A Taxonomy of Aboriginal Rights

Brian Slattery, Osgoode Hall Law School of York University

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Edited by Hamar Foster, Heather Raven, and Jeremy Webber

Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights
Section 35(1) of the Constitution Act, 1982 recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." The provision is heavily indebted to the recognition of Aboriginal rights in the landmark case Calder et al. v. Attorney-General of British Columbia, which was decided by the Supreme Court of Canada a decade earlier. However, the sparse wording leaves open a number of fundamental questions. What precisely are Aboriginal rights and what is their legal basis? What relationship, if any, do they bear to one another? Do all Aboriginal peoples have the same set of rights or does each group have its own specific set?

These are difficult questions, which do not allow for simple or pat answers. Since 1982, the Supreme Court of Canada has delivered a series of decisions that furnish many important pieces of the puzzle. However, the pieces still lie scattered about in a somewhat disconnected fashion. This chapter attempts to fit them together and fill in the gaps, so as to provide a coherent taxonomy of Aboriginal rights in Canada. The chapter deals first with the important distinction between specific and generic rights, which emerges from the Court's judgments in R. v. Van der Peet and Delgamuukw v. British Columbia. It then discusses the main types of generic rights and their relationship to specific rights, arguing that generic rights provide the foundation for specific rights and supply the criteria that govern them. Generic rights are not only uniform in character but also universal in distribution. They comprise a set of fundamental rights held by all Aboriginal groups in Canada.

Specific and Generic Rights
In the Van der Peet case, the Supreme Court of Canada recognized a class of Aboriginal rights whose nature and scope are determined by the particular circumstances of each specific Aboriginal group. The Court held that in order to constitute an Aboriginal right protected by section 35(1) of the
Constitution Act, 1982, a present-day activity of an Aboriginal group must be based on a practice, custom, or tradition that was integral to the distinctive culture of that specific group in the period prior to European contact. To qualify as being “integral” to a particular culture, a practice has to be a central and significant part of the culture— one of the things that makes the society what it is. Aspects of the society that are only incidental or occasional do not qualify. They must be defining and central features of the society. A practice has to be a characteristic element of the culture; however, it does not need to be unique or different from the practices of other societies. So, for example, fishing for food may constitute an Aboriginal right, even though it is practised by many different societies around the world.

The rights recognized in Van der Peet are what we may call specific rights— rights whose existence, nature, and scope are determined by factors that are particular to each Aboriginal group. Specific rights differ from group to group and sometimes take quite specialized forms. For example, in R. v. Gladstone, the Supreme Court of Canada held that the members of the Heiltsuk people of British Columbia had an Aboriginal right to trade in herring spawn on kelp (a kind of seaweed) and that this trade might be conducted on a commercial basis. The Court’s holding was based on historical and anthropological evidence showing that the Heiltsuk had engaged in such a trade as an integral part of their culture prior to contact with Europeans. The right was obviously one that few other Aboriginal groups would be able to claim. It was rooted in the distinctive practices of the Heiltsuk nation and, indeed, was confined to trade in a single, rather exotic, commodity.

In Van der Peet, the Supreme Court expressed the view that all Aboriginal rights were specific rights. However, this proved to be a premature generalization. It was quietly discarded by the Court in Delgamuukw, which was decided the following year. The hereditary chiefs of the Gitxsan and Wet’suwet’en peoples asserted Aboriginal title to a large tract of land in northern British Columbia, a claim that was contested by the British Columbia government. In argument before the Court, the parties to the case advanced strikingly different conceptions of Aboriginal title, which effectively raised the issue whether Aboriginal title was a specific right, grounded in factors particular to each Aboriginal group, or a right of a more generalized nature. The Aboriginal claimants maintained that Aboriginal title was equivalent to an inalienable fee simple, arguing that it was a right of a fixed and uniform character, similar in this respect to standard estates known to the English law of real property. According to this view, the nature of Aboriginal title did not vary from group to group, depending on their particular culture or customs, but was the same in all cases. As such, Aboriginal title did not constitute a specific right but was a right of a standardized character.
In reply, the governmental parties maintained that Aboriginal title to land was simply a collection of particular Aboriginal rights to engage in specific culture-based activities on the land. In other words, Aboriginal title had no definite character—it was just a bundle of specific Aboriginal rights, each of which had to be proven independently. At best, Aboriginal title gave a group the right to the exclusive use and occupation of the land in order to exercise these specific rights. The group would not be entitled to use the land for any purposes it wanted. It would be limited to exercising the rights in its particular bundle. In effect, in order to engage in a certain activity on the land, a claimant group would have to prove that the particular activity in question satisfied the Van der Peet test—that it was an element of a practice, custom, or tradition that was integral to the group's distinctive society at the time of European contact. Thus, according to the governmental argument, the content of Aboriginal title was variable. It differed from group to group, depending on the group's particular cultural practices at the time of European contact. By contrast, according to the Aboriginal parties, the content of Aboriginal title was uniform and did not depend on the group's historical practices. If a group had Aboriginal title, it could use the land in any way it wanted, subject only to a restriction on transfers to third parties.

In its judgment, the Supreme Court of Canada rejected the governmental argument and adopted a position close to that of the Aboriginal parties. Chief Justice Antonio Lamer stated that Aboriginal title is governed by two principles. Under the first principle, a group holding Aboriginal title has the right to the exclusive use and occupation of the land for a broad range of purposes. These purposes do not need to be grounded in the group's ancestral practices, customs, and traditions. So, a group that originally lived mainly by hunting, fishing, and gathering would be free to farm the land, raise cattle on it, exploit its natural resources, or use it for residential, commercial, or industrial purposes. Nevertheless, according to the second principle, land held under Aboriginal title is subject to an "inherent limit." This prevents the land from being used in a manner that is irreconcilable with the fundamental nature of the group's attachment to the land, so as to ensure that the land is preserved for use by future generations. In other words, the group may not ruin the land or render it unusable for its original purposes.

The crucial point to note is that the Supreme Court treats Aboriginal title as a uniform right, whose basic dimensions do not vary from group to group according to their traditional ways of life. All groups holding Aboriginal title have fundamentally the same kind of right, subject only to minor variations stemming from the inherent limit. In effect, the Court recognizes that Aboriginal title is not a specific right of the kind envisaged in Van der Peet or even a bundle of specific rights. Aboriginal title is what we may call
a *generic right* – a right of a standardized character that is basically identical in all Aboriginal groups where it occurs. The fundamental dimensions of the right are determined by the common law doctrine of Aboriginal rights rather than by the unique circumstances of each group.

In short, in *Van der Peet* and *Delgamuukw*, the Supreme Court of Canada recognized two different kinds of Aboriginal rights – specific rights and generic rights. Specific rights are rights whose nature and scope are defined by factors pertaining to a particular Aboriginal group. As such, they vary in character from group to group. Of course, different Aboriginal groups may have similar specific rights, but this is just happenstance. It does not flow from the nature of the right. By contrast, generic rights are rights of a uniform character whose basic contours are established by the common law of Aboriginal rights. All Aboriginal groups holding a certain generic right have basically the same kind of right. The essential nature of the right does not vary according to factors peculiar to the group.

The distinction between specific and generic rights gives rise to a number of important questions. First, is Aboriginal title the sole instance of a generic right or are there others? Second, what is the precise relationship between generic and specific rights? Are they completely distinct or do they overlap in some fashion? Third, are generic rights not only *uniform* in character but also *universal* in distribution – that is, are they held by all Aboriginal groups or only by certain groups and not others? Fourth, are generic and specific rights both grounded in historical practice? If so, are they open to evolution and change? The remainder of this chapter will be devoted to answering these questions.

**The Range and Character of Generic Rights**

Is Aboriginal title the only example of a generic right? If we review the *Van der Peet* decision in the light of *Delgamuukw*, we come to a surprising conclusion. Recall that in *Van der Peet* the Court held that Aboriginal groups have the right to engage in activities based on the practices, customs, and traditions that were integral to their distinctive cultures at the time of European contact. To be “integral” to a particular culture, a practice must be a central and significant part of the culture, one of the things that makes the society what it is. When we stand back from this decision, we can see that it has the effect of recognizing another generic right: namely, the right of Aboriginal peoples to maintain and develop the central and significant elements of their ancestral cultures.

At the abstract level, this right has a fixed and uniform character. Each and every Aboriginal group has the same general right – to maintain the central and significant aspects of their culture. Of course, what is “central and significant” varies from group to group, in accordance with their particular circumstances, so that at the concrete level the abstract right blossoms into
a variety of distinctive specific rights – a matter we will come back to later. However, the point to grasp here is that the abstract right itself is uniform. As such, it constitutes a generic right – what we may call the right of cultural integrity.

Are there still other generic Aboriginal rights? A little reflection shows that the answer is yes. A tentative list of generic rights follows, which includes the two rights already identified:

- the right to conclude treaties
- the right to customary law
- the right to honourable treatment by the Crown
- the right to an ancestral territory (Aboriginal title)
- the right of cultural integrity
- the right of self-government

This list is not necessarily complete, and some rights (such as the right of cultural integrity) may need to be subdivided. However, it includes the most important generic rights tacitly recognized in Supreme Court of Canada cases so far. As the jurisprudence evolves, further generic rights may come to light. We will say a few words about each of the rights listed, enough to give a taste of the subject.

The Right to Conclude Treaties
Aboriginal peoples have the right to conclude binding treaties with the Crown and to enforce the Crown's treaty promises in the courts. At Canadian common law, the treaty-making capacity of Aboriginal groups has a fixed and uniform character that does not vary from group to group. The capacity of the Blackfoot is no greater or less than that of the Mi'kmaq or the Innu. All have the same power to negotiate treaties with the Crown, which are protected under section 35(1) of the Constitution Act, 1982. As such, the right to conclude treaties constitutes a generic Aboriginal right. The right of Aboriginal peoples to treat with the Crown is matched by the Crown's right to treat with Aboriginal peoples under the royal prerogative. In both cases, the power flows from the inter-societal law of Aboriginal rights, which forms part of the common law of Canada. Since the time of Confederation, the Crown's power in this area has vested primarily in the federal government under section 91(24) of the Constitution Act, 1867.

The right to conclude treaties is one of the most important of the generic rights held by Aboriginal peoples, with roots reaching back to the earliest days of European settlement on the continent. It is a highly distinctive right, without exact parallels in other spheres of Canadian constitutional law. Although provincial governments may conclude agreements with the federal government, these agreements have a quite different character and do
not hold the constitutional status and protection enjoyed by Aboriginal treaties.\textsuperscript{20}

The Right to Customary Law
Aboriginal peoples have the right to maintain and develop their distinctive systems of customary law within an all-embracing federal framework that features multiple and overlapping legal systems and levels of government.\textsuperscript{21} The introduction of French and English laws into the colonies founded by the European powers did not have the effect of wiping out the customary laws of Aboriginal groups, which continued to operate within their respective spheres. As Justice Beverley McLachlin observes in \textit{Van der Peet}:

The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement.\textsuperscript{22}

The right of Aboriginal peoples to maintain their own laws is a generic right, whose basic scope is determined by the common law doctrine of Aboriginal rights. It does not differ from group to group or from area to area. The Mohawk and Haida peoples are equally entitled to enjoy their respective systems of customary law. Nevertheless, the legal systems protected by the generic right obviously differ in content. Mohawk laws are not the same as Haida laws.

Aboriginal systems of customary law have a status similar to that of provincial legal systems. At Confederation, the \textit{Constitution Act, 1867} provided that the laws in force in the provinces would continue in force, subject to the legislative powers of the federal and provincial governments.\textsuperscript{23} Existing bodies of provincial law were carried forward into the new federation, and the power to amend or repeal those laws was distributed between the two main levels of government.

The Right to Honourable Treatment by the Crown
Aboriginal peoples have the right to the fiduciary protection of the Crown and the right to the performance of particular fiduciary duties flowing from that relationship.\textsuperscript{24} In \textit{R. v. Sparrow}, the Supreme Court of Canada stated:

\begin{quote}
[T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government
and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.25

Although the Court was referring to section 35(1) of the Constitution Act, 1982, subsequent Supreme Court of Canada decisions have made it clear that the Crown's fiduciary responsibility is not confined to this context but accompanies and controls the discretionary powers that the Crown historically has assumed over the lives of Aboriginal peoples.26 As Chief Justice McLachlin noted in Mitchell v. M.N.R.,27 from early days the Crown asserted sovereignty over Aboriginal lands and underlying title to the soil; from this assertion "arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."

At the most abstract level, the right to honourable treatment by the Crown is a generic right, which vests uniformly in Aboriginal peoples across Canada. The point is underlined in Haida Nation v. British Columbia (Minister of Forests), where Chief Justice McLachlin held that the honour of the Crown is always at stake in its dealings with Aboriginal peoples.28 The Crown has the general duty to determine, recognize, and respect the rights of Aboriginal groups over which it has asserted sovereignty. This, in turn, binds the Crown to enter into treaty negotiations with Aboriginal peoples for the purpose of reconciling their rights with the advent of Crown sovereignty and to achieve a just settlement. Pending the conclusion of treaties determining these rights, the Crown has a duty to consult with Aboriginal peoples whenever it undertakes actions that may affect their asserted rights and also to accommodate these rights where necessary. In situations where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. This generally requires the Crown to act with reference to the Aboriginal group's best interest in exercising its discretion over the specific Aboriginal interest at stake.

In effect, then, the generic right to honourable treatment gives rise to a range of more precise rights and duties that attach to specific subject matters in particular contexts. As Justice Ian Binnie explains in Wewaykum Indian Band v. Canada,29 not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature, and this observation holds true of the relationship between the Crown and Aboriginal peoples. It is necessary to focus on the particular obligation or interest that is the subject matter of the dispute and to inquire whether the Crown had assumed sufficient discretionary control in relation thereto to ground a fiduciary obligation.

In the context of Indian reserves, for example, the nature and intensity of the Crown's fiduciary duties differ depending on whether the subject
matter relates to the creation of a new reserve or the protection of an exist­ing reserve. When the Crown sets out to create a new reserve in lands where the Indian beneficiaries have no prior treaty or Aboriginal claims, its fiduciary duties are limited to the basic obligations of loyalty and good faith in the discharge of its mandate, providing full appropriate disclosure, and acting in the best interest of the beneficiaries. However, once a reserve has been created, the Crown's fiduciary duties expand to include the protection and preservation of the Indian band's interest from exploitation.

The Right to an Ancestral Territory (Aboriginal Title)
Aboriginal peoples have the right to the exclusive possession and use of lands occupied at the time of sovereignty. Aboriginal title exists as a burden on the Crown's underlying title and may not be transferred to third parties; it may be ceded only to the Crown. As seen earlier, Aboriginal title has a uniform legal character, which does not vary from group to group according to their traditional practices and customs. At the same time, Aboriginal title provides a framework for the internal operation of the distinctive land laws of each Aboriginal group and so allows for quite varied regimes of property rights and interests. Aboriginal title is similar in this respect to the title held by the provinces to lands within their boundaries under section 109 of the Constitution Act, 1867. In principle, the provincial title is a uniform one and gives provinces the same range of rights to their lands and resources, subject to any specific constitutional provisions. However, land laws vary from province to province and generate distinctive regimes of property rights and interests. The property system of Québec is very different from that of Manitoba.

The Right of Cultural Integrity
As seen earlier, in Van der Peet, the Supreme Court of Canada recognizes that Aboriginal peoples have the right to maintain and develop the central and significant elements of their ancestral cultures. The generic right of cultural integrity gives birth to a host of specific rights that differ from group to group in accordance with their distinctive practices, customs, and traditions, such as the right to hunt in a certain area, the right to fish in certain waters, the right to harvest certain natural resources, the right to practise a certain religion, the right to speak a certain language, and so on. Despite such differences, these specific rights fall into a number of broad classes, which relate to such subjects as livelihood, religion, language, and art. These classes constitute generic cultural rights of intermediate generality.

For example, the right to practise a traditional religion arguably qualifies as an intermediate cultural right because spirituality is normally a central and significant feature of Aboriginal societies. Viewed in the abstract, this
right has a uniform scope, which does not vary from one Aboriginal people to another. However, the particular activities protected by the right differ from group to group, depending on the distinctive religious practices and beliefs of the group. In effect, then, the generic right of cultural integrity harbours an intermediate right to practise a traditional religion, which, in turn, shelters a plethora of specific religious rights vested in particular Aboriginal groups.

Consider another example. Aboriginal groups arguably have the constitutional right to use their ancestral languages and to enjoy the educational and cultural institutions needed to maintain and develop them. The language of a group is normally an integral feature of its ancestral culture and an important means by which the culture is manifested, nurtured, and transmitted. So the right to use an Aboriginal language has a strong claim to qualify as a cultural right of intermediate generality. According to this approach, the abstract dimensions of the right are identical in all Aboriginal groups where it occurs; however, it gives rise to specific rights to speak and transmit particular Aboriginal languages.

Perhaps the most important intermediate right is what we may call the right of traditional livelihood. A fundamental principle informing the Crown's acquisition of sovereignty was that an Aboriginal people could continue to gain its living in its accustomed manner. Justice McLachlin identified this right in her dissenting opinion in the Van der Peet case.\textsuperscript{33} Citing the terms of treaties and the Royal Proclamation of 1763,\textsuperscript{34} she observed:

These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding — the Grundnorm of settlement in Canada — was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them.\textsuperscript{35}

This viewpoint later attracted the Supreme Court of Canada's support in \textit{R. v. Marshall}.\textsuperscript{36} In the course of interpreting a Mi'kmaq treaty of 1760, Justice Binnie appealed to a fundamental precept of British imperial practice in North America, which held that when an Aboriginal people passed under Crown sovereignty it was entitled to continue to sustain itself in the manner it had done previously. As Justice Binnie noted dryly, this principle was not wholly altruistic:
Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent. The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. 37

The right of livelihood recently attracted detailed discussion in R. v. Sappier; R. v. Gray, where Justice Michel Bastarache held that the weight of authority supports the view that section 35 protects the means by which an Aboriginal society traditionally sustained itself. 38 He went on to explain that the doctrine of Aboriginal rights arises from the simple fact of prior occupation of the lands now forming Canada. So the Court's focus should be on the nature of this prior occupation. This involves an inquiry into the traditional way of life of a particular Aboriginal community, including its means of survival.

In summary, the right of cultural integrity forms a pyramid with three levels. At the top is the abstract right itself, which takes the same general form in all Aboriginal groups. Beneath this level lies a tier of intermediate generic rights that relate to distinct subject matters such as livelihood, religion, language, and the like. At the bottom rests a broad range of specific rights that differ from group to group in accordance with their particular cultural characteristics.

The Right of Self-Government
Aboriginal peoples have the right to govern themselves within a federal constitutional framework characterized by a division of powers among various orders of government. 39 This right finds its source in the British Crown's recognition that it could not secure the amity of the indigenous nations over which it claimed sovereignty without acknowledging their right to manage their own internal affairs. As Justice Lamer noted in R. v. Sioui, the Crown treated Indian nations with generosity and respect, out of the fear that the safety and development of British colonies would otherwise be compromised:

The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible. 40

It is submitted that the right of self-government is a generic right, which recognizes a uniform set of governmental powers held by Aboriginal peoples
as a distinct order of government within the Canadian federal system. At the same time, it allows Aboriginal groups to establish and maintain their own constitutions, which take a variety of forms. There are close parallels to the provinces, which not only possess a set of generic governmental powers under section 92 of the Constitution Act, 1867 but also are entitled to maintain distinctive provincial constitutions.

It could be argued that the Aboriginal right of self-government is not a generic right but a collection of specific rights, each of which has to be proven separately under the Van der Peet test.41 In R. v. Pamajewon, the Supreme Court of Canada viewed the question through the lens of Van der Peet and held that the right of self-government would have to be proven as an element of specific practices, customs, and traditions integral to the particular Aboriginal society in question.42 According to this approach, the right of self-government would be a collage of specific rights to govern particular activities rather than a generic right to deal with a range of abstract subject matters. However, the Pamajewon case was decided prior to the Court's decision in Delgamuukw, which expanded the horizons of Aboriginal rights and recognized the category of generic rights.

In light of Delgamuukw, it seems more sensible to treat the right of self-government as a generic Aboriginal right, on the model of Aboriginal title, rather than as a bundle of specific rights. In this view, the right of self-government is governed by uniform principles laid down by Canadian common law. The basic scope of the right does not vary from group to group. However, its application to a particular group differs depending on the circumstances. This is the approach taken in the Report of the Royal Commission on Aboriginal Peoples, which the Supreme Court of Canada cites in its brief comments on self-government in the Delgamuukw case.43 Nevertheless, certain other observations in Delgamuukw arguably rule out this approach. In declining to be drawn into an analysis of self-government, the Court reiterates its holding in Pamajewon that rights to self-government cannot be framed in “excessively general terms” and notes that the Aboriginal parties to the case had advanced the right to self-government “in very broad terms, and therefore in a manner not cognizable under s. 35(1).”44 It is submitted that these remarks should be understood simply as a warning against over-ambitious litigation, which attempts to induce the courts to settle very difficult questions in a vacuum, without an appropriate factual or doctrinal context.45

The Relationship between Generic and Specific Rights

The link between generic and specific rights should now be clear. Specific rights are concrete instances of generic rights. So, for example, the generic right to honourable treatment by the Crown operates at a high level of abstraction and harbours a range of intermediate generic rights relating to
different subject matters, such as the creation of Indian reserves or the protection of existing reserves. These intermediate rights, in turn, engender myriad specific fiduciary rights vesting in particular Aboriginal groups, whose precise scope is determined by the concrete circumstances in which they arise. Similarly, the broad right of cultural integrity fosters a range of intermediate generic rights, which relate to such matters as livelihood, language, and religion. These intermediate rights give birth to specific rights, whose character is shaped by the practices, customs, and traditions of particular Aboriginal groups.

The precise relationship between generic and specific rights varies depending on the generic right in question. Consider, for example, the generic right of self-government. As just seen, this right arguably confers the same set of governmental powers on all Aboriginal peoples in Canada. In this respect, the right of self-government resembles the uniform package of governmental powers vested in the provinces. However, this abstract homogeneity does not mean that Aboriginal peoples possess the same internal constitutions and governmental structures or that they exercise their governmental powers up to their full theoretical limits. An important component of the Aboriginal right of self-government is the power of an Aboriginal group to establish and amend its own constitution within the overarching framework of the Canadian constitution. This power parallels the power of a province to amend its own constitution under section 45 of the Constitution Act, 1982. So, it appears that the generic right of self-government, in allowing for the creation of a variety of governmental structures, engenders a range of specific governmental powers and rights, as detailed in the particular constitutions of Aboriginal groups.

It might be argued that not all generic rights blossom into specific rights; rather, some generic rights give rise to specific institutions, which represent a complex mix of rules, rights, and obligations. For example, the generic right to conclude treaties empowers Aboriginal groups to enter into binding agreements with the Crown. As such, the right spawns an array of particular agreements differing in subject-matter and scope. According to this argument, while it is true that each treaty represents the concrete exercise of the generic right, it does not follow that the treaty itself is a “specific right” or that the rights embodied in the treaty are “specific rights.” Rather, the generic right to conclude treaties gives rise to a web of reciprocal rights and obligations embodied in a concrete agreement, which is best characterized as an institution.

How persuasive is this argument? In some respects, it is correct. A treaty does not, itself, constitute a specific right, nor do its terms necessarily embody specific rights. Indeed, treaties often contain a blend of generic and specific rights. Nevertheless, it remains true that the Aboriginal party to a
treaty has a specific right to its performance, and the nature and scope of that right and the remedies to which it gives rise are shaped by the generic right that engenders it.

Similarly, the generic right to customary law harbours a host of distinct legal systems held by particular Aboriginal groups. Although each system is a concrete manifestation of the overarching generic right, it seems clear that the legal system is not itself a specific right. Nevertheless, it is also true that an Aboriginal group has a specific right to enjoy its own legal system to the extent determined by the generic right that governs it.

Just as all generic rights give birth to specific rights, so also are all specific rights the offspring of generic rights. In other words, there are no "orphan" specific rights. The reason is that generic rights provide the basic rules governing the existence and scope of specific rights. So an Aboriginal group cannot possess a specific right unless it is rooted in a generic right. By the same token, the scope of a specific right cannot exceed the basic dimensions of the generic right that engenders it.

The Universality of Generic Rights

Generic rights are not only uniform in character, they are also universal in distribution. They make up a set of fundamental rights presumptively held by all Aboriginal groups in Canada. There is no need to prove in each case that a group has the right to conclude treaties with the Crown, to enjoy a customary legal system, to benefit from the honour of the Crown, to occupy its ancestral territory, to maintain the central attributes of its culture, or to govern itself under the Crown's protection. It is presumed that every Aboriginal group in Canada has these fundamental rights, in the absence of valid legislation or treaty stipulations to the contrary. This situation is hardly surprising, given the uniform application of the doctrine of Aboriginal rights throughout the various territories that make up Canada, regardless of their precise historical origins or previous positions as French or English colonies.

The generic rights held by Aboriginal peoples resemble the set of constitutional rights vested in the provinces under the general provisions of the Constitution Act, 1867. Just as every province presumptively enjoys the same array of governmental powers, regardless of its size, population, wealth, resources, or historical circumstances, so also every Aboriginal group, large or small, presumptively enjoys the same range of genetic Aboriginal rights. However, this conclusion could be disputed. For example, it could be argued that the generic right of Aboriginal title is not a universal right. According to this viewpoint, some Aboriginal peoples did not have sufficiently stable connections with a definite territory to hold Aboriginal title, although they may have possessed specific rights of hunting, fishing, and gathering. Certain musings of the Supreme Court of Canada seem to entertain this
possibility. However, the better view is that every Aboriginal group presumptively holds Aboriginal title to an ancestral territory, unless there is very strong evidence to the contrary.

The Critical Date for Aboriginal Rights

As a matter of Canadian law, Aboriginal rights came into existence when the Crown gained sovereignty over an Aboriginal people — what we will call the “time of sovereignty.” Before this time, the relations between an Aboriginal people and the Crown were governed by international law and the terms of any treaties. Although Aboriginal peoples clearly held rights in international law prior to the time of sovereignty (and continue to hold certain international rights today), it was only when the Crown gained sovereignty that Aboriginal rights as such arose in Canadian law. So, it seems natural to think that the critical date for establishing the existence of Aboriginal rights is the time of sovereignty. However, the matter is not so straightforward. We have to distinguish between generic and specific rights.

Generic Rights

As seen earlier, when an Aboriginal people passes under the Crown’s sovereignty, it automatically gains a set of generic rights — the right of cultural integrity, the right to honourable treatment by the Crown, and so on. These rights come into existence at the time of sovereignty and possess a uniform character. Nevertheless, some generic rights have concrete aspects that change over time. For example, although the generic right to customary law arises at the time of sovereignty, the particular bodies of customary law protected by the right are not static but continue to evolve and adapt to keep pace with societal changes. It follows that the relevant date for determining the existence of a particular rule of customary law is not the date of sovereignty but the date of the activity or transaction whose legality is in question. So, for instance, the validity of a customary adoption that took place in 1960 would be governed by the customary rules prevailing at that date, rather than the time of sovereignty. Of course, rules must normally be followed for an appreciable period of time before they gain the status of customary law. However, there is no need to show that they existed at the time of sovereignty.

Aboriginal title provides a different example. As seen earlier, when an Aboriginal people passes under Crown sovereignty, it automatically gains title to its ancestral territories in Canadian law. So, prima facie, the boundaries of an Aboriginal territory are ascertained by reference to the situation at the time of sovereignty. However, this general rule is subject to two qualifications, which we can discuss only briefly. The first relates to the Royal Proclamation of 1763 and the second to historical migrations. The Royal
Proclamation of 1763 recognizes the rights of all Aboriginal peoples living under the Crown's protection to the lands in their possession. It accepts the pattern of indigenous occupation existing in 1763 as the basis for Aboriginal land rights, regardless of patterns of occupation that prevailed in earlier eras. So the Royal Proclamation seems to provide a common historical baseline for all Aboriginal groups living under British protection in 1763. However, there is reason to think that, at this date, the British Crown claimed sovereignty over the entirety of the territories now making up Canada. So, the year 1763 arguably constitutes a uniform baseline for the entire country, from Newfoundland in the east to British Columbia in the west.

The second qualification relates to historical migrations. In the fluid conditions that prevailed in earlier periods of Canadian history, it was common for Aboriginal groups to migrate to new areas due to conflict, environmental change, resource depletion, economic opportunities, and similar factors. The onset of Crown sovereignty did not bring this process to a sudden halt. Aboriginal groups continued to migrate in response to changes in their circumstances. With the establishment of effective British government and the creation of reserves, Aboriginal mobility was gradually reduced, although in some areas it persisted into relatively recent times. When an Aboriginal group voluntarily migrated to a new area after the date of Crown sovereignty (or after the year 1763, whichever is later), it seems arguable that within a certain period – perhaps twenty to fifty years – it would gain Aboriginal title to the new territory that it occupied while losing title to the territory it left behind.

Specific Rights
As we have seen, specific Aboriginal rights arise under the auspices of their generic counterparts. While generic rights come into existence at the time of sovereignty, specific rights do not necessarily originate at that date. For example, the broad principle of the honour of the Crown takes force at the time of sovereignty, however, specific fiduciary rights normally stem from events occurring well after that time, as when Aboriginal lands are ceded to the Crown or a reserve is created. In such cases, the relevant date for proving a specific fiduciary right is obviously the date of the event that triggered it, not the date of sovereignty.

A more difficult issue is posed by the right of cultural integrity. Like other generic rights, the abstract right comes into existence at the time of sovereignty, and the same holds true of the intermediate generic rights that shelter under its auspices. What, then, of the specific cultural rights that occupy the bottom tier in the pyramid? In principle these specific rights cannot date from a period earlier than the time of sovereignty because, as a matter of Canadian law (as distinct from indigenous law or international law), they do not exist prior to that date. So, presumably, they must arise either at the
time of sovereignty or at some later period, depending on the precise nature of the right in question.

However, here we must draw a distinction between the date that a specific cultural right comes into existence and the date by reference to which its concrete content is ascertained – for the two are not necessarily the same. Supposing that a specific cultural right originates at the time of sovereignty, at what date is its concrete content fixed? This question is bedevilled by a puzzling problem. It stems from the fact that Aboriginal cultures (like all cultures) are not static but undergo significant changes over time. After Europeans arrived in North America, Aboriginal societies responded in a dynamic fashion to new opportunities, circumstances, and influences. Just as European cultures quickly adopted many products of American origin, such as tomatoes, corn, and potatoes (to say nothing of tobacco), so also Native American cultures swiftly absorbed many items of European origin, such as horses, metal artefacts, and firearms. Trade in furs, skins, and fish transformed the economies of Aboriginal societies and helped sustain the economies of the settler colonies. Christianity also had a notable impact on many Aboriginal societies, as did Aboriginal conceptions of personal freedom and federalism on European political thought. European diseases such as smallpox decimated many Aboriginal societies and caused important changes in lifestyle, political organization, and outlook, while syphilis (thought to be of American origin) took its toll in Europe. So the question arises, given the dynamic nature of Aboriginal cultures and the fact that they underwent significant changes both before and after sovereignty, by reference to what date should the concrete content of specific cultural rights be ascertained?

The most workable answer is as follows. The doctrine of Aboriginal rights and the honour of the Crown assured an Aboriginal society that it had the right to maintain and develop the central features of its culture as these existed at the time of effective Crown control. This approach universalizes the critical date laid down for Métis peoples in R. v. Powley, where the Court held that section 35 protects the customs and traditions that were historically important features of Métis communities “prior to the time of effective European control.” While the ruling is explicitly limited to Métis groups, we suggest that it should apply to Aboriginal groups across the board. It is hard to see why Indian and Inuit peoples, who often had close social and economic links with their Métis neighbours and descendants, should have their Aboriginal rights determined at a different and earlier date. Such a discrepancy would inevitably produce bizarre and unjust results. Take, for example, two Aboriginal groups, one Indian and the other Métis, that became partners in a commercial trading relationship after European contact but before effective Crown control: the Métis group would gain an Aboriginal right to engage in the trade but the Indian group would not.
Of course, Aboriginal cultures could (and did) change dramatically after the time of effective Crown control. In principle, an Aboriginal society was free to take its cultural and economic life in any direction it saw fit. However, the Crown's honour was pledged to protect only the central aspects of an Aboriginal society as these aspects existed at the time of effective control and as they subsequently adapted to modern conditions. Beyond this point, the members of Aboriginal societies enjoyed the same legal rights and liabilities at common law as other members of the larger society.

The rationale for this approach is not hard to understand. When Aboriginal peoples were confronted with encroaching Crown control, they were apprehensive that their lives would undergo swift and forced change in unwelcome and harmful ways. They required assurance that they could continue in their current modes of life and adapt their societies at the pace and in the ways they considered desirable. The honour of the Crown was committed to providing this assurance, both as a matter of basic justice and also because it was necessary to maintain the friendship of Aboriginal peoples, which was crucial to the peace and security of the colonies. So, in light of this rationale, it is submitted that the critical date for specific cultural rights is the period at which the Crown gained effective control over a particular Aboriginal group.

However, in Van der Peet, the Supreme Court of Canada took a different approach. It held that the date for ascertaining the content of specific cultural rights is the time of European contact rather than effective control. The Court reasoned that the right of cultural integrity was designed to preserve the central aspects of an Aboriginal culture as these existed in their "original" form, prior to the impact of Europeans. The Court seems to have thought that there existed ideal types of Aboriginal societies, untouched by outside influences, in the misty period before Europeans arrived. However, this approach loses sight of the underlying rationale for the right of cultural integrity, which, as just seen, is rooted in the honour of the Crown at the time it assumed effective control. The critical date of "contact" also makes little historical sense. For example, when the Indian nations of New France fell under British rule after 1763, it would have been strange for the Crown to promise solemnly to respect not their current customs but rather their long-vanished ways of life as these existed some two centuries previous when the French first sailed up the St. Lawrence River. An approach less apt to win the friendship of the Indian nations can hardly be imagined.

**Conclusion**

We have seen that Aboriginal rights fall into two basic classes: generic rights and specific rights. Generic rights comprise a range of basic rights presumptively held by all Aboriginal groups under Canadian common law. They include the right to conclude treaties, the right to customary law, the
right to honourable treatment by the Crown, the right to an ancestral territory, the right of cultural integrity, and the right of self-government. These abstract rights have a uniform character, which does not change from group to group. Specific rights, by contrast, arise under the auspices of generic rights and assume different forms in different Aboriginal groups, depending on the particular circumstances of each group. Ranged between basic generic rights and specific rights are rights of intermediate generality, which relate to particular subject matters. We suggest that this scheme provides a simple and practical way of understanding the array of Aboriginal rights recognized in section 35(1) of the Constitution Act, 1982.

16 Ibid. at 438.


19 Baker Lake, supra note 18.

20 Ibid. at 542.

21 Although it has not been raised explicitly in recent judgments, the rationale that lies behind the Baker Lake test is commonly found in the reasoning used in judgments at all levels of the judiciary.

22 Baker Lake, supra note 18 at 542.

23 Southern Rhodesia, supra note 8 at 233.

24 Baker Lake, supra note 18 at 543.

25 Ibid. at 544.


27 Specifically, he asserted: “I do not accept the ancestors ‘on the ground’ behaved as they did because of ‘institutions.’ Rather I find they more likely acted as they did because of survival instincts which varied from village to village.” Delgamuukw, supra note 26 at 441.

28 Ibid. at 1208.

29 Ibid. at 452ff.

30 Ibid. at 452.

31 Ibid. at 455.

32 Ibid. at 462.

33 Ibid. at 455.


35 Specifically, they concluded that the Stó:lo were at a band level and not a tribal level of society. As they state: “[T]he Stó:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour – for example, specialization in the gathering and trade of fish – whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Stó:lo culture. I would note here as well Scarlett Prov. Ct. J.’s finding that the Stó:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Stó:lo way of life.” Ibid. at para. 90.

36 Sparrow, supra note 18 at 1103. For a commentary on this passage in Sparrow, see Hamar Foster, “Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases” (1992) 21 Manitoba Law Journal 343.

37 Asch and Macklem, supra note 17 [emphasis added].

38 The “settlement thesis” also provides the most “cogent” explanation in English law to explain the presumption that sovereignty and jurisdiction were acquired legitimately by the Crown in regions of the country, such as most of the territory of British Columbia, where treaties that purport to include provisions ceding rights to the Crown were not negotiated.

Chapter 7: A Taxonomy of Aboriginal Rights


Constitution Act, 1867, 30 & 31 Victoria (U.K.), c. 3, s. 91(24).


See Connelly v. Woolrich (1867), 17 R.J.R.Q. 75 (Que. S.C.); Casimel v. Insurance Corp. of British Columbia, [1994] 2 C.N.L.R. 22 (B.C.C.A.); Van der Peet, supra note 3 at paras. 38-40; Delgamuukw, supra note 4 at paras. 146-48; Campbell v. British Columbia (Attorney General)
22 Van der Peet, supra note 3 at para. 263. Justice McLachlin was dissenting, but not on this point.

23 Section 129, Constitution Act, 1867, supra note 19.


25 Sparrow, supra note 24 at 1108.

26 Wewaykum, supra note 24 at paras. 79-80.

27 Mitchell, supra note 6 at para. 9.


29 Wewaykum, supra note 24 at para. 83.

30 Ibid. at paras. 86-104.

31 Delgamuukw, supra note 4.


33 Van der Peet, supra note 3 at paras. 270-72.


35 Van der Peet, supra note 3 at para. 272.


38 Sappier, supra note 8 at especially paras. 37-40 and 45.


41 The following discussion draws on Brian Slattery, “Making Sense of Aboriginal and Treaty Rights,” supra note 5 at 213-14.


44 Delgamuukw, supra note 4 at 1114-15.

45 As the Court states: “The broad nature of the claim [of self-government] at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government ... We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach” (ibid. at 1115).


For detailed discussion, see Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories" (D.Phil. diss., Oxford University, 1979; reprinted in Saskatoon: Native Law Centre, University of Saskatchewan, 1979) at 204-82; Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 American Journal of Comparative Law 361 at 368-72; and Brian Slattery, "The Legal Basis of Aboriginal Title," in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books, 1992) at 121-29.


52 See *Delgamuukw*, *supra* note 4 at paras. 197-98 (per La Forest J.); and Slattery, "Understanding Aboriginal Rights," *supra* note 12 at 741-44 and 755-69.


56 On the evolution of Aboriginal rights, see especially *Sparrow*, *supra* note 24 at 1093; and *Sappier*, *supra* note 8 at paras. 48-49.

57 However, the various *Indian Acts* passed by the federal government, notoriously, did not respect this basic principle.

58 *Van der Peet, supra* note 3.

Chapter 8: Judicial Approaches to Self-Government since Calder


3 *James Bay and Northern Quebec Agreement and Complementary Agreements* (Sainte-Foy: Gouvernement du Québec, 1998) [JBNQ4].


7 Jean Chrétien retracted the white paper in a speech at Queen's University on 17 March 1971, entitled "The Unfinished Tapestry – Indian Policy in Canada." See Weaver, *supra* note 5 at 184-89.

8 *Constitution Act*, 1867, 30 & 31 Victoria (U.K.), c. 3, s. 91(24).
