

Whose “Distinctive Culture”?

Aboriginal Feminism and *R. v. Van der Peet*

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Aboriginal women have been historically disadvantaged through oppression by both the Canadian state and their own communities. While feminism has often been dismissed as a tool for Aboriginal women, a theoretical and activist movement known as Aboriginal feminism has slowly been gaining ground. Its tenets include drawing inspiration from non-Aboriginal forms of feminism; analyzing colonialism and patriarchy together; evaluating Aboriginal traditions on their merits—that is to say, on whether the way they are currently practised benefits or harms women; and being willing to ally with the Canadian state and non-Aboriginal feminists in order to promote the interests of Aboriginal women. This paper draws on Aboriginal feminist ideas and applies them to a leading Aboriginal rights case, R. v. Van der Peet, in which an Aboriginal right is defined as a practice or tradition integral to the distinctive culture of the group claiming the right. This analysis demonstrates that the test set out in Van der Peet is inconsistent with Aboriginal feminist doctrine and that it tends to encourage results that Aboriginal feminists warn against. In particular, it tends to elevate to rights only those practices or traditions that benefit Aboriginal men over women; it encourages the rigid idealization of pre-contact practices; and finally, it indirectly reinforces internal violence and oppression. Therefore, an alternative test is needed, through which traditions that enrich women's roles are celebrated and revived, and ones that oppress women are rejected.

I Introduction

The situation of Aboriginal people in Canada is an important and ongoing concern; this is especially true in the case of Aboriginal women,¹ who have been historically disadvantaged not only by the colonial and patriarchal practices of Canadian society, but also, in many instances, by discrimination and mistreatment within their own communities.² Despite disadvantage due partially to their gender, Aboriginal women have, for many reasons, historically not been friends of feminism.³ Recently, though, some writings have emerged that affirm the relevance of feminist theory for Aboriginal women and apply feminist analyses to problematic issues such as sexual violence and sexist Band membership practices. The small but growing movement of Aboriginal feminism faces many challenges, because feminism—like other movements that challenge existing power relations in society—is not popular in mainstream society and even less so in Aboriginal societies. Given Aboriginal women’s position, however, a feminism that takes into account racial and colonial disadvantage in addition to gender disadvantage has the potential to be empowering and helpful; also, the conclusions it reaches have much to teach Canadian society at large. In particular, its conclusions should be taken into account by Canadian courts when they are adjudicating Aboriginal rights claims.

It should be noted that not all Aboriginal feminists agree on many of these issues. The “Aboriginal feminism” I have focused on in this paper is one that is reflected in the works of Joyce Green and the other contributors to her compilation *Making Space for Indigenous Feminism*, one of the most comprehensive collections of Aboriginal feminist writing to date. While even the feminists within this school of thought do not agree on everything, their position and mine can be described as being similar to that reflected in the policies of the Native Women’s Association of Canada (NWAC). While I will use the term “Aboriginal feminism” in reference to this position, it is not the position of all Aboriginal feminists. The precise perspectives of this stream of Aboriginal feminism will be expanded on throughout the paper.

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- 1 I am of mixed European and Ojibway descent. I am non-status and do not speak for any particular group. Later in this paper, I will be referring to a situation in which many Indian women who married non-Indian men, as well as their descendants, lost their Indian status. This is an issue that has directly affected my family.
 - 2 See generally Royal Commission on Aboriginal Peoples, *Perspectives and Realities*, Vol. 4 (Ottawa: Supply and Services, 1996), Chapter 2.
 - 3 For a detailed list of the arguments Aboriginal women have made against feminism’s relevance for them, see generally Verna St. Denis, “Feminism is for Everybody: Aboriginal Women, Feminism and Diversity” in Joyce Green, ed., *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) [Green, *Making Space*] 33.

An Aboriginal right, according to the Supreme Court of Canada in *R. v. Van der Peet*,⁴ is an activity that is “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”⁵ It is my intention in this paper to draw on the works of notable Aboriginal feminist theorists and to critically analyze the *Van der Peet* test through this lens.

I will begin with a review of the *Van der Peet* judgment, as well as some related jurisprudence, and then move on to describe a case in which the type of reasoning in *Van der Peet* was applied to an issue affecting Aboriginal women—the *Sawridge*⁶ dispute. The discussion of *Sawridge* will include a description of some of the history of the Band membership controversy leading up to the case as this is a matter some Aboriginal feminists have critiqued extensively.

That summary will be followed by an attempt to distill some of the principles arising out of Aboriginal feminism and some of the conclusions reached by some streams within this burgeoning movement. These features include drawing inspiration from non-Aboriginal forms of feminism, such as liberal feminism; analyzing colonial oppression in concert with patriarchal oppression; viewing tradition as a source of strength that is nevertheless open to question; and finally, the help from the Canadian state and from non-Aboriginal feminists.

Having provided a description of Aboriginal feminism, I will apply some of its analyses to the *Van der Peet* test, and demonstrate how the test’s reasoning encourages and supports oppressive practices that many Aboriginal feminists warn against. Specifically, I will illustrate that *Van der Peet* encourages the elevation of practices and traditions that favour men over women, the rigid idealization of pre-contact practices, and the continuation of internal violence toward, and subordination of, Aboriginal women.

Ultimately, I will argue that *Van der Peet* is inconsistent with an Aboriginal feminist world view: a view in which the experiences of Aboriginal women are seen as important. This having been illustrated, I will conclude that *Van der Peet* should be abandoned and an alternative sought—an alternative in which the traditions and practices of Aboriginal societies are allowed to evolve and flourish, while at the same time are critically evaluated with respect to their effect on women, and eliminated if they are found to be oppressive.

4 [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet*].

5 *Ibid.* at para. 46.

6 *Sawridge Band v. Canada* (1995), [1996] 1 F.C. 3, [1995] 4 C.N.L.R. 121 (T.D.) [*Sawridge TD*], as rev’d by *Sawridge Band v. Canada*, [1997] 3 F.C. 580, 3 Admin L.R. (3d) 78 (C.A.) [*Sawridge CA*]. The Federal Court of Appeal ordered a new trial, and the dispute is still in litigation, with the final result as yet undetermined.

II Overview of *Van der Peet* and Related Cases

Section 35 of the *Constitution*⁷ reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

In *Van der Peet*, the Supreme Court of Canada set out the test that would be used to define the Aboriginal rights recognized and affirmed by s. 35.⁸ The case itself involved a Sto:lo woman, Dorothy Van der Peet, who had been charged with the offence of selling fish contrary to an Indian food fish license.⁹ She did not deny having sold the fish, but contended that the restriction on selling fish infringed an existing Aboriginal right she enjoyed under s. 35.¹⁰ The evidence showed that before European contact, the Sto:lo had fished for food and ceremonial purposes, as well as for some limited trade activity.¹¹

Lamer C.J. (as he then was) began by stating that a purposive approach must be taken to s. 35.¹² He reviewed the interpretive principles applicable to legal disputes between Aboriginal peoples and the Crown, namely that “a generous, liberal interpretation of the words in the constitutional provision is demanded,”¹³ and that any ambiguities should be resolved in favour of the Aboriginal peoples.¹⁴ With that in mind, Lamer C.J. went on to articulate the Court’s view of s. 35’s purpose:

[T]he aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.¹⁵

7 Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Constitution*].

8 *Van der Peet*, *supra* note 4 at para. 1.

9 *Ibid.* at para. 5.

10 *Ibid.* at para. 6.

11 *Ibid.* at para. 7.

12 *Ibid.* at para. 21.

13 *Ibid.* at para. 23.

14 *Ibid.* at para. 25.

15 *Ibid.* at para. 43.

Lamer C.J. then said that this purpose would be best fulfilled by the Court's chosen test: that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."¹⁶ He also set out some factors that courts should consider when applying the test. The Aboriginal peoples' perspectives should be considered,¹⁷ and the precise nature of the claim identified,¹⁸ as the claim must be adjudicated on a specific rather than a general basis.¹⁹ The rules of evidence must be approached in light of the evidentiary difficulties of these types of claims.²⁰ The practice, custom or tradition needs to be of *central*²¹ significance, and *independent* significance²² to the Aboriginal society in question, and it must have continuity with a practice that existed prior to contact with Europeans.²³ The group's relationship to the land and its distinctive culture must be taken into account.²⁴ The practice must be distinctive rather than distinct.²⁵ European influence only becomes relevant if the practice, custom or tradition is only integral because of that influence.²⁶

Lamer C.J.C. went on to apply the newly defined test to Dorothy Van der Peet's situation. He identified the nature of her claim as the right to exchange fish for goods or money.²⁷ He reviewed the evidence and found that it did not indicate that the exchange of fish for goods or money was integral to the culture of the Sto:lo. He accepted that the activity in question had occurred, but insisted it was not what "made the culture what it [was]."²⁸ Therefore, the fishing regulations did not infringe an Aboriginal right.

In a more recent case, *R. v. Sappier; R. v. Gray*,²⁹ the Supreme Court of Canada further clarified the *Van der Peet* test. In *Sappier*, the Court dealt with three men of Mi'kmaq or Maliseet descent who were charged with unlawful possession or cutting of Crown timber, and who claimed an Aboriginal right to harvest timber for personal use.³⁰ Unlike in *Van der Peet*, the Court here concluded that the men did establish an Aboriginal right to harvest wood for

16 *Ibid.* at para. 46.

17 *Ibid.* at para. 49.

18 *Ibid.* at para. 51.

19 *Ibid.* at para. 69.

20 *Ibid.* at para. 68.

21 *Ibid.* at para. 55.

22 *Ibid.* at para. 70.

23 *Ibid.* at para. 60.

24 *Ibid.* at para. 74.

25 *Ibid.* at para. 71.

26 *Ibid.* at para. 73.

27 *Ibid.* at para. 79.

28 *Ibid.* at para. 85.

29 2006 SCC 54, [2006] 2 S.C.R. 686 [*Sappier*].

30 *Ibid.* at para. 1.

domestic uses.³¹ In so concluding, Bastarache J. emphasized the importance of flexibility in applying the *Van der Peet* test, both in deciding whether the practice was integral to the claimant’s distinctive culture and in determining whether the relevant pre-contact time frame had been proven.³² He also held that a practice that was undertaken only for survival purposes could be considered integral to an Aboriginal group’s distinctive culture,³³ and clarified that it was incorrect to say that the practice needed to be a “defining feature” of the society or that it had to be what made the society what it was.³⁴ He reiterated that the right cannot be frozen in its pre-contact form, but must be allowed to evolve into a modern practice.³⁵ *Sappier*, therefore, arguably represents a more generous interpretation of Aboriginal rights than *Van der Peet*; however, it does not alter the test significantly.

It should also be noted that the test set out in *Van der Peet* for establishing the existence of an Aboriginal right forms part of a larger framework for determining the infringement of an Aboriginal right, which the Supreme Court of Canada set out in *R. v. Sparrow*.³⁶ Thus, if an Aboriginal right is established pursuant to *Van der Peet*, the claimant must then show that the right was not extinguished prior to 1982; before the entrenchment of s. 35, extinguishment could be accomplished through federal legislation with a clear and plain intention to do so.³⁷ If the right was not extinguished, the claimant must then show that the government legislation in question is an infringement of that right, something which is determined by asking whether the limitation is unreasonable, whether it imposes undue hardship and whether it denies the right-holders their preferred means of exercising that right.³⁸ If the claimant can prove an infringement, the onus then shifts to the Crown to show that the infringement is justified, which can be done by demonstrating that there was a compelling and substantial objective for infringing the right, and that it was done in a way that upheld the “honour of the Crown.”³⁹

In the next section, I will describe a case in which the characterization of Aboriginal rights described in *Van der Peet* and related cases was used in an attempt to uphold an Aboriginal right in a manner that is extremely significant to Aboriginal women and feminists.

31 *Ibid.* at para. 3.

32 *Ibid.* at para. 33, 34.

33 *Ibid.* at para. 38.

34 *Ibid.* at paras 40-41.

35 *Ibid.* at para. 52.

36 [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*].

37 *Ibid.* at paras 30-36.

38 *Ibid.* at para. 70.

39 *Ibid.* at paras 40-41.

III Sexism in the *Indian Act*, Band Membership Controversy, and the *Sawridge* Dispute

An example of the negative impact on Aboriginal women that can result from the application of a test for Aboriginal rights similar to the test in *Van der Peet* can be found in the outcome of the *Sawridge* case.⁴⁰ The reasoning in the case demonstrates some of the deeply problematic thought processes that some Aboriginal feminists criticize, and thus, it is a good illustration of how *Van der Peet* can be used in a way that undermines women's interests. A description of some of the background of the case is essential to an understanding of the situation of Indian women. The history of sexist status provisions in the *Indian Act*⁴¹ and the corresponding sexist Band membership policies is a vital part of that discussion.

History of Sexist Status Provisions in the *Indian Act*

From 1869⁴² to 1985, The *Indian Act* (and its predecessor statutes) contained provisions that stripped Indian status and its corresponding benefits from Indian women who married non-Indian men.⁴³ Children of these marriages were also deprived of status, while Indian men who married non-Indian women continued to enjoy their status, as did their wives and children. Some opposition to these blatantly sexist positions emerged in the 1960s when their

40 The Federal Court, Trial Division's judgment in *Sawridge* came out before the Supreme Court of Canada's judgment in *Van der Peet*, and therefore *Van der Peet* is not cited directly. However, Muldoon J. uses a test for Aboriginal rights from the B.C. Court of Appeal's judgment in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 C.N.L.R. 1 (B.C.C.A.) [*Delgamuukw BCCA*], which is almost identical to the test later enunciated by the Supreme Court in *Van der Peet*:

The common law will give effect to those traditions regarded by an aboriginal society as integral to the distinctive culture, and existing at the date sovereignty was asserted.

The Constitution Act, 1982 protects those aboriginal rights which still existed in 1982.

Delgamuukw BCCA, *ibid.* at 492-93, cited in *Sawridge TD*, *supra* note 6 at para. 36. As well, in that *Sawridge* is still in litigation after the Federal Court of Appeal ordered a new trial, *Van der Peet* is ultimately the test the plaintiffs will need to use to frame their arguments. Although the test from *Delgamuukw* used by Muldoon J. sets out sovereignty as the date to be proven for an Aboriginal right, whereas *Van der Peet* requires the practice to be proven pre-contact, the arguments presented herein should stand regardless as they do not depend on whether the relevant date is that of sovereignty or contact.

41 R.S.C. 1985, c. I-5 [*Indian Act*].

42 See Joyce Green, *Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the Sawridge Case* (D. Phil thesis, University of Alberta, 1997) [licensed and distributed by the National Library of Canada, Acquisitions and Bibliographic Services, Ottawa] [Green, *Exploring*].

43 This notorious provision was found in s. 12(1)(b) of the pre-1985 *Indian Act*. For a more detailed description of the different wording over the years, see *ibid.*; see also John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics" (1994) 43 U.N.B.L.J. 19 [Borrows, *Contemporary*].

repeal was recommended in the report of the *Royal Commission on the Status of Women*,⁴⁴ this was as a result of a presentation by Mary Two-Axe Earley, one of the women who had lost her status, who had been expelled from her community because of the provisions, and in response who had founded a group called Indian Rights for Indian Women.⁴⁵

In the 1970s, prior to the genesis of the *Charter*,⁴⁶ there were two notable cases in which First Nations women protested the *Indian Act*'s sexist status provisions. In *Lavell v. Canada (Attorney General)*,⁴⁷ two non-status Indian women challenged the provisions based on s. 1(b) of the *Canadian Bill of Rights*,⁴⁸ which guaranteed equality before the law. They were unsuccessful; the Supreme Court of Canada held that the *Bill of Rights* only applied to the application or enforcement of the law, and that the *Indian Act* thus did not breach the *Bill of Rights* because it treated all Indian women equally.⁴⁹ Alarmingly, status Indian organizations intervened in the case, not in support of the female claimants, but in support of the *Indian Act*. This was part of a larger strategic manoeuvre that sought to use Aboriginal women's rights as a bargaining chip in a bid to force the federal government to overhaul the entire *Indian Act*.⁵⁰

In *Lovelace v. Canada*,⁵¹ Sandra Lovelace, a Maliseet woman who had been fighting for her status and community membership for many years, challenged the same sexist *Indian Act* provisions before the United Nations Human Rights Committee, who ultimately concluded that the Canadian government had breached s. 27 of the *International Covenant on Civil and Political Rights*⁵² by denying her the right to enjoy her culture. Another example of Aboriginal women's political activism during the 1970s was the formation of the Native Women's Association of Canada in 1974. NWAC has, to this day, “played a major role in pressing for sexual equality for Indian women.”⁵³

44 Royal Commission on the Status of Women, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Supply and Services, 1970).

45 Borrows, *Contemporary*, *supra* note 43 at 26.

46 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

47 (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 [*Lavell*].

48 S.C. 1960, c. 44 [*Bill of Rights*].

49 See Green, *Exploring*, *supra* note 42 at 73.

50 *Ibid.* at 74. Green notes that Harold Cardinal, the president of the Indian Association of Alberta at the time and an influential Aboriginal politician, explicitly expressed this view, and also the corresponding sexist view that if women who married non-Aboriginal men retained their status, reserves would be overrun by white men. He did not address why this same fear did not apply to Aboriginal men who married non-Aboriginal women: *ibid.*

51 36 U.N. GAOR Supp. (No. 40) Annex XVIII. Doc. A/36/40 (1981) [*Lovelace*].

52 19 December 1966, 999 U.N.T.S. 171, Arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

53 Borrows, *Contemporary*, *supra* note 43 at 27.

NWAC and other groups advocating for Aboriginal women's equality have been instrumental in the movement described as Aboriginal feminism, although these groups' members do not always self-identify as feminist.⁵⁴

In 1985, in response to years of the type of political activism just described, and also due in large part to the introduction of equality provisions in the *Charter*,⁵⁵ the federal government introduced Bill C-31,⁵⁶ which, among other things, eliminated the discriminatory provision in s. 12(1)(b) of the *Indian Act* which had previously stripped Indian women of their status when they married non-status men.⁵⁷ The result was the reinstatement of a large number of non-status women and their children. Bill C-31 also provided more statutory power to Bands to determine their own membership, as ways of promoting self-government.⁵⁸ Unfortunately, the majority of those who gained status under Bill C-31 have had difficulty acquiring Band membership and reintegrating into their home communities, and many have experienced discrimination, threats, and even violence.⁵⁹

In addition to the problems experienced by those reinstated under Bill C-31, the current *Indian Act* is still not completely free of discrimination itself. Women who marry non-status men retain their status, and their children are also entitled to status; however, the children are not entitled to the full status under s. 6(1), but are registered under s. 6(2), meaning that if they marry someone not entitled to be registered they cannot pass their status on to their children. This is known as the "second generation cut-off" and, in effect, it

54 For reasons why this might be the case, see *supra* note 3 and surrounding text. Other organizations that advance goals that can be described as Aboriginal feminist include Pauktuutit, an organization of Inuit Women, and the National Metis Women of Canada (NMWC). These organizations, though they all advocate for women, do not necessarily agree on issues of Aboriginal feminism. As mentioned in the Introduction, the feminism I have focused on in this paper most closely resembles that of NWAC.

55 Section 15 of the *Charter*, which came into effect in 1985, reads:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 12(1)(b) of the *Indian Act* would almost certainly have been found to be in violation of s. 15, and hence the government moved to alter it pre-emptively. It was through lobbying by women's organizations that s. 15 and s. 28, which guarantee equality between men and women, were included in the *Charter*: Green, *Exploring*, *supra* note 42 at 85.

56 *An Act to Amend the Indian Act*, S.C. 1985, c. 27 [Bill C-31].

57 For a detailed account of the harms sustained by the Aboriginal women and children who were deprived of their status under the discriminatory provisions, see Kathleen Jamieson, *Indian Women and the Law: Citizens Minus* (Ottawa: Supply and Services Canada, 1978).

58 Green, *Exploring*, *supra* note 42 at 86.

59 *Ibid.* at 87. See also Janet Silman, ed., *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987).

just puts off the discrimination for a generation.⁶⁰ Sharon McIvor, a lawyer and prominent Aboriginal feminist, whose family has been deeply affected by the status provisions, challenged the current *Indian Act* provisions under s. 15 of the *Charter*, and she was successful at the British Columbia Supreme Court which held that s. 6(1) and 6(2) were unconstitutional.⁶¹ The BC Court of Appeal upheld that decision in part, while narrowing its effect.⁶² While the government of Canada has announced it will not appeal the case further and plans to amend the *Indian Act* accordingly, McIvor has stated that she plans to appeal to the Supreme Court of Canada on behalf of those left out of the Court of Appeal’s ruling.⁶³

There was and continues to be a great deal of opposition to Aboriginal women speaking out against the sexist provisions of the *Indian Act* and, in some cases, Band resistance to women’s reinstatement under Bill C-31 has degenerated into threats of violence and intimidation.⁶⁴

As Joyce Green points out, much of the Aboriginal male leadership’s earlier opposition to the advancement of Aboriginal women’s rights, though unfortunate and lacking in sensitivity to women’s interests, did not invoke tradition in an attempt to prevent the women’s rights from being recognized.⁶⁵ The dynamic was different in the *Sawridge* situation—arguably as a result of the kind of reasoning found in *Van der Peet*—and added a whole new dimension to Aboriginal Band leadership’s oppression of Aboriginal women.

60 See *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827, [2007] 3 C.N.L.R. 72 [*McIvor*] at paras 81-82.

61 *Ibid.* at para. 351. McIvor, as vice president of NWAC, was also instrumental in another important case for Aboriginal women, *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 627, [1995] 1 C.N.L.R. 47, in which NWAC challenged the federal government’s funding and consultation of four other Aboriginal associations during the Charlottetown Accord negotiations and corresponding failure to consult and fund NWAC under s. 15 of the *Charter*. The case contains disturbing arguments, suggesting that the mainstream Aboriginal organizations (most notably the Assembly of First Nations) are male-dominated and may not represent the political interests of Aboriginal women.

62 2009 BCCA 153.

63 See Bill Curry, “Indian status case going to Supreme Court” *The Globe and Mail* (5 June 2009), online: <http://www.theglobeandmail.com/news/politics/indian-status-case-going-to-top-court/article1168979/>. See also Barbara Barker & Tyler McCreary, “Sharon McIvor’s fight for gender equality in the Indian Act,” *Briarpatch Magazine*, online: <http://briarpatchmagazine.com/2008/03/01/sharon-mcivor/>. It should be acknowledged that this issue is not a simple male v. female issue, as many Indian women also oppose changes to the *Indian Act*. As well, the impugned provisions also discriminate against the male offspring of Indian women who married non-Indian men, not just against women. I highlight the Band membership issue in the paper because it is the primary situation many Aboriginal feminists have critiqued. In doing so, I do not wish to minimize the many complex implications of changes to the *Indian Act* status provisions, discussion of which is beyond the scope of this paper.

64 Green, *Exploring*, *supra* note 42 at 76.

65 *Ibid.* at 75.

The Sawridge Dispute

The *Sawridge* case arose from resistance to women's reinstatement under Bill C-31, but unlike the earlier Aboriginal organizations who sought to sacrifice women's rights as a strategic tool against the Canadian government, the plaintiffs in *Sawridge* framed the exclusion of women as an Aboriginal tradition and therefore as a constitutional right.⁶⁶

The 1985 amendments gave Bands the right to control their own Band lists, but Bands were required to include on these lists certain people who had regained their status as a result of Bill C-31, including women who had lost status due to marrying non-status men, and the children of such women.⁶⁷ Three Alberta bands—the Sawridge Band, the Ermineskin Band, and the Sarscee Band—initiated a legal action seeking a declaration that these portions of the *Indian Act* were unconstitutional.⁶⁸ They claimed the exclusion of women who married someone outside the Band was based on Aboriginal tradition and that the right to determine their own membership based on that tradition was protected by s. 35's guarantee of existing Aboriginal and treaty rights.⁶⁹

The plaintiffs in *Sawridge* presented a number of arguments to show that they had an Aboriginal and/or treaty right to determine membership in general.⁷⁰ The arguments that are of the most relevance to this paper are the ones specifically concerning the asserted right to exclude both women who married non-Indian men, as well as their children. The plaintiffs brought forward extensive evidence, including several witnesses, in an attempt to show that the provisions in the pre-1985 *Indian Act* excluding women who married non-Indian men were reflective of an older Aboriginal tradition, described as the doctrine of “woman follows man”:

In the case before this Court, the evidence also confirms that the plaintiff aboriginal communities have, since aboriginal times, determined membership in their territories through the practice of traditional customs, inter alia, whereby women followed their men upon marriage.⁷¹

66 *Ibid.* at 90.

67 *Indian Act*, *supra* note 41, ss. 11, 12; *Sawridge TD*, *supra* note 6 at para. 5; see also Joyce Green, “Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada” in Green, *Making Space*, *supra* note 3, 140 [Green, “Balancing”] at 150-151.

68 *Sawridge TD*, *ibid.* at para. 1.

69 *Sawridge CA*, *supra* note 6 at para. 4. The plaintiffs also sought to declare the provisions invalid based on s. 2(d) of the *Charter*, which guarantees freedom of association. Additionally, there were also extensive arguments about the subsuming of Aboriginal rights into treaty rights, and about treaty rights in general; however, since this paper focuses on Aboriginal rights under the *Van der Peet* test, I have omitted discussion of these arguments.

70 Muldoon J. concluded that if this more general right to determine membership had existed, it was conclusively extinguished by the *Indian Act* of 1876: *Sawridge TD*, *supra* note 6 at para. 72.

71 *Ibid.* at para. 98.

Several witnesses, some of them Elders, described “woman follows man” as an Aboriginal tradition or “the Indian way.”⁷² They described a custom whereby a woman who married a man from another community would move to that community, and they claimed that this custom pre-dated the arrival of white men. Many of the witnesses also expressed concern that the new membership rules would result in their reserves being overpopulated and overrun by white men.⁷³

Muldoon J. did not find the evidence showing a custom of “woman follows man” to be very convincing, and pointed out that it was unclear whether much of it actually referred to pre-contact times, or referred to the way of life under the regime of the *Indian Act*. For example, some of the witnesses spoke of women following men to the man’s “reserve,” whereas there would obviously have been no reserves in existence before contact.⁷⁴ The Crown was also able to discredit some of the evidence by getting witnesses to admit to instances where the opposite had happened and a man had actually followed his wife to her community.⁷⁵

It must be noted, however, that when Muldoon J. was examining this evidence he had already seemingly concluded that the plaintiffs’ arguments must necessarily fail. He began his judgment by asserting that even if the plaintiffs could make out an Aboriginal or treaty right in existence in 1982, it would conclusively have been extinguished by s. 35(4) of the *Constitution* which states that existing Aboriginal and treaty rights are guaranteed equally to male and female persons; this was ultimately his conclusion in the case.⁷⁶ There were also indications in the judgment that Muldoon J. doubted the validity of oral history in general, and thus he may not have put as much weight on oral history as what *Van der Peet* and other cases require.⁷⁷

72 *Ibid.* at para. 105, quoting witness testimony given by Wayne Roan, who was one of the plaintiffs in the case.

73 *Ibid.* at paras 15-19. Joyce Green suggests that like the earlier leaders who were opposed to equality for Aboriginal women in the Band membership context, the plaintiffs in *Sawridge* were motivated more by strategy than by genuine desire to preserve their traditions: Green, *Exploring*, *supra* note 42 at 90.

74 *Ibid.* at para. 108.

75 *Ibid.* at para. 107.

76 *Ibid.* at para. 20. Muldoon J. made a number of statements throughout his judgment that indicated that he was not supportive of an Aboriginal rights regime in general, and which led to a finding of reasonable apprehension of bias, ultimately nullifying what seems like an otherwise correct decision.

77 See, for example, *ibid.* at para. 109, where Muldoon J. states:

That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that their ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.

Regardless, due to reasonable apprehension of bias, the Federal Court of Appeal overturned Muldoon J.'s judgment and ordered a new trial.⁷⁸ By virtue of major procedural issues in the case, however, it now appears that proceedings have come to an end without a definitive judicial statement on whether a tradition that discriminates against women can be an existing Aboriginal right.⁷⁹ This is unfortunate in that "[t]his case may make an important precedent for all women, if it settles the question of whether 'tradition' can trump women's human rights to equality."⁸⁰

Having summarized the relevant cases and history, I will now move on to further describe some tenets of the movement known as Aboriginal feminism.

IV What Is Aboriginal Feminism?

Like feminism itself, Aboriginal feminism⁸¹ is difficult to distill into a comprehensive statement that accurately describes what it stands for. This is partially because, like feminists, Aboriginal feminists do not agree amongst themselves on many issues. The diversity of opinions between Aboriginal feminists could arguably be described as one of the key features of the movement. It would be impossible and inadvisable to generalize and attempt to speak for all Aboriginal feminists as there are many different streams within the movement. The Aboriginal feminism I focus on is in large part associated with the work of Joyce Green and the positions of NWAC. While these may be some of the loudest voices in Aboriginal feminism, they are by no means the only ones. I attempt in this section to describe some of the areas of general consensus among Aboriginal feminists, while keeping in mind that none of the areas of consensus is unanimous.

As a starting point, it goes without saying that Aboriginal feminists view the situation of Aboriginal women as important and seek to improve this situation. Many of them also draw from non-Aboriginal feminisms, such as liberal

78 *Sawridge CA*, *supra* note 6 at para. 1.

79 After lengthy adjournments and procedural disputes about the permissibility of witnesses, among other things, the plaintiffs closed their case at the Federal Court, Trial Division, agreeing that Russell J. should dismiss their case, and stating that they intended to pursue an appeal at the Federal Court of Appeal, again alleging reasonable apprehension of bias: *Sawridge v. Canada*, 2008 FC 322, 319 F.T.R. 217. Most recently, the Bands' appeal of Russell J.'s decision was dismissed by the Federal Court of Appeal: 2009 FCA 123.

The plaintiffs' decision to close their case and move to an appeal before evidence was presented meant that Russell J. could not assess the merits of their case: *ibid.* at para. 29. The Federal Court of Appeal did not discuss the merits either, and at this point it appears that there is little chance of this happening.

80 Green, "Balancing," *supra* note 67 at 151.

81 What I am describing here will pertain mainly to women who describe themselves as Aboriginal feminists, but there will necessarily be some overlap between these women and those who carry out similar work but are resistant to the label "feminist."

feminism, while adding analysis connecting patriarchy to colonialism. Many of them view Aboriginal traditions as a potential source of strength and equality, but insist these traditions are still open to question. Finally, they are generally in favour of at least some protection of Aboriginal women’s rights from the Canadian state. I will briefly discuss each of these features.

Drawing from and Building on Traditional Feminisms

All feminisms, including Aboriginal feminism, start from the basic assumptions that political analysis of any kind should take women’s experiences seriously, and that gender matters:

The characteristic of feminism ... is that it takes gender seriously as a social organizing process and, within the context of patriarchal societies, seeks to identify the ways in which women are subordinated to men and how women can be emancipated from this subordination.⁸²

In addition, feminism is almost always both a theory—one that seeks to “describe and explain women’s situations and experiences and support recommendations about how to improve them”⁸³—and a social movement dedicated to action.⁸⁴

Although Aboriginal feminism shares these characteristics with all other forms of feminism, it tends to have the least in common with liberal feminism,⁸⁵ which is seen as seeking to make women the same as men. Aboriginal feminists tend to identify more with feminist movements, such as radical feminism⁸⁶ and cultural feminism,⁸⁷ that value and celebrate differ-

82 Joyce Green, “Taking Account of Aboriginal Feminism” [Green, “Taking Account”] in Green, *Making Space*, *supra* note 3, 20 at 21.

83 Marilyn Frye, “Feminism” in Lorraine Code, ed., *Encyclopedia of Feminist Theories* (New York: Routledge, 2000), cited in *ibid.*

84 Green, “Taking Account,” *ibid.* at 21.

85 Liberal feminism is probably the most well-known form of feminism; it generally seeks women’s equal access to power structures (employment, public office, etc.) traditionally only enjoyed by men. Because it advocates equal treatment between women and men, this is sometimes interpreted as a desire for women and men to be the same, or as a denial of difference: see “Kinds of Feminism” in *Virginia Woolf Seminar*, University of Alabama in Huntsville, online: http://www.uah.edu/woolf/feminism_kinds.htm.

86 Radical feminism, which was prominent in the 1960s and 70s, sprung out of the civil rights and peace movements of the 60s. Radical feminists view oppression against women as the most fundamental form of oppression, and often advocate dramatic social change, sometimes even advocating for women’s segregation from men: see “Kinds of Feminism,” *ibid.* The only real common ground it has with most types of Aboriginal feminism is its emphasis on difference, rather than sameness, between women and men.

87 Cultural feminism is similar to radical feminism, but with even more emphasis on difference, in that it seeks to form a women’s culture and focuses less on social change and more on creating alternatives, resulting in rape crisis centres and the like. Some cultural feminists hold the view that “while various sex differences might not be biologically determined, they are still so

ences between women and men.⁸⁸ This may have to do with the perception that in many traditional Aboriginal cultures women may have had different roles than men, but that these roles were equally valued, if not valued above men's roles.⁸⁹ In fact, the perception among some Aboriginal women activists that liberal feminism is the only form of feminism may account for their reluctance to associate themselves with the label "feminist," and their insistence that feminism is irrelevant to Aboriginal women, in that liberalism is viewed as a colonial ideology.⁹⁰

Another important difference between Aboriginal feminists and some other types of feminists is that Aboriginal feminists, by definition, do not analyze gender and women's subordination in isolation as they are issues that must necessarily be analyzed in the context of colonialism and the oppression of Aboriginal peoples by settler states.

Connection Between Colonialism and Patriarchy

Aboriginal feminists invariably see colonialism and patriarchy as inextricably intertwined; they see the two as interdependent processes or sometimes as part of the same process.⁹¹ They believe that colonial oppression of Aboriginal peoples cannot be properly addressed without also dealing with Aboriginal women's gender oppression, an oppression that is imposed both by Canadian society at large, and internally, through the sexist and patriarchal practices of male Aboriginal leaders.⁹² The following statement is illustrative of this interconnection:

It is often the case that gender justice is often articulated as being a separate issue from issues of survival for Indigenous peoples. Such an understanding presupposes that we could actually decolonize without addressing sexism, which ignores the fact that it has been precisely through gender violence that we have lost our lands in the first place.⁹³

Aboriginal feminists generally treat as uncontroversial the fact that the European societies that colonized what became Canada were patriarchal, and

thoroughly ingrained as to be intractable": see "Kinds of Feminism," *supra* note 86. Another form of feminism that may find some common ground with Aboriginal feminism is what is known as eco-feminism: see *ibid.*

88 See, for example, St. Denis, *supra* note 3 at 36.

89 See *ibid.* at 36-40.

90 St. Denis, *ibid.* at 36, 43.

91 See Green, "Taking Account," *supra* note 82 at 23; Andrea Bear Nicholas, "Colonialism and the Struggle for Liberation: The Experience of Maliseet Women" (1994) 43 U.N.B.L.J. 223 at 228; St. Denis, *supra* note 3 at 47-48.

92 See Green, *Exploring*, *supra* note 42 at 4; Andrea Smith, "Native American Feminism, Sovereignty and Social Change" in Green, *Making Space*, *supra* note 3, 93 at 99.

93 Smith, *ibid.* at 98.

that mainstream Canadian society largely remains so today.⁹⁴ The fact that most Indian Bands today are male-dominated and engage in at least some oppressive practices against Aboriginal women is also relatively uncontested by Aboriginal feminists, and most Aboriginal feminists assert that the oppression experienced at the hands of Aboriginal men is overwhelmingly the result of colonial influence.⁹⁵ Indeed, in many cases, the patriarchal ideas introduced by colonialism are so ingrained in Aboriginal societies that, much like what may have happened in the *Sawridge* case, they get repackaged as “tradition.”⁹⁶

Flowing from the logic that much of the oppression of Aboriginal women within their communities is a result of colonial influence, many Aboriginal feminists view Aboriginal traditions as a potential source of strength and even equality; however, they maintain that even pre-contact traditions are open to question.

Pre-Contact Aboriginal Traditions as a Source of More Equality, but also Open to Feminist Analysis

Perhaps one of the most important features of Aboriginal feminism for the purposes of this paper is its approach to tradition. Connected to their dissatisfaction with liberal feminism, many Aboriginal feminists advocate a vision of equality that is inspired by Aboriginal tradition; they see pre-contact Aboriginal cultures as more egalitarian than Canadian ones.⁹⁷ However, this view is tempered by the crucial caveat that traditions themselves are still open to question.⁹⁸ This is true, naturally, in contexts where traditions become “re-

94 See, for example, Green, *Exploring*, *supra* note 42 at 40, for an extensive description of Canadian patriarchy.

95 See *ibid.* at 4; Nicholas, *supra* note 91 at 228; Denise K. Henning, “Yes, My Daughters, We Are Cherokee Women” in Green, *Making Space*, *supra* note 3, 187.

96 See Green, “Balancing,” *supra* note 67 at 150-151; Green, *Exploring*, *supra* note 42 at 4; See also Rauna Kuokkanen, “Myths and Realities of Sami Women” in Green, *Making Space*, *ibid.*, 72, for a striking description of how this repackaging has happened with regards to stereotypes about women in the Sami context, creating the myth of “strong Sami matriarchs,” in order to ignore the demands of women’s groups: *ibid.* at 73.

Emma LaRocque describes a similar idealism at work in Aboriginal cultures in terms of women’s roles as “all embracing mothers and healers”: Emma LaRocque, “Metis and Feminist” in Green, *Making Space*, *ibid.*, 53 at 62. NWAC has also stated that “patriarchy is so ingrained in our society that it is now seen as a ‘traditional trait’”: St. Denis, *supra* note 3 at 45.

97 See Nicholas, *supra* note 91 at 228-229; Henning, *supra* note 95 at 190; St. Denis, *supra* note 3 at 38-44; Green, *Exploring*, *supra* note 42 at 82. Green describes how many Aboriginal women’s organizations that are advocating for rights invoke a return to traditions that valued women; she points to this as an argument against the common attack on Aboriginal feminism that Aboriginal feminism is “untraditional” or somehow allied with colonial forces.

98 See, e.g., Green, “Taking Account,” *supra* note 82:

Tradition consists of valued inter-generational social practices. All societies have them; all venerate them. Not all of the members of a society are similarly faithful to them, nor are all societies monolithic in their identification or replication of them ... [T]radition is

packaged” due to colonial influence, but Aboriginal feminists also often suggest that it is likely that there were some pre-colonial indigenous practices that were sexist or oppressive.⁹⁹

The idea of traditional Aboriginal societies being more egalitarian is often described in the context of separate but equally valued roles for women and men. For example, Andrea Bear Nicholas provides a fascinating account of pre-colonial Maliseet culture and how settlers looked down on the Maliseet for their “egalitarian, consensus-making, and power-sharing societies.”¹⁰⁰ She also describes how quickly this egalitarian way of living was obliterated as a result of the Maliseet people’s contact with fur traders.¹⁰¹

Many Aboriginal feminists would like to see these types of egalitarian traditions revived, but at the same time they do not favour the idealization of tradition in general. Specifically, they often acknowledge that there were probably practices in pre-contact Aboriginal societies that were oppressive to women.¹⁰² This type of analysis sometimes draws on the common feminist assertion that at least some subordination of women is nearly universal, and that this includes, to some extent, Aboriginal societies.¹⁰³ For example, Emma LaRocque cites feminist Josephine Donovan, who asserts that women in all societies have experienced certain forms of subordination, including political oppression and assignment to the domestic sphere.¹⁰⁴ LaRocque argues this is also true for most Aboriginal societies, and that when dealing with the rhetoric of “balance” between genders in these societies it must be remembered that women were still assigned largely to the domestic sphere.¹⁰⁵ She cautions against assuming that just because the domestic role may have been valued and respected this meant men and women were equal:

neither a monolith, nor is axiomatically good, and the notions of what practices were and are essential, how they should be practiced, who may be involved and who is an authority are all open to interpretation.

Ibid. at 26-27.

99 See *infra* note 103 and surrounding text.

100 Nicholas, *supra* note 91 at 230.

101 *Ibid.*

102 See Green, “Taking Account,” *supra* note 82 at 23, 2-28; Green, *Exploring*, *supra* note 42 at 64; Kuokkanen, *supra* note 96 at 72; St. Denis, *supra* note 3 at 45.

There is not consensus on this point among Aboriginal feminists, with some claiming there were no sexist practices pre-contact: see generally Henning, *supra* note 92; Smith, *supra* note 89 at 102. At least some Aboriginal communities were “matrilineal and matrilineal,” and women served in leadership roles in some of these societies: Smith, *ibid.* at 102. However, many Aboriginal feminists see this as the exception rather than the rule.

103 See LaRocque, *supra* note 93 at 54.

104 *Ibid.* Donovan also refers to women experiencing different physical events from men as a function of their biology, and that their labour is generally for “use,” rather than “exchange.” LaRocque concedes that this last point is less applicable to Aboriginal societies due to their pre-industrial economies.

105 *Ibid.* at 55.

There is an over-riding assumption that Aboriginal traditions were universally historically non-sexist and therefore, are universally liberating today. Besides the fact that not all traditions were non-sexist, we must be careful that, in an effort to celebrate ourselves, we do not go to the other extreme of biological essentialism of our roles as women by confining them to the domestic and maternal spheres, or romanticizing our traditions by closing our eyes to certain practices and attitudes that privilege men over women.¹⁰⁶

When focusing on women’s oppression then, Aboriginal feminists favour taking account of all of its sources, regardless of whether the sources are external or internal to Aboriginal communities:

The rights abuses claimed by [Aboriginal women] result from colonial imposition and Canadian racism and sexism, but also from the internalization of colonial practices by aboriginal people and practiced by aboriginal organizations and administrations now, and because of sexist practices indigenous to aboriginal cultures.¹⁰⁷

Given this analysis, many Aboriginal feminists tend to prefer a scenario in which traditions can be evaluated on their merits, and oppressive ones can be discarded while ones that are non-oppressive and positive for women can be nurtured or even revived if they have been extinguished.¹⁰⁸ When I use the phrase “evaluated on their merits,” what I mean is that an Aboriginal practice should not be endorsed or accepted simply *because* it is traditional, but rather the valid need to preserve Aboriginal culture in the face of colonialism should be balanced with the need to promote the well-being of Aboriginal women. If a practice is found to be harmful or oppressive to Aboriginal women, its continuance should not be justified simply on the basis that it is traditional. Instead, it should be allowed to evolve into a form that is more sensitive to Aboriginal women’s needs or, if this is not possible, it should be eliminated. This type of position was articulated in the *Declaration of Indigenous Women*, at the Beijing Fourth World Conference on Women in 1995:

[We demand] that Indigenous customary laws and justice systems which are supportive of women victims of violence be recognized and reinforced. That Indigenous laws, customs, and traditions which are discriminatory to women be eradicated.¹⁰⁹

106 *Ibid.* at 65.

107 Green, *Exploring*, *supra* note 42 at 4.

108 See, e.g., Green, “Taking Account,” *supra* note 82 at 27:

Each choice must be interrogated on its own merits, relative to the objective of a contemporary emancipatory formulation that will benefit Aboriginal men, women and children. Feminist critique is an essential part of this process.

109 NGO Forum, UN Fourth World Conference on Women, *Beijing Declaration of Indigenous Women* (1995), Indigenous Peoples Council on Biocolonialism, online: <http://www.ipcb.org/resolutions/htmls/dec_beijing.html>.

This idea that traditions must be evaluated on their merits seems to also carry over to Aboriginal feminists' attitudes toward the Canadian state and non-Aboriginal feminists; they are willing to embrace help from these entities when doing so helps them to achieve their goals.¹¹⁰

Desire for Protection from the Canadian State and Willingness to Ally with Non-Aboriginal Feminists

Some Aboriginal feminists are not averse to getting help from the Canadian state and non-Aboriginal feminists in achieving their goals. This separates them from many Aboriginal activists who condemn these types of alliances as colonial and anti-traditional.

Specifically, in terms of assistance from the Canadian state, some Aboriginal feminists are in favour of using the *Charter*, especially s. 15, to fight for Aboriginal women's rights.¹¹¹ This is, of course, reflected in the previously described litigation connected to the sexist status provisions in the *Indian Act* and the Band membership controversy. As well, many Aboriginal feminists, while in favour of moving toward Aboriginal self-government, have urged that it is absolutely essential that these new governments be subject to the *Charter*, in order to avoid formalization of the types of oppression already seen under male-dominated Band councils.¹¹² Interestingly, some Aboriginal feminists have adopted an analysis that relates traditional Aboriginal concepts to *Charter* ideas, and argue that many *Charter* concepts are similar to values traditionally endorsed by Aboriginal societies.¹¹³

The desire for protection from the state is also relevant to Aboriginal feminists who advocate on issues related to criminal justice. Many such feminists,

110 Eminent Aboriginal scholar John Borrows has expressed a position remarkably similar to those enunciated by Aboriginal feminists. He states:

Allow me to suggest that the meaning of goodness is embedded in our languages and traditions. Of course, not all our traditions are good; like other nations on the earth we have past flaws and present failings that are harmful. We must not be so fixated on tradition that we lose the power to evaluate its usefulness and appropriateness ... We must ... guard against rejecting everything that flows from those who we regard as having harmed us. The damage we experience is real and should be fully acknowledged, but such recognition does not require us to completely cut ourselves off from the noble, honourable and positively productive things that other cultures have learned.

John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (2008), Research Paper, National Centre for First Nations Governance, online: <www.fngovernance.org/research/john_borrows.pdf> at 9.

111 See, e.g., Green, *Exploring*, *supra* note 42 at 4.

112 See Green, *Exploring*, *supra* note 42 at 4; Green, "Balancing," *supra* note 67 at 150. NWAC has supported the *Charter* applying to Aboriginal governments, while other, male-dominated groups such as the Assembly of First Nations, have opposed this based on the assertion that the *Charter* is "a colonial imposition that could violate cultural practices": *ibid*.

113 See Verna Kirkness, "Emerging Native Women" (1987-88) 2 *Can. J. Women & L.* 408. John Borrows has also discussed a similar approach: see Borrows, "Contemporary," *supra* note 43.

though supportive of movement toward restorative justice in some areas, warn against being too lenient on perpetrators of spousal violence and sexual assault—an alarmingly common problem in Aboriginal communities.¹¹⁴

Some Aboriginal feminists have also benefited willingly from the support of non-Aboriginal feminists and women’s organizations.¹¹⁵ This is not surprising in that Aboriginal feminists have drawn on much of the analysis done by non-Aboriginal feminism.

Having summarized the foundational tenets of Aboriginal feminism, I will now move on to apply some of this theory to critique the Supreme Court of Canada’s interpretation of Aboriginal rights in *Van der Peet*.

V Aboriginal Feminist Arguments Against *Van der Peet*

The Supreme Court’s characterization of the nature of Aboriginal rights in *Van der Peet* has already been criticized extensively.¹¹⁶ With the arguments that follow, I hope to add to these critiques from the Aboriginal feminist perspective I have described above. My arguments deal with, first, the inevitability of the practices or traditions that pass the test favouring men over women; second, the promotion of rigid idealization and even exaggeration of pre-contact traditions; and third, the excessive narrowness of the test being a potential aggravator for internal oppression.

The Practices and Traditions That Pass the *Van der Peet* Test Will Inevitably Favour Men Over Women

Practices or traditions elevated to rights under *Van der Peet* will inevitably—in large part because of colonial influence—be framed in a way that advantages the interests of Aboriginal men over those of Aboriginal women. This is true for two distinct reasons: first, courts will inevitably listen to the characterization of those who are in power in Aboriginal communities, and these people are overwhelmingly male; second, the pre-contact practices and traditions that still exist today and have survived centuries of European influence will in most cases be the ones that are more consistent with colonialism, and therefore favour men rather than women.

114 See Tina Beads & Rauna Kuokkanen, “Aboriginal Feminist Action on Violence Against Women” in Green, *Making Space*, *supra* note 2, 221 at 225-226. See also Angela Cameron, “*R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism” in John D. Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008), in which Cameron argues that courts should undertake gender analysis when applying the sentencing factors set out in *R. v. Gladue* to Aboriginal women offenders.

115 See Green, *Exploring*, *supra* note 42 at 78, 89, 84.

116 See, e.g., Avigail Eisenberg, “Reasoning about Identity: Canada’s Distinctive Culture Test” in Avigail Eisenberg, ed., *Diversity and Equality* (Vancouver: UBC Press, 2006) 34.

The Practices and Traditions Will Be Articulated by the Male Leadership

The first point is an obvious one. As mentioned earlier, because of colonial influence and the structure of the *Indian Act*, most of the Aboriginal Band councils and chiefs' organizations in Canada are male-dominated.¹¹⁷ This means, of course, that most litigation of Aboriginal rights claims in Canadian courts will be conducted or supported by males, or those who support male interests, for the trite reason that litigation costs money.¹¹⁸ If an Aboriginal woman were to attempt to litigate an Aboriginal right that went counter to the male leadership's interests, not only would she likely get no financial support, she would probably be ostracized and intimidated within her own community¹¹⁹ and perhaps even denied funding for other needed resources, since the Band leadership controls the allocation of funding on reserve.¹²⁰

Since the voice that articulates the rights claims under *Van der Peet* will probably be male,¹²¹ it is also probable that the practices and traditions that are promoted as Aboriginal rights will be reframed in patriarchal terms. Ironically, one of the aspects that seems to make the *Van der Peet* test more flexible—the assertion that the right cannot be frozen in its pre-contact form, but must be allowed to evolve into a modern practice—may actually facilitate this process. Much of the “evolving” that Aboriginal practices have undergone has been due to the influence of European society.

It is also possible that, as articulated earlier, colonial-influenced patriarchal practices will be repackaged as tradition. In the *Sawridge* situation, for example, it is still unclear from the evidence what actually happened—either a colonially inspired patriarchal practice was being claimed as an Aboriginal right, or a legitimate Aboriginal tradition that discriminated against women was being claimed as an Aboriginal right. In the context of Aboriginal feminism, neither of these should be accepted. Since much of the evidence when dealing with pre-contact practices is inevitably oral history, it is often difficult to ascertain, as it was in *Sawridge*, whether the tradition being claimed is legitimately a “pure” pre-contact practice or one that has been colonially

117 See, e.g., Green, *Exploring*, *supra* note 42 at 4.

118 This is especially true given the demise of the Court Challenges Program, which helped many Aboriginal women in the past to pursue equality challenges. Sharon McIvor's fight against the current provisions of the *Indian Act* has been rendered difficult due to this development: see Barker & McCreary, *supra* note 63.

119 See *supra* notes 59 and 64 and surrounding text for how intimidation and violence have been inflicted on women in their own communities for standing up for rights that conflicted with what the male leadership saw as their interests.

120 This kind of retaliation has been alleged in several cases. See, e.g., *McAdam v. Big River First Nation*, 2009 CHRT 2.

121 This is not meant literally; it could very well be a female lawyer, or even a female claimant promoting the right at issue (as in *Van der Peet*, for example). However it is unlikely that a rights claim that goes against the interests of the male Band leadership will ever succeed.

influenced. But in reality, it should not matter. From the Aboriginal feminist perspective, a practice that disadvantages and discriminates against women should be discarded, regardless of its source. The *Van der Peet* test does not allow for this eventuality.¹²² The *Van der Peet* test does not allow for this eventuality, which insures that if *Van der Peet* serves any Aboriginal interests at all, it will likely not be women’s interests.

The Practices That Have Survived Colonialism Will Be the Ones That Favour Men, Not Women

On a related note, many pre-contact practices that were positive for women and even favoured them will not likely be considered Aboriginal rights under the *Van der Peet* test, for the simple reason that they were long ago discontinued due to colonial influence. Under *Van der Peet*, not only must the practice or tradition have existed pre-contact, but it also must have continuity with a practice or tradition that still exists today. On my argument that European society was and is patriarchal and that this heavily influenced Aboriginal societies, this requirement of continuity ensures that the practices that will pass the test will not be the ones that advantage women.

Today’s Aboriginal groups have been in contact with European cultures for, in some cases, several centuries, and it is indisputable that this contact has been extremely influential, eradicating many Aboriginal traditions. There are many striking examples of how early contact with settlers rapidly changed the way Aboriginal women’s roles were viewed in their own societies.¹²³ For example, Denise Henning provides a detailed description of pre-contact Cherokee society, and how women had roles equal or superior to men’s.¹²⁴ The society was matrilineal and the man would move to his spouse’s community upon marriage—a reversal of the “woman follows man” tradition claimed in the *Sawridge* case.¹²⁵ Women also had the important role of “arbitrator of justice.”¹²⁶ Henning describes how the arrival of Europeans and their contempt for Cherokees, due in part to the Aboriginals’ valuation of women, eroded the

122 Arguably, s. 35(4) does. We will not know this for certain until the *Sawridge* litigation is concluded. However, it is important to note that this type of analysis extends beyond the rights of women. What the Aboriginal feminist analysis stands for is the idea that all traditions should be evaluated on their merits, and not idealized merely because they are traditions. Even if s. 35(4) resolves this particular situation, the conclusions of the feminist analysis should still bear relevance in other situations.

123 See, e.g., Green, *Exploring*, *supra* note 42 at 44, 49-50. “Aboriginal women’s traditional roles in their communities were in some cases partially and in others completely displaced”: *ibid.* at 44. See also Nicholas, *supra* note 91 at 227.

124 Henning, *supra* note 95 at 189-90.

125 *Ibid.* at 190.

126 *Ibid.*

balance between Cherokee men and women and decimated women's previously valued roles in Cherokee society.

Aboriginal feminists might favour a revival of such practices that valued women and put them in powerful roles, but because *Van der Peet* does not allow the revival of practices that were eliminated due to colonialism, it would not be possible to use the doctrine of Aboriginal rights to fight for such a development.

One of the oppressive practices Aboriginal feminists criticize is when traditions are selectively invoked to legitimate oppression. *Van der Peet*, far from preventing this, encourages it. Another problematic process it encourages is the idealization of pre-contact practices.

The Idealization of Pre-Contact Practices

Another Aboriginal feminist argument against *Van der Peet* is that its emphasis on pre-contact tradition encourages fixation on and idealization of the past. It encourages a context wherein pre-contact traditions are elevated to quasi-sacred status, closed to questioning, and thus resulting in a false idea of Aboriginal culture as fixed and unchanging.

It is perfectly understandable that, given the narrowness of the *Van der Peet* test, Aboriginal groups would want to maximize their ability to preserve the few rights they can establish under it. If pre-contact practices or traditions are the only source of Aboriginal rights, it is only natural that Aboriginals would not want these traditions questioned or criticized based on their effect on women. Indeed, the narrowness of the test encourages an attitude of rigidity and exaggeration of tradition similar to what has been called "nativism"¹²⁷ or "reactive culturalism."¹²⁸

The following is a description of what Edward Said and Joyce Green refer to as "nativism":

["Nativism" results from] fixating on adhering to a traditional standard that is exemplified by past practices and contexts ... "Nativism" has often led to com-

127 See Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1993) at 228; Green, *Exploring*, *supra* note 41 at 12.

128 Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (New York: Cambridge University Press, 2001) at 36. Shachar discusses the problems experienced by women in minority communities when these communities are given accommodation by the state that ends up restricting women's rights. Shachar advocates a model called "transformative accommodation," a form of joint governance designed to encourage cultural accommodation while at the same time giving women in these groups tools to combat oppressive internal practices by having the choice of jurisdictions (state or group) in certain instances. She points to Aboriginal women's experience of sexual assault within their communities as a situation that could potentially be helped through transformative accommodation. I have my doubts about the usefulness of such a model in the Aboriginal context, and evaluating it is beyond the scope of this paper, but Shachar's description of "reactive culturalism" is telling.

elling but demagogic assertions about a native past, narrative or actuality that stands free from worldly time itself. It is a stance which is reactive to the colonial relationship and is often so reactive that it is at least partially an internalization of the stereotypes of the colonizer.¹²⁹

This type of thinking, of course, discourages any internal critique of practices that may be oppressive toward women or other internal minorities. It prevents the type of approach to tradition that Aboriginal feminists advocate; that is, an approach that evaluates traditions on their merits and leaves room for culture to evolve, modifying traditions and even eliminating them when appropriate.

Ayelet Shachar describes a similar phenomenon, called “reactive culturalism,” in the context of minority communities in general. “Reactive culturalism” is a process “whereby the group adopts an inflexible interpretation of its traditions precisely because of the perceived threat from the modern state.”¹³⁰ Hence, when their sphere of autonomy is narrowly defined, cultures tend to exaggerate their traditions as a defensive mechanism; this idealization often manifests itself in an exaggeration of the subordinated roles of women, and makes it particularly difficult for women in those cultures to challenge the traditions that oppress them.¹³¹

Because *Van der Peet* limits Aboriginal rights to pre-contact practices and traditions, it reinforces this type of thinking. Traditions are frozen and exaggerated, idealized and placed beyond question, so that a principled, flexible approach to evaluating traditions on their merits is impossible.

External Oppression Encouraging Internal Oppression

One of the biggest issues facing Aboriginal women is family violence and spousal abuse at the hands of Aboriginal men.¹³² There is a great deal of social science and anecdotal evidence to show that, in many cases, men commit violence against women when they feel powerless due to external oppression and when their social roles are denigrated.¹³³ A wide and generous interpretation of Aboriginal rights has the potential to help Aboriginal men regain their self-respect and sense of belonging, which would in turn make them less likely to abuse and subordinate Aboriginal women.

The Royal Commission on Aboriginal Peoples describes how Aboriginal men’s “deadened feelings” and “cultural self-hate,” caused by colonial oppression, result in the anger and frustration that leads to abuse: “[W]e begin

129 Green, *Exploring*, *supra* note 3 at 12, citing Said, *supra* note 127 at 7-8, 228.

130 Shachar, *supra* note 128 at 142.

131 *Ibid.* at 36.

132 See generally RCAP Report, *supra* note 2; Beads & Kuokkanen, *supra* note 114.

133 See, e.g., Elliot Liebow, *Tally’s Corner: A Study of Negro Streetcorner Men* (Boston: Little Brown, 1967) at 67-89. Liebow’s study involved impoverished black men in Washington, DC, but many of his conclusions could also apply to Aboriginal men in Canada.

to adopt our oppressors' values, and in a way, we become oppressors ourselves ... we begin hurting our own people."¹³⁴

In a similar vein, Verna St. Denis cites, as a cause of Aboriginal men's violence toward Aboriginal women, a theory that in patriarchal societies "men are allowed to dominate women as a kind of compensation for their being subordinated to other men because of social class, race, or other forms of inequality."¹³⁵ The subordination inflicted on Aboriginal men due to colonialism makes it hardly surprising that they would then turn this subordination on their own culture's women.

In its narrowness, *Van der Peet* offers limited hope for the development and nourishment of Aboriginal culture, and therefore it does little to help Aboriginal men regain their self-respect and sense of belonging and of having meaningful roles in a strong and vibrant community. As a result, it does virtually nothing to improve the suffering and violence that Aboriginal women endure.

It is evident from the preceding arguments, then, that *Van der Peet* is unsatisfactory as a test for Aboriginal rights from an Aboriginal feminist perspective. This conclusion may raise the question of what type of test for Aboriginal rights would be better than *Van der Peet*. The answer to this question is beyond the scope of this paper, but I hope my critique has provided food for thought that will inspire others to come up with solutions.

VI Conclusion

The Supreme Court of Canada set out the test for defining an Aboriginal right under s. 35 of the *Constitution*, and in *Van der Peet* and related cases. Essentially, an Aboriginal right is defined as a practice or tradition that is integral to the distinctive culture of the group claiming the right, and that has existed continuously since the group's contact¹³⁶ with Europeans.

The type of characterization of Aboriginal rights articulated in *Van der Peet* was applied in the *Sawridge* dispute in ways that were problematic for Aboriginal women. The case was the continuation of a long history of sexist rules about status and Band membership in the *Indian Act*, which stripped

134 Statement of Roy Fabian, Executive Director, Hay River Treatment Centre, in Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, Indian and Northern Affairs Canada, online: <<http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp>>.

135 St. Denis, *supra* note 3 at 46, citing Alan Johnson, *The Gender Knot: Unravelling our Patriarchal Legacy* (Philadelphia: Temple University Press, 1997) at 37.

136 Note that the *Powley* Decision [*R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at 37] articulated a different test for determining Métis peoples' Aboriginal rights. For Métis peoples, the relevant date for the determination of the existence of an Aboriginal right is the date at which the Crown obtained effective control over the Métis people involved in the litigation.

women of their status for marrying non-status men. After women had fought against these provisions for decades, Bill C-31 removed some of the discrimination; however, in the *Sawridge* case, three Bands characterized the practice of excluding women as an Aboriginal tradition and claimed it as a constitutional right. The types of arguments in the case, where patriarchal practices are repackaged as tradition, and/or tradition is reframed in patriarchal terms, are the types of practices Aboriginal feminists argue against.

Aboriginal feminism is a promising movement and its combination of critical analysis and political and legal activism has much to offer Aboriginal women in the difficult situations with which they are faced. Its features include drawing on traditional feminism while incorporating analysis that looks at colonialism and patriarchy together; analyzing tradition from a principled perspective that seeks to strengthen traditions that are a source of equality but dismiss those that are oppressive; and finally, the desire for help from the Canadian state and non-Aboriginal feminists in reaching the goals of equality for Aboriginal women.

In applying Aboriginal feminist analysis to the *Van der Peet* scenario, it becomes clear that, on a much broader basis than the problematic reasoning employed in *Sawridge*, the test articulated for Aboriginal rights is unsatisfactory. It promotes the elevation of practices and traditions that benefit men rather than women; it encourages the rigid idealization of pre-contact tradition; and it does nothing to rectify the horrific abuse and subordination of Aboriginal women by Aboriginal men.

An alternative test, more in line with Aboriginal feminism’s approach to tradition is required—one which embraces traditions that support and empower women and discards those which oppress them.

The situation of Aboriginal women in Canada, and Aboriginal peoples in general, is a challenging one. It will take more than revamping of the *Van der Peet* test to solve all the problems that exist. However, if the courts were willing to acknowledge the perspectives of Aboriginal feminists on such a crucial decision, and abandon *Van der Peet* in favour of a more gender-sensitive test, it would be an important step toward achieving equality for Aboriginal women, while at the same time nurturing and protecting Aboriginal cultures.

