Letting go of Culture: A Comment on R. v. Sappier; R. v. Gray

BY GUY C. CHARLTON *

This Comment argues that the recent Supreme Court of Canada decision R. v. Sappier has significantly rearticulated the "integral to a distinctive culture" approach previously used by the Court to determine the existence of aboriginal rights under s. 35. The new approach weakens the emphasis on inherently subjective and culturally biased notions of aboriginal culture but continues to include cultural elements. However, it is more consistent with common law notions of aboriginal title in that it presumes that subsistence activities are protected.

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I. Introduction

Canadian courts have been especially active in creating and imposing cultural constructs on Native American societies. This is neither unique nor surprising. The judicial process involves the description and systemization of historical facts and rules that are then used as the premises, logical bases and precedents in adjudicating a particular dispute before the court. In aboriginal disputes, where a court must often ascertain what various imperial and colonial officials, frontiersmen, settlers and aboriginals were doing and thinking at a particular historical moment, based on contested documentary and oral evidence, the limitations of the adversarial process in creating historical narrative become manifest.

In Canadian aboriginal rights jurisprudence, the use of cultural constructs to establish historical narratives, which are then used to ascertain the content and scope of constitutionally protected aboriginal rights, has been particularly problematic. The “integral to a distinctive culture” approach, as developed by the Supreme Court of Canada in R. v. Van der Peet and Delgamuukw v. British Columbia, is difficult to apply and requires courts to evaluate the cultural meaning and significance of various historic practices. Moreover, it has the tendency to limit the recognition and protection of aboriginal rights to pre-colonial subsistence practices of the claimant tribe. Barsh and Henderson, noting the requirement that a practice must be “central” to an aboriginal society to receive protection under section 35 of the Constitution Act, 1982 have pointed out that “[t]he extent to which an idea, symbol or practice is central to the cultural identity of a particular society is inescapably subjective to that society,” and the idea that a judge can detangle the central from the incidental is a judicial fic-

tion. "The notion of centrality in human society is . . . as absurd as arguing that an ecosystem remains the same after the removal of a few 'incidental' species."

This comment argues that the recent Supreme Court of Canada decision R. v. Sappier; R. v. Gray in effect abandons the cultural approach set forth in Van der Peet to be used in evaluating the existence, content and scope of aboriginal rights. This move away from the particularist subjective cultural approach is more consistent with aboriginal rights as they have been historically understood in Canadian law and provides for a more principled and legitimate constitutional jurisprudence. At the same time, the decision raises additional issues regarding how claimed present-day aboriginal rights are related to historic activities and practices.

II. R. v. SAPPIER; R. v. GRAY

A. Background

Since the establishment of Nova Scotia and New Brunswick, the various Aboriginal peoples who occupied Acadia—the Mi'kmaq, Maliseet and Passamaquoddy—have continuously insisted on the recognition of their aboriginal and treaty rights. These efforts did result in some political measures, including the establishment of reserves and preferential fishing licences for food. However, both the Crown and the courts have refused to recognize any unextinguished aboriginal rights or treaty rights. The aboriginal title arguments of the Mi'kmaq, Maliseet and Passamaquoddy have been based on the fact that neither Great Britain nor Canada signed any land cession treaties with these communities. Indeed, the British had entered into a series of peace and friendship treaties with the Mi'kmaq, Maliseet and Passamaquoddy, but these treaties involved no land cessions or any extinguishments of aboriginal title.

7. Ibid. at 1001.
9. The British insisted that the French cession of Acadia made the area a British territory by right of war. As such the occupying tribes were necessarily subject to British sovereignty and jurisdiction. New Brunswick, Nova Scotia and Canada maintained this position and it was acknowledged by the courts. The unfavourable judicial reception to the assertion of aboriginal rights in the Maritimes changed in the 1975 case R. v. Isaac where the Nova Scotia Court of Appeal recognized the existence of a common law aboriginal right to hunt and fish on the various Mi'kmaq reserves. This "usufructuary right," the court stated, is "a right to use that land and its 'fruit' or resources. It certainly must include the right to catch and use the fish and game and other products of the streams and forests of that land." [1976] 13 N.S.R. (2d) 460 at 478, 9 A.P.R. 460 (N.S.C.A.) [Isaac cited to N.S.R.]. The Isaac Court, while limiting its holding to hunting, fishing and gathering rights on reserve lands, nevertheless suggested in dicta that the common law rights extended throughout Nova Scotia territory because aboriginal title may not have been extinguished. MacKeigan C.J. wrote at 479-80: "No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves . . . . Agreements with the Indians in the Maritimes were primarily treaties of peace, informal and sometimes oral. They were pledges of peace . . . . They usually provided for exchange of prisoners. They often acknowledged gifts to the Indians and sometimes specifically assured hunting and fishing rights to the Indians." Federal and provincial courts subsequently adopted the observations of MacKeigan C.J. in the 1980s and 1990s.
The various treaty rights asserted by the Mi'kmaq, Maliseet and Passamaquoddy were based on treaties they had signed with the British in 1725/26, 1752, 1760/61 and 1779.10

Prior to the enactment of section 35 of the Constitution Act, 1982, aboriginal litigants asserting aboriginal and treaty rights were generally unsuccessful. The Supreme Court of Canada's 1985 decision Simon v. The Queen11 provided the impetus for Aboriginal groups in the area to begin bringing forth aboriginal and treaty rights claims. Prior to Sappier, the high water mark of these efforts was the 1999 case R. v. Marshall12, where the Supreme Court ruled that the Mi'kmaq had a treaty right to commercially harvest eels. However, in a subsequent decision, a claimed right to commercially harvest timber on Crown land based on aboriginal and treaty rights was rejected.13


R. v. Sappier; R. v. Gray was a consolidated criminal case which involved aboriginal and treaty rights claims by the Mi'kmaq and Maliseet aboriginal defendants to cut timber for personal use in New Brunswick Crown forests. Justice Bastarache, writing for the unanimous Court (Justice Binnie concurring), noted that the central issue on the appeal was "how to define the distinctive culture [of the aboriginal defendant tribes] and how to determine which pre-contact practices were integral" to their distinctive culture.14 The Supreme Court held that the Mi'kmaq and Maliseet defendants held an unextinguished aboriginal right to harvest wood for domestic uses.15

The Court's analysis tracked the reasoning set forth in Van der Peet as modified by subsequent case law. Under this approach, an activity is found to be an aboriginal right where it is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."16 The test initially requires that the claimed right be appropriately characterized. Justice Bastarache, however, observed that the defendants had instead proffered evidence of the importance of wood to their culture and the uses to which it was put, rather than providing evidence

14. Supra note 8 at para. 2.
15. Ibid. at para. 72.
16. Ibid. at para. 20.
on the importance and meaning of the practice within which the wood was utilized. The emphasis on the importance and meaning of a practice, he noted, as opposed to the importance of the resource, is crucial to the characterization of an aboriginal right. Without cultural practice as a defining characteristic of an aboriginal right, he reasoned, an asserted aboriginal right to a particular resource would not sufficiently differentiate an aboriginal right from a common law right.

After characterizing the claimed aboriginal right as a “right to harvest wood for domestic uses as a member of an aboriginal community,” the Court then applied the “integral to a distinctive culture test.” The Court first confronted the issue of whether resource use for subsistence, without the more elaborate showing of how the use was given meaning within the claimants’ culture—in order to establish that the practice was a central element of that culture—could be characterized as an aboriginal right. The Crown, relying on Van der Peet, argued that “[t]he court cannot look at those aspects of the aboriginal society that are true of every human society” and that the use of wood to survive, while integral to the society, was not sufficiently “distinct.” The Court rejected this argument, and expanding upon its approach in earlier cases stated that “the scope of s. 35 should extend to protect the means by which an aboriginal society traditionally sustained itself . . . .”

The Court then addressed the question of what is meant by the term “distinctive culture.” It pointed out that the concept was meant to delimit the extent of the special constitutional protection granted to aboriginal practices. However, it noted that “[c]ulture, let alone ‘distinctive culture,’ has proven to be a difficult concept to grasp . . . .” This difficulty is compounded because aboriginal claimants often have no parallel concept of the English language term “culture” in their aboriginal language. “Ultimately,” Justice Bastarache wrote, “the concept of culture is itself inherently cultural.” He held that the Court should focus on the nature of the aboriginal communities, not their “practices” per se, prior to contact. In this context “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,

17. Ibid. at para 21.
20. Ibid. at paras. 27–47.
23. Supra note 8 at para. 37.
24. Ibid. at para. 44.
25. Ibid.
potentially, their trading habits. The notion of “distinctive,” as it relates to the concept of culture in aboriginal rights jurisprudence, is meant to incorporate the idea that aboriginal rights are limited to aboriginal groups and peoples, but, Justice Bastarache continued, this element of aboriginal specificity is not premised on the “idea that the practice must go to the core of a people’s culture.” As such, because the harvesting of wood for “shelter, transportation, fuel and tools” was directly related to the Mi’kmaq and Maliseet pre-contact lifestyle as migratory communities, wood harvesting for personal use is within the range of rights protected by section 35.

While the nature of the practice upon which a section 35 right is found must be considered in the context of pre-contact aboriginal activities, the “nature of the right must be determined in light of present day circumstances.” The Crown argued that the construction of modern dwellings with modern extraction and milling methods was not grounded in traditional aboriginal culture. The Court disagreed. It noted that aboriginal rights must be allowed to evolve; otherwise rights would remain “frozen” in pre-contact form. The Court simply concluded that the use of modern cutting and milling technologies to build a private home for personal use was a logical evolution of the right to harvest wood for temporary shelters.

Finally, Justice Bastarache addressed the “site-specific” requirement. The incorporation of a geographical component of aboriginal rights is necessary to both ground and limit the extent of territory over which there exist aboriginal hunting, fishing, and gathering rights. The geographical element is wedded to the cultural component set forth in Van der Peet because the particular territory where the rights are exercised must in some way be integral to the aboriginal culture in carrying out its section 35 protected activity. The Supreme Court, noting that the courts below had accepted that the areas used by the defendant had been in traditional Mi’kmaq and Maliseet territory, affirmed that the activities took place in an area traditionally used by the tribes.

After finding that the Mi’kmaq and Maliseet did hold the rights being claimed, the Court proceeded to consider the question of whether the restrictions imposed by provincial forestry regulations were a justified infringement under the test articulated in R. v. Sparrow. The Crown had conceded that the New Brunswick regulations infringed upon these rights, but did not attempt to justify the infringement before the lower courts. For this reason, the Supreme Court did not consider the issue on appeal.

26. Ibid. at para. 45.
27. Ibid. at para. 46.
28. Ibid. at para. 48.
29. Ibid. at paras. 23, 49.
30. Ibid. at para. 52.
The Crown did argue, however, that the rights had been extinguished by New Brunswick. It cited a series of pre-confederation New Brunswick forestry regulations as evidence of intent to extinguish any aboriginal right to harvest wood.\(^3\) Noting that the Crown must bear the burden of proving extinguishment, the Court expressed doubt as to whether New Brunswick had the delegated authority to extinguish aboriginal rights.\(^3\) In any event, it held that the existence of the forestry regulations alone did not demonstrate the necessary intent to extinguish the rights. Following its similar ruling in Sparrow, the Court held that “the regulation of Crown timber through a licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the aboriginal right to harvest wood for domestic uses.”\(^3\) The Court then discharged the defendants.\(^3\)

C. The Concurring Opinion of Justice Binnie

In his concurring opinion, Justice Binnie concluded that aboriginal communities should be allowed to sell, trade, or barter wood products for money within the reserve or in their communities. He observed that aboriginal societies, like settler societies, had a division of labour. A division of labour, mediated by barter exchanges, resulted in inter-societal trade among tribal members. This division of labour “should be reflected in a more flexible concept of the exercise of aboriginal rights within modern aboriginal communities . . . .”\(^3\) However, he noted that any trade, barter or sale beyond reserve territory, or outside the local aboriginal community, would be impermissible commercial activity.

III. Eliminating Culture as a Basis for Determining Aboriginal Rights

Aboriginal rights jurisprudence holds that the historic occupation of territory prior to the expansion of the British Empire and the formation of Canada gives rise to aboriginal rights and, indirectly, to treaty rights.\(^3\) The rights arise from both the occu-
pation and use of the land as well as the existence of distinctive aboriginal cultures and their social organizations and traditional laws. The rights do not depend upon historical recognition by the British, the pre-confederation colonies, or Canada; nor is their existence dependent upon executive action or legislative enactment. During the process of colonial expansion, the imperial authority incorporated these inherent rights into the common law, and they are reflected in various provincial and federal statutes as well as in constitutional texts.38

The spiritual, cultural, economic and social aspects of aboriginal existence (usually denominated “traditional”) as they relate to territory occupied or used by aboriginal peoples are the primary factors in the determination of the existence, content, and scope of common law rights.39 Van der Peet shifted the focus from aboriginal “activities” towards aboriginal “practices” by articulating a test that emphasized the “meaning” of the pre-contact aboriginal practice and the “centrality” of the practice to the culture.40 The culturally informed standard was augmented by the Mitchell Court, which stated that the cultural practice must “lay at the core of the peoples’ identity,” and that it must be a “defining feature” of their culture.41

As mentioned above, legal scholars have pointed out the difficulty with the Van der Peet “integral to a distinctive culture” approach and the Sappier Court has sensibly weakened the categorical and culturalist focus. First, Sappier dispenses with the idea that a cultural approach to aboriginal rights is necessary in order to reconcile aboriginal rights with Canadian common law and liberal constitutionalism. The Van der Peet test required that the cultural aspect of a claimed right would affirm the communal nature of aboriginal rights while at the same time providing the necessary specificity to the rights, so as not to deny uses and rights that other Canadians might possess.42 The Sappier Court, impliedly incorporating common law aboriginal rights

40. This emphasis on culture, and by implication aboriginal "customary" law, is analogous to the approach in Australian jurisprudence. In a major hunting, fishing and gathering case Yanner v. Eaton, the cultural/legal approach of the Australian courts is evident. Gleeson C.J. of the High Court of Australia noted: "Native title rights and interests must be understood as what has been called 'a perception of socially constituted fact' as well as 'comprising various assortments of artificially defined jural right.'" [1999] HCA 53, 166 A.L.R. 258 at para. 38.
41. Supra note 37 at para. 12.
42. Supra note 2 at paras. 19–20.
doctrine, instead noted that section 35 extends constitutional protection to those
devices that "assist in ensuring the continued existence of these particular aboriginal
societies." This de-contextualization of section 35 rights from other liberal rights is
salutary because it does not envision aboriginal rights as being somehow contrary to
other rights and it does not seek to reconcile the rights with other rights. Rather, it
is simply a recognition that the Canadian legal system has incorporated the collective
rights, and the basis and holder of those rights is the aboriginal group as a continu-
ously existing political entity within history. As such, instead of categorically reject-
ing activities that are primarily for survival purposes, because they are neither
cultural practices nor sufficiently distinctive, the Court noted that flexibility is more
appropriate since the purpose of the Van der Peet analysis "is to provide cultural secu-
rity and continuity for the particular aboriginal society."

Second, the Sappier Court has eliminated the requirement that a practice must
be central or integral to a distinctive culture in order to have the protection of sec-
tion 35. The Court in Sappier discussed whether a practice undertaken for survival
purposes could ever be an aboriginal right, because such an activity cannot be con-
sidered integral to a culture. The Crown had argued, and case law had suggested,
that such an activity could not be "integral" because a subsistence practice can never
be a "defining feature" or core component of a culture. Subsistence practices are com-
mon across cultures and polities, and while they are certainly "integral," they cannot
be considered part of a "distinctive" culture. This argument, grounded in the reason-
ing of Van der Peet and Mitchell, which sought to use cultural significance to limit the
range of aboriginal rights under section 35, is ironically premised on the functional-
ist assumption that divergent solutions to common problems can be considered as
having no cultural content. Such an approach is unsatisfactory. It is strange to con-
sider sustenance activities as "non-integral" to a culture simply because they are a pre-
condition of a human society and everyone engages in such activity, given the diverse
range of foodstuffs and harvesting methods as well as the cultural practices that have
arisen around them. It is more unsatisfactory to categorize subsistence activities as not

43. Supra note 8 at para. 26.
44. Ibid. at para. 33.
45. Ibid. at paras. 35–41.
46. "Functionalist comparison begins by the choice of the particular practical problem that is to be the subject
of the study. The legal systems to be compared are then selected and examined with regard to how they
resolve such problems . . . . [F]unctionalist method disregards differences in doctrinal construction and
legal concept and, instead, directs its attention almost exclusively to the practical consequences of the
norms, and particularly to the remedy provided in the specified fact situation. 'For the comparative
process, this means that the solutions we find in different jurisdictions must be cut loose from their con-
ceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the
light of their function, as an attempt to satisfy a particular legal need.' [citations omitted]. Richard Hyland,
"Comparative Law" in Dennis Patterson, ed., A Companion to Philosophy of Law and Legal Theory (Oxford:
Blackwell Publishing, 1996) 184 at 188.
a distinctive characteristic of aboriginal cultures where anthropological evidence suggests that a vast majority of tribes engaged in subsistence activities. Furthermore, judicial constructions of history have provided that traditional non-accumulative subsistence activities are a defining characteristic of aboriginal life.\(^4\)

At the same time, the Sappier Court rightly did not completely eliminate the cultural aspect of the aboriginal rights analysis. Rather, it dispensed with the requirement that there must always be a salient cultural “meaning” within a highly abstracted conceptual category, which includes all aspects of the claimant’s aboriginal culture, for a claimed activity. The Court recognized that to separate subsistence activities from the cultural and legal context, especially where aboriginal peoples are engaged in a subsistence migratory economy, is artificial and privileges the concept of “centrality” to a culture in an inappropriate manner. Instead, it held that “the traditional means of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people.”\(^4\)

This is because “the purpose of [the inquiry] is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it.”\(^4\)

From this perspective, subsistence activities are those activities that make aboriginal societies “distinctive” from contemporary Canadian society generally, and this distinctiveness applies to the entire category of aboriginal societies across Canada. It continues to allow for specificity as to the particular tribal entity claiming an aboriginal right. Yet it envisions a category of aboriginal rights based on aboriginal activities that were shared across aboriginal groups because the activities are part of common pre-European collective social and political experience.

Third, the Court rearticulated the notion of “distinctive culture.” The concept of a distinct or distinctive culture, Justice Bastarache wrote, has a tendency to mean a “fixed inventory of traits or characteristics,” which requires the courts to separate various cultural components and assess the relative importance of those components within the cultural context.\(^4\)

The Sappier Court held that an assessment of the relative importance or distinctiveness of a culture is “in itself cultural” and the positivist \(Van\) der \(Peet\) methodology does not consider the idea that “different people may entertain different ideas of what is distinctive,” thereby creating

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47. For example, in litigation regarding the 1760/61 treaties the Supreme Court of Canada found that the historic Mi'kmq trade never generated the amount of wealth that would exceed a sustenance lifestyle. The Court determined that the intent of the negotiators during these treaty negotiations was to continue to trade in the type of goods traditionally hunted and gathered on a subsistence basis by the Mi'kmq in 1760 such as fish and wildlife. See \(Marshall\), supra note 12 at paras. 31–32.

48. \(Supra\) note 8 at para. 37.

49. \(Ibid\). at para. 40.

50. \(Ibid\). at para. 42, citing Barsh & Henderson, \(Supra\) note 4 at 1002.
problems of indeterminacy...."51 Rather, the Court noted that the "integral to a distinctive culture" test must be understood in the common law context of pre-contact aboriginal occupation and use of land. Under these circumstances, a court needs to focus on the nature of this prior occupation. Thus, "[w]hat 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."52 Moreover, the Court continued, the use of the word "distinctive" is meant to incorporate an element of aboriginal "specificity," but should not be used to reduce aboriginal existence to a racial or cultural stereotype.

IV. Culture and Aboriginal Rights

Where does the Sappier Court's modification of the Van der Peet test leave aboriginal rights litigation? Do culture and the "meaning" of the claimed practices to the aboriginal group have any impact on the determination of the aboriginal right for the purposes of section 35? While it is beyond the scope of this comment to exhaustively discuss the implications of the Court's new approach to aboriginal rights jurisprudence after Sappier, I will venture a few observations.

First, it is clear that the Van der Peet approach to aboriginal rights and treaty rights, while grounded in the common law, nevertheless approaches the determination of section 35 rights in a categorical and relatively inflexible manner. The schematization of aboriginal practices in order to construe the meaning of those practices in cultural terms needlessly reifies culture and presumes that culture can be ascertained in a value-neutral manner. The Sappier Court has introduced a new approach that instead builds on common law notions of aboriginal rights and recognizes the problems inherent in reifying culture either as a conceptual category or a legally operative concept. At the same time, it has preserved the notion that culture and aboriginal law, from an aboriginal perspective (as can best be understood given the inherent problems in such an analysis) remains an important aspect of section 35 jurisprudence. Common law reasoning and categories within the jurisprudence remain, but when they are applied in concrete circumstances, they will be informed, but not solely defined, by the aboriginal social and cultural meanings. Cultural meaning is even less important when analyzing a set of historic subsistence activities.

Second, it is clear that the Sappier Court has refocused the inquiry away from analyzing the "centrality" and "meaning" of a particular practice within a culture

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51. Sappier, ibid. at para. 43, quoting the dissent of McLachlin J. in Van der Peet, supra note 2 at para. 257.
52. Sappier, ibid. at para. 45.
towards an examination of pre-contact aboriginal activities as they relate to the political, cultural, social and economic existence of the group. From this perspective, historic hunting, fishing and gathering activities will presumptively be considered aboriginal rights in the territory historically exploited by the aboriginal group. This is more consistent with previous notions of aboriginal title which emphasize that certain activities and property interests arise from aboriginal occupancy and use of a particular territory.53

Third, given that culture and the “meaning” of social practices are less important to the determination of the existence of an aboriginal right, it is likely that future decisions will reemphasize the idea that aboriginal title is both a generative and limiting factor (i.e. aboriginal rights are related to or arise from historic aboriginal possession, occupation, or use of a particular territory) when considering the content and scope of certain aboriginal rights. Presently, the courts consider aboriginal title to be “simply one manifestation of a broader-based conception of aboriginal rights.”54 However, the current conception of aboriginal title is capable of encompassing the political, social, cultural and economic aspects of aboriginal existence as opposed to a pure occupancy right. This post-Sappier approach fits well with the first prong of Chief Justice Lamer’s discussion of aboriginal title in Delgamuukw:

54. Adams, supra note 22 at para. 37, cited in Delgamuukw, supra note 3 at para. 137.
55. Delgamuukw, ibid. at para. 117.
56. Supra note 13.
that a claimant group needs to show over a particular territory in order to establish aboriginal title. In addition, the emphasis may preclude a finding of aboriginal rights in cases similar to Côté and Adams where the Court found aboriginal use rights in territories even where the claimant groups could not establish aboriginal title.57

Yet an emphasis on aboriginal practices and aboriginal concepts of possession in the pre-contact period, coupled with the first prong of the Delgamuukw approach to aboriginal title, will likely require the Court to revisit the strict common law derived exclusivity requirements set forth in Marshall III, as well as other culturally biased notions of aboriginal title. Arguably, the stricter exclusivity requirements found in Marshall III are due to the ambiguity and uncertainty implicit in the cultural approach. A more historically nuanced view of what constitutes pre-contact occupation, possession and use in terms of the activities, culture and laws of a particular group would result from an analysis of the "nature" of the aboriginal communities. Less emphasis on historically inappropriate or biased common law categories (given the requirement that historic aboriginal occupation and use of a particular territory must be reconciled with the core common law notions of occupancy and title)58 to determine aboriginal title would result. Similarly, de-emphasizing culture and meaning should deter against the continued judicial manipulation of the concept of aboriginal title, which precludes any uses that would destroy or transform the natural state of the territory, thereby severely limiting the "possessory" nature of the title. Lamer C.J.C. explicitly drew this connection in Delgamuukw when he wrote that a "special bond" between the aboriginal group and the land is part of the definition of the group's distinctive culture. Transforming the land in a non-traditional manner (e.g. by modern economic activity) would thus destroy the very basis of the aboriginal right.59

Fourth, because the new approach emphasizes aboriginal pre-contact activities, the issue of how those activities are analogous to modern practices or are progenitors of modern processes will need to be addressed more adequately. Post-Sappier, a court will determine the nature of an aboriginal right in contempo-

57. Supra note 18. In Côté, the Supreme Court found that the group's fishing rights claim was not dependent upon a showing of aboriginal title. In Adams, the Court held the Mohawk defendant could maintain an aboriginal rights claim apart from aboriginal title because the court must look at both the relationship of an aboriginal claimant to the land and at the customs and traditions arising from the claimant's distinctive culture and society.


59. Delgamuukw, supra note 3 at para. 128 (The idea of how to judicially determine a "manner" of living is explained by La Forest J. at para. 194: "[W]hen 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.").
rary circumstances by evaluating whether the claimed modern activity has logically evolved from the pre-contact activity and is analogous or equivalent to the pre-contact activity "carried on in a modern economy by modern means." This approach is adequate where there is only a minimal difference between the pre-contact and present day activity. However, it is inadequate where the specific objective of the activity has changed over time and the methods used have been superseded or mediated by modern economic or technological developments, which in some sense attenuates the relationship or changes the "quality" of the activity. In these circumstances, it would be useful to focus less on the objective of the practice (e.g. harvesting a particular food to live) than on the importance of the modern day activity to the collective identity of the aboriginal group. How is the claimed modern day activity nested within the aboriginal society as well as the governing structure and law of the group claiming the right? In this instance, a cultural analysis is necessarily included because the fact that a large proportion of a modern day community is doing an activity would not in itself be sufficient to support the claim that a modern use right has evolved from an historic practice.

Finally, while culture and social practice will be less important in determining the existence of an aboriginal right, they will continue to be important elements in determining the content of the right, its scope and the manner in which it relates to the claimed present day activity. Cultural norms, as they relate to actual resource use, may limit certain resource uses and levels of exploitation. Aboriginal practices in resource harvesting, for example, could be self-limiting or might need to be performed in accordance with aboriginal law as it relates to environmental protection or religious concerns. Aboriginal litigants will continue to face the indeterminacy of the "logical evolution" test, which circumscribes the type of new activities that may be related to the pre-contact practice, and the "moderate livelihood" standard, which explicitly limits tribal resource harvesting to a low economic standard based on a judicial construction of historic tribal use patterns. However, a more accurate and historically sensitive judicial narrative, focusing on actual historic resource use, and changes in uses in response to external and internal economic and social transformations would likely provide a better matrix of historical fact for litigating these issues.

60. *Sappier*, supra note 8 at para. 48.
V. Conclusion

The *Sappier* Court has clearly decreased the culturalist focus of aboriginal rights jurisprudence. Indeed, the re-articulation of the *Van der Peet* test in *Sappier* suggests that the Court no longer completely subscribes to the "integral to a distinctive culture" approach. *Van der Peet* has been difficult to apply in practice and arguably misconstrued the true nature of aboriginal rights. It has led the courts to reify culture and cultural relationships, which paradoxically enhances certain positive qualities of the aboriginal relationship to the real world while at the same time trivializing and ossifying important aspects of community existence. Moreover, it attempted to rank the importance of a particular practice within an aboriginal community in an ostensibly value neutral manner, providing constitutional protection only to those practices that are central to a culture. The result has been that certain aboriginal activities, which are in some sense congruent with aboriginal rights and practices as they have been historically understood, have not been seen to fall within the scope of section 35 because they were not sufficiently "distinctive."

The *Sappier* decision has refocused aboriginal rights on the uses the aboriginal community carried on across the territory they occupied while continuing to apply cultural concepts and meanings to create a more accurate picture of why these activities should be constitutionally protected. Evaluations of cultural importance and distinctiveness are no longer the most significant factors in the determination of aboriginal rights. With a diminished cultural emphasis, aboriginal rights are less likely to be historically circumscribed or "frozen" in time.

These changes should be welcomed as they present the opportunity for an aboriginal rights jurisprudence that is more closely aligned with the concrete activities of aboriginal groups. However, with a de-emphasis on the "meaning" of an activity from the internal point of view of the aboriginal practitioner (as construed by the court), courts must continue to include cultural concepts in analyzing aboriginal rights, but simultaneously must avoid resurrecting the old judicial approach which restricted aboriginal rights only to those pre-contact activities that are considered "traditional." In addition, a renewed emphasis on aboriginal title, with its common law categories of land use and exclusive occupation and possession, could unduly restrict the territory across which aboriginal rights may be exercised. As such, in light of *Sappier*, the Court must rethink its approach to the exclusivity requirement as set forth in *Marshall III* and its view on how pre-contact activities and practices find articulation in our contemporary modern economy and society.