "The Aboriginal Peoples' Movement and its Critics," p.465-66.

²¹¹ Lary Chartrand, "The Aboriginal Peoples' Movement and its Critics," p.470-73.

²¹² In effect, this notion that identity is multilayered and includes attachments to a plurality of communities characterizes Cairns' conception of all Canadians' identities. He states that "most Canadians carry several civil identities simultaneously – as a Canadian, as a possessor of Charter rights, as a provincial resident, and for about a million Canadians, as an Aboriginal, as well as other particularistic identities defined by ethnicity, gender, language, etc." (Alan Cairns, "Dreams versus Reality," p.317-8).

²¹³ Alan Cairns, *Citizens Plus*, p.157.

²¹⁴ Alan Cairns, *Citizens Plus*, p.204.

²¹⁵ Alan Cairns, *Citizens Plus*, p.115, 157-58. For an explicit statement concerning Cairns' rejection of Treaty Federalism see: Lary Chartrand, "The Aboriginal Peoples' Movement and its Critics," p.465-66. For

not advance a form of self-government that challenges the ultimate sovereignty of the Crown. The significant role played by a common regime of citizenship and rights in his characterization of the citizens plus concept indicates that the opposite is the case. After all, citizenship and rights are the products of the sovereignty of the Crown and it is through this sovereignty that these are protected. In this regard, Hanvelt and Papillon are correct to conclude that, “Cairns never questions the basis for the legitimacy of Canada’s sovereignty over Aboriginal peoples.”²¹⁶

The Citizen-State version of Aboriginality

When aboriginality is constructed within the citizen-state paradigm of interaction it is understood as a single component, or facet, of an individual’s overall identity. This important aspect of the individual’s overall identity denotes a connection with a particular bounded community within the state. This component of the individual’s overall identity exists in concert with another significant facet – membership in a broader political community where the Crown is sovereign. In this way, this collective identity envisions overlapping attachments and loyalties to multiple communities. The distinguishing nature of the former facet may give rise to a particular set of rights and duties that goes above and beyond the ones accorded to citizens generally.

Articulations of Aboriginality

This chapter applies the interactions based approach to conceptualizing aboriginality and generates three different articulations of this collective identity – the

a comprehensive and compelling presentation of the meaning, historical and conceptual origins, and implications of Treaty Federalism see James Youngblood Henderson, “Empowering Treaty Federalism.” For a discussion of treaty federalism in practice in Canada see Graham White, “Treaty Federalism in Northern Canada.”

²¹⁶ Marc Hanvelt and Martin Papillon, “Parallel or Embedded?” p.249.

nation to nation conception, the colonial conception and the citizen-state conception. When aboriginality is constructed within the nation to nation paradigm of interaction it entails the recognition of self-defining and self-governing nationhood. As a collective identity it vests those individuals who bear this identity with an equivalent moral status to that enjoyed by non-aboriginals and it creates a number of moral imperatives regarding how those same individuals ought to be treated as a collective. Alternatively, when aboriginality is constructed within the colonial paradigm of interaction it entails the rejection of self-defining nationhood. One constitutive aspect of this version of aboriginality is that it is a collective identity that is externally defined. A second constitutive aspect is that it includes the experience of being subject to institutions and structures that are not created by those who bear the identity and whose operation lacks their consent. Ultimately, this version of aboriginality entails being defined and ruled by the will of another. Finally, when aboriginality is constructed within the citizen-state paradigm of interaction it is understood as a single component of an individual's overall identity which denotes a connection with a particular bounded community within the state. This important component of the individual's identity exists in concert with another significant facet – membership in a broader political community where the Crown is sovereign. In this way, the citizen-state conception of aboriginality envisions overlapping attachments and loyalties to multiple communities. The distinguishing nature of the former facet may give rise to a particular set of rights and duties that goes above and beyond the ones accorded to citizens generally. This dissertation focuses on these three versions of aboriginality because they are the ones most often found in the court material on existing aboriginal rights.

CHAPTER SIX
ARTICULATIONS OF ABORIGINALITY FOUND IN S.35(1) COURT
MATERIAL

Chapter six provides an illustration of the role played by the three articulations of aboriginality found in court material from the most significant cases dealing with s.35(1) in the jurisprudence on existing aboriginal rights. The materials surveyed include both factums and SCC decisions. The resulting examination demonstrates that the aboriginal claimants in s.35(1) cases advance a nation to nation conception of aboriginality. The federal/provincial AGs advance a colonial or citizen-state conception. For their part, SCC justices writing in majority decisions put forward a citizen-state conception. Chapter six also reveals the important differences among these conceptions of aboriginality, the most significant being the varying positions regarding the nature and scope of rights covered by s.35(1) underpinned by these three conceptions.

Before proceeding with the examination of the court materials, it is important to highlight the fact that this examination is possible precisely because of the interactions based approach to conceptualizing aboriginality. In chapter five the interactions based approach was employed to generate three distinctive versions of aboriginality. In essence, it provides an ideal type of each version of aboriginality. A survey of material pertaining to s.35(1) litigation reveals numerous and varying examples of articulations of this collective identity. The interactions based approach is necessary for an analysis of this material because it provides ideal types of this collective identity which can be used to categorize the various invocations of aboriginality. Once we are able to categorize these articulations of aboriginality, we can then go on to say something about who advances which version of aboriginality. We can also go on to examine the way in which

these versions of aboriginality are linked to particular visions of aboriginal/non-aboriginal relations and specific positions taken by the parties to these cases about what the aboriginal rights covered by this constitutional provision should include. A survey of the material pertaining to s.35(1) litigation also reveals that the articulations of aboriginality contained herein rely on both traits and relations. In other words, in this material aboriginality is at times characterized by a set of traits and at other times characterized by a set of relations. As a consequence, in order to capture all of the various articulations of aboriginality found in this material the selected approach must allow for traits and relations. One of the advantages of the interactions based approach is the fact that it can account for both traits and relations. As a consequence, the interactions based approach to conceptualizing aboriginality makes an examination of the court material pertaining to s.35(1) possible because it provides ideal types of this collective identity (that is, it provides us with examples of what to look for) and this approach makes this examination comprehensive because it encompasses articulations of aboriginality that rely on traits and relations.

Nation to Nation Articulations of Aboriginality in the Factums

Cooperative, non-coercive interactions which allow for the pursuit of group-specific interests and are informed by acts of mutual recognition constitute the nation to nation paradigm of interaction. In order to engage in these kinds of relations, groups must recognize each other as self-defining nations, morally entitled to govern their peoples and territories. As a result, when aboriginality is constructed within the nation to nation paradigm of interaction it entails the recognition of self-defining and self-governing nationhood. As a collective identity it vests those individuals who bear this identity with an equivalent moral status to that enjoyed by non-aboriginals as well as

creating a number of moral imperatives regarding how those same individuals ought to be treated as a collective.

The aboriginal participants and interveners in cases dealing with s.35(1) rights represent a wide variety of aboriginal groups, communities and nations. Culture, religion, geography, economics and the like distinguish these collectives in many significant ways. That having been said, an examination of the factums submitted by the aboriginal parties reveals substantial commonality regarding the way in which these participants and interveners characterize aboriginality. These interveners pointed to self-definition and self-government as constitutive aspects of their collective identities. In terms of self-definition they offered the substantive contents of this collective identity and made the case that those who bear this collective identity ought to decide its substantive contents. In terms of self-governing nationhood, the interveners addressed the question of who ought to decide how to actualize this status and what this actualization entails. The participants surveyed here also highlighted the need for procedures that reflected their status as self-defining and self-governing nations.

Self-Definition

Many important examples of self-definition come to the fore in an examination of the factums submitted by the various aboriginal participants in the cases under consideration. Taken together, the self-characterizations offered by the aboriginal parties present a particular portrait of the substantive contents or the constitutive elements of aboriginality. These elements come in the form of relationships between aboriginal peoples and natural resources/natural resource exploitation, traditional territories and conceptions of the good.

Natural Resources and Natural Resource Exploitation

The SSC has ruled on numerous cases involving aboriginal peoples, natural resources and natural resource exploitation.²¹⁷ According to a number of aboriginal participants to these cases there is an important link between aboriginality and the natural world. Moreover, they argue that this link is different from its non-aboriginal counterpart. As a consequence, when the aboriginal participants outline the substantive contents of their societies and collective identities they do so in a way that includes this distinctive relationship to the natural world.

In *R. v. Van der Peet*, the factum of the appellant, Dorothy Van der Peet, outlines how this link between natural resources/natural resource exploitation, social organization and collective identity is constructed. According to the factum the Fraser River plays a central role in the development of the Sto:lo people's social organization and their sense of collective identity. It states that, "Sto:lo means "people of the river" and [...] all the Sto:lo villages in the past and today are located along the Fraser River and its tributaries attests to the centrality of the fishing to Sto:lo social organization."²¹⁸ The factum goes on to conclude that "[t]he river and its resources are the very definition of the people."²¹⁹

In *R. v. Sparrow*, the appellant Ronald E. Sparrow submits that "[f]ishing has always been of central importance to their [the Musqueam nation's] culture and economy."²²⁰ Intervening in this case, the Assembly of First Nations (AFN) provides support for this position. The AFN factum states that the Musqueam "identity and

²¹⁷ The most important cases include, but are not limited to, *Sparrow*, *Van der Peet*, *Gladstone*, *Adams*, *Marshall I*, *Marshall (II)*. See Borrows for a detailed list of all cases involving aboriginal peoples that came before the SCC between 1990-2000 (Measuring a Work in Progress, Note.40, p.254).

²¹⁸ Factum of the Appellant Dorothy Marie Van der Peet, *R. v. Van der Peet*, p.31 para 107.

²¹⁹ Factum of the Appellant Dorothy Marie Van der Peet, *R. v. Van der Peet*, p.31 para 107.

²²⁰ Factum of the Appellant Ronald Edward Sparrow, *R. v. Sparrow*, p.1-2 para. 2.

survival as distinct peoples is linked to the salmon.”²²¹ What these statements about the Musqueam people share is the contention that this natural resource (that is, the salmon) occupies a central role in the characterization of this group’s collective identity and culture. Not only is this natural resource important because of its role as a marker of Musqueam identity and culture, but it is also significant because of the impact that this natural resource and its exploitation has on the continued wellbeing of the Musqueam people. The appellant, Ronald E. Sparrow, argues that, “[t]he Musqueam view their aboriginal rights to fish as critical to their future. They are far more than just nostalgic relics of their past. These rights may have origins in time immemorial, but they exist today as part of the twentieth century.”²²² Here, the ability to exploit this natural resource is presented as a vital aspect of the future development of this aboriginal nation.

These statements found in Sparrow’s factum and the AFN’s factum reveal that, first, there is a close connection between the identity and culture of this aboriginal group and the natural resource in question. Second, they explain the belief that fishing is an integral part of the Musqueam peoples’ future and this future includes the future wellbeing of Musqueam culture. This example serves to expose how natural resource exploitation can be an important constitutive element of an aboriginal nation’s sense of collective identity, including both its current state and its future development.

From this view, natural resources/natural resource exploitation are more than incidental descriptors of the Sto:lo and Musqueam and their corresponding collective identities. These elements are presented by these aboriginal groups as constitutive

²²¹ Factum of the NIB/AFN, *R. v. Sparrow*, p.1 para. 1.

²²² Factum of the Appellant Ronald Edward Sparrow, *R. v. Sparrow*, p.35 para. 66.

elements. They are presented as central markers of these nations' collective identities and cultures. The implication is that without them any characterization of their societies or collective identities would be unintelligible to those who bear these identities.

Land

In *Delgamuukw v. British Columbia* the factums submitted by the various aboriginal parties to this case provide an opportunity to identify the way in which these aboriginal peoples conceptualize the relationship between territory and aboriginality. These factums reveal that aboriginal relationships with traditional territories are constitutive elements of the way in which these aboriginal participants describe the structure of their societies and their sense of collective identity.

The Wet'suwet'n appellants in this case advanced the argument that traditional territories form a significant aspect of their distinctive culture. The appellants describe how Wet'suwet'en society is built upon three foundational institutions – the House, the Clan and the Feast – which are linked to territory in important ways.²²³ First, the Wet'suwet'en are organized into Houses and Clans which are territorially based. Here, land is a primary aspect of social division. The appellants explain that: “Integral to this structure [House/Clan structure] is the “ownership”, in Wet'suwet'en law, of specific parcels of land by the individual Houses and Clans.”²²⁴ In this way, identifying as a member of a House and Clan includes identifying with a certain territory. It is for this reason that the appellants conclude that the “proprietary relationship between House,

²²³ Factum of the Appellant Wet'suwet'en Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.48 para.139.

²²⁴ Factum of the Appellant Wet'suwet'en Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.50 para.156.

Chief and territory is an integral part of the organization, culture, laws, and ceremonies which define Wet'suwet'en identity."²²⁵

The other aboriginal appellants in this case, the Gitksan Hereditary Chiefs, advance a similar view of the relationship between territory and aboriginality. Like the Wet'suwet'en, the Gitksan are also organized along House lines. This results in an identification with both a Gitksan House and House territory.²²⁶ Moreover, in the Gitksan submission to the court, these appellants discuss the link between territory and the feast – their central social and political institution.²²⁷ The Gitksan factum states that one of the functions of the Gitksan feast is the management of the land tenure system (including the harvesting and conservation of natural resources).²²⁸ The feast plays a significant social function as well. Through its incorporation of a number of important social ceremonies (for example, the presentation of crests, the raising of totems, the recitation of oral history, etc)²²⁹ it is a vehicle for the transmission of culture and so facilitates the replication of this collective identity. In this way, the management of territory becomes linked with, or is itself, a mechanism for the replication and maintenance of Gitksan culture and identity. A poignant example of this last point comes to the fore when one considers the way in which the Gitksan characterize the succession of their chiefs. They describe how the “[r]ights to the land are transmitted by inheritance from one holder of a

²²⁵ Factum of the Appellant Wet'suwet'en Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.47 para.137.

²²⁶ Factum of the Appellant the Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.4 para.14.

²²⁷ Factum of the Appellant the Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.4 para.15.

²²⁸ Factum of the Appellant the Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.10 paras.36 - 37.

²²⁹ Factum of the Appellant the Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.5 paras.17 - 18.

chiefly name to another, resulting in perpetual succession. This system of succession connects the present generation of Gitksan legally and spiritually to their ancestors.”²³⁰ Here, ownership and inheritance of territory have significant social consequences. The passing on of territory marks the succession of a new chief. Furthermore, according to the appellants, land transferred in this fashion acts to create a coherent cultural narrative allowing the Gitksan to feel a connection with their ancestors. In this way, land and its transfer occupy a significant place in the cultural narrative of these people and so take on a significant role in the way in which the Gitksan understand their national story and construct their collective identity.²³¹

Aboriginal Conceptions of the Good

A number of the self-characterizations included in the factums submitted in the cases of *Delgamuukw* and *Van der Peet* include aboriginal conceptions of the good. These conceptions of the good are presented as constitutive elements of the way in which some aboriginal groups characterize their social organization and their sense of collective identity.

In the *Delgamuukw* case, the Gitksan hereditary chiefs advance the notion that their laws and land tenure system are underpinned by a particular normative vision. This vision is based on the belief that the members of this aboriginal nation are stewards of the land and its bounty and as such must manage and exploit the land and its natural

²³⁰ Factum of the Appellant Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.9 para.34. For a similar characterization of the relationship between aboriginal peoples and territory see: Factum of Delgamuukw et al., in *R. v. Van der Peet* and *R. v. Gladstone* et al., p.6 para21.

²³¹ Arthur Ray discusses the contents of his testimony for the Aboriginal participants in the *Delgamuukw* case, as well as the testimony of the opposing side in, “Constructing and Reconstructing Native History,” p.27-28. In this piece he outlines the relationship between land tenure, governance and identity.

resources in a respectful way.²³² Moreover, the hereditary chiefs make the argument that this normative vision ought to be considered in this case. This last point can be clearly seen in their proposed construction of the concept of aboriginal title. They argue that “Aboriginal title [...] carries with it a right to maintain their [the Gitksan] stewardship over, and their spiritual and material relationship with those [claimed] lands.”²³³ This characterization of aboriginal title highlights the Gitksan people’s position that they are the stewards of the territory in question and this role generates the claim that aboriginal title ought to facilitate the continuation of this stewardship or relationship between the Gitksan and their territory.

A similar normative vision is expressed by the Sto:lo appellant in *R. v. Van der Peet*. According to the appellant, Sto:lo oral history describes “an ancient respectful and spiritual relationship between the Sto:lo, the salmon and the Fraser River.”²³⁴ This relationship, like the one described by the Gitksan chiefs, is best characterized as a form of stewardship. Additionally, the appellant’s factum in the *Van der Peet* case includes an obligation to ensure that this relationship is protected for future generations. It states that the “Sto:lo believe that the Creator gave the Sto:lo the responsibility to take care of the fishery within their territory and to harvest fish for the benefit of this generation and for generations unborn.”²³⁵ This obligation mirrors the obligation identified in the Gitksan hereditary chiefs’ factum. There is a parallel between the position taken by the Sto:lo in regards to the inclusion of aboriginal conceptions of the good and s.35(1) rights and the

²³² Factum of the Appellant Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.11 para.39.

²³³ Factum of the Appellant Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.27 para.108.

²³⁴ Factum of the Appellant Dorothy Van der Peet, *R. v. Van der Peet*, p.2 para.8.

²³⁵ Factum of the Appellant Dorothy Van der Peet, *R. v. Van der Peet*, p.3 para.10.

position taken by the Gitksan on this same issue. “Fishing rights” they argue “are more closely defined as the relationship of the Sto:lo to the Creator, to the fish, to the fishery and to each other, their ancestors and generations unborn. The right embraces the laws, and the accumulated knowledge of the fishery to this generation, who in turn are expected to teach the next.”²³⁶

Here, Sto:lo and Gitksan conceptions of the good underpin the way in which these aboriginal nations define themselves. They are the stewards of this territory or that natural resource. These aboriginal peoples describe the existence of a particular relationship between their nations and the natural world which is based on the principle of stewardship. The discussions above reveal that this vision not only influences how these nations define themselves but it also impacts their position regarding the ultimate nature and scope of the rights that are capable of accommodating these aboriginal identities.

A subsequent conception of the good that both informs and is present in aboriginal self-characterizations is the idea that aboriginal and non-aboriginal people are equals and ought to conduct their affairs in a manner that acknowledges this equality. In the *Mitchell* case, for example, the Mohawk Council of Kahnawake advanced this type of characterization and justified its application to aboriginal/non-aboriginal relations by employing the metaphor of the Two-Row Wampum (or more specifically, the historical use of the Two-Row Wampum metaphor to structure relations between the two groups). The council explained that “[t]he Two-Row Wampum Treaty [...] represents the fundamental understanding that the Europeans who came to North America and the people of the Aboriginal Nations they encountered, would respect one another’s laws,

²³⁶ Factum of the Appellant Dorothy Van der Peet, *R. v. Van der Peet*, p.31 para 105.

languages, customs and institutions with neither party interfering in the other's affairs."²³⁷

The council went on to argue that the "defining feature of the Two-Row Wampum was that both societies were considered to be equals."²³⁸ The central claim here is that aboriginal and non-aboriginal peoples are equals. In light of this equality (which is represented by the use of the Two-Row Wampum treaty) aboriginal and non-aboriginal peoples ought to conduct themselves in a fashion that is compatible with this equality which, in this case, includes refraining from interfering in the other's affairs. The notion that aboriginals and non-aboriginals are equals, also underpins the insistence by many aboriginal participants in s.35(1) cases for the use of treaties as the proper vehicle for managing inter-societal relations. This will be discussed in more depth in a subsequent part of this section.

Who ought to decide the substantive contents of this national status?

The factums include discussions regarding the inappropriateness of others (or non-group members) defining the meaning of aboriginality and aboriginal identities. In the case of *R. v. Van der Peet*, the appellant's factum is critical of the 'practice based' approach and 'test' for aboriginal rights adopted by the majority opinion of the Court of Appeal. In part, these criticisms are based on the argument that this approach and test rely on externally generated definitions of aboriginality that are inappropriate and inaccurate. In terms of inappropriateness, Dorothy Van der Peet's factum takes the position that if "a legal test to prove a right requires the court to become the ultimate arbiter on the *true* [emphasis added] nature of aboriginal societies existing over a century

²³⁷ Factum of the Mohawk Council of Kahnawake, *M.N.R. v. Mitchell*, para.20.

²³⁸ Factum of the Mohawk Council of Kahnawake, *M.N.R. v. Mitchell*, para.20.

ago, the law serves a dysfunction.”²³⁹ There is an explicit rejection, here, of the appropriateness of externally generated evaluations of aboriginal societies.

The appellant’s factum outlines the primary reasons for this rejection. It exposes how these evaluations of aboriginality may not correspond to the ones held by the people who bear this identity. The appellant characterizes aboriginality as a dynamic collective identity that is both traditional and contemporary²⁴⁰. In this case, the appellant’s factum reveals that the majority of the justices of the Court of Appeal characterized aboriginality and the subsequent construction of the rights that arise from this characterization in a manner that failed to recognize this dynamism. The appellant states “[a]s defined, the [s. 35] rights are not societal, collective and contemporary rights and do not reflect the reality that aboriginal peoples are both ancient and contemporary civilizations.”²⁴¹ The appellant’s factum takes the position that the opposite is the case. “Under the majority’s [of the Court of Appeal] view “traditional” is the definition of “aboriginal” under s.35. “Aboriginal” becomes synonymous with a pre-contact past which, unrealistically, must struggle to resist all outside influences.”²⁴² The appellant’s factum, in *R. v. Van der Peet*, advances the position that outsiders should not define the substantive contents of aboriginality by exposing a serious consequence that results from these types of external

²³⁹ Factum of the Appellant Dorothy Van der Peet, *R. v. Van der Peet*, p.28 para 92.

²⁴⁰ Factum of the Appellant Dorothy Van der Peet, *R. v. Van der Peet*, p.15 para. 47.

²⁴¹ Factum of the Appellant Dorothy Marie Van der Peet, *R. v. Van der Peet*, p.15 para. 47.

²⁴² Factum of the Appellant Dorothy Marie Van der Peet, *R. v. Van der Peet*, p.15 para. 48.

definition. Here, the consequence is the correspondence made between ancientness/traditional and aboriginality.²⁴³

In the *Delgamuukw* case, the Westbank First Nation took a similar position regarding the construction of this type of correspondence. This intervener submitted that “[i]t is a mistake to equate aboriginal with “primitive” cultures.”²⁴⁴ The Westbank First Nation then went on to outline its understanding of the meaning of aboriginality and the manner in which this understanding undermined the maintenance of this correspondence. “Aboriginal,” the intervener argued, “simply means that some people were here first. “Firstness” has nothing to do with the state of society among either first peoples or those who came after.”²⁴⁵

Who ought to decide how to actualize this status and what this actualization entails?

Many of the factums submitted by the aboriginal participants in these cases advance the argument that aboriginal people ought to actualize this self-defining and equal status through aboriginal self-government. This position is outlined in the following fashion. First, many of the aboriginal parties and interveners in s.35(1) cases describe themselves, or aboriginal peoples in general, as self-governing nations or as collectivities entitled to certain powers of self-government. Second, these participants support this view by taking the position that aboriginal self-government is linked in significant ways to aboriginal culture and collective identity. Third, these participants conclude that nation to nation negotiations and treaty-making are the proper mechanisms

²⁴³ For a similar criticism of the practice based approach to aboriginal rights and the misrepresentation of “aboriginality” see: Factum of *Delgamuukw et al.*, *R. v. Van der Peet* and *R. v. Gladstone et al.*, p.4 para.15.

²⁴⁴ Factum of the Intervener Westbank First Nation, *Delgamuukw v. British Columbia*, 1997: para.41.

²⁴⁵ Factum of the Intervener Westbank First Nation, *Delgamuukw v. British Columbia.*, 1997: para.41.

for structuring relations between two parties that are entitled to self-government. And lastly, these participants point out that aboriginal self-government is not understood as a claim to absolute sovereignty. The result is that while self-governing nationhood is a constitutive element of aboriginality, sovereign nationhood (or independence) is not.

In their submissions to the SCC numerous aboriginal parties described aboriginal nations (and their historic counterparts) as self-governing societies that are entitled to powers of self-government. In *R. v. Sparrow*, intervening on behalf of the appellant Ronald E. Sparrow, the AFN characterized the original aboriginal inhabitants of North America as “organized in distinct and self-governing societies.”²⁴⁶ In *Delgamuukw v. B.C.*, the Gitksan appellants argued that their nation has “an unextinguished right to self-government.”²⁴⁷ In the same case, the Wet’suwet’en appellants stated that “they have certain rights which maybe described as rights of “governance”, in that they concern the role of traditional laws and structures of governance in relation to the territory and the land.”²⁴⁸ In all of these factums, self-government and powers or rights of self-government are deployed in the characterization of aboriginal nationhood (both generally speaking and in reference to particular aboriginal nations).

In the case of *R. v. Pamajewon* the Federation of Saskatchewan Indians and White Bear First Nations, intervening on behalf of the aboriginal appellants, echo the sentiments of the Wet’suwet’en appellants regarding aboriginal rights of governance. These

²⁴⁶ Factum of the NIB/AFN, *R. v. Sparrow*, p.7 para.17.

²⁴⁷ Factum of the Appellant Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.19 para.78. The rest of the quote reads “as an existing aboriginal right within the meaning of section 35(1) of the Constitution Act, 1982.”

²⁴⁸ Factum of the Appellant Wet’suwet’en Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.20 para.56.

interveners conclude that: “First Nations enjoy broad and existing self-government rights.”²⁴⁹ They go on to clarify that these self-government rights “do not owe their existence to particular legislation or Crown grant.”²⁵⁰ Here, aboriginal nations are characterized, once again, as entities that are entitled to certain rights of governance. Moreover, in this characterization, offered by the Federation of Saskatchewan Indians and White Bear First Nations, these rights of self-government do not flow from the Crown and are not a product of legislation. They inhere in and emanate from the collectivity itself.

The Westbank First Nation addresses this last point in a more general sense. They submit in their factum that “the power of self-government is inherent in any organized society or culture. That is to say, that in each society or culture there is an authority to bind those within its sway.”²⁵¹ From this view, a society and/or culture is the locus of origin of the right to self-government. Factums submitted by other aboriginal participants in section 35(1) cases support this particular conceptualization regarding the origin of the right to self-government. In their factum, the appellants in *R. v. Pamajewon*, Mr. Pamajewon and Mr. Jones, identify a similar source for these rights of self-government. They put forward the notion that the right of self-government “is an inherent right flowing from their peoples’ history in their homelands.”²⁵² For their part, the Federation of

²⁴⁹ Factum of the Federation of Saskatchewan Indians and White Bear First Nations, *R. v. Pamajewon*, p.5 para.13.

²⁵⁰ Factum of the Federation of Saskatchewan Indians and White Bear First Nations, *R. v. Pamajewon*, p.5 para.13. and Factum of the Appellants Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.58-59 para.223.

²⁵¹ Factum of the Westbank First Nation, *Delgamuukw v. British Columbia*, p.15 para.42.

²⁵² Factum of the Appellants Pamajewon and Jones, *R. v. Pamajewon*, p.6 para.23.

Saskatchewan Indians and White Bear First Nations concur with the appellants' explanation citing the fact that "First Nations were living in what is now Canada and governing their own peoples prior to contact"²⁵³ as the source of aboriginal rights of governance. In all of these factums aboriginal nations are presented as self-governing entities that have rights of governance that result from an historical occupation of the land, an organized society and an historic exercise of self-government.

In many instances, the factums advance the case that aboriginal self-government is exercised through institutions which are not only institutions of governance but are also significant cultural institutions, rendering them mechanisms for the creation and replication of aboriginal culture and identity. In *R. v. Pamajewon*, the appellants describe how their nation exercised self-government in a fashion that was culturally specific to their national group. "From time immemorial through the 19th century," they explain, "the Ojibwa managed their affairs in their traditional territory through their own form of self-government."²⁵⁴ The implication of this explanation is that the exercise of aboriginal self-government can be understood as an expression of a particular aboriginal nation's culture.

In *Delgamuukw v. B.C.* the Gitksan appellants make a similar point, though in a far more explicit fashion. Their factum states that "[t]he means and exercise of self-government within aboriginal society is a characteristic of such society no less integral to its distinctive culture than its language, spirituality, resource use or ancestral

²⁵³ Factum of the Federation of Saskatchewan Indians and White Bear First Nations, *R. v. Pamajewon*, p.6 para.16 and Factum of the Appellants Wet'suwet'en Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.54 para.160.

²⁵⁴ Factum of the Appellants Pamajewon and Jones, *R. v. Pamajewon*, p.3-4 para.14.

homelands.”²⁵⁵ From this view, the means and exercise of self-government are presented as significant markers of cultural distinctiveness and as constitutive elements of culture. The importance of these means and the exercise of self-government to aboriginal culture are revealed by the fact that a parallel is drawn here between these considerations of self-government and some foundational markers of culture and collective identity such as language, spirituality and territory.

Negotiation and Treaty Making

The factums also include numerous discussions regarding the importance of relying on treaty-making as the appropriate way to conduct relations between aboriginal peoples and the state. In *R. v. Pamajewon* the appellants contend that the basic “premise of aboriginal rights is that the Crown and aboriginal peoples will exercise their respective rights and responsibilities in an arrangement which reconciles their mutual and competing interests.”²⁵⁶ They go on to clarify that the “Courts have never sought to define the actual terms of that arrangement. That was the task of negotiated treaties.”²⁵⁷ In this factum, the appellants are advancing an important normative claim. This claim is that the basic rules of engagement for aboriginal/Crown interactions (that is, each party’s rights and responsibilities) ought to be worked out vis-à-vis negotiations and treaty-making.

The AFN’s intervention in the case of *R. v. Sparrow* provides an historical explanation for this normative claim (and the resulting emphasis on treaty-making). According to the AFN, historically aboriginal peoples and the Crown relied on treaty-making in order to structure their relations with one another. They point to the alienation

²⁵⁵ Factum of the Appellant Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, p.55 para.208.

²⁵⁶ Factum of the Appellants Pamajewon and Jones, *R. v. Pamajewon*, p.18-19 para.64.

²⁵⁷ Factum of the Appellants Pamajewon and Jones, *R. v. Pamajewon*, p.19 para.65.

of aboriginal lands as a prime example and explain how the alienation of aboriginal lands could only result from the treaty-making process. They state that, “[w]hen the Crown wished to purchase Indian title, it had to deal with the Indian people collectively. Treaty-making between the Crown and the Indians was the mechanism developed for that purpose.”²⁵⁸ The AFN also goes on to argue that “[b]y the treaties, the Crown recognized the Indian tribes or nations as polities.”²⁵⁹ This characterization of the treaty-making process is important because of the role it plays in structuring aboriginal/Crown relations. The process is also significant here because it constitutes a form of recognition of aboriginal nationhood.

The Question of Sovereignty

Intervening on behalf of the aboriginal appellants in *R. v. Pamajewon*, the Federation of Saskatchewan Indian Nations and White Bear First Nations advance the position that aboriginal self-government is not a claim to absolute sovereignty or a claim to be outside of the framework of Canadian federalism. In their factum they state that, “[i]t is important to emphasize that neither the Appellants, nor the Interveners in support of the Appellants, have argued that the Appellants’ First Nations are sovereign and outside of the basic framework of Canadian Confederation.”²⁶⁰

Along the same lines, the sovereignty of the Crown is not rejected in the factums submitted by the aboriginal participants. In *MNR v. Mitchell*, the aboriginal respondent insists that his actions were not “an act of defiance against Canadian sovereignty” nor “an

²⁵⁸ Factum of the NIB/AFN, *R. v. Sparrow*, p.8 para. 20.

²⁵⁹ Factum of the NIB/AFN, *R. v. Sparrow*, p.8 para. 20.

²⁶⁰ Factum of the Federation of Saskatchewan Indian Nations and White Bear First Nations, *R. v. Pamajewon*, p.17 para. 42.

attack on that sovereignty.”²⁶¹ Here, aboriginality as a collective identity does not entail a claim to absolute sovereignty or a wholesale rejection of Canadian sovereignty.

The factums submitted by the aboriginal participants involved in s.35(1) litigation include both significant examples of self-definition and articulations of self-government. The examples of self-definition discussed in this section reveal two things of import. First, they expose that even though these factums are produced by members of different aboriginal groups and nations there are certain common substantive components or elements that these individuals employ in their characterizations of aboriginality. The relationship between aboriginal peoples and the natural world (including here land, resources and resource exploitation) and aboriginal conceptions of the good are common themes contained within the various presentations of aboriginality offered by the aboriginal participants in their legal submissions. Second, the examination of the examples of self-definition reveals a developed argument regarding the question of who ought to define this collective identity. By exposing the inherent problems associated with characterizations of aboriginality that are not products of self-definition, the aboriginal participants build the case that the locus of origin of appropriate presentations of aboriginality (that is, definitions that capture what it means to be a bearer of this collective identity and what this collective identity entails – the aforementioned common substantive components or elements) is aboriginal groups or nations themselves. In other words, the aboriginal claimants in these cases are advancing that aboriginality ought to be the product of a process of self-definition.

²⁶¹ Factum of the Respondent Mitchell, *MNR v. Mitchell*, p.8 para.19; Also see: Factum of the Mohawk Council of Kahnawake, *MNR v. Mitchell*, p.5 para.6(B); Factum of the AFN, *MNR v. Mitchell*, p.1 para.1.

The various examples of articulations of self-government, found within the factums under consideration, work to present the argument that aboriginality entails self-governing nationhood. This is accomplished by, first, arguing that aboriginal nations are entitled to self-government and/or powers of self-government because of historical realities. Next, a substantial link between aboriginal culture and self-government (both its exercise and its form) is drawn. This link acts to render considerations of self-government constitutive aspects of aboriginality. As a result, negotiations and treaty-making are held as the appropriate mechanisms for dealing with these self-governing collectivities. And lastly, this argument includes an important clarification. It advances the explanation that even though aboriginality entails self-governing nationhood it does not necessarily entail a claim to absolute sovereignty in the form of independence. As a result, the various factums submitted by aboriginal participants in these s.35(1) cases present a characterization of aboriginality that entails self-defining, self-governing nationhood. This characterization corresponds to the notion of aboriginality that results from the nation to nation paradigm of interaction.

Colonial Articulations of Aboriginality in the Factums

Self-definition and self-government are two elements of the nation to nation version of aboriginality that are rejected by the colonial version of this collective identity. Accordingly, aboriginality of the colonial variety is, first, understood as a collective identity that is created by persons who do not belong to the group being defined; second, aboriginality denotes the experience of being subject to the will and rule of another. As a consequence, the interactions that occur between aboriginal and non-aboriginal peoples are unilateral in nature and are marred by a lack of consent and respect for the former group's differences.

Rejection of Aboriginal Self-Definitions and Examples of External Definition

A number of provincial and federal participants in s.35 cases either reject the aboriginal participants' self-definitions and/or present their own versions of aboriginality. In their submissions to the SCC in the cases of *R. v. Sparrow*, *R. v. Van der Peet* and *R. v. Gladstone* the Musqueam, the Sto:lo and the Heiltsuk all took the position that fishing and/or the trading of fish (for social, ceremonial or commercial purposes) were constitutive elements of their respective cultures and collective identities.²⁶² For their part, provincial and federal participants submitted arguments in each of these cases that rejected the self-characterizations offered by these aboriginal litigants.

In *Sparrow*, the Attorney General of Canada (AG) advanced that fishing, as of the 1960s, did not provide the staples for the Musqueam diet nor did it constitute a significant element of Musqueam culture. The AG made the case that the "evidence, if anything, shows that by the late 1960s, the Band had practically turned its back to the sea for food fishing purposes and that the fishing that did occur bore no resemblance whatsoever to the historical intensity level, purpose and mode of exploitation by the ancient Musqueam."²⁶³ In the same case, the AG of British Columbia reinforced this last point by contending that the Indian food fishery was a creation of positive law.²⁶⁴ Taken together, these submissions made by the AGs of Canada and British Columbia represented a rejection of the position that the fishery is of central importance to the Musqueam people and that it has historical continuity with the activities of this aboriginal nation's ancestors.

²⁶² Factum of the Appellant Ronald Edward Sparrow, *R. v. Sparrow*, 1990: para.2; Factum of the Appellant Dorothy Marie Van der Peet, *R. v. Van der Peet*, para 107; Factum of the Appellant Donald Gladstone, *R. v. Gladstone*, para.28.

²⁶³ Factum of the Respondent HMQ, Attorney General of Canada, *R. v. Sparrow*, para.89

²⁶⁴ Factum of the Attorney General of British Columbia, *R. v. Sparrow*, para.34

Moreover, these government submissions attempt to establish that the fishery is, in actual fact, a creation of the Crown. As a consequence, the fishery cannot be a constitutive aspect of the aboriginal nation's collective identity as the aboriginal litigants claimed. Thus, we find in *Sparrow* examples of outsiders rejecting significant constitutive aspects of aboriginal articulations of aboriginality.

Unlike the *Sparrow* case, in *R. v. Van der Peet*, the role that fishing played in aboriginal culture was not at issue. Instead, in *Van der Peet*, the Crown attempted to make the case that the Sto:lo trade of fish was not of the commercial variety. The Crown contended that “[i]n the pre-contact era the Sto:lo exchanged fish and other goods for social and ceremonial purposes. As the learned trial Judge found, there was no market economy in existence prior to the arrival of Europeans.”²⁶⁵ The Crown outlined how:

Food, wealth, and access to resources were exchanged within the family, and with other families connected through ties of kinship and marriage, on the basis of reciprocity. The social exchange was not a market system. There was no all-purpose money. It was not possible to take a surplus of food and simply peddle it. One had to have the social relations that made exchange possible. The economy was therefore firmly embedded in the social networks.²⁶⁶

Similarly, in *Gladstone*, the Crown put forward the argument that the Heiltsuk did not traditionally participate in commercial trading of herring spawn on kelp.²⁶⁷ The Crown stated that “trading herring spawn on kelp was not a major feature of the culture of the Heiltsuk Band.”²⁶⁸

²⁶⁵ Factum of the Respondent, HMQ, *R. v. Van der Peet*, para.14

²⁶⁶ Factum of the Respondent HMQ, *R. v. Van der Peet*, para.15

²⁶⁷ Factum of the Respondent HMQ, *R. v. Gladstone*, para.77

²⁶⁸ Factum of the Respondent HMQ, *R. v. Gladstone*, para.112. For a similar view on the non-commercial dimension of harvesting rights see SCC, *R. v. Sappier/R. v. Gray*, para.25.[0]

In both of these cases the aboriginal appellants assigned significant weight to resource exploitation and trade in their expressions of self-definition. In other words, the appellants described their collective identities in reference to these factors. By rejecting the validity of these references (that is, by questioning whether the Sto:lo and the Heiltsuk actually traded these resources commercially) the representatives of the Crown cited here were in essence rejecting the Sto:lo and Heiltsuk characterizations of their collective identities. This left space for these same representatives to offer their own characterizations of these aboriginal identities. In *Van der Peet*, for example, the Crown characterizes the Sto:lo, not as commercial traders, but as social traders (that is, people who engaged in trade in order to create/maintain social connections). This characterization of the Sto:lo was not only markedly different than the one advanced by the Sto:lo but serves as a illustrative example of an exercise of external definition.

In the *Pamajewon* and *Delgamuukw* cases a similar dynamic of rejection and external definition comes to the fore. Once again, the aboriginal litigants' expressions of self-definition are challenged by the representatives of the Crown. In *Pamajewon* the AG of Ontario stated that "Bingo has nothing to do with the culture, practices or history of the Shawanaga people. [...] Casinos and commercial destination gambling are foreign to the culture, practices and history of the Shawanaga. These are European in origin."²⁶⁹ Here, the AG is advancing the position that the practices of gambling at issue in this case are elements of European cultures and so cannot be elements of an aboriginal culture.

In *Delgamuukw*, the Wet'suwet'en and Gitksan appellants advanced that traditional territories are a central component of their nations' social organization, culture,

²⁶⁹ Factum of the Respondent the Attorney General of Ontario, *R. v. Pamajewon*, para.11

laws and collective identity.²⁷⁰ The AG of Canada, however, rejected the appellants' positions. First, the AG challenged the appellants' view of the dimensions of their traditional territories and the role that these territories played in the formation and maintenance of their collective identities by advancing that "the evidence does not establish that, at contact and excluding the effects of the commercial fur trade, the appellants' ancestors occupied lands outside the immediate areas of the villages for purposes that were integral to the distinctive culture of their societies."²⁷¹ The AG then went on to challenge the notion that the appellants' laws and customs governed these territories. The AG submitted that the, "trial judge found that what the appellants' witnesses described as law was really "a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves." This conclusion was entirely justified on the evidence."²⁷² What comes to the fore here is the fact that the AG of Canada, by rejecting the explanations offered by the appellants regarding the territorial dimensions, the impact of territory on aboriginal identity and culture, is, in effect, rejecting important expressions of self-definition offered by the aboriginal litigants.

In the same case, the submissions made by the AG of British Columbia regarding the issue of aboriginal self-government included important elements of external definition. While the aboriginal appellants characterized their claims as rights of self-government, the AG of British Columbia likened aboriginal self-government to self-regulation. This provincial litigant argued that "a self-government right is a right in the

²⁷⁰ Factum of the Appellant the Wet'suwet'en Hereditary Chiefs, *Delgamuukw v. British Columbia*, para.137; Factum of the Appellant the Gitksan Hereditary Chiefs, *Delgamuukw v. British Columbia*, paras.14-15, 36-37.

²⁷¹ Factum of the Attorney General of Canada, *Delgamuukw v. British Columbia*, para.136.

²⁷² Factum of the Attorney General of Canada, *Delgamuukw v. British Columbia*, para.131.

aboriginal community to regulate or govern its members inter se. It is properly described as “self” (or “internal”) in that it does not permit the governance or regulation of non-members.”²⁷³ The AG explained that “[t]he defining feature of the right of self-government is that it recognizes the aboriginal community’s right or power to govern its members by the creation and enforcement of norms of behaviour or conduct in accordance with historical customs, practices and traditions.”²⁷⁴ Self-government constructed in this fashion is perhaps better termed as self-regulation which takes the form of instituting social norms that aim to govern the social behaviour of members of an aboriginal community. It does not entail the right to institute laws which would govern non-social activities and which would apply to non-members. This understanding is very different from the claim of jurisdiction and self-government advanced by the aboriginal litigants who took the position that self-government includes the capacity to make laws in relation to non-social things such as the land.²⁷⁵ The argument made here by the AG of British Columbia hinges on the proposition that aboriginality entitles aboriginal people to a right more properly understood as a right of self-regulation not a right that is akin to a right of self-government. Advancing this particular version of this constitutive aspect of aboriginality is an example of an attempt at external definition. The AG of British Columbia is presenting an alternative definition of what this collective identity entails.

The colonial version of aboriginality entails not only instances of external definition but it also includes the notion that aboriginal peoples are subject to the rule of others. So, for example, in the *Gladstone* case the AG of Alberta argued that “[t]here is

²⁷³ Factum of the Attorney General of British Columbia, *Delgamuukw v. British Columbia*, para.299.

²⁷⁴ Factum of the Attorney General of British Columbia, *Delgamuukw v. British Columbia*, para.294.

²⁷⁵ Factum of the Appellant Wet’suwet’en Hereditary Chiefs, *Delgamuukw v. British Columbia*, para.56.

no broad right of self-government or self-regulation that would enable the Heiltsuk to reject the concept of a licensing scheme.”²⁷⁶ Here, this provincial intervener is explicitly stating that this aboriginal nation does not possess rights of self-government or self-regulation that would render this aboriginal nation exempt from the government’s existing regulatory system. Similarly, the AG of British Columbia, in the *Delgamuukw* case, advanced that underlying title to the land, and the capacity to govern said land, was vested in the Crown. The AG advanced that “all of these pre-Confederation laws are clearly inconsistent with, and hence extinguish, an aboriginal land tenure system which purports to vest in the aboriginal community a title that would burden the Crown’s title. There could only be one legal system which creates interest in land and as of sovereignty that legal system was that of the Colony of BC.”²⁷⁷ From this view, as of sovereignty there was only room for one legal order and that legal order was the non-aboriginal one. From that time on, aboriginal peoples and their lands were to be governed by this alien legal order.

Similarly, in the *Pamajewan* case, the AG of Ontario advanced that the Shawanaga and Eagle Lake First Nations did not have the right to conduct high stakes gaming on their reserves, or the capacity to make laws with regards to this criminal law matter because these First Nations and their territories were under the jurisdiction of the Federal government. Referring to s.91(24) of the *Constitution Act, 1867*, the AG argued that “[t]he intention of the Crown to extinguish the right of self-government of the Shawanaga First Nation or the larger aboriginal nation to which the Shawanaga First

²⁷⁶ Factum of the Attorney General of Alberta, *R. v. Gladstone*, para.13.

²⁷⁷ Factum of the Attorney General of British Columbia, *Delgamuukw v. British Columbia*, para.140.

Nation belongs or belonged at the relevant time has been clearly and plainly expressed. This necessarily includes criminal law making capacity.”²⁷⁸ Here, these First Nations are presented as lacking the right to conduct/regulate gaming on their reserves because these matters, the First Nations in question and their reserve lands are all under the jurisdiction of the federal government. This position is quite different from one that advances that these First Nations are self-governing peoples.

In the *Sparrow* case, the AG of Alberta accepted the notion that aboriginal peoples had collective rights but defined them in such a way as to make these nations subject to the rule of the Crown. The Attorney General explained that “Indians were considered to have certain limited rights, described as usufructuary rights dependent on the goodwill of the Crown.”²⁷⁹ Two important points speak to the notion that aboriginal peoples are subject to the rule of outsiders. First, usufructuary rights allow an individual or person to use and enjoy the benefits of land in the absence of possession of underlying title to that land. The important point here is that title rests, not with the holders of these rights, but with others (in this case the Crown). Second, the insistence that the rights that aboriginal peoples possess exist at the pleasure of the Crown means that these rights may be extinguished at the Crown’s discretion. Both of these conditions work to explain how a group may possess collective rights and simultaneously be ruled by another.

By far, the clearest manifestation of the argument that aboriginal nations are subject to non-aboriginal rule comes in the form of continued claims to sovereignty by non-aboriginals over the land and the people inhabiting Canada. In the case of *Mitchell v.*

²⁷⁸ Factum of the Respondent the Attorney General of Ontario, *R. v. Pamajewon*, para.14.

²⁷⁹ Factum of the Attorney General of Alberta, *R. v. Sparrow*, para.6.

M.N.R. the appellant, the Minister of National Revenue, argued that the aboriginal litigants did not possess the right to cross Canada's international border without paying duties because such a right would be irreconcilable with Canadian sovereignty. The Minister submitted that "Canadian sovereignty entails the power to control both who and what enters the country."²⁸⁰ From this view, the aboriginal litigants were subject to the sovereignty of the Crown and as a consequence could not cross the international border without being subject to the existing rules and regulations associated with doing so.

Similarly, in *Pamajewon* the AG of Canada argued that "[a]n aboriginal claim to sovereignty cannot be supported at Canadian law."²⁸¹ The AG went on to state that "Canadian sovereignty is a legal reality recognized by the law of nations. This Court in *R. v. Sparrow*, rejected the notion that the aboriginal peoples of Canada might retain any measure of sovereignty."²⁸² The important point to take away from this position is that in what is now Canada the Crown is sovereign and aboriginal peoples are unconditionally subject to that sovereignty.

Citizen-State Articulations of Aboriginality in the Facts and SCC Decisions

In the case of *R. v. Van der Peet* Lamer C.J., writing for the majority of the Court, advances the position that aboriginal rights "arise from the fact that aboriginal people are aboriginal."²⁸³ Citing academics Michael Asch and Patrick Macklem he states that "aboriginal rights "inhere in the very meaning of aboriginality".²⁸⁴ This link between

²⁸⁰ Factum of the Appellant the Minister of National Revenue, *Mitchell v. M.N.R.*, para.1.

²⁸¹ Factum of the Intervener the Attorney General of Canada, *R. v. Pamajewon*, para.2.

²⁸² Factum of the intervener the Attorney General of Canada, *R. v. Pamajewon*, para.7.

²⁸³ SCC, *R. v. Van der Peet*, para. 19.

²⁸⁴ SCC, *R. v. Van der Peet*, para. 19.

aboriginality and aboriginal rights is significant because it provides an important degree of direction in the effort to trace the way in which the majority of the SCC conceptualizes aboriginality. Due to the fact that the majority of the SCC envisions that aboriginal rights inhere in the very meaning of aboriginality, an examination of the characterization of the nature and scope of aboriginal rights held by the majority inevitably includes the majority's characterization of this collective identity. A consequence of this type of examination is the realization that the majority of the SCC holds a citizen-state view of aboriginality. Moreover, an examination of the factums submitted by some provincial/federal AGs in s.35(1) cases reveals that a number of these parties employ a similar understanding of this collective identity in aboriginal rights litigation.

The citizen-state version of this collective identity conceives of aboriginality as a single component, or facet of an individual's overall identity. This important aspect of the individual's overall identity denotes a connection with a particular bounded community within the state. This component of the individual's overall identity exists in concert with another significant facet – membership in a broader political community where the Crown is sovereign. In this way, this collective identity envisions overlapping attachments and loyalties to multiple communities. The distinguishing nature of the former facet may give rise to a particular set of rights and duties that goes above and beyond the ones accorded to citizens generally.

First Facet

When aboriginality is constructed within the citizen-state paradigm one significant facet of this collective identity is an individual's connection with a particular bounded community. An examination of a number of post-1982 SCC decisions and provincial factums dealing with aboriginal rights cases reveals that this connection manifests itself

as membership in and attachment to a specific cultural group that can claim prior or pre-Contact social origins. This connection also manifests itself as a unique attachment to particular lands or territories. From this view, part of what it means to be aboriginal includes membership in and attachment to a pre-Contact socio-cultural group and a sense of attachment to specific lands. These attachments are constitutive elements of this way of understanding aboriginality. Moreover, it is this facet of aboriginality (that is, these bonds of attachment) that gives rise to a bundle of rights not accorded to citizens generally. Accordingly, the majority of the SCC has found that aboriginal rights arise from the fact of prior occupancy and “from the prior social organization and distinctive cultures of aboriginal peoples on that land.”²⁸⁵ The next section traces the majority’s and some provincial participants’ characterization of the doctrine of aboriginal rights, the test for aboriginal rights and aboriginal title in an effort to demonstrate the significant role played by these bonds of attachment on the nature and scope of aboriginal rights and so on the very meaning of aboriginality.

Membership in and attachment to a pre-Contact socio-cultural group

In the case of *R. v. Van der Peet* Lamer C.J. describes the doctrine of aboriginal rights in following way:

[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.²⁸⁶

²⁸⁵ SCC, *R. v. Van der Peet*, Held, p.7

²⁸⁶ SCC, *R. v. Van der Peet*, para. 30.

What comes to the fore in this characterization of the doctrine of aboriginal rights is the notion that the fact of prior social organization, distinctive culture and land are, first, factors that distinguish aboriginal peoples from non-aboriginal peoples and, second, are aspects of the collective identity of aboriginal peoples that merit a particular legal and constitutional status. For all intents and purposes, then, it is these aspects of aboriginality that are legally and constitutionally significant. Stated differently, for Lamer C.J. and the majority of the SCC these aspects are definitive of their characterization of aboriginality.

The test for identifying aboriginal rights supports this proposition. Lamer C.J. states that “[the test] must aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.”²⁸⁷ He goes on to conclude that “identifying those practices, traditions and customs that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.”²⁸⁸ Consequently, the test for aboriginal rights hinges on practices, customs and traditions that are integral to the distinctive pre-Contact cultures of aboriginal peoples and are crucial elements of distinctive pre-Contact aboriginal societies. By protecting these distinctive and integral pre-Contact elements of aboriginal culture the majority of the Court contends that it is affording protection to these distinctive aboriginal groups. Thus, aboriginal peoples could maintain their attachment to these groups and continue their membership in these groups.²⁸⁹

²⁸⁷ SCC, *R. v. Van der Peet*, para.44

²⁸⁸ SCC, *R. v. Van der Peet*, para.45.

²⁸⁹ The test for and purpose of Metis s.35(1) rights parallels what is described here. In *R. v. Powley*, the SCC reasons that “the purpose and the promise of s.35(1) is to protect practices that persist in the present day as integral elements of their Metis culture.” Para.13. One significant difference is the pre-Contact

In this way, it is accurate to argue that this activities-based test for aboriginal rights, as formulated by the majority, centres on a concern for protecting aboriginality by extending protection to identifiable and discrete practices, traditions and customs that lay at the core of this collective identity. In the case of *Mitchell v. M.N.R.* McLachlin C.J. explains the link between this collective identity and the protected practices in a similar fashion. The Chief Justice states that the “practice, tradition or custom must have been integral to the distinctive culture of the aboriginal people in the sense that it distinguished or characterized their traditional culture and lay at the core of the aboriginal people’s identity.”²⁹⁰ McLachlin C.J. then goes on to clarify that

it [the activity] must be a “defining feature” of the aboriginal society, such that the culture would be “fundamentally altered” without it. [...] This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society’s cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society.²⁹¹

From this view, aboriginal rights protect the activities that both constitute and distinguish a particular aboriginal culture, society and collective identity.

Along the same lines, a number of the provincial AGs in the *Pamajewon* case characterize the link between this collective identity and aboriginal rights in a similar fashion. For example, the AG of Ontario suggests that the SCC “[c]onsider the question in these terms: if these gambling centres [the issue at bar in this case] close [...] will either First Nation lose anything of its sense of ‘aboriginalness’.”²⁹² Here, the question of

temporal requirement. The pre-Contact requirement is modified in order to properly account for the post-Contact genesis of the Metis and, so, the temporal period of significance for Metis s.35(1) rights is the time period between Contact and the assertion of control by the Crown. SCC, *R. v. Powley*, para. 18.

²⁹⁰ SCC., *Mitchell v. M.N.R.*, para.12.

²⁹¹ SCC, *Mitchell v. M.N.R.*, para.12

²⁹² Factum of the Respondent, the Attorney General of Ontario, *R. v. Pamajewon*, para.48.

whether this activity qualified as an aboriginal right centres on the question of whether this activity was a constitutive element of this collective identity (or as stated here “aboriginalness”). In this same case, the AG of British Columbia presents a similar link between the test for aboriginal rights and aboriginality. This provincial intervener states that the activities that are recognized as aboriginal rights “go to the very core of “Indianness”.”²⁹³ Similarly, the AG of Saskatchewan submitted that the purpose behind the legal protection afforded aboriginal rights was “to enable Aboriginal people to maintain their distinctive identities.”²⁹⁴ What comes to the fore, here, is the notion that aboriginality is constituted by discrete practices, customs and traditions and that protecting these by elevating them to the status of aboriginal rights results in the protection of this collective identity.

The above discussion of the test for aboriginal rights brings to light the important role played by identifiable activities in the majority of the SCC’s characterization of aboriginality. If aboriginal rights inhere in the very meaning of aboriginality then one way of constructing the majority’s understanding of aboriginality is to examine what exactly aboriginal rights are meant to protect. Since aboriginal rights afford protection to identifiable practices, customs and traditions then one could make the case that, here, aboriginality is understood as the sum total of these activities. Along the same lines, the test for aboriginal rights as outlined by the majority includes the caveat that in order for practices, customs and traditions to qualify for constitutional protection they must be of the pre-Contact variety or they must have pre-Contact origins. Lamer C.J. is explicit

²⁹³ Factum of the Attorney General of British Columbia, *R. v. Pamajewon*, para.15; Note, the Province of British Columbia makes a similar argument in *R. v. Gladstone, NTC Smokehouse Ltd., et al.*, para.20.

²⁹⁴ Factum of the Attorney General of Saskatchewan, *R. v. Pamajewon*, para.26.

about this stating that “the rights recognized and affirmed by s.35(1) must be temporally rooted in the historical presence – the ancestry of aboriginal peoples in North America.”²⁹⁵

Consequently, the version of aboriginality employed here is one that not only hinges on identifiable activities that are integral to an aboriginal group’s collective identity but also activities that are temporally limited because they are historically rooted in pre-Contact aboriginal societies. Stated differently, aboriginality is a collective identity that is constituted by pre-Contact practices, traditions and customs that are integral to a distinctive bounded community. This understanding of aboriginality comes to the fore when one examines the way in which the Court outlined the task at hand in the *Sappier/Gray* case of 2006. It asked “[c]omment peut-on définir la culture distinctive de ces peuples et déterminer quelles pratiques antérieures au contact avec les Européens en faisaient partie intégrante? Voilà la question fondamentale que soulèvent les présents pouvoirs.”²⁹⁶ In this example, defining aboriginal culture and identifying significant practices are collapsed together to form the “fundamental question” before the SCC in this case.

L’Heureux-Dubé J.’s dissenting opinion in the *Van der Peet* case highlights the manner in which the majority’s construction of the test for aboriginal rights focuses too narrowly on the central (and for her problematic) role played by pre-Contact considerations. This dissenting SCC justice takes the position that the majority’s focus on

²⁹⁵ SCC, *R. v. Van der Peet*, para.32.

²⁹⁶ SCC, *R. v. Sappier/R. v. Gray*, para.2

pre-Contact aboriginal practices, traditions and customs results in the mischaracterization of aboriginal rights and a misconceptualization of aboriginality.

According to L’Heureux-Dubé J., the majority of the Court supports an approach to identifying aboriginal rights that “considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted.”²⁹⁷ For this Supreme Court Justice, characterizing aboriginal rights in such a fashion is akin to creating a catalogue of discrete practices, traditions and customs that are eligible for constitutional protection.²⁹⁸ L’Heureux-Dubé argues that the significance that these activities hold for aboriginal peoples and their cultures should be of primary import here, not the activities themselves.²⁹⁹

The major problem that results from this way of approaching aboriginal rights regards the way in which the majority arrives at its definition of ‘identifying activities’. These activities must be pre-Contact in nature. L’Heureux-Dubé J. describes a situation wherein the majority’s pre-Contact requirement translates into a conception of aboriginal culture that is marked by the existence of negation. In other words, aboriginal culture (and, by extension the collective identity it generates) cannot contain elements that are constitutive of other non-aboriginal cultures.

L’Heureux-Dubé J. argues that, “on [the majority’s view], what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture.”³⁰⁰ She goes on to warn that this inevitably leads to a situation where “if an activity is integral to a

²⁹⁷ SCC, *R. v. Van der Peet*, para.150

²⁹⁸ SCC, *R. v. Van der Peet*, para.157

²⁹⁹ SCC, *R. v. Van der Peet*, para.157

³⁰⁰ SCC, *R. v. Van der Peet*, para.150

culture other than that of aboriginal people, it cannot be part of aboriginal people's distinctive culture."³⁰¹ Here, L'Heureux-Dubé J. advances the claim that the majority's approach to characterizing aboriginal rights is underpinned by a dichotomous view of culture which envisions a binary relationship between aboriginal culture and its non-aboriginal counterpart. This position leads her to conclude that "an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away."³⁰²

This discussion is significant here because one of the constitutive aspects of aboriginality as understood by the majority of the Court is membership in and attachment to a pre-Contact socio-cultural group which is protected by extending constitutional protection to specific activities. L'Heureux-Dubé J.'s concerns about the approach employed by the majority to identify aboriginal rights demonstrates that when the majority refers to pre-Contact socio-cultural groups a series of basic assumptions about aboriginal culture and aboriginality are at play – the most important being a conception of aboriginality that envisions this collective identity as an aggregate of identifiable and discrete pre-Contact practices, customs and traditions not held by non-aboriginals. A significant consequence of conceptualizing this collective identity in the aforementioned fashion is that aboriginality, as a collective identity, runs the risk of referring to that which is not a constitutive element of any other collective identity.

Attachment to a Particular Territory

³⁰¹ SCC, *R. v. Van der Peet*, para.150

³⁰² SCC, *R. v. Van der Peet*, para.154

Another important component of the first facet of aboriginality is the attachment to land. The importance of this component was recognized in *R. v. Sparrow*. In that case, the AG of Ontario made this point quite effectively by indicating that, “the occasion and rationale of aboriginal rights is the aboriginal relationship to the land and resources – the traditional occupation, use and enjoyment of them by the aboriginal peoples.”³⁰³ Subsequent cases and other interveners also express the importance of aboriginal attachment to particular territories. In the case of *Delgamuukw v. B.C.* the AG of Canada cautioned that, “[t]o ignore the historical relationship to the land is to ignore the unique nature of aboriginal title.”³⁰⁴ Here, this intervener is putting forward the notion that the historic relationship between a people and its traditional territory (that is, its attachment to particular lands) is an important factor in the ultimate nature and scope of the aboriginal right in question in this case (that is, aboriginal title).

Delgamuukw v. British Columbia is the most significant case that has come before the SCC that deals with the issue of land. It is significant not only because it provided the Court with the opportunity to define the nature and the scope of aboriginal title, but also because it reveals the willingness of the Court to accept the proposition that aboriginal peoples have a distinctive relationship to certain territories. Not unlike the above discussion, examining the way in which the majority of the Court conceptualizes aboriginal title reveals a great deal about how the majority characterizes aboriginality. This results from the fact that aboriginal title is a subset of aboriginal rights. Thus, it too inheres in the very meaning of aboriginality.

³⁰³ Factum of the Attorney General of Ontario, *R. v. Sparrow*, para.47.

³⁰⁴ Factum of the Attorney General of Canada, *Delgamuukw v. British Columbia*, para.34

In the *Delgamuukw* case, Lamer C.J. (speaking for the majority) found that there is a significant connection between land and aboriginal identity. According to Lamer C.J., occupancy is a central consideration when settling the question of aboriginal title.³⁰⁵

He goes on to clarify the following:

Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture.³⁰⁶

Here, it is evident that Lamer C.J. is accepting that territory may play a role in shaping a group's collective identity because he is advancing that this same factor can have a determinant role in a group's distinctive culture. This link makes sense given the influence that culture has on collective identity formation and maintenance.

According to Lamer C.J., considerations regarding the bond between land and a group's identity may justify, in some instances, limits on the contents of aboriginal title. He reasons that, "the content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."³⁰⁷ He goes further arguing that: "the relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. [...]Uses of the lands that would threaten that future relationship are by their very nature excluded from the content of aboriginal title."³⁰⁸ This discussion regarding the limits of aboriginal title is important for

³⁰⁵ SCC, *Delgamuukw v. British Columbia*, para.128.

³⁰⁶ SCC, *Delgamuukw v. British Columbia*, para. 128.

³⁰⁷ SCC, *Delgamuukw v. British Columbia*, para. 125

³⁰⁸ SCC, *Delgamuukw v. British Columbia*, para. 127.

two reasons. First, the fact that considerations based on identity are capable of limiting the contents of aboriginal title reinforces the idea that aboriginal identity is a significant factor in the court's ultimate construction of this legal concept. In other words, aboriginal title, like aboriginal rights, inheres in the very meaning of aboriginality. Second, this construction of aboriginal title means that it is possible to tease out part of the majority's understanding of this collective identity by focusing on the types of relationships or attachments to land that are granted protection. From this view, aboriginality is partly constituted by attachments to land that are candidates for constitutional protection.

In their submissions to the SCC some AGs present a similar construction of aboriginal title and so a similar conception of this collective identity. In the *Pamajewan* case the AG of Ontario argued the following:

This is not a case about Shawanaga and Eagle Lake First Nations governing members of their bands, but rather about the Band Councils governing off-reserve non-Natives who are invited onto reserve land. That is not, it is submitted, an act related to aboriginal land use or the continuing relationship between a people and their territory, but rather an act purporting to govern the broader community in a manner divorced from the relationship between First Nations, their lands and their history. It has no relationship with anything that could be said to be an "integral part of the distinctive culture" of the Ojibwa.³⁰⁹

Here there are two things of import. First, the AG of Ontario is advancing that certain relationships to the land are not candidates for aboriginal title. The basis of this argument is that some relationships are not constitutive of an aboriginal identity. The second point, which stems from the first, is that certain relationships would not be eligible for constitutional protection. Given the role that land has in shaping aboriginal culture and identity, the result of controlling the contents of aboriginal title would also include shaping, to a significant degree, the possible forms that aboriginal identities may take.

³⁰⁹ Factum of the Respondent the Attorney General of Ontario, *R. v. Pamajewan*, para.45.

Those relationships or attachments that are not deemed to be acceptable versions of this bond between aboriginal peoples and lands (because of the reasons provided by Lamer C.J. or the AG of Ontario) are left unprotected because they cannot be the basis of aboriginal title. In this instance, the judiciary becomes (or may be called upon to act as) a keeper of aboriginal identity for both present and future generations of aboriginal nations.

Second Facet

Attachment to a particular bounded community (manifested as membership in and attachment to a pre-Contact socio-cultural group and relationships to traditional territories) represents one significant facet of the citizen-state conception of aboriginality. This conception of aboriginality, however, posits that this facet is not intelligible on its own because this component of an individual's overall identity exists in concert with another significant facet – membership in a broader political community where the Crown is sovereign. An examination of the jurisprudence on aboriginal rights reveals that the constitutive aspects of this second facet include the propositions that aboriginal people are members of the Canadian political community in a manner akin to non-aboriginals and that the Crown is ultimately sovereign.

Aboriginal People are members of the Broader Canadian Political Community

A central proposition underpinning the second facet of the citizen-state understanding of aboriginality is that Aboriginal people are members of the broader political community. This membership entails the proposition that, at times, aboriginal peoples ought to be treated in a manner akin to non-Aboriginals. In the case of *Michell v. M.N.R.* Binnie J. (writing for himself and Major J.) explains that “the respondents and other aboriginal people live and contribute as part of our national diversity. So too in the Court's definition of aboriginal rights [...]. They are projected into modern Canada

where they are exercised as group rights in the 21st century by modern Canadians who wish to preserve and protect their aboriginal identity.”³¹⁰ Binnie J. goes on to explain that “while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. For other purposes he or she must be recognized and treated as an ordinary member of Canadian society.”³¹¹ In this case, Binnie J. is clearly expressing the opinion that Aboriginal people are members of the broader political community and under certain circumstances ought to be treated as such regardless of membership in a particular bounded community.

The majority’s decision in the case of *R. v. Gladstone* advances that at times aboriginal peoples ought to be treated in a manner akin to non-aboriginals and that this may result in the infringement of their s.35(1) rights. The majority in this case held the view that the infringement of s.35(1) rights is partially explained vis-à-vis the fact that aboriginal peoples are simultaneously members of particular aboriginal communities and members of a broader Canadian political community. Lamer C.J., writing for the majority, is cited at length here in order to expose the manner in which this fact of membership in a broader community can act as the justification for the infringement of aboriginal rights. The then Chief Justice states:

Aboriginal rights are recognized and affirmed by s.35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the

³¹⁰ SCC, *Mitchell v. M.N.R.*, para.132.

³¹¹ SCC, *Mitchell v. M.N.R.*, para.133.

Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.³¹²

From this view, the infringement of s.35(1) rights is explained vis-à-vis appeals to the fact that aboriginal peoples are members of the broader Canadian social, political and economic community. Accordingly, in certain circumstances, these rights may be infringed in order to pursue interests that are important to the broader Canadian community as a whole. According to the SCC, this is justifiable because aboriginal peoples are members of this broader community. In this way, the infringement of aboriginal rights can be an important part of the process of reconciliation discussed by the Chief Justice. This discussion is significant here for two reasons. First, it demonstrates that part of the majority's characterization of the collective identity of aboriginal peoples includes the idea of membership in the broader Canadian community, which includes treating aboriginal peoples in a manner akin to other Canadians. Second, this fact of membership is capable of limiting the degree of protection afforded to aboriginal peoples' attachments to their particular bounded communities. This is a result of the fact that membership in the broader Canadian community is cited as a rationale for infringement of s.35(1) rights which protect aboriginal peoples' attachments to their particular bounded communities.

A number of provincial and federal interveners also point to this element of membership in their submissions to the Court in aboriginal rights cases. In a number of

³¹² SCC, *R. v. Gladstone*, para.73

these submissions, these interveners demonstrate that this fact of membership in the broader Canadian community underpins the argument that in certain circumstances aboriginal peoples ought to be treated in a manner akin to their non-aboriginal counterparts. In the *Sparrow* case, the AG of Ontario advanced that “aboriginal people are in the same position as other persons in Canada when they engage in activities that are not among their aboriginal activities and [...]there is no valid general policy reason arising from the unique status of aboriginal peoples in Canada that commends a departure from that principle.”³¹³ This underpinned the AG’s contention that, “[w]here the aboriginal rights of a particular aboriginal people do not extend to commercial fishing, the aboriginal people in question are as free as anyone else to engage in commercial fishing.”³¹⁴ The AG of Ontario’s position is based on the following: Aboriginals are no different than non-Aboriginals when they are engaging in non-Aboriginal activities. In these instances, they are subsequently subject to the same policies, restrictions, laws, and the like as all other members of the Canadian community.

Similarly, in the *Pamajewon* case the AG of Canada argued that “criminal prohibitions within a society can know of no exceptions other than those defined by the sovereign; the criminal law must apply equally to all those within the state.”³¹⁵ The AG went on to conclude that “[g]ambling and gaming have been found by this Court to constitute proper subject matters for prohibition pursuant to Parliament’s valid exercise of criminal law power. As such this conduct is of concern to all of Canadian society,

³¹³ Factum of the Attorney General of Ontario, *R. v. Sparrow*, para.55

³¹⁴ Factum of the Attorney General of Ontario, *R. v. Sparrow*, para.56

³¹⁵ Factum of the Attorney General of Canada, *R. v. Pamajewon*, para.29.

regardless of where it takes place.”³¹⁶ Here, the AG of Canada is of the opinion that the criminal law applies to all members of the Canadian community. The AG expressly points out that some matters, like gambling and gaming, concern all of Canadian society and so are rightly the responsibility of Parliament (the institution that represents the interests of Canadian community as a whole). From this view, in instances where the interest at stake is of importance to all Canadians aboriginal and non-aboriginal people ought to be subject to the same authority and rules – that is, treated in a like fashion.

Sovereignty of the Crown

In the case of *R. v. Sparrow* the AG of Quebec characterized the task before the SCC in the following fashion:

Pour permettre aux peuples autochtones et aux gouvernements de concilier leurs intérêts, il faut que l’article 35(1) ne confère qu’une protection relative face aux droits ancestraux et issus de traités ou d’accords de revendications territoriales. Il s’agit en fait de la seule interprétation raisonnable face à une interprétation qui confèrerait soit une protection absolue, soit aucune protection.³¹⁷

The central point of this submission by the AG of Quebec is that s.35(1) ought not be interpreted in a manner that renders the rights covered by this constitutional provision either absolute or meaningless. A degree of protection that lies somewhere in between these poles, argues this AG, would be appropriate and balance the interests of both aboriginal peoples and the Crown.

A key interest for the SCC in this case was the sovereignty of the Crown. Accordingly, the SCC in its *Sparrow* ruling included a strong and unambiguous statement about the nature of the Crown’s sovereignty. It stated that “there was from the outset

³¹⁶ Factum of the Attorney General of Canada, *R. v. Pamajewon*, para. 53

³¹⁷ Factum of the Attorney General of Quebec, *R. v. Sparrow*, para.29

never any doubt that sovereignty and legislative power, and indeed underlying title [...] vests in the Crown.”³¹⁸ Given the Court’s position regarding the unquestionable nature of the Crown’s sovereignty it is easy to see how considerations regarding the sovereignty of the Crown made it into the majority’s understanding of s.35(1) and of the collective identity this constitutional provision is meant to protect.

To begin with, Lamer C.J., writing for the majority in the *Van der Peet* case, provides an indication of the manner in which the doctrine of aboriginal rights links the first facet of aboriginality (i.e. the attachment to a particular bounded community) with the sovereignty of the Crown.

[W]hat s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”³¹⁹

Here, it is evident that the majority conceptualizes a substantial link between the first facet of aboriginality (i.e. the attachment to a particular bounded community) and an element of the second facet (i.e. the sovereignty of the Crown). More specifically, the majority advances the argument that only those attachments to a particular bounded community that can be reconciled with the sovereignty of the Crown are candidates for constitutional protection. Stated differently, any aspects of this collective identity that cannot be reconciled with the Crown’s sovereignty cannot be constitutive aspects of the majority’s conception of aboriginality. This last point is reinforced by the fact that these

³¹⁸ SCC, *R. v. Sparrow*, p.30

³¹⁹ SCC, *R. v. Van der Peet*, para.31

aforementioned aspects would not be covered by the doctrine of aboriginal rights and so, to use Lamer C.J.'s wording, would not inhere in the very meaning of aboriginality.

A number of factums submitted by the provinces in various aboriginal rights cases support this last point. In *Delgamuukw v. B.C.* the AG of British Columbia urged the Court to dismiss the Aboriginal appellants' claims to aboriginal title and self-governance by warning that "[i]f those [...] claims are to be constitutionalized, the result could be a huge enclave of land in which provincial and federal laws and Crown grants might have little or no application."³²⁰ Crown sovereignty includes issues such as the applicability of provincial and federal laws and Crown grants. Concerns about the applicability of these laws and security of these grants are concerns about the sovereignty of the Crown. The justificatory work for this argument is accomplished vis-à-vis an appeal to the possible irreconcilability between these claims to aboriginal title and self-governance and the Crown's sovereignty. Similar arguments were offered by the Respondent in the case of *R. v. Pamajewan*. The, respondent, the AG of Ontario, advanced the view that Aboriginal "Title does not create an island of sovereign or legislative authority within the broader community [...]. Such a right would have no beginning and no end. It would be without legitimacy in our legal system."³²¹ The AG of Ontario went on to justify this position by stating that "[s]overeignty [...] was clearly vested in the Crown, at least as early as the Royal Proclamation of 1763."³²² Here, the Respondent urged the Court to reject the Appellants' claims on the grounds that they could not be reconciled with the sovereignty of the Crown. Once again the justificatory work is accomplished vis-à-vis an appeal to

³²⁰ Factum of the Attorney General of British Columbia, *Delgamuukw v. British Columbia*, para36

³²¹ Factum of the Respondent, the Attorney General of Ontario, *R. v. Pamajewan*, para.39

³²² Factum of the Respondent, the Attorney General of Ontario, *R. v. Pamajewan*, para.49

the question of whether the claims advanced by the Appellants could be reconciled with the Crown's sovereignty.

S.35(1) Court Material and the Contestation over the Meaning of Aboriginality

The examination conducted in this chapter reveals the presence of all three versions of aboriginality outlined in chapter five. The various factums submitted by the aboriginal claimants in s.35(1) cases present a characterization of aboriginality that entails self-defining, self-governing nationhood. This characterization corresponds to the nation to nation version of this collective identity. A number of the provincial and federal AGs in s.35(1) cases reject the aboriginal participants' self-definitions and present their own versions of aboriginality. These AGs put forward that aboriginal peoples were and are subject to the rule of non-aboriginals. As a consequence, these AGs are advancing a conception of aboriginality that coincides with the colonial version of this collective identity. The SCC and a number of AGs characterized aboriginality as entailing two constitutive components. The first is membership in and a connection to a particular bounded community. The second component is the notion that this membership and connection coexists with membership in a broader political community where the Crown is sovereign. In essence, the SCC and these AGs are articulating a citizen-state conception of aboriginality. What is clear, then, is that in the material surveyed in chapter six (material drawn from the most important cases dealing with existing aboriginal rights) three different versions of this collective identity are present.

These findings represent a direct challenge to approaches to the study of aboriginal rights (like Eisenberg's difference perspective) that proceed as if the meaning of aboriginality is uncontested and/or settled. What comes to the fore in this chapter is that the parties to s.35(1) litigation do not agree about the nature of this collective

identity. This fact makes it very difficult to imagine that these same parties would provide similar answers for the questions that drive a difference perspective analysis – questions like: “What is the role of the tradition or practice in the way that a group defines itself? Is this role or definition in dispute? How disputed is it? To what extent will disallowing the practice alter the group’s identity? To what extent will an external court interfering in the internal affairs of a minority community jeopardize that community’s ability to define and govern itself?”³²³ Given what we know about how the parties to s.35(1) cases characterize aboriginality, they would likely disagree about the role of a tradition or practice, about whether the role is in dispute and the degree to which it is disputed, the extent to which losing the tradition or practice would alter a group’s identity and of the impact of external interference. The importance of the answers to these questions for a difference perspective analysis is that they are meant to shed light on the actual identity related interests at stake in these cases. If these interests are identified, Eisenberg argues, we are better able to mediate between competing claims.³²⁴ Since the parties to these cases would provide different answers the likelihood that we could cite an uncontested account of the identity related interests at stake in these cases is very small. The unlikelihood of doing so would also mean that we would be unable to use this approach to mediate between the competing claims that constitute s.35(1) litigation. All of this works to build the case that the difference perspective does not get us any closer to mediating the various claims at stake in aboriginal rights cases because it presupposes a settled definition of aboriginality. Moreover, the various problems identified here

³²³ Avigail Eisenberg, “Identity and Liberal Politics,” p.259.

³²⁴ Avigail Eisenberg, “Using Difference,” p.166.

regarding the use of the difference perspective come to the fore vis-à-vis a successful demonstration of the existence of multiple and competing conceptions of aboriginality in s.35(1) litigation. In this instance, this demonstration is the product of the use of the interactions based approach to identity and so this chapter is a testament, of sorts, of the utility of the employ of this approach to conceptualizing collective identity.

The presentation thus far would seem to indicate that proceeding as if the meaning of aboriginality were settled ignores some very important instances of contestation that are at play in aboriginal rights cases in Canada. In fact, proceeding as if the meaning and implications of this collective identity were settled explains how one could argue, as Eisenberg does, that judicial interpretation of s.35(1) is unbiased and principled. It allows one to do this because it enables one to ignore the fact that the SCC has based its rulings on the nature and scope of aboriginal rights on one version of this collective identity (its own version) without explaining or providing a justification for how it came to select this version and not the other versions of this collective identity. The next chapter builds the case that the SCC's actions are in fact biased and arbitrary and that its actions have resulted in a bundle of rights that disadvantage and harm aboriginal rights claimants.

CHAPTER SEVEN

THE IMPLICATIONS OF A CONTESTED IDENTITY

This chapter demonstrates that the contestation surrounding s.35(1) is characterized by two related disputes: a dispute about the rights aboriginal peoples have (or ought to have) and a dispute about the nature of aboriginality itself. This chapter shows that the way in which the SCC went about settling the latter dispute explains to a significant degree the resulting academic criticism of this constitutional provision as well as the ultimate failure of s.35(1) rights to protect and accommodate aboriginal peoples. Confronted with three competing definitions of aboriginality, the SCC selected its own version (that is, the citizen-state conception) of this collective identity as the object of constitutional protection and accommodation. This decision means that the version of aboriginality advanced by the aboriginal participants in s.35(1) litigation does not directly benefit from constitutional protection and accommodation. This decision creates a situation wherein correspondence (in this case the degree to which aboriginal peoples are willing to adopt the citizen-state conception of aboriginality) is a condition of constitutional accommodation. Furthermore, the SCC does not provide any justifications for this decision rendering its actions in s.35(1) litigation biased and arbitrary.

The Identity Dispute

The presentation outlined in chapter six demonstrates that the aboriginal claimants in s.35(1) cases advance a nation to nation conception of aboriginality, while some of the provincial/federal AGs put forward a colonial conception or a citizen-state conception of this collective identity. For their part, the SCC justices represented in majority decisions employ a citizen-state conception of aboriginality. The existence of this definitional multiplicity in s.35(1) litigation reveals a degree of the plurality of meanings shouldered

by the term aboriginality. It is important at this point to establish, however, that the existence of this plurality of meanings does in fact rise to the level of a dispute. In other words, it is not enough to say that the participants in s.35(1) cases did not advance the same conceptions of this collective identity. In order to argue that this plurality of articulations represents a contestation over the meaning of this collective identity it is necessary to show that the three conceptions of aboriginality advanced by the participants in s.35(1) cases are in fact irreconcilable. What immediately follows compares and contrasts the constitutive elements of the colonial, nation to nation and citizen-state conceptions of aboriginality. Here, the visions of aboriginal rights underpinned by each conception of aboriginality are of particular interest. These visions are compared in order to establish that each conception is distinctive in such a way as to make it irreconcilable with its two other counterparts. As a consequence, the investigation reveals the important link between a particular conception of aboriginality and its corresponding bundle of rights and, in the process, renders the following claim intelligible: S.35(1) litigation is not simply a contestation over rights (that is, a contestation about what rights aboriginal peoples have or ought to have) but is also a serious contestation about the meaning of aboriginality itself.

Nation to Nation and Colonial Conceptions Considered

The aboriginal participants' nation to nation conception of aboriginality and the provincial/federal AGs' colonial conceptions are incompatible. In terms of logical coherence, if self-definition and self-government are constitutive elements of a conception of aboriginality then this cannot be reconciled with a conceptualization of aboriginality that entails external definition and external rule. These positions are not simply different; they are in fact polar opposites. It is not surprising, then, to find

conflicting views on the question of what s.35(1) rights ought to ultimately entail by those who advanced these opposing articulations of aboriginality. For example, in many instances the aboriginal participants worked to build the case that elements such as natural resources and land were significant constitutive aspects of their collective identities. These arguments formed the basis for the aboriginal participants' claims that s.35(1) rights ought to include jurisdictional authority over land and natural resources. For their part a number of provincial/federal AGs argued that these elements were not constitutive aspects of aboriginal peoples' collective identities and rejected the idea that this constitutional provision ought to grant such jurisdictional authority.

The examination in chapter six also shows how the aboriginal participants and various AGs presented numerous cultural, political and economic characterizations of aboriginality. In most cases, the AGs' characterizations differed immensely from the ones offered by those who bore the collective identity in question and resulted in opposing views about the nature and scope of s.35(1) rights. A striking example came to the fore in chapter six as a number of AGs advanced that the rights of self-government claimed by aboriginal participants should more properly be understood as rights of self-regulation. The former (as outlined by the aboriginal participants) entails jurisdiction over both people and territory while the latter (as outlined by some provincial/federal AGs) entails the regulation of community members' social behaviour. What is absent here is the right to institute laws which would apply to non-social activities, aboriginal peoples from other first nations and non-aboriginal peoples – that is, the pith and substance of the type of self-government outlined by the aboriginal participants. The position taken by these AGs is rendered intelligible only if their views about the constitutive elements of aboriginality are considered. In many instances these AGs

rejected the notion that aboriginal peoples constitute (or ever constituted, for that matter) self-governing entities. Discussions about the unquestioned and unquestionable status of the sovereignty of the Crown and about the complete division of powers between the federal and provincial governments (which, it was argued, were a direct result of Confederation) both speak to this last point. In essence, these were held up as evidence of and justification for the existence of one sovereign, self-governing political entity (that is, the Canadian political community) to the exclusion of all others. Here, it becomes quite evident that the two parties presented very different ideas about the nature and scope of this constitutional provision and, in important ways, this difference is a product of the differing conceptions of aboriginality advanced by these parties. Stated differently, the aboriginal participants and the AGs in question were disputing the nature and scope of aboriginal rights that ought to be covered by s.35(1) as well as the nature of aboriginality itself.

Nation to Nation and Citizen-State Conceptions Considered

Perhaps what is less obvious (and so more interesting) is the fact that the examination conducted in chapter six demonstrates that a nation to nation conception of aboriginality is also not easily reconciled with a citizen-state conception. While these two conceptions do not constitute opposites in the same way that the nation to nation and colonial conceptions do, the court materials expose important instances of divergence. The nation to nation and the citizen-state conception of aboriginality place very different emphasis on the importance and role of aboriginal self-government and self-definition.

The nation to nation conception of this collective identity includes a right of self-government that is broad in both scope and content and is equivalent to its non-aboriginal counterpart. The factums submitted by the aboriginal participants establish the existence

of a substantive link between this view of self-government and aboriginality. They do this by presenting self-government as the vehicle by which aboriginal nations actualize their collective identities and nationhood. The following, drawn from the material examined in chapter six, were offered as support for this position. First, self-government was cited as a constitutive element of this collective identity. Second, self-government was presented as relying on aboriginal culture and society for its *raison d'être*, processes and products. Lastly, the exercise of self-government was cited as an expression of the normative status of aboriginal peoples (that is, the notion that aboriginal nations are equally entitled to govern peoples and territories as are their non-aboriginal counterparts). Consequently, the examination of the aboriginal factums unearths a clear equivalence that is drawn by the aboriginal participants – aboriginality, whatever else it may entail, denotes a collective of self-governing people. It is not surprising, then, that factum after factum submitted by aboriginal participants places the creation, maintenance and protection of aboriginality squarely in the hands of those who bear this collective identity by anchoring identity formation and maintenance/protection to the exercise of self-government.

By contrast, the SCC justices surveyed in chapter six use a citizen-state conception of aboriginality and advance far more limited rights of self-government. Arguably, these rights of self-government would include protection and accommodation of specific practices, traditions and customs of self-government, but would not entail a right to self-government whose nature and scope is as broad as the aboriginal participants put forward.³²⁵ In fact the majority of the SCC advocates a different mechanism for

³²⁵ The SCC has yet to directly rule on what a s.35(1) right to self-government would look like (Michael Murphy, “Culture and the Courts,” p.109). However, given decisions handed down in *Sparrow*,

securing the protection and accommodation of aboriginal peoples' collective identities. From their view, aboriginality would be maintained and protected through the exercise of specific/discrete s.35(1) cultural rights not the broad/open-ended right of self-government advocated by the aboriginal participants. Moreover, the maintenance and protection of aboriginal peoples' collective identities is always contingent on the need to reconcile these particular ends with the interests of the pan-Canadian political community and, of course, with the sovereignty of the Crown. The SCC's position is justified vis-à-vis the explanation that since aboriginal peoples are members of the Canadian community that have attachments to both particular bounded communities and the broader political community both s.35(1) rights and rights accorded to citizens generally are the vehicles by which their interests (including their identity based interests) are accommodated and protected.

Moreover, the citizen-state conception of aboriginality and its corresponding bundle of rights limit the extent to which aboriginal peoples are able to engage in self-definition. In chapter six, the schema for aboriginal title outlined by a majority of the SCC included the view that certain relationships that aboriginal peoples could have with the territories they claimed could not be the basis for this title. This limits the possible constitutive elements of this collective identity. Given the relationship between land and aboriginality, limits on the types of relationships that are covered by aboriginal rights and aboriginal title translate into limits on the versions of this collective that qualify for constitutional protection. The result is a significant limit on the potential evolutionary

Delgamuukw, Van der Peet, Pamajewon and Mitchell the notion that discrete practices, traditions and customs of self-government (rather than a broad right of self-government) would qualify as s.35(1) rights is most likely. For more on this argument also see Michael Asch, "From Calder to Van der Peet," p.437; Kent McNeil, "The Inherent Right of Self-Government," p.2-3.

development of these collective identities and the erosion of the capacity of aboriginal peoples to engage in self-definition. In this case, the importance that aboriginals accord to self-definition is not shared by the SCC. In fact, given the type of role that SCC justices have assigned the courts in ensuring that particular kinds of relationships between aboriginal peoples and lands continue it cannot be said that self-definition figures as a significant element of the SCC's articulation of this collective identity. Other elements (such as the relationships the justices deem important) are of far more consequence as is evidenced by their role in structuring the boundaries of aboriginal title.

The examination of the constitutive elements of the colonial, nation to nation and citizen-state conceptions of aboriginality establishes that the aboriginal claimants, the provincial/federal AGs and the SCC justices took substantively different positions regarding the nature and scope of aboriginal rights in s.35(1) litigation. This examination brings to the foreground the notion that a fundamental reason for these different positions is the conflicting conceptions of aboriginality advanced by the various parties. Accordingly, the positions taken by the various parties about the nature and scope of aboriginal rights are not fully intelligible without acknowledging the identity connection and understanding how this connection functions. The conceptual irreconcilability among the three articulations of aboriginality and the various positions they underpin reveal that there was more than a simple plurality of conceptualizations of aboriginality in s.35(1) litigation. It speaks to the presence of a serious contestation over the meaning of this collective identity. It is this link between a particular conception of aboriginality and a particular position on aboriginal rights that forms the foundation for the argument in this dissertation that the contestation surrounding s.35(1) is constituted by two related but

separate disputes – a dispute about rights (that is, what rights aboriginal peoples have or ought to have) and a dispute about the very meaning of this collective identity.

An Account of the Contestation Surrounding S.35(1)

A comprehensive analysis of s.35(1) must include an examination of the SCC's attempts to settle the rights dispute *and* its handling of the identity dispute. In what follows, this type of analysis is pursued. The most important findings of this analysis are briefly outlined here: It is abundantly clear that the SCC recognizes that the contestation surrounding s.35(1) involves a dispute about what rights aboriginal peoples have or ought to have. In essence, all of the cases under review represent efforts by the SCC to clarify the nature and scope of this constitutional provision (that is, an attempt to settle the rights dispute). In this instance, the SCC settled the rights dispute by employing the citizen-state conception of aboriginality (which is its own conception of this collective identity). This conception of aboriginality set the boundaries of the constitutional rights aboriginal peoples could expect to enjoy. As a result, aboriginal rights offer protection and accommodation for one of the possible articulations of aboriginality advanced in s.35(1) litigation – the citizen-state version. These same rights do not protect or accommodate the nation to nation version of this collective identity advanced by the aboriginal claimants. This result causes many scholars to be critical of the way in which the SCC went about settling the rights dispute part of the contestation surrounding s.35(1). Moreover, the SCC did not provide any justifications for why the citizen-state version of this collective identity (and not the other two versions) is the proper object of constitutional accommodation. The absence of any justification for why the SCC selected the citizen-state version of this collective identity indicates that the SCC either does not think that the contestation over the meaning of aboriginality is of sufficient importance to

require comment or is not aware of this aspect of the contestation surrounding s.35(1). As a consequence, it cannot be said that the SCC dealt with the dispute over the meaning of aboriginality in an adequate fashion. In fact, many criticisms of the SCC's construction of s.35(1) rights – the SCC's attempt to resolve the contestation surrounding s.35(1) – are anchored in the SCC's failure to adequately deal with the dispute over the meaning of aboriginality.

S.35(1) Rights Accommodate and Protect the Citizen-State Conception

In chapter six the *Van der Peet* decision was cited in order to introduce the idea that the justices surveyed envision that aboriginal rights inhere in the very meaning of aboriginality (see page 31 and 122-23). As a consequence, the nature and scope of the rights covered by s.35(1) would be directly related to the conception of aboriginality put forward by those justices who participated in majority decisions – that is, the citizen-state conception. A brief review of the SCC's analytical framework for s.35(1) rights (which was presented in chapter two) reinforces the validity of this argument. It does so by demonstrating how the framework for this constitutional provision takes into account the significant constitutive aspects of the citizen-state conception of aboriginality.

The framework for s.35(1) rights outlines that existing aboriginal rights are practices, customs and traditions that have pre-Contact origins and are, first, integral to the distinctive culture of an aboriginal group and, second, were not extinguished prior to 1982. This framework also stipulates that these rights may be justifiably infringed by the Crown if there is a valid legislative objective that both takes account of the need to reconcile the pre-Contact presence of aboriginal societies with the sovereignty of the Crown and does not breach the fiduciary relationship that exists between the Crown and aboriginal peoples. The analytical framework includes that aboriginal title, a subset of

aboriginal rights, is the right to occupy and use lands for a variety of purposes that are not irreconcilable with the group's traditional attachment to those lands.

The analytical framework for s.35(1) rights developed by the SCC coincides with the citizen-state conception of aboriginality in that there is a great deal in this framework that demonstrates a concern for aboriginal peoples' attachment to and membership in particular bounded communities. This represents one facet of the citizen-state conception of aboriginality. For instance, s.35(1) rights protect practices, customs and traditions that are integral and distinctive to the cultures of particular bounded communities. Doing so facilitates and even makes possible these kinds of attachments. Similarly, this interpretation offers the possibility of continuing and even strengthening these attachments by providing aboriginal groups with the means to acquire title to ancestral territories. Moreover, considerations centred on the pre-Contact presence of aboriginal societies are a constitutive part of the justification process. Stated differently, these bounded communities are of sufficient significance that they must be included and accounted for if the Crown is to make a legitimate case for infringing on a s.35(1) right.

At the same time, there is a great deal in the SCC's framework for s.35(1) that indicates that there is significant concern that attachments to and memberships in particular bounded communities are balanced with attachment to and membership in the broader Canadian political community where the Crown is sovereign. This concern coincides with the second facet of the citizen-state conception of this collective identity. The temporal requirements which structure the identification stage of the test for aboriginal rights is evidence of this concern. According to the s.35(1) analytical framework, the significant historical moment is contact with Europeans (or, in the case of the Metis, the establishment of effective control). This is the moment in which the Crown

asserted sovereignty. This temporal requirement works to ensure that even at the stage where aboriginal rights are identified, considerations that include the broader political community (here, in the form of the Crown's sovereignty) play a major role in determining which practices, customs and traditions are included in this constitutional provision. This effort to balance attachments to particular bounded communities and the broader political community also comes to the fore if one takes into account the fact that the justification for infringement of s.35(1) rights is explained vis-à-vis membership in the pan-Canadian political community. Accordingly, the list of legislative objectives that may legitimately justify infringement are what could be called "national" concerns or concerns that have the potential to impact the pan-Canadian political community as a whole.³²⁶ Along the same lines, the sovereignty of the Crown (which represents all Canadians) is an important factor in the justification process. All of this works to build the case that the analytical framework for s.35(1) coincides with one conception of aboriginality – the citizen-state conception. Taken in combination, the discussions regarding the version of aboriginality put forward by the majority of the SCC and the resulting analytical framework for s.35(1) point in one direction. The SCC has created an analytical framework for this constitutional provision that aims at protecting and accommodating aboriginality as advanced by the SCC justices surveyed herein – that is, the citizen-state conception of this collective identity.

A number of prominent scholars engaged in the study of aboriginal politics and the law have produced compelling critiques and discussions of the SCC's analytical

³²⁶ For a list of these factors consult the following cases: *R. v. Sparrow* p.37-38 and *R. v. Gladstone* para.75. For academic commentary on these factors and their impact on s.35(1) rights see Kent McNeil "Defining Aboriginal Title in the 90s"; John Borrows, "Domesticating Doctrines," p.647-649.

framework for s.35(1) and the rights that it generates. What follows examines Borrows' explanation of the rationale underlying the built-in limits of aboriginal rights, Macklem's outline of the problems associated with aboriginal title, Binnie J.'s and Asch's discussions of the possible political rights that may be included in this framework. This examination demonstrates that even though these scholars focus their attention on different aspects of this constitutional provision and different aboriginal rights cases, a common thread binds their work. All of their critiques and explanations incorporate, to varying degrees and in various guises, the argument that s.35(1) rights aim at protecting and accommodating the citizen-state version of aboriginality.

Borrows' work on *Sparrow* highlights the existence of a significant lacuna between what was claimed by the aboriginal plaintiffs in this case and what was ultimately secured. What is of interest for the task at hand is that the explanatory account Borrows provides relies on the proposition that s.35(1) is interpreted in a manner that is consistent with the citizen-state conception of aboriginality, resulting in a set of rights that accommodates and protects this one version of this collective identity. Here, Borrows shows how this directly contributes to the failure of this constitutional provision to meet the expectations of the aboriginal claimants.

According to Borrows, the aboriginal plaintiffs in the *Sparrow* case argued that s.35(1) "created a sphere of authority within Canada's federal structure that shielded Aboriginal Peoples from the operation of certain Dominion laws."³²⁷ He goes on to explain that "it could be said that Aboriginal Peoples were claiming recognition of their ability to exercise regulatory authority in Canada in a manner similar, though with

³²⁷ John Borrows, "Measuring a Work in Progress," p.232-33.

obvious differences, to that shared by the Dominion and provincial governments.”³²⁸ In effect, Borrows is making a similar argument to the one outlined in earlier sections of this chapter – namely, that the aboriginal participants in these cases seek powers of self-government that are broad in both their nature and scope. Borrows points out that the SCC ignored this jurisdictional point and instead offered a statement about the limits of Aboriginal power by discussing the ways in which aboriginal rights could be legitimately infringed.³²⁹ He speculates that

[p]lacing limits on Aboriginal Rights presumably diminished fears that some people may have had that Aboriginal Rights could strain and potentially rip the fabric of federalism that had been operative to that point. Therefore one could speculate that the Court held that Dominion laws could infringe Aboriginal Rights because of its concern for social cohesion.³³⁰

In Borrows’ account, the motivation underpinning the SCC’s focus on spelling out the limitations of s.35(1) instead of dealing with the jurisdictional issues raised by the aboriginal plaintiffs in *Sparrow* was a product of its concerns about the social cohesion of the entire pan-Canadian political community. The fact that concerns for the broader political community were cited as justifiable reasons for limiting the rights covered by this constitutional provision lends credence to the notion that these rights are meant to accommodate and protect a version of aboriginality that includes these types of considerations. The citizen-state conception does exactly this. Aboriginal peoples under this conception are members of both a particular bounded community and the pan-

³²⁸ John Borrows, “Measuring a Work in Progress,” p.233. The entire citation reads: “[I]t could be said that Aboriginal Peoples were claiming that social cohesion and civil peace under s.35(1) would best be served through a recognition of their ability to exercise regulatory authority in Canada in a manner similar, though with obvious differences, to that shared by the Dominion and provincial governments.”

³²⁹ John Borrows, “Measuring a Work in Progress,” p.233-34.

³³⁰ John Borrows, “Measuring a Work in Progress,” p.233-34.

Canadian community allowing the SCC to simultaneously advance that aboriginal rights are capable of placing certain checks on the Crown's actions (in order to protect the former community) and that these rights may be justifiably infringed (in order to protect the latter community).

Macklem's explanation and critique of aboriginal title parallel Borrows' account of the SCC's actions in *Sparrow*. Macklem concedes that aboriginal title "provides that, under certain circumstances, Aboriginal nations can claim rights of possession and use of remnants of ancestral territory."³³¹ He goes on to argue, however, that "the burden that Aboriginal title placed on the Crown's underlying interest has never meaningfully checked the exercise of Crown proprietary power, let alone the exercise of the Crown's legislative authority. As a result, Aboriginal title exists at the margins, meaningful only in geographic spaces left vacant by Crown or third-party non-use."³³² From Macklem's view, aboriginal title has amounted to very little because it has failed to alter the Crown's proprietary power or legislative authority over territories claimed by aboriginal peoples. According to Macklem, this has created a situation wherein aboriginal peoples are only able to enjoy title to lands that are of little interest to both the Crown and third-parties (that is, non-aboriginals). In essence what comes to the fore in this explanation and critique of aboriginal title is the fact that this constitutional provision does grant title in some instances, but also has built-in limits that render title unlikely in others. In those instances where title is granted this constitutional provision can be said to provide protection and accommodation of aboriginal peoples' attachments to their particular

³³¹ Patrick Macklem, "What's law got to do with it?" p.134.

³³² Patrick Macklem, "What's law got to do with it?" p.134.

bounded communities. In those instances where title is denied this constitutional provision does not accomplish this. Of import, here, are the reasons offered for the latter case. In his assessment, Macklem reveals that the latter case is explained by concerns for ensuring the continued use and enjoyment of lands by the Crown and third-parties. These concerns are in many ways concerns about the broader pan-Canadian community.³³³ In this way, it becomes evident that aboriginal title is constructed in a fashion that takes into account concern for aboriginal peoples' attachments to and memberships in particular bounded communities as well as concern for the pan-Canadian community (though the degree of concern for each differs significantly). This structure mirrors the citizen-state construction of aboriginality and lends credence to the argument that aboriginal title under s.35(1) works to accommodate and protect the constitutive elements of the citizen-state conception of this collective identity. In essence, the attempt to reconcile these concerns (concerns for the pan-Canadian political community and aboriginal communities) is a product of employing a citizen-state conception of aboriginality. This attempt is also the reason, according to Macklem, that aboriginal title has failed to alter the proprietary power and legislative authority of the Crown – that is, the reason aboriginal title has failed to significantly improve the condition of aboriginal peoples in Canada.

³³³ After all, any kind of change in the proprietary power and legislative authority of the Crown that went above and beyond “a marginal shift” would surely have political implications for the broader pan-Canadian community. Along the same lines, altering the Crown’s current role in authorizing and regulating third-party use of Crown land (which includes aboriginal peoples’ traditional territories) would have a substantial economic impact in various parts of the country. For some interesting discussions of the relationship between the Crown’s interest in maintaining the current political and economic status quo and the subsequent limits on aboriginal title and aboriginal self-government see Paul Raynard, “Ally or Colonizer?”; Ronald Niezen, “Culture and the Judiciary,” p.8-9,22-25; Winona Stevenson, “ “Ethnic” Assimilates “Indigenous,” p.42, 46.

In his work on early s.35(1) jurisprudence Binnie J. takes the position that the SCC will be hesitant to read a broad right to self-government into this constitutional provision.³³⁴ The reasons Binnie J. provides for his position echo those outlined by Borrows and Macklem. Specifically, he argues that concern for the broader pan-Canadian community plays a decisive role in shaping the decisions reached by the SCC in aboriginal rights litigation. Binnie J. explains that,

[t]he *Sparrow* doctrine makes it improbable that the judicial concept of Aboriginal right will extend to such key objectives as Aboriginal self-government. The application of the Supreme Court's interpretation of section 35 in *Sparrow* would afford too much immunity from other levels of government to Aboriginal communities, many of which lie cheek by jowl with non-Aboriginal communities [...]. "Constitutionalizing" a right to Aboriginal self-government would, in light of *Sparrow*, leave the courts with inadequate mechanisms to regulate the overlapping interests of communities occupying contiguous territory.³³⁵

The limits of s.35(1), according to Binnie J., will be crafted with an eye to ensuring the stability of the broader political community. In particular, he advances that the problems that could potentially result from multiple levels of government exercising overlapping and/or adjacent jurisdictional authority will ultimately make a judicially defined right to aboriginal self-government improbable. Here, concern for the pan-Canadian political community is part of Binnie J.'s views about the nature and scope of s.35(1).

However, Binnie J.'s work on *Sparrow* also shows that s.35(1) is concerned with attachments to and memberships in particular bounded communities. For example, he advances that the SCC "thus continues to recognize the distinction between rights acquired under the ordinary law *subsequent* to the establishment of European sovereignty (which of course Aboriginal peoples acquire as do other individuals, in the ordinary way)

³³⁴ W.I.C. Binnie, "The Sparrow Doctrine," p.217.

³³⁵ W.I.C. Binnie, "The Sparrow Doctrine," p.218.

and collective Aboriginal rights that *predate* the transplanted European legal system and now flow from ethnicity.”³³⁶ What is significant here is the notion that for aboriginal peoples rights flow not only from the pan-Canadian community where “ordinary law”, as he calls it, generates rights of universal citizenship, but rights also flow from membership in particular bounded communities (that is, what Binnie J. refers to as ethnicity). This discussion regarding the source of rights highlights that s.35(1) is interpreted in a manner that takes into account the importance of particular bounded communities (because these can generate collective rights) and the broader political community (because it is viewed as the source of universal rights of citizenship). Consequently, Binnie J.’s discussions on self-government and the two sources of rights for aboriginal peoples in Canada demonstrate that he is presenting an understanding of s.35(1) rights which acknowledges the importance of both particular bounded communities and the pan-Canadian political community. This is an understanding of s.35(1) that envisions protection and accommodation of the two constitutive facets of a citizen-state conception of aboriginality.

Asch’s work on the *Van der Peet* decision provides support for the argument that Binnie J.’s interpretation of the *Sparrow* decision and the limits of aboriginal rights were in many ways correct. According to Asch, s.35(1) does not include substantive political rights. Asch advances that

a contemporary system of Aboriginal self-government may be protected as an Aboriginal right where it could be linked to a distinctive, pre-European-contact, political practice of that society. [...]In short, following *Van der Peet*, Aboriginal rights of a political nature are not defined as ‘political rights’ flowing from

³³⁶ W.I.C. Binnie, “The Sparrow Doctrine,”p.224.

abstract principles, but as ‘way-of-life’ rights deriving from the distinctiveness of their pre-European-contact societies.³³⁷

Asch explains that the SCC “defines Aboriginal rights as derived solely from customs, practices, and traditions that can be traced to Aboriginal cultures, rather than ‘general and universal’ rights such as self-determination and sovereignty, thus excluding these from the definition.”³³⁸ He outlines the SCC’s rationale for characterizing rights in this way by highlighting that:

Aboriginal rights as constitutional rights are defined as the means by which the prior facts of Crown sovereignty and of the original occupation of the land by indigenous peoples are reconciled. Described in this manner, even if it included fundamental political rights, the concept of Aboriginal rights could never challenge Crown sovereignty, for, logically, a means to reconcile prior facts cannot also challenge the nature of those facts.³³⁹

Asch concludes that “the judgment therefore implies that the courts will not acknowledge that Aboriginal peoples hold, or indeed ever held fundamental rights if such acknowledgment challenges the sovereignty of the Crown.”³⁴⁰ The central point to take away from Asch’s discussion of the *Van der Peet* decision is the following: built into the very meaning of s.35(1) is the requirement that whatever rights are generated by this constitutional provision they must be reconcilable with the sovereignty of the Crown. This makes it difficult to include aboriginal sovereignty and self-determination as constitutive elements of these rights. Recognition of and concern for the sovereignty of the Crown is a key aspect of the second facet of the citizen-state conception of aboriginality. Consequently, one is able to make sense of the exclusion of important

³³⁷ Michael Asch, “From Calder to Van der Peet,” p.437.

³³⁸ Michael Asch, “From Calder to Van der Peet,” p.439.

³³⁹ Michael Asch, “From Calder to Van der Peet,” p.440.

³⁴⁰ Michael Asch, “From Calder to Van der Peet,” p.440.

political rights that facilitate aboriginal sovereignty and self-determination only if one takes into the account that the citizen-state conception of aboriginality underpins the SCC's interpretation of s.35(1).

The above commentaries of s.35(1) jurisprudence all include that the SCC's decision to protect and accommodate the citizen-state version of this collective identity underpins what the SCC says about the limits of aboriginal rights (Borrows), the limits of aboriginal title (Macklem) and the limits of the rights of self-government (Binnie J. and Asch). In essence, this decision informs the way in which the SCC went about establishing a meaning for this constitutional provision – that is, settling the rights dispute inherent in the contestation surrounding s.35(1). Confronted with three competing conceptions of aboriginality, the SCC handled the identity dispute inherent in the contestation surrounding this constitutional provision by selecting one version of this collective identity (its own) as the object of constitutional protection and accommodation. At this point, some may remark that choosing one conception of aboriginality is not surprising given the many ways in which the three articulations of aboriginality were shown to be irreconcilable. Others may go so far as to add that extending protection and accommodation to only one conception of aboriginality is not self-evidently problematic, especially in light of the aforementioned irreconcilability. After all, this course of action may have been inevitable, a constitutive element of the task that was before the SCC. Kulchyski explains that some scholars, wrongly, take the position that “[i]t is the job of the courts to take on the role of defining, fixing and circumscribing Aboriginal rights.”³⁴¹

³⁴¹ Peter Kulchyski, “Introduction,” p.2. For Kulchyski, the courts' attempts to define aboriginal rights can be a form of constraining and oppressing aboriginal peoples. In his work, he advances a way to get around the oppressive effects of defining aboriginal rights and aboriginality. He argues that the way forward is to

What follows challenges the notion that the SCC pursued a justifiable course of action. This case is advanced vis-à-vis the demonstration that the interpretation of this constitutional provision provided by the SCC is ill equipped to accommodate and protect self-definition and self-government – the two constitutive elements of the nation to nation conception of aboriginality advanced by the aboriginal participants. In the process, this presentation works to expose the serious limitations of this constitutional provision and thus renders suspect the claim that protecting and accommodating the citizen-state version of this collective identity is unproblematic. This claim can be rephrased in the following manner: the SCC’s handling of the dispute over the meaning of aboriginality (that is, its decision to accommodate and protect the citizen-state conception of this collective identity) is unsatisfactory. As a consequence, s.35(1) rights, first, fail to protect and accommodate the nation to nation version of this collective identity and, second, pose a threat to this version of aboriginality. Moreover, the existing s.35(1) jurisprudence has created a justificatory lacuna because the SCC has not made the case that the citizen-state version of this collective identity is the proper object of constitutional protection and accommodation.

S.35(1) Rights Do not Accommodate and Protect the Nation to Nation Conception

Self-definition and self-government play a primary role in the version of aboriginality put forward by the aboriginal claimants. Concerns related to the capacity of aboriginal nations to engage in self-definition and self-government underscored the key positions taken by the aboriginal claimants regarding the types of rights that ought to be generated by s.35(1). It is not mere speculation then to suggest that rights that do not

produce the requisite conditions for continual aboriginal/non-aboriginal (re)negotiation. (Peter Kulchyski, “Introduction”).

adequately account for these factors would be open to criticism from those who advance a nation to nation conception of this collective identity. A number of scholars interested in s.35(1) concur with this statement. More specifically, their critiques of this constitutional provision centre on and/or include the idea that s.35(1) rights are problematic precisely because they limit or erode aboriginal peoples' capacity to engage in self-definition and self-government. A number of these scholars go on to argue that this constitutional provision poses a threat to the nation to nation version of this collective identity.

To begin with, Lee Maracle reveals her concerns about the inability of this constitutional provision to adequately take into account these two important components of the nation to nation understanding of aboriginality. Her critique of the way in which s.35(1) is interpreted by the SCC centres on the majority's mischaracterization of aboriginality (though she employs the term indigeneity) and its impacts on self-definition and self-government. According to Maracle,

Aboriginal Rights in cases interpreting s.35 have amounted to nothing more than the reduction of nationhood to anthropological definitions of the nature of Indigenous Peoples in pre-colonial times. The definition of Aboriginal Rights that the courts have offered up has little to do with the reality of modern Indigenous Nations capable of exercising jurisdiction over our national territories, and sharing jurisdiction with Canada. The colonial relationship, colonial perceptions and definitions of Indigeneity are held in place. [...]Today we are village-based, nationally governed modern societies who ought to be seeking full participation in the existing economic life of the modern world, rather than quibbling over the breadth and extent of a 19th century non-Indigenous anthropologically driven definition of Indigeneity.³⁴²

What comes to the fore in Maracle's sweeping critique of s.35(1) is the idea that aboriginal rights under this provision are based on an unsatisfactory conception of aboriginality. She points out that this conception is a product of 19th century non-

³⁴² Lee Maracle, "The Operation was Successful, but the Patient Died," p.312.

aboriginal expertise (that is, nineteenth century anthropology) that operated within the context of colonialism. Maracle's argument advances that the problem with s.35(1) is not only that it is based on a mischaracterization of aboriginality which seriously limits the political and economic rights generated by this constitutional provision (placing into question the extent of self-government that would be possible under s.35(1)) but also that this mischaracterization obscures what ought to be the proper focus of aboriginal rights. For Maracle, the proper focus ought to be providing aboriginal peoples with the tools (political, legal and economic) to challenge this conception, to expose its complicity in maintaining colonial relations between aboriginals and non-aboriginals. This, she insists above, is a far more useful course than engaging in a debate about the nature of aboriginality where the parameters are spelled out solely by non-aboriginal "experts". In essence, her argument is based on concerns about self-definition and self-government – the significant elements of the nation to nation conception of aboriginality. Since Maracle's critique of s.35(1) centres on the way in which this provision presupposes a problematic definition of this collective identity, generates limited rights of governance and does not furnish aboriginal peoples with the tools to challenge this definition (which would include significant rights of governance) her critique reveals that the nation to nation conception of aboriginality is not reconcilable with the current interpretation of s.35(1).

In his work on s.35(1), McNeil includes an insightful discussion on the limitations that aboriginal title imposes on aboriginal people's abilities to engage in self-definition. McNeil begins by pointing out that the SCC's construction of aboriginal title includes that patterns of use that would prevent future generations from enjoying certain historic relationships that existed/exist between aboriginal nations and their ancestral territories

are not candidates for s.35(1) protection.³⁴³ This is a substantial limit of aboriginal title. This built-in limitation underpins McNeil’s argument that aboriginal title renders aboriginal peoples “prisoners of the past” for, as he explains, “present uses are not restricted to, but they are restricted by, past practices and traditions.”³⁴⁴ The problem, he argues, is that given the connection between aboriginal lands and aboriginal cultures and societies, court defined and imposed limits on aboriginal title translate into court defined and imposed limits on aboriginality. McNeil asks, “what if an Aboriginal society has changed so that its members no longer use their lands as they once did – they now have a different relationship with the land, which is still special to them, but is not historically based?”³⁴⁵ The current construction of aboriginal title would offer little to no protection for relationships to land that fall into this category and, as a consequence, little to no protection for the aboriginal cultures, societies and collective identities that are shaped by these latter relations. If aboriginal title acts to protect and accommodate a certain set of relationships that aboriginal peoples have with their claimed territories and in certain instances these are not the relationships that are of significance for the maintenance of aboriginal culture, society and identity then, from the perspective of the holders of s.35(1) rights, the efficacy of this particular s.35(1) right to protect and accommodate their collective identities is quite dubious. McNeil sums up his criticism by advancing that “Canadian courts should not sit in judgment over social change in Aboriginal communities, deciding what is and what is not necessary for their cultural

³⁴³ Kent McNeil, “Defining Aboriginal Title,” p.9.

³⁴⁴ Kent McNeil, “Defining Aboriginal Title,” p.10.

³⁴⁵ Kent McNeil, “Defining Aboriginal Title,” p.10.

preservation.”³⁴⁶ In this way, his criticism goes beyond the results of including the aforementioned limitations into the meaning of aboriginal title. It extends to encompass the role that the SCC has assigned itself as a result of reading these limits into s.35(1). McNeil concludes that “[a]ny internal limitations on Aboriginal title in the interests of cultural preservation should be determined by Aboriginal nations through the exercise of self-government within their communities – they should not be imposed by Canadian courts.”³⁴⁷ Doing otherwise, he argues, is simply an exercise in paternalism.³⁴⁸ Here, McNeil’s dissatisfaction with the SCC’s construction of aboriginal title is related to his concerns about self-definition in two important ways. On the one hand, McNeil is critical of the kinds of relationships to the land that the SCC has described as worthy of constitutional protection and accommodation because he believes that they are not necessarily the ones that the holders of this s.35(1) right would or do select. On the other hand, McNeil is critical of the fact that the Court has assigned itself the task of guiding the evolutionary development of aboriginality by determining which relationships are worthy of s.35(1) protection. In other words, he is critical of the way in which the SCC has taken on the task of defining what aboriginality is and which parts of it will be protected and accommodated. His assessment of the negative impacts of the current construction of aboriginal title on aboriginal peoples’ abilities to define their own collective identities by selecting the relationships with the land that they see as important for the maintenance of their cultures and societies exposes the serious degree to which aboriginal self-definition is frustrated by the current construction of aboriginal title.

³⁴⁶ Kent McNeil, “Defining Aboriginal Title,” p.12.

³⁴⁷ Kent McNeil, “Defining Aboriginal Title,” p.12-13.

³⁴⁸ Kent McNeil, “Defining Aboriginal Title,” p.11.

McNeil's work also exposes the degree to which this constitutional provision is incompatible with self-government. McNeil begins by clarifying the extent of the scope of the rights of self-government claimed by aboriginal peoples. He advances that jurisdiction (defined as governmental authority or political power) has a territorial and personal dimension.³⁴⁹ "The territorial dimension," he explains, "empowers the government in which the jurisdiction is vested to exercise authority over a specific geographic area."³⁵⁰ The personal dimension, on the other hand, "involves authority over persons, who are usually either citizens of the "nation" in question or residents of the territory over which the government has jurisdiction."³⁵¹ For McNeil, an aboriginal right of self-government includes both of these dimensions. He points out that this would be necessary in order to permit an aboriginal nation to "make and enforce laws in relation to such matters as land use and environmental protection" and "involve authority over the citizens of that nation, even when physically outside the territory of the nation."³⁵² McNeil argues that the SCC's interpretation of s.35(1) does not produce rights of self-government that entail this kind of jurisdictional authority. He advances that the application of the test for aboriginal rights outlined in *Van der Peet* to self-government claims is problematic precisely because it excludes these important components of jurisdiction.

³⁴⁹ Kent McNeil, "The Inherent Right of Self-Government," p.19.

³⁵⁰ Kent McNeil, "The Inherent Right of Self-Government," p.19.

³⁵¹ Kent McNeil, "The Inherent Right of Self-Government," p.19.

³⁵² Kent McNeil, "The Inherent Right of Self-Government," p.20. McNeil cites such things as family law matters (including marriage, divorce and adoption) as well as cultural and educational matters as examples of the personal dimension of aboriginal jurisdiction. (Kent McNeil, "The Inherent Right of Self-Government," p.20).

[I]t [the Van der Peet test] means that self-government rights exist only in relation to matters that were already integral to specific Aboriginal societies and regulated by them prior to being influenced by Europeans, which in some parts of Canada was 400 years ago. This might eliminate claims relating to many of the matters that have become the business of governments in more recent times, effectively hampering the capacity of First Nations to function effectively in the modern world.³⁵³

Together, McNeil's discussion regarding the built-in limits of aboriginal title and his views on aboriginal rights of self-government work to raise serious doubts regarding the extent to which s.35(1) allows aboriginal peoples to engage in self-definition and self-government. His work exposes a significant degree of incompatibility between this constitutional provision and the nation to nation conception of aboriginality advanced by the aboriginal litigants.

Niezen's work reveals a similar concern regarding the manner in which the SCC's interpretation of s.35(1) advances a particular view of this collective identity and in the process hampers aboriginal peoples' abilities to define themselves (both in the present and into the future). He focuses his criticism on the approach for identifying an existing aboriginal right constructed by the SCC. Niezen explains that the "*cultural rights* approach (taken, for example, in *R. v. Van der Peet*) [...]is almost exclusively based on consideration of the concept of culture, attempting to discern the scope of contemporary rights by elucidating the significant, *distinctive* practices of aboriginal individual's (or communities') pre-contact ancestors."³⁵⁴ The first problem with such an approach, Niezen argues, is that it presents a version of aboriginality that is overly determined by past practices, customs and traditions which, then, become the object of this constitutional

³⁵³ Kent McNeil, "The Inherent Right of Self-Government," p.3.

³⁵⁴ Ronald Niezen, "Culture and the Judiciary," p.9. For a subsequent critique of a practice/culture-based approach to s.35(1) rights see Gordon Christie, "Aboriginal Citizenship," p.484; Michael Murphy "The Limits of Culture."

provision's protection and accommodation. The second problem is that the result of this approach is not only rights that are anchored to a specific historical moment, but rights that cannot protect or accommodate societal, cultural or even identity-related changes that aim at securing the future survival of these collective identities and societies. Niezen outlines that the SCC

does not recognize innovation as an aspect of tradition so much as the sputtering and reigniting of practices that remain fixed within the limits of claims characterized as "modern forms" of centrally significant pre-contact traditions. Innovations that took place after the arrival of settlers are not seen as being integral to tradition. A "frozen in time" approach to culture is thus avoided only in the sense that practices can survive some discontinuity, not in a sense that affirms the importance of adaptation, creativity and innovation. The judicial approach to culture is thus "frozen in time" in the truest sense of the term: it sets limits on change, even in response to challenges to the prosperity and survival of distinct cultures as a whole.³⁵⁵

From this view, s.35(1) rights encompass practices, traditions and customs of a historical nature to a far greater degree than they do societal, cultural and identity-related changes, innovations and adaptations developed by aboriginal peoples in their efforts to continue to survive as distinctive communities and nations. In terms of self-definition, Niezen is arguing that adaptation, creativity and innovation – elements which are of significance to the process of self-definition – are at odds with this constitutional provision. This is so even when these are employed by aboriginal peoples in their efforts to secure their cultural and societal survival. Given the primary role reserved for self-definition in the nation to nation articulation of aboriginality, the current interpretation of s.35(1) is very much anathema with these aspects of self-definition and so the version of aboriginality advanced by the aboriginal participants.

³⁵⁵ Ronald Niezen, "Culture and the Judiciary," p.7.

The notion that s.35(1) leaves little room for self-definition is echoed by other scholars. Commenting on the *Pamajewon* decision Bradford W. Morse characterizes the SCC's approach in this case as a "judicial assessment of historical, sociological and anthropological evidence of what constitutes a culture that was freeze-dried at the time of contact with Europeans."³⁵⁶ Accordingly, he argues that "such an approach tells Aboriginal peoples that what is relevant about them is their past – not their present or future."³⁵⁷ He concludes by insisting that this approach "excludes what may have become, or what may become in the future, integral to the survival of Aboriginal cultures."³⁵⁸ From this view, the basic proposition underlying Morse's critique of s.35(1) is that the SCC based this constitutional provision on its own version of aboriginality that is unable to account for certain kinds of change (even when this change may be an important factor in the maintenance of this collective identity). In this instance, not only is there a mischaracterization of aboriginality (at least according to this scholar) but this mischaracterization takes the place of aboriginal self-definition. Given the important role played by self-definition in the nation to nation conception, it cannot be said that the version of aboriginality employed by the SCC as described by Morse is of the nation to nation variety. Moreover, the version selected by the SCC is not the version advanced by the aboriginal litigants. Morse's discussion (as well as Maracle's and McNeil's) is distressing because it demonstrates how the SCC's conception of aboriginality sets the limits of what is and what is not the subject of constitutional protection and creates a situation wherein those who ultimately shoulder the costs of getting this wrong (that is,

³⁵⁶ Bradford W. Morse, "Permafrost Rights," p.1031.

³⁵⁷ Bradford W. Morse, "Permafrost Rights," p.1031.

³⁵⁸ Bradford W. Morse, "Permafrost Rights," p.1032.

constructing s.35(1) rights that fail to adequately protect and accommodate this collective identity) would be the bearers of this collective identity who, incidentally, did not set these limits in the first place.

The previous section, covering the work of Maracle, McNeil, Niezen and Morse demonstrates that the interpretation of this constitutional provision offered by the SCC does not accommodate and protect aboriginal processes of self-definition or self-government – the two constitutive elements of the nation to nation conception of aboriginality. As a result, these scholars are critical of s.35(1) rights because they cannot accommodate and protect the version of this collective identity put forward by the bearers of this collective identity. Stated somewhat differently, they are critical of the SCC because of the nature and scope of the rights encompassed by this constitutional provision. These scholars' criticisms, however, go beyond dissatisfaction with the rights covered by the SCC's interpretation of s.35(1) (that is, the way in which the SCC attempted to deal with the rights dispute part of the contestation surrounding this constitutional provision). In their own way, all of these scholars' criticisms take issue with the way in which the SCC characterizes aboriginality. Maracle is concerned about the way in which aboriginal identities are misrepresented by the courts. McNeil is concerned about the limited opportunities for aboriginal self-definition (which McNeil attributes to the role that the courts have assigned themselves in guiding the evolutionary development of aboriginal cultures and identities). For their part, Niezen and Morse are concerned about the constraints on aboriginal cultural/societal development (which according to these scholars result from the cultural rights approach and the temporal requirements). All of these concerns are challenges to the version of aboriginality advanced by the SCC. As a consequence, these scholars are not only contesting the rights

covered by the SCC's interpretation of s.35(1) they are also contesting the characterization of aboriginality that informs and structures these rights. They are contesting the very meaning of this collective identity advanced by the SCC.

The Justificatory Lacuna

The question of whether s.35(1) rights accommodate and protect the nation to nation conception of aboriginality cannot be answered in the absolute. It would be an overstatement to suggest that s.35(1) rights, as currently constructed, always and in every instance fail to protect and accommodate all aspects of aboriginal peoples' collective identities. There is no reason why, for example, certain identity based interests and needs of aboriginal peoples that are compatible with the citizen-state conception of aboriginality would not receive a degree of protection and accommodation from the exercise of these group rights. Yet, the protection and accommodation that would occur is always contingent on this compatibility. This is a product of the fact that s.35(1) rights themselves, as well as their limits, are shaped by the citizen-state conception of aboriginality. As a consequence, in instances where aboriginal peoples' identity based interests and needs contradict this conception no accommodation or protection can result from the exercise of s.35(1) rights.

In this case, correspondence is a condition of accommodation. A significant problem immediately follows from this type of approach to accommodation. It is difficult to imagine that demanding this kind of correspondence as a condition for accommodation could meet most reasonable standards of fairness. As Joseph Carens argues, "[i]t is not fair to make people conform to a culture and an identity that they have not accepted

themselves, or to marginalize them if they do not, at least when possible.”³⁵⁹ In this instance, Carens is indicating that problems of fairness can result from demanding that members of a group embrace a collective identity (or version of a collective identity) that does not correspond with their own understanding. Moreover, Carens is arguing that demanding correspondence as a condition of accommodation, even though issues of fairness may arise, should only be pursued in rare circumstances, when alternatives are unavailable. If this line of reasoning is applied to the case at hand, the SCC’s decision to base s.35(1) on a citizen-state conception of aboriginality (and thus, to require correspondence as a condition of accommodation) can only be justified if alternatives are unavailable. Stated somewhat differently, the SCC would have to show that basing s.35(1) rights on a colonial or nation to nation conception is somehow unworkable. The SCC, however, does not engage in this type of justification. This lack of engagement is manifestly evident vis-à-vis its silence about the identity dispute inherent in the contestation over s.35(1). The SCC does not provide reasons for its decision to select the citizen-state version of aboriginality. As a consequence, its interpretation of s.35(1) creates a justificatory lacuna which leaves unaddressed both the reasons why the citizen-state version of this collective identity is the proper object of constitutional accommodation and protection and the reasons why demanding correspondence as a condition of accommodation is a legitimate requirement in this instance. Without these justificatory reasons to evaluate, one cannot help but conclude that the decision to select the citizen-state conception is arbitrary and biased.

³⁵⁹ Joseph Carens, “Culture, Citizenship and Community,” p.11. Here Carens is referring specifically to requiring members of a minority group to conform to a majority group’s culture and society. The point, however, is equally valid in this instance (that is, requiring them to conform to a version of their culture and identity that they do not hold). This equivalency can be drawn because in both cases the culture and identity are alien to the group in question.

Misrecognition, Disadvantage and Harm

Demanding correspondence as a condition for accommodation is problematic for another reason. This requirement can be harmful if it constitutes an act of misrecognition.

In his work on the politics of recognition Taylor argues that,

our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.³⁶⁰

The basic point here is the idea that misrecognition can result in real and serious disadvantage and harm. In fact, in the same work Taylor equates the harm that can result from misrecognition with the harm that can result from inequality, exploitation and injustice.³⁶¹ In the case of s.35(1), misrecognition is a result of the demand for correspondence because, as was already demonstrated, s.35(1) rights are based on a citizen-state conception of aboriginality which is irreconcilable with the nation to nation conception put forward by the aboriginal claimants. Stated somewhat more plainly, the SCC has misrecognized aboriginal peoples. S.35(1) constitutionalizes this misrecognition. The constitutionalization of this misrecognition disadvantages and harms aboriginal peoples – the most significant examples are presented and discussed below.

In terms of misrecognition leading to disadvantage, Vallance and Murphy highlight the existence of a double standard which is applied to aboriginal peoples and their rights. These scholars focus on the fact that the burdens shouldered by aboriginal

³⁶⁰ Charles Taylor, “The Politics of Recognition,” p.25.

³⁶¹ Charles Taylor, “The Politics of Recognition,” p.64. James Wong presents a similar equivalence in “What’s in a Name?” p.451.

rights claimants are weightier than those shouldered by their non-aboriginal counterparts. An analysis of both Vallance's and Murphy's work demonstrates that the unfair treatment they speak of can be attributed to the fact that s.35(1) recognizes a citizen-state conception of aboriginality not a nation to nation conception of this collective identity.

According to Vallance, aboriginal rights are treated differently than other constitutionally guaranteed rights in Canada. In particular, Vallance is critical of the way in which culture is used (and in his opinion abused) by the SCC in aboriginal rights cases. His position is that "the court uses the term [culture] in a manner that confers [...] an unjust burden upon the First Nations of Canada."³⁶² He goes on to explain that his

survey [of the jurisprudence on constitutional rights in Canada] found no cases, outside the area of Aboriginal rights, in which claimants were required to prove anything about their culture as a prerequisite for entitlement to rights. [...] In other words, claimants to Aboriginal rights are held to a higher standard than claimants to Charter or other rights. I believe that the creation of this double standard constitutes an injustice against the First Nations in Canada.³⁶³

Vallance's work is significant here because it demonstrates that the terms of accommodation, arrived at by the SCC, (that is, the analytical framework for s.35(1)) place unique and onerous demands on aboriginal peoples in their efforts to actualize their aboriginal rights which are not placed on people who attempt to actualize non-aboriginal rights. If aboriginal rights are rights that are connected to aboriginal nationhood and other constitutionally guaranteed rights in Canada are rights that are connected to Canadian nationhood then this double standard is, in effect, providing the latter type of nationhood with a different (and elevated) status than the former type.

³⁶² Neil Vallance, "The Misuse of "Culture" by the Supreme Court of Canada," p.97.

³⁶³ Neil Vallance, "The Misuse of "Culture" by the Supreme Court of Canada," p.109.

Along the same lines, Murphy's work on the normative underpinnings of self-determination and the SCC's interpretation of s.35(1) exposes a subsequent double standard. In this instance, aboriginal peoples attempting to actualize their rights of self-determination are required to meet a higher threshold than their non-aboriginal counterparts. According to Murphy,

[s]elf-determination is a nation's right to determine its own future as free as possible from external interference or domination by another nation or nation-state. This democratic feature of self-determination is the expression of a political rather than a cultural practice. It is the principle that political legitimacy flows from the consent of the governed.³⁶⁴

From this view, self-determination includes a particular kind of democratic claim. Murphy points out that the SCC advances an alternative understanding of aboriginal self-determination which is problematic because it ignores the fundamental democratic feature of this right.³⁶⁵ According to Murphy, instead of conceiving of self-determination as encompassing this fundamental democratic claim, the SCC argues that self-determination is a means to achieving a specific cultural end – that is, the preservation of a group's distinctive culture.³⁶⁶ 'Culturalism' is the term employed by Murphy to describe this instrumental view of self-determination. A significant problem with this conceptualization of self-determination is that it creates an unfair (and morally arbitrary) distinction between the rights of nations that have states and those (in this case aboriginal nations) who lack them.

³⁶⁴ Michael Murphy, "The Limits of Culture," p.368.

³⁶⁵ Michael Murphy, "The Limits of Culture," p.381-382. Jean Leclair presents a similar critique of the impact of culturalism on self-determination, though he employs the terms "cultural distinctiveness" versus aboriginal political autonomy ("Federal Constitutionalism," p.522-23).

³⁶⁶ Michael Murphy, "The Limits of Culture," p.368. Here, Murphy explains that, "culturalism assumes that a normative defence of the right to self-determination stands and falls on the question of its instrumental importance to the preservation of a nation's distinctive culture."

Murphy explains that, “[...]culturalism subjects the claims of sub-state nationalists to an unfair double standard. It does so by requiring that their right to self-determination be adjudicated in terms of their maintenance or not of their cultural distinctiveness, when no similar demand is made of nations that currently enjoy the right to self-determination via control of a territorial state.”³⁶⁷ Murphy aptly points to the inconsistency and absurdity of this position by stating that “just as it is absurd to claim that either Canada or New Zealand forfeits its right to self-determination the more closely its public culture resemble, respectively, that of the United States and Australia, so it is absurd to assume the same of any sub-state national group seeking self-determination.”³⁶⁸ Culturalism assumes that nations have differing statuses. The rights accorded to nations differ depending on whether these nations have been able to successfully secure statehood. In other words, nations that have become states are entitled to exercise their rights of self-determination in one way and nations without statehood are subjected to culturalism and so their entitlement to exercise the rights of self-determination is limited.

Both Vallance and Murphy insist that the differential treatment of aboriginal peoples described above is an unjustifiable double standard. Stated somewhat differently, these scholars are advancing that in these particular instances aboriginal rights claimants ought to be treated in the same manner as non-aboriginal rights claimants. They ought to be recognized as being subject to equivalent treatment to non-aboriginals. Here, Vallance’s and Murphy’s criticisms of s.35(1) jurisprudence are rooted in concerns about recognition. More specifically, their concerns are about the SCC’s failure to recognize

³⁶⁷ Michael Murphy, “The Limits of Culture,” p.368.

³⁶⁸ Michael Murphy, “The Limits of Culture,” p.381.

that aboriginal peoples are nations that ought to enjoy the same status as their non-aboriginal counterparts.

Exploring this instance of misrecognition reveals that its source is the SCC's citizen-state conception of aboriginality. This becomes evident by the answer to the following question: How can one make sense of the fact that aboriginal rights claimants are saddled with a weightier burden than non-aboriginal rights claimants (that they are subject to a double standard)? Binnie J.'s work on the *Sparrow* decision provides some guidance here. Binnie J. argues that the SCC recognizes that aboriginal peoples are Canadians who can enjoy all of the rights of citizenship accorded to all Canadians generally and a bundle of rights that are accorded to them exclusively because of their memberships in ethno-cultural communities.³⁶⁹ Binnie J. defends the limits placed on these rights by the SCC (an important limit being the higher threshold for their actualization) on the grounds that these rights are 'extra' rights and so it is appropriate to demand 'extra' requirements for their actualization.³⁷⁰

From this view, aboriginal rights claimants are subject to this differential treatment because they are exercising rights that go above and beyond the ones accorded to citizens generally. Gillian Brock outlines one reason behind this way of approaching aboriginal rights. She explains that some scholars, inappropriately, contend that granting rights on the basis of ethno-cultural membership is tantamount to discrimination.³⁷¹ The differential treatment (that is, the higher threshold) is a way to mitigate for the fact that some members of a political community are privileged with rights that others cannot

³⁶⁹ Binnie J., "The Sparrow Doctrine," p.224.

³⁷⁰ Binnie J., "The Sparrow Doctrine," p.221-25.

³⁷¹ Gillian Brock, "Are There Any Defensible Indigenous Rights,"p.286.

enjoy. In essence, this attempt to mitigate the impact of some members of a political community having rights that others do not creates a hierarchy of rights. It becomes easier to actualize the rights of universal citizenship than it is to actualize the rights associated with ethno-cultural membership. This way of conceptualizing aboriginal rights transforms aboriginal rights from national rights into special or extra rights.

This treatment of aboriginal rights is only intelligible if one advances a conception of aboriginality that includes the notion that aboriginal peoples are simultaneously members of the pan-Canadian community (where the Crown is sovereign) with all the rights that go along with this status and members of bounded communities with rights that go above and beyond the ones accorded to citizens generally – that is, if one advances a citizen-state conception of this collective identity. Thus, in their work on aboriginal rights claimants Vallance and Murphy point to a significant example of the SCC misrecognizing aboriginal peoples and the disadvantages faced by aboriginal peoples as a result.

The discussion above outlined that, according to Taylor, misrecognition not only leads to disadvantage, but it also leads to harm. Misrecognition generates these two results in the case of s.35(1) as well. The SCC's interpretation of S.35(1) harms aboriginal people by posing a threat to aboriginal cultures, identities and societies. In their work on s.35(1), Bruce and Walkem characterize this constitutional provision as entailing a particular kind of uneven exchange between aboriginal peoples and the state. They argue that,

[i]n order for Indigenous Peoples to achieve any protection under s.35(1), all of the following are recognized and protected first: (1) Canadian sovereignty and nationhood; (2) Canadian Crown title to all of our [aboriginal] territories; and (3) Canadian governments' rights to make laws about our territories and resources. In

exchange for recognizing Crown sovereignty, title and jurisdiction, Indigenous Peoples are entitled to Aboriginal Rights.³⁷²

Here, Bruce and Walkem are advancing that protecting the citizen-state version of aboriginality comes at a very high price: aboriginal acceptance of the legitimacy of the Crown's claims to sovereignty, title and jurisdiction. Many scholars argue that the Crown's sovereignty, title and jurisdiction are the very state mechanisms that have led to aboriginal peoples' dispossession, displacement and disappearance.³⁷³ For example, Frances Abele's critique of Cairns' concept of citizens plus (the theoretical foundation of the citizen-state conception of aboriginality) is premised on the notion that the citizens plus concept ignores how the Crown's acquisition of title in Canada facilitated aboriginal displacement and disappearance. She argues that:

[I]t is not possible to discuss citizenship without first taking into account property: who had it, who defined its intrinsic value, and how has it been appropriated. This circumstance is part of the miserable legacy of imperialism, and it is one of the fundamental issues remaining to be resolved before a true community can be created. [...]They [aboriginal peoples] may accept citizenship, but they do not wish to accept it at the price of their societies.³⁷⁴

Here, Abele is advancing that the cost of embracing a notion of citizenship that is founded on the citizens plus model is the continuation of the mechanisms which have caused widespread suffering in aboriginal communities. She goes so far, here, as to suggest that doing so would cost aboriginal peoples their very societies.

³⁷² Halie Bruce and Ardith Walkem, "Bringing our Living Constitutions Home," p.350.

³⁷³ For example see Ardith Walkem, "Constructing the Constitutional Box"; Larry Chartrand, "The Aboriginal People's Movement," p.462; James Tully "The Struggle of Indigenous Peoples," p.39-40.

³⁷⁴ Frances Abele, "Belonging in the New World," p.224. The omitted part of the citation reads: "The foundation of the European colony of Canada entailed the expropriation of the indigenous nations who lived here, and this was not a sudden event. In the long period of conquest, they have resisted the transformations of their relations with the land and with each other." For more on the impact of territorial dispossession on aboriginal peoples and their communities see Patrick Macklem, "What's Law Got to do with it?" p.134 and Garry Potts, "Bushman and Dragonfly," p.186-87.

In short, Bruce, Walkem and Abele are all making the same case. These mechanisms (that is, the Crown's sovereignty, title and jurisdiction) have and do result in harm to aboriginal individuals and their communities. It is unreasonable, then, to ask aboriginal peoples to accept a set of rights that, first, accommodates and protects a version of their collective identity that they do not advance and that, second, comes at the cost of leaving the principle tools of aboriginal subordination undisturbed. In fact, Tully argues that, at least since the mid-nineteenth century to the present, what is referred to as 'aboriginal resistance' is characterized by attempts to challenge these very mechanisms.³⁷⁵

For their part, Alfred and Cornstassel argue that the citizen-state conception of aboriginality, itself, plays a complicit role in the continuing colonization of aboriginal peoples. They state that:

In fact, this identity is purely a state construction that is instrumental to the state's attempt to gradually subsume Indigenous existences into its own constitutional system and body politic since Canadian independence from Great Britain – a process that started in the mid-twentieth century and culminated with the emergence of a Canadian constitution in 1982. Far from reflecting any true historical or honest reconciliation with the past or the present agreements and treaties that form an authentic basis for Indigenous-state relations in the Canadian context, 'aboriginalism' is a legal, political and cultural discourse designed to serve an agenda of silent surrender to an inherently unjust relation at the root of the colonial state.³⁷⁶

If Alfred and Cornstassel are correct in holding that the citizen-state version of aboriginality demands aboriginal acceptance of the very mechanisms they contend are at the root of their subordination and that the citizen-state version of this collective identity plays an active role in aboriginal subordination then it would be more than unfair – it

³⁷⁵ James Tully, "The Struggle of Indigenous Peoples," p.38.

³⁷⁶ Also see Taiaiake Alfred and Jeff Cornstassel, "Being Indigenous."

would be unreasonable – to ask the bearers of this collective identity to accept a set of rights that accommodates and protects the citizen-state version of aboriginality. Bruce and Walkem sum up this position quite aptly arguing that “S.35 rights – defined so as not to upset any existing political order or interests of Canada – are not tools of our survival, but markers of our colonized status.”³⁷⁷

The Results of Ignoring the Identity Dispute

The analysis conducted in this chapter reveals that a number of serious disadvantages and harms stem from the misrecognition of aboriginal peoples. When the SCC decided to employ the citizen-state version of aboriginality in its interpretation of s.35(1) it constitutionalized this act of misrecognition and in the process constitutionalized these disadvantages and harms. The SCC erred by not recognizing that since s.35(1) rights are tied to aboriginality that the ultimate nature and scope of these rights and their exercise may have significant negative impacts on certain versions of aboriginality (such as the nation to nation conception) and so on those who bear this collective identity. If scholars such as Alfred, Cornstassel, Bruce and Walkem are correct, these negative impacts may be significant enough to render the use of these rights irrational. The SCC also erred by advancing its own conception of this collective identity instead of addressing the existence of multiple versions of aboriginality and finding a fair way to account for this multiplicity. The SCC should have provided reasons for its actions in the matter of s.35(1), especially given that its has included an important condition of accommodation in its construction of aboriginal rights. In this case, correspondence is a condition of accommodation (that is, aboriginal peoples who wish to

³⁷⁷ Halie Bruce and Ardith Walkem, “Bringing our Living Constitutions Home,” p.356-57.

enjoy constitutional accommodation vis-à-vis the exercise of s.35(1) rights must conform to the conception of aboriginality advanced by the SCC). Without any justificatory reasons to evaluate we are unable to say that it was in fact reasonable for the SCC to require correspondence as a condition of accommodation (as Carens argues would be necessary). Given the harms that result from constitutionalizing the SCC's act of misrecognition, one can only conclude that the SCC's decision to select the citizen-state conception is, at best, arbitrary, at worst, biased.

The analysis presented in this dissertation focuses primarily on evaluating the current interpretation of s.35(1) and highlighting the way in which this constitutional provision's inadequacies are directly linked to the fact that it is premised on a citizen-state understanding of aboriginality. One may wonder, at this point, how the analysis of s.35(1) would differ if this constitutional provision was premised on either the colonial or nation to nation conception. Along the same lines, one may wonder which conception of aboriginality, if any, would avoid the various problems plaguing the current construction of aboriginal rights in Canada. Answers to these questions would inevitably involve a certain degree of speculation but the author offers the following thoughts on these important issues. In terms of a colonial understanding, it is unlikely that rights constructed on this version of aboriginality would eliminate the disadvantages and harms identified in this chapter. Given that the colonial conception of aboriginality (a version premised on external definition and external rule) is the polar opposite of the nation to nation conception (a version premised on self-definition and self-government), constitutionalizing this version of aboriginality would still constitute a serious act of misrecognition – perhaps a much more serious act of misrecognition than constitutionalizing the citizen-state conception. In essence, employing a colonial

conception of aboriginality in order to construct an interpretation for s.35(1) would not resolve (and would probably only exacerbate) the problems plaguing aboriginal rights in Canada.

On the other hand, employing a nation to nation understanding of aboriginality would avoid the problems that result from misrecognition because the version of aboriginality advanced by aboriginal peoples themselves would be the object of constitutional accommodation and protection. Along the same lines, the justificatory lacuna which marks the existing jurisprudence on aboriginal rights would be eliminated because correspondence to an externally held conception of aboriginality (that is, the citizen-state conception) would no longer be a condition of constitutional accommodation. Stated somewhat more plainly, the need to provide reasons for the SCC's decision to employ a citizen-state conception of aboriginality in its construction of aboriginal rights arises from the correspondence requirement. Once this requirement of accommodation is lifted there is no longer a need to justify its existence. Now, the intention in this last section is not to claim that s.35(1) rights premised on a nation to nation conception of aboriginality would be problem free. Instead, the intention is to advance that one way to eliminate the existing problems with aboriginal rights identified throughout this dissertation is to employ a nation to nation version of aboriginality in the construction of these rights. It is the belief of the author that issues that may arise from rights premised on a nation to nation conception of aboriginality would be less severe than the problems that currently exist and that if rights are going to create problems for the rights-holder then the rights-holder ought to have a significant say in the nature and scope of those rights. This is currently not the case for aboriginal peoples in Canada.

CONCLUSION

This dissertation is anchored by an interest in aboriginality and the group differentiated rights encompassed by s.35(1) of the *Constitution Act, 1982*. Numerous philosophers, political scientists, legal scholars, scholars of aboriginal politics, and many others have contributed to an on-going debate about the adequacy of the SCC's interpretation of this constitutional provision. This dissertation differs from these other contributions in that it offers a unique, multidimensional characterization of the contestation surrounding s.35(1) and, as a consequence, an original assessment of s.35(1) rights.

Since the *Sparrow* decision, majority SCC rulings in s.35(1) cases have made it clear that the underlying purpose behind the constitutionalization of aboriginal rights is the accommodation and protection of aboriginality. Chapter two of this dissertation presents the case for this view of s.35(1) by reviewing the jurisprudence on existing aboriginal rights and its corresponding scholarly commentary. Chapter three highlights and traces the contested nature of aboriginality. It brings to the fore that the term 'aboriginal' is employed in a multiplicity of ways that, in many instances, express differing and irreconcilable meanings. This chapter exposes that the definitional multiplicity results from the wide variety of traits and relations that can and are incorporated in any given conceptualization of aboriginality. The chapter also advances that the way one goes about conceptualizing this collective identity (that is, whether one employs a presence/absence of traits approach or a relational approach) will increase the plurality of meanings shouldered by the term 'aboriginal'. Chapter four examines the existing advantages and disadvantages associated with the different approaches to conceptualizing this collective identity and makes the case that a modified relational

approach (the interactions based approach) is the most appropriate way to pursue an investigation of aboriginality and existing aboriginal rights in Canada. Chapter five applies the interactions based approach and presents three different conceptions of this collective identity – the nation to nation conception, the colonial conception and the citizen-state conception. The first five chapters of this dissertation establish two basic propositions. The first is the notion that aboriginality is a contested identity and the second is that the accommodation and protection of aboriginality is an underlying purpose for the constitutionalization of aboriginal rights in Canada. Together, these propositions produce the central question of this dissertation: What happens to the efficacy of s.35(1) rights as tools of accommodation and their protective capacity when the identity they are meant to accommodate and protect is contested?

By employing the interactions based approach to identity, chapter six provides the empirical foundations for an answer to this question. The material under investigation includes SCC decisions and factums relating to s.35(1) cases submitted by the Crown and aboriginal peoples. The examination reveals that the aboriginal participants in these cases consistently advance a nation to nation conception of aboriginality. The federal/provincial AGs employ a colonial or citizen-state conception. For their part, SCC justices writing in majority decisions put forward a citizen-state conception. What comes to the fore in this chapter is that the parties to s.35(1) litigation do not agree about the nature of this collective identity. These findings indicate that proceeding as if the meaning of aboriginality were settled ignores very important instances of contestation that are at play in aboriginal rights cases in Canada.

Chapter seven analyzes the findings presented in chapter six, provides an account of the contestation surrounding s.35(1) and an assessment of the efficacy of existing

aboriginal rights in Canada. This chapter argues that the controversy surrounding s.35(1) is actually comprised of two related yet separate disputes. The first dispute is a dispute about the nature and the scope of the rights aboriginal peoples in Canada have (or ought to have). The second dispute is a dispute about the very meaning of this collective identity. The analysis of s.35(1) conducted in chapter seven includes an examination of these two central disputes that make up the contestation surrounding s.35(1). An examination of the analytical framework for s.35(1), including both what the SCC has said about this constitutional provision and scholarly criticism of the existing jurisprudence, forms one important part of the analysis. This examination is, simultaneously, an analysis of the SCC's attempt to settle the rights dispute. The second part of the analysis conducted in chapter seven is an examination of the SCC's (mis)handling of the identity dispute aspect of the contestation surrounding s.35(1). This analysis advances that unless both types of examination are conducted it becomes extremely difficult to trace the actual contours of the contestation surrounding s.35(1) and, furthermore, it becomes impossible to provide a satisfactory assessment of the degree to which this constitutional provision protects and accommodates aboriginal peoples. After all, if we are unaware that the participants in s.35(1) cases advance three different understandings of this collective identity, we might erroneously conclude that since s.35(1) rights protect and accommodate the citizen-state conception of aboriginality that these rights successfully protect and accommodate aboriginal peoples. It is only when we recognize that aboriginal peoples do not, in fact, define themselves in s.35(1) cases in the way characterized by the majority of the SCC that we begin to glimpse the inadequacy of the SCC's interpretation of this constitutional provision.

The analysis in chapter seven reveals that the constitutional tool of accommodation developed by the SCC (that is, existing aboriginal rights covered by s.35(1)) is fashioned to protect and accommodate the citizen-state conception of aboriginality, an understanding of this collective identity put forward by the SCC. S.35(1) rights do not protect and accommodate the nation to nation conception of aboriginality, the conception of aboriginality advanced by the bearers of this collective identity. As a consequence, correspondence is a condition of accommodation. The degree of constitutional protection and accommodation aboriginal peoples can expect to enjoy from this constitutional provision is a function of the degree to which their collective identities correspond to the citizen-state conception of aboriginality. The SCC does not provide any justifications for why the citizen-state version of this collective identity (and not the other two versions) is the proper object of constitutional accommodation. The absence of any justification for why the SCC selected the citizen-state version of this collective identity renders its actions biased and arbitrary. Moreover, the decision to employ the citizen-state version of this collective identity in the construction of s.35(1) rights constitutes an act of misrecognition which has resulted in disadvantage and harm. Since s.35(1) rights are constitutional rights, this act of misrecognition and its adverse consequences have been constitutionalized as well. First, aboriginal rights claimants are disadvantaged in their efforts to actualize aboriginal rights because they are subjected to a double standard which is justified vis-à-vis appeals to the citizen-state understanding of aboriginality. Second, aboriginal acceptance and exercise of s.35(1) rights legitimize the principle tools of aboriginal subordination in Canada – that is, the Crown’s sovereignty, title and jurisdiction. When this final point is combined with the rest of the analysis presented in chapter seven the dissertation argues that s.35(1)

rights fail to accommodate and protect aboriginal peoples' collective identities and that these rights actually pose a threat to these identities. The SCC's interpretation of this constitutional provision is woefully inadequate.

Limitations of the Work

The limitations of this dissertation result, for the most part, from choices made about the scope of the work pursued herein. As a result some may wonder why only three articulations of aboriginality are explored when it is evident that the interactions based approach to identity is capable of generating many more articulations of this collective identity. Along the same lines, some may question why the examination and analysis of s.35(1) jurisprudence focused primarily on majority decisions (that is, the opinions of dissenting judges do not play a substantive role in the analysis). Moreover, some may raise concerns about the segments of the aboriginal population excluded from the discussion. Finally, some may wonder why so little is said about what motivates the parties in s.35(1) cases to advance particular versions of aboriginality and so take particular positions on what this constitutional provision ought to entail. In what follows, these four concerns are outlined and addressed.

To begin with, even though the interactions based approach to conceptualizing aboriginality is capable of generating numerous versions of this collective identity, this dissertation focuses on three – the nation to nation articulation, the colonial articulation and the citizen-state articulation. This dissertation focuses on these three versions of aboriginality not because other articulations are insignificant, but because these are the ones most often found in the court material on existing aboriginal rights. However, other scholarship in the area of aboriginal politics could use the interactions based approach to conceptualizing aboriginality and, depending on the work being pursued, generate other

articulations of this collective identity. For example, the study of aboriginal/non-aboriginal relations in urban areas would include a set of relations that would differ from those examined in this work and so would yield a distinctive version (or a number of distinctive versions) of aboriginality ('urban aboriginality'). In this way, this dissertation serves as a model of how to apply the interactions based approach to conceptualizing collective identity and the type of investigation and analysis that can potentially result from doing so.

Another limitation of this dissertation stems from the fact that the examination focuses almost exclusively on majority decisions of the SCC. As a result, dissenting opinions are rarely included in the work. This dissertation is primarily interested in the reasons outlined by the SCC justices that actually ended up structuring the meaning of s.35(1). Thus, dissenting opinions are included in the examination only insofar as they clarify the analysis of the existing jurisprudence.

Furthermore, it is significant to note that while the aboriginal submissions which make up the presentation in this dissertation represent a number of different First Nations and two national aboriginal associations (the AFN and the Metis Council) from diverse regions with distinctive socio-cultural, economic and political circumstances, these submissions are not in any way completely representative of the existing diversity within the aboriginal population at large. Given that the focus of this dissertation is limited to cases concerning s.35(1) existing aboriginal rights, important segments of the aboriginal community are not discussed here. Significant examples would include urban aboriginals, non-territorially based aboriginals and aboriginal women. Along the same lines, organizations representing these groups (such as the Native Women's Association which has been granted intervener status at the SCC in the past) are also not included.

These segments of the aboriginal community and/or their representatives are omitted because they do not play a substantive role in the cases under review in this dissertation.

Finally, this dissertation examines the participants' identity related justifications for the positions they advance regarding what this constitutional provision ought to entail. In other words, it explores how the participants employ particular versions of aboriginality in order to build the case that s.35(1) ought to entail x, y or z. What this dissertation does not do is examine the motivations the participants might have had for taking these positions. These motivations may include such things as concerns about authenticity³⁷⁸, strategic considerations or the structural constraints surrounding submissions to the SCC (for example, the types of arguments that can be effectively advanced, the degree of technical legal language required, the existing jurisprudence and the like). Following the work of Quong, this dissertation takes the position that "there is an important normative difference between the justification for an act, and its motivation."³⁷⁹ The identity related justifications for the parties' positions are spelled out in their legal submissions to the SCC. The motivations for these positions, however, are not. In fact, providing an adequate account of these motivations would be a project in and of itself. Moreover, the argument presented herein does not require knowledge of the motivations underpinning the participants' positions. One only needs to know the positions of each of the parties and the reasons they provide for holding these positions in order to evaluate the degree to which the current interpretation of this constitutional provision corresponds to each position and the ways in which the judicial reasons

³⁷⁸ See Jean Leclair for an interesting discussion regarding the reasons aboriginal peoples should avoid employing claims of authenticity in their efforts to reshape the aboriginal-state relationship ("Federal Constitutionalism," p.524).

³⁷⁹ Jonathan Quong, "Are Indigenous Claims Bad for Deliberative Democracy," p.314.

provided by the SCC coincide with the reasons offered by the participants. As a consequence, this dissertation agrees with Quong's statement that "[t]here is nothing suspicious or fraudulent about having one reason for acting, and a different reason for thinking that you are justified in acting."³⁸⁰ In a similar vein, this dissertation is interested in the reasons offered by the parties for their actions not their motivations for any particular action or position.

Further Implications: The SCC, Political Negotiations and Reconciliation

This dissertation has shown that the SCC has decided to advance a citizen-state conception of aboriginality in s.35(1) jurisprudence even though this version of aboriginality is not the one advanced by the participants in these cases who bear this collective identity. This dissertation also put forward that the citizen-state conception of aboriginality and the rights that are a product of this conception cannot adequately address aboriginal processes of self-definition and self-government – the fundamental constitutive elements of the nation to nation conception of aboriginality held by the aboriginal participants. This dissertation has explored a number of the serious disadvantages and harms that result from constitutionalizing the misrecognition of aboriginal peoples.

The findings and analysis presented in this dissertation seem to point in an important direction – namely, that litigation is not the proper venue for delineating rights that protect and accommodate aboriginality. Instead, political negotiations may represent a better way for aboriginals and the state to develop rights that are capable of protecting

³⁸⁰ Jonathan Quong, "Are Indigenous Claims Bad for Deliberative Democracy," p.314. Here Quong provides a compelling illustration of this logic. He explains that "My motivation for having sex is that it feels good, but this isn't why sex between consenting adults is free from government interference."

and accommodating this collective identity. In fact, there is a strong consensus in many sectors that political negotiations are the best way for the aboriginal and non-aboriginal communities to work out all, if not most, of their outstanding conflicts – that is, the best way to achieving inter-societal reconciliation.

The courts are no exception. In a number of judgments pertaining to existing aboriginal rights the SCC has clearly stated a preference for political negotiations. Borrows' thorough examination of the impact of s.35(1) surveys numerous examples of SCC justices urging the aboriginal participants and the Crown to engage in political negotiations instead of resorting to litigation.³⁸¹ According to this legal scholar, the SCC's position results from "the Court's disquiet with having to resolve complex legal issues when the parties have done so little to provide concrete and specific statutory or contractual terms for the Court to interpret."³⁸² This leads Borrows to observe that "[i]t is plain that the Court would prefer not to deal with these issues as the first line of authority on Aboriginal Rights. The Court would rather perform a subsidiary role in reinforcing the independent political actions of the parties."³⁸³ The problem, he argues, is that political authorities have performed poorly in their efforts to pursue political settlements with aboriginal peoples and in their efforts to promote the societal change necessary in order to facilitate political solutions that would be acceptable to both aboriginals and non-

³⁸¹ John Borrows, "Measuring a Work in Progress," p.244-245. In this discussion Borrows cites the following cases as evidence of the SCC's encouragement of negotiations: *Delgamuukw*, *Sparrow*, *Sioui*, *Horseman*, *Lovelace* and *Matsqui Indian Band*. Also see *Haida Nation v. BC*, para.14, 38; *R. v. Marshall*, para.22. For a discussion about the SCC's support for political negotiations see Binnie J., "The Sparrow Doctrine," p.221, 242. For a discussion specifically about aboriginal title and the SCC's call for negotiations see John Borrows, "Domesticating Doctrines," p.644.

³⁸² John Borrows, "Measuring a Work in Progress," p.244.

³⁸³ John Borrows, "Measuring a Work in Progress," p.244.

aboriginals alike.³⁸⁴ As a consequence, he advises aboriginals and non-aboriginals interested in achieving inter-societal reconciliation to shift their attention and efforts away from s.35(1) specifically and constitutional change generally and instead to focus on societal change and political negotiations. He cautions that “Section 35 can blind us to what needs to be accomplished, even as we think it is opening up a whole new world.”³⁸⁵ Borrows sums up his argument by stating that “[t]o think that s.35 will shoulder the burden of reconciling Aboriginal Peoples with the Crown is to think that our *Constitution* does more than it does.”³⁸⁶

Borrows builds a convincing case that significant work is required by government and other societal actors if the reconciliation of aboriginal and non-aboriginal communities is to become a reality in Canada. Upon first glance, his case would seem to coincide with the position of this dissertation – namely, that the courts have done an inadequate job of working out the meaning of aboriginal rights. Even though there may be some overlap that results from the shared belief that political settlements are preferable to litigation, this dissertation does not share Borrows’ contention that too much attention is focused on the courts and the constitution. In fact, this dissertation takes the position

³⁸⁴ John Borrows, “Measuring a Work in Progress,” p.246,249. For example he argues that “[i]t is time those in the political arena heeded this message, and bring greater peace and stability to Canada by negotiating for the resolution of those issues that treat at our common humanity. While there have been some efforts and successes in this regard, the unconscionably slow pace at which this is occurring illustrates that there needs to be a broader based concern with concepts of citizenship attentive to our long term interdependencies” (p.246). He goes on to explain that “Section 35 is a lever, a tool – a platform for further extending the development of a political culture that is supportive of Aboriginal Rights. But the most important work lies beyond this horizon. In the media, classrooms, kitchens, committee rooms, party strategy rooms, union halls, churches, corporate board rooms, cabinet and legislatures of this, and other countries” (p.249).

³⁸⁵ John Borrows, “Measuring a Work in Progress,” p.248.

³⁸⁶ John Borrows, “Measuring a Work in Progress,” p.248. He reinforces this point by arguing that “we do ourselves a great disservice if all our efforts for reform are channeled through the language and categories of *Constitution* or discussions about Canadian citizenship. The *Constitution*, by and large, does not cut across the grain of society, but runs with it” (p.249).

that scholars who are interested in inter-societal reconciliation and political negotiations ought to keep the SCC and this constitutional provision squarely in their line of sight. This is because even though the SCC has expressed its preference for negotiated settlement it has also expressed the opinion that it has a role to play in both inter-societal reconciliation and political negotiations. This role is best characterized as that of a facilitator. While Borrows makes a significant effort to highlight the need for political negotiations and societal change (a need that is not disputed here) he seems to have turned a blind eye on the possible negative impact of the SCC on both the former and the latter.

The SCC has encouraged the parties in s.35(1) cases to engage in political negotiation while simultaneously promoting the idea that it has a role to play in these negotiations. For example, in *Sparrow*, the SCC concluded that s.35(1) “provides a solid constitutional base upon which subsequent negotiations can take place.”³⁸⁷ Right from the initial forays into s.35(1) interpretation, then, the SCC presents the idea that its judgments regarding aboriginal rights would have a significant role in future negotiations between aboriginals and the state. To use the SCC’s words, these judgments form a constitutional base for future negotiations.

The SCC’s decision in the *Delgamuukw* case provides further support for this position. The majority’s decision reads:

[...] the Crown is under a moral, if not legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I state in *Van der Peet* [...] to be the basic

³⁸⁷ *R. v. Sparrow*, p.1105.

purpose of s.35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.³⁸⁸

Here, the majority puts forward that reconciliation through negotiated settlement will be ‘reinforced by the judgments of this Court’. Again, the notion that the SCC can and does facilitate political settlements comes to the fore.

Borrows is not ignorant of this point. He himself acknowledges that the SCC’s approach to this constitutional provision includes the idea that the SCC plays a facilitation role. He states that,

[t]he Court’s ability to untangle threats to the country’s political stability and civic peace is tempered by their recognition that they are not the best party to ultimately work out the details of the necessary arrangements. Thus, they have approached the issue of social cohesion in questions of Aboriginal citizenship by devising procedures and broad principles to direct the parties in better performing their duties in this regard.³⁸⁹

For Borrows, the SCC has indicated that it has a role to play in negotiations between aboriginals and the state because it provides structural support for these negotiations in the form of procedures and broad principles which guide the parties.

Whether fact or mere possibility, the notion that the SCC and s.35(1) jurisprudence impact either political negotiations or inter-societal reconciliation should be of concern given the analysis presented in this dissertation.³⁹⁰ What kind of political negotiations or inter-societal reconciliation could be supported by the SCC and its jurisprudence on aboriginal rights? Given that the SCC employs a citizen-state conception of aboriginality in its characterization of aboriginal rights, it is likely that this

³⁸⁸ *Delgamuukw v. British Columbia*, para.186.

³⁸⁹ John Borrows, “Measuring a Work in Progress,” p.249.

³⁹⁰ Leonard Rotman advances that s.35(1) jurisprudence does in fact impact political negotiations. He argues that “Aboriginal and treaty rights litigation begets negotiation and that negotiations becomes meaningful and effective only with the continued presence, or threat, of litigation” (“Let us face it, we are all here to stay,” p.227).

body and the existing jurisprudence on aboriginal rights would only be capable of supporting political settlements and societal change that advanced a citizen-state conception of aboriginality. In other words, political settlements and reconciliation that conceive of aboriginal peoples as citizens with attachments to multiple bounded communities (including the pan-Canadian political community where the Crown is sovereign) and as citizens who have special rights. This dissertation has demonstrated that rights based on the citizen-state conception of this collective identity are unable to protect and accommodate the nation to nation conception of aboriginality. Negotiations and societal change that produced the same result (that is, that do not result in the protection and accommodation of aboriginal peoples' collective identities) would frustrate, if not render impossible, the achievement of inter-societal reconciliation. Along the same lines, this dissertation highlighted the serious problems that result from the fact that s.35(1) rights protect and accommodate the citizen-state conception of aboriginality. Negotiations and societal change that are premised on a citizen-state conception of aboriginality may also result in similar disadvantages and harms. This result may induce aboriginal peoples to reject inter-societal reconciliation just as some have rejected s.35(1) rights.

It does not make any sense, then, to shift our attention away from this constitutional provision as Borrows suggests – the stakes are far too high. The wise course of action would be to continue to scrutinize and critically assess s.35(1) jurisprudence and the impact of the SCC on efforts to reach political settlements and achieve inter-societal reconciliation. Failing to do so may eliminate the benefits of the former, thus rendering the latter even further out of reach.

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