

**Aboriginal Rights and Title in  
Canada after *Delgamuukw*:  
Part Two, Anthropological Perspectives on Rights,  
Tests, Infringement & Justification**

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*The 1997 Delgamuukw decision of the Supreme Court of Canada has been an important moment in determining the nature and extent of Aboriginal rights and title in Canada. This paper (the second of a two-part essay) critically reviews this decision, drawing on anthropological and legal scholarship to put into context how Aboriginal rights and title have been conceptualized and argued. I first examine the use of the notion of 'culture' in formulating conceptions of aboriginal rights and title. This is followed by a critical discussion of how anthropology has and can continue to play a part in providing evidence for and critiquing legal tests for proof, infringement and justification of aboriginal rights and title.*

*Le jugement de la Cour suprême du Canada concernant Delgamuukw en 1997 a été un événement important dans la détermination de la nature et de l'étendue des droits et du titre autochtones au Canada. Cet exposé (le deuxième d'une dissertation en deux parties), examine ce jugement de manière critique, faisant appel au savoir anthropologique et juridique pour mettre en contexte la manière dont les droits et le titre autochtones ont été conceptualisés et défendus. J'examine d'abord l'utilisation de la notion de culture dans la formulation des conceptions des droits et du titre autochtones. C'est suivi d'une discussion critique sur la manière dont l'anthropologie a joué et continue à jouer un rôle dans l'apport de preuves pour la violation et la justification des droits et du titre autochtones et dans la critique d'essais juridiques de preuves.*

## Introduction

Since the failure of four constitutional conferences and the Charlottetown accord, the judiciary has become the main source for definitions of Aboriginal rights and title in Canada (Borrows 1998:38). First Nations have

clearly articulated that they have been excluded from defining concepts of Aboriginal rights and title, particularly in the courts (see also Boldt and Long 1985; Cassidy 1992). Wet'suwet'en leader Don Ryan has stated it well:

Canada has held the racist view that Aboriginal people are primitive and are incapable of political, legal, historic, or economic thought... Canada has put a lot of energy towards making sure Aboriginal people never get involved in the development of legal principles of Aboriginal rights and title, especially in the courts and in parliament (Ryan 1994:xi)

Counsel Thomas Berger reiterated these sentiments when he lamented, "Our profession has too often demonstrated an incapacity to understand the fact that the native people had well-developed and sophisticated concepts of legal regulations and legal rights." (Berger 1981:56). Moving between decisions based on racist legal precedent and building new precedent from contemporary socio-political values, these judges have constructed a set of meanings for how Aboriginal rights and title should be construed (Sanders 1990). In spite of the courts' immersion in a traditional colonialist legal positivism, their expression of Aboriginal rights as *sui generis* rights has "embraced the native discourse of rights... not necessarily subject to orthodox reasoning via tests and doctrines developed in other areas of law" (Jhappan 1991:61).

The Supreme Courts' *Delgamuukw* decision requires critical examination of the definitions of the nature and scope of Aboriginal rights and title established by the court. These definitions have been challenged by the legal and social science communities as static and ethnocentric. In this essay, I make suggestions as to how the definitions should be reconsidered within the legal framework of the Canadian Constitution. The Supreme Court has developed specific legal tests from these conceptualizations of Aboriginal rights which have also been challenged and responded to by legal and social science scholars. While social science provides useful critiques, it is clear that to respond to the tests on their own terms more refined methods and theory in anthropology need to be developed.

The most limiting aspect of the *Delgamuukw* decision for First Nations people is the political power the Supreme Court has given the Crown

for infringing on Aboriginal rights. Below, I critically examine the infringement and justification tests and the responses that Aboriginal people have mounted to these challenges. Again, anthropologists have been at the forefront in providing evidence used to protect Aboriginal rights from these infringements. Finally, I briefly review how Aboriginal rights and title issues have been argued outside the court in the implementation of resource management, economic development and treaty negotiations. Anthropology has had a key role to play in facilitating communications over the cultural divide that Aboriginal people face towards greater self-determination.

I have developed this essay into two parts, following the order of the reasoning of Chief Justice Lamer in the *Delgamuukw* decision. In the first part of this essay, published in the previous issue of the *Native Studies Review*, I provided a brief summary of the *Delgamuukw* decision, followed by an investigation of the nature of evidence—both oral traditions and anthropological expert witness testimony—that the Supreme Court has come to accept as valid. I provided a critique of the court's conception of these kinds of knowledge, and considered the theoretical and political difficulties inherent in using oral histories and anthropological evidence in an adversarial legal setting. Though these parts can stand alone, it is intended that they be read together to provide the broadest context and critique of the reasoning in the Supreme Court's *Delgamuukw* judgement.

## Defining Aboriginal Rights

In defining the source and nature of these *sui generis* Aboriginal rights and title, the courts have drawn up tests which must be met by Aboriginal people claiming those rights. The source and nature of the rights and the burden of proof that must be met in the tests all interface with concepts of culture. This articulation between how culture is conceived and the interpretation of law happens either implicitly through the judiciary's assumptions or explicitly through the facts presented to challenge the tests. Reviewing the literature around the definition of Aboriginal rights in Canada, there emerges a clear critique of these judicial assumptions and of the test required to substantiate claims to the rights. Other visions for defining Aboriginal rights emerge from this critique, but have not had the practical power of those which emanate from this country's courts.

*Source and Nature of Aboriginal Rights & Title*

The rights of Aboriginal peoples were recognized and affirmed in section 35(1) of the *Canadian Constitution Act, 1982*. However, the nature and extent of these rights are not further clarified in the *Constitution*, and have been a long-standing question argued in the courts. Lamer clarified his vision of the nature and extent of these rights in the Supreme Court's *Van der Peet* and *Delgamuukw* decisions. Essentially, rights and title emerge from the fact of prior occupation of the land:

When Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status. (Lamer CJ., in *Van der Peet* 4 [1996] C.N.L.R. 193).

Flowing from Aboriginal peoples' prior occupation, are the traditional laws and customs which make up the Aboriginal common law that is now protected by section 35(1) of the *Canadian Constitution Act, 1982* and which must be reconciled with the British and French laws that came with claims to European sovereignty over Aboriginal territory (*ibid.* 199-200).

This source of Aboriginal rights and title has been historically debated, variously argued as emerging from acts of parliament (e.g. the 1889 Privy Council ruling in *St. Catherine's Milling and Lumber Company v. The Queen* that Aboriginal title was granted by the *Royal Proclamation, 1763*) or inherently connected to Aboriginal peoples being autonomous societies prior to contact (Asch 1992:475-6). The first argument has been roundly dismissed by both academics (Asch and Macklem 1991; Hall 1991; McNeil 1989; Slattery 1992), and the Supreme Courts' *Sparrow*, *Van der Peet* and *Delgamuukw* decisions, and therefore will not be treated further here. The implications of the second argument continue to be debated.

Though Aboriginal rights have been given explicit recognition in the Constitution, the source of these rights remains unsettled. Theories of Aboriginal rights have been proposed from the perspective of interna-

tional law (Jhappan 1992) as part of natural rights handed to Aboriginal people by the Creator (Gormely 1984; Jhappan 1991). These perspectives are interesting, but have had little impact compared with the development of the recognition of Aboriginal rights on the domestic front. Both Jhappan and Barsh have documented Canadian Aboriginal strategies of appealing to the international community in support of their Aboriginal rights. Jhappan demonstrates that, in the short term, lobbying the international community has been successful in intervening with specific issues, but has had little long-term impact on domestic policies (Jhappan 1992). Barsh has suggested that those Aboriginal communities in Northern Quebec who have stated that they may declare unilateral self-determination upon the secession of Quebec from Canada would not likely find support in the international community (Barsh 1997:22). Arguments for Aboriginal rights as natural rights have been integrated to a certain degree in the characterization of Aboriginal rights and title as *sui generis* or unique in law (Jhappan 1991). The question the domestic courts have left, then, is in their contradictory formulation of Aboriginal rights as alternately coming from prior occupation of the land or as an extension of Aboriginal common law.

Asch has argued that Aboriginal rights would best be envisioned as integral, allowing the Canadian government to build a society based on consociation, or the recognition of "the existence of various ethnonational collectives in its constitutional charter" (Asch 1990:95), thus explicitly acknowledging the right of Aboriginal peoples (and also Quebec) to self-determination (*ibid*: 99, see also Asch 1992, 1993a, 1993b). By taking this position of consociation, the state could no longer justify taking legal and political positions which deny Aboriginal rights by claiming they were abolished when sovereignty was asserted by European powers (Asch 1992:479-480). As continued challenges to claims for Aboriginal rights in the courts demonstrate, the Crown has not yet explicitly acknowledged a consociation system. However, Slattery observes that in enshrining Aboriginal rights in the *Constitution* of 1982, the Crown has offered "its protection to such peoples, accepted that they would retain their lands, as well as their political and cultural institutions and customary laws, unless the terms of treaties ruled this out or legislation was enacted to the contrary." (Slattery 1992:736). This, alongside the continued debate over distinct society status for Quebec, suggests that there is an implicit consociation status embedded in the *Canadian Constitution*

(Asch 1990). Asch and Smith have seen this explicit acknowledgement of multiple ethnonationals in Canada becoming explicit in the formation of Aboriginal self-government in Nunavut and Denendeh (Asch and Smith 1992).

Though Slattery sees Aboriginal rights as emerging from Aboriginal common law (Slattery 1992), McNeil observes that there has been an inconsistency in the statements of the Supreme Court on this matter (McNeil 1997). For instance, Judson, CJ. in *Calder* emphasises that Aboriginal title (a kind of Aboriginal right) lies in prior occupancy of the land, while Dickson, CJ, in *Guerin* argued that Aboriginal title emerges from Aboriginal systems of law (McNeil 1997:136). Stated another way, there is a big difference in how the courts have defined Aboriginal rights and title, one where they are very narrowly construed as emerging in the specific sites and practices of past societies, the other which broadly views them as a set of Aboriginal laws which have survived European assertions of sovereignty.

This situation has not been resolved by the recent Supreme Court decisions in *Delgamuukw* or *Van der Peet*, where Lamer acknowledged that Aboriginal title is derived both from "the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law [arising] from possession *before* the assertion of British sovereignty" (Lamer CJ., *Delgamuukw* [1998] 1 C.N.L.R. p. 58). Dissenting judge McLaughlin argued that "Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the Aboriginal people in question" (McLaughlin J., *Van der Peet* [1996] 4 C.N.L.R. p. 264). In accepting Lamer's majority position, the courts have frozen "the development of certain Aboriginal practices in the distance past" (Borrows 1998:57).

The implications of Lamer's view of rights as being frozen in time have been criticized by McNeil (1997), Borrows (1998) and Cheng (1997). These authors have insisted that though rights emerge from a unique historic situation they may change over time, as rights do in any society. McNeil argues that, if taken seriously, this frozen rights approach "would condemn Aboriginal societies to extinction, as cultures which cannot adapt to changing conditions are bound to disappear" (1997:151). Borrows (1998) examines a case where the Supreme Court took this position very seriously. In *Pamajewon* ([1996] 4 C.N.L.R. 164), an Ojibway people claimed a casino as an Aboriginal right which falls within the broad scope

of their ability to be a self-determining nation. The claim was rejected because Ojibway traditional gambling was "not done on a twentieth century scale," a finding which Borrows finds unsurprising given that "not many activities in any society, prior to this century, took place on a twentieth-century scale" (Borrows 1998:54). Cheng comments that by limiting the recognition of Aboriginal rights to "merely continuing rights to discrete practices and customs, the court is in danger of reducing Aboriginality to a package of anthropological curiosities rather than manifestations of an Aboriginal right to occupation, sovereignty and self-government" (Cheng 1997:432). Put another way, "the more state-like the Aboriginal claim ... the less likely the Aboriginal claimants are to convince courts of their claim. The less familiar and more 'primitive' the claim, such as nonexclusive hunting and fishing rights, the more likely its success" (Korsmo 1996:73).

The notion that Lamer's conceptualization of Aboriginal rights freezes them in time is also born out in the "inherent limit" Lamer put on Aboriginal title in the *Delgamuukw*. Aboriginal title, for Lamer, is claimed because of a group's "special bond with the land because of its ceremonial or cultural significance" (Lamer, CJ., *Delgamuukw* [1998] 1 C.N.L.R. p. 63-4). This "special bond" is broken if it is used in ways which "destroy that relationship," citing the example of turning an important location into a parking lot (*ibid.*). The Musqueam First Nation have allowed the last remnants of the oldest and largest village and burial ground in their traditional territory (the "Marpole site") to be turned into a parking lot beside the Fraser Arms Hotel. Have the Musqueam infringed on their Aboriginal title by making a sacred place into a parking lot? Does the Provincial Heritage legislation, which has guidelines that include "capping" such sites to protect them, conflict with Musqueam's Aboriginal title to that important place? Without looking too literally at the example, I would suggest that the inherent limit to Aboriginal title, and the broader principles of frozen rights on which it is based, forces the two systems of law to interact on an unequal basis, with First Nations being left with limited means to demonstrate and exercise their rights as they choose.

Lamer's majority ruling in the Supreme Court's decisions of *Van der Peet* and *Delgamuukw* clarified how an Aboriginal right or title may be extinguished. Essentially, extinguishment of an Aboriginal right occurs through agreement through treaty, or if the Crown can show that legislation was passed, prior to the enactment of the *Canadian Constitution*

Act, 1982, that had the clear and plain intent of extinguishing these rights (*Van der Peet* [1996] 4. C.N.L.R. p. 226). This later ability to extinguish Aboriginal rights is based on the thesis that the Crown acquired such a right when it became sovereign over the newly "discovered" land. This position has been critiqued as being ethnocentric for legalizing European constructions of history. (Doyle-Bedwell 1992). Under Lamer's ruling, a strong right like one to sovereignty is "extinguished merely by the act of establishing a European regime, regardless of the original inhabitants and their thoughts, beliefs, and laws" (*ibid.* 202). Some legal scholars have suggested that this type of power of extinguishment is an inappropriate view of the nature of Crown sovereignty, which is merely the vested or exclusive right to acquire native title. The Crown cannot, under the later interpretation, unilaterally extinguish rights or title without the consent of, and compensation to, the Aboriginal community in question (Macklem 1991:406). Thus, Lamer was contradictory, on one hand insisting on consultation and compensation in negotiating treaties, on the other recognizing a sovereign right of the Crown to extinguish rights and title with clear and plain intent.

Federal and Provincial governments have pursued a policy that asks Aboriginal people to extinguish their general or undefined rights for specific rights outlined in a treaty or settlement (Asch and Zlotkin 1997:213). When challenged in court, the Crown has also argued, as in *Delgamuukw*, that Aboriginal rights have been extinguished by prior laws (Foster 1991:345-7). Though the later position was rejected by the Supreme Court for Aboriginal people in British Columbia through *Delgamuukw* on the basis of the strict historical test that extinguishment legislation must have "clear and plain intent," the former position continues to be a central tenet to the Crown's desire in negotiating treaties. For the Crown, this would create certainty and finality over the scope of particular Aboriginal rights and title. For instance, the relevant clause of the final agreement of the 1998 Nisga'a treaty reads:

This agreement constitutes the full and final settlement in respect of the Aboriginal rights, including Aboriginal title, in Canada, of the Nisga'a Nation ... The Nisga'a Nation releases Canada, British Columbia and all other persons from all claims, demands, actions and proceedings, of whatever kind, and whether known or unknown, that the Nisga'a Nation ever had,

now has or may have in the future, relating to or arising from any act, or omission, before the effective date that may have affected or infringed any Aboriginal rights, including Aboriginal title in Canada of the Nisga'a Nation. (Nisga'a Nation *et al.* 1998:21 ).

Asch and Zlotkin see the Crown's extinguishment policy as being anti-thetical to Aboriginal relationships to the land, which from Aboriginal perspectives, "flows from the Creator ... is inherent ... is not something granted to Aboriginal people by an alien legal system [and is] inextricably linked with their identity as Aboriginal people" (Asch and Zlotkin 1997:215). As such, many Aboriginal leaders would not accept the kind of extinguishment clauses sought by the Crown, favouring negotiations over "the manner in which Indian and non-Indian jurisdictions will accommodate each other" (*ibid.*, 217). Asch and Zlotkin propose that seeking affirmation of rights and title, rather than extinguishment, would provide the certainty governments seek by establishing long-term, formal relations between Aboriginal and non-Aboriginal governments, thus challenging ethnocentric and unjust perspectives (*ibid.*, 220). This vital debate will certainly continue.

### *Tests for Proof of Aboriginal Rights and Title*

In order to prove that an Aboriginal right or title exists, Lamer set out a series of tests in the *Delgamuukw* and *Van der Peet* cases which required the Aboriginal claimant to satisfy the burden of proof. These court tests have drawn on precedence set in previous court decisions, but are modified to suit the now clarified nature and scope of Aboriginal rights and title. The current *Van der Peet / Delgamuukw* tests, as well as the tests previously set out by the courts to establish the existence of an Aboriginal right, are set out in the table below (see Table 1). These tests have determined to a large extent the kinds of evidence that expert witnesses are expected to bring forward when working on Aboriginal rights and title cases (Culhane 1998:99). As many of the current tests have their roots in precedence from old tests, many of the critiques of the tests themselves and the kinds of evidence presented are useful to review. Specific attention has been brought to problematic assumptions in these tests and the data used to support them.

One of the fundamental problems which emerge from the first three

<i>Van der Peet (VdP)/ Delgamuukw (Del) Tests for Existence of Aboriginal Rights &amp; Title</i>	<i>Baker Lake (BL) Bear Island (BI) Sparrow (Sp) Tests for Existence of Aboriginal Rights &amp; Title</i>
1 take into account the perspective of Aboriginal peoples themselves ( <i>VdP</i> )	be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake ( <i>Sp</i> )
2 take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal people ( <i>VdP</i> )	
3 identify precisely the nature of the claim being made ( <i>VdP</i> )	establish the nature of Aboriginal rights enjoyed at the relevant dates (1763 or coming of settlement) ( <i>BI</i> )
4 ensure that the practice, custom or tradition is of central significance ( <i>VdP</i> )	
5 ensure that the right is of independent significance to the Aboriginal culture in which it exists ( <i>VdP</i> )	establish that the claimed right constituted an integral part of their distinctive culture ( <i>Sp</i> )
6 ensure that the cultural claim is distinctive to the Aboriginal culture, though it need not be distinct ( <i>VdP</i> )	
7 ensure that the cultural claims are those of which have continuity with those that existed prior to contact ( <i>VdP</i> ); claimants must show continuity with present and pre-sovereignty occupation ( <i>Del</i> )	that the occupation was an established fact at the time sovereignty was asserted by England ( <i>BL</i> ); establish the continuity of the exclusive occupation to the date of the commencement of the action ( <i>BI</i> )
8 adjudicate claims on a specific basis ( <i>VdP</i> )	that the organized society occupied the specific territory over which they assert Aboriginal title ( <i>BL</i> )
9 claimants must show exclusive occupancy, though shared exclusive occupancy may be considered ( <i>Del</i> )	that the occupation was to the exclusion of other organized societies ( <i>BL</i> ); establish the fact that [the organized society] exercised exclusive occupation of the land claim area ( <i>BI</i> )
10 ensure that the influence of European culture will only be relevant to the inquiry if it is demonstrated that the claim is only integral because of that influence ( <i>VdP</i> )	[no equivalent]
11 approach rules of evidence in light of evidentiary difficulties inherent in adjudicating Aboriginal claims ( <i>VdP</i> )	[no equivalent]
12 [no equivalent]	ensure that [the claimants] and their ancestors were members of an organized society ( <i>BL</i> ); demonstrate the existence of an organized society or social organization ( <i>BI</i> )

Table 1

components of the *Van der Peet / Delgamuukw* tests is the difficulty in reconciling the ideal of taking into account Aboriginal perspectives with the requirement that Aboriginal rights be defined as specific, "precise" practices, cultures and traditions integral to the distinctive Aboriginal cultures making claim (Zalweski 1997:446). Zalweski argues that, along with dissenting *Van der Peet* judges McLachlin and L'Heureux-Dubé, for Aboriginal perspectives to be taken into account, "the courts would also have to examine the social structure and beliefs of that Aboriginal group" as "it is the laws and ideologies of Aboriginal groups, not mere practices to which those laws and ideologies give rise" that should be considered to fairly and respectfully protect Aboriginal rights (Zalweski 1997:451-2). Borrows concurs with Zalweski, taking issue with how each facet of the *Van der Peet / Delgamuukw* tests brings Aboriginal rights "more fully under the cultural assumptions of the common law ... [establishing] non-Aboriginal characterizations of Aboriginality, evidence and law" (Borrows 1998:52).

Failure to take Aboriginal perspectives has been cited by Asch and Macklem as resulting in the courts not challenging Canadian sovereignty and making Aboriginal right "contingent" on western laws (Asch and Macklem 1991:501). They argue that to respect an Aboriginal perspective, the courts must try to entertain Aboriginal sovereignty and self-government as "inherent" Aboriginal rights protected under the *Canadian Constitution Act, 1982* (1991:503). Asch and Macklem's inherent rights argument has been challenged with the critique that Aboriginal sovereignty has been extinguished by centuries of practice, and that "any recognition of Aboriginal sovereignty must take place within the existing legal and constitutional framework" (Isaac 1993:709) and that recognition must take the form of some kind of limited self-government.

Regardless of these difficulties, providing evidence which identifies the specific nature of the Aboriginal right, as well as taking into account Aboriginal perspectives, will still be required in future rights and title cases. Careful, ethnohistoric and ethnographic documentation of Aboriginal practices, such as those presented by Suttles in *Sparrow*, will prove useful to this task. John Cove suggested long before *Delgamuukw*, *Sparrow* or *Van der Peet* went to trial that studies which documented the cultural geography of Aboriginal people would be advantageously integrated with studies of cosmology in an effort to build more holistic systems of land tenure that take Aboriginal perspectives into account when

arguing in Aboriginal rights and title cases (Cove 1982).

The fourth, fifth and sixth *Van der Peet / Delgamuukw* tests revolve around the notion that the narrowly defined practice must be of central significance. These tests have been critiqued, like tests set out in *Sparrow* before them, that the notion that some cultural trait can be seen as being so critical (or integral) to the society, that without it the culture would be "fundamentally altered or other than what it is" (Zalweski 1997:444) is flawed. Speculating what a culture would be like without one of its traits seems an almost impossible and fruitless task. Borrows sees the continuing use of this idea as having the "potential to reinforce stereotypes about Indians" by determining what is integral to Aboriginal societies being from "questionable North American cultural images" (Borrows 1998:43, note 40).

After the *Sparrow* ruling, there had been optimism that taking into account practices that were integral to the Aboriginal cultures would be more respectful of Aboriginal perspectives on their own rights (Bowker 1995:2; Isaac 1993; Zalweski 1997:438). However, *Sparrow* did not clarify what was "integral," what was a "distinctive culture," the time period in question, and the relevance of European influence, thus failing "to give significance to the Aboriginal perspective that it purports to espouse" (Zalweski 1997:440). Bowker demonstrates this weakness in citing several decisions of the BC Court of Appeal that rejected otherwise strong cases for the protection of Aboriginal commercial fishing rights on the basis of these vague *Sparrow* definitions (Bowker 1995). Such a rejection failed to take Aboriginal perspectives into question, for from the Aboriginal perspective their rights included the right to engage in a commercial fishery.

Elias frames these questions as being a practical response to injunction cases which "require an Aboriginal applicant to demonstrate a measure of extent and locus of injury resulting when competing interests interfere with Aboriginal people's use of resources and occupation of lands" (Elias 1993:244). He suggests that when arguing that an Aboriginal right is integral to the distinct society, harvest studies and household budgets could be used to show the integral nature of the resources acquired through the right to the economy and larger society (*ibid.*). However, these studies have been conducted outside of the context of the courts (e.g. Elberg, Hyman and Salisbury 1972; Usher 1971) in a less systematic way than demanded by Elias (Asch 1983:207) and may not prove useful in estab-

lishing the integral nature of a cultural practice. The most likely effective tool for this task is descriptive ethnography, which places cultural practices within the larger social context, with a keen attention to the historical contingencies which may have affected the nature and extent of the practice today.

The seventh test sets out the requirement that continuity must be shown between the group claiming the right or title and their ancestors at the time of contact or sovereignty. Borrows has critiqued this test for relying too much on "pre-contact practices [that] restricts contemporary Aboriginal development" (Borrows 1998:49). Finding incontestable evidence to satisfy this test can prove challenging, as the historic and ethnographic records are often scant in areas debated in the courts, such as Aboriginal law (Asch and Bell 1994). Elias proposes that well-documented kinship charts of the claimants, drawn as far back as the ethnohistoric data and oral histories permit, will provide sufficient evidence for this task (Elias 1993:256). However, this technique can be full of ambiguities (as are all genealogies) and may not reflect the changes, contingencies, and continuities in Aboriginal communities when drawn back even a few generations. Elias has also suggested that a description of the socio-cultural system of the claimants (possibly compiled from map biography work) would provide useful data to determine "whether the identified resources play a role in ... society consistent with their role in the past" (Elias 1993:261). In work documenting traditional use of the land and resources for the Sto:lo Nation, Washbrook and I have argued that in looking for pre-contact or pre-sovereignty continuity between contemporary data, and historic records, ethnographies and the archaeological record, there are many gaps in the data which must be accounted for by historic processes (Washbrook and Thom 1997). The relaxed evidentiary standards noted in test eleven (discussed above) make the integration of oral histories acceptable, but no less difficult to interpret.

Lamer's seventh test partially originates out of the Australian *Mabo* ruling. From this test, he envisioned claimants showing "substantial maintenance of the connection between the people and the land" to establish title (Lamer, C.J., *Delgamuukw* [1998] 1 C.N.L.R. p.72). However, Lamer did not clarify a critical question about the content of this connection. Would the occasional berry picking of a few Elders be sufficient? Would telling the stories which embody the Aboriginal common law be acceptable? This vagueness leaves room for new approaches to

be developed for this test. Drummond has skillfully described how "Nunavut" is a radical new conception of "place" that has come to be accepted by Canadian institutions and governments (Drummond 1997). Her work builds on a much earlier thesis by both Lester (1979) and Wonders (1987), who suggest that Inuit place-naming was a useful way to understand the rights claimed by the Inuit in their own terms because place names are a record of land use and occupancy and a common law means of possession of land. The Gitksan and Wet'suwet'en also included extensive maps showing their place names throughout the territory they claimed in their evidence submitted at trial in *Delgamuukw* (Sterritt *et al.* 1998).

The eighth test requires that claims be specific to the First Nation making the claim, not to Aboriginal people generally. This test reifies the notion that Aboriginal rights are site- and resource-specific (Borrows 1998:50), and are consistent with earlier tests which required claimants to show use and occupancy of specific areas of land. Several methods of demonstrating occupancy have been completed, ranging from expert summary of traditional use and occupancy of the land to defining the symbolic relationship between the land, people and resources, to extensive map biographies, none of which may be completely satisfying (Weinstein 1993; Tobias 2000).

Strategies for showing use and occupancy have been employed in the courts since *Calder*, where Duff was asked to define the extent of Nisga'a land use. He responded by framing Nisga'a use in terms of territories recognized by other tribes, common uses of lands, territories owned by family groups, and extensive use of lower and upper valleys and waterways for resources and trade. He concluded that "ownership of an entire drainage would be recognized as resting within one or other groups of Nishga Indians and these boundaries, this ownership would be respected by others" (Duff in Berger 1981:59-60). As such, Duff did not rely on extensive map biographies detailing site-specific claims to individual parcels of land, but presented use as the ownership of a watershed, recognized by neighbouring groups and reinforced by continued and varied use. This was accepted by Hall as proof that the Nisga'a had laws and concepts of ownership (Berger 1981:63). It is important to note how problematic the Nisga'a construction of their territories has been for their Gitksan neighbours. The Nisga'a, in presenting their claim as a single large territory, have far exceeded the bounds of actual ownership by indi-

vidual Houses, as demonstrated by the oral traditions, and documentary records assembled by the Gitksan (Sterritt *et al.* 1998). Nonetheless, this statement of claim has been accepted (and expanded) right through to a final negotiated land-claims agreement with the Federal and Provincial governments. The Gitksan and Wet'suwet'en in their *Delgamuukw* arguments filed to have each individual chief's jurisdiction recognized and presented more evidence consistent with their own common laws and traditions to support their claims (*ibid.*). Ironically, the judges and negotiators have accepted the simplistic, generalized model of the Nisga'a in favour of the complex and nuanced one of the Gitksan and Wet'suwet'en. This raises the question of how much information the courts or negotiators are willing to take, particularly if it doesn't fit their own preconceptions of "primitive" Native societies.

Mills presented a very different argument for rights to the land in *Delgamuukw*. She characterized land use as symbolic: "in the Gitksan view, an individual's subconscious contains the memories of past lives, ultimately reaching back to the time of the origin myths which situate the ancestors on the land... In childhood the ancient memories are re-awakened by the stimulus of returning to the same places and seeing the same people. The land passed on through the matriline contains all these memories" (Mills 1994:161). Though her evidence was not accepted because of her supposed biases, this argument is nevertheless a useful way of framing Aboriginal title, if we take Justice McLaughlin's view. It could be argued that seeking to satisfy the legal test for occupation of lands since time immemorial does not require the spiritual beliefs or symbolic understandings of the claimants to be elaborated. However, Fortune points out that, again, this misses the point of taking the Aboriginal perspective into account, thus limiting how this spiritual connection plays a part of the larger understanding of title (Fortune 1993:95).

Elias has suggested that to demonstrate the specific resources used and areas occupied, extensive, community-wide map biographies be conducted (Elias 1993:242). Several studies which use map biographies have been completed in the context of asserting Aboriginal rights and title. The Inuit of the Northwest Territories (Freeman 1976), Labrador (Brice-Bennett 1977), and Dene of the Northwest Territories (Asch, Andrews and Smith 1986) have all completed land use and occupancy studies which map the extent of a claimed area by documenting the land use by living community members and extent of knowledge about traditional

lands through place names, spiritual locations and burial grounds (see Brooks 1993 for a more thorough list accounting of these studies). The outer area of the mapped uses and occupancy was taken to be the extent of claim to the land. These studies did not distinguish change in land use over time, nor were they encyclopaedic in their coverage of Aboriginal occupancy of the land. They marked out only a starting point for understanding Aboriginal cultural geography and, by extension, Aboriginal claim to the land (Weinstein 1993:11).

The ninth test, set out to eliminate complex overlapping jurisdictions, again faces the problem that it may not satisfy the varying perspectives of the Aboriginal claimants. Elias does not offer any solutions to the researcher trying to document exclusive occupancy, stating only that historic and oral evidence must be consulted (Elias 1993:264). The chiefs of the Gitksan and Wet'suwet'en worked out, differences in their perceived territorial boundaries at the outset of their litigation. However, there has been an ongoing dispute between Gitksan and their Nisga'a neighbours who, after the Calder decision, decided to pursue a comprehensive land claims agreement. The overlapping territories at stake became a very public topic when one of the Gitksan, the Gitanyow, launched a challenge to the Nisga'a claim as they reached the final stage of their negotiations (e.g., *Vancouver Sun* 17 July 1998, A1, see also Sterritt *et al* 1998). The media characterized this dispute as being one of modern political agendas which in the past would have been easily reconciled shared jurisdictions. BC Supreme Court Judge Williamson declined the application to have the Nisga'a Agreement-in-Principle struck on several grounds. He stated that any future infringement of Aboriginal rights could not be pondered, though he admitted that the Crown may be in breach of their fiduciary duty to the Gitanyow in concluding an agreement with the Nisga'a that does not take their claims into account (Williamson, *J. Gitanyow First Nation* [1998] 4 C.N.L.R. 48).

However, the research team working for the Gitksan has assembled and published a large volume of evidence countering the large Nisga'a claim (Sterritt *et al.* 1998). These scholars set out to make explicit the Aboriginal common law about land tenure, drawing on the oral traditions of both the Gitksan and Nisga'a. They worked through an impressively complex body of traditional narratives, historical sources, anthropological literature and place names data to establish concretely the location and extent of the territories of each House and village. By assem-

bling evidence from so many different perspectives, they have illustrated clearly, and with specificity to the context of their culture, the historic and contemporary extents of traditional territories. A similar, though less exhaustive, approach was taken by Suttles (1996) and Galloway (personal communication 1996) in entering place name evidence from Musqueam and Squamish in order to determine the historic extent of their respective territories (*Mathias v. Canada* [2000]). Place name evidence alone is insufficient, as there are many ambiguities about language borrowing which cannot be worked out through historical linguistic analysis.

The tenth test places "those activities that developed solely as a result of European culture outside of the protection of the Canadian Constitution," and has thus "relegated Aboriginal peoples to the backwaters of social development, deprived them of protection for practices that grew through intercultural exchange, and minimized the impact of Aboriginal rights on non-Aboriginal people" (Borrows 1998:45). Though this test developed out of Lamer's vision of Aboriginal rights as stemming from the practices, customs and traditions of the people who were here before European sovereignty, this particular test flies in the face of the previous *Sparrow* ruling which recognized that Aboriginal rights had to be interpreted flexibly so as to permit their evolution over time, and again alienates the Aboriginal perspective from being able to be heard. As with other historic tests, archaeological data and oral histories will be required to satisfy the burden of proof.

The eleventh test was discussed at length in part one of this paper (published in the previous issue of the *Native Studies Review*), in my discussion of oral history and anthropological evidence, and will not be reiterated here.

The twelfth and final test listed has been side-stepped by the new *Van der Peet* and *Delgamuukw* rulings. Most visions of Aboriginal rights and title outlined by the courts until *Van der Peet* insisted that Aboriginal claimants prove that they were an "organized society," a test based on precedence back to the 1889 *Re: Southern Rhodesia* decision and reiterated in *Calder* and *Baker Lake*. Such a test has been widely characterized as ethnocentric and absurd (Asch and Bell 1994:524; Kew 1993:4:99; Cruikshank 1992:28). These former tests rely on an evolutionary "analytical framework which was developed by the social sciences in the nineteenth century" (Bell and Asch 1997:64). This evolutionary theory

has been challenged and rejected in the social sciences since the 1920's, when *Re: Southern Rhodesia* was discredited by Malinowski:

Hence the Judicial committee plainly regards the question of native land tenure as both beyond the scope of practicable inquiry and below the dignity of legal recognition. On the contrary, I maintain that there is no people so low on the scale of social organization, but have a perfectly well-defined system of land tenure. It is absurd to say that such a system 'can not be reconciled with the institutions or legal ideas of civilized society'. To reconcile the two is precisely the task of colonial statesmanship (Malinowski, cited in Bell and Asch 1997:64).

Slattery has suggested taking the question of "organized society" in a different light, calling for interpretation not as a call to prove the evolutionary status of Aboriginal peoples but as a clause to exclude claims by individuals, thus recognizing the communal nature of the rights (Slattery 1992:756). Following this reasoning, Elias suggests that kinship studies should be done, proposing that "a population forms a distinct society if the individuals of that population are mutually involved in kin relations and if there are significant ways in which kinship materializes relationships between the claimant population and the lands and resources in which they claim" (Elias 1993:253). However, detailed kinship studies may not always correspond with a First Nation's sense of contemporary political identity, particularly if two competing First Nations are closely related, but have overlapping or conflicting claims, such as the current Musqueam and Squamish claim for valuable alienated land in Vancouver (*Mathias v. Canada* [2000]).

#### *Problems of addressing these tests*

The critique of these court tests moves beyond their problematic assumptions as to how the evidence given is interpreted and ruled on. A consistent critique in the literature is that the judiciary is not equipped to make fair decisions on academic issues. Culhane ironically portrays judges as self-appointed experts in social science and native culture. (Culhane 1998:264). Bell and Asch echo this concern: "given the amount of training that judges receive in the analysis of non-western cultures as compared to their training in law, and given matters they are reviewing criti-

cally are often facts that ought to have been admitted in evidence as self-evident [such as a society being organized], the efforts expended in judgments on cultural analysis rather than legal analysis is often profoundly wasteful of judicial time and expertise" (Bell and Asch 1997:73). Culhane has argued that there is a giant rift between the discourses of law and anthropology, where the narratives given to satisfy court tests are reduced to true/false, guilty/innocent by legal discourse while "anthropology demands that stories are told with complexity and context." (Culhane 1998:264). These differing demands of the different discourses can make it difficult for one to interact with the other.

Aboriginal rights counsel Louise Mandel also questions the advisability of fighting these battles in the courtroom, recognizing frequent judicial bias against Aboriginal people, and argues that these are ultimately political issues that should be settled in other ways (Mandel 1987:365). Asch and Bell (1994) argue that the courts have taken an ethnocentric and ultimately unjust view of culture. An example of this is the test requiring Aboriginal groups to prove that they are an "organized society" by presuming that societies can be ranked as being on different levels of "organization" (Asch and Bell 1994:521). They believe that judges should take cultural relativism into account when trying to consider Aboriginal rights from the perspective of Aboriginal societies. Kew, however, notes that the judiciary cannot be expected to reject dated or wrong-headed theories and conclusions simply on the basis that anthropologists have discredited them. He cites the evolutionary models used by McEachern as a test of truth for the evidence presented in *Delgamuukw* as having been "rejected as oversimplified and mis-representative of differences between societies" by anthropologists (Kew 1993-4:97). Kew calls for anthropologists to be critical of the concepts they are asked to present in courts, just as they would in academic discourse. The question remains as to whether the courts are willing to follow anthropologists down a long road of theoretical critiques of concepts in a venue primarily interested in "facts."

Finally, the volume of evidence needed to satisfy the burden of proof in these tests may be requiring unreasonable demands on the judiciary. As Elias recounts "in 'the old days', when Aboriginal rights were argued primarily as questions of law, making these proofs was relatively simple" (Elias 1993:235). For example, the length of time early major Aboriginal rights and title cases were argued was notably brief—*Calder*, four

days; *Kruger & Manuel*, one day; *Baker Lake*, twelve days. These trials starkly contrast *Bear Island* and *Delgamuukw* which took 300 and 374 days, respectively, to argue. These long depositions of evidence in Aboriginal rights and title cases have been mandated by the increasingly specific burdens of proof placed on claimants and defendants. They have also made it increasingly difficult for judges to fairly weigh the evidence presented.

### Infringement and Justification - Relations Underlying Aboriginal Rights

Providing that oral histories and rigorous anthropology have been accepted as evidence, the framing of the nature and scope of Aboriginal rights have been settled on, and that all the tests for the existence of an Aboriginal right or title have been met in favour of an Aboriginal claimant, Lamer's majority decision in *Delgamuukw* has provided the Crown with a powerful legal tool with which "compelling legislative objectives" such as resource exploitation, urban expansion and environmental protection can be achieved (Lamer CJ., *Delgamuukw* [1998] 1 C.N.L.R. 75). This infringement option of the courts is an attempt to balance Aboriginal rights with those of competing political and economic interests. The test for infringement is subject to the Crown's fiduciary obligation, where it may infringe on the rights, provided the infringement is not unreasonable, does not cause undue hardship and does not deny Aboriginal people their preferred means of exercising their right (Dickson, CJ., *Sparrow* [1990] 1 S.C.R. 1112). Provided this infringement test is satisfied, the Crown must further recognize its fiduciary duty to Aboriginal people by either setting Aboriginal rights (particularly those which are integral to their distinctive cultures) as a priority over non-Aboriginal interests (such as conservation over Aboriginal resource use) or, in the interests of reconciling competing interests by ensuring there is as little infringement as possible, making fair compensation available and ensuring the Aboriginal group has been consulted (Lamer, CJ., *Delgamuukw* [1998] 1 C.N.L.R. p. 76). This ability to justify an infringement on Aboriginal rights and title has been characterized as a "downgrading" of rights to compensate for looser evidentiary rules and broader definitions of rights and title than had been conceived of in the past (Borrows 1998:58).

*The infringement test*

To challenge an infringement, Aboriginal people must demonstrate that it is unreasonable, causes undue hardship, or denies their preferred means of exercise. Social impact studies and traditional descriptive ethnography have been conducted to provide a baseline of evidence which could be presented to satisfy these tests in defence of Aboriginal rights.

Social impact studies focus on effects of catastrophic events (like industrial expansion) on Aboriginal communities (Usher 1993:100). They generally establish a baseline of social information at an early date, from which hypotheses are developed as to the social effects that would result from the development (*ibid.*, 101). The Berger Inquiry into the Mackenzie Valley Pipeline (Berger 1978) is a well-published example of how rights can be defended by providing evidence which shows that development causes undue hardship in Aboriginal communities. Proponents of the pipeline argued that the economy of the area was undergoing an inevitable transition from "backward" (traditional) to "modern" (industrial) and that the pipeline would be a spur (Usher 1993:103-106). Social scientists debunked this argument by challenging notions that Aboriginal institutions were dying, arguing that this view of history was not consistent with evidence that showed continuity between past and present traditional land-based activities of the Dene, the destructiveness of the development to the native economy, and the adverse effects on native social and cultural well-being (Asch 1986:274; Usher 1993:106-107; Watkins 1977). Commissioner Berger concluded that the pipeline would be too sudden a change, calling instead for expansion of the modern economy through resource development, native industries and tourism, raising money to achieve this through grants and taxation on their lands (Asch 1982:4-5). Asch has challenged these recommendations as still failing to recognize that Aboriginal communities' needs are best served by self-determination, not integration into the modern economy (Asch 1993).

Other examples of ways in which infringements on Aboriginal rights have been argued against on these terms are documented in the Dene opposition to the Alaska Highway natural gas pipeline (Brody 1988), the Cree struggle over hydroelectric development in James Bay (Salisbury 1986) and the Lubicon Cree fight to keep oil development out of their lands (Ferreira 1992:18-19; Ryan and Ominayak 1987; Goddard 1991). The authors of these social impact and land use studies have recognized the inadequacy and political bias of old theoretical models like accul-

turation, and have proposed more subtle lines of examination such as showing the persistence of traditional ways of life and recognizing the unequal power structures underlying social change (Usher 1993:116). However, even when the social impact of these projects can be demonstrated and the power relations underlying them revealed, the Crown may still see economic development as being paramount and push ahead with their plans.

A more likely common application of this test is where current regulations or legislation prohibits Aboriginal people from exercising their rights by their preferred means. For instance, when three Coast Salish men from the Penelakut Band were arrested for hunting by torch at night, they claimed that the Provincial regulations denied them their preferred means of hunting in the *Seward* case. Anthropologist Wayne Suttles testified that Coast Salish hunters have long used torches at night to aid them in hunting game, supporting his testimony with historical descriptions of hunting and his own ethnographic work. This evidence was convincing to Judge Higinbotham, who upheld the practice of hunting with torches as a preferred means of exercising their Aboriginal right to hunt (Higinbotham J., *Seward* [1997] 1 C.N.L.R. 139). This was, on appeal, characterized as "academic speculation" by Justice Thackray, and charges were allowed to stand (Thackray, J. *Seaward* [1998] 3 C.N.L.R. 254).

#### *The justification test*

If an Aboriginal right or title will be infringed on, the Crown's honour must be preserved by recognizing its fiduciary duty. As mentioned above, Lamer's majority decisions in *Van der Peet* and *Delgamuukw* have determined that the Crown may infringe on an Aboriginal right if it can satisfy the three-part justification test by (1) ensuring that there is as little infringement as possible; (2) making fair compensation available; and (3) ensuring that the Aboriginal group has been consulted.

Madame Justice McLachlin criticized Lamer's justification test as both unconstitutional and a violation of the government's fiduciary duty. She argued that by justifying an infringement on the basis of political and economic interests, as opposed to interests such as conservation or safety, the right itself is extinguished, not just the exercise of the right (McLachlin, J., *Van der Peet*, [1996] 4 C.N.L.R. p. 279). Such an act violates the governments fiduciary duty by giving priority to business

interests over Aboriginal rights, and is unconstitutional in that it extinguishes rights without treaty or constitutional amendment (*ibid.*).

Though the justification test may be unconstitutional, the terms of it have been addressed to by governments, businesses and First Nations. Much of this response has been around the principles of minimal infringement and consultation, where there has developed a large body of "grey literature," consisting of consultants' reports, ministry documents, and First Nations' position papers. Some British Columbia examples will serve to demonstrate this process.

Since the Crown must make every effort to limit its infringement on Aboriginal rights and title, the British Columbia government has developed a program to inventory traditional Aboriginal land use (BC Ministry of Forests 1996). This program has set out guidelines for creating these inventories, which require Aboriginal cultural geography to be mapped on a large scale (1:20,000). With the results of these studies in their database, the Province will have site-specific information on where they can proceed with development in areas not marked as significant and thus would not infringe on Aboriginal rights (Gelean 1997). These studies diverge from broad areal land use and occupancy studies done in other areas of the country in that they view Aboriginal rights as site-specific and in that they are used by the Crown, not Aboriginal people, in defining which Aboriginal rights are not a concern (Weinstein 1997). Aboriginal organizations have responded by developing highly restrictive information sharing agreements which recognize the Crown's attempt to limit the scope of Aboriginal rights to site-specific areas and to force continued consultation over a broad range of Aboriginal rights concerns (Washbrook and Thom 1997).

Archaeological overview and impact assessments have also been employed by the Crown to document how development which infringes on Aboriginal rights can proceed with minimal impact on archaeological resources (BC Ministry of Forests 1997). As demonstrated by the flurry of recent legal action, Aboriginal people clearly view control over their heritage as a right, and have responded vigorously to developers who threaten their heritage sites (Fladmark 1993, McLellan 1995). Archaeological consultants are hired by both sides to document the presence of or potential for archaeological sites and culturally modified trees (Wickwire 1991-2; Stryd and Eldridge 1993). Though the Aboriginal rights significance of these places is widely recognized (Stryd 1997; Eldridge 1997),

these studies are done under the guidelines of Provincial heritage or environmental legislation which were never intended to address fundamental concerns over Aboriginal rights, and are inadequate to the task. First Nations often get involved in long involved negotiations over these site-specific heritage projects, while their overall interests in the land and resources—their broad Aboriginal rights and title—are impacted with Crown claims to having satisfied requirements for limited infringement through mitigation of impact to heritage sites. Though imbalanced power relations underlie these studies, in some instances they have been successful in limiting infringements on Aboriginal rights and title (Scientific Panel for Sustainable Forest Practices in Clayoquot Sound 1995).

Assessing environmental impact of developments may often also demonstrate infringements on Aboriginal rights and title. For instance, Haida leaders have critiqued the environmental impact assessment process for inadequately addressing their Aboriginal rights and title concerns (Sharpcot 1989, Keller 1990). Post-treaty Yukon First Nations and pre-treaty First Nations on the Fraser River have also been unsuccessful in engaging in environmental and land-use planning (Duerden, et al 1996; Thompson 1991). Again, no clear guidelines have been established which satisfy both Aboriginal desires to be involved with the process and the Crown's emphasis on proceeding with development. Particularly difficult are issues of jurisdiction, which Aboriginal people have been systematically excluded from most non-federal (i.e., provincial and municipal) environmental and land-use planning processes (Borrows 1997:444).

Guidelines for what constitute adequate consultation have also not been adequately addressed. The Kitkatla First Nation recently had their injunction to halt logging on land claimed by them and the neighbouring Laxkw'alaams First Nation overturned on the basis that the courts felt they had been adequately consulted, though the Kitkatla felt they had not (*Kitkatla v. British Columbia*). In my own experience working on resource management issues for the Sto:lo Nation, consultation has often been in the mode of faxing a notice and asking for a copy to be returned with a signature to indicate that it has been received. Phone logs are kept by government officials to "prove" consultation with First Nations. This is consistent with the experiences of First Nations communities throughout Canada, who as Peter Usher has pointed out, have had consultation "about major projects [which] consisted of government and industry arriving together at meetings to announce their plans, and to suggest how

people could accommodate themselves to these" (Usher 1993:102). Inadequate consultation and differing views of what "minimal impact" is have led to court action, injunctions, blockades and political demonstrations (Pinkerton 1983; Blomley 1997; Foster 1996).

## Resolution of Aboriginal Rights and Title Issues

Negotiated resolutions to Aboriginal rights and title have been called by the courts, scholars, and governments alike as the preferred solution to recognizing Aboriginal rights and working out agreements whereby Aboriginal people can live in equality with other Canadians (Cassidy 1990; Royal Commission on Aboriginal People 1996). However, the implementation of these agreements has produced varied results. For instance, Haysom suggests that the settlement of Labrador Inuit land claims will not result in giving their communities the independence, equality and security they are seeking, suggesting instead that "distinct society" be sought (Haysom 1992). Légaré is more optimistic about the implementation of land claims settlements for achieving equality and successful co-management of resources. (Légaré 1996). Regardless of these predictions, self-determination for Aboriginal people has been partially recognized in their increasing involvement in resource management, economic development, land-use planning and through comprehensive modern treaties.

Resource management agreements have been suggested as being useful but problematic in that power relations are never really equal. As part of a major re-thinking of the use of the Fraser River ecosystem, Kew and Griggs suggest that by implementing Aboriginal models of fishery management, specifically a river-based fishery rather than a primarily ocean-based one, fish stocks can be better controlled (Kew and Griggs 1991). Self-government as a third order of government has been suggested as providing a viable way to develop sustainable resource use, as Aboriginal people have their own laws and regulations which are highly adapted to the local environments where they live (M'Gonigle 1988; 1989/90; Payne & Graham 1984). Feit has made concrete suggestions for using Cree models of hunting management for the James Bay area, laying out the ethnographic viability and the current political inequalities (Feit 1980, 1989, 1992a, 1992b). A lack of adequate information for interacting with Crown resource managers has proved to be a difficulty

in some jurisdictions where traditional land use and occupancy studies were used as a common information base. In the north, where studies were done on a very small scale (Freeman 1976; Brice-Bennett 1979), the data has not been specific enough for resource management (Riewe 1991). In British Columbia, where detailed, large-scale studies have been attempted, there has been a problem of sheer quantity of information being too great to provide a complete analysis given moderate financial resources (Washbrook and Thom 1997).

Increased Aboriginal participation in economic development has also been plagued with power problems (Charest 1992). Wood-lots and gravel pits have been suggested as viable enterprises, but do not recognize broad exercise of Aboriginal rights. For instance, Nathan (1993) has an optimistic, naive view of Native participation in forestry, believing that giving Aboriginal communities wood lot licences would satisfy their needs for forest land. This is clearly inadequate for the variety of needs Aboriginal people have for forests. However, where self-determination has become more of a reality in the north, First Nations have become major players in economic developments and the growth of local and regional economies (Weick 1988). Rather than completely assimilating into modern state economies, the Cree have, since the implementation of the James Bay Cree settlement, asserted their Aboriginal rights by attempting to reinstate hunting, fishing and trapping as their major means of prosperity (Niesen 1998; Scott 1984), an achievement made possible by the broad recognition of rights to self-determination, rather than piecemeal self-management or site/resource specific rights (Scott 1992).

In the areas of Canada where no treaties have been signed, Aboriginal title issues are still outstanding. This includes British Columbia and parts of Quebec and the Territories (Coates 1992). In these areas, the extent of land that Aboriginal people have claimed title to has not been questioned by government negotiators. Unlike the strict tests for occupancy set out by the courts, the BC Treaty commission, for instance, has simply outlined a requirement to submit a statement of claim with overlaps with neighbouring groups constraining the extent of land being claimed (McKee 1996). Specific land transfers and classes of title are worked out in the negotiations. A major stumbling block of the process has been to work out overlapping claims, where multiple First Nations claim title to the same territory and the government has required all parties to agree on the degree of shared jurisdiction and overlap (BC Treaty

Commission 1998). Some of these problems in overlapping claims are wrapped up in long histories of land use and occupancy which have continued to develop and change through the period of non-native sovereignty. Slattery (1992:758) suggests that a claim of 20 to 50 years may be "sufficient to defeat the claims of previous native possessors and to resist newcomers," but that "time is less important for its own sake than for what it says about the nature of the group's relationship with the land and the overall merits of their claim." Wonders (1988) has explored some issues of overlap in the Northwest Territories, calling for more subtle modelling of cultural geography of overlapping claims which recognizes complex environments and their use.

Academics in universities, from anthropologists to geographers, have called for an increased effort to consult with Aboriginal leaders in order to develop useful research that will aid these negotiations and strategies to communicate them effectively (Dyck 1990:48; Duerden 1996; McNab 1986; Mensah 1995, 1996). There is an air of fear and mistrust among the general public toward negotiated settlements which might hopefully be filled by promoting cross-cultural understanding (Menzies 1994). These issues have been successfully expressed by contemporary First Nations artists (Townsend-Gault 1994). However, most of the difficult work on this front is in the hands of Aboriginal politicians and their enlightened counterparts in mainstream governments.

## Conclusions

The recent decisions of the Supreme Court of Canada have made a significant but narrow opening from which Aboriginal rights and title can be integrated within Canadian society at large. To widen the opening, Aboriginal leaders are wise to keep their lawyers, and their anthropologists, close at hand. Anthropology has provided a significant contribution for arguing Aboriginal rights and has made a useful critique of the ethnocentric biases of Canadian law and government policy.

Specifically, in part one of this essay, I reviewed how anthropology has provided insight into how oral histories may be understood by people not immersed in the traditions and perspectives of the culture from which they are told. Their expert witness testimony has been sought by Aboriginal leaders. Testimony based on long-term research in a community which did not invoke problematic models of cultural evolution or

difficult to communicate symbolic analysis has been successful in the courts.

In the present essay, I have reviewed how theories of Aboriginal rights and title have been formulated by the courts on the basis of legal precedence, firmly placing these rights within the context of Canadian sovereignty, thus denying Aboriginal aspirations for autonomy. More problematic, however, has been the characterization of these rights and title as frozen in time to the era of contact and settlement. These characterizations are formidable barriers to Aboriginal peoples' claims to self-determination within the Canadian constitutional framework. Anthropological research around formulation of Aboriginal common law concepts and practices will provide valuable insight into how these rights and title may be exercised and enjoyed by Aboriginal people today within Canadian society. Future pursuits of Aboriginal rights and title claims in the courts will require Aboriginal people to satisfy tests which require anthropological evidence on the nature of these common laws and practices of Aboriginal people. Methods and theories must be developed to challenge the ethnocentric biases and assumptions latent in these court tests.

Defending Aboriginal rights will continue to be a political as well as a legal contest as the Supreme Court has granted the government broad power to infringe on these rights. Anthropological studies which demonstrate the negative social impact of developments or how a preferred means of exercise of a right may help limit these infringements. However, the Crown may justify their infringements on a wide range of political and economic bases. As Aboriginal institutions work with governments and businesses to limit the impact of development and engage in meaningful consultations, anthropology must develop ways of integrating Aboriginal perspectives of land and resources to help balance current unequal power.

Finally, outside the courts there has developed a myriad of processes and approaches for recognizing existing Aboriginal rights. Increasingly, Aboriginal people are achieving their aspirations for self-determination through integration into resource management, economic development and treaty negotiations. Anthropologists will continue to be close to these processes as their work in native communities is increasingly done in collaboration with Aboriginal governments and institutions. Observing the benefits and pitfalls of the changes in Aboriginal societies can serve

to provide direction to other communities following these paths. Bridging the cultural gap between Aboriginal and non-Aboriginal perspectives provides openings for mutual understanding and respect in a world where power relations are shifting to recognize Aboriginal rights and title.

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