Culture, Identity, and the Courts: Group-Rights Scholarship and the Evolution of s. 35(1)

by

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Introduction

Justifying the conferral of group-specific rights has been the subject of significant scholarly attention and debate in Canada. A prominent stream of group-rights scholarship maintains that differential rights schemes are justified by the human need for identity recognition and the harm that individuals suffer where their identities are misrepresented by others. The most prominent defences of this sort revolve around the critical role played by culture in the constitution of individual identity. Charles Taylor and Will Kymlicka are two Canadian scholars who defend the provision of group-specific rights to protect the cultures of national minorities, namely Québécois and Aboriginal peoples, arguing that the cultural community to which a person belongs is constitutive of individual identity. Thus, respecting individual identity requires the protection and preservation of minority cultures, and this is achieved by providing group-specific rights to national minorities.

However, the discourse of minority group rights, culture and identity has not been limited to the theoretical efforts of scholars seeking to justify group-specific rights. In recent years, this discourse has found judicial support in the jurisprudence on the constitutional rights of Aboriginal peoples, and the interpretation of s.35(1) of the *Constitution Act, 1982*, which provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." In this regard, the court's jurisprudence on s.35(1) can be divided into three phases. In the first phase, the court emphasized the inherent nature of the Aboriginal rights. In the second, the court moved towards a cultural justification to ground Aboriginal rights. More recently, the court has connected the importance of culture to the well-being of Aboriginal identity, seeking to protect Aboriginal identities that can be said to be 'authentic'.

The purpose of this paper is to examine the evolution of Canadian case law on the constitutional rights of Aboriginal peoples to show how the approach to Aboriginal rights developed by the Supreme Court of Canada has come to reflect the theories of prominent Canadian scholars who justify the provision of group-specific rights by connecting the importance of culture to identity. This discussion will proceed in three parts. In the first part of the paper, a brief examination of the work of Taylor and Kymlicka will be offered, highlighting their reliance on culture and identity to ground the rights claims of national minorities. The second part of the paper will focus on the jurisprudence of the Supreme Court of Canada on s.35(1). By examining the court's record, I hope to illustrate how the court's approach to Indigenous rights has evolved from one emphasizing the status of Aboriginal peoples as Canada's First Nations, to one connecting Aboriginal rights to the protection of Aboriginal cultures and identities that are historically authentic. Having charted the evolution of the court's jurisprudence, discussion in the third part of the paper will shift to the consequences of the evolution of the Supreme Court's test under s.35(1). My intention here is to show how the discourse of culture and identity employed by the court undermines Aboriginal claims for self-determination and self-government; threatens to level the status of Aboriginal peoples to that of ethnocultural minorities; offers no protection for contemporary Aboriginal identities; constrains the autonomy of Aboriginal peoples in the economic, political and social realms; and reinforces oppressive relations of power within Aboriginal communities.

Culture and the Courts

In his excellent work, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?", Michael Murphy laments the Supreme Court of Canada's move toward a cultural test for determining the scope and nature of s.35(1) Aboriginal rights, arguing that the court's emphasis on culture undermines the claims of First Nations to be treated as political equals (Murphy, 2001: 113-114). Of particular interest is his commentary on the works of Will Kymlicka and Charles Taylor, which, Murphy suggests, offer theories of group rights that support the claims of First Nations to be recognized as peoples who possess an inherent right to "autonomous self-government" (Murphy. 2001: 113-114; 125). Murphy contends that the court's move to ground the rights claims of First Nations in cultural terms signals a move away from the normative offerings of these scholars. However, the direction of the court may not be as far removed from the works of these scholars as Murphy suggests. In fact, it can be argued that the court's choice to ground the rights claims of First Nations on the importance of Aboriginal culture actually reflects the scholarship of both Taylor and Kymlicka.

Taylor: Identity as Inwardly Generated and Dialogical

The guiding premise of Charles Taylor's justification of group-specific rights is the idea that the recognition of identity is a "vital human need" (Taylor, 1994b: 26). To explain why identity recognition is so important, Taylor begins by describing the process through which our identities are formed, presenting a conception of the self that is both self-determining and socially constructed. According to Taylor, individual identity is both discovered within and shaped through our contact with others. To say that the process of identity formation involves self-discovery is to accept that all persons are the bearers of an identity that is particular to them, and can only be found within. This idea is expressed by Taylor as "the ideal of authenticity" (1994b: 28). Identity is individualized; all persons have a way of being that accords with their inner self, a way of living that is true to themselves (Taylor, 1994b: 28-29).

However, the process through which we discover our inner identity is not monological; it cannot be discovered through solitary reflection. As Taylor explains, "my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others" (1994b: 34). Thus, true to the dialogical nature of the process of identification, identity consists of more than our own self-understanding that we find within. It also entails the people, places, and things that we take to be significant in defining who we are (Taylor, 1994b: 32). Individual identity thus entails our "horizon of meaning," understood as "the background against which our tastes and desires and opinions and aspirations make sense" (Taylor, 1994b: 72; 33-34). Our horizon of meaning organizes our world, provides us with reference points for making qualitative distinctions between things, and helps us to determine what it is good to do or to be (Taylor, 1994c: 45). In short, our horizon of meaning makes deliberative choice possible. At the same time, those aspects of our horizon of meaning that are particularly valued by us become a part of our identity. It is in this respect that culture is both constitutive of individual identity and worthy of protection.

For Taylor, the recognition of people in their authentic identities is a claim that must be extended to all; the mutual recognition of all individuals and groups is a universal principle

(Taylor, 1994a: 191, 194). Moreover, the need for identity recognition is critical to both our personal and public lives. In our personal lives, we rely on significant others to help us discover and affirm our authentic, inwardly generated identities (Taylor 1994b: 36). In public life, the affirmation of identity demands a "politics of equal recognition" that requires not only mutual recognition between groups but the affirmation of group members in their particular and authentic identities (Taylor, 1994b: 37). Discussing Canada's Québécois national minority, Taylor contends that the principle of mutual recognition demands the affirmation and protection of the horizon of meaning that is constitutive of Québécois identity. As the cultural traditions and customs of their ancestors are crucial components of the horizon of meaning that constitutes Québécois identity, affirming Québécois identity requires that we "maintain and cherish [Québécois] distinctness, not just now but forever" (Taylor, 1994b: 40). The connection between Québécois identity and traditional Québécois culture means that preserving the "integrity" of Québécois culture is paradigmatic for Taylor (Taylor, 1994b: 61).

The Ideal of Authenticity: Attention to Difference and Autonomy

Two major ramifications flow from Taylor's thesis. First, Taylor's recourse to the discourse of identity suggests that cultural groups share a common identity that is guided principally by their membership in their original cultural community. Second, Taylor's goal of protecting the cultural authenticity of Québécois diminishes the autonomy of the community and its individual members in the name of cultural authenticity. It is important to understand that Taylor's conception of authentic, original identity is not confined to individual citizens; culture-bearing groups also possess authentic identities (Taylor, 1994b: 31). The Québécois people have a way of being that is true to their culture (Taylor, 1994b: 31, 61). This is why the conception of the good advanced in Quebec must be committed to "remaining true" to the ancestral traditions of Québécois (Taylor, 1994b: 58). However, if there is a way of living and a personal identity that are true to Québécois culture, then Taylor's notion of Québécois identity is essentialist and static. Rather than being open to transformation, Québécois identity is more or less determinate because, like the horizon of meaning that constitutes it, its boundaries are limited by Québécois authenticity (Taylor, 1994b: 31, 61).

At the same time, the relationship drawn between cultural authenticity and identity produces a model of Québécois identity that is as homogeneous as it is static. Though he acknowledges that affirming individuals in their authentic identities will require that the horizon of meaning that is specific to each be respected, Taylor does not account for the possibility that there may be important differences that cut across Québécois as a group (Taylor, 1994c: 45). Instead, they are assumed to share a horizon of meaning that they find value in, and identify with, in much the same way. Indeed, it would seem that the identities of Québécois individuals are constituted almost exclusively by their cultural group membership. No consideration is given to the possibility that the identities of some Québécois might be shaped by their attachments to non-cultural social groups, or that the values such groups contribute to the horizons of meaning of individuals might conflict with those values that are authentically Québécois.

The essentialist tendencies that mark Taylor's conception of authentic identity also have serious ramifications for individual autonomy. Where individuals are met with the proposition that there are authentic ways of being Black, Québécois, or women, it cannot help but

compromise individual autonomy. The imposition of totalizing identities, even where they are intended to be positive and affirming, infringes upon the right of all individuals to autonomous self-determination, begging the question of "whether we have not replaced one kind of tyranny with another" (Appiah, 1994: 162-163). Taylor's plan to bind Québécois to their culture by demanding that those who are "ethnically francophone" organize their lives around their language and ethnicity deprives future generations of the right to choose their own conception of a valuable life, should their choices involve abandoning traditional cultural practices (Appiah, 1994: 161-163). Their freedom and autonomy as self-determining agents is not protected from those who would seek to control their choices (Appiah, 1994: 159).

Kymlicka's Identity-Driven Theory of Group Rights

Will Kymlicka is a second theorist who seeks to justify the conferral of group-specific rights to national minorities on the basis of culture and its connection to identity. Like Taylor, Kymlicka begins his defence of group rights by arguing that cultures are worthy of protection because they are indispensable to our capacity for deliberative judgement. In the first place, the range of options from which we choose in formulating our life plans is culturally given. Though we are free to choose amongst any number of options in deciding how to live our lives, we do not choose the options themselves (Kymlicka, 1989: 164). Second, our cultural heritage is critical to our ability to judge the value of those options. Our capacity to assess the options before us and to "intelligently examine their value" only can take place within a cultural context that helps us assign value and significance to particular activities and life plans (Kymlicka, 1989: 165). In this respect, the context of choice provided by our cultural community is indispensable to the exercise of personal liberty and individual autonomy; it is a critical component of our capacity for reflective judgement.

Leery of the problems that plague Taylor's reliance on cultural authenticity, Kymlicka seeks to devise a theory of group rights that eschews notions of cultural integrity. Thus, rather than professing the need to protect the authenticity and integrity of cultures, Kymlicka attempts to affirm the importance of cultural communities, without restricting the freedom of individuals to critically assess, modify, or even reject the "norms, values and . . . attendant institutions" of their society (1989: 166). As a result, rights that function to protect the "cultural character" of a community by immunizing its traditional way of life from challenge are insupportable as an undue restriction on our freedom to form our own conception of value and choose our own ends (Kymlicka, 1989: 166-67). In Kymlicka's view, the overriding value of a cultural community is its "cultural structure," the existence of a context of choice that provides community members with meaningful options and helps them to judge the value of various life choices. Here, culture is synonymous not with the authentic characteristics of a cultural community but with "the existence of a viable community of individuals" who share a common heritage and self-identification with the group (Kymlicka, 1989: 168). According to this understanding of culture, "the cultural community continues to exist even when its members are free to modify the character of the culture, should they find its traditional ways of life no longer worth while" (Kymlicka, 1989: 167).

For Kymlicka, distinguishing between a culture's character and its structure serves to delineate the nature of permissible group-specific rights. National minorities, such as First

Nations, should be afforded an extensive scheme of rights that function as external protections against the "disintegrating effects" of the choices of the dominant cultural community (Kymlicka, 1989: 198). However, rights that function as internal restrictions, that is, group rights that restrict the choices or activities of individual community members, to insulate the group against the effects of internal dissent, for example, are not permissible. These kinds of restrictions are insupportable because they conflict with liberal-democratic principles by allowing groups to oppress their members (Kymlicka, 1998: 62). That being said, Kymlicka places a critically important caveat on this general rule; national minorities should be able to limit their members' behaviour where failing to place "restrictions on the internal activities of minority members . . . would literally threaten the existence of the community" (1989: 199). Thus, where a tradition or practice is considered integral to the continued existence of the community, it can be defended, even if it violates the rights of members of the national minority.

Cultural Membership and Individual Identity

The importance assigned by Kymlicka to the existence of a secure cultural structure that provides individuals with a context of choice does not, by itself, explain why citizens have a right to the protection of their *own* cultural structure. Indeed, given Kymlicka's rejection of arguments in favour of protecting the cultural character of communities, it would not seem unreasonable to require members of minority cultural groups to rely on the meanings and options provided by the cultural structure of the dominant community to guide their choices. Kymlicka's response to this challenge is to appeal to the importance of individual identity and its connection to culture.

While it is true that our cultural community equips us with a context of choice that helps us to make deliberative choices about our life plans, our cultural heritage is critical to our personal agency in another way. Our cultural heritage endows us with a "sense of belonging" and provides us with "emotional security," "personal strength," and a "sense of agency," and so failing to show due respect for the cultural membership of others constitutes a harm (Kymlicka, 1989: 175). According to Kymlicka, it is the role played by culture in constituting individual identity that is critical to the claim that minority cultures deserve protection. For in the absence of the constitutive nature of cultural membership, there is no reason to favour the protection of particular cultural structures, rather than ensuring the existence of *a* secure cultural structure to facilitate citizens in exercising their moral powers and individual autonomy. Indeed, this aspect of Kymlicka's theory has prompted Rainer Forst to contend that "it is not culture as a 'context of choice' . . . but culture as a 'context of identity'" that truly drives Kymlicka's thesis (Forst, 1997: 66). And though Kymlicka is resolute in insisting that his framework of minority group rights is more autonomy driven than identity driven[1], the importance of identity to his project cannot be dismissed. Individuals may possess an "autonomy-interest" in the context of choice provided by their culture, but the interest minority cultural groups have in their own particular cultural structures, and the corresponding rights that can be claimed for their protection, are grounded in the constitutive role that culture plays in the formation of individual identity (Kymlicka, 2001: 55, n. 7).

Difference and Autonomy Revisited

Wary of the potential for theories premised on cultural authenticity to unfairly restrict the liberty of group members, Kymlicka seeks to distinguish his rights framework from Taylor's by rejecting the legitimacy of group-specific measures designed to protect the integrity of a culture's character. However, the exception he offers to his general prohibition against internal restrictions seems to undermine his efforts to reject rights claims that are based on the desire to protect a culture's character or authenticity. Instead, the primacy afforded to community and identity in Kymlicka's analysis threatens to resurrect the same problems posed by Taylor's politics of equal recognition. Though Kymlicka expresses a greater concern for the ability of cultural group members to reject and reform the character of their communities, the idea that culture-bearing groups share a context of choice and accompanying group identity may lead back, willingly or not, to the problem of authenticity and the oppression of non-conforming group members.

By suggesting that there are limits on the degree of change that a culture's character can withstand, without also jeopardizing its cultural structure, Kymlicka leaves open the possibility that more permanent internal restrictions can be defended to protect traditional practices that are claimed as essential or integral to the existence of the community and the shared identity of its members. This not only impairs the autonomy of group members by limiting their ability to challenge substantive components of the community's culture but marks those who would seek to effect change as outsiders who are hostile to the community's well-being (Dick, 2006). Thus, despite his efforts to avoid the problems that arise with Taylor's ideal of authenticity, Kymlicka's reliance on culture and identity to ground the rights claims of national minorities raises the same set of difficulties. It should not be surprising, then, that as the Supreme Court of Canada has come to embrace the discourse of culture and identity, the weaknesses of Taylor and Kymlicka's theories have been replicated in the court's approach to the rights of Aboriginal peoples, as provided in s.35(1).

Phase I: The Inherent Nature of Aboriginal Rights

For proponents of Aboriginal self-determination and self-government, the jurisprudence assigning a cultural basis to Aboriginal rights represents an unfortunate turn in the legal approach advanced by the Supreme Court of Canada and a marked departure from earlier rulings offering greater support for inherent rights theories of Aboriginal rights. Commencing with the 1973 decision in *Calder* v. *A.-G. of British Columbia*, the court had identified the occupation of lands from time immemorial as the source of Aboriginal rights. Rather than owing their existence to the Canadian state, Aboriginal land rights were found to inhere in the status of Aboriginal peoples as the original inhabitants and First Nations of the territory that came to be Canada (*Calder* v. *A.-G. of British Columbia*, 1972: 152-156).

This inherent understanding of Aboriginal rights was affirmed in *Guerin* v. *The Queen*, where the court not only recognized that Aboriginal rights emanate from the status of Aboriginal peoples as the original occupants of their territories but that these pre-existing legal rights survived the assertion of European sovereignty and could only be extinguished by legislation clearly intending to do so. Further, while the court acknowledged the overriding authority of the Canadian government over lands, it concluded that the "unique character both of the Indians' interest in land and of their historic relationship with the Crown," placed a "*sui generis*,"

fiduciary duty on the state to recognize its "trust-like" relationship with Aboriginal peoples and, accordingly, to act in the best interests of the latter in dealings between the two (*Guerin* v. *The Queen*, 1984: 342-343). The unique relationship between the Canadian state and Aboriginal peoples also was recognized by the court in *R.* v. *Sioui*. Describing the historical relationship between French and English colonial powers and Aboriginal peoples as being "very close to those maintained between sovereign nations," the court again acknowledged the unique, *sui generis* nature of the relationship between First Nations and the Canadian state, characterizing the relationship as something less than relations between independent states but something more than relations between state and citizen (*R.* v. *Sioui*, 1990: 441; 451).

Interpreting s. 35 (1): *R. v. Sparrow*

While the decisions rendered in *Calder*, *Guerin*, and *Sioui* grounded the rights of Aboriginal peoples in their status as Canada's original inhabitants and First Nations, none of these cases dealt directly with the constitutionally recognized rights affirmed in s.35(1). It was the 1990 case of *R.* v. *Sparrow* where the Supreme Court considered the scope of s.35(1) for the first time. In *Sparrow*, the appellant, a member of the Musqueam Indian Band, was charged with fishing with a drift net longer than that permitted by the Band's Indian food fishing licence and in contravention of federal fisheries regulations. Sparrow argued that the net length restriction set out in the regulations was inconsistent with his Aboriginal right to fish protected by s.35(1). The judgement of the Dickson court affirmed the inherent nature of Aboriginal rights, finding that Sparrow's right to fish originated from the fact that Aboriginal peoples lived in organized societies long before the arrival of European settlers, occupying their lands and fishing in their ancestral waters "from time immemorial" (*R.* v. *Sparrow*, 1990: 172).

It is important to note, however, that in *Sparrow* the Crown did not challenge the existence of an Aboriginal right to fish and, as a result, scant attention was paid by the court to the test for establishing a right under s.35(1). Instead, many of the questions addressed by the court concerned the right to fish. More specifically, the court was asked to determine whether the Aboriginal right to fish for food was limited to fish taken for subsistence purposes, or whether it also encompassed fish taken for social and ceremonial purposes. The court concluded, on the basis of anthropological evidence regarding the importance of salmon to Musqueam culture, that the right to take fish for food purposes should include the right to take fish for ceremonies (*R.* v. *Sparrow*, 1990: 172). In making this determination, the Dickson court noted that the Musqueam used salmon both for subsistence purposes and for ceremonial and social occasions and characterized fishing for salmon as an "integral part" of the lives of the Musqueam both historically and in the present day (*R.* v. *Sparrow*, 1990: 171). Though the court accepted, unquestioningly, the sovereignty of the Canadian state over Aboriginal lands and peoples, its affirmation of earlier jurisprudence grounding Aboriginal rights in the existence of organized societies prior to European settlement provided hope that it would continue to advance an inherent rights approach to Aboriginal rights (*R.* v. *Sparrow*, 1990: 177).

Phase II: *Van der Peet's* Cultural Test

The evolution of s.35(1) jurisprudence took a significant turn with the 1996 decision of the Supreme Court in *R.* v. *Van der Peet*. This case involved a member of the Sto:lo nation who

was charged with the offence of selling fish that had been caught under the authority of a valid Indian food fishing licence. The appellant argued that the British Columbia fishing regulations infringed her Aboriginal right to sell fish pursuant to s.35(1). Writing for the court's majority, Lamer C.J. began by acknowledging the history of Canada's Aboriginal peoples and the inherent nature of their rights, explaining the 'rationale and foundation' for their special constitutional status as follows:

> In my view, the 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. (*R.* v. *Van der Peet*, 1996: 193)

With this purpose in mind, the court determined that the constitutional framework for the recognition and affirmation of Aboriginal rights was to be "directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown" (*R.* v. *Van der Peet*, 1996: 193). It more particularly concluded that as it was the existence of distinctive Aboriginal societies that was being reconciled with the assertion of Crown sovereignty, "it is to those pre-existing societies that the court must look to in defining Aboriginal rights" (*R.* v. *Van der Peet*, 1996: 205). Accordingly, "the test for identifying the Aboriginal rights recognized and affirmed by s.35(1) must be directed at identifying the crucial elements of those pre-existing societies. It must, in other words, aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans" (*R.* v. *Van der Peet*, 1996: 200).

The Lamer court referred to the *Sparrow* decision to support the test offered. Noting that the nature of the Aboriginal rights protected by s.35(1) had not been addressed by the court in its previous judgement, the following passage from *Sparrow* was referred to in explaining how the *Van der Peet* test was conceived:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an *integral part of their distinctive culture*. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. (*R.* v. *Sparrow*, 1990: 175; quoted in *R.* v. *Van der Peet*, 1996: 200)

Thus, while both the Dickson court and the Lamer court found that the rationale and foundation for Aboriginal rights lay in the organized Aboriginal societies that pre-dated European settlement, the Lamer court did not read the *Sparrow* decision as having grounded s.35(1) rights in the status of Aboriginal peoples as Canada's First Nations. Instead, the Lamer court concluded that it was the role played by fishing in Musqueam culture that formed the basis of the right affirmed in *Sparrow*; it was the fact that the salmon fishery was "an 'integral part' of the 'distinctive culture' of the Musqueam" that justified the finding of a right (*R.* v. *Van der Peet*,

1996: 200). Relying on this reading of the *Sparrow* decision, the general principle established by the Lamer court was that the crucial elements of Aboriginal societies that warrant constitutional protection can be determined by identifying the "traditions, customs and practices that are integral to distinctive aboriginal cultures" (*R.* v. *Van der Peet*, 1996: 200).

A particularly noteworthy aspect of the test in *Van der Peet* is the time line adopted but the court. In the court's view, because the test seeks to reconcile the distinctive cultures of Aboriginal societies with the arrival of Europeans, the practices, customs, and traditions that are capable of constituting s.35(1) rights are those that were integral to the distinctive culture of the Aboriginal society in question at the time of European contact. To be considered integral to a distinctive Aboriginal culture, then, the practice, custom, or tradition must have been centrally significant to the culture before the arrival of Europeans in North America.

Perhaps the most interesting aspect of the judgement of the Lamer court in *Van der Peet* is its interpretation of the Dickson court's holding in *Sparrow*. The test for establishing an Aboriginal right enunciated in *Van der Peet*, requiring that a practice, custom, or tradition constitute an integral part of the distinctive culture of the Aboriginal society, is said to have been drawn from *Sparrow*, where the Dickson court noted that the Musqueam used salmon both for subsistence purposes and for ceremonial and social occasions. However in *Sparrow*, the existence of the Musqueam's Aboriginal right to fish was not seriously questioned by the Crown and, consequently, very little was said about the test for establishing a right under s.35(1) (*R.* v. *Van der Peet*, 1996: 209). The passage from *Sparrow* on which the *Van der Peet* test is based did not arise in the context of a discussion about whether the Musqueam enjoyed an Aboriginal right to fish. Instead, the issue being considered was whether the Aboriginal right to fish for food was limited to fish taken for subsistence purposes, or whether it also encompassed fish taken for social and ceremonial purposes. The court in *Sparrow* concluded, on the basis of anthropological evidence regarding the importance of salmon to Musqueam culture, that the right to take fish for food purposes should include the right to take fish for ceremonies (*R.* v. *Sparrow*, 1990: 172).

Nothing in the *Sparrow* decision suggests that had salmon had no particular cultural relevance to the Musqueam, that is, if salmon had merely been the most readily available food source at the time of European contact, no Aboriginal right to fish for food could have been established. In fact, Patrick Macklem, though earlier having characterized the *Sparrow* decision as having grounded the Musqueam's right to fish in the centrality of fishing to "Musqueam culture" (Asch and Macklem, 1991: 506), has since acknowledged that "strictly speaking, the court in *Sparrow* did not explicitly state that the practice of fishing among the Musqueam constituted an Aboriginal right because it forms an integral part of Musqueam culture" (Macklem, 2001: 58). Granted, a broad understanding of culture that includes physical survival might allow for the taking of salmon to qualify as a practice that was integral to Musqueam culture, in so far as it relates to the continued survival of the Musqueam people. However, the judgement of the Lamer court in *Van der Peet* seems to belie any such reading of the test. In fact, the court explicitly addressed the impossibility of such as a claim where it stated that "eating to survive," because it is "true of every human society," is not a distinctive aspect of Aboriginal societies (*R.* v. *Van der Peet*, 1996: 204). In the Lamer court's view, the nature of the Musqueam's claim in *Sparrow* was that fishing for food was "characteristic of Musqueam

culture, and, therefore, a *distinctive part* of that culture" ((*R.* v. *Van der Peet*, 1996: 209). In short, fishing for food "made Musqueam culture what it is" (*R.* v. *Van der Peet*, 1996: 209).

Phase III: *Mitchell* v. *M.N.R.*

Though based on a questionable reading of the Dickson court's judgement in *Sparrow*, the *Van der Peet* decision embraced the cultural justification for minority group rights championed by Taylor and Kymlicka, advancing the view that the purpose of Aboriginal rights is to protect practices, customs, and traditions that are integral to Aboriginal cultures. Nonetheless, the court, to this point, had not linked its choice to ground the rights of Canada's Indigenous peoples in the value of preserving Aboriginal cultures to the protection of Aboriginal identity. This would change with the court's ruling in *Mitchell* v. *M.N.R.* (2001).

The *Mitchell* case involved the claim of a member of the Mohawk Nation to bring items across the Canadian border without paying customs duties. Chief Mitchell had purchased goods in the United States which he brought into Canada to present as gifts to another Mohawk community, symbolizing the renewal of historic trading relations between the two communities. The opinion of the court's majority, delivered by McLachlin C.J., found that the evidence did not support an ancestral Mohawk practice of trading north of the St. Lawrence River and that, in any event, northerly trade could not be said to be a defining feature of the Mohawk culture. However, in re-visiting the criteria for establishing a s.35(1) right, a new version of the test was offered that incorporated a notion of Aboriginal identity for the first time.

> Stripped to its essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture *and lay at the core of the peoples' identity*. It must be a "defining feature" of the aboriginal society such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was." 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 in question (*Mitchell* v. *M.N.R.*, 2001: 928, emphasis added).

With the *Mitchell* decision the connection between group-specific rights and the preservation of distinctive Aboriginal cultures and identities asserted by Taylor and Kymlicka was brought to the forefront of Aboriginal rights jurisprudence. In finding against the existence of an Aboriginal right to trade north of the St. Lawrence River, the court noted not only that the Mohawk culture would not have been "fundamentally altered" without such trade but that the activity was not "vital to the Mohawk's *collective identity*" (*Mitchell* v. *M.N.R.*, 2001: 952, emphasis added). Just as Kymlicka suggests that the absence of certain cultural practices actually can threaten the existence of a cultural community, in *Mitchell*. constitutional protection

was limited to those activities whose absence would "fundamentally alter" the Aboriginal society claiming the right.[2]

Indeed, the court's approach in *Mitchell* mirrors the theses of Taylor and Kymlicka in significant ways. First, according to the McLachlin court, the purpose of s.35(1) is to protect those activities that are integral to distinctive Aboriginal cultures. Aboriginal rights function to protect the group differences that distinguish Aboriginal cultures from the cultures of others. Second, the court acknowledged that these cultural group differences are crucial to identity; they lie at the very core of the collective identity of the group. Third, in determining whether the litigation involved a group difference that required constitutional protection, the court specified the character of the Mohawk identity at stake in the conflict and concluded that because northerly trade was not vital to the collective identity of the Mohawks it could not qualify as an Aboriginal right.

Political Consequences

The evolution of the court's approach to Aboriginal rights from an inherent right approach to an approach focussing on practices, traditions and customs that are integral to an authentic Aboriginal identity and culture brings with it a host of problems. First and foremost, the court's approach undermines claims for self-determination and self-government. Aboriginal peoples have long insisted that the basis of their rights inheres in their status as Canada's First Nations; it is this important historical difference that is relied on most often to characterize the unique nature of their rights. However, the court's choice to restrict the scope of Aboriginal rights to the protection of cultural difference has important ramifications for relations of power between Aboriginal peoples and the Canadian state. The cultural approach advanced by the court allows it to sidestep the issues of Aboriginal sovereignty and the legitimacy of the Canadian state's authority over Aboriginal peoples (Macklem, 2001; Murphy, 2001). In the face of continued calls for the recognition of Aboriginal sovereignty and self-government, the discourse of cultural distinctiveness diverts attention from the issue of political power that characterizes the rights agendas of First Nations and, in so doing, depoliticizes their claims. As Patrick Macklem has argued, "there is more to the constitutional relationship between Aboriginal people and the Canadian state than the constitutional protection of Aboriginal cultural difference. Indigenous difference should not be reduced to cultural difference; constitutional protection should also extend to interests associated with Aboriginal territory, Aboriginal sovereignty, and the treaty-making process" (Macklem, 2001: 75).

The second consequence that flows from the evolution of the court's test for establishing an Aboriginal right is that the principal rationale offered fails to distinguish Aboriginal peoples from ethnocultural minorities. Assigning a cultural basis to Aboriginal rights threatens to level the status of Aboriginal peoples to that of other ethnocultural groups by minimizing the politically significant difference that distinguishes Canada's Indigenous peoples from multicultural minorities, namely, the fact that the former constitute First Nations. The cultural rationale for Aboriginal rights offered by the court fails to explain why the cultural distinctiveness of Aboriginal peoples should be singled out for constitutional protection. If culture is so inherently valuable to the well-being of identity that its maintenance warrants constitutional protection for Aboriginal peoples, on what grounds are the cultures of non-

Aboriginal minority groups to be denied similar rights (Macklem, 2001: 72-74)? A test emphasizing the importance of culture to identity does not explain why the distinctive cultures of multicultural minorities should not enjoy similar protections.

The third issue raised by the s.35(1) case law concerns judicial competence. The *Mitchell* test not only assumes that Aboriginal peoples possess common cultural identities but that the courts of the dominant society, whose composition is decidedly unrepresentative of Canada's Aboriginal population, can determine which practices, customs, and traditions lie at the core of those identities. The court has implied that the nature and scope of Aboriginal rights can be determined by specifying the content of the shared Aboriginal identity in question and, according to McLachlin C. J., by determining its integral components (*Mitchell* v. *M.N.R.*, 2001: 952). The question that arises is what capacity does the court have to make such judgements, especially where there is disagreement within a community over which cultural practices or which Aboriginal identities are 'authentic'? Indeed, how difficult would it be for members of the court to define the shared identity of their own culture and society - that of the 'Canadian nation' or simply of English-speaking Canada?

The fourth consequence of the evolution of the court's jurisprudence is the fact that it fails to provide protection for the contemporary identities of Aboriginal peoples. In this respect, the new found concern for the protection of Aboriginal identities expressed in *Mitchell* presents its own irony. Rather than protecting those aspects of First Nations' communities that Aboriginal peoples acknowledge to be significant to their well-being, the purview of constitutionally protected rights is limited to cultural activities that are authentic. According to the test, where autonomous choices taken by Aboriginal peoples about how to structure their communities depart from pre-contact traditions, they are either "unAboriginal" or peripheral to Aboriginal identity (Green, 2001: 728). While more recently adopted practices and values may actually be of central importance to Aboriginal communities, they may not be the subject of s.35(1) rights. Thus, it would seem that the Aboriginal identities and cultural practices with which the court is concerned are not the identities and practices that are truly significant to Aboriginal peoples, but those that enjoy cultural integrity, those that are essential, unchanging, and can be tied to a pristine Aboriginal past. While what is important to the lives of Aboriginal peoples may change, the new identities that accompany these changes are beyond judicial concern. Despite the continued warnings about the human need for identity recognition, the court is only prepared to bestow recognition on the identities that accord with a judicially conceived notion of Aboriginal authenticity. For this reason, the adoption of new practices, customs, and traditions presents a difficult choice for Aboriginal peoples.

The fifth consequence of the court's s.35(1) test flows directly out of the fourth, and concerns constraints on the economic, political and cultural autonomy of Aboriginal persons. Assuming that cultures have an essential core that is fixed and constant ignores the fact that cultures overlap and influence one another, making it impossible to demarcate clear cultural boundaries. Limiting the scope of s.35(1) rights to authentic, pre-contact activities not only disregards the fact that cultures necessarily undergo significant transformations but that Aboriginal Canadians, no less than non-Aboriginal Canadians, are influenced by, and find value in, the cultures and practices of other communities. Yet, the court's response to the plurality of cultural influences and non-cultural group memberships that inform the lives of Aboriginal

persons has been to retreat to a pre-contact, authentic Aboriginal past and to limit Aboriginal rights to those activities that were integral to pre-contact societies. As a consequence, the autonomy of Aboriginal peoples is constrained in at least two ways.

First the constitutional protection of activities that result in economic profit is effectively excluded. According to the court, only those practices, customs, and traditions that were integral to Aboriginal societies at the time of European arrival may qualify as Aboriginal rights. By excluding those activities and practices that arose as a consequence of colonization from rights status, Canadian courts have rejected claims involving the right to engage in traditional activities for profit.[3] Critics of this aspect of the court's test note the harsh economic consequences of limiting Aboriginal rights to activities that have pre-contact continuity. As Michael Murphy explains, "this restriction can affect a wide range of rights, including ownership and exploitation of non-renewable resources, the establishment of high-revenue business ventures, and the exploitation of traditional lands for economic purposes or the operation of large-scale commercial renewable resource enterprises" (2001: 126). Also commenting on the court's approach to claims involving commercial exchange and authenticity, Russell Lawrence Barsh and James Youngblood Henderson argue that "Aboriginal peoples must remain poor to be genuine - an especially pernicious way of being stuck in the past" (1996-1997: 1005, n. 44).

The pre-contact test also limits the autonomy of Aboriginal peoples by constraining their freedom to make choices regarding their political and cultural evolution. Where Aboriginal peoples choose to abandon certain traditional practices in favour of others, they risk diminishing the collection of constitutional rights they enjoy. Abandoning traditional practices and values for new ones may very well entail abandoning the scope of constitutional protection that the community enjoys. By deciding to adopt the practices or values of another culture or political community, Aboriginal peoples face the prospect of lessening what little authority they have over their own communities. It is difficult to reconcile the idea that the well-being of Aboriginal peoples is furthered where the content of their own social and political choices can reduce the range of constitutional protection afforded to the group. The cultural authenticity requirement articulated in *Van der Peet* and *Mitchell* unnecessarily constrains the freedom of Aboriginal peoples to make choices about their lives and communities. Where Aboriginal culture entails a "fixed inventory" of authentic traits and characteristics, Aboriginal peoples are denied full authority over the reproduction of their own culture (Barsh and Henderson, 1996-1997: 1002). Further, if cultures are bound to evolve, then the erosion of constitutionally protected Aboriginal rights is inevitable. Indeed, the day soon may be coming when there will be no remaining practices that can be tied to an authentic Aboriginal past.

The final problem raised by the evolution of the court's test is the way that it reinforces oppressive relations of power in the community. The judicial test articulated in *Mitchell* clearly illustrates the court's belief that each Aboriginal community possesses a readily identifiable identity and that this identity is shared by all members of the community. Yet, like members of other social groups, Aboriginal peoples are diverse. Their societies are marked by cleavages that create divisions of interest within their communities and forge shared interests with non-Aboriginal social groups. Differentiating characteristics such as class, gender, and sexual identity are as politically significant inside Aboriginal communities as they are outside of them.

Accordingly, the lives and identities of Aboriginal individuals are not guided exclusively by their membership in their traditional cultures - a fact not accounted for in the court's test.

Despite these differences, the court's approach assumes that authentic Aboriginal values and traditions are equally valued by all members of the community - that practices are worthy of protection simply because they are authentic. Little consideration is given to the possibility that traditional practices may be oppressive. Indeed, the danger in assuming that authentic cultural practices are worthy of legal protection is the likelihood that existing relations of power within Aboriginal communities will be constitutionally sanctioned, creating avenues for the defence of oppressive practices in the name of tradition. Aboriginal feminists, in particular, argue that where cultural authenticity serves as the primary justification for Aboriginal rights, appeals to tradition and authenticity can insulate sexist cultural practices from challenge (Green, 2001: 726-28).

Conclusion

An examination of the jurisprudence of Canada's highest court illustrates the evolution of its Aboriginal rights framework from an inherent rights approach connecting the nature and source of Aboriginal rights to the fact that Aboriginal peoples were the original inhabitants and First Nations of the territory that came to be Canada, to an approach emphasizing the protection of cultural difference and Aboriginal identity. The approach developed by the court has striking similarities to rights frameworks offered by Taylor and Kymlicka, which ground the provision of group-specific rights in the importance of culture to identity. The court's choice to limit the ambit of Aboriginal rights to distinctive, pre-contact cultural practices, as articulated in *Van der Peet*, mirrors Taylor's commitment to cultural authenticity and his belief that culture-bearing peoples have a way of living that is true to themselves, which must be protected and preserved for future generations.

While the decision rendered in *Van der Peet* embraces the cultural basis of group-specific rights, the *Mitchell* decision brings the importance of identity to the forefront of Aboriginal rights jurisprudence. With *Mitchell*, the cultural rationale for group-specific rights remains, but is bolstered by the connection drawn between the preservation of authentic Aboriginal cultures and the well-being of authentic Aboriginal identities. The suggestion offered by the court is that the paramount reason for protecting Aboriginal cultural difference lies in the value of protecting Aboriginal identity. Moreover, the court's suggestion that the well-being of particular cultural communities hinges on the continued existence of certain integral practices resonates with Kymlicka's contention that protecting the substantive character of some cultural practices may be required to ensure the continued existence of a minority cultural community.

However, in choosing to ground the rights of Aboriginal peoples in the discourse of culture and identity, the court's jurisprudence weakens the claims of Aboriginal persons for self-determination and replicates the problems that arise in Taylor and Kymlicka's identity-driven theories. Arguing that rights should to be afforded to Aboriginal peoples because of the importance of culture to identity does little to explain why multicultural minorities should not be afforded a similar scheme of rights. At the same time, the court's choice to limit the nature of Aboriginal rights to those traditions and practices that were integral to pre-contact Aboriginal

societies constrains the autonomy of Aboriginal communities and their members because choosing to abandon traditional practices in favour of new ones promises to diminish the level of constitutional protection enjoyed by the community. Compounding this difficulty is the fact that the authenticity standard adopted by the court can be wielded to dismiss or discredit those in the community who would seek to effect change or challenge existing relations of power. Where oppressive practices can be held out as centrally significant to the community or, in Kymlicka's terms, as critical to the community's cultural structure, they can form the basis of a constitutionally protected Aboriginal right. Whether viewed in terms of the relationship between First Nations and the Canadian state or the relationship between Aboriginal communities and their members, the court's test, predicated as it is on culture and identity, serves to constrain the autonomy of Aboriginal peoples by imprisoning them in a judicially conceived, authentic Aboriginal past.

Endnotes

1. Kymlicka responds to Forst's contention as follows: "Considerations of identity provide a way of concretizing our autonomy-based interest in culture. In principle, either the minority's own culture or the dominant culture could satisfy people's autonomy-interest in culture, but considerations of identity provide powerful reasons for tying people's autonomy-interest to their own culture. Identity does not displace autonomy as a defence of cultural rights, but rather provides a basis for specifying which culture will provide the context for autonomy" (2001: 55, n. 7).

2. While the court has not rejected the connection between culture and identity espoused in *Mitchell*, it has sought to loosen the s.35(1) test enunciated in that case. In its 2006 judgement in *R.* v. *Sappier*, Bastarache J., writing for the majority, offered the following commentary. "Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a 'core identity' may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it is necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining feature. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture" (*R.* v. *Sappier*; *R.* v. *Gray*, 2006: para. 40).
3. See, for example, *Van der Peet*, 1996; *R.* v. *N.T.C. Smokehouse Ltd.*, 1996, *R.* v. *Pamajewon*, 1996; *Mitchell* v. *M.N.R.*, 2001, *R.* v. *Sappier*; *R.* v. *Gray*, 2006.

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