

*Articles*

## Disagreement-in-Principle: Negotiating the Right to Practice Coast Salish Culture in Treaty Talks on Vancouver Island, BC

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**ABSTRACT** In negotiations to define the nature and scope of aboriginal rights, land ownership and self-government, British Columbia-based First Nations are asked to consider a clause setting out a right to practice their culture. When read in the full context of these proposed treaty agreements, the vision of the culture defined in this right is static and narrow, removing the constitutional protections for the complex and powerful social, political, economic dimensions of a more fully realized understanding of culture. This paper critically evaluates this proposed treaty right in the context of the long-standing processes of assimilation, and describes a more dynamic model of recognition and reconciliation of these cultural rights in treaties.

Key words: treaty negotiations, land claims, culture, self-government, certainty

### Introduction

Twenty-five years ago, Canada passed into law the Canadian Constitution and the Canadian Charter of Rights and Freedoms. These laws affirmed a framework of cultural and legal pluralism that has been a definitive element of Canadian statehood. The recognition and protection that the Constitution and Charter give to Aboriginal and treaty rights in Canada has become the political and legal centre-ground in the discourse about the political, social and economic futures of First Nations, Inuit and Métis people. Section 35 of the constitution recognizes and affirms aboriginal and treaty rights, while Section 25 states that the Charter must be interpreted in a manner that respects these Aboriginal and treaty rights. While these foundational laws open a box for the recognition and protection of the collective legal rights

of Aboriginal people, the political leaders of the day left open the matter of what exactly these rights would be, and what relationships these rights would have to the overall governance of Canada. With no national legislation ever taken up to give life to these constitutional principles, the discourse around these rights has fallen largely to the courts and individual negotiations between First Nations and federal and provincial governments to work out.

Over the last twenty-five years, the Supreme Court of Canada has been a powerful voice in defining these issues, framing aboriginal rights as largely "cultural rights." Since Chief Justice Antonio Lamer concluded in *Van der Peet* [1996] 2 S.C.R. 507 that to establish an aboriginal right under section 35 of the *Constitution*, aboriginal people must prove that

their practices, customs or traditions were integral to the distinctive culture at the time of contact, showing that they were a “defining feature” of their society that “truly made the society what it was.” Some legal theorists (Zalewski 1997; Slattery 2007) have argued that these cultural rights ought to be conceived as generic rights including rights to conclude treaties, to customary law, to fiduciary protection of the Crown, to an ancestral territory, to cultural integrity, to a moderate livelihood, and to self-government. However, Chief Justice McLachlin more recently confirmed in *Mitchell* [2001] 1 S.C.R. 911, that aboriginal rights can not be determined on a general basis, but rather that they are dependent on the “particular modalities” of the cultural practices, customs or traditions of an aboriginal group. Without specificity, she declared, any collective right could be argued on the basis of the right to self-government. Such a broad acceptance of these collective rights, the logic goes, has the potential to undermine the sovereignty of the state. For the most part, however, rather than defining these rights themselves the courts have strongly encouraged negotiations between aboriginal people and the state to define the specific content of these constitutionally protected rights and to reconcile them with other societal rights and interests.

So, while litigators craft strategies and test cases to establish cultural rights through the court, practice-by-practice, community-by-community, right-by-right, many First Nations leaders are engaged in land claim and self-government negotiations with Federal and Provincial governments to discuss the ways these rights may be commonly understood. The goals of the parties to these negotiations are complex and varied (Woolford 2005). First Nations are attempting to achieve some measure of reconciliation of the fact of their continuing cultural practices—which in spite of two centuries of colonialism, have not ‘disappeared’—with the social, political and economic institutions of Canadian society. The driving force behind these negotiations for governments is to achieve legal and political certainty as to the content of these cultural rights, in an atmosphere of minimizing economic and political risks of having such “difference” constitutionally enshrined and protected.

There has been a reaction from quarters of the anthropological community against the way the Supreme Court justices have framed and constrained the culture concept (e.g. Niezen 2003, Howes 2005). As Niezen has suggested, the idea of the courts that culture is a “thing” has come just at the moment that social scientists have agreed to see it more as a “process.” Following this critique, I suggest that the concept of “culture” upon which these rights are drawn, is better conceived as a system of practices, meanings, symbols, and learned behaviour, all of which have social, economic, political, and symbolic elements pervasively threaded with relations of power. Theorizing culture from this stance provides a framework, within the context of the Canadian constitution, of the possibility for the co-existence of dramatically different ways of living, with “culture” powerfully guiding the interface of state and indigenous relations.

For the remainder of this paper, I will examine the present status of negotiations around cultural rights drawing on my experiences over the past decade as a negotiator, advisor and researcher for several Coast Salish First Nations in the BC Treaty Process. My overall observation is that the social science critique of how culture is conceptualized in aboriginal rights discourse has had little more effect at the negotiating table than it has had sway in the decisions of the justices of the Supreme Court of Canada. Alarming, from my view, several First Nations leaders and their legal advisors have turned their backs to this issue, enshrining a very narrow and static view of culture in the text of their Final Agreements. There are alternatives to these provisions which have been proposed by some First Nations but not yet accepted by Governments. There is more room for creative work to be applied to proposing a vision of cultural rights that can be articulated and sustained in these kinds of constitutionally binding agreements.

### Drafting “Culture” into Final Agreements

The drafting of the Final Agreements (Lheidli T’enneh et al. 2006; Tsawwassen et al. 2006; Maa-nulth et al. 2006) being negotiated with Canada and British Columbia has followed a form that has emerged out of nearly 40 years of land claims

negotiations in Canada. The agreements begin with a non-binding preamble, setting out the intent of the Parties in reaching an agreement, followed by a chapter ambiguously cloaked with the term ‘General Provisions’ where the legal instruments for the transformation of the entire array of undefined (or previously defined in the case of historic treaties being folded into modern agreements) collective constitutional rights, including attendant rights of self-government, into a body of discretely defined rights, law-making powers, and fiscal and policy commitments. The First Nation releases all prior claims, and indemnifies governments from any future harm arising from these past rights. The chapter recognizes the constitutional status of the rights defined in the agreement, and sets the First Nations law-making powers in the context of concurrently applying Federal and Provincial laws. Though there is space for changes to these rights and relationships as time goes on, changes based on claims to prior cultural rights are permanently abandoned. This is the core of the legal, political and economic certainty that is the foundation of governments engaging these negotiations.

In the most recent of these Final Agreements (Tsawwassen, Lheidli T’enneh, Maa-nulth), there are around ten “treaty rights” described, forming the new totality of “cultural rights” that Canada and BC will recognize after treaty. These include rights to:

- practice language and culture in ways consistent with the agreement
- harvest fish and aquatic plants for food, social and ceremonial purposes
- trade or barter fish and aquatic plants with other First Nations people
- harvest wildlife & migratory birds for food, social and ceremonial uses in a limited area
- trade or barter wildlife with other First Nations people in BC
- participate in public regional wildlife management processes
- participate in and develop terms of reference for any public land planning process
- gather plants for food, social and ceremonial purposes on Crown land in their territory
- self-govern, as set out in the agreement

While many of these have the cultural components that are familiar from the past four decades of aboriginal rights litigation (fishing, harvesting, hunting, trade and barter, gathering) or federal policy (participation in public processes, self-government), it is the right to practice culture and the associated law-making provision for the protection, promotion and preservation of the culture of the First Nation that pose the most significant challenge for interpreting the future of cultural rights (see Table 1).

It is difficult on the face of it to interpret the meaning of the word “culture” when it is used in the context of affirming “the right to practise the culture” of the First Nation, as per clause 1 of Tsawwassen’s Culture and Heritage chapter. The term culture is not defined in the context of this clause, though there are clues elsewhere in the Final Agreement that may guide future courts and policy makers as to what the parties to these negotiations had intended “culture” to mean.

The best clue is only three lines below in the agreement where a sense of the meaning of “culture” is indicated in respect of the law-making powers that the First Nation has in respect of “the preservation, promotion, and development of the culture and language of the Tsawwassen First Nation.” Here, the agreement states that “for the purposes of sub-clause 2.a, the culture of the Tsawwassen First Nation includes its history, feasts, ceremonies, symbols, songs, dances, stories and traditional naming practices,” not relating to intellectual property or official languages. Given the legal drafting conventions of these agreements, this description is not intended to be definitive, but rather to be illustrative of kinds of things. Art, dress, language are not listed, but would be like-things in the list of the attributes of culture. Gathering plants, selling proceeds of traditional harvests, and regulating gambling, would be examples of kinds-of-things that would not be considered as part of this definition of culture.

It is my understanding that Canada views the list as demonstrative of the kinds of things they understand “culture” to be in the context of the law-making provision in order to provide a point of reference to what might be considered to be aspects of First Nations culture that would not tread on Canada’s

Table 1: 'Culture' clauses from the Tsawwassen Final Agreement (2006)

**Preamble (p. 1-2)**

- B. Tsawwassen First Nation claim aboriginal rights based on their assertion of a unique, current and historical, cultural connection and use, since time immemorial, to the lands, waters and resources that comprise Tsawwassen Territory in Canada.
- I. Canada and BC acknowledge the perspective of Tsawwassen First Nation that harm and losses in relation to its aboriginal rights have occurred in the past and express regret if any acts or omissions of the Crown have contributed to that perspective, and the Parties rely on this Agreement to move them beyond the difficult circumstances of the past;
- J. Canada and BC acknowledge the aspiration of Tsawwassen First Nation to preserve, promote and develop the culture, heritage, language and economy of Tsawwassen First Nation;
- K. Canada and BC acknowledge the aspiration of Tsawwassen First Nation and Tsawwassen people to participate more fully in the economic, political, cultural and social life of British Columbia in a way that preserves and enhances the collective identity of Tsawwassen people as Tsawwassen First Nation, and to evolve and flourish in the future as a self-sufficient and sustainable community.

**Chapter 14, Culture and Heritage, General (p. 125)**

- 1.0 Tsawwassen First Nation has the right to practise the culture of the Tsawwassen First Nation, and to use the Hun'qum'i'num language, in a manner that is consistent with this Agreement.

**Chapter 14, Culture and Heritage, Power to Make Laws (p. 125)**

- 2.0 Tsawwassen Government may make laws in respect of:
  - a. the preservation, promotion and development of the culture of the Tsawwassen First Nation and the Hun'qum'i'num language on Tsawwassen Lands.
- 3.0 A Tsawwassen Law made under clause 2 prevails to the extent of a Conflict with a Federal or Provincial Law.
- 4.0 For the purposes of subclause 2.a, the culture of Tsawwassen First Nation includes its history, feasts, ceremonies, symbols, songs, dances, stories and traditional naming practices. For greater certainty, Tsawwassen Government does not have the power to make laws respecting Intellectual Property or the Official Languages of Canada.

**Chapter 16, Governance, Tsawwassen First Nation Law Making Authorities, Education (p. 149)**

- 76. Tsawwassen Government may make laws in respect of education in the culture of Tsawwassen First Nation and the Hun'qum'i'num language provided by a Tsawwassen Institution or a person appointed by Tsawwassen First Nation on Tsawwassen lands including:
  - a. the certification and accreditation of teachers of the culture of Tsawwassen First Nation and the Hun'qum'i'num language; and
  - b. the development of the curriculum for teaching the culture of Tsawwassen First nation and the Hun'qum'i'num language
- 80. A Tsawwassen law made under clause 76 prevails to the extent of a conflict with a Federal or Provincial law.

concerns with intellectual property. Such a view is consistent with the Federal Policy Guide on the Inherent Right to self government (Canada 1995), which states that Canada is willing to negotiate “the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, [and] integral to its distinct Aboriginal culture,” but will not negotiate “subject matters where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority” such as intellectual property. While British Columbia does not have the same national policy mandates on these matters, I understand that they have agreed to this type of clause for similar reasons of wanting to ensure that aboriginal governments have jurisdiction over local cultural matters above-and-beyond the ten or so land-and-resource related rights and governance powers described above.

The other guide post the Final Agreements provide is in the preamble (Table 1), where “Canada and BC acknowledge the aspiration of Tsawwassen First Nation to preserve, promote and develop the culture, heritage, language and economy of Tsawwassen First Nation;” and where “Canada and BC acknowledge the aspiration of the Tsawwassen First Nation and Tsawwassen people to participate more fully in the economic, political, cultural and society life of British Columbia in a way that preserves and enhances the collective identity of the Tsawwassen people as Tsawwassen First Nation, and to evolve and flourish in the future as a self-sufficient and sustainable community.”

In this reading, “culture” is overwhelmingly defined in symbolic terms, evoking practices that are evocative of Canadian multi-culturalism, largely concerned with identity rather than practices which may have political or economic components. The preamble in particular gives a strong hint that in setting out as distinctive elements of culture only the symbolic/identity senses of the term, the assimilation of political or economic distinctiveness is intended, offering the alternative of “promoting and developing the economy,” “fully participating in the economic, political, cultural and social life of British Columbia,” which provide opportunities to “flourish in the future and a self-sufficient and sustainable community.”

The possibility of radical difference is eliminated as the constitutionally-protected cultural rights of the Tsawwassen people are integrated into the cultural mainstream of British Columbia for all areas other than the ten or so rights (hunting, fishing, gathering, etc) listed in the agreement.

Reading the whole text of the agreement, there are extensive clauses which further circumscribe the interpretation of this cultural right, which much be exercised “in a manner consistent with the Final Agreement.” Throughout the various chapters of the Final Agreements, elements of cultural practices are described as distinctly not being an element of a treaty right. Group membership, one of the most significant elements of cultural life, is delineated to a specific set of criteria and constrained by a prohibition to affiliate with more than one group simultaneously. There are new documentation processes required for the exercise of harvest rights, which constrain (through the prohibition of out-of-member designations for non-allocated species) the kind of fluid and inclusive approaches to resource harvesting that have long been the foundation of aboriginal sharing economies. Territoriality is extinguished to the vast majority of aboriginal lands, reconfiguring land tenure relations to small-scale land bases wholly based on the western doctrine of tenures that have emerged from western feudal land law, where First Nations are the vassals to the sovereign whose *dominium* over the land is no longer encumbered by a radical (allodial) native title. Similarly, aboriginal sea tenure systems are converted to, at best, a mix of non-exclusive access to the open marine commons and some private interests being created in aquaculture-focussed Crown tenures to discrete foreshore areas. Rights to aboriginal intangible properties are extinguished. The right to care for the dead at the ancestral sites throughout the territories is replaced by an optional process of communication between the Province and First Nation. Plant gathering rights are dramatically limited in scope, reinforcing the low-status of a right dominantly exercised by women. In the exercise of self-government, no uncoded laws will be recognized or protected as valid jurisdictions, and any jurisdictions of customary law which have not been mentioned in the Agreements are released. Village-

based or regional polities are entrenched as being the authorities through which all collective rights will be governed, eliminating any recognition of kin-group based polities.

In the context of the “modify and release” model of certainty, and the application of the *Charter* to First Nations governments, the right to practice culture, and the attendant provision to make laws over the protection, promotion and preservation of a First Nation’s culture appear to be rather narrowly construed. Though a few First Nations have accepted this model in British Columbia, a great many other have rejected it as falling outside their vision of land claims and self-government agreements bringing respect and reconciliation to their cultural practices. These issues, I suggest, may be as important as land/cash/fish quanta or government insistence on relinquishing the tax exemption, for most First Nations not reaching substantive agreement. Indeed, given the current state of powers of First Nations governments, even under the incredible constraints of the *Indian Act* (constraints which are almost universally reviled), First Nations have said that in terms of their cultures, they are being asked to give up too much.

### **A Rejected Proposal of a Model of Difference**

The Hul’qumi’num Treaty Group has argued at the negotiation table that there ought to be an expansive vision of cultural practices that receives the constitutional protection of modern-day treaties (Table 2). The central premise of this model is that all potential cultural rights can not possibly known or described fully enough to enumerate them all in the text of the Final Agreement. Attempting to do so would too fully reduce the complexity of their First Nations culture, and the ability for it to dynamically transform in future circumstances. Instead, the clauses give some guidance to the interpretation of the breadth and dynamic nature of culture, and sets out an orderly process for cultural rights to be enumerated as additions to a treaty relationship as the need arises.

The proposal received little serious consideration by federal and provincial negotiators, being dismissed as fundamentally incompatible with their desire for

certainty. In treaties, the desire of governments is for everyone to rely only on the treaty for the exhaustive understanding of the nature and scope of aboriginal and treaty rights. For such a broadly stated right to remain uncodified and outstanding, there would be, for government, too much legal and political uncertainty with respect to how those rights may interact with government decisions or the economic interests of others. It is here that the theorizing of culture as a system of social, economic, political, and symbolic practices is shown to be incompatible with a view of culture as a series of discrete and definable traits.

As a member of the Hul’qumi’num Treaty Group negotiation team, I felt the exhaustion and frustration of debating these things, in spite of feeling strategically and intellectually right. The cautions of the older people about how their cultural practices should be handled when it is in these “whiteman’s papers” rang in my ears. Success at the treaty table, however, is not measured by being right. It is measured by the number of clauses agreed upon. In spite of the seeming stalemate, the energies of the negotiation table continued, our sleeves rolled-up, looking for agreement and opportunities. One suggestion was that perhaps we should simply focus on “just getting it done,” not arguing over the philosophical issues which divided the parties, but keep looking for the “practical solutions.” Success, from this view, may not be built on enshrining complex cultural issues in a constitutionally protected legal text, but rather in developing small-scale, on-the-ground, economic and political relationships, hoping that in the short term nothing will fall off the rails.

### **Is ‘Getting it Done’ Really Just Assimilation?**

Some may argue that by First Nations holding out for an expansive, evolving recognition of cultural rights in the treaty (beyond the symbolic/identity recognition), they are concerning themselves with matters that are largely peripheral to “getting it done.” Such a critique would point out that the cultures of all the immigrant nations in Canada are still practised, and that they flourish, particularly when these communities are economically successful. Clearly, if “getting it done” means integrating with mainstream

Table 2: A Rejected Proposal for the Constitutional Recognition of Broad Cultural Rights

**General**

0.0 Any cultural practice that has been explicitly enumerated in the treaty as a right is set out fully and exhaustively. Those cultural practices that are not enumerated as a right in this treaty are not extinguished or released, rather are recognized and affirmed under the clauses in this section.

**Hul'qumi'num Right to Practice Coast Salish Culture**

- 1.0 Hul'qumi'num Mustimuhw have the right to practice Coast Salish culture in a manner consistent with this Agreement.
- 2.0 For purposes of this Chapter, the Hul'qumi'num right to practice Coast Salish culture includes contemporary practices inextricably linked to and derived from Hul'qumi'num ancestral activities, customs and traditions. The form of these cultural practices may develop, change, and adapt over time, and may have economic, governance, social or political components.
- 2.1 The Hul'qumi'num right to practice Coast Salish culture is subject to limitations for public health, safety and conservation.

**Incremental Certainty and the Enumeration of Hul'qumi'num Cultural Rights**

- 3.0 The Hul'qumi'num right to practice Coast Salish culture is intended to be in addition to those treaty rights which are exhaustively set out in the agreement, including: a) list of the 15 or so clauses where rights are mentioned in the treaty (fishing, hunting, gathering, etc., etc.).
- 3.1 For the purposes of achieving incremental certainty, the Parties agree to set out a process by which Hul'qumi'num Mustimuhw may explicitly identify a cultural practice as a right under 1.0. However, a cultural practice does not have to be explicitly identified or enumerated under 3.2 below in order to be a valid treaty right.
- 3.2 As a cultural practice becomes explicitly recognized as a right under this section, the Parties will engage a process for the enumeration of that right as a treaty right whose form of expression is consistent with those listed in 3.0a above.

**Dispute Resolution Process for rights practised in a manner inconsistent with Final Agreement**

- 4.0 If an specific cultural practice exercised as a Hul'qumi'num right to practice Coast Salish culture is declared by a Court, including a Hul'qumi'num court, to be inconsistent with this Agreement, the Parties will negotiate and attempt to reach agreement on how to resolve the inconsistency.

capitalist modes of production and political discourses, individuals prospering while having a lively symbolic/identity culture, then indeed these concerns about the scope and breadth of cultural rights may be academic.

However, I hold a view that if real, significant diversity is to be part of the constitutional fabric of Canadian society—diversity that might from some quarters seem fundamentally non-economic, even anti-individualistic—then First Nations need a broader vision of the recognition and affirma-

tion of their cultural rights. Otherwise these Final Agreements may become powerful tools of social engineering, powerfully generating cultural homogeneity, couched in a rhetoric of the “right to practice culture.”

Unfortunately, from my experiences of government intransigence on these issues, the cost for aboriginal communities for taking strong positions on their cultural rights is likely going to be decades of more social/political/economic inequality, with equalities being slowly won litigation-by-litigation,

right-by-right, community-by-community, until perhaps a future day arrives where more First Nations can more fully meet their reconciliation interests. Building a Canada that can recognize, accommodate and reconcile cultural rights is likely, I believe, essential to giving an example for peaceful, multicultural relations all over the world (think of the complexities in Africa and the Middle East that have ensued because these issues have only been dealt with in the context of a very messy colonial world). They

are likely critical to the environmental sustainability of the planet too, as it is the kinds of intense, long-term relationships that aboriginal people have with the environment, built from layer-upon-layer of integration with aboriginal cultures that the rest of the world will need to have as a balance to the otherwise unchecked forces of free-market capital. Indeed, in these contexts, holding out for cultural difference may have a material impact on the fate of the world.

## References

Canada

1995 The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government. Ottawa, Minister of Public Works and Government Services Canada.

Howes, David

2005 Introduction: Culture in the Domains of Law. The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada. *Canadian Journal of Law and Society*. 20(1):9-29.

Lheidli T'enneh, Canada and British Columbia

2006 Lheidli T'enneh Final Agreement. Ottawa and Victoria: Government Printers.

Maa-nulth, Canada and British Columbia

2006 Maa-nulth Final Agreement. Ottawa and Victoria: Government Printers.

Niezen, Ronald

2003 Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada. *Canadian Journal of Law and Society*. 18(2):1-26.

Slattery, Brian

2007 A Taxonomy of Aboriginal Rights. In Hamar Foster, Heather Raven, and Jeremy Webber, eds. *Let Right Be Done: Calder Aboriginal Title and the Future of Indigenous Rights*. Pp. 111-128. Vancouver: University of British Columbia Press.

Tsawwassen, Canada and British Columbia

2006 Tsawwassen Final Agreement. Ottawa and Victoria: Government Printers.

Woolford, Andrew

2005 *Between Justice And Certainty: Treaty Making In British Columbia*. Vancouver: UBC Press.

Zalewski, Anna

1997 From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights *University of Toronto Faculty of Law Review*. 55(2):435-455.