

Beyond Culture in the Courts:
Re-inspiring Approaches to Aboriginal and Treaty Rights in Canadian Jurisprudence

by

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BA, University of Regina, 2008

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of the Requirements for the Degree of

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Supervisory Committee

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Abstract

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Over the last 30 years, the concept of culture has gained increased ground in Canadian jurisprudence on Aboriginal and Treaty rights under section 35 of the Constitution Act, 1982. This thesis focuses on the gendered nature of the court's culturalist method of interpreting and adjudicating s.35, arguing that it acts as a containment strategy with respect to Aboriginal and Treaty rights generally, and Indigenous women's rights in particular. Specific focus is given to the frequent and extreme rights infringements experienced by Indigenous women in Canadian contexts. This project foregrounds Indigenous narratives, Treaty-based and otherwise, as a way of inspiring a s.35 framework that extends well beyond the confines of culture and provides more equitable, comprehensive and substantive protection for a broad range of Aboriginal and Treaty rights within Canadian legal and political institutions.

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Lastly, I acknowledge the financial support received from the Pacific Century Graduate Foundation during the first year of my Master of Arts program.

Dedication

To my late Grandma Annette Desjarlais, whose experiences of violence were silenced.

This is for you.

INTRODUCTION

In recent years, one of the most common things that people have asked me about has been the status of my graduate work. They want to know what I'm writing about, where I'm at, and most importantly, how long until I finish. I usually respond to people that my thesis is all about culture, and that my timeframe has been more relaxed to allow me to maintain balance between the various realms of my life. I say that my family, the communities that I'm part of, my relationships, and my own wellness are all very important to me, and rather than a linear action plan, the cyclical approach that I assumed in writing this thesis emphasizes the continuing nature of my learning journey. When I started, I acted on what I knew at the time. As I acted, I learned new things from all facets of life (not just the academic), which helped clarify my goals and vision, and in turn allowed me to make more measured assessments. This thesis was a walk taken one step at a time, each experience and lesson helped focus the next steps. When I tell this to people, I get follow-inquiries because I must not have understood their questions. How could I with answers like that? These sorts of interactions and conversations, though not always pleasant, were some of the main catalysts that got me to thinking about this project's essence and, more importantly, its roots.

Exploring the Terrain

In one of my 3rd year undergraduate courses on Aboriginal politics, taught by Métis feminist Dr. Joyce Green, I was doing research for a paper and started looking through some of my mom's old files from when she was writing a Master's thesis on

Treaty Number Four with a focus on Indian interpretations of the Treaty. I had heard and read her thesis before, but was much younger and seemed to understand it differently with the passing of time. In her thesis, there was a letter that Chief Star Blanket, my great-great-great-grandfather and our band's original Chief, had given to the Governor General during a visit to the File Hills five years before his death in 1917:

Star Blanket Chief of a Cree band of Indians at File Hills, son of White Calf a Chief who signed a Treaty with the Great white mothers speaks to the Great White Chief who has come such a long way to visit us. A distance so great that we have no way of speaking to you only when a time such as this comes. We have waited patiently for many years for a chance to speak to some one who would carry a message to the Government and to our white brothers in the east. The first part of our message Great Chief is one of Good wishes and peace to yourself first and then to the Government. For as I was both with two legs and as these two legs have not yet quarreled, so I wish to live in peace with the white people. When I was in middle life the Government of the Great White Mother sent some wise men to ask us to give them much land. A large camp of Indians was made near Qu'Appelle and there the Government and Indians after much talking signed a treaty, on paper and much was promised as well. One of these papers has been carefully kept by us, and by it we Indians gave to the Government a large piece of land and held back for ourselves some small pieces as Reserves. In the treaty we made then the Government promised to make a School for every band of Indians on their own Reserve, but instead little children are torn from their mothers arms or homes by the police or Government Agents and taken sometimes hundreds of miles to large Schools perhaps to take sick and die when their family cannot see them. The little Ants which live in the earth love their young ones and wish to have them in their homes. Surely us red men are not smaller than these Ants. For many years I have not been paid all my treaty money, it was not much only Twenty-five dollars a year. I need it much as I am now nearly eighty years old and not able to work. I do not care so much for myself as I am nearly finished with life, but for many years I have had a sore heart watching my old people nearly starving. The buffalo and deer are gone and our people will soon be hard to find but while we are still here I would ask that the Government not to forget their treaty, to send out some honest men to enquire into our troubles and let us explain them. And then as the Great Spirit live I trust justice will be done.¹

¹ Department of Indian and Northern Affairs. Record Group 10 (RG 10) Files, Vol. 4068 File 422,752. Oct 1912. *Letter from Chief Star Blanket to the Governor General.*

Chief Star Blanket was the son of Wahpiimoosetosis (White Buffalo Calf), one of the Plains Cree chiefs who signed Treaty Four at Fort Qu'Appelle, Saskatchewan in 1874. His Cree name was Ahchacoosahcootahcoopit, which translated to "has a star for a blanket." He was present at the signing of Treaty Four and was middle age around that time.² Star Blanket's father, Chief Wahpiimoosetosis had signed the Treaty on behalf of his people; when he passed away in 1875, he handed over the chieftainship to his son, who became chief and dedicated himself to working towards the implementation of written and oral treaty commitments.³

Star Blanket's letter made me revisit the perception of the Numbered Treaties I clung to despite my mother and ancestors' teachings; that is, that treaty signatories had been cheated or deceived by settlers. It prompted a shift from the resistance approach I championed in my undergraduate degree towards a nation-to-nation approach that would allow me to better understand and hopefully follow the work of my ancestors. Rather than write-off the Numbered Treaties, I've since regarded them as works-in-progress, or as living documents that will continue to grow and develop, as our Elders say back home, as long as the sun shines, the grass grows and the rivers flow. While this shift in thinking doesn't necessarily mark the beginning of this project, it represents a turning point that facilitated the development of different academic and cultural inquiries, several of which coalesced into this project.

² Ibid.

³ Danette Starr-Spaeth, *Revisiting the Meaning of Treaty Number Four in Southern Saskatchewan*, (Regina: MA. Thesis, University of Regina, 2001), 80.

As I learnt about Canadian legal and political systems in my undergraduate degree, particularly the evolution of Section 35 of the Constitution Act⁴ (s.35), the less I heard about Treaties and the more I heard about things like culture and identity when talking about Aboriginal and Treaty rights. Relative to treaties and Treaty rights, culture was a concept that seemed to gain significant ground in many literatures over the past few decades. As far as I knew, none of my ancestors' understandings of the treaties included anything about rights to 'culture'. Their understandings of Treaty Four were much more comprehensive than this. Rather than consider how this phenomenon had occurred, I set out in my graduate work to explore some of the implications of what I considered to be the privileging of culture, especially as a way of understanding Aboriginal and Treaty rights but at a broader level, as a basis for Indigenous peoples' legal and political movements.

While critiques of culture also seemed to be fairly commonplace over the past few decades: in relation to postcolonialisms, nationalisms, recognition of difference, and so on, the culturalist position has remained relatively popular in practice (the language of culture has been especially prominent in many Indigenous decolonization and resistance discourses). Having recognized the co-opted and hegemonic character of many supposedly progressive positions that rely on the discourse of culture either implicitly or explicitly, I sought to gain a better understanding of how these ongoing culturalist processes implicate Indigenous people on a day-to-day basis. Who gets privileged, who is marginalized, and what happens next? How do women's equality or liberatory pursuits factor into culturalist equations? I grew particularly interested in how cultural

⁴ *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

fundamentalism, as Joyce Green terms it, impacts Indigenous women's sovereignty in the contemporary colonial experience.

Project Overview

It's been around 30 years since the repatriation of the Constitution and the inclusion of Aboriginal and Treaty rights under s.35. One of the central features that has emerged from the Supreme Court of Canada's (SCC) interpretation of this framework has been the overarching supremacy of the role of culture relative to Indigenous peoples' rights. At the same time, in working towards decolonization and self-determination or seeking protection for their rights, many Indigenous communities have turned to conceptualizations of culture as the foundation for their movements. In these contexts, the cultivation of collective cultural identities has proven to unify, empower, and advance the political actions of many Indigenous peoples seeking to decolonize. This thesis focuses both on issues that arise from processes of culture themselves and on the broader impacts of the role played by culture in contemporary jurisprudence and discourse on Indigenous peoples' rights.

In Chapter One, I set out to identify some of the benefits and limits of culture. I begin with a review of select writings by Indigenous women who center women relative to culture in their writings. This is in the aim of outlining the empowering or seemingly most valuable implications of the culture-identity link. This project is further developed through reference to the Native Women's Association of Canada's (NWAC) approach to constitutional negotiations. Then, I turn to relevant critiques of culture in the aim of

outlining key concerns with the culture-identity link that have been identified in the literature, with particular focus on its limits when operationalized by members of a colonizing society.

In Chapter Two, I provide an overview of Canadian jurisprudence on Indigenous rights with particular focus on the distinctive culture test implemented by the Court to adjudicate Aboriginal and Treaty rights. I seek to demonstrate how the test functions as a containment strategy with respect to Treaty rights and particularly, how the influence of culturalist discourse extends beyond the test itself. I argue that the sustained centrality of culture has led to the emergence of a gendered framework of rights protected under s.35, and demonstrate this through reference to the disproportionate degree of rights infringements experienced by Indigenous women in Canada. I argue for an expanded framework of s.35 rights, one which functions to provide more equitable and comprehensive protection to Indigenous peoples. I argue that for Canada to begin to reconcile its colonial presence it must honor its obligations to Indigenous peoples in a comprehensive and substantive way, and maintain that this commitment is not yet in evidence.

In Chapter Three, I focus on alternate sources of inspiration that might be useful in conceptualizing an expanded framework of s.35 rights. The bulk of this chapter is dedicated to a discussion on the spirit and intent of Treaties as means of deconstructing Canadian myths and strengthening nation-to-nation relationships. I argue that movements towards Indigenous sovereignty or self-government and claims for protection from the Canadian state can go hand in hand if we can look beyond cultural rights and consider a

range of positive Treaty principles in conceptualizing future relationships. I also review other possible sources of inspiration for s.35, such as international legal principles relating to Indigenous peoples' rights.

Methodology

In this thesis I deploy a gendered analysis of issues of culture; although I take seriously the warnings of Indigenous scholars who remind us that feminist movements have historically been preoccupied with the needs and concerns of white, middle-class women;⁵ as Métis scholar Emma LaRocque reminds us, feminism does not require us to abandon our commitments to the Indigenous community and can provide a viable basis for working towards equitable gender relations.⁶ While various interpretations of feminism have emerged in waves over the years, I understand it to be a dynamic process that varies in relation to the social and political context in which it emerges. It is both an ideology and form of action that involves working against multiple intersecting forms of oppression that exist within various systems of power and hierarchy. It also involves considering my own location within those structures and understanding the ways in which my own complicity helps to sustain them. In my view, feminism doesn't privilege sexism and gender-based inequality over other experiences of oppression, rather it

⁵ Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks*, (Halifax: Fernwood Publishing, 1995), 171.

⁶ Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization" in J. Green, ed. *Making Space for Indigenous Feminism*, (Winnipeg: Fernwood Publishing, 2007), 67-68.

represents an analytical foundation and toolbox with which to challenge sexist, racist, and imperialist systems and dynamics.

With regards to the intent of this thesis, I seek to write an accessible, readable review of issues the gendered impact of culture on Indigenous peoples' rights, with specific regard for Treaty rights. While I recognize and respect many Indigenous leaders and knowledge-keepers for their work within their respective communities and while I cannot deny the influence that their discourses and actions have had on my thoughts, I endeavor to undertake this project through a framework that foregrounds the voices and perspectives of my relatives as much as possible. I would like to be clear that I in no way intend to represent the views or beliefs of any members of the Star Blanket band, any other Treaty Indians, or other Indigenous peoples generally. That is; my perspective is informed by my interpretation of the knowledge and ways of my ancestors, complete with my own subjectivities. While I've seen a great deal of the knowledge passed on by my ancestors reflected in other Indigenous peoples histories and traditions, I recognize that their teachings are distinctive even if they bear cross-cultural similarities due to their spiritual foundations, the people who carried them forward, the space and time in which they exist, and in particular ways of enacting them.

Language

Many of the concepts discussed in this thesis emerge from Canadian legal and political systems, so in invoking and reproducing them it's important for me to be mindful of their roots and implications. As Green points out, terms such as 'Indian', for

instance, “are best used cautiously, with full regard for their politically laden meanings.”⁷ The term 'Indian' is a label that was imposed on Indigenous peoples by early settlers after having mistaken what is now North America for India. This label constructed Indigenous peoples as a homogenous group and served to eclipse diverse nations' cultural, linguistic, economic, political and other differences while simultaneously setting them apart from colonizing societies and 'othering' them in the process.⁸ As LaRocque notes, this invention later turned into a subculture of stereotypes within White North American entertainment and cultural productions. It has also come to represent colonial authority over Indigenous peoples under the Indian Act.⁹ Now, the term Indian denotes those who are formally recognized as Indians within the meaning of the Indian Act while the terms Native, First Nations, Aboriginal and Indigenous are used to refer to the original inhabitants of this land. For the purposes of the current conversation, I seek to identify the particular cultures and nations that I am referring to in context, and use the term Indigenous as a category that broadly encompasses people with First Nations, Metis, and mixed ancestries. I use the term Indian interchangeably as well, however this is typically in casual reference to myself or to close members of my family and community. Although the term Indian reflects colonial origins and assumptions, my preference for the term comes from my own origins in Southern Saskatchewan where status and non-status Indians in my community commonly identify and refer to each other as such.

⁷ Joyce Green, *Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the Sawridge Case*, (Edmonton: PhD. Dissertation, University of Alberta, 1997), 36.

⁸ Green, *Sawridge*, 37.

⁹ LaRocque, *When the Other is Me: Native Resistance Discourse 1850 – 1990*, (Winnipeg: University of Manitoba Press, 2010), 6.

For the purposes of this discussion, I understand and use the term colonialism as the coalescence of forces of capitalism and imperialism. As Edward Said wrote, it is an exploitative relationship designed to extend a settler state's sovereignty to distant territory at the direct expense of Indigenous populations.¹⁰ It is justified through the use of instrumental racism, which constructs the colonized as "other than the virtues and norms which the colonizer attributes to itself."¹¹ I consider colonialism to be an ongoing process that shapes the lives and relations of Indigenous peoples and non-Indigenous peoples in Canada, and is not at all a thing of the past. As Green writes that, "the oppression of colonialism is a relentless and pervasive reality" existing in the "invisibility of the colonized in cultural icons, in academic canons, in political structures, processes, discourses and objectives" as well as in "overwhelming pressures which coerce the colonized in myriad ways to conform to the colonial norms".¹² Additionally, I treat colonialism as an explicitly gendered process that relies on the subordination and devaluation of Indigenous women. Cherokee activist and scholar Andrea Smith, for instance, writes that the subjugation of women within Indigenous societies was a prerequisite to colonization: "in order to colonize a people whose society was not hierarchical, colonizers must first naturalize hierarchy through instituting patriarchy. Patriarchal gender violence is the process by which colonizers inscribe hierarchy and domination on the bodies of the colonized."¹³ Today, patriarchy has become a pan-cultural reality in Canada, as Green writes "despite the historical diversity of [I]ndigenous

¹⁰ Edward Said, *Culture and Imperialism*, (New York: Vintage Books, 1993), 9.

¹¹ Ibid.

¹² Ibid., 14.

¹³ Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide*, (Boston: South End Press, 2005), 23.

nations, despite the historical valuation of women by many (but not all) [I]ndigenous nations, patriarchy has now become normative for the vast majority.”¹⁴ As I do not view patriarchy as emerging exclusively as a consequence of colonialism, and as patriarchy and colonialism rarely exist as mutually exclusive phenomenon in the lives of Indigenous women, I seek to examine these concepts within an intersectional framework. I do so to leave space for critique of sex and gender oppression within Indigenous governments and communities and, at a broader level, to acknowledge the complex and diverse dimensions of Indigenous women's experiences of oppression.

In talking about identity, my understanding is that it is representative of a person's individual and collective experiences, statuses, affiliations, and relationships. My use of the term is drawn largely from Bonita Lawrence, who writes: “Because identities are embedded in systems of power based on race, class, and gender, identity is a highly political issue, with ramifications for how contemporary and historical collective experience is understood. [...] For Native people, individual identity is always being negotiated in relation to collective identity, and in the face of an external, colonizing society.”¹⁵ While I take the position that cultural differences are certainly a defining part of one's identity, I also believe in the fluidity and hybridity of identity.

In this project, I invoke the dominant liberal multicultural treatment of culture as referring to national and ethnic differences in the context of relations between dominant and minority groups as this understanding of the concept is the most common and seems

¹⁴ Ibid., 8.

¹⁵ Bonita Lawrence, “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview”, *Hypatia* 18:2 (2003), 4.

to have the most pervasive influence in mainstream Canadian systems. It's also the way that the concept has been employed in Canadian jurisprudence on Aboriginal and Treaty rights and since this research takes up the court's emphasis on culture in later chapters, it seems appropriate to demonstrate an understanding of the concept before engaging in a discussion on its merits and/or weaknesses. The purpose of this thesis is not to discredit dominant understandings of culture or offer a more precise or useful articulation of the concept, but instead to prompt readers to deploy the concept critically, and to reflect upon whether it deserves to occupy so much space at the expense of other valuable considerations in talking about Aboriginal and Treaty rights.

A Treaty Location

As an urban Indigenous woman with both Indian and settler status, my perspective and methodology is informed by a range of experiences and relationships and is grounded in what I understand to be Western and Cree knowledges and ways of being. I have Plains Cree and Saulteaux ancestry on my mother's side, and French and German on my father's side. I'm a member of Star Blanket Cree Nation, which is located near the Qu'Appelle Valley in the southern region of Saskatchewan. My Mosom Gerry Starr is from the Star Blanket Cree Nation and my grandma Annette Desjarlais is Saulteaux and from the Fishing Lake First Nation; both of these communities are in Treaty 4 territory however I generally identify as Plains Cree due to my membership in the Star Blanket Cree Nation. When I refer to my own Indigeneity in my writings it is important to note that the context in which my personal and political identity as an Indigenous person has primarily been through time spent with my mom and through the knowledge, beliefs,

values, and histories that her ancestors passed down to her. My perspective is always informed by the spirit and intent of Treaty Four, which has allowed me to remain grateful for the learning that has taken place in all realms of my life (even the learning that has occurred through Western education systems, pedagogies, and curriculums). My ancestors expressly defended the right to education for future generations during the negotiation of Treaty Four to ensure that their descendants would have an equal footing with which to engage in the social, economic, and cultural reality that was to come. This education was to include a combination of traditional and European ways. While I recognize the ongoing impacts that residential schools have on Indigenous peoples in Canada, and acknowledge the limits of mainstream education models for contemporary Indigenous learners, it is important for me to note that many of the analytical tools I have acquired within these systems have been incredibly useful in that they've helped me understand and articulate responses to imperialist, racist and sexist dynamics and interactions that form a regular part of Indigenous peoples' everyday lives.

Linda Tuhiwai Smith writes: “from the vantage point of the colonized, a position from which I write and choose to privilege, the term research is inextricably linked to European imperialism and colonialism.”¹⁶ She further emphasizes that the act of research, having historically functioned as an expression of Western ideology and epistemology, carries powerfully offensive connotations for many colonized peoples. Western based methodologies are distrusted for privileging Western voices and perspectives and for subjugating, mis/re-representing, and failing to recognize the legitimacy of traditional

¹⁶ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, (London: Zed Books, 1999), 1.

Indigenous knowledges and worldviews. Tuhiwai Smith highlights the need to develop research frameworks which foreground Indigenous traditions, knowledges and priorities in order to advance distinctly Indigenous forms of research. Her analysis has provided me with important cautions in navigating systems that have historically embodied “the worst excesses of colonialism.”¹⁷ In approaching this project, I therefore seek to pursue my own research agenda within an intersectional and cyclical approach that does not directly follow any of the frameworks prescribed within Western academia or dominant Indigenous discourse.

In many contexts, I feel as though I am negotiating my Plains Cree teachings and worldview with colonial knowledges and practices that I sometimes respect and in other ways seek to resist and challenge. In the letter quoted above, Chief Star Blanket stated “For I was born with two legs and as these two legs have not yet quarreled, so I wish to live in peace with the white people”. This metaphor has been helpful relative to my own experiences negotiating an ongoing conflict between Cree worldviews and epistemology and the predominantly Western frameworks that I am working within in academia. In this sense, I can adapt Star Blanket's words to my own identity in understanding myself a person with roots from two different worlds, but that both inform my personal and political philosophy. Losing sight of either leg of my identity has, at times, made it difficult to maintain balance and move the project forward.

Looking back, I now realize that while I began to conceptualize this project during the later years of my Undergraduate degree, it stems from experiences and

¹⁷ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, (London: Zed Books, 1999), 1.

questions that I've had as far back as I can remember. This is not to say that it's the culmination of my collective experiences, rather that I am indebted in many ways to my relations, my family, and my ancestors for much of its inspiration. I think that the project emerged in many ways from questions that I had about Treaties, and Treaty rights. Star Blanket is a community with a long legacy of leaders who have advocated for Treaty rights to education, treating education metaphorically as “the new buffalo” in that it will be central to the wellness and vitality of our people. While the nation-to-nation approach that was inherent in Treaty-making conflicted in many ways with some of the resistance discourses that I found to be empowering in my early undergraduate learning, over time I've realized that these and other approaches to thinking about Indigenous-Canadian relations aren't mutually exclusive, and each demonstrate valuable and relevant ways of understanding and relating that I've incorporated into the analytical framework used in writing this thesis project. It is with this in mind that I approach this thesis, not through a fixed format but more of an ongoing dialogue that I hope will continue to evolve and become richer in time, much like the Treaty relationships that inspired it.

CHAPTER 1

Introduction

In the beginnings of my graduate work, I began to engage with many political theories surrounding Indigenous-Settler relations at a deeper level than before. Throughout my coursework, I grew interested in recognition politics, minority rights and identity politics, liberatory and nationalist movements, and prescriptions for group wellness or survival. One thing that seemed to figure centrally across the board, though, was the seemingly universal relevance of the concept of culture. My first intuition was that culture must simply be one of the most important and accessible mediums for understanding Indigenous peoples' individual and collective difference. As Green writes, it is the context in which our "individuality is made meaningful [...] where culture has been suppressed, as in colonial relationships, recovery for resurrecting political power flowing from culture are part of a decolonization narrative."¹⁸

While in many contexts, the culture-identity link seemed to facilitate the mobilization efforts of many Indigenous groups, I also noticed that the language of culture was being increasingly invoked by non-Indigenous Canadians as a way of understanding Indigenous difference and rights. At the same time, Indigenous and post-colonial feminists have suggested that the concept of culture is notoriously gendered in

¹⁸ Green, *Cultural and Ethnic Fundamentalism: The Mixed Potential for Identity, Liberation, and Oppression* (Regina: Saskatchewan Institute of Public Policy, 2003), 8.

ways that can disadvantage or be disempowering to women.¹⁹ These critiques presented themselves as particularly salient in the literature I reviewed near the end of my coursework, often in response to decolonization discourses such as those outlined by Frantz Fanon. While these critiques rang true to me, I remained fascinated by Fanon's theories, particularly because there seemed to be a number of social and political discourses and movements in the Canadian context that exemplified his culturalist tendencies in many broad respects. One of the main critiques I developed in a paper that I wrote for my Political Theory (POLI 509) class was that Fanon seemed to centralize women at a symbolic level for their role in the maintenance and transmission of culture, tradition, and group identity while relegating them to the margins of the collectivity in material ways. This involved many questions surrounding what this meant for women throughout and after the decolonization process, and I began to think hard about how similar social and political discourses and movements might implicate Indigenous women in the Canadian context. This chapter provides an overview of the beginnings and an introduction to the subsequent evolution of this query.

At the outset, I review Indigenous women's writings that exemplify culturalist tendencies, and consider these writings through reference to relevant commentaries and critiques such as those offered by Emma LaRocque, Joyce Green, Uma Narayan, and Gayatri Spivak. From there, I aimed to identify the primary benefits and limits of culture

¹⁹ See Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (Toronto: University of Toronto Press, 1998), 58-59. Also see Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism" in U. Narayan & S. Harding, eds. *Decentering the Center: Philosophy for A Multicultural, Postcolonial, and Feminist World*, (Indianapolis: Indiana University Press, 2000), 93.

so as to identify some of the overarching factors to be mindful of as the concept becomes an increasingly established site of reference in Indigenous legal and political practice.

Indigenous Women as ‘Carriers of Culture’

In this section, I look at some of the ways that contemporary representations of Indigenous cultural traditions posit women as central to group identity through metaphors of Indigenous women as the ‘carriers of culture’. Specifically, I focus on how conceptualizations of Indigenous culture that locate women as central to the maintenance and transmission of collective cultural identities emerge and are reproduced in the works of Indigenous women writers such as Sharon Venne, Leanne Simpson, and Paula Gunn-Allen, who each elucidate different facets of the ‘carriers of culture’ metaphor.

Contemporary representations of Indigenous group culture have a tendency to define women's location within Indigenous communities as centrally maternal and link notions of motherhood and gender equality to cultural authenticity. For instance, the figure of the Indigenous woman as “the centre and wheel of life” and “the keeper of Indian cultures” figures prominently in many literary conceptualizations of Indigenous group culture. This metaphor emerges as particularly salient within writings where responses and resistance to colonialism are geared towards the reclamation or resurgence of women’s traditional positions within Indigenous societies.

Leanne Simpson is a Nishnaabekwe scholar who is widely renowned for writings on incorporating Nishnaabeg theory, philosophy, and cultural traditions into resistance

and resurgence movements.²⁰ In her article “*Birthing an Indigenous Resurgence: Decolonizing our Pregnancy and Birth Ceremonies*”, Simpson writes that Indigenous self-determination begins in the womb and as “the carriers of culture”, the responsibility falls on Indigenous women “to lead the resurgence” by “confront[ing] the colonialism within us” and “bringing forth a generation of children that are strong, healthy, and properly prepared to live their traditions.”²¹ She writes that colonialism specifically targeted Indigenous women's reproductive capacity and power as “life-givers”, and in doing so, “stole our power and sovereignty as Indigenous women.”²² Simpson emphasizes goals of motherhood, cultural revitalization, decolonization, and nationalism, writing: “If more of our babies were born into the hands of Indigenous midwives using Indigenous birthing knowledge, on our own land, surrounded by our support systems, and following our traditions and traditional teachings, more of our women would be empowered by the birth process and better able to assume their responsibilities as mothers and nation-builders.”²³

The reclamation of traditional practices of motherhood, for Simpson, is an important way for Indigenous women to work towards physical decolonization and ensure a decolonized pathway for future generations; as a result, “the foundation of our

²⁰ See Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a new Emergence*, (Winnipeg: Arbeiter Ring Publishing, 2011). Also see *Lighting the Eight Fire: The Liberation, Resurgence, and Protection of Indigenous Nations*, (Winnipeg: Arbeiter Ring Publishing, 2008).

²¹ Simpson, “Birthing as an Indigenous Resurgence: Decolonizing our Pregnancy and Birthing Ceremonies” in D. M. Lavell-Harvard and J. Corbiere Lavell, eds. *Until Our Hearts are on the Ground: Aboriginal Mothering, Oppression, Resistance and Rebirth*, (Toronto: Demeter Press, 2006), 29.

²² *Ibid.*, 28.

²³ *Ibid.*, 29.

nations would be strengthened.”²⁴ In Simpson's view, “reclaiming Indigenous traditions of pregnancy, birth, and mothering will enable our children to lead our resurgences as Indigenous Peoples, to rise up and rebel against colonialism in all its forms, to dream independence, to dance to nationhood.”²⁵ For Simpson, motherhood is key to women’s empowerment as well as the empowerment of future generations. Within the role of motherhood, Simpson also seems to envision several inherent responsibilities associated with cultural sustainability and revitalization.

Paula Gunn Allen, a Pueblo-Sioux scholar who is renowned for her efforts to subvert the patriarchal paradigms that many colonial narratives and histories are steeped in, also sheds light on the ‘carriers of culture’ metaphor but accomplishes this through a slightly different approach than Simpson in that she emphasizes on the metaphor’s spiritual foundations. Gunn Allen seeks to center women in relation to Indigenous group culture by highlighting their spiritual, rather than physiological, connection to creation. She explains that motherhood should be understood as more than the capacity for biological creation, as it involves the power of thought, of memory and of transformation: “The Mother, the Grandmother, recognized from earliest times into the present among those peoples of the Americas who kept to the eldest traditions, is celebrated in social structures, lives, and from her comes our ability to endure, regardless of the concerted assaults on our, on Her, being, for the past five hundred years of colonization. She is the Old Woman who tends the fires of life [...] the one who Remembers and Re-members;

²⁴ Ibid.

²⁵ Simpson, “Birthing as an Indigenous Resurgence: Decolonizing our Pregnancy and Birthing Ceremonies” in D. M. Lavell-Harvard and J. Corbiere Lavell, eds. *Until Our Hearts are on the Ground: Aboriginal Mothering, Oppression, Resistance and Rebirth*, (Toronto: Demeter Press, 2006), 32.

and though the history of the past five hundred years has taught us bitterness and helpless rage, we endure into the present, alive, certain of our significance, certain of her centrality, her identity as the Sacred Hoop of Being."²⁶

While Gunn Allen emphasizes the significance of motherhood to cultural revitalization, she's also vigilant not to overextend her analysis as she cautions against "fertility cultism", which overlooks the full "creative prowess" of woman. Representations of women as "fertility goddesses" are, in Gunn Allen's view, "excessively demeaning" and limit the power of woman to her capacity for material creation. She seeks to reconfigure the motherhood ideology by depicting a weak link between biology and mothering responsibilities within pre-contact Indigenous communities and by emphasizing the spiritual facets of motherhood. She also demonstrates that in some pre-contact Indigenous cultures, conceptualizations of motherhood were not restricted to an individual's capacity to become pregnant and give birth, rather motherhood was also understood as a spiritual and social condition. Thus women who did not have children "had other ways to experience Spirit instruction and stabilization, to exercise power, and to be mothers."²⁷ While she seeks to avoid essentializing women through their physical capacity for motherhood, Gunn Allen's emphasis on women's role as spiritual nurturers continues to centralize women in relation to the transmission of cultural identity by linking women's value within communities to their ability to nurture regardless of their reproductive abilities. Rather than challenge the motherhood link, Allen's perspective functions to refocus it by restricting women's social

²⁶ Paula Gunn Allen, *The Sacred Hoop : Recovering the Feminine in American Indian Traditions*, (Boston: Beacon Press, 1994) 11.

²⁷ *Ibid.*, 251.

and cultural agency to their capacity to mother rather than their capacity to give birth. Ultimately, she still posits women as central to culture in a way that can be read as confining their movements, agency, and capacity for full participation in cultural communities within dominant expectations of motherhood and broader gendered narratives of Indigenous experience.

After reading the works of Simpson and Gunn Allen, my graduate student tendencies generally tell me to draw out a critique, to find something to say about it. The only thing I can think of is how much they remind me of Fanon and others who seem to have received much of their inspiration from him. One thing that propelled me to push past my own intellectual tendencies (that mainly involve obsessing about gaps or disconnects in the material) was a project that my undergraduate honours supervisor Joyce Green invited me to get involved in. She was editing an upcoming issue of the *Prairie Forum Journal* and asked me to review a new book, *When the Other is Me: Native Resistance Discourse from 1850 -1990*, by Dr. Emma LaRocque. So I did.²⁸

In the review, I described LaRocque's understanding of Indigenous peoples' written expressions as symbolic and material forms of resistance to the linguistic warfare that inheres within the colonial archive. On her view, Indigenous peoples' resistance to gross misrepresentation and marginalization has been articulated through a number of textual techniques; one of these approaches involves emphasizing Indigenous faces and feelings in writing, another seeks to re-establish the viability of Indigenous cultures by emphasizing an idealized nativism in which Indigenous cultures are represented as

²⁸ Starblanket, Gina, "When the Other is Me: Native Resistance Discourse 1850 – 1990", Book Review in *Prairie Forum Journal*, 36:1 (2011), 129-131.

“better culture[s]” than non-Indigenous cultures, and a third approach seeks to reverse the civilized/savage paradigm, charging settlers rather than Indigenous peoples with savagism.²⁹ While each of these techniques relies on different methodologies and ideological frameworks, all function to deconstruct and/or correct damaging misrepresentations and, thus, in LaRocque’s view, constitute a powerful way of engaging in collective resistance against colonialism’s project to dehumanize Indigenous peoples.

LaRocque’s approach helped me to recognize and appreciate the empowering features of a range of Indigenous women’s writings, including those that centralized women in relation to culture. By applying LaRocque’s theoretical framework to Paula Gunn Allen’s perspective, Gunn Allen could be understood as emphasizing the spirituality of Indigenous women as a method of reversing charges of patriarchy in addition to emphasizing an idealized nativism in which Indigenous cultures are represented as superior to non-Indigenous cultures. Gunn Allen locates women as central within cultural communities through reference to their heightened spirituality, citing the gynocratic or non-patriarchal nature of traditional Indigenous lifestyles as evidence. By emphasizing the heightened balance between men and women in traditional Indigenous cultures, particularly in the face of patriarchal Western values, Allen’s approach can be read as an attempt to reverse and return colonial efforts to devalue Indigenous women by citing the gender equality of pre-contact Indigenous nations and emphasizing settler tendencies to engage in gendered oppression.

²⁹ LaRocque, *When the Other is Me*, 100.

In considering Simpson's analysis of resistance movements and women's role within them through reference to LaRocque's framework, Simpson's emphasis on women's motherhood ability could be understood as an attempt to re-humanize Indigenous women by highlighting their intimate connection to creation and live-giving. Additionally, re-centering traditional mothering practices could represent a way of re-establishing the viability of Indigenous cultures in the face of colonialism's historical and ongoing attack on traditional kinship systems.

Culture clearly represents a relevant and powerful source of identity through which to unite and work towards decolonization and other social and political pursuits. This is evident when interpreting Gunn Allen, Simpson, and other Indigenous women who invoke the 'carriers of culture' metaphor in their writings. Although they assume relatively different approaches, Simpson and Gunn Allen each advocate for Indigenous women's empowerment by challenging the continued colonial regulation and authorship of Indigenous identities and by locating women as central to projects of cultural revitalization. Both seek to re-center women as the keepers of Indigenous culture as a way of challenging the discursive devaluation of Indigenous women that inheres within the colonial archive and resisting the continued colonial authorship of Indigenous women's experiences. And finally, each of these authors approaches this task by treating motherhood as a central way for women to challenge colonialism, which has at times attacked the mother-child connection. LaRocque's analysis is useful as it prompts inquiries into the author's goals and vision and facilitates a generous, purposive reading. For these and other reasons, her analytical framework is helpful in understanding the empowering features of a range of expressions and discourses, and at a broader level, is

relevant to anyone interested in learning more about the role of Indigenous women's narratives in resistance, cultural revitalization and liberatory projects.

While there are many positive impacts of understanding the concepts discussed above as acts of resistance, it's also important to note that the foundational elements of many of these writings, such as the culture-motherhood link, are rooted in pre-contact Indigenous traditions and beliefs, therefore they also bear consideration in their own light (and not solely as responses to colonialism). Cree lawyer Sharon Venne, for instance, demonstrates that the centrality of Indigenous women relative to culture is rooted in pre-Treaty Indigenous societies. Through reference to the Treaty relationship between colonial representatives and Treaty 6 First Nations in her article, *Understanding Treaty 6: An Indigenous Perspective*, Venne describes how women's central status and socio-political locations in their cultural communities were intimately linked to their capacity for motherhood:

When the Elders speak about the role of women at the treaty, they talk about the spiritual connection of the women to the land and to treaty-making. The Creator gave women the power to create. The man is the helper to the woman, not the other way around. Women are linked to Mother Earth by their ability to bring forth life. The women sit beside the Creator as a recognition of their role and position. [...] Because of this spiritual connection with the Creator and Mother Earth, it is the women who own the land. Man can use the land, protect and guard it, but not own it. Women can pass on authority of use to the man, but not the life of the earth.³⁰

Venne explains that women's prominent roles within pre-contact Indigenous societies follow from their life-giving abilities, which gives them a heightened connection

³⁰ Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, (Vancouver: UBC Press, 1997), 191.

with the Creator. Her analysis is helpful in understanding some of the underlying spiritual reasons why Indigenous women's roles and significance within their cultural communities are so commonly linked to their identity as mothers. It also helps think about the concepts like the culture-motherhood link independent from the resistance movements they so often appear within.

The popularity and widespread receptiveness of the culturalist approach, whether invoked as an act of resistance or as a way of explicating pre-contact social structures, has demonstrated how the discourse of culture can function as an empowering and unifying concept, at least at a discursive level. It also provides a useful way of preserving the distinctiveness of a non-Western national identity, and when a strong collective identity exists, it provides a medium through which to proceed with nationalist pursuits without the further dilution or destruction of cultural traditions. LaRocque's analysis helps to understand the ways that culturalist discourses function to deconstruct colonial narratives, re-write Indigenous histories, and re-humanize representations of Indigenous societies. However, while women are evidently key players in maintaining and safeguarding group cultural identities, their central roles as symbolic carriers of culture can also require them to carry a heavy weightload within these collective projects. The next section of this chapter will review relevant critiques of culture and processes of culturally-based group identity formation, particularly as they relate to Indigenous women.

Cautions Related to Culture

The above discussion has highlighted many of the positive impacts of treating the concept of culture as a marker of group identity or difference. At the same time, as Caroline Dick observes, because “the discourse of culture and identity is so apt to freeze identities, attribute an essential or authentic nature to a group's culture, and erase the heterogeneity that marks all group categories” [...] “culture and the identities that are informed by culture, are very narrowly construed.”³¹ Dick explains that in the process of constructing collective identities, some groups put aside their internal differences or particularities and emphasize essential aspects of their identity to forge a heightened sense of solidarity and move collectively towards certain goals.

This process has been described by Gayatri Spivak as a form of strategic essentialism that can be used as a short-term strategy by a marginalized group to affirm a political identity, so long as this identity does not then get fixed as an essential category by a dominant group. The aspects that are temporary emphasized do not necessarily occur naturally, rather they are invoked by the oppressed group when useful to do so. While Spivak rejects essentialism- the theory that groups of peoples have essential qualities, properties, or aspects- she recognizes that it is impossible to be completely non-essentialist as essentialism is something one must be committed to even in rejecting. Therefore, she proposes the "strategic use of positive essentialism in a scrupulously visible political interest."³² Yet, as she has also pointed out, “a strategy suits a situation; a

³¹ Caroline Dick, “Culture and the Courts’ Revisited: Group-Rights Scholarship and the Evolution of s.35(1)”, *Canadian Journal of Political Science*, 42:4 (2009), 3.

³² Gayatri Spivak, *In Other Worlds: Essays in Cultural Politics*, (New York: Methuen, 1987), 205.

strategy is not a theory.”³³ The strategic use of an essence is thus described by Spivak as a context-specific strategy rather than a long-term political solution to end oppression and exploitation. Ideally, Spivak views this approach as one that is self-conscious for those who are mobilizing, writing that: "the strategy becomes most useful when "consciousness" is being used in the narrow sense, as self-consciousness.”³⁴ She emphasizes the element of strategy in this approach and is clear that it should be employed in a critical fashion, with comprehensive awareness of its inherent limits.

The main risk for Spivak is that the use of essentialist concepts to mobilize the disempowered groups may ossify into a fixed identity, which can ultimately perpetuate the subordination of the groups they claimed to emancipate. Resistance to colonialism, on this view, necessitates space for the critique and disruption of essentialist conceptualizations of Indigenous culture to make room for the development of cultural identities that are more fluid and thus better equipped to transform and adapt to new demands and challenges. For instance, the culture-motherhood link, as demonstrated through the works of Gunn-Allen and Simpson, can represent an important aspect of Indigenous peoples' individual and collective cultural identities (especially as it becomes operationalized in relation to colonialism). However, it becomes problematic when understood as a static, fixed tenet of Indigenous experience and thus is most useful when treated as one of many choices, and so long as it is not essentialized in a way that undermines other means of empowerment for women or renders it a universal imperative.

³³ Spivak, *Outside of the Teaching Machine*, (New York: Routledge, 1993), 4.

³⁴ Spivak, *Other Worlds*, 205.

In her analysis of the dangers of cultural essentialism within feminist agendas, Uma Narayan contends that feminists need to be cautious of the selective labeling of cultural practices that occurs within the social and political mobilization efforts of marginalized communities. Such essentialist portraits of culture have a tendency to foreground culturally dominant norms of femininity as central tenets of cultural identity, relying on the symbolic figure of women to resolve the temporal anomaly inherent in their project, which is to lay claim to categories of modernity while reviving pre-colonial traditions to safeguard the nation's cultural difference from the West.³⁵ This contradiction resolves itself by invoking woman as a symbol for a pure and stable pre-colonial tradition that guarantees the nation's cultural identity and its difference from the colonizer's culture. Women who fit within these prescriptions are thus situated as central to the preservation of culture, while feminist challenges to the norms and practices affecting women are cast aside as cultural losses or betrayals.³⁶ Within these essentialized constructions of culture, particular understandings of women's roles and statuses, such as representations of Indigenous women as the carriers of culture, are established as a primary way of safeguarding against the continued incursion of Western culture and advancing projects of cultural renewal.

For Narayan, the construction of dominant understandings of “cultures” and “cultural difference” depends on complex discursive processes linked to political agendas and motivations. Because such pictures of culture often represent cultures as naturally occurring entities that exist separate from projects of distinguishing between them,

³⁵ Madhu Dubey, “The ‘True Lie’ of the Nation: Fanon and Feminism”, *Differences: A Journal of Feminist Cultural Studies*, 10:2 (1998), 2.

³⁶ Narayan, *Essence of Culture*, 89.

Narayan reminds us of the need to be mindful of the contexts in which what are currently taken to be “particular cultures” came to be seen and defined as such. Essentialist representations of culture eclipse the reality that the differences between particular cultures themselves have a historical provenance and political purpose. Narayan recommends anti-essentialist ways of thinking about “cultural difference” and offers strategies for resisting the construction of essentialist pictures of culture. A useful approach, for Narayan, involves the cultivation of a critical stance that “restores history and politics to prevailing notions of “culture.”³⁷

Narayan's analysis can be read as highlighting the importance of having space for critique of cultural practices and the processes underlying their demarcation or identification as crucial elements of culture. Otherwise, social and political movements grounded on a collective identity and centered around the concept of culture have the potential to implicate Indigenous women as responsible for their preservation at a symbolic level while marginalizing or excluding them from dominant decision-making structures and processes. When considering these tendencies, a range of contemporary social and political movements in Canada come to mind as exemplary in many broad respects.³⁸

As Lilianne Krosenbrink-Gelissen observes in her analysis of the motherhood ideology, organizations such as the NWAC ground their agenda in the desire to be culturally authentic and strive to fulfill this mandate by drawing on strategic representations of Indigenous motherhood. Krosenbrink observes how NWAC

³⁷ Ibid.

³⁸ Consider NWAC's participant status in Constitutional negotiations.

operationalized the motherhood ideology in order to make its claims relevant to its male counterpart, the AFN, during constitutional negotiations. Both the federal government and the AFN objected to women's participation in the First Ministers' Conferences on Aboriginal Constitutional Matters that took place in 1983, 1984, 1985, and 1987. The AFN objected to NWAC's participation as it feared Aboriginal women would steer the focus away from self-government and towards sexual equality issues. The federal government denied NWAC a formal seat on the grounds that NWAC was not democratic since it only represented women, arguing that Indigenous women were already represented in the negotiation process by their respective national (male-dominated) organizations. According to Krosenbrink, the NWAC was able to achieve temporary harmony with the AFN, through strategic articulation of the "traditional motherhood ideology" to express common conceptualizations of the traditional egalitarianism of Indigenous cultures.

In this context, culture played an integral role in facilitating group cohesiveness as Indian men and women generally agreed that their traditional societies were egalitarian; that the sexes had different but equal socio-political positions."³⁹ This shared understanding of culture also helped to establish important group boundaries between Aboriginal and non-Aboriginal peoples during constitutional negotiations as colonial policies were blamed for contemporary gender inequalities within Indigenous communities, which, as previously mentioned, are often represented as inherently un-

³⁹ Lilianne Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987*, (Saarbrücken: Verlag Breitenbach, 1991), 44-8; 123-8.

Indian.⁴⁰ And lastly, the concept of culture informed much of the traditional gender equality argument used in Aboriginal peoples' struggle for self-government. This argument suggests that decolonization requires the re-establishment of cultural traditions which are inherently egalitarian. In this way, the ideology of Indigenous women as the “carriers of culture” represented an instrumental part of Indigenous peoples' political opposition to Canadian society during constitutional negotiations as it facilitated group cohesion, helped forge group boundaries, and grounded Indigenous peoples' movements towards self-determination. By informing the articulation of a shared collective identity that was relevant and useful to many Indigenous people, the concept of culture thus operated as an important political strategy. But while the ideology of women as the carriers of culture may have been strategic in terms of affecting group cohesion and solidarity, it did nothing to draw attention to sexual equality issues or move women beyond secondary status in negotiations.

As Sharene Razack explains in her analysis of the risks of culture for women of color and Aboriginal women, many cultural communities conceptualize culture and community in ways that reflect and fail to challenge male privilege. In this sense, she refers to static treatments of culture, writing that “the notion of culture that has perhaps the widest currency among both dominant and subordinate groups is one whereby culture is taken to mean values, beliefs, knowledge, and customs that exist in a timeless and unchangeable vacuum outside of patriarchy, racism, imperialism, and colonialism,” in this way culture maintains a “superautonomy that reduces all facets of social experience

⁴⁰ Ibid., 217.

to issues of culture”⁴¹ Razack argues that culturalist discourse has a tendency to eclipse structures of racism, sexism, and white complicity. In her view, the risks of talking culture become even more salient when the dominant group is responsible for controlling the interpretation of what it means to take culture into account.⁴² In the judicial realm, Razack notes how this focus on cultural difference can overshadow legacies of racism and colonialism, with the net effect of denying Indigenous peoples right to exist as sovereign nations and viable communities.

Three central themes emerge from the literature outlined above; foremost is that the concept of culture is most risky when it is invoked in a way that leaves space for culturally essentialist or fundamentalist processes to occur or be reinforced. If treatments of culture are to be used as ways for Indigenous peoples to mobilize politically, they are best used internally, and as short-term political strategies. Most importantly, culturalist agendas and prescriptions should be understood in light of their limits and allowed space for feedback and critique. As Green reminds us, decolonizing societies can engage in collective culturalist projects “most safely when [they are] not tied too closely to political power” and when treated as “dynamic, contestable process[es] involving even those who dissent.”⁴³

Taken together, the authors reviewed in this chapter highlight the salience as well as the value and limits of culture, with particular focus on how culturalist discourses implicate and impact Indigenous women as the carriers of culture. As Paula Gunn Allen

⁴¹ Razack, *Looking White People*, 58.

⁴² *Ibid.*, 59.

⁴³ Green, *Cultural and Ethnic Fundamentalism*, 12.

and Leanne Simpson's writings demonstrate (especially when read through Emma LaRocque's resistance framework), the concept of culture, understood as a symbolic repository for group identity, can represent an empowering and unifying concept. This is especially true with respect to treatments of Indigenous women as the carriers of culture, which have a tendency to emphasize women's central roles in Indigenous societies through the culture-motherhood link. By re-centering women as the keepers of Indigenous culture they effectively challenge colonialism's ambition to devalue Indigenous women in the following ways: first, they re-humanize representations of Indigenous women by emphasizing their capacity to give birth and create life; second, they re-establish the viability of Indigenous cultures by emphasizing an idealized nativism in which Indigenous cultures are represented as egalitarian or matriarchal in the face of a Western, patriarchal society; and third, they reverse the civilized/savage paradigm, charging settlers rather than Indigenous peoples with patriarchal violence.

Recognizing that there are many benefits to the projects under discussion, the authors reviewed in the latter part of this chapter outlined some of the associated limits of culture; namely, that while useful when treated as one of many sources of group identity and as a short-term political strategy, culture can be risky when essentialized or invoked by members of a dominant society. When situated as central to the maintenance of the national population and to the transmission of cultural identity, women are inherently associated with the symbolic role of maintaining group difference from the West or gatekeeping the boundaries of the national collectivity. And at the same time as they occupy this crucial location relative to group culture, there is no guarantee that this centrality will extend to the material realities that occur within collective

movements. This was evidenced by Krosenbrink's analysis of NWAC's location in constitutional negotiations, which depicts NWAC as deprived of direct national agency and generally relegated to the margins of the collectivity.

Conclusion

This chapter has demonstrated that in recent years culture has been especially prominent in the representation of Indigenous group identities and in group efforts to advocate for Indigenous rights and recognition as self-governing entities. It has outlined the positive features and limits of culture, with a focus on literature that frames Indigenous women as the carriers of culture. The purpose here has been to identify the overarching factors to be mindful of as the concept continues to gain ground, with the potential to implicate and impact Indigenous women in increasingly explicit ways.

In her recent article *Culture, Identity, and the Courts: Group-Rights Scholarship and the Evolution of s.35(1)*, Caroline Dick demonstrates how the discourse of culture has increasingly found judicial support in contemporary jurisprudence on Aboriginal peoples' rights under s.35 of the Constitution Act. Dick argues that the Court's recent jurisprudence on Aboriginal rights mirrors salient aspects of dominant liberal rights approaches, such as those advocated by Charles Taylor and Will Kymlicka, whose theories both foreground the importance of culture in the constitution of individual identity. Taylor and Kymlicka each view culture as central to identity and advocate for the provision of group rights to protect the specific culture, or cultural community, that individual identity relies upon. On this view, group rights are intended to protect culture as it is integral to the wellbeing of Indigenous peoples' or minority identities. Dick

demonstrates how this particular way of understanding culture, identity, and rights has evolved from a theoretical approach to one that informs legal and political systems and processes in Canada. She explains that the dominant approach to rights has, over time, shifted from one emphasizing the status of Aboriginal peoples as Canada's First Nations to one connecting Aboriginal rights to the protection of “authentic” cultures and identities.⁴⁴

Through reference to the Court's treatment of s.35 in the *R. v. Van der Peet*⁴⁵ and *Mitchell v. Peguis Indian Band*⁴⁶ decisions, Dick argues that the court's approach has the distinct potential to replicate the problems that arise in Taylor and Kymlicka's identity-based theories of culture. For instance, she suggests that the discourse of culture and identity employed by the courts threatens to undermine Indigenous peoples claims for self-determination and self-government. Additionally, Dick warns that the dominant liberal multicultural approach threatens to level the status of Indigenous peoples to that of ethnocultural minorities; that it offers no protection for contemporary Indigenous identities; that it constrains the autonomy of Indigenous peoples in economic, political, and social realms; and ultimately that reinforces oppressive relations of power within Indigenous communities. Her analysis is significant as it illuminates the ways that discourses of culture and identity can become embedded within dominant legal systems which have a direct impact on Indigenous peoples' rights and sovereignty.

⁴⁴ Dick, (2009).

⁴⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507

⁴⁶ *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85

Amidst topics ranging from Treaty governance to decolonization, the concept of culture clearly occupies a prominent position within a broad spectrum of collective processes. At the same time, while the concept has received a significant degree of attention from critics, the culturalist position remains very popular in practice. Reflecting on this disconnect, as well as the growing influence of culture in the courts has led me to query what the privileging of culture means for Indigenous women and their rights in various Canadian contexts. Having moved to Victoria for my graduate work, I was very much dislocated from a prairie Treaty framework and became increasingly embedded in what I've now come to understand as a West Coast social justice activist and academic environment. One way of finding community within this environment was meeting and organizing collectively with Indigenous women around issues of violence that affect us. At the same time, I was learning from new teachers like Anishinabe law scholar Dr. John Borrows, whose refreshing approach to Indigenous legal systems inspired a number of discussions ranging from violence against Indigenous women to Treaty governance and implementation. From these conversations, my questions surrounding how violence can be made invisible or eclipsed by claims to culture or tradition evolved into questions regarding the gendered nature of Aboriginal and Treaty rights that are protected by the courts.

I chose to explore these inquiries further through a review of the current status of Aboriginal and Treaty rights under Canadian law, which prompted my focus to shift towards some of the ways that the culturalist position has increasingly found judicial support in contemporary jurisprudence on s.35. The next chapter provides a brief overview of this stage of my learning and the reflections and assertions that followed.

CHAPTER 2

Culture and Aboriginal and Treaty Rights in Canada

“What I have offered does not take away your way of life, you will have it then as you have it now, and what I offer is put on top of it.”⁴⁷

So far, much of the discussion in this thesis has centered around the way culture has been privileged in Indigenous legal and political discourse and on the some of the benefits and limits of these culturalist paradigms, with particular regard for the ways they can inscribe and/or defy the configurations of Indigenous women's lives. Recognizing that hegemonic treatments of culture can be dangerous for women, and particularly for Indigenous women due to their perceived status as the carriers of culture, while also acknowledging that the culturalist position is clearly empowering for a host of reasons and remains very popular in practice, I now turn to the implications of understanding Aboriginal and Treaty rights through the lens of culture, as has been the tendency in contemporary jurisprudence on Indigenous peoples rights under s.35 of the Constitution Act.

I begin with an introduction to Aboriginal and Treaty rights and provide a brief overview of their method of interpretation under s.35; then, I describe the distinctive culture test developed by the court in *Van der Peet* to identify the existence of an Aboriginal right. I review relevant critiques of the distinctive culture test to identify its limitations for Indigenous peoples generally, and then move on to consider its particular implications for Indigenous women. Finally, I argue that the distinctive culture test

⁴⁷ Delia Opekokew, *Position of the Federation of Saskatchewan Indians on the Confirmation of Aboriginal and Treaty Rights in the Canadian Constitution and /or Legislation*, (Federation of Saskatchewan Indian Nations, 1980), v-5.

functions as a containment strategy with respect to a range of potential Aboriginal and Treaty rights by constructing a gendered framework of rights that largely defies the needs and configurations of Indigenous women's lives.

Aboriginal and Treaty Rights in the Constitution of Canada

In 1982, the Aboriginal and Treaty rights of Canada's Indigenous population received constitutional recognition and affirmation under s.35 of the Constitution Act.⁴⁸ S.35 builds the framework for the constitutional protection of Treaty rights that was virtually absent in Canadian precedent. The patriation of the Constitution Act, the inclusion of the Charter of Rights and Freedoms, and the recognition and affirmation of the "Existing Aboriginal and Treaty rights" of Indigenous peoples under s.35 marked a significant shift for the Canadian state as this was one of the first times that it had formally recognized the existence of Aboriginal peoples fundamental rights and freedoms.⁴⁹ Combined with s. 25 of the Canadian Charter of Rights and Freedoms,⁵⁰ s.35 affirmed Aboriginal and Treaty rights as part of the law of the new constitutional order and introduced the possibility of a new legal framework to advance claims relating to their infringement.⁵¹

⁴⁸ Section 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁴⁹ For many years, the rights of Indigenous peoples to their ancestral lands, particularly their legal rights, were virtually ignored. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103.

⁵⁰ Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982.

⁵¹ See Russell Barsh & Sákéj (James) Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal", *Journal of Canadian Studies*, 17:2 (1982), 55. Also see M. Boldt, J.A. Long, & L. Littlebear, eds. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, (Toronto: U of T Press, 1985).

Some Indigenous scholars, such as Sákéj Henderson, have even described s.35 as a coalescence of traditional Indigenous law with colonial law. Henderson views the entrenchment of Aboriginal rights in the Constitution as remedying the political denial of First Nations traditional law as well as the failure of the courts to respect treaties as constitutional documents.⁵² In my view, s.35 doesn't so much protect Aboriginal and Treaty rights under Indigenous jurisprudence and law, but recognizes that they exist and should not be denied under Canadian law. In other words, repatriation provided no assurance that Indigenous peoples' traditional legal principles, or perspectives, would inform the interpretive mechanisms used to determine s.35's reach or application, nor did it guarantee that Indigenous men and women would have an equitable voice in those processes. It expressed a constitutional commitment towards protecting Aboriginal rights within an uncertain environment for interpreting the delivery and degree of that protection.

While Henderson's assessment of s.35 as embodying the potential to protect Indigenous peoples and their traditions from the will of legal and political majorities seems relatively optimistic, he's also mindful of the inherent complexities and limitations of constitutional processes as he points out that the "contrived resistance of the First Ministers and their advisors" towards the right of Indian self-government during the four constitutional conferences that were held between 1982 and 1987, "continued the cognitive legacy of colonialism."⁵³ During constitutional talks, Aboriginal representatives were invited guests in the process rather than voting participants. The Federal

⁵² Henderson, "Interpreting Sui Generis Treaties" *Alberta Law Review*, 36:1 (1997), 50.

⁵³ Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society*, (Saskatoon: Native Law Centre, 2006), 42.

government chaired the discussions and the meetings were organized and facilitated within predominantly western bureaucratic frameworks. The governments present were under no formal obligation to arrive at consensus or agreement on any issue. Furthermore, the Indigenous spokespeople who were present were not treated as representatives of sovereign peoples or nations but as representatives of a segment of the Canadian population seeking to clarify their rights and relationship with Canada.⁵⁴ Sovereignty or “nationhood” was not up for discussion. Therefore, the discussion was limited to topics over which the levels of Canadian government had the will to negotiate, making it clear that Indigenous rights and issues surrounding their meaning and implementation remained firmly under Canadian jurisdiction.

Furthermore, a number of feminist scholars have demonstrated that the processes Henderson broadly describes as colonial were also decisively gendered, referencing Indigenous women's explicit exclusion from constitutional talks in their calls to confront sexism in relation to colonial institutions and Indigenous ones. For instance, the constitutional conferences held to translate, identify, and define Indigenous rights included the Canadian Prime Minister and Premiers, representatives of territorial governments, and two representatives from each of the four male-stream Indigenous organizations (with a total of 8 out of 34 seats reserved for Indigenous peoples).⁵⁵ None of these were reserved for Indigenous women; in fact, three broad-based national feminist

⁵⁴ Native Women's Association of Canada. *Aboriginal Constitutional Discussions & Treaty Rights*, (1987), 8.

⁵⁵ The four national Indigenous organizations invited to participate in Constitutional discussions include the National Indian Brotherhood/Assembly of First Nations (AFN), the Inuit Committee on National Issues, the Metis National Council, and the Native Council of Canada.

organizations had asked for and were denied participant status in the discussions.⁵⁶ As Green writes in her article *Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government*, “the process of exclusion of Aboriginal women by key players in the constitutional sandbox, with the tacit approval of all other players, is characteristically sexist, and indicative of political and policy hegemony by men.”⁵⁷ Green recognizes that while Indigenous women benefit from an expansion of and concretization of Indigenous rights generally, she highlights the need for “new law pertaining to Aboriginal women's rights or to a requirement for gendered policy analysis in the development of Aboriginal and Treaty rights.”⁵⁸

The issue of the right to self-government figured centrally in constitutional discussions, with First Ministers and Indigenous leaders apparently willing to put Indigenous women's rights on the back burner.⁵⁹ For instance, while s.35's separation from the Charter is praised by some for keeping Indigenous rights at a safe distance from the Constitution's notwithstanding clause and s.1., some Indigenous women, especially NWAC, have sought the Charter's protection, namely its equality rights guarantees, and called for its application to Indian governments. For many years, the AFN vehemently opposed the Charter's application to Indian governments, labeling it a colonial byproduct that could violate cultural practices.⁶⁰ This is an explicit instance of culture being invoked strategically to legitimize power relations and eclipse the reality of sex oppression

⁵⁶ The National Action Committee on the Status of Women (NAC), the Native Women's Association of Canada (NWAC), and the National Metis Women of Canada.

⁵⁷ Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government", *Constitutional Forum* 4:4 (1993), 110.

⁵⁸ Green, "Balancing Strategies", in J. Green ed. *Making Space for Indigenous Feminism*, (Halifax: Fernwood Publishing, 2007), 150.

⁵⁹ Green, *Constitutionalizing the Patriarchy*, 115.

⁶⁰ Green, *Balancing Strategies*, 150.

within Indigenous communities. While the Charter certainly is a colonial creation, so are many Canadian legal and political institutions and mechanisms. It seems overly selective and strategic to target the Charter on its own without taking issue with some of the other facets of Canadian law and policy that affect Indigenous peoples and replicate equally if not more explicitly colonial tendencies.⁶¹ Additionally, the AFN's claim of conflict between the Charter and traditional Indigenous cultures provides no explanation as to why dialogue surrounding these issues could not occur, or why Indigenous women were excluded from constitutional processes.

Interpreting Section 35

Since the constitutional dialogue surrounding s.35 failed to produce an amendment clarifying and protecting an existing right to self government or any other Indigenous rights, the responsibility of interpreting and explaining its application fell to the Canadian courts. Beginning with the landmark *R. v. Sparrow* decision in 1990, the Court has articulated a series of principles to guide the interpretation of Aboriginal and Treaty rights under s.35. In this case, Ronald Sparrow, a member of the Musqueam Band, was caught fishing with a net longer than permitted by the band's fishing license under the Fisheries Act and argued that he was exercising his Aboriginal right to fish under s.35. The issue before the Court was whether this restriction on fishing net length violated s.35. The SCC concluded that to claim an Indigenous right under s.35, a person must be

⁶¹ It is also important to note, as John Borrows reminds us, that Canadian laws and political institutions "lie on a spectrum, with some being more supportive of Indigenous peoples, and others being dismissive and oppressive." (*Personal comment regarding my thesis*).

acting under a protected 'existing Aboriginal right', meaning a right recognized before the Constitution Act, 1982 came into effect. Moreover, the court emphasized the government's fiduciary duty (the highest duty known in law highlighted by good faith, loyalty and trust) to Indigenous peoples, which obliges it to act fairly when engaging Indigenous matters.

Several subsequent rulings functioned to supplement the initial principles that were articulated by the court in *Sparrow*. In 1996, Dorothy Van der Peet, a member of the Sto:lo First Nation, was charged with selling 10 salmon caught under the authority of an Aboriginal food fish license contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, which prohibited the sale or barter of fish caught under such a license. As Ms. Van der Peet insisted that she was exercising an existing Aboriginal right to sell fish, her defense was based on the position that the s.27(5) laws preventing the sale of fish infringed upon her s.35 rights. The Court queried the constitutional question of whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of an Aboriginal right within the meaning of s.35 of the Constitution Act. The SCC held that Indigenous fishing rights did not include the commercial selling of fish because this practice was not part of the distinctive culture of the group asserting the right.⁶²

Additionally, in *Van der Peet*, the court grounded the purpose of s.35 rights within a paradigm of reconciliation, maintaining that s.35 provides the constitutional framework through which the fact that Indigenous peoples lived on the land in distinctive

⁶² *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 30 & 46.

societies with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The court stated that the substantive rights that fall within the provision must therefore be defined in light of this purpose and must be directed towards the reconciliation of the pre-existence of Indigenous societies with the sovereignty of the Crown. It's worth noting that the *Van der Peet* decision, and the reconciliatory approach to Indigenous rights that it entrenched, emerged within a broader movement among English-settler states that sought to promote reconciliation as the preferred conceptual approach to addressing colonial injustices committed against Indigenous peoples.⁶³ As Damien Short notes through reference to the 1991 Australian Reconciliatory Process, linking social justice for Indigenous peoples to a reconciliatory framework places a ceiling on Indigenous peoples' aspirations by couching them within the rhetoric of citizenship. I would argue that this reconciliatory approach was paralleled in the *Van der Peet* decision through the court's proliferation of liberal multicultural discourse that reduces the foundations and content of Aboriginal and Treaty rights to issues of culture, with a similar effect of containing Indigenous peoples political movements, sovereigntist and otherwise, within the broader project of nation-building.

The Distinctive Culture Test

In *Van der Peet*, the courts developed a distinctive culture test to identify the existence of an Aboriginal or Treaty right. The test requires the claimant to demonstrate that the practice being claimed as a right was a central part of the pre-contact society of

⁶³ See Damien Short, "Reconciliation, Assimilation, and the Indigenous Peoples of Australia", *International Political Science Review* 24: 4 (2003).

the person advancing the claim. Additionally, the claimant must demonstrate that the practice, custom or tradition was integral to the group's distinctive culture,⁶⁴ in other words, that it was truly a defining feature of that society. The court's rationale for this narrow approach was grounded upon the notion that because s.35 rights emerge from Indigenous peoples distinct relationships with the land prior to the arrival of Europeans, it is therefore to that pre-contact period they should look in identifying Aboriginal rights.⁶⁵ In the wake of *Van der Peet*, several authors have taken issue with the distinctive culture test itself and, at a broader level, the way that s.35 is being interpreted by the courts generally. There has, however, been a lack of attention paid to the gendered nature of this method of interpretation. This is an important area of concern that will be taken up throughout this project.

Pre-Contact

One of the primary aspects of the test that has been targeted by Indigenous legal scholars is its pre-contact requirement for legal recognition of an Aboriginal right.⁶⁶ Critics have suggested that the distinctive culture test locks Aboriginal rights in a distant past, overlooking those practices that have developed since European contact and failing to provide for the contemporary survival of Indigenous societies. John Borrows writes that under the distinctive culture test "Aboriginal is retrospective. It is about what was,

⁶⁴ *Van der Peet*, *supra* note 54, at 55.

⁶⁵ *Van der Peet*, *supra* note 54, at 60.

⁶⁶ See Barsh and Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand* *McGill Law Journal* 42 (1997), 993-1009. See also John Borrows "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" *University of Toronto Law Journal* 47:4 (1997).

'once upon a time,' central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities."⁶⁷ He fears that these pre-contact determinations of Indigeneity will become more important than what it means to be Indigenous today. On this view, the court's denial of legal protection for practices that were invented to adapt to changing environments is inadequate, and represses the legitimate exercise of the more fundamental and universal component of Aboriginal rights: that of taking appropriate measures to preserve their cultural and physical survival as distinct peoples.⁶⁸ Borrows also suggests that physical and cultural survival depend as much on attracting legal protection for contemporary activities as they do on gaining recognition for traditional practices.⁶⁹

For instance, the pre-contact aspect of the distinctive culture test fails to protect practices that developed after contact and many activities practiced by Indigenous women developed or changed after contact. Under early federal legislation regulating membership in Indigenous communities, Indigenous women were required to leave their communities when marrying non-Indigenous men. Upon marrying out, many Indigenous women left with their particular knowledges which then could not be passed on, and many of their children were also restricted from membership and participation in their ancestral communities. Non-Indigenous women, on the other hand, had the ability to enter and leave communities and pass on knowledges and practices to their children. So did Indigenous men. As many Indigenous women were exited from their ancestral

⁶⁷ Borrows, *Water and Rocks*, 43.

⁶⁸ John Borrows & Leonard Rotman. *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2d ed. (Markham: LexisNexis Butterworths, 2003), 40.

⁶⁹ Borrows, *Water and Rocks*, 63.

communities and disconnected from their traditional roles and responsibilities within society, there are multiple barriers that hinder their ability to demonstrate a practice's continuity since before European contact. Many Indigenous women were forced to evolve or adapt to new circumstances, and their traditional activities and responsibilities developed or changed accordingly. Some of these activities were practiced prior to European contact, and others developed as a result of European influences as Indigenous laws, traditions, customs, and practices have developed, grown, changed, and been invented to ensure physical and cultural survival.⁷⁰ Indigenous women have distinct economic and cultural practices originating in pre and post contact times, which have and continue to be integral to the survival of the community as a whole. Consider, for example, the significant social and economic role that Indigenous and Métis women played in the development and functioning of fur-trade societies.⁷¹

Integral-ness/Incidental-ness

The *Van der Peet* test's incidental/integral distinction is intended to help identify which elements of pre-contact Indigenous culture warrant constitutional protection. Its purpose is to ensure that the practice, custom, or tradition being claimed as a right is integral to the distinctive culture of the group asserting the right. This distinction is problematic because Indigenous rights, and processes surrounding their interpretation and implementation, are not neutral. The structure of the test tasks the courts with

⁷⁰ Borrows & Rotman, 36.

⁷¹ See Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670 – 1870*, (Winnipeg: Watson & Dywer, 1980).

adjudicating what is integral and what is incidental to Indigenous cultures. In other words, the distinctive culture test provides representatives of dominant Canadian society with the authority to make the distinction between which practices are integral and which ones are merely incidental to Indigenous culture. There are several problems inherent in assigning this task to a patriarchal settler society. These are primarily related to majority norms that have constructed women's practices as secondary across societies.

In allowing the court the authority to determine the nature and scope of Indigenous rights, we must remain conscious of the potential for the court to be influenced by patriarchal values and norms. As outlined by one of the dissenting judges in *Van der Peet*, "...one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be colored by the subjective views of the decision maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right."⁷²

As Sarah Song writes, processes of interpreting integral-ness can easily go awry in contexts where patriarchal members of a dominant society engage in projects of cultural interpretation of a minority groups. Song describes how in such processes, the culture of the dominant society is made invisible as "culture may well operate within evaluative frameworks already defined by the majority culture's own norms, which in some cases are patriarchal."⁷³ She considers how gender hierarchies within minority and

⁷² *Van der Peet*, *supra* note 54, at 257.

⁷³ Sarah Song, "Majority Norms, Multiculturalism, and Gender Equality," *American Political Science Review* 99: 4 (2005), 487.

majority societies influence and reinforce one another, arguing that the mainstream legal frameworks within which minority claims for accommodation are evaluated have themselves been informed by patriarchal norms, which in turn offer support for gender hierarchies within minority cultures.⁷⁴

From Song's perspective, minority appeals to mainstream institutions are problematic as these processes are rarely neutral, and are easily susceptible to majority (in many cases patriarchal) influences. The consequence is the continued oppression of Indigenous women, not only by patriarchy manifested within Indigenous societies, but also by patriarchal institutions and processes that they encounter when seeking remedy through mainstream systems. In the Canadian context, the conditions described by Song call for special vigilance towards the ways that dominant institutions and norms are implicated in the maintenance of gender inequality and oppression within Indigenous societies, and vice-versa. Her perspective also demonstrates how, within these processes, attention is centrally focused on the cultural distinctiveness of minority groups, often with little regard for the cultural context of the Court itself. For instance, in the Canadian context there is an occlusion of concern for the possibility that the Courts will be influenced by the capitalist and colonial interests that the State was founded by and for in their adjudications of Indigenous rights.

⁷⁴ Song writes: "Majority cultures have long shaped the gender practices of minority cultures. For instance, majority institutions directly imposed mainstream gender biases onto minority cultural communities, as in the case of the 1887 Dawes Act, which subverted Native American women's roles in agricultural work by making Native American men heads of household, landowners, and farmers... More common today and of greater concern for contemporary debates on multiculturalism are the indirect ways in which mainstream gender norms have resonated with and offered support for gender hierarchies in minority cultural communities." *Ibid.*, 474-476.

The distinctive culture test is designed in a way that deprives a practice, custom, or tradition of constitutional protection once it has been deemed incidental. There is no spectrum or scale to gauge the degree of significance that a practice, custom, or tradition might represent. The integral/incidental distinction is absolute, and without exception or qualification. As outlined in *Van der Peet*, "Where two customs exist, but one is merely incidental to the other, the custom which is integral to the [A]boriginal community in question will qualify as an [A]boriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as Aboriginal rights through a process of piggybacking on integral practices, customs and traditions."⁷⁵ Minor or incidental practices, customs, or traditions may be subject to exclusion because they are not defining features of the culture in question.

Together, the test's pre/post-contact and integral/incidental distinctions impose inherent limits on the exercise of Aboriginal and Treaty rights due to their direct potential to deny a right of constitutional protection. These distinctions are absolute, without qualification or exception. By limiting constitutional protection to those practices that meet the requirements of the test, the court's approach suggests that Indigenous rights which are not distinctive to a particular culture are not entitled to receive protection under s.35. As a result, the developing framework of s.35 has been shaped predominantly through reference to rights claims that have sought protection for specific cultural practices such as hunting,⁷⁶ fishing,⁷⁷ and logging.⁷⁸ While these activities aren't

⁷⁵ *Van der Peet*, *supra* note 54, at 70.

⁷⁶ *Kruger and al. v. The Queen*, [1978] 1 S.C.R. 104; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Horse*, [1988] 1 S.C.R. 187; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Powley*, [2003] SCC 43; *R. v. Blais*, [2003] SCC 44, *R. v. Morris*, [2006] SCC 59.

exclusively practiced by men, their relation to a group's cultural distinctiveness is often viewed as more explicit than Indigenous women's interests, which are all too often understood as social issues such as identity and membership, collective v. individual rights, matrimonial real property, sexual and physical violence, health, and poverty, among other matters which are also constricted in a similar fashion. As Val Napoleon writes, "the so-called 'Aboriginal women's issues' need to be contextualized within a larger political analytical frame. And, at the same time, the larger political issues are in dire need of a gendered analysis. Without such a dual political strategy, an appalling disconnect remains between the political rhetoric and the lives of Aboriginal women."⁷⁹

Violence Against Indigenous Women as an Issue of Rights

In this section, I seek to demonstrate that the court's culturalist method of interpreting Aboriginal and Treaty rights functions in a gendered way by centering cultural rights and restricting a range of potential Crown obligations and responsibilities under s.35. I argue that the judiciary's preoccupation with cultural distinctiveness has distracted from alternative purposes of s.35, such as ensuring the contemporary survival of Indigenous communities. In particular, I suggest that the basic kinds of oppression and violation that Indigenous women experience fall outside the culturalist framework of s.35, and that if we are to look to s.35 for any substantive protection of those rights, it

⁷⁷ *Sparrow*, *supra* note 42; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139 c 2 S.C.R. 723; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Van der Peet*, *supra* note 54; *R. v. Kapp*, 2008 SCC 41

⁷⁸ *R. v. Sappier*; *R. v. Gray*, [2006] SCC 54, [2006] 2 S.C.R. 686; *R. v. Marshall*; *R. v. Bernard*, [2005] SCC 43, [2005] 2 S.C.R. 220.

⁷⁹ Val Napoleon, "Aboriginal Feminism in a Wider Frame," *Canadian Dimension* 41: 3 (2007), 44.

needs to be implemented in a way that provides equitable protection to Indigenous men and women. A particularly salient example of the way s.35 has failed in its responsibility to protect the rights of Indigenous women can be seen in the heightened risks of violence and abuse faced by Indigenous women in Canada. Finally, I call for the need to implement fundamental measures to provide more substantive protection for Indigenous women's rights and in particular, the need to implement more proactive efforts to work towards addressing the violence and abuse faced by Indigenous women in Canada.

Some of the early material reviewed in this project spoke to the role of racism and sexism in acts of violence carried out against Indigenous women as inherent processes of colonialism. This racism and sexism takes the form of direct violence and discrimination and of implicit or systemic discrimination in the form of state policies and practices that have consistently failed to provide Indigenous women with adequate protection from violence.⁸⁰

The developing framework of s.35 rights has paid little attention to the contemporary needs, interests, and practices of Indigenous women, neglecting the disproportionately high rate of physical and sexual violence that they face and failing to provide constitutional protection for the particular aspects of Aboriginal and Treaty rights that are gendered. Of all the factors that could be considered in conceptualizing Aboriginal and Treaty rights, violence against Indigenous women is one of the most urgent and overarching issues of concern affecting Indigenous communities today.

Dialogue surrounding the systemic rights infringements that occur within this violence

⁸⁰ Amnesty International. *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, (2004), 3.

also requires attention to multiple interrelated factors such as socio-economic factors, education, disconnection from traditional lands and resources, and the denial of Indigenous sovereignty or self-government.

By limiting constitutional protection to those practices perceived as integral to cultural distinctiveness, the approach used by the court in *Van der Peet* suggests that Indigenous rights which fall outside the category of culture are not entitled to receive protection under 35(1). In particular, the courts have neglected to adequately consider notions of physical survival in addition to cultural survival in their conceptualization of Indigenous rights. Despite overwhelming evidence that Indigenous women face the most frequent and explicit rights infringements in Canada, the way the courts have interpreted s.35 suggests that it was not designed to provide protection for these types of rights.

As the 2004 Amnesty International Stolen Sisters Report indicates, violence against women, and certainly violence against Indigenous women, is rarely understood as a rights issue and is much more frequently described as a criminal concern or a social issue.⁸¹ The report states “Indigenous women have the right to be safe and free from violence. When a woman is targeted for violence because of her gender or because of her Indigenous identity, her fundamental rights have been abused. And when she is not offered an adequate level of protection by state authorities because of her gender or because of her Indigenous identity, those rights have been violated [...] when Indigenous women are targeted for racist, sexist attacks by private individuals and are not assured the necessary levels of protection in the face of that violence, a range of their rights are at

⁸¹ Amnesty International. *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, (2004), 4.

stake.”⁸² These include the right to life,⁸³ the right to be protected against torture and ill treatment,⁸⁴ the right to security of the person,⁸⁵ and the right to both sexual and racial equality.⁸⁶ While subsection (4) of s.35 states that the Aboriginal and Treaty rights referred to in subsection (1) are guaranteed equally to male and female persons, s.35(4) guarantees haven’t been much assistance to Indigenous women over the past 30 years. Many of the basic kinds of oppression and violation that Aboriginal women experience fall outside the culturalist framework developed by the courts to determine the existence of an Aboriginal or Treaty right. The disparity in degrees of protection that s.35 offers to Indigenous men and women only reinforces the systemic discrimination of Indigenous women that occurs at legislative and policy levels and makes them especially vulnerable to violence, exploitation and other forms of abuse.

In recent decades, NWAC has recorded the cases of more than 600 missing or murdered Indigenous women in Canada. As Amnesty International and NWAC point out, Indigenous women are five times more likely to be murdered than other women in Canada. Along Highway 16 in Northern British Columbia, more than 40 women have gone missing or have been found murdered since 1974. Almost all the victims on the Highway of Tears are Indigenous women. More than half of the women were under the age of 25 when they went missing. According to the Saskatchewan Association of Chiefs of Police website nearly 60% of all missing women in Saskatchewan are Indigenous

⁸² Amnesty International. *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, (2004), 4-5.

⁸³ *International Covenant on Civil and Political Rights (ICCPR)*, article 6.

⁸⁴ *Convention against Torture and other Cruel, Unhuman, or Degrading Treatment or Punishment*, article 2; *ICCPR*, article 7.

⁸⁵ *ICCPR*, article 9.

⁸⁶ *Convention on the Elimination of Discrimination against Women (CEDAW)*, article 2, *ICCPR*, articles 2(1), 3; *Convention on the Elimination of all forms of Racial Discrimination (CERD)*, article 2; *ICCPR*, 2(1).

women while only about 14% of the provincial population currently is Indigenous.⁸⁷ These numbers demonstrate that being Indigenous puts a woman at a far higher risk of being abducted. Indigenous women's organizations, government commissions such as the inquiry into the murder of Helen Betty Osborne and the Royal Commission on Aboriginal Peoples, Amnesty International and United Nations human rights bodies have all called on Canadian officials to address the marginalisation of Indigenous women in Canadian society and to ensure that the rights and safety of Indigenous people are respected and upheld by police and courts. Despite assurances to the contrary, police in Canada have continuously and unabashedly failed to provide Indigenous women with an adequate standard of protection.⁸⁸

The *Van der Peet* court's narrow focus on the preservation of distinct cultures eclipses alternate potential interpretations of s.35, including those that are concerned with the physical survival of Indigenous peoples. As Borrows writes, the courts must look to notions of collective physical and cultural survival, as well as specific Indigenous laws, customs, and practices in making determinations of Aboriginal rights.⁸⁹ Borrows further explains that the *sui generis* nature of Aboriginal rights suggests that they have two components, a theoretical and a material element: "The theoretical element is a constant, and concerns the underlying purpose for the right in question - namely the contemporary cultural and physical survival of Indigenous societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific. [...] With the

⁸⁷Saskatchewan Missing Person Statistics 1935 – 2012 Total Number of Females by Race: http://www.sacp.ca/missing/pdf/20120309/Female_Race.pdf

⁸⁸Native Women's Association of Canada. *UN Will Conduct Inquiry into Missing and Murdered Native Women in Canada*, Online Press Release available at: <http://www.nwac.ca/media/release/13-12-11>.

⁸⁹Borrows & Rotman, 335.

constitutionalization of Aboriginal rights and their recent description as *sui generis*, the courts must go beyond this older description and now protect both the specific practices of Indigenous people, as well as the physical and cultural survival of their societies."⁹⁰

Borrows indicates that Aboriginal rights exist first and foremost to protect the survival of the group, and are only incidentally concerned with the protection of specific practices.⁹¹

In addition, he confirms that many judgments, like *Van der Peet*, have not fully addressed the notion of contemporary survival as the universal component of Aboriginal rights.⁹²

While it is evident that the culturalist framework of s.35 fails to secure protection for Indigenous women's basic rights, some commentators might argue that many of the rights infringements Indigenous women experience exist in the non-Indigenous community as well and might be dealt with through other sections of the Charter or other social policies. Charter skeptics including feminists argue that policies are needed which address the social problems for all women, not just Indigenous or non-Indigenous women. This is an important argument as it highlights the need for consideration of intersectionality in analyzing Indigenous women's experiences. The link between multiple systems of oppression (patriarchy, racism, and capitalism) has been well established in feminist scholarship.⁹³ Indigenous rights are a distinct form of human rights at international law;⁹⁴ they arise through conditions of colonization and represent

⁹⁰ Ibid., 40-41.

⁹¹ Borrows, *Water & Rocks*, 63.

⁹² Borrows & Rotman, 40-41.

⁹³ See Razack, *Race, Space, and the Law: Unmapping a White Settler Society*, (Toronto: Between the Lines, 2002), 15. See also Rauna Kuokkanen, 'Globalization as Racialized, Sexualized Violence', *International Feminist Journal of Politics*, 10:2 (2008), 218.

⁹⁴ James Anaya, *Indigenous Peoples in International Law*, (New York: Oxford University Press, 2004), 7.

sites of resistance against the colonial oppressor.⁹⁵ Women's rights arise through conditions of patriarchy and represent sites of resistance to oppression based on their gender. Aboriginal women have rights by virtue of their Indigeneity and their gender; neither of these are replacements for the other.⁹⁶ While it is true that Indigenous women should also be able to seek protection as women under s.15 and 28 of the Charter, perspectives that deny the breadth of s.35 overlook the intersectionality of Indigenous women's identities and experience. Given the multiple and overlapping forms of oppression they face as women and as Indigenous peoples, these sections may not be enough. A comprehensive understanding of rights is therefore required because it requires attention to the various forms of oppression faced by Indigenous women because of their Indigeneity and their gender, among other factors.

The court in *Van der Peet's* culturalist interpretation obscures a wide range of potential rights that could, and should be incorporated into an expanded interpretation of s.35. While one could advance the argument that the protection of cultural rights is a way to address socio-economic factors that lead to many of the basic rights infringements faced by Indigenous women, cultural rights are not necessarily a fair and credible way to address social issues. They are far too broad and ambiguous to be the primary determinant of Indigenous rights, which require a much more precise footing. As Borrows argues, if Aboriginal rights are to have substantive protection from s.35, Canadian courts must infuse their understanding of Aboriginal rights with more

⁹⁵ Napoleon, *Aboriginal Feminism*, 4.

⁹⁶ Green, "Canaries in the Mines of Citizenship: Indian Women in Canada", *Canadian Journal of Political Science* 34, 4 (2001).

meaningful content that pays heed to Indigenous perspectives and understandings.⁹⁷ In effect, the judiciary in *Van der Peet* appears to have spent more time and energy on identifying the limitations of those rights than facilitating their expansion or development in accordance with Indigenous peoples' voices and visions.⁹⁸

Conclusion

From its origins, s.35 has been a gendered construction shaped by the agendas and priorities of Indigenous and non-Indigenous male leadership with little regard for Indigenous women's needs and interests in its construction and subsequent interpretation. This section has looked at how the benefits and limits of culture identified in Chapter One have manifested themselves in Canadian jurisprudence with very real effects for Indigenous peoples (and especially women). While the concept of culture has certainly proved useful in offering constitutional protection for a framework of rights that has emerged through the distinctive culture test and the jurisprudence assigning a cultural basis to Aboriginal, Treaty, and other rights, it becomes risky when essentialized as the only source of these rights, when it is operationalized by members of a dominant society, and when adequate space is not allowed for critique of the processes surrounding the identification and protection of cultural practices. I've identified some of the limits of using culture as a way of understanding Indigenous rights; that is, how the processes of interpretation that are part of the test could lead to gender bias, arguing that the processes by which centrality, integral-ness, and pre-contact are determined are easily tainted by

⁹⁷ Borrows & Rotman, 437.

⁹⁸ *Ibid.*, 436.

patriarchy within Canadian society and its norms. Furthermore, I've sought to demonstrate the risks of privileging culture as the only way of understanding Aboriginal, Treaty, and other rights, and have emphasized that culture is most useful when understood as one of many sources of inspiration for these rights. The links between the lessons identified in Chapter One and the implications and impacts of the court's approach to aboriginal rights are particularly explicit when considering the ways that the centrality of culturalist discourse has contributed to the emergence of a gendered framework of s.35 rights in the courts, mirroring in many ways the highly gendered processes of constitutional negotiation that followed from a similar privileging of culture discussed in Chapter One.

While the protection of key cultural practices is certainly an important aim, we should be cautious not to allow a focus on culture to obscure other potential determinants of Aboriginal rights. In conceptualizing Aboriginal and Treaty rights, including rights protected under s.35, it is imperative that greater attention is paid to the equality rights of Indigenous women as protected by s.35(4). In addition, the particular aspects of Aboriginal and Treaty rights that are gendered, such as activities traditionally practiced by Indigenous women, must be protected under this section. The overarching point here is that the court's emphasis on cultural practices obscures the need to provide protection against rights infringements that do not fall under the purview of culture. In a sense, however, the most important issue isn't which practices are central and integral to a culture, rather that any method of interpreting Indigenous rights which doesn't provide equal protection to the cultural and physical survival of Indigenous men and women is fundamentally racist, sexist, and flawed. Though cultural rights are certainly worth

preservation, of even greater importance is equality as a value that overrides any court's interpretation of cultural distinctiveness. And while the distinctive culture test is a misguided and incomplete way of interpreting Indigenous rights, it's important to remember that it remains a work in progress and there are many determinants of Indigenous rights aside from culturalist considerations that can help broaden our vision. It is to these I turn in the following chapter.

CHAPTER 3

Reconceptualizing Section 35

Introduction

Having recognized the limitations inherent the judiciary's culturalist interpretation of s.35, one might question why Indigenous peoples would want to bother engaging with it at all; this is an important inquiry. Indigenous peoples clearly have rights that are independent from their recognition by the Canadian state and anyone who wants to seek protection for their rights through more culturally appropriate means should certainly explore those options, constitutional law is just one of many tools to consider in seeking measures of justice.

I've chosen to engage with s.35 as a way of giving voice to Aboriginal and Treaty rights not because of a preference for engaging with Canadian law; I'm certainly aware of the limits and risks of rights frameworks as they relate to Indigenous peoples and communities and am familiar with questions surrounding the application of western rights traditions as mechanisms of "charter imperialism"⁹⁹- some of them have already been named in this project. The arguments against the application of rights discourse to Indigenous governments include the rejection of s.35 and other rights-based frameworks as neo-colonial extensions of Canadian sovereignty, and more philosophical critiques surrounding the relevance of a model of rights grounded in western liberal political traditions for Indigenous societies (such as arguments that posit individual rights as a

⁹⁹ Green, *Sawridge*, 187.

threat to collective rights).¹⁰⁰ While recognizing these as important and valid queries, I still maintain an ongoing desire to engage s.35 due to its potential to safeguard against rights infringements, and due to my own location and position as an advocate of Treaty rights, which has fueled my desire to work towards a strengthened Treaty partnership with the Canadian state and explore s.35's potential rather than discard it as irrelevant to Indigenous peoples' lives. A quote from my great-grandfather Victor Starblanket's brother, Gilbert Starblanket (who was also Chief Star Blanket's grandson), comes to mind here: "I used to hear my dad tell us never to let the treaties go, those are the most important things the crown gave us that we should keep them, never to be broken."¹⁰¹ Projects which engage s.35 have the potential to make significant contributions towards the retention and fulfillment of Treaty rights so long as such ventures maintain full regard for the experiences of Indigenous men and women and are undertaken in an equitable way. Otherwise, they could serve to narrow rather than broaden the range of obligations that emerge from Treaty relationships.

While s.35 along with its centralized focus on culture has evident limits (some of which were outlined above), it remains significant in its potential to give constitutional voice to Aboriginal and Treaty rights and to provide for their protection. While Indigenous peoples certainly had universal rights as well as specific rights related to their Indigeneity or Treaty status prior to repatriation, these rights did not enjoy substantial strength until the government's legal duty to honour them was legally confirmed and corresponding limits were placed on the government's capacity to infringe upon them.

¹⁰⁰ Ibid.

¹⁰¹ Personal Interview with Gilbert Starblanket and Merceline Alexson in Fort Qu'Appelle on Sept 15th, 1994. Cited in Starr-Spaeth, 88.

As mentioned earlier in this thesis, much of our current constitutional imagination with respect to s.35 has been shaped by cases where it has been invoked in defense of an Aboriginal or Treaty right. As a result, the way that s.35 has been interpreted has largely been through reference to practices that have come into conflict with Crown sovereignty.¹⁰² In many of these cases, the burden of identifying the existence of an Aboriginal or Treaty right has fallen to the person or people claiming the right. But as Borrows argues in his analysis of the implications of the *Calder* case, “there is a great need for a different level of legal analysis related to Aboriginal issues,” suggesting that this analysis can be extended further by focusing explicitly on Crown obligations.”¹⁰³ Borrows seeks to illuminate the reciprocal relationship between Indigenous rights and Crown obligations, which he considers to be “under-theorized and largely unrecognized.”¹⁰⁴ He encourages us to re-focus our constitutional vision around the relationship between Indigenous peoples and non-Indigenous Canadians in order to conceptualize rights that exist within those relationships. Highlighting the need for a more expansive understanding of governmental obligations relative to Aboriginal and Treaty rights, Borrows writes: “reconciliation [under s.35] is best obtained through a large, liberal, and generous conception of its constitutional purpose.”¹⁰⁵ On this view, future relationships can move beyond repressive domination if they build on mutuality and balance rather than domination and supremacy, and broadening our understanding of

¹⁰² For a useful site of reference on this topic, John Borrows has compiled an extensive list of governmental obligations recognized under s.35 that limit the Crown's sovereignty in his article "Let Obligations be Done" in Foster, H. et al. eds. *Let Right be Done*, (Vancouver: UBC Press, 2007).

¹⁰³ Borrows, *Let Right be Done*, 204-205.

¹⁰⁴ *Ibid.*, 205.

¹⁰⁵ *Ibid.*, 207.

governmental obligations that exist in relation to Indigenous peoples is a vital part of this process.

Treaties as Key Sources of Inspiration for Section 35

In further developing our current interpretation of s.35, legal and political projects aimed at deriving a more comprehensive understanding of Aboriginal and Treaty rights should recognize the importance of protecting cultural rights but should give equal consideration to alternate sources of inspiration as well. These can take many forms, and can range anywhere from grassroots sources to Indigenous legal principles, to international legal principles on Aboriginal rights.

Given my personal location as a direct descendant of a Treaty Four signatory, the most appropriate source of inspiration for the purposes of this analysis is to look at Treaties as a relevant means of informing a broader vision of rights empowered by s.35. The perspectives of various Treaty elders are reviewed in addition to sources that include compilations of existing records of oral history. Much of my own perspective has been informed by conversations with my mother, inspired by the old ones before her who passed down their histories, worldviews, and traditions with regards to the Treaty. It was my ancestors' passion for the Treaty that inspired my mother to write a Master's thesis on Treaty Four in an effort to document "the elders' testimony [which] contradicted what was written in the books."¹⁰⁶ Her thesis examines the Treaty Four negotiations from a foundation of cultural and historical research that includes testimony, oral histories, and

¹⁰⁶ Starr-Spaeth, 13.

perspectives of Elders in the aim of documenting our family's perspectives on the treaties. I feel privileged to learn about her conversations with Elders in our community and to have her share their words and teachings with me over the years.

For many (but not all) Treaty Indians, the Numbered Treaties are regarded as one of the first and most fundamental instruments of Canadian confederation. In the aim of considering the ways that Treaties can inform and be enacted through s.35, I therefore begin by examining the meaning and contemporary implications of a central and fundamental aspect of the Treaties – the sovereign, nation-to-nation relationship recognized through Treaty negotiations and confirmed by the Treaties themselves. After reflecting on the nature and character of those sovereign relationships and other interpretive principles underlying Treaties, I turn to an exploration of some of the ways that Treaty commitments could be implemented to broaden the contemporary Canadian legal and constitutional framework. I do this by considering the content and implications of specific rights and commitments negotiated in Treaties, such as the rights to education, livelihood, and multiple others that fall beyond the culturalist framework crafted by the courts in interpreting s.35. Finally, I end by describing alternate potential sources of inspiration for an expanded vision of s.35, such as relevant international laws and principles.

Treaty Federalism

The Numbered Treaties, by nature, represent agreements between sovereign nations. Pursuant to the Royal Proclamation of 1763, treaties were entered into between sovereign and independent Indigenous nations with their own pre-existing laws,

principles, and forms of government. In taking treaty, signatories and the First Nations they represented did not relinquish their right to nationhood or their right to govern themselves. In fact, the treaties created a framework for the Crown and First Nations to be full partners in the administration of justice.¹⁰⁷ Treaty First Nations agreed to maintain peace and good order in their relations with settlers so that we could live in co-existence with one another with respect to and without interference in each other's laws, governments and ways of life. This understanding of treaties, as nation-to-nation agreements, pre-dates the arrival of settlers and remains relevant for many Indigenous peoples despite the Crown's refusal to recognize the sovereignty of Indigenous nations. In addition to this recognition inherent in the process of Treaty-making, several commitments made by the Crown during Treaty negotiations evidence the recognition of the sovereign authority and jurisdiction of Indigenous nations.¹⁰⁸ As outlined by the FSIN, "The Indian understanding of the Crown commitment to recognize and respect the sovereignty is in part reflected in meaning attributed to the promise that 'a silver medal', 'a suitable flag', and 'a suitable suit of clothing', would be provided under Treaty."¹⁰⁹ For Treaty Indigenous peoples, these symbols represented the establishment of a permanent nation-to-nation relationship.¹¹⁰

¹⁰⁷ Henderson, "Implementing the Treaty Order" in R. Gosse, J. Henderson & R. Carter, eds. *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, (Saskatoon: Purich Publishing, 1994), 53.

¹⁰⁸ Federation of Saskatchewan Indian Nations (FSIN), *Preliminary Views on Implementing Treaties Between the Crown and the First Nations of Saskatchewan in Treaties 3, 4, 5, 6, 8, & 10*, (1997), 3.

¹⁰⁹ "According to the elders the images of the persons on both sides of the Medal represented two sovereigns, the Queen and the Treaty Indian Nations. The image of two persons shaking hands symbolized the undertaking of the Treaty sovereigns to create and maintain a relationship of peace, friendship and alliance with one another. [...] the promise of a suitable flag signified the commitment of the British sovereign to commit her power to come to the defence of the Indian nations, if those Indian nations were ever attacked by another power. [...] the suit symbolized a Crown commitment to recognize, complement, and support the sovereign authority of the chief [Okimaw] with that of Her own." Ibid., 3-4.

¹¹⁰ Ibid., 16.

While the Crown has betrayed its Treaty commitments to Indigenous peoples in many ways and could be viewed as turning its back on Indigenous peoples' understanding of the Treaty relationship, there hasn't been much question amongst Treaty Indigenous peoples that the Treaties represented an agreement between respective sovereign nations. The following excerpt from the 1978 FSIN Report clearly articulates this position: "For our people, there has never been any doubt [...] that the Treaties recognized and confirmed the right of our nations to continue exercising sovereign authority and jurisdiction of our nations. Neither has there been any doubt among our people that Treaties created and preserved for Indian Nations, within the national legal and political framework of Canada, constitutional space within which they could continue to exercise their sovereign authorities and jurisdiction on their lands and territories."¹¹¹ This perspective challenges dominant Canadian narratives used to depict the character and nature of Treaty First Nations, which have a tendency to suggest that Indigenous peoples signed away their sovereignty and jurisdiction for specific rights and entitlements outlined in Treaties. However, in the face of this position, there is an increasing number strong and empowering Treaty Indians working tirelessly to challenge colonial narratives surrounding Treaties and to overcome the prevailing ignorance amongst Canadian society regarding the nature and content of Treaties. Far from viewing the Treaties as a thing of the past, generation after generation of Treaty Indians continue to take it upon themselves to put these relationships into better perspective by foregrounding Indigenous knowledges as means of informing the development and evolution of Treaty-based frameworks through which to address contemporary social, economic, legal, political,

¹¹¹ Federation of Saskatchewan Indian Nations (FSIN), *Preliminary Views on Implementing Treaties Between the Crown and the First Nations of Saskatchewan in Treaties 3, 4, 5, 6, 8, & 10*, (1997), 4.

and philosophical dilemmas. By deconstructing the prevailing Canadian view of Treaties and centering a more relational understanding, we can start to re-conceptualize the foundation underlying Treaties and work towards constructing increasingly strong and reciprocal relationships on a more balanced foundation.

Spirituality Surrounding Treaties

My understanding of the spirit and intent of Treaty 4, informed by Cree oral and written histories, knowledges, and beliefs, centers around the importance of reciprocity and responsibility within relationships. In thinking and talking about Treaties, many of the teachings that I've encountered and reflected upon have emphasized the importance of learning about the spiritual foundations underlying the Treaty-making process as a starting point. Because the Treaty-making process was rooted in Indigenous peoples' spiritual traditions, beliefs, and ceremonies, those who seek to discuss Treaties should be willing to think carefully about the particular spiritual laws and principles of the Indigenous people who took part. For instance, at the beginning of the Federation of Saskatchewan Indian Nations' (FSIN) Treaty Elders Forums, Elder Jimmy Myo stated: "You cannot begin to understand the treaties unless you understand our cultural and spiritual traditions and our Indian laws."¹¹² What this means to me, is that discussions around Treaty Four necessitate full regard for the spiritual laws and traditions of my family and ancestors in addition to awareness surrounding how that spirituality relates to concepts such as creation, land, and relationships.

¹¹² Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that our Peoples will One Day be Clearly Recognized as Nations*, (Calgary: University of Calgary Press, 2000), 1.

In an interview with my mother, my great-grandfather, the late Victor Starblanket, talked about the spiritual significance of ceremony and prayer as part of the Treaty-making process, “the white man used the bible to swear to keep the treaties and the Indian used, the pipe and the tobacco, he swore to take an oath with it.”¹¹³ The incorporation of the pipe ceremony and sweetgrass, among other things, brought the Creator into the Treaty process and anchored this process in the spiritual traditions of the Crown and Indigenous Nations, thereby ensuring that Treaty partners would speak honestly and make good of their promises. Elder Jim Ka-Nipitehtew makes a similar analogy, referring to Treaties as constituting a framework of sacred promises between parties to Treaty and the Creator: “(the pipe stem) is the bible of the Cree which he held, swearing upon it in response that no one would ever be able to break the promises he had made to us.”¹¹⁴

The use of spiritual symbols by the Crown and Indigenous Nations represented a way of symbolizing the sacredness of the commitments being made to one another. Because the Creator had been brought into Treaty-making processes, Treaties were regarded as sacred and perpetual undertakings that would help guide the relationship between Indigenous peoples and newcomers. As outlined by the FSIN, the “spiritual component” of Treaty-making represented an understanding that the Treaty relationship would be governed by “the principles of justice, fairness, generosity and equity as

¹¹³ Starr-Spaeth, 82. Citing Personal Interview held at Victor Starblanket’s home on the Star Blanket Reserve on Feb 22, 1994.

¹¹⁴ Freda Ahenakew & H.C. Wolfart, eds. *The Counselling Speeches of Jim Ka-Nipitehtew*. (Winnipeg: University of Manitoba Press, 1998), 113.

reflected in the core teachings of each of their respective spiritual systems”.¹¹⁵ By forging a relationship grounded in their respective spiritual traditions, the Crown and Indigenous nations undertook to have these principles guide the evolution and implementation of their Treaty relationship, and ensuring that those principles inform any contemporary analysis of Treaty rights is an elementary part of this process. The most relevant point here, however, is that legal and political projects aimed at interpreting or defining Aboriginal and Treaty rights inherently necessitate the perspectives of Indigenous men and women on the nature and intent of those rights, complete with a comprehensive understanding of the spirituality surrounding their negotiation. Otherwise, we run many of the risks outlined in previous chapters regarding dominant interpretations of minority rights and the dominant group’s culture being made invisible in adjudications of Indigenous rights.

Implementing Treaties between the Crown and Indigenous Nations through s.35

The Court has considered relatively few s.35 Treaty rights cases in interpreting the scope and modern status of rights provisions in the numbered Treaties. These questions have typically arisen, as in Aboriginal rights cases, in relation to charges under provincial legislation prohibiting hunting or fishing activities that are being claimed, in defense, as Treaty rights. In the 1996 hunting rights decision in *R. v. Badger*, the Court outlined two key interpretive principles to be used by the judiciary in interpreting Treaties: first, any ambiguity in Treaties should be resolved in favour of the Indians;

¹¹⁵ FSIN, *Preliminary Views*, 6.

second, Treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward Indigenous peoples.¹¹⁶ According to the court in *Badger*, a Treaty represents an “exchange of solemn promises between the Crown and various Indian nations.” In addition, Treaties are to be regarded as sacred agreements in which exchanges of promises were made and mutually binding obligations created,¹¹⁷ with the assumption that the Crown intended to fulfill its promises towards Indigenous peoples. Finally, any limitations restricting Treaty rights must be “narrowly construed”, while the Crown bears the onus of establishing proof of extinguishment of a Treaty right. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish Treaty rights.¹¹⁸ In *Badger*, the court also outlined some distinguishing features of Treaty rights (in comparison to Aboriginal rights):

Aboriginal rights flow from the customs and traditions of the native peoples [...] they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.¹¹⁹

The court has clearly acknowledged that the Crown does not have the right or authority to unilaterally determine or define the nature of Treaty relationships or of the rights flowing from Treaties. The Crown and provincial governments do, however, have

¹¹⁶ See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at 36; *Simon*, *supra* note 68 at 402; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at 142-43.

¹¹⁷ See *Sioui*, *supra* note 107, at 1063; *Simon*, *supra* note 68 at 401.

¹¹⁸ See *Simon*, *supra* note 68, at 406; *Sioui*, *supra* note 107, at 1061; *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, at 404.

¹¹⁹ *Badger*, *supra* note 68, at 76.

the ability to infringe upon a Treaty right provided that the infringement furthers a compelling and substantial legislative objective and is consistent with the special fiduciary relationship between the Crown and Indigenous peoples.¹²⁰ When considering a Treaty, the court must take into account the context in which the Treaties were negotiated, concluded and committed to writing. As written documents, the Treaties recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement. As a result, the words in the Treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by signatories at the time of Treaty-making.¹²¹

The interpretive principles outlined above demonstrate that the court has recognized the need to re-conceptualize the Treaty relationship and Treaty rights in a way that gives equal weight to all the information available from both the written and oral histories and traditions of our respective nations. And since the Crown's narrative of the nature and contents of these Treaty relationships has already occupied so much space in Canadian history and culture, one of the ways of restoring balance to Crown-Indigenous relationships is to deconstruct those narratives and their unilateral determinism, while foregrounding the perspectives of Treaty elders and Treaty peoples in a comprehensive way. In doing so, we can work towards challenging common misconceptions about the Treaties, and allow future descendants of Canadian and Indigenous nations to educate themselves on the spirit and intent of Treaties as understood by all Treaty partners.

¹²⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 13.

¹²¹ *Ibid.*, at 52.

Elders' historical understandings of Treaties were passed down from signatories to generations to come after them so that their descendants could work towards the fulfillment of Treaties and ensure their associated Treaty rights would continue to be protected. As our traditional teachers, the elders who have had this knowledge passed down to them and have consequently been informed of the Treaty process constitute the principal source for what occurred at the time the Treaty was signed. This way of learning is integral to the transmission of knowledge through cultural and spiritual traditions. Their words provide invaluable insight and should be regarded as central to projects aimed at understanding Indian perspectives on the Numbered Treaties. Reflecting on these conversations helps me understand the original spirit and intent of Treaty Four, which reminds me that my ancestors envisioned the treaties as documents that would be able to adapt and evolve in conjunction with changing conditions. They didn't necessarily want us to defer to their interpretations, but deploy our own skills to learn about and advocate for Treaty implementation in a good way.

Survival as Key to Treaties

"The government made promises that 'we'll take care of your basic needs in addition to the treaty.'"¹²²

Many of the interviews and conversations with elders suggest that previous to the negotiation of the numbered Treaties, Indian leaders knew that the incursion of Europeans onto their lands was inevitable, and entered into Treaty negotiations as a way of mediating relations with newcomers and ensuring the well-being of future generations. For example, my great-uncle, the late Chief Irvin Starblanket, spoke of Star Blanket's

¹²² Starr-Spaeth, 85. Citing personal interview with Gerry Starr in Regina, Sask on Aug 9, 1997.

intentions in relation to the Treaty: “The old people knew that we were developing, it was a natural evolution yet at the same time, they knew that the white people were coming in great numbers and they knew they were going to have a lot of influence, they were going to impact on the way we lived. That's why Star Blanket tried to get his children educated in the white man system so they could compete; he knew that their way of life was going to change. He was trying to prepare cause he knew.”¹²³ Star Blanket anticipated forthcoming conditions and sought to ensure the survival of his band in the face of these new challenges through the realization of Treaty commitments relating to Indigenous education and livelihood.

Star Blanket was adamant that his children should have access to educational and training opportunities, and sought to secure education that would enable the combination of traditional learning practices with western teachings offered by newcomers. Education was particularly important as it would ensure that subsequent generations, given adequate opportunities, would gain the skills required to learn the spirit and intent of Treaties and how to implement and adapt them to meet the demands of the time. Additionally, education would help reconcile traditional learning and knowledge with the imported skills and knowledge needed to survive in a new reality in which Indigenous peoples and settlers could coexist. As my Mosom Gerry Starr said (when asked about Star Blanket's thoughts on the Treaty):

The government of the day made a lot of promises in the form of treaty. They honestly believed that they would be followed through because in their most sacred way, they smoked the peace pipe and the white man by the same token

¹²³ Ibid., 88. Citing personal interview with Irvin Starblanket at the Star Blanket Band Office on Feb 18th, 1994.

swore on the bible that these things would be honored. He thought that there were probably more good things than bad things, that's why he agreed to sign it, learn a little bit about the white man's ways and living and so on. But at the same time he wanted his people to retain their traditions, that is the values, like religious value, how to hunt, sharing. The government made promises that 'we'll take care of your basic needs in addition to the treaty.'¹²⁴

Mosom's perspective describes an entirely different view than the Treaty terms outlined in Morris' written transcripts. He emphasizes that concern for the wellbeing and survival of future generations was a central motivation for Indigenous people entering into Treaty relationships. One way of ensuring this was to ensure that Indigenous children should have equal access to educational and training opportunities that would enable the combination of traditional learning practices with western teachings offered by newcomers. "Under the spirit and intent of the treaties, education was to help reconcile traditional learning and knowledge with the imported skills and knowledge needed to survive and prosper in a new reality in which Indigenous and newcomer cultures would coexist in harmony."¹²⁵ These Treaty principles bring to mind a more expansive understanding of Treaty rights, specifically one that includes adequate resources dedicated to Indigenous-controlled educational institutes, in addition to providing the necessary resources for the incorporation of Indigenous pedagogies and curriculums into mainstream institutes to allow for the coalescence of culturally-relevant and Western-European ways of learning, knowing, and sharing knowledge.

¹²⁴ Ibid., 85. Citing personal interview with Gerry Starr in Regina, Sask on Aug 9th, 1997.

¹²⁵ Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant*, (Saskatoon: Saskatchewan Institute of Public Policy, 2007), 46.

The terms regarding education in Treaty Four read as follows: “Her majesty agrees to maintain a school on the reserve, allotted to each band, as soon as they settle on said reserve, and are prepared for a teacher.”¹²⁶ This particular clause highlights the need for stable funding for the delivery of education in both urban and rural environments. As the young Indigenous population grows across Canada, both on and off reserve, it is particularly important to re-conceptualize dominant standards regarding Indigenous education and begin to broaden our vision to one that includes comprehensive support for both urban and community-based education delivery.

Community-based education is widely regarded as a best practice in the delivery of Indigenous post-secondary programming, yet remains notoriously underfunded and often requires rural Indigenous communities with already limited socio-economic means to cover the bulk of the costs. While there are some supports in these areas, they are generally in the form of grants or short-term funding initiatives that require Indigenous applicants to make their way through lengthy administrative obstacle courses to access funds. Even then, the temporary nature of these grants or top-up programs leaves them open to loss and limitation, and their sustainability becomes dependant on the current priorities and generosity of the province, state, institution, or funder rather than being founded on a genuine commitment to education as treaty right. For instance, the Canadian state has always refused to acknowledge post-secondary education as a treaty right and prefers to frame post-secondary assistance to Indigenous communities as a top-up initiative despite the fact that a main issue pursued by the Qu’Appelle Indians of

¹²⁶ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, (Saskatoon: Fifth House Publishers, 1991), 333.

Treaty 4 was to have “an Indian institution established where they [could] receive higher education, so that they [could] become Indian Agents, clerks, and professional men.”¹²⁷

This is another key treaty principle that directly inspires a more comprehensive understanding of Aboriginal rights, one that includes our ancestors' views that the education rights they were negotiating would secure them access to education at all levels and in perpetuity in exchange for use of the land.¹²⁸

Because the negotiation of Treaties represented a change in Indigenous peoples' relationship to land afforded by the Creator, treaty relationships were guided by and forged through promises made to the Creator. For example, Treaty Elders explain that when agreements are made to the Creator through ceremonies conducted in accordance with the laws governing them, the resulting promises, agreements, or vows are irrevocable and inviolable.¹²⁹ In entering into Treaty agreements through the Creator, Indigenous peoples therefore sought to ensure that the agreed-upon promises would be regarded as living, breathing documents that would continue to evolve in perpetuity.

Many of the topics of issues raised or addressed through Treaty negotiations rotated around a concern for prospects for success and equal opportunity for children and those yet unborn, education is just one manifestation of this will. Some of the additional provisions Treaty signatories sought to secure for future generations include, but are not limited to: Indigenous nationhood, sovereign authority to govern a full range of social,

¹²⁷ Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, (Montreal: McGill University Press, 1990), 257.

¹²⁸ Treaty 7 Elders and Tribal Council, Walter Hildebrandt, Sarah Carter, & Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7*, (Montreal: McGill-Queen's University Press, 1996), 302.

¹²⁹ Treaty Elders of Saskatchewan p.6

economic, legal, spiritual, cultural, and educational institutions,¹³⁰ rights to lands, water and resources,¹³¹ the right to education,¹³² the right to health care services free of cost,¹³³ socio-economic rights¹³⁴ including a Crown commitment to provide shelter and assistance in times of hardship and destitution,¹³⁵ annuities,¹³⁶ police/military protection from Canadian partners, the right to hunting, fishing, trapping and gathering,¹³⁷ exemption from war service,¹³⁸ tax exemption,¹³⁹ the right to cross international boundaries,¹⁴⁰ and the right to livelihood,¹⁴¹ among many others. These are some of the original matters that were discussed at treaties; because signatories were negotiating on behalf of a collectivity the treaty commitments that ultimately emerged may appear to focus principally on collective interests, however it's important to note that the dynamic nature of treaties requires their implementation or understanding within a broad and generous frame that allows space for differences within collectives or individual interests to be eligible for

¹³⁰ Federation of Saskatchewan Indian Nations *Indian Treaty Rights*, (1979), 11. & FSIN, *Preliminary Views*, 9.

¹³¹ FSIN, *Preliminary Views*, 14.

¹³² Treaty 7 Elders & Tribal Council, *The True Spirit and Original Intent*, 302: Records of oral promises made during treaty negotiations indicate that treaty signatories believed the education rights they were negotiating would secure them access to education at all levels and in perpetuity in exchange for use of the land. In addition, the educational clauses included in the text of Treaty Four not only clarifies the Crown's responsibility to provide a physical building and instructors to Indian communities, but also specify the Crown's financial responsibility towards the provision of education to Indians whenever they desired such services.

¹³³ *Ibid.*, 17-18: The annual treaty day was established in part to review the progress of the medical services delivered, on an annual basis, to ensure these were kept up to date with changing medical practices.

¹³⁴ FSIN, *Indian Treaty Rights*, 19-20, 23-24.

¹³⁵ FSIN, *Preliminary Views*, 11.

¹³⁶ *Ibid.*, 13.

¹³⁷ *Ibid.*, 25.

¹³⁸ *Ibid.*, 28.

¹³⁹ *Ibid.*, 27.

¹⁴⁰ *Ibid.*, 31.

¹⁴¹ FSIN, *Preliminary Views*, 15: *Pim atchi Hoo Win* is a Cree concept, translated in part as "making a living" or "livelihood". According to the FSIN, it is the Cree teachings and Cree laws governing this concept which chiefly informed the desire of the Cree nations to seek Treaty based guarantees that the ability of their people to "make a living" and the right of the nation to economic security would be assured into the future.

protection as Treaty rights. While the conflicts between individual and collective rights have been well documented in many literatures over the years and while this incommensurability might seem overwhelming, it is not insurmountable. Indigenous women's rights are responsibilities of both Indigenous and non-Indigenous governments. It is important that collective movements, including those geared at treaty implementation, remain mindful of the needs of all their members in developing and executing their political agendas to avoid further "constitutionalizing the patriarchy" or perpetuating the gendered nature of constitutional interpretation presented in Chapter One of this thesis.

The above treaty principles elucidate the disconnect between Elders' understandings of the spirit and intent of the numbered Treaties and the way that Aboriginal and Treaty rights have been interpreted in Canadian jurisprudence under s.35. They help identify the gaps in rights and obligations that result from strictly culturalist interpretations of Aboriginal and Treaty rights. They also demonstrate how these omissions manifest into highly gendered patterns of oppression; for instance, the provision surrounding police protection certainly hasn't been applied equitably to Indigenous men and women, particularly with regard to Indigenous women engaged in sex work or living within limited socio-economic situations. On the contrary, there's an emerging body of discourse and dialogue surrounding the role law enforcement has played in perpetuating the disappearances and murders of Indigenous women in Canada through its refusal to take proactive efforts in contexts that explicitly warranted them.¹⁴²

¹⁴² The Missing Women Commission of Inquiry has released four reports that form part of the study commission aspect of its mandate. The reports are available online at

Similar observations can also be drawn for the rest of the provisions outlined above; consideration of each helps to broaden our vision with respect to s.35 by incrementally expanding the conceptual framework that shapes dominant interpretations of Aboriginal and Treaty rights. There are several benefits that emerge from projects aimed at foregrounding Indigenous perspectives on treaties and re-centering these treaty principles in Canadian legal and political institutions; first, they prompt broader and more relevant justification for Aboriginal and Treaty rights under s.35; second, they facilitate conceptual movement towards First Nations jurisdiction over areas discussed at treaty; and third, they contribute to the deconstruction of Canadian narratives on settlement and development, thus embodying several important ways of engaging in collective resistance.

The treaty principles articulated above merely demonstrate some of the commitments that were agreed upon in the negotiation of Treaty Four; they are not representative of a universal perspective. The purpose of outlining them is to inspire the reconceptualization of dominant understandings of Treaty relationships and Treaty rights, both as a means of overcoming the prevailing ignorance about Treaties and to guide their implementation in a way that not only ensures their protection under s.35, but also builds on and broadens the existing constitutional structure. It's important to note that efforts to mobilize towards legal or political pursuits that occur within a treaty framework should proceed with regard for the implications outlined in the first two chapters of this thesis regarding the gendered implications of processes of cultural definition, meaning-making, representation, and rights adjudication. Indigenous women's rights are the responsibilities

of Indigenous and non-Indigenous governments, and efforts to provide for their protection must be equitably informed by the population whose rights are being defined.

It's also important to note that the numbered Treaties are simply one place to look in considering an expanded framework of Aboriginal and Treaty rights under s.35, and that there are many other sources of inspiration that are also worthy of consideration. For instance, in conceptualizing an expanded framework of s.35 rights, it could also be helpful to look at international human rights mechanisms such as the Declaration on the Rights of Indigenous Peoples, ILO Convention 169, and other international human rights doctrines to illustrate the emerging set standards and norms that states are expected to meet in relation to Indigenous nations.

International Legal Principles and Standards

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) describes the individual and collective rights of Indigenous peoples. It sets out a number of principles to guide relationships between Indigenous peoples and States, such as equality, partnership, good faith and mutual respect. After taking an active role in the early stages of the UNDRIP's construction, Canada withdrew its support under the direction of a Conservative government that initially deemed the UNDRIP unconstitutional and incompatible with Canadian law, until the eve of a federal election when his government moved to endorse it. The UNDRIP outlines several standards on Indigenous peoples' (and especially women's) rights that could inform a broader conceptualization of the state's obligations; for instance:

Article 7:1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 21:1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security; 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22:1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration; 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Although the UNDRIP isn't a legally binding document, it is part of a developing body of international law and legal norms on Indigenous peoples' rights that can breathe life into the Canadian constitution and other domestic rights mechanisms. It challenges the imperialist doctrines that many narratives of settlement and development rely upon and, perhaps most pertinent to the current discussion, it guarantees all rights equally to Indigenous men and women and encourages states to take measures to "combat prejudice and eliminate discrimination."

Another international human rights instrument that doesn't exercise a specific focus on Indigenous women's rights but illuminates the breadth of Indigenous peoples' rights generally is *the International Labor Organization's Convention 169*. This convention is a legally binding international human rights instrument which outlines basic standards to guide to States' relationships with Indigenous peoples, including

protection against discrimination, standards for consultation with Indigenous peoples, a number of social and cultural, and land rights, and protection for traditional ways of life. Although Canada hasn't ratified the Convention, it could certainly stand to benefit from such a commitment. States that have signed on to the Convention are required to respect the “integrity of the values, practices and institutions of Indigenous peoples, and to support the “full development of these peoples' own institutions”. Moreover, given “the vulnerable situation of Indigenous and tribal peoples”, Article 4 of the Convention calls for special measures to be adopted to safeguard the persons, institutions, property, labour, cultures and environment of these peoples.¹⁴³ While not legally binding on Canada, *ILO Convention 169* ultimately highlights the need for all states to engage in participatory and consensual relationship building with Indigenous peoples, and calls for a commitment to “good faith negotiation and co-operation” within those relations as the minimum standard for states to meet.

And finally, another relevant international Indigenous rights instrument that Canada has not yet ratified and that deals specifically with the issue of violence against women is the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)*. The Treaty requires states to condemn, prevent, and punish violence against women, and obliges them to undertake progressively specific measures to deal with the root causes of gender-based violence, including the provision of specialized shelters and social services for the victims of violence; education and training programs for all those involved in the administration of justice; the gathering of statistics and other relevant information relating to the causes,

¹⁴³ *International Labour Organization (ILO) Convention No. 169.*

consequences and frequency of violence against women; and specialized programs aimed at countering social and cultural patterns of conduct "which legitimize or exacerbate violence against women."¹⁴⁴ Taken together, the terms of the *Convention of Belém do Pará* recognize the right of every woman to be free from violence and reflect the need for states to adopt comprehensive strategies to prevent and eliminate it. Canadian ratification of this Treaty would strengthen Canada's legal and institutional framework for protecting Indigenous women, and would demonstrate a more dedicated commitment to protecting Indigenous women's rights than has been evidenced in Canadian history.

Canada is also already signatory to many conventions that could help inspire a more comprehensive understanding of Aboriginal rights, such as the *Convention on the Elimination of All Forms of Discrimination Against Women*. In late 2011, the United Nations Committee on the Elimination of Discrimination against Women announced that it would conduct an inquiry into the failures of Canadian governments to take effective action in connection with the disproportionately high amount of deaths and disappearances of Indigenous women. International legal standards such as those outlined in the Convention also provide valuable inspiration in understanding violence against Indigenous women as an issue of rights, which in turn could prompt a greater level of protection for those rights.

Taken together, the provisions in the above international rights instruments reflect some of the minimum standards surrounding Indigenous women's rights that states are increasingly expected to adhere to, and speak to the expansive nature of Indigenous rights

¹⁴⁴ *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women* (Convention of Belém do Pará), article 8.

recognized beyond the realm of culture at international law. In conceptualizing Aboriginal and Treaty rights, then, it's worthwhile to consider the broad spectrum of social, political, economic, spiritual and cultural rights outlined in this chapter rather than limiting our view by conceptualizing Indigenous rights solely through the lens of culture, (as they have been interpreted and constructed under the s.35 framework). I'm not suggesting that cultural rights aren't worthy of protection, but am arguing that the privileging of culturalist discourse in Indigenous law and politics can eclipse other concerns that Indigenous peoples, and women especially, might have to bring forth from more grassroots movements.

In my mind, looking to Indigenous perspectives on Treaties involves the deconstruction of Canadian narratives on the nature, intent, and contemporary role of the numbered Treaties, and requires the reconstitution of those relationships from a perspective that incorporates the legal and political principles of Treaty partners. Insofar as Treaties are understood by many Indigenous and non-Indigenous peoples to represent nation-to-nation undertakings, it follows that Treaty relationships should also be governed, to the extent jointly deemed appropriate, by applicable international law conventions and principles. It is in this way that I have sought to re-conceptualize the relationship between the Canadian state and Indigenous peoples to derive a more comprehensive and equitable understanding of Aboriginal and Treaty rights, but it's also important to note that this is not the only manner through which such a project can be approached. Indigenous people interested in pursuing liberatory and transcultural projects within nation-to-nation frameworks can also refer to a host of other legal principles and conventions that might be more suited to their particular location and analysis.

CONCLUSION

When I began writing this thesis, I had no idea that this much of it would end up being about treaties. Thinking about ways to look beyond culture helped me understand the breadth of my own interests and responsibilities as an urban Indigenous woman and realize that the themes I've been exploring in this project, namely Culture, Treaties, Gender and Narrative, do not need to be compartmentalized as separate areas of consideration. The multiple and overlapping rights infringements that Indigenous women face on a daily basis are not the result of isolated or mutually exclusive phenomena, but merit analysis within a generous legal and political frame. From its beginnings as a paper on culture and identity, this project has come full circle as I've gradually learnt to incorporate my own Treaty perspective into the discussion in a measured way. Reflecting on the positive effects of recognizing and affirming First Nations jurisdiction in the areas discussed at Treaty has allowed me to conceptualize ways that I could utilize my learning to give back to my own community, even if I remained geographically dislocated from them, by emphasizing the constitutional powers of Treaty First Nations and envisioning future ways that I, and all Treaty partners could advocate for the recognition and protection of a broad spectrum of Treaty rights under constitutional law.

Ultimately, the focal point of this project has been the way that culture, as a marker of Indigenous difference, operates in Canadian case law on Aboriginal and Treaty rights. I have proposed that, insofar as it fails to provide equitable protection to Indigenous men and women, the concept of culture functions more as a containment strategy with respect to Indigenous rights and sovereignty than facilitating any genuine

form of reconciliation with respect to the Indigenous-Crown relationship. I've argued that the judiciary's culturalist focus on Indigenous rights has removed attention from both the illegitimacy of Crown sovereignty in addition to a host of rights and obligations that fall outside the realm of culture but have the distinct potential to inform movements towards reconciliation and the construction of stronger, more equitable partnerships. These relationships would be more consistent with the spirit and intent of Treaty relationships as understood by the perspectives of Treaty Indigenous peoples.

In the jurisprudence on Aboriginal and Treaty rights, culture is treated as the central facet of Indigenous life that is worthy of protection and promotion under s.35. Cultural rights are either said to be a way of providing protection for other facets of Indigenous peoples' experiences, or these facets are treated as residing within the purview of the Charter or other social policies. Having established that concept of culture can be intensely empowering for collective movements but also dangerous for some people (particularly women) within those movements when it becomes to privileged, essentialized, or gratuitously deployed. I've sought to identify contexts where the culturalist position remains popular in practice and poses a particular problem for Indigenous women in Canada. Given my location within a Treaty framework, one of the overarching contexts where culturalist tendencies have demonstrated themselves to be extremely salient and particularly problematic is the way in which a broad spectrum of Crown obligations, as they have been recognized by the state and adjudicated by the courts, have been reduced to a narrow framework of cultural rights. At a broader level, I have sought to consider the multiplicity of ways that Treaty relationships have been reduced to social, political, economic, cultural, and environmental realities that my

ancestors expressly sought to avoid through the establishment of Treaty partnerships. Again, the frequent and extreme rights infringements that Indigenous women in Canada face come to mind here. With regards to the current government's track record on Indigenous rights, it's particularly easy to identify the multiplicity of ways that Canada has turned its back on its obligations to Indigenous women in recent years.

Instead of seeking to contribute to the protection or expansion of Indigenous peoples rights, the current Conservative government has actively taken measures to reduce the mechanisms and services that are available to women seeking protection for their rights. Since 2006, the Conservatives have cut funding to the Court Challenges Program, the Law Commission of Canada, the Canadian Human Rights Commission, and the Status of Women Canada, compelling the closure of 12 of its 16 regional offices and the closure of the National Association of Women and the Law's office. Significant funding cuts have also been made to other programs and organizations aimed at working towards women's equality, in particular those devoted to women's advocacy, justice, research, and social policy development. As point of reference, the Ad-Hoc Coalition for Women's Equality and Human Rights compiled the following list of Women's and Indigenous organizations that have had their funding cut by the federal government in recent years:

- Aboriginal Healing Foundation (cuts affected several healing centres that focused on providing support to abused women, such as the Native Women's Shelter of Montreal)
- Action travail des femmes
- Alberta Network of Immigrant Women
- Assembly of First Nations
- Association féminine d'éducation et d'action sociale (AFEAS)
- Canadian Child Care Federation

- Canadian Research Institute for the Advancement of Women (CRIAOW)
- Centre de documentation sur l'éducation des adultes et la condition féminine
- Child Care Advocacy Association of Canada
- Child Care Resource and Research Unit, SpecialLink
- Conseil d'intervention pour l'accès des femmes au travail (CIAFT)
- Elspeth Heyworth Centre for Women Toronto (funding cut by CIC in December 2010)
- Feminists for Just and Equitable Public Policy (FemJEPP) in Nova Scotia
- First Nations Child and Family Caring Society
- International Planned Parenthood Federation
- Kelowna Women's Resource Centre (KWRC)
- Marie Stopes International, a maternal health agency, has received only a promise of "conditional" funding IF it avoids any & all connection with abortion
- MATCH International
- National Aboriginal Health Organization
- National Association of Women and the Law (NAWL)
- Native Women's Association of Canada
- New Brunswick Coalition for Pay Equity
- Older Women's Network
- Ontario Association of Interval and Transition Houses (OAITH)
- Ontario Coalition for Better Child Care
- Réseau action femmes
- Réseau des Tables régionales de groupes de femmes du Québec
- Riverdale Immigrant Women's Centre, Toronto
- Sisters in Spirit
- South Asian Women's Centre
- Status of Women Canada, (mandate also changed to exclude "gender equality and political justice" and to ban all advocacy, policy research and lobbying)
- Tri-Country Women's Centre Society
- Womanspace Resource Centre (Lethbridge, Alberta)
- Women and Health Protection
- Women for Community Economic Development in Southwest Nova Scotia (WCEDSN)
- Women's Innovative Justice Initiative – Nova Scotia
- Workplace Equity/Employment Equity Program

This list is important as it highlights the deeply embedded and systemic nature of racism and sexism currently at play within the Canadian state and its institutions. Yet

despite its expansive reach, it still doesn't exhaust the myriad ways that the Conservatives' ideological hostility towards Indigenous peoples' and women's rights has manifested itself over the past 5 years.

While the state has historically acted as one of the primary oppressors of Indigenous peoples in Canada under the direction of any political party, the Conservatives have made some particularly noteworthy blows to Indigenous peoples and women's rights since getting elected in 2006. First, there was the cancellation of the Kelowna Accord - a groundbreaking piece of consensus between Indigenous leaders, First Ministers and representatives of the federal government that would have committed \$5.1 billion dollars to education, employment, and social services for Indigenous peoples.¹⁴⁵ Specifically, the Accord included \$1.8 billion for education, \$1.6 billion for housing, water, and other infrastructure needs, \$1.315 billion for health services geared towards reducing infant mortality, youth suicide, childhood obesity, and diabetes by 20% in five years and by 50% in ten years and also to double the number of health professionals by 2016 (from the 2005 level of 150 physicians and 1,200 nurses), and \$200 million for economic development.¹⁴⁶ Through these funding arrangements and other commitments aimed at reducing the socio-economic gap between Indigenous peoples and non-Indigenous Canadians, the various provisions of the Accord signalled a shift away from the state's persistent disregard for the wellbeing of Indigenous peoples and communities, towards an arrangement that would have seemingly supported and

¹⁴⁵ The high number of Indigenous leaders who took part in this process is noteworthy. Of 147 participants, 41 were federal, 10 provincial officials participated as observers, and 90 were from Indigenous organizations, associations, foundations, councils, and other entities.

¹⁴⁶ *Undoing the Kelowna Agreement* (CBC News Online, Nov. 21, 2006)

better reflected Indigenous peoples' own visions of wellness. By discarding the Accord as “having been drafted on the back of a napkin on the eve of the election,”¹⁴⁷ the Conservatives abandoned this shift in direction for Indigenous-state relations in a way that was incredibly dismissive of the time, energy, and work that many Indigenous representatives, community members, and elders dedicated to its creation.

Another incredibly damaging blow to Indigenous women’s rights came in 2010 when the Conservatives failed to renew \$10 million in federal funding to Sisters in Spirit - NWAC's research, education, and policy initiative that has compiled data on over 583 missing and murdered Indigenous women over the past 30 years. Instead, funds were allocated to different policing initiatives to help "all Canadians", along with new funding rules that expressly prohibit the use of the *Sisters in Spirit* name in any proposed projects on missing and murdered Indigenous women, or the use of federal funds to continue work on the database, or the use of funds for future research and policy work in this area. These funding cuts and the new funding guidelines reflect both the state's ongoing impunity towards the rights of Indigenous women, as well as its apparent will to further invisibilize violations of those rights. Additionally, by dedicating funding in this area to future justice initiatives administered by the RCMP rather than Indigenous women's organizations, the state is only further entrenching its colonial status rather than seeking to reconcile or transform it in any substantive way.

And yet another instance that comes to mind when contemplating Canada’s lip service style of governance with respect to Indigenous relations involves Harper’s failure

¹⁴⁷ *B.C. questions Conservative Commitment to First Nations Deal* (CBC News Online, 11 January, 2006)

to renew \$350 million in federal funding to the Aboriginal Healing Foundation (AHF) less than two years after his apology for the Canadian government's role in administering the Indian Residential School system. Since its inception in 1998, the AHF has financed community-based Indigenous programs that address abuse suffered in Canada's residential school system. As a result of the funding cuts in 2010, many community-based programs that were previously funded by the AHF have been forced to close their doors. While this thesis isn't about the Conservatives, these cuts bear consideration as they shed light on the recent environment that has shaped Indigenous peoples' relationships with and movements within the Canadian state. They also demonstrate how coalescing forces of colonialism and capitalism continue to fuse together to sustain the federal government's agendas and priorities at the direct expense of Indigenous women. There are many other examples that could be offered, funding cuts are just an immediate and tangible example of how the state's ideological hostility towards Indigenous women's rights manifests itself through explicit and ongoing efforts to limit protection for those rights.

The courts have stated that the purpose of recognizing Aboriginal and Treaty rights under s.35 of the Constitution Act is to reconcile the pre-existence of Indigenous societies with the sovereignty of the Crown. For s.35 to truly aspire to this reconciliatory purpose, Canadian governments must engage in proactive efforts to meet Canada's obligations flowing from Treaty relationships and international legal principles and frameworks described above, among other considerations. In developing s.35, these various obligations and commitments will hopefully inform the implementation of a more comprehensive framework of rights, particularly with respect to Indigenous women's

needs and aspirations. At the very least, consideration of the various sources of inspiration outlined above will help us understand the limits of conceptualizing rights strictly through the lens of culture. Many of the cautions outlined in Chapter One are applicable here. First, cultural rights are worthy of protection so long as they aren't essentialized as the central source of Aboriginal and Treaty rights and so long as they are understood as one of many sources of inspiration for s.35. Second, strategies that seek to gain protection for non-cultural rights by articulating or framing them through the lens of culture aren't useful over the long term as they function to reinforce and further narrow the framework of rights being defined (by risking their indefinite exclusion as non-cultural rights). In other words, if culture is to be used strategically, it is best employed as a specific short-term strategy, in addition to the other noted recommendations. Next, if culture is to be used as a source of rights (among many), it is best that processes of cultural identification, definition, and meaning-making are taken up by the group whose rights are being defined rather than members of a dominant, colonizing society. And finally, projects that invoke culture to serve legal or political agendas should proceed in a fashion that's mindful of its implications and risks for Indigenous women, and should pursue these agendas in ways that are open to input, change, adaptation, and critique, especially from the margins of their movements.

While the court's treatment of s.35 has been limited by many factors, there are many alternate sources of rights that could inspire new pathways much like the ones explored in this chapter. Part of what this could look like, or how it could begin to occur is for Canada to honor the Crown's commitments made during Treaty negotiations with Indigenous peoples, among other commitments and obligations including ones that

emerge from International legal principles and frameworks. At a broader level, the implementation of Treaty relationships could facilitate greater respect, honour, recognition, responsibility and sharing between Treaty partners, in the aim of working towards a more equitable future for Indigenous peoples. First, however, it is important that we work to overcome the prevailing ignorance about the nature and intent of Treaty relationships by utilizing and giving equal weight to all information available from the written and oral histories and traditions of Treaty nations and to the voices of Indigenous men and women. Treaties shouldn't be discarded or cast aside as relics of colonialism's past, they should be looked to as one of the first and most fundamental instruments of Canadian confederation that will continue to develop with time, much like a living tree. It's important to regard this constitutional tree as one that lives forever and will keep evolving as long as the sun shines, the rivers flow, and the grass grows.

The FSIN has written “the Elders are often heard saying that some day soon young Indians will be educated enough to properly articulate the true spirit and intent of our treaties”. My aim in this project has been to build upon and accentuate positive Treaty principles to serve as a guiding light in talking about s.35. By bringing more positive Treaty principles to light, we can start to reconceptualize our understanding of s.35 and envision a more balanced vision of Aboriginal and Treaty rights in working towards reconciliation and the implementation of mutually beneficial relationships. Part of what this could involve is a stronger understanding of which aspects of Indigenous-Crown relations aren't being considered in dominant constructions of s.35. As discussed throughout this project, the way that s.35 has been interpreted by to date has been predominantly through reference to practices that are understood as being part of

Indigenous peoples' distinct cultures, and especially those that have come into conflict with Crown sovereignty or jurisdiction. But there are also many ways of living that have successfully been able to co-exist with each other, and that have the potential to broaden our understanding of the nature, content, and implications of Indigenous-Crown partnerships.

Efforts to re-inspire or inspire new pathways in Canadian jurisprudence on Aboriginal and Treaty rights under s.35 should not be carried out uncritically, however. In this thesis, I've sought to emphasize that efforts aimed at re-envisioning or broadening the Court's culture-based interpretation of Aboriginal and Treaty rights under s.35 are valuable and worthwhile, particularly because of the inherent limitations and gendered nature of the current method of interpretation. However, projects aimed at bringing these narratives, Treaty-based or otherwise, to the forefront must be approached with attention to who is informing and shaping them, at whose exclusion, and the contexts in which they emerge and occur.

When I use the term re-inspiring, I mean bringing Indigenous narratives on matters ranging from treaties, to law and politics, to conceptions of wellness and survival back to the forefront when thinking about rights-based responses to contemporary social and political concerns such as violence against women. This will help create a s.35 framework that extends beyond the court's privileging of culture, which I've argued acts as a containment strategy with respect to Indigenous women's rights. In other words, the recentralization of specific Indigenous narratives, Treaty-based and otherwise, can be a useful strategy to deconstruct and see past static and narrow treatments of culture that

have the potential to reinforce or sustain gendered systems of oppression. At a broader level, strengthened Treaty relationships including Indigenous jurisdiction over the areas covered at Treaty have the potential to give greater voice to Indigenous women and their rights within Canadian legal and political institutions. And finally, at a personal level, I've found the act of re-centering my roots in my work and writings to be incredibly valuable to my own strength and sense of self in the face of static and sometimes exclusionary treatments of culture.

As I wrote in the introduction, this thesis doesn't seek to provide expert analyses or answers but represents a starting point for many complex inquiries that are already unfolding in my mind, heart, and spirit. It's also not intended to be prescriptive or have universal applicability, but represents my contribution to a growing body of literature and dialogue surrounding the need for more substantive and expansive ways to protect against rights infringements (with particular regard to the high levels faced by Indigenous women). This is work that I will continue to do for my family, community, and generations to come. While I'm glad to near the completion of this stage in my learning journey, it really does feel like the beginning.

Kinanâskomitinawaw

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