ACHIEVING CULTURAL SECURITY AND CONTINUITY: *R. v. SAPPIER* AND THE REFINED *VAN der PEET* TEST

These materials were prepared by F. Matthew Kirchner of Ratcliff & Company, LLP, North Vancouver, B.C. for a conference held in Vancouver, B.C. hosted by Pacific Business & Law Institute, February 26th and 27th, 2009.

TABLE OF CONTENTS

ACHIEVING CULTURAL SECURITY AND CONTINUITY:
***R. v. SAPPIER* AND THE REFINED *VAN der PEET* TEST**

I. INTRODUCTION

In 1996, the Supreme Court of Canada established the test for proving an aboriginal right. This test, which is referred to generally as the *Van der Peet* test (for the case in which it was developed)[1] or the "integral to a distinctive culture test"[2] (a fairly simplistic summary of the test's essence), was developed largely from a blank slate. Fourteen years earlier, "existing aboriginal rights" had received recognition and affirmation in s. 35 of the *Constitution Act, 1982*. Six years earlier, *R. v. Sparrow*, [1990] 1 S.C.R. 1075 gave the Supreme Court of Canada had its first opportunity to comment on s. 35. There, the Court called for a "generous, liberal" interpretation of s. 35 but did not explore what is required to prove an aboriginal right. *Sparrow* was a case about fishing for food, social and ceremonial purposes and it did not require significant analysis to conclude that this must be an aboriginal right.

Thus, when the Supreme Court of Canada had before it a more serious dispute as to the existence of an aboriginal right, it became necessary to define a test for proving such rights. Drawing on a comment from Dickson C.J. and La Forest J. in *Sparrow* that "the taking of salmon was an integral part of their [the Musqueam's] lives and remains so to this day" the majority in *Van der Peet* developed the "integral test", which requires aboriginal rights claimants to establish that a modern day activity claimed as an aboriginal right has developed from a practice that was "integral to the distinctive culture" of the pre-contact aboriginal group from which the claimant descends.

The difficulty with developing a test from a largely blank slate is that one cannot be certain that the test will achieve its objectives; and the Supreme Court of Canada has established very profound objectives for the doctrine of aboriginal rights. In *Sparrow*, the Court said that s. 35 is a "solemn commitment" that provides aboriginal peoples with protection from sovereign power. The court said that s. 35 provides a "solid constitutional base" from which negotiations can take place and that it calls for "just settlement" for aboriginal people after a "long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights." In

[1] *R. v. Van der Peet*, [1996] 2 S.C.R. 507
[2] see *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 where this term was used. In *Van der Peet*, Lamer C.J. simply called it the "integral test."

Van der Peet, the Court said that s. 35(1) provides "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"[3] and in *Mikisew Cree First Nation v. Canada* the Court said that the fundamental objective of the modern law of aboriginal rights is "the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[4] More recently, the Supreme Court of Canada has said that the purpose of the *Van der Peet* test is to provide "cultural security and continuity" to aboriginal societies. These are all very important objectives that could be frustrated by an overly strict test for proving aboriginal rights.

It is submitted here that the "integral to a distinctive culture" test initially risked missing the mark in seeking to achieve these important objectives. However, recent jurisprudence of the Supreme Court of Canada has redefined crucial elements of the test so that courts can now look more broadly (or more generously and liberally to use the language of *Sparrow*) at the way of life of pre-contact aboriginal societies and at the needs of First Nations in modern times in defining existing aboriginal rights. Through a framework developed in *R. v. Marshall; R. v. Bernard*[5], and *R. v. Sappier* the Court has set an analytical framework that focuses on the modernization of aboriginal rights with the objective of making them relevant and meaningful in a modern economy. The framework allows aboriginal communities to translate those activities that helped to define their ways of life pre-contact into modernized rights in order that they may maintain their cultures in practical ways today.

Further, the Supreme Court of Canada has relaxed the *Van der Peet* test by no longer requiring that pre-contact practices on which aboriginal rights are based be "core" to the aboriginal group's identity or a "defining feature" of that culture. Rather, they must merely be one of the things that helped to define the way of life or distinctiveness of the aboriginal group.

It is submitted here that the Supreme Court of Canada's more recent jurisprudence on aboriginal rights better equips the courts with the analytical tools needed to achieve the important objectives that the doctrine of aboriginal rights is intended to serve. This paper reviews that recent

[3] *Van der Peet,* para. 31
[4] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 1
[5] *R. v. Marshall; R. v. Bernard,* [2005] 2 S.C.R. 220, 2005 SCC 43

jurisprudence and comments briefly on how the refined "integral to a distinctive culture" test can achieve the objectives of the aboriginal rights doctrine using fishing rights as an example.

II. ABORIGINAL RIGHTS AND THE *VAN DER PEET* TEST

A. Aboriginal Rights

Aboriginal rights flow from practices that were, at the time of contact with Europeans, integral to the distinctive culture of the aboriginal society from which the claimant group descends. Though based on pre-contact activities, aboriginal rights take modern forms. In *R. v. Marshall; R. v. Bernard,* McLachlin C.J. said:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty [or pre-contact] aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.[6]

B. The *Van der Peet* Test

The test for proving an aboriginal right was initially set out in *R. v. Van der Peet* as follows:

> …in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.[7]

The majority in *Van der Peet* outlined a three-stage framework for applying this test:

1. ***Characterization of the right that is claimed***: At this stage, the court is to characterize the modern activity that is claimed as an aboriginal right;

2. ***Examination of the Pre-Contact Practice*:** At this stage the court examines the pre-contact practice on which the claimed modern right is based and determines whether that practice was integral to the distinctive culture of the claimant group prior to contact. In *Van der Peet,* the majority said that to be integral, a practice had to have been a "defining feature" of the society such that it "truly made the society what it was." As discussed below, the Court's recent jurisprudence has backed off this strict approach and cast this aspect of the test in terms of

[6] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 48
[7] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 para. 46

examining whether the pre-contact practice "helps to define the way of life or distinctiveness" of the pre-contact aboriginal group;[8] and

3. ***Continuity:*** At this stage the court looks at whether the modern activity claimed as a right has continuity with the pre-contact practice on which the right is based. The court is to translate the pre-contact practice, "as faithfully and objectively as it can," into a modern legal right.[9] There must be a "reasonable degree of continuity."[10]

C. Development and Early Consideration of the *Van der Peet* Test

The *Van der Peet* analysis was applied by the Supreme Court of Canada in several cases that were released contemporaneously with *Van der Peet* or followed shortly thereafter. In *R. v. Gladstone*[11] the test was applied in finding an aboriginal right of the Heiltsuk people to sell herring spawn commercially and in *R. v. NTC Smokehouse*[12] where the Court held that aboriginal rights to sell salmon by the Tseshaht and Hupacasath were not established. Later that year food fishing rights were established by the Mohawk in *Adams*[13] and by Algonquin people in *Côté*[14] on the basis of the *Van der Peet* test.

In 2001, five years after *Van der Peet*, the Supreme Court of Canada applied the test in *Mitchell v. M.N.R.*,[15] which concerned a claim by the Mohawk to bring goods into Canada over the St. Lawrence River for trading purposes. [16] The claim was rejected and, in applying the *Van der Peet* test, McLachlin C.J. added one minor element to the "integral to the distinctive culture" test, suggesting that it is those activities that are core to the identify of the aboriginal group will receive protection as aboriginal rights. As discussed below, *Mitchell* would become significant as representing the high-water mark of stringency for the *Van der Peet* test.

---

[8] *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at para. 24
[9] *Marshall; Bernard* at para. 48
[10] *Mitchell v. MNR*, at para. 12
[11] [1996] 2 S.C.R. 723
[12] [1996] 2 S.C.R. 672
[13] [1996] 3 S.C.R. 101
[14] [1996] 3 S.C.R. 139
[15] 2001 SCC 33, [2001] 1 S.C.R. 911
[16] The claim was actually to bring goods over the boarder at the St. Lawrence River "without having to pay any duty or taxes whatsoever to any Canadian government authority" and for trading purposes. However, the court was of the view that the issue of paying duties is properly addressed in the infringement analysis.

In *R. v. Powley*[17] the Court applied the *Van der Peet* test to find that Métis in Sault St. Marie area had aboriginal rights to hunt for food. The test required some adjustment for timing of the integral practices since Métis communities were non-existent at contact but otherwise applied the "integral" test without modification.

Each of these cases has significant aspects for different reasons, but none of them modified the essence of the "integral to a distinctive culture test." Even *Mitchell*, which added the element of "core" to the aboriginal group's identity was really only re-stating how Lamer C.J. had defined "integral" in *Van der Peet* itself.

III. RECENT DEVELOPMENTS IN THE *VAN der PEET* TEST

A. Overview

As noted, *Mitchell v. MNR* represented the high mark for the *Van der Peet* test, a mark from which recent case law has retreated. *R. v. Marshall; R. v. Bernard* marks the beginning of the re-examination of the aboriginal rights test. It was an appeal of two separate but similar proceedings concerning the commercial harvesting of timber from lands over which the accused claimed aboriginal title. Though based on aboriginal title, the case provides guidance on the aboriginal rights doctrine generally and is significant for aboriginal rights cases. Specifically, the Court spoke of the importance of developing and defining aboriginal rights with the aboriginal perspective and ensuring that aboriginal rights can function in a modern economy.[18]

The more substantive re-examination of the aboriginal rights test came in *R. v. Sappier; R. v. Gray*, which was also an appeal of two separate proceedings relating to the harvesting of timber but this time for domestic uses. It is the most significant aboriginal rights case since *Van der Peet* and, it is submitted, must now be taken as the leading authority on the aboriginal rights test. In *Sappier*, the court re-defined the "integral to a distinctive culture" and, in so doing, lowered the threshold for proving an aboriginal right. In *Sappier*, the Court set a course away from looking at aboriginal rights as a collection of isolated practices and on to an examination of the

[17] 2003 SCC 43, [2003] 2 S.C.R. 207
[18] The case also provides considerable guidance for aboriginal title but that is the subject of another presenter.

overall "way of life" of an aboriginal community and the role that pre-contact practices played in "helping to define" that way of life.

The effect of these two cases is significant. It is submitted here that taken together these cases:

- further develop the purpose of the aboriginal rights doctrine beyond reconciliation to achieving cultural security and continuity for aboriginal communities;
- place considerable importance on defining aboriginal rights, and the pre-contact practices on which they are based, from an aboriginal perspective;
- emphasize the importance of modernizing pre-contact practices so they have contemporary relevance and vigour;
- acknowledge that aboriginal rights frequently have an economic function and they must be able to function in a modern economy; and
- lower the bar for proving that the integrality of a practice.

These various aspects are examined in the next section.

B. Specific Developments in the *Van der Peet* Test

1. Modernization of the Right - Cultural Security and Continuity

It has long been held that aboriginal rights are not frozen in time. This was first enunciated in *R. v. Sparrow* in the context of whether aboriginal fishing rights should be defined in accordance with the regulatory scheme that applied to fishing activities in 1982 when s. 35 was enacted. *Marshall; Bernard* and *Sappier* have given this principle more vigour by emphasizing that aboriginal rights are modern day rights which, while based on pre-contact practices, must be receive modern definition. In *Sappier*, Bastarache J. said:

> Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal

> community, the nature of the *right* must be determined in light of present-day circumstances.[19] (emphasis in original)

The importance of translating pre-contact practices into modern-day rights was also emphasized in *Marshall; Bernard*:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty [or contact] … translates into a modern legal right, and if so, what right?[20]

The Court emphasized that in translating a pre-contact practice into a modern right, "absolute congruity is not required, so long as the practices engage the core idea of the modern right."[21] The process requires flexibility:

> This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.[22]

The court expressly contemplated that evolution of aboriginal rights serves to ensure that they can be exercised and have meaning in the modern economy:

> Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology.[23]

In *Sappier*, the court emphasized the importance of aboriginal rights having contemporary relevance:

> L'Heureux-Dubé J. in dissent in *Van der Peet* emphasized that **"**aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in

[19] *Sappier*, para. 48
[20] *Marshall; Bernard* para. 48
[21] *Marshall; Bernard* para. 50
[22] *Marshall; Bernard* para. 48
[23] *Marshall; Bernard* para. 25

> which they live" (para. 172). If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless.[24]

The focus of on the modern definition of the right is in keeping with the objective of the aboriginal rights test which was explained as follows in *Sappier*. There the court said:

> Section 35 recognizes and affirms existing aboriginal and treaty rights **in order to assist in ensuring the continued existence of these particular aboriginal societies**.[25] (emphasis added)

And:

> Flexibility is important when engaging in the *Van der Peet* analysis because **the object is to provide cultural security and continuity for the particular aboriginal society.** This object gives context to the analysis. (emphasis added)[26]

These objectives show that the aboriginal rights serve not simply to preserve the right of aboriginal people to engage in ancient practices but they are to give aboriginal societies the ability to maintain and develop their traditional way of life in modern times, in a modern economy, using modern means.

It is submitted that the focus on the modern definition of aboriginal rights together with pursuing the objective of cultural security and continuity means that aboriginal rights must have practical significance. That is, aboriginal rights must enable aboriginal communities to maintain their cultures (or ways of life) today through the integration ancient practices into their modern living.

2. Retreat from *Van der Peet* and *Mitchell*

As noted, *Sappier* marks a significant re-definition of the "integral to a distinctive culture test." The Court in *Sappier* did not do away with the "integral" test but rather re-defined the terms "integral" and "culture" with the effect of coming up with a less stringent test.

(a) Integrality

In *Van der Peet* Lamer C.J. described what he meant by "integral" test in these terms:

---

[24] *Sappier*, para. 49
[25] *Sappier*, para. 26
[26] *Sappier*, para. 33

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a **central and significant part** of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that **truly made the society what it was**. (underlining in original, emphasis added)[27]

In *Mitchell v. M.N.R.*,[28] McLachlin C.J., speaking for the majority, restated the test drawing on Lamer C.J.'s definition of "integral" and adding that the custom, practice or tradition must have gone to the "core" of aboriginal group's identity. She summarized the integral test in these terms:

> 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" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in *Van der Peet*).[29]

In *Sappier*, though, Bastarache J., writing for the Court on this point,[30] said that the *Mitchell* standard of requiring that the pre-contact activity laid at the "core of the peoples identity" had set the bar too high. Bastarache J. wrote:

> 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 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 character. 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.[31]

---

[27] *Van der Peet* para. 55
[28] [2001] S.C.R. 911, 2001 SCC 33
[29] *Mitchell*, para. 12
[30] Bastarache J. was writing for eight judges. Binnie J. gave concurring reasons, substantially agreeing with Bastarache J.
[31] *Sappier*, para. 40

Thus, the court pulled back from *Mitchell*'s addition of "core identity" standard but Bastarache J. went further by reconsidering *Van der Peet* itself. He concluded that Lamer C.J. had overstated what it means for an activity to be "integral." Bastarache J. wrote:

> The notion that the pre-contact practice must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights.[32]

The notions of "defining feature" and "fundamentally altered" come from paragraph 55 of Lamer C.J.'s judgment in *Van der Peet* (quoted above) which is where he principally described the meaning of "integral." His description has now been replaced by *Sappier* and, for this reason, *Sappier* must now be taken as the leading case on the test for proving an aboriginal right.

(b) Culture

Mr. Justice Bastarache's reconsideration of *Van der Peet* did not stop at the definition of "integral". He also took issue with the term "distinctive culture" as used in the *Van der Peet* test, noting that it is a challenging concept. He said that the focus on "distinctive culture" risks identifying aboriginal rights as an "inventory of traits or characteristics."[33] Drawing on observations made by L'Heureux-Dubé and McLachlin JJ. in their respective dissenting judgments in *Van der Peet*, Bastarache J. noted that the *Van der Peet* test poses a risk of considering "only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted."[34]

Bastarache J. proposed that "culture" simply means the aboriginal group's "way of life" and that courts should look not at particular cultural characteristics but rather at how aboriginal communities lived pre-contact:

[32] *Sappier*, para. 41
[33] *Sappier*, para. 42
[34] *Sappier*, para. 43

> What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.[35]

This notion of looking at the "way of life" appears to have originated in a passage from La Forest J.'s minority judgment in *Delgamuukw* that was adopted by the majority in *Marshall; Bernard*. In discussing what a First Nation must show to prove occupancy for the aboriginal title test, La Forest J. said:

> . . . when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. (emphasis is La Forest J.'s)[36]

(c) Integral to the Distinctive Culture

Where, then, does the "integral to the distinctive culture" test stand after *Sappier*? Rather than looking for practices that are a "defining feature" of the society, courts must look at the way of life of the aboriginal society and consider how the practice claimed as a right relates to that way of life. Bastarache J. provides his interpretation of the "integral to the distinctive culture" test as follows:

> The goal for courts is, therefore, to determine **how the claimed right relates to the pre-contact culture or way of life of an aboriginal society**. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. (emphasis added)[37]

And:

> As previously explained, it is critical that the Court identify a practice that **helps to define the way of life or distinctiveness** of the particular aboriginal community. The claimed right should then be delineated in accordance with that practice.[38] (emphasis added)

---

[35] *Sappier*, para 45
[36] *Marshall; Bernard*, para. 49, quoting *Delgamuukw*, [1997] 3 S.C.R. 1010 at para. 94]
[37] *Sappier*, para. 22
[38] *Sappier*, para. 24

And:

> As I have already explained, **the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it.** This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact.[39] (emphasis added)

It is evident from the above passages that the court does not purport to replace the "integral to the distinctive culture" test. In fact, in leading off his analysis of the aboriginal rights claim, Bastarache J. states:

> In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46.

However, while the test has not been replaced, its key elements have been redefined. "Integral" no longer means "core" or "defining feature." "Distinctive culture" simply means the "way of life" of the pre-contact aboriginal society. And aboriginal claimants no longer must show that their culture would have been "fundamentally altered" without the practice. Rather, they simply must show that the practice "helped to define" their pre-contact way of life. It is submitted that going from "core identity" in *Mitchell* to "helps to define" in *Sappier* constitutes a significant relaxation of the aboriginal rights test and is much better suited to achieving the objective of cultural security and continuity.

3. Importance of Aboriginal Perspective

A third element of *Van der Peet* that has been expanded upon in recent case law is the role of the aboriginal perspective in defining aboriginal rights. This has always been an element of the *Van der Peet* test but *Marshall; Bernard* and *Sappier* appear to give it more force.

In *Marshall; Bernard* the Court provided greater clarity on this point and, it is submitted, strengthened the role of the aboriginal perspective. The court stated that when looking at the pre-contact practice that is said to form the basis of the aboriginal right, the aboriginal perspective must be paramount. The common law perspective comes into play only when

[39] *Sappier*, para. 40

translating the pre-contact practice into a modern right. The function of the common law perspective is to ensure that the pre-contact practice, when translated into a modern right, fits a common law right. Speaking for the majority in *Marshall; Bernard*, McLachlin C.J. said:

> The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it.[40]

However, even at this stage of translating an ancient practice into a common law right, the aboriginal perspective informs the process. As stated by McLachlin C.J. " The aboriginal perspective grounds the analysis and **imbues its every step**." (emphasis added)[41]

4. Practices Not Species

A final area that has received at least some clarification from *Sappier* is whether aboriginal rights are species or resource-specific or more general rights. This issue has been percolating around the case law for many years now, especially in the context of fishing rights. It has been squarely decided by the Supreme Court of Canada in the context of rights to hunt for food and by the B.C. Supreme Court in the context of commercial hunting and, more recently, in fishing rights. It is likely that the matter will be before the B.C. Court of Appeal in *Lax Kw'alaams Indian Band v. Canada*.[42]

The question of whether aboriginal rights are "species-specific" has been addressed by the Supreme Court of Canada in two cases. The first was *R. v. Powley* where the accused Métis person was charged with unlawfully hunting moose. One argument advanced by the crown against the right was that moose were "scarce if not non-existent" in the area in question at the relevant time for identifying the practice that forms the basis of the right. The trial judge rejected this argument as a basis for denying a hunting right, suggesting that the argument required one to "suspend common sense." The Supreme Court of Canada said:

---

[40] *Marshall; Bernard* para. 48
[41] *Marshall; Bernard*, para. 50
[42] *Lax Kw'alaams Indian Band v. Canada*, 2008 BCSC 447. Appeal scheduled for October 2009.

> We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory. (emphasis in original)[43]

The issue was addressed more generally in *Sappier* where the Court commented that aboriginal rights are ordinarily based on practices and not a right to a particular resource. It was noted there that converting an aboriginal right into a right to a resource would improperly convert it to a property right:

> …the respondents led most of their evidence about the importance of wood in Maliseet and Mi'kmaq cultures and the many uses to which it was put. This is unusual because the jurisprudence of this Court establishes the central importance of the actual practice in founding a claim for an aboriginal right. Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. **They are not generally founded upon the importance of a particular resource. In fact, an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right**. (emphasis added)[44]

This issue was addressed more directly in the lower courts in *Sappier*. At issue in *Sappier* was whether the accused Maliseet and Mi'kmaq people had an aboriginal right to harvest timber for domestic purposes. The crown argued that it was insufficient for the accused to prove a pre-contact practice of harvesting timber *simpliciter* but rather suggested that the accused had to prove that the harvesting of "bird's eye maple" was integral to the culture.

In the unanimous judgment of the New Brunswick Court of Appeal, Robertson J.A. considered whether it is necessary to specify the particular species of resource when characterizing an aboriginal right. He looked at whether a fishing right would require the aboriginal claimant to specify the species of fish that is subject to an aboriginal right. Speaking for the Court, Robertson J.A. states:

> By way of introduction, and as a summary of what is to follow, the jurisprudence tells us that it is not permissible to characterize an aboriginal right in terms of the species of fish being harvested (e.g. perch or salmon). Nor is it permissible to characterize the nature of the aboriginal right in terms of the means used in furtherance of the harvesting activity

[43] *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 at para. 20
[44] *Sappier*, para. 21

> (e.g. the use of drift nets). What is of immediate importance is whether the aboriginal right to fish is for purposes of personal consumption or trade. (emphasis added)[45]

Robertson J.A. reviewed the Supreme Court of Canada's fishing rights jurisprudence, including *Sparrow, Nikal, Van der Peet, Smokehouse, Gladstone* and *Côté* and concluded that in most cases the particular species of fish did not form part of the characterization of the right. Based on this review, Robertson J.A. concluded that "the nature of the aboriginal right being claimed does not involve an analysis of the species of the natural resource being harvested."[46]

In *Tsilhqot'in Nation v. British Columbia,* Vickers J. did much the same analysis when considering whether commercial hunting rights were species-specific. Like the previous jurisprudence, Vickers J. concluded that the right was not limited to a particular species.

Vickers J. also founded his conclusion on the rejection of frozen rights. In his view, the modernization of pre-contact practices into relevant modern-day rights would be frustrated by a species-specific approach:

> This Aboriginal right is properly characterized as a right to trade skins and pelts as a means to secure a moderate livelihood. In my view, the case law does not support Canada's argument that this right must be restricted to specific species of animals. I find that such an approach would unduly frustrate the modern expression of this Aboriginal right.[47]

Finally, in *Lax Kw'alaams Indian Band v. Canada* Satanove J. found that commercial fishing rights are not species specific:

> I agree that an aboriginal right, once proven, is not limited in terms of species of the specific resource which formed the subject of the ancestral activity on which the aboriginal right is based.[48]

However, Satanove J. went on to find that the band had not established a general aboriginal right to sell fish even though she found that the pre-contact Coast Tsimshian (the pre-contact ancestors of the Lax Kw'alaams) had traded eulachon grease on a scale akin to commercial. Eulachon grease is made by rendering eulachon, an anadromous fish, into grease. Eulachon were

---

[45] *R. v. Sappier and Polchies* (2004), 242 D.L.R. (4th) 433, 2004 NBCA 56, para. 33
[46] *Sappier,* NBCA, paras. 34-47
[47] *Tsilhqot'in*, para. 1246
[48] Lax Kw'alaams v. Canada, para. 498. See also para. 100

harvested by the Coast Tsimshian at the mouth of the Nass River primarily for the purpose of rendering them into grease. The question of why this pre-contact fishing practice does not translate into modern generalized commercial fishing right will be before the Court of Appeal in the fall.

Thus, the case law in the Supreme Court of Canada has gone significantly towards rejecting the "species-specific" characterization of aboriginal rights and courts in this province have done so decisively.

5. Conclusion of the New Developments

It is submitted that the development of the above elements of the aboriginal rights test in *Marshall; Bernard* and *Sappier* lead to a broader consideration of aboriginal rights than has been the case in the past. As Bastarache J. observed in *Sappier*, the old *Van der Peet* test has "served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights."[49] With those barriers now removed by the Court, it is the task of courts to apply the re-defined "integral to the distinctive culture" test with a broader examination of indigenous ways of life, to consider how pre-contact practices informed that way of life in social, cultural and economic terms, and translate those practices into modern rights that have relevance to a modern economy.

IV. THE FUTURE OF ABORIGINAL RIGHTS – IS CULTURAL SECURITY AND CONTINUITY ACHIEVABLE?

A. The Mandate for a Broader View of Rights

With its decisions in *Marshall; Bernard* and *Sappier*, the Supreme Court of Canada has established very laudable objectives for the aboriginal rights doctrine. The framework for the aboriginal rights test now emphasizes the definition of pre-contact practices from aboriginal perspective, a more liberal definition of what it means to be "integral to a distinctive culture" and a generous and flexible approach to translating those practices into a modern right that can function and have practical significance in a modern economy. With this invigorated approach

[49] *Sappier*, para. 41

to the aboriginal rights doctrine, can the objectives of "cultural security and continuity" be achieved for First Nations operating in a "modern economy"?

B. Broader Consideration Requires Economic Considerations

It is suggested here that this broader consideration of aboriginal rights should look at the economic component of aboriginal ways of life both pre-contact and on modern times. The "way of life", as described by the Supreme Court must of necessity contain key economic elements, especially for those First Nations who did not live a "hand-to-mouth" existence. Further, the Supreme Court has repeatedly emphasized that in giving pre-contact practices modern expression, the activities must be able to be carried out in a "modern economy".

To date, and with some exceptions, the case law on aboriginal rights has focused on quite narrow subsistence aspects of aboriginal life rather than the broader economy. Claims that have routinely succeeded in the courts are fishing for food, hunting for food, or harvesting wood for domestic purposes; but rights that serve a broader economic function have been less frequent. The finding in *Gladstone* of a right to sell herring spawn on a commercial scale and in *Tsilhqot'in* the Court found a right to hunt for purposes of trade to earn a moderate livelihood are exceptions.

It is submitted that if the aboriginal rights doctrine is to provide "cultural security and continuity" in a modern economy, courts will need to look more broadly at the economic function of aboriginal rights. It is unlikely that aboriginal groups can sustain their ways of life in a modern economy on mere subsistence activities. Fishing rights provide a good example of why this is so.

C. Fishing Rights as an Example

It is widely accepted that aboriginal groups on the coast have aboriginal rights to fish for food, social and ceremonial purposes. Indeed for many of these groups, their very existence revolves around the fishery. In *Lax Kw'alaams*, for example, Satanove J. said:

> No one disagrees that the pre-contact Coast Tsimshian and the present day Coast Tsimshian are a fishing people. Indeed, their very existence is attributed to the abundance of marine and riverine foods available to them.[50]

In the landmark 1982 report of the Commission on Pacific Fisheries Policy, Dr. Peter Pearse commented:

> The patterns of Indian settlement can be traced in large part to the accessibility of fish both on the coast, where permanent villages and seasonal camps were located near fishing grounds, and the interior, where villages and fishing stations were established on rivers and streams near places where salmon could be easily caught. Today, these patterns of Indian settlement remains in large part unchanged. Seasonal fishing established the annual routine of life…[51]

Dr. Pearse also commented on how this way of life based on fishing evolved into the integration of aboriginal peoples into a modern fishing economy:

> When the modern fishery developed in the last century, the Indians of the Pacific coast adapted to the new technology of fishing and canning much more readily and successfully than they adapted to other industries. The fisheries provided them with an opportunity to participate in the new industrial society, and for a great many, it was the only opportunity. As a result, Indians have held a particularly important place in the Pacific fisheries, and fisheries policy has been moulded, with mixed success, to accommodate their special needs.[52]

Yet several studies have documented a sharp decline in aboriginal participation in the modern commercial fishery and the resulting economic impacts that are felt more acutely by remote aboriginal fishing communities.[53] These losses have impacts on aboriginal peoples' ability to maintain their fishing cultures in a "modern economy"

The protection of food, social and ceremonial ("FSC") fishing rights (in cases such as *R. v. Sparrow*) is significant but it does not necessarily ensure that aboriginal communities have the capacity to maintain their fishing cultures. Fishing, even for FSC purposes, costs money in terms of investments in boats, gear and time; yet an FSC fishery generates no revenues to make those

---

[50] *Lax Kw'alaams* para. 225
[51] Peter H. Pearse, *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, p. 173
[52] Peter H. Pearse, *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, p. 151.
[53] see for example Gislason et al, *Fishing for Answers: Coastal Communities and the BC Salmon Fishery* (B.C. Job Protection Commission) 1996; *Fishing for Money: Challenges and Opportunities in the BC Salmon Fishery* (B.C. Job Protection Commission) 1998;

investments. This has resulted in the loss of fishing capacity in aboriginal communities and an inability for aboriginal communities to engage in the practice of harvesting their own FSC fish.

The problem was identified in the Report of the First Nation Panel on Fisheries where it was noted that the loss of commercial fishing vessels in coastal communities has impacted on First Nations' ability to conduct their FSC fisheries. The Panel reported that:

> First Nations now often have to resort to contracting commercial vessels to supply food and ceremonial fish and shellfish to their villages."[54]

Thus, while aboriginal rights to fish for food, social and ceremonial purposes guarantee access to fish, they do not ensure survival of fishing as a practice in aboriginal communities. As the authors of "Fishing Around the Law" observed:

> If fish on the dinner table, no matter how it got there, is the only protection of fishing rights that section 35 accords, it is a partial and inadequate protection."[55]

To achieve the objectives of "cultural security and continuity" and to see aboriginal ways of life continue to exist in modern economies, courts will have to look more broadly than merely protecting subsistence rights. They can no longer look at pre-contact practices in isolation. They must examine the role of those practices more broadly in helping to define the aboriginal way of life both prior to contact and in the modern economy and determine how pre-contact practices can be translated into modern legal rights so that they do not become "utterly useless."[56] The Supreme Court of Canada has provided the tools and, it is submitted, the mandate for courts to do this.

V. CONCLUSION

In its recent jurisprudence on aboriginal rights, the Supreme Court of Canada has provided a much-needed reinterpretation of the "integral to the distinctive culture" test. The Court has attempted to remove elements of the test which it acknowledges have created "artificial barriers

[54] First Nations Panel on Fisheries, *Our Place at the Table: First Nations in the B.C. Fishery* 2004 p. 45
[55] Walter, Emily, R. Michael M'Gonigle and Céleste McKay, "Fishing Around the Law: The Pacific Salmon Management System as a 'Structural Infringement' of Aboriginal Rights", (2000) 45 McGill L.J. 263, page 296.
[56] *R. v. Sappier*, para. 49

to the recognition and affirmation of aboriginal rights."[57] Further, the emphasis on the modern definition of rights and the objective of cultural security and continuity attempts to ensure that aboriginal rights will have practical significance in maintaining aboriginal communities as distinctive groups operating in a modern economy. *Sappier* provides a real opportunity to invigorate the aboriginal rights doctrine and give aboriginal ways of life, rather than bare subsistence practices, relevance in a modern economies. If First Nations are permitted to modernize the pre-contact practices that helped to define their ways of life and integrate those practices into a modern economy, then the aboriginal rights test can begin to meet the objective of achieving both cultural security and continuity.

[57] *R. v. Sappier* para. 41