

THE USE OF THE TERM 'CULTURE' BY THE SUPREME COURT OF CANADA:  
A COMPARISON OF ABORIGINAL AND NON-ABORIGINAL CASES SINCE 1982

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## ABSTRACT

This thesis is intended to provide both a preliminary reconnaissance of the use of the term 'culture' by the Supreme Court of Canada in non-aboriginal rights cases, and a basis for comparison with Aboriginal rights cases. First, the extent of the use of the term by the Court in all Aboriginal and non-aboriginal rights cases over the last twenty-one years was surveyed. Secondly, selected cases were subjected to a more in-depth analysis. The survey confirmed that there is no equivalent, in any area of Canadian law, to the "distinctive culture test" in *R. v. Van der Peet* (1996). In no area of law, other than Aboriginal rights, were cases found where claimants were required to prove anything about their 'culture' as a prerequisite for entitlement to rights. Analysis of the selected cases revealed the Court's use, without any critical awareness, of out-dated concepts of culture.

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My wife Marilyn, and our children Quinn and Kate, for their love.

## **DEDICATION**

I would like to dedicate this work to the memory of my friend, the late Dr. Robert B. Lane. My first contact with Bob was in 1968, listening to his elliptical and brilliant lectures on the ethnography of the South Pacific. As his wife Barbara once remarked, Bob could think around corners. He was a fine scholar, but more importantly, he was a kind and gentle man. In 1998, Bob gave unstintingly of his wisdom and support as I struggled with the decision to return to anthropology. Time and again he restored my flagging determination and inspired me to carry on. I miss him sorely.

## EPIGRAPHS

*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*

Oliver Wendell Holmes, in *Towne, v. Eisner*, (1918) 245 U.S. 425

*Culture is one of the two or three most complicated words in the English language. This is so...mainly because it has now come to be used for important concepts in several distinct intellectual disciplines, and in several distinct and incompatible systems of thought.*

Raymond Williams, in *Keywords, a Vocabulary of Culture and Society*, (1976:76).

*'That's a great deal to make one word mean,' Alice said in a thoughtful tone.*

Lewis Carroll, in *Through The Looking-Glass, and What Alice Found There*.

## CHAPTER I: INTRODUCTION

Big M Drug Mart Ltd. was charged with selling groceries, plastic cups and a bicycle lock on a Sunday contrary to the Lord's Day Act. Jean-Claude Mahe sued the Province of Alberta over the management of a French language school. Quebec claimed the right to secede from Canada unilaterally. The Little Sisters Book and Art Emporium's shipments of gay and lesbian erotica were seized at the border by customs officers. Kimberly Van de Perre commenced proceedings against Theodore Edwards, an African-American professional basketball player, for custody of their son, Elijah. The Kitkatla Band sought an injunction to prevent the Province of B.C. from issuing a permit to cut culturally modified trees.

What do these seemingly random disputes have in common? First, they all ended up before the Supreme Court of Canada (*R. v. Big M Drug Mart* 1985; *Mahe v. Alberta* 1990; *Reference re Secession of Quebec* 1998; *Little Sisters Book Shop and Art Emporium v. Canada (Minister of Justice)* 2000; *Van de Perre v. Edwards* 2001; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)* 2002;). Secondly, all six decisions contain references to the term 'culture'. Thirdly, they are all non-aboriginal rights<sup>1</sup> cases described and analyzed in this thesis

The use of 'culture' by the Supreme Court of Canada in Aboriginal rights cases has received critical attention from scholars in both anthropology and law. This raises the

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<sup>1</sup> "Non-aboriginal rights cases" is a category defined by its opposite, the Aboriginal rights cases. Aboriginal rights cases are the 20 cases I have identified which claim an aboriginal right under section 35 of the Constitution Act of 1982, the Indian Act or a treaty. The "non-aboriginal rights cases" are therefore all other cases decided by the Court, in any area of law, whether or not a "right" is explicitly claimed. The *Kitkatla* case may appear to belong in the Aboriginal rights category, but no claim was made for Aboriginal rights or title. It is in substance a constitutional decision, based on a division of powers argument.

question of how culture is used by the Court in non-aboriginal rights cases. A quick scan of the literature indicated to me that little attention has been paid to the Court's use of 'culture' in areas of law other than Aboriginal rights. Therefore, my thesis is intended to provide both a preliminary reconnaissance of those 'other' areas, and a basis for comparison with Aboriginal rights cases.

My<sup>2</sup> research was conducted in two stages. First I undertook a survey of the extent of the use of the term 'culture', and its adjectival form, 'cultural', by the Court in both Aboriginal and non-aboriginal rights cases over the last twenty-one years. For this purpose, I used a 'manifest data' analysis. I followed this method to develop twelve research questions guided by my collection and analysis of data from the approximately two thousand decisions rendered by the Court since 1982. The answers to the questions disclosed many commonalities and differences in the Court's use of the term over time and across areas of law.

While the manifest data analysis produced objective results, it tended to lift the data out of its context. I decided to apply a second, more subjective approach, which would allow analysis of the data in context. For this purpose I employed a 'latent data' analysis of a number of complete judgments. Based on the results of the survey, I chose six of the leading cases for this second stage of my research. The case studies are preceded by a methodological review and a Supreme Court 'primer'. These are followed by brief descriptions and analyses of the use of culture in five of the cases. The leading non-aboriginal rights case (*Mahe*) was given an extended

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<sup>2</sup> The use of the first person and the adoption of an informal style are deliberate, ongoing reminders to the reader of the presence of the writer.

description and analysis, permitting a preliminary comparison with the leading Aboriginal rights case (*R. v. Van der Peet* 1996).

In the conclusion, I argue that the Court has made very different uses of culture in the Aboriginal rights and non-aboriginal rights cases, with very different results. I also argue that the past and present use of culture by the Court may not serve the interests of justice in the future.

Before describing my research and its results, I review the literature on the concept of culture, and on the use of culture in Aboriginal rights cases. This is done to illustrate how difficult it is to define in theory and apply in practice.

## CHAPTER II: REVIEW OF LITERATURE

### A. Introduction

I begin with a survey of the long and contested history of the concept of culture within anthropology. My goal is not to derive ‘the’ definition, or to take sides in the debate, but to highlight the complex and elusive nature of the concept. Then, I focus on the academic literature on culture in a specific arena: the assertion of Aboriginal rights before the courts. Most of the commentators from both anthropology and law find the Court’s use of culture problematic.

There is almost no literature dealing with the use of culture by the Court in areas of law other than Aboriginal rights. Any material relevant to the non-aboriginal rights areas will be included as part of my analysis of individual cases in Chapter IV.

I was tempted to include multiculturalism and cultural rights in my research, but concluded that I could not devote the time and space needed to properly address these topics. (see Keesing 1994, Kymlicka 1995, 1997, Tully 1995, Venne 1998, Sahlins 1999 and Cowan *et al* 2001).

I also considered undertaking a review of the literature on legal anthropology (see Nader 1997, Moore 2000, Star & Collier 1989, and Merry 1992), and the relationship between anthropology and law (see the articles in Kandel 1992). With considerable regret I again decided that these topics, while potentially relevant, were beyond the scope of the present project.

## **B. Culture as a Concept**

### **1. Introduction**

My readings on culture have confirmed D'Andrade's trite observation that, "In anthropology, the term has been widely discussed and debated" (1999:87). Like Andrade, I start with a few of the standard anthropological definitions enumerated by Kroeber and Kluckhohn (1966). I then proceed to review some of the definitions produced in the last fifty years, which point out the weaknesses of the earlier attempts. However, these recent efforts have not resulted in unanimity. The controversy continues, and current debate centers on whether the time has come to abandon the concept as an analytical tool (Borofsky 2001). At the same time, the popularity of the term within other disciplines and the public domain shows no signs of diminishing.

### **2. Four Aspects of Culture**

The classic definitions of culture can be found in a landmark study by A.L. Kroeber and Clyde Kluckhohn: *Culture, A Critical Review of Concepts and Definitions* (1966, originally published in 1952). The following very small sample is designed to demonstrate the range of definitions:

#### **a. Holistic (omnibus definitions):**

Culture, or civilization,...is that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society (Tylor 1871:1; quoted in Kroeber & Kluckhohn 1966:81)

#### **b. Way of life:**

A culture is the way of life of a people; while a society is the organized aggregate of individuals who follow a given way of life. In still simpler terms

a society is composed of people; the way they behave is their culture. (Herskovits 1948:29; Kroeber & Kluckhohn 1966:97)

'A culture' refers to the distinctive way of life of a group of people, their complete 'design for living'. (Kluckhohn 1951:86; Kroeber & Kluckhohn 1966:98)

**c. Tradition or Heritage:**

Culture means the whole complex of traditional behavior which has been developed by the human race and is successively learned by each generation. A culture is less precise. It can mean the forms of traditional behavior which are characteristic of a given society, or of a group of societies, or of a certain race, or of a certain area, or of a certain period of time. (Mead 1937:17; Kroeber & Kluckhohn 1966:90)

**d. Learned versus Instinctive:**

...culture is the sociological term for learned behavior, behavior which in man is not given at birth, which is not determined by his germ cells as is the behavior of wasps or the social ants, but must be learned anew from grown people by each new generation. (Benedict 1947:13; Kroeber & Kluckhohn 1966:112)

In an effort to make the distinctions as clear as possible, I used four categories from the dozen supplied by Kroeber and Kluckhohn, and chose a mere five definitions from the one hundred sixty four reproduced in their book. Even so, there is some overlap. The authors acknowledged this feature of the (always increasing) inventory of definitions, but forged ahead on the theory that any classification is better than no classification (1966:77). However, the possible permutations and combinations are astronomical. As a consequence, definitions are either incomplete or unwieldy. Conversely, some of the definitions are contradictory, with the result that espousing one implies rejection of others. While Kroeber and Kluckhohn acknowledge these differences, (1966:356), they steadfastly maintained the hope that the variations would all somehow be reconciled in the future. Their hope was not realized.

### 3. Four Concepts of Culture

The matter of definitions was reprised in Roger Keesing's "Theories of Culture" (1974). He opened with the contention that "the holistic, humanistic view of culture synthesized by Kroeber and Kluckhohn includes too much and is too diffuse either to separate analytically the twisted threads of human experience or to interpret the designs into which they are woven" (1974:73). Keesing placed the developments of the two decades subsequent to Kroeber and Kluckhohn into four categories:

#### a. Adaptive systems (cultural ecology and cultural evolution):

Technology, subsistence economy, and elements of social organization directly tied to production are the most adaptively central realms of culture. It is in these realms that adaptive changes usually begin and from which they usually ramify. However, different conceptions of how this process operates separate the 'cultural materialism' of Harris from...the 'cultural evolutionism' of Service and distinguish the cultural ecologists of the Steward tradition from human ecologists such as Rappaport and Vayda. However, all...would view economies and their social correlates as in some sense primary, and ideational systems – religion, ritual, world view – as in some sense secondary, derived, or epiphenomenal. (Keesing 1974:76)

#### b. Cognitive systems:

A society's culture consists of whatever it is one has to know or believe in order to operate in a manner acceptable to its members. Culture is not a material phenomenon; it does not consist of things, people, behavior, or emotions. It is rather an organization of these things. It is the form of things that people have in mind, their models for perceiving, relating, and otherwise interpreting them. (Goodenough 1957:167)

#### c. Structural systems:

Levi-Strauss views cultures as shared symbolic systems that are cumulative *creations of mind*; he seeks to discover in the structuring of cultural domains – myth, art, kinship, language – the principles of mind that generate these cultural elaborations. (Keesing 1974:78; emphasis in original)

#### d. Symbolic systems:

Geertz sees his view of culture as *semiotic*. To study culture is to study shared codes of meaning...Geertz recently has treated a culture as 'an assemblage

of texts' .... Anthropology thus becomes a matter of *interpretation*, not decipherment... and interpretation becomes 'thick description' that must be deeply embedded in the contextual richness of social life. (Keesing 1974:79; emphasis in original).

Keesing wrote a follow-up article, "Theories of Culture Revisited" (1994), but did not record any new definitions. Novel definitions continue to be offered (see Kuper 1999:3 and Shweder 2001: 437), but commentators in the 1980s and 1990s focus more on criticisms of the existing panoply. It is to these criticisms that I now turn, to emphasize the contested aspect of the concept.

#### 4. Four Criticisms of Culture

In his 1974 article Keesing noted some of the criticisms leveled by proponents of one definition against the authors of competing versions. This battle for supremacy continues. It is exhaustively documented in the introductory chapter, "Culture Wars", in Adam Kuper's book, *Culture, The Anthropologists' Account* (1999), and is exemplified by Marshall Sahlins' combative article, "Two or Three Things That I Know about Culture" (1999). Rather than recount these *ad hominem* arguments, I present two general criticisms, both of which deal with four interrelated issues: boundaries, homogeneity, change and agency:

Once we locate the reality of society in historically changing, imperfectly bounded, multiple and branching social alignments, however, the concept of fixed, unitary, and bounded culture must give way to a sense of the fluidity and permeability of cultural sets. In the rough-and-tumble of social interaction, groups are known to exploit the ambiguities of inherited forms, to impart new evaluations or valences to them, to borrow forms more expressive of their interests, or to create wholly new forms to answer to changed circumstances. (Wolf 1982:387)

The [present] task...is...to revise ethnographic description away from [a] self-contained, homogeneous, and largely ahistorical framing of the cultural unit toward a view of cultural situations as always in flux, in a perpetual historically

sensitive state of resistance and accommodation to broader processes of influence that are as much inside as outside the local context (Marcus & Fischer 1986:78)

The criticisms effectively demonstrated the inadequacy of any definition which did not take into account these four factors. This left anthropology with the unpalatable options of returning to omnibus definitions, or acknowledging that any definition is partial.

Kuper (1999) and Barth (2001) chose a third option: the concept of culture does more harm than good, and should be replaced by narrower terms. Even in 1952 Kroeber and Kluckhohn noted that, “Indeed, a few sociologists and even anthropologists have already, either implicitly or explicitly, rejected the concept of culture as so broad as to be useless in scientific discourse or too tinged with valuations” (1966:7-8). However, if calls to end the use of the concept over the last fifty years have had no effect, culture is unlikely to disappear any time soon from academic or public discourse.

Still to be addressed is the question of the perception of culture outside the confines of anthropology. The next section takes up the issue with a look at the layperson’s notion of culture.

## **5. Popular Conceptions of Culture**

I think it is important to obtain some insight into popular notions of culture, as the members of the Court may well be closer to laypersons than academics in their understanding and use of the term.

Raymond Williams provides a brief review of the extant usages of the term<sup>3</sup> from the “physical process” of plant and bacterial culture, to “intellectual, spiritual and aesthetic development”, to “a particular way of life, whether of a people, a period or a group”. However, in his opinion, the most recent and widespread use of culture is to describe “the works and practices of intellectual and especially artistic activity”: music, literature, painting and sculpture, theatre and film, and sometimes philosophy, scholarship and history (1976:80). William’s vision of ‘culture’ is said to be the inspiration for the emerging discipline of “cultural studies” (Kuper 1999:230)

D’Andrade quotes an American dictionary entry (of the omnibus type) as the “standard definition of culture in the world outside anthropology” (1999:85). The *Concise Oxford Dictionary* has a brief entry: “2. the customs, civilization, and achievements of a particular time or people (*studied Chinese culture*)” (Thompson 1995:328; italics in original). For the adjective ‘cultural’, the *Concise Oxford* gives the following meaning: “of or relating to the cultivation of the mind or manners, esp. through artistic or intellectual activity” (1995:328). Kroeber and Kluckhohn reviewed the dictionary entries of their day and concluded that in general they are “fumbling”(1966:64). I believe their conclusion applies equally to the more recent dictionary entries. They offer the following, still convincing, explanation:

When it comes to broader concepts, especially of ‘intangibles,’ they appear to become disconcerted by the seeming differences in professional opinion, and hence either leave out altogether, as long as they can, the professional meaning which a word has acquired, or they hedge between its differences in meaning even at the risk of conveying very little that makes useful sense. (1966:65)

Kuper hints at a more radical approach to the popular ‘meaning’ of the word:

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<sup>3</sup> Longer, and to my mind confusing, histories are provided in Kroeber & Kluckhohn (1966) and Kuper (1999)

Politicians urge cultural revolution. Apparently a seismic cultural change is needed to resolve the problems of poverty, drug abuse, crime, illegitimacy, and industrial competitiveness. There is talk of cultural difference between the sexes and the generations, between football teams, or between advertising agencies. When a merger between two companies fails, it is explained that their cultures were not compatible. The beauty of it is that everyone understands. "We tried to sell 'semiotics,' but we found it a bit difficult," reported a London company called Semiotic Solutions, "so now we sell 'culture.' They know that one. You don't have to explain it". (1999:1)

In essence he has produced a 'non-definition': "The beauty of it is that everyone understands....You don't have to explain it". The assumption that everyone "understands" what is meant by culture without the need to "explain" it, may well suffice for everyday use of the term. A similar approach is adopted by a legal scholar asked to comment on the term in a recent issue of the *American Anthropologist* (Stolzenberg 2001). She compares 'culture' to vague and ambiguous terms in law such as 'obscenity', 'privacy', 'sovereignty' and 'religion'. While criticisms of these terms "abound", efforts to eliminate them from law have failed. She concludes that, "As the parallel example of retaining vague legal terms suggests, it appears that there are some undefinable terms that we simply cannot do without" (2001:443).

## 6. Conclusion

The 'culture' component of the thesis has forced me to consider my own position. There were times when the sheer mass of material, and the pettiness of much academic criticism tempted me to reject the concept as more trouble than it was worth. However, I have come to accept that all the definitions have merit in that they express some aspect of the concept, and all criticisms have merit in that they are reminders of the incomplete and provisional nature of definitions. The 'omnibus' definitions may be useless for analytic purposes, but they do give a sense of the

holistic nature of the concept. The ‘mini’ definitions, such as “way of life”, “design for living” and “cultural versus biological” are handy for shorthand reference. I think that casual use of the terms ‘culture’ and ‘cultural’ in conversation or popular media does not require a definition, but anything more than a passing reference does. I also believe that the term can be useful in research if specific content is assigned to it by an explicit ‘working’ definition.

What does all this have to do with the use of culture by the Court? The survey should turn up any ‘working’ definitions used by the Court. The survey results should also identify the instances of casual, incidental use of the terms. These two categories of use are not problematic. What about cases which make repeated use of the terms, but do not define them? Such use of a term with a long history of overlapping, contradictory, contested and changeable meanings *is* problematic. The reader is left to guess which meaning (if any) the judge might have had in mind. This lack of certainty provides an inadequate guide for those who must interpret and follow the Court’s judgments as binding precedents. In the absence of definition, the Court, without realizing it, may also use the terms differently from one case to the next. Again, this lack of consistency places an unfair burden on subsequent litigants and lower court judges. It is even more problematic to use the term as the basis for a legal test, without providing a *clear* definition for the guidance of those who must apply it. However, the Court appears to have done just that with the “distinctive culture test” developed in the pivotal Aboriginal rights case, *R. v. Van der Peet* (1996).

## C. Culture in Aboriginal Rights Cases

### 1. Introduction

The main focus of this section is the development of the “distinctive culture test” by Lamer, C.J., in the case of *R. v. Van der Peet* (1996), and critical reaction to the test in law and anthropology. It highlights the problems which result from the uncritical use of ‘culture’.

As in the previous section, I begin by specifying the literature not reviewed. I will maintain a narrow focus to avoid being drawn into the burgeoning literature on Aboriginal rights in general (see Alfred 1995, Asch 1997, Barsh & Henderson 1997, Borrows 2001, Christie 1998, Culhane 1998, Harring 1998, Henderson *et al* 2000, Kulchyski 1994, McNeil 1989, Proulx 2000, Canada: Royal Commission on Aboriginal Peoples 1996, Slattery 1987 and Slattery 2000). Similarly, the implications for Aboriginal rights of international public law and decisions from other jurisdictions are not pursued (see Macklem 2001:66-71, Venne 1998). Finally, I make reference to lower court decisions only to the extent that they provide insight into the Court’s use of culture.

### 2. Pre *Van der Peet*

Part I of the *Constitution Act, 1982* created the “Charter of Rights and Freedoms” (the “Charter”). Part II gave constitutional status to the “Rights of the Aboriginal Peoples of Canada”, specifically in Section 35(1): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (“s 35”). Part II did not define “aboriginal rights”, nor did it mention the word ‘culture’. A series of

conferences held pursuant to s.37(1) of the Act were intended to “identify and define” Aboriginal rights. However, no agreement was reached (Asch & Macklem 1991:504), and it was left to the Court to interpret the meaning of “aboriginal rights”.

The beginning of an “interpretive framework” was provided in *R. v. Sparrow* (1990). One sentence in particular from the judgment of the Court in *Sparrow* played an important role in the future use of culture by the Court. Dickson, C.J. and La Forest, J., speaking for the Court, commented as follows: “The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture” (1990:402).

The reference to “an integral part of their distinctive culture” was developed six years later into the “distinctive culture test” by Lamer, C.J., in *Van der Peet* (1996).

### **3. *R. v. Van der Peet* (1996)**

Dorothy Marie Van der Peet, a member of the Sto:lo, was charged with selling ten salmon contrary to the *Fisheries Act*. In her defence, she alleged that the restrictions imposed by the Act infringed her aboriginal right to sell fish, and therefore violated s.35(1) of the *Constitution Act, 1982* (1996:para.6)<sup>4</sup>.

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<sup>4</sup> My research copies of many cases are taken from the Lexum internet site, which often provides only paragraph (or ‘pinpoint’) references.

- **“The Distinctive Culture Test”:**

The majority decision was delivered by Lamer, C.J. In the following extract, Lamer both justified and promulgated his test:

In light of the suggestion of *Sparrow, supra* [the passage from *Sparrow* quoted above], and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. (para.46)

Lamer acknowledged that the test needed “further elaboration” (para.48), and intended the following three points to assist in the “practical” application of the test:

**a. Aboriginal perspective**

In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right...It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. (para.49)

**b. Integral versus incidental**

The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society.... (1996:para.56)

A practical way of thinking about this problem [ascertaining what is “integral”] is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question. (para.59)

**c. Relevant time frame**

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. (para.60)

After discussing other aspects of Aboriginal rights, he applied his test to the case at hand, based on the evidence adduced at trial:

Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour – for example, specialization in the gathering and trade of fish – whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. (para.90)

When all was said and done, Dorothy Marie Van der Peet was convicted (para.93).

The first criticisms of Lamer's test are to be found in the dissenting reasons for judgment of L'Heureux-Dube and McLachlin, JJ. On the other hand, it must be remembered that they were members of the Court, and hence their reasons remain available for incorporation into future decisions. L'Heureux-Dube took a different approach to culture than Lamer. For example, on the issue of the relevance of the Aboriginal perspective she felt that "...what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations" (para.162). Her position on the issue of 'integral versus incidental' is consistent: "Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves" (para.157). Her most "extreme" view is in relation to the relevant time frame. She opted for a "reference period of 20 to 50 years" (para.178).

McLachlin felt that her position fell between the “extremes” (para.246) adopted by Lamer and L’Heureux-Dube. However, she came out strongly against the “indeterminacy” of the test on the ground that,

...different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right (para.257)

#### 4. Critical reaction to the “Distinctive Culture Test”

I limit myself to critical reaction which addresses some aspect of the concept of culture. The concerns expressed in the wake of *Van der Peet* (1996) were anticipated by Asch in a 1992 article commenting on the use of culture by McEachern, J., in the trial decision in *Delgamuukw v. British Columbia* (1991). Asch began by justifying the value of an anthropological critique, on the ground that “...anthropology represents the primary approach developed in the western intellectual tradition to understand cultures other than one’s own. It has developed its approach on the basis of over a century of purposive enquiry into the nature of culture....” (1992:505). He then directed his criticism towards specific examples of McEachern’s ethnocentrism and his uncritical (and unacknowledged) adoption of Julian Steward’s cultural ecology approach (1992:225-34).

All the articles in the Winter 1997 issue of *Constitutional Forum* were dedicated to the six decisions on Aboriginal rights handed down by the Court in 1996. In one article, John Borrows, a legal scholar, ridiculed the presumption of Lamer: “As promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, ‘once upon a time,’ central to the survival of a community, not necessarily about what is central, significant and distinctive to the

survival of these communities today” (1997:28-9). Borrows went on to wonder, “What would it be like for Canadians to have their fundamental rights defined by what *was* integral to European peoples’ distinctive culture prior to their arrival in North America?” (1997:30; emphasis in original).

Also writing in 1997, Barsh and Henderson made these objections to the Courts’ quest for “the grail of ‘centrality’”:

**a. Aboriginal perspective**

“The extent to which an idea, symbol or practice is central to the cultural identity of a particular society is inescapably subjective to that society – or, in the jargon of anthropologists, *emic* (a matter of subjective meaning)”. On the other hand, Lamer treated Aboriginal culture as objective, or, *etic* (“a phenomenon which can be reliably and consistently measured by outsiders”). They also noted that in the United States, Indian religious practices enjoy constitutional protection only to the extent that they are “central” to their religious beliefs. “Determinations of ‘centrality’ have generally been left to the trier of fact, with results that have attracted substantial scholarly criticism” (1997:1000).

**b. Integral versus incidental**

They observe that to make a distinction between “integral” and “incidental” implies that the component parts of a culture can exist independently of one another. “This presumption of independence is, in and of itself, utterly incompatible with Aboriginal philosophies, which tend to regard all human activity (and indeed all of existence) as inextricably inter-dependent” (1997:1000). Like Borrows, they imagine its application to all Canadians: “We wonder if the Supreme Court would dare render an

opinion as to what is ‘central’ to modern Canadian society (hockey? beer? The maple-leaf flag?)” (1997:1001).

**c. Relevant time frame**

Barsh and Henderson object to the awarding of constitutional protection only to activities in existence at the time of “contact”: “A precolonial practice is permitted to evolve, but an Aboriginal culture cannot adopt new elements and remain genuine” (1997:1002).

Finally, Barsh and Henderson offer this original and fascinating explanation of Lamer’s presumption in formulating the test:

Anthropologists long regarded ‘culture’ as something that could be observed, counted, measured and then compared, and tribal societies were routinely characterized as simple, transparent and static. The aim of fieldwork for more than a century was to produce a comprehensive ethnography – a book that contained everything that was useful or interesting about a society. From this conceit – that a ‘simple’ society could be described adequately in one book when European society has not even begun to exhaust its possibilities (and its ambiguities) in a hundred thousand books – arises the presumption that a Euro-Canadian jurist today can sit in judgment of what a Heiltsuk or Sheshaht once believed or valued most. (1997:1002)

I disagree with their blanket assertions about the attitudes and aims of anthropologists, but I agree that the standard ethnographies may well have contributed to that “conceit” among members of the public and even the judiciary. Their concerns are closely related to the criticisms within anthropology, enumerated in the first part of this chapter, of the standard definitions of culture.

With respect to Lamer’s “practical” advice to judges, who are encouraged to ask themselves whether, without a particular practice, custom or tradition a culture would be “fundamentally altered or other than what it is” (para.59), anthropologist Brian Thom

makes the obvious point that, “Speculating what a culture would be like without one of its traits seems an almost impossible and fruitless task” (Thom 1999:18).

Finally, Asch (2000) has provided a critique of Lamer’s application of the “distinctive culture test” to the evidence in *Van der Peet*. Lamer had decided that the exchange of fish was not central to Sto:lo culture because they were at the “band level of social organization”. Specialization, such as the trade of fish, occurs the tribal level, while at the band level, “division of labour tends to occur only on the basis of gender or age” (1996: para.90). To Asch this is unacceptable: “The statement is clear that the Sto”lo are disadvantaged because they are not organized in the manner of tribal societies, with institutions that are similar to our own. Such reasoning is clearly ethnocentric” (Asch 2000:130).

From a purely pragmatic perspective, perhaps the most telling criticism is this: the “distinctive culture test” requires that the existence of Aboriginal rights be determined on a case-by-case basis, with the result that Canada’s judges face the prospect of reviewing evidence on pre-contact culture from over 600 First Nations (Barsh and Henderson 1997:1005).

The test continues to attract critical comment, although attention is now focused on suggestions for amendment or replacement (Slattery 2000 and Macklem 2001 respectively).

## 5. Post *Van der Peet*

In 1997 the Court had an opportunity to revisit the “distinctive culture test” in *Delgamuukw v. British Columbia* (1997). While it decided important issues with respect to Aboriginal title to land, it added little to the basic principles developed in *Van der Peet* (Asch 2000:125).

The “distinctive culture test” was considered in the recent case of *Mitchell v. Minister of National Revenue* (2001). McLachlin, C.J., delivered the majority decision of the Court, and made one reference to criticism of the test: “Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned” (para.32). The statement was followed by citations of three articles, without comment, including Borrows (1997) and Barsh and Henderson (1997). While her judgment accepts that the “integral” versus “peripheral” distinction is “subjective” and therefore difficult to apply, she felt able to decide that the right claimed was “...not a practice integral to the distinctive culture of the Mohawk people” (para.60). Therefore, the “distinctive culture test” remains the law of the land.

## 6. Conclusion

From all of the foregoing it is possible to identify elements of at least two definitions of culture at work in the “distinctive culture test”. The Court seems to hold a notion of Aboriginal culture consistent with the “way of life” definitions cited in the first section of the chapter. However, the emphasis in on “integral” versus “incidental”, and the distinction made in *Van der Peet* between “band level” and “tribal level” also point

toward an implicit adoption of the “Adaptive systems (cultural ecology and cultural evolution)” definition. Aboriginal culture as thus seen by the Court is bounded, homogenous and without agency, changing only in response to outside influences such as European contact. The critical response to the “distinctive culture test” clearly demonstrates the pitfalls of an uncritical application of these definitions of “culture” to the determination of Aboriginal rights. The next two chapters seek to identify other applications of ‘culture’ by the Court, and to determine if similar problems are present.

## CHAPTER III: SURVEY OF ALL CASES

### A. Introduction

The initial challenge was to find the cases where the Court has dealt with culture. One simple and obvious route was to identify the cases in which the word is used. This was made possible by the recent posting of the Court's decisions on the internet with a search engine capable of listing all such cases and highlighting the examples or 'hits' in each case. By this means I hoped to capture the relevant cases for description and analysis.

Of course, the scope of this research is limited to those cases which use the *word* 'culture' (and its adjectival form, 'cultural'). This relieves me of the impossible burden of finding the cases which may use the *concept* without using the word. Consistent with my earlier decision not to review the literature on multi-culturalism, I did not include the hyphenated form, 'multi-cultural', in the survey. Only Supreme Court of Canada cases are considered for two reasons. From a practical standpoint, it is a way to keep the scope of the thesis within manageable bounds. Secondly, the SCC is the court of final resort in all matters. The temporal limit was chosen to coincide with the passage the *Constitution Act, 1982*, which simultaneously created the "Charter of Rights and Freedoms" and confirmed the "Rights of the Aboriginal Peoples of Canada".

I am aware of only one social scientist, Peter McCormack, using statistics derived from the content of the reported reasons for judgment of the Court. The titles of his

journal articles are self-explanatory: “The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989-1993” (1995), “The Supreme Court of Canada and American Citations 1949-1994” (1997), “Do Judges Read Books, Too?: Academic Citations by the Supreme Court of Canada 1991-7” (1998) and “Second thoughts: Supreme Court citation of dissents & separate concurrences, 1949-1996” (2002). I am not aware of anyone using the text of the Court’s judgments as a database for a manifest data analysis

Specifically, I set out to provide some basic information concerning the Court’s use of the terms ‘culture’ and ‘cultural’, by way of a manifest data analysis. I also realized that the Aboriginal rights cases have not been subjected to this kind of analysis, and comparisons would not be feasible unless I expanded my research to include them.

## **B. Methodology**

During the ten-year period from 1990 to 2000 the Court rendered 1218 judgments, yielding 34,111 pages of text (Supreme Court of Canada 2001:4-9). Using a conservative average of 100 judgments per year for twenty-one years (from 1982 to 2002), yields an estimated total of 2000 judgments. How many of those cases use the words ‘culture’ and ‘cultural’? Once I am able to identify the cases which use the terms, how many occurrences are in the text of each judgment? This presents a formidable challenge as the average length of each judgment, by rough calculation, is over thirty pages.

Locating examples of the use of the terms ‘culture’ and ‘cultural’ within the corpus of reported decisions over the last twenty-one years would be impossible were it not for the internet. There, free for the use of any researcher, is the Supreme Court website (<http://www.lexum.umontreal.ca/csc-scc/en/index.html>), maintained jointly by the Court and by the “Lexum” team at the University of Montreal. As well as general information about the Court, the website provides in searchable form a database of the full text of all decisions since 1985. For decisions prior to that date resort must be made to a private (and expensive) database maintained by “Quicklaw” (<http://www.quicklaw.com/en/home.html>).

Given this mass of material, and the ability to conduct on-line word searches of Court judgments, my sampling strategy was to search the texts of judgments for the words ‘culture(s)’ and ‘cultural’, and then conduct various content analyses of the results. My proposed research seemed to fit within one of the situations where Holsti recommends the use of content analysis: “...content analysis may be helpful when there are technical advantages because the volume of material to be examined exceeds the investigator’s ability to undertake the research by himself” (1969:17). I cannot possibly read all the Court’s judgments, and thus the on-line search of the database is the only way for me to locate and then analyze the cases which explicitly use the terms.

The technique of manifest content analysis offers two advantages in my circumstances. First, it avoids the risk of “confusing the description of the contents of a text with inferences about its possible meanings” (Sanders *et al* 1999:218-9). This became a valuable reminder as I reported my results, because I had to fight a tendency to liven up the description with colourful adjectives. I found that the

adjectives inevitably disclosed my reaction to the results, which in fact constituted a form of inference about meanings. Secondly, this method lessened the risk of my “personal feelings, opinions, and prejudices” compromising the reliability of the results (1999:218). This is particularly relevant in my situation, because I am a lawyer. As a solicitor (or office lawyer) by preference, I have developed a bias against the adversarial process so favoured by judges and the counsel who appear before them. I tend to regard litigation as a failure of negotiation rather than a source of justice. I am also aware that barristers and judges (who are almost always drawn from the ranks of barristers) are slightly condescending towards mere solicitors (Vallance 2000). Finally, I have my favorites among judges, and those I dislike, including a personal antipathy towards one former member of the Court.

Berelson cautions that “Content analysis stands or falls by its categories” (quoted in Holsti 1969:95). According to Holsti, “The most important requirement of categories is that they must adequately reflect the investigator’s research question” (1969:95). I have chosen to use “subject matter categories”, because they are “developed specifically for the problem at hand; [and] thus their variety is limited only by the number of different substantive questions one seeks to answer with content data” (1969:104).

First, I chose categories of information easily obtainable from the Lexum versions of Court judgments. For example, for each case I list the adjectives that modify the noun ‘culture’, and the nouns that are modified by the adjective ‘cultural’ Secondly, the issues raised by both sections of the literature review helped with the formulation of

the more general research questions in the survey. For example, I look for definitions of the term and for use of the term in legal tests.

I followed Altheide's preferred method of "progressive" sampling, in which categories are selected and amended in a back-and-forth process, based on an "emerging" understanding of the material (1996: 33-4). While the 'draft' data sheet was never formally updated, the categories were refined over time, with the data becoming answers to the following questions:

1. How frequently is the noun 'culture' used?
2. How frequently is the adjective 'cultural' used?
3. How frequently are the terms used over time?
4. Which judges use the terms?
5. What adjectives and pronouns modify the noun?
6. The adjective modifies what nouns?
7. 'Culture' is used in conjunction with what other nouns?
8. 'Cultural' is used in conjunction with what other adjectives?
9. Are specific 'cultures' identified?
10. Is the term defined?
11. Are the terms used in legal tests<sup>5</sup>?
12. How frequently are the terms used in each area of law?

Some additional categories of data also proved useful. They were as follows:

1. brief recitation of the facts.

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<sup>5</sup> I use a broad definition of "test", including general statements of principle intended to provide general guidance to judges and counsel.

2. decision in the case.
3. the complete sentence or phrase in which the term was used (particularly useful for verifying totals and culling additional information).

A number of categories were gradually discontinued when I realized I would not be able to use them. They were as follows:

1. list of all appellants and respondents.
2. list of all interveners.
3. names of all sitting judges.
4. use of the term 'multi-culturalism'.
5. use of the terms in head-notes<sup>6</sup>
6. use of the term to perform a stated purpose<sup>7</sup>

Data sheets were completed for each non-aboriginal case containing one or more references to the words 'culture(s)' or 'cultural'. However, I realized that the Aboriginal rights cases, while the object of much critical attention, have not been subjected to a manifest data analysis. Therefore, I needed to complete data sheets on the Aboriginal rights cases as well, to permit subsequent comparison with the non-aboriginal rights cases. Finally, for the sake of completeness, I was able to collect some data on cases prior to 1982 using the terms 'culture' and 'cultural'.

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<sup>6</sup> The use of the term in the text of a judgment is sometimes repeated in the head-note. For example the terms appear a total of thirty five times in the head-notes of twenty one non-aboriginal rights cases. I reviewed the head-notes in question, but no way of organizing the information suggested itself to me.

<sup>7</sup> This question became subsumed in the question, "Are the terms used in a legal test?"

For the results section which follows, I totaled and collated the information in the data sheets to provide answers to the research questions.

### **C. Results**

I briefly considered undertaking a formal quantitative analysis of the data, but decided that a qualitative analysis would suffice. I intend to limit my use of the survey to answering the twelve research questions posed in the Methods section above, briefly discussing them, and then selecting cases for detailed analysis in the next chapter.

The ‘overall’ results are described first, followed by results for the Aboriginal rights cases, then the non-aboriginal rights cases, and concluding with a brief summary. For the sake of consistency, the results are presented in the form of answers to the research questions.

#### **1. Use of the Terms Prior to 1982**

The data gathered from my review of the pre-1982 cases provides insight into the evolution of the judicial use of the terms. They were used in 29 cases in the 106 years between 1875 (the founding year of the Court) and 1981. Of that total, 20 cases used ‘culture’, 8 used ‘cultural’ and one used both. Culture was used a total of 59 times, and cultural was used 10 times, for a grand total of 69.

In the early years of the Court, English translations of judgments in French were not provided. Seventeen judgments using ‘culture’ are in French, and all appear to use the term in the sense of cultivation of land. Six cases use the term in scientific contexts

(biological, horticultural, agricultural or silva-cultural). One case uses the term in the title of a government ministry. The earliest case, *St. Lawrence & Ottawa Railway Co. v. Lett* (1885)<sup>8</sup>, uses the term as follows: "... moral culture, like bodily health and mental development, improve and perfect the man". In *Barrett v. Winnipeg* (1890), the Court made reference to "the spiritual culture of the child". A case from 1927, *Tiny (township) Roman Catholic Separate Schools v. Canada*, makes one reference to "higher culture". A 1940 case, *Association Catholique de la Jeunesse Canadienne-Francais v. Chicoutimi*, refers to "the teaching and practice of physical culture". The use of culture by the Court in the sense of artistic, literary, spiritual or physical development does not seem to recur after 1940. The first instance of its use in the 'anthropological' sense is in *R. v. Calder* (1973), discussed below. A 1976 custody case, *Natural Parents v. B.C.*, referred to a child as follows: "He must be considered as an individual, not a part of a race or culture". One of the boy's parents was a native "Indian".

The first appearance of the adjectival form was in a 1938 case, *Reference re: Alberta Legislation*, quoting an extract from an Alberta statute, which contained a reference to "the cultural heritage of the people of the province". The other eight cases use 'cultural' in the following phrases: "the cultural, political, social and economic fabric of Canada", *Capital Cities Communications v. C.R.T.C.* (1978) & *R. v. CKOY Ltd.* (1979), "educational, technical, cultural or literary purposes", *Simpsons Sears Ltd. v. New Brunswick* (1978), "administrative, medical, educational or cultural purposes", *ILGWU Center Inc. v. Montreal* (1974), "social and cultural objective", *Quebec*

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<sup>8</sup> These cases were obtained via (and are available to those with access to) "Quicklaw", but, unfortunately, I did not make note of the Supreme Court Report citations.

*(Public Service Board) v. Canada* (1978), “the religious, cultural, physical, social, agricultural and general welfare”, *Jewish National Fund Inc. v. Schechter Estate* (1965), “his cultural upbringing”, *R. v. Parnerkar* (1974) and “heroin and other cultural poisons”, *Prince George (City) v. Payne* (1978). In sum, the term ‘cultural’ did not come into common use until the 1970s.

The final case is *R. v. Calder* (1973), the only Aboriginal rights case to use the terms prior to 1985. ‘Culture’ is used 14 times, and ‘cultural’ once. The ‘cultures’ referred to were “Indian culture” in general, and “the culture of the Nishgas” in particular. The total of 14 uses of ‘culture’ was not to be bettered in Aboriginal rights cases until 1996.

## 2. Overall Use

### a. How frequently are ‘culture’ and ‘cultural’ used?

Of the estimated 2000 cases decided by the Court since 1982, 165 contain the words ‘culture’ and/or ‘cultural’. Data sheets for the 165 cases were completed, disclosing that the noun ‘culture’ was used a total of 714 times. The adjective ‘cultural’ made 494 appearances, yielding a combined total of 1208. Table A (in the Appendix) lists all of the cases in alphabetical order, and the totals (‘culture’, ‘cultural’ and combined) for each case.

Among the 165 cases there are 20 Aboriginal rights cases, containing a total of 494 uses of ‘culture’ and 47 uses of ‘cultural’, for a grand total of 541. Table B lists all of the Aboriginal rights cases in alphabetical order, and the total usage for each case. That leaves 145 non-aboriginal rights cases, containing 220 uses of

'culture' and 447 uses of 'cultural', for a grand total of 667. Table C sets out the same data for these cases.

In 12 cases the term is used only in book or official titles. In another 4 cases the term is used only in its scientific sense. There are also cases in which some, but not all, of the uses are in book or official titles, or in scientific contexts. I have not attempted to weed out these uses in my totals for each case.

Table D ranks the cases with 8 or more uses. The winner is *Van der Peet* (1996), with 213. Of the top ten, six are Aboriginal rights cases, two are constitutional cases, *Kitkatla* (2002) and *Reference re Secession of Quebec* (1998), and two are minority language education cases, *Arsenault-Cameron* (2000) and *Mahe* (1990). The cases with 4 or more uses of the term 'culture' are ranked in Table E. The winner is again *Van der Peet*, with 210. Of the top ten, seven are Aboriginal rights cases, two are minority language education, *Arsenault-Cameron* and *Mahe* again, and one is constitutional, *Little Sisters Book and Art Emporium* (2000). Finally, the cases with 4 or more uses of 'cultural' are ranked in Table F. The winner in this category is *Kitkatla Band v. British Columbia* (2002), with 39. Of the top ten, only one is Aboriginal rights, *R. v. Marshall* (1999). There are two minority language cases, *Arsenault-Cameron* and *Mahe* again, two constitutional cases, *Kitkatla* and *Reference re Secession of Quebec* again, two equality cases, *Corbiere* (1999) and *Lovelace* (2000), one 'miscellaneous', *Re Canada Labour Code* (1992), one human rights, *Gould v. Yukon* (1996) and one family case, *Van de Perre v. Edwards* (2001)

**b. How frequently are the terms used over time?**

The combined usage (all areas of law including Aboriginal rights) over the last 21 years is not very informative. Accordingly, I decided to deal with the data separately under the Aboriginal rights and non-aboriginal rights categories.

**c. Which judges use the terms?**

The use of the terms judge by judge is not shown on a table. This is because some of the early judgments were delivered by “the Court”, and some of the recent judgments are collaborative affairs of two or more judges. Also, it is not easy to factor in the retirement and elevation of judges within the 1982-2002 period. I did track on a worksheet the totals for judges using the terms, but the only obvious result is that one judge, former Chief Justice Lamer, accounts for almost one third of the total. He rendered judgments in nine Aboriginal rights cases, and most (approx. 85%) of his use of the terms came from them.

**3. Aboriginal Rights Cases**

**a. How frequently are the terms used over time?**

Table G shows the totals for ‘culture’ and ‘cultural’ in each year from 1982 to 2002. The results are also graphically displayed in the form of a bar chart (Figure 1 in the Appendix). There is very little use of the terms before 1996, and variable use after 1996. The year 1996, when six Aboriginal rights decisions (containing a total of 388 references) were handed down, is clearly exceptional.

**b. Which judges use the terms?**

Again, no comparisons are possible, with the exception of Lamer, C.J., who is clearly dominant, accounting for over one half the total usage in Aboriginal rights cases.

**c. What adjectives and pronouns modify the noun?**

Table H (below) lists 42 different adjectives and pronouns used to modify the noun ‘culture’. The number of times each modifier is used (if more than once) is indicated in brackets. They are listed in descending order of frequency, with “distinctive” (used 174 times) the most frequent by far, followed by the variant “distinctive aboriginal”(at 67 times). The use of “distinctive” commences in 1990 with a single reference in *R. v. Sparrow* (1990), and skyrockets in 1996, especially in *R. v. Van der Peet* (1996).

**Table H: Modifiers/Aboriginal Rights Cases**

<p>distinctive (174), distinctive aboriginal (67), the (42), aboriginal (37), Mohawk (14), their (13), Stolo (10), non-aboriginal (8), European (6), specific (6), native (6), legal (5), Salish (3), Musqueam (3), Indian (3), particular (3), traditional (3), peoples’ (3), a (3), Shawanaga (2), Eagle Lake (2), band (2), other (2), different (2), that (2), Algonquin, Sheshaht, Opetchesaht, Heiltsuk, Ojibwa, ancestral, historic, pre-sovereignty, pre-existing, tribal, community’s, general, unique, most, another, that, its</p>
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One of my twelve research questions was, “Culture is used in conjunction with what other nouns?” Not many “other” nouns are used in conjunction with ‘culture’ in the Aboriginal rights cases, so no results are reported.

**d. The adjective modifies what nouns?**

Here the sample is much smaller than for ‘culture’, since ‘cultural’ is only used 47 times in the Aboriginal rights cases. The contrast is most evident in *Van der Peet* (1996) where ‘culture’ is used 210 times, and ‘cultural’ only 3 times. Table H (below) sets out 23 examples. Most of the use of the leading example, “context”, comes from the *Marshall* (1999) case. Another of my twelve research questions was, “Cultural is used in conjunction with what other adjectives?” ‘Cultural’ is used with very few “other” adjectives in the Aboriginal rights cases, so no results are reported.

**Table I: Nouns/Aboriginal Rights Cases**

<p>Context (12), differences (5), identity (4), component (3), backdrop (2), survival (2), well-being (2), preservation, goals, considerations, property, framework, historian, ties, purposes, fields, communities, tradition, significance, relationship, distinctiveness, anthropology.</p>
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**e. Are specific cultures identified?**

What I originally had in mind were ‘named’ cultures. However, I realized that the phrases “Salish culture”, “European culture” and “prison culture” all purport to name or attach a label to ‘a’ culture, but do so with widely varying degrees of specificity. I settled on an easy but arbitrary definition of ‘specific’ cultures, as those named in capitals. On that basis, ‘specific’ cultures named in the judgments are as follows: Salish, Mohawk, Musqueam, Algonquin, Sheshaht, Opetchesaht, Heiltsuk, Ojibwa, Shawanaga, Eagle Lake, Stolo, Indian and European.

**f. Is the term defined?**

To answer this question, I first had to decide what constituted a ‘definition’<sup>9</sup>. My ideal would be for a judge to explicitly state that she or he is going to define the term. I found no such definitions. The phrase, “defining feature”, is often used, but only as a marker of the perceived importance of a particular activity of an Aboriginal culture. In the absence of the obvious, I was forced to look for circumstantial evidence of a definition. It is beyond the scope of the thesis to deduce definitions from the general tenor of each judgment. As an alternative, I considered certain words and phrases used in conjunction with the word “culture”. In *Jack & Charlie v. The Queen*, Beetz, J., used the phrases, “tribe or culture” and “the culture and way of life” (1985:336-7). A similar phrase was used by Lamer, C.J., in *R. v. Adams* (1996:para.21): “the customs, culture, way of life”. In that same case Heures-Dube, J., used the phrase, “culture and social organization” (1996:para.67). In *R. v. Van der Peet*, Lamer used the words

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<sup>9</sup> Kroeber and Kluckhohn discussed the logical issues of a “definition of definition”, but decided it was not a “profitable” exercise (1966:78-80).

“societies and cultures”, and Heureux-Dube used the variant “culture and society” (1996:paras.16 & 162). Finally, in that case Heureux-Dube used the phrase “the social structure and culture” (1996:para.211). However, just because the words are connected by “and” or “or” does not necessarily mean that they are intended to be synonyms. In sum, the Court may have used some of the following as complete or partial synonyms for Aboriginal culture: “tribe”, “customs”, “society”, “social organization”, “social structure” and “way of life”.

**g. Are the terms used in a legal test?**

This is difficult to answer because tests are not often identified as such in judgments. Therefore their existence usually has to be inferred, thus introducing an element of subjectivity.

As well, much depends on what is considered ‘use’. At lower end of the scale is ‘use’ in the sense of ‘present’ in the wording of the test. Into this category would fall any cases where the Court incorporates a word into a maxim intended for the general guidance of counsel and lower court judges in future cases. The only example I found is in the most recent treaty case, *R. v. Marshall* (1999). The Court decided (*inter alia*): “Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and *cultural* context of a treaty may be received even absent any ambiguity on the face of the treaty” (per Binnie, J., para.11, emphasis added).

At the other end of the scale is the “distinctive culture test” expounded by Lamer, C.J., in *Van der Peet* (1996), and already described in part two of the Literature Review.

#### **4. Non-aboriginal Rights Cases**

##### **a. How frequently are the terms used over time?**

Table J (in the Appendix) shows the number of non-aboriginal rights cases using the terms and the totals for ‘culture’ and ‘cultural’ in each year from 1982 to 2002. This is graphically represented on a bar chart (Figure 2 in the Appendix). The results indicate a gradual overall increase in use of the terms over the last twenty-one years.

##### **b. Which judges use the terms?**

The use per judge is not tabulated, for the same reasons as set out in the previous section. I did track the use by each judge on the data sheets, but no single judge stands out from the pack in the non-aboriginal rights cases.

##### **c. What adjectives and pronouns modify the noun?**

Table K (below) lists adjectives and pronouns used in conjunction with the noun ‘culture’, in descending order of frequency. Frequency of use (if more than once) is indicated in brackets. No single adjective is used with outstanding frequency.

**Table K: Modifiers/Non-aboriginal Rights**

gay (7) lesbian (7), French (6), different (5), our (5), dominant (4), their (4), his/her (4), the (3), a (2), other (2) First Nation (2), fundamentalist (2), legal (2), distinct (2), Indian, European, Canadian, East Indian, distinctive, unique, ancestral, usual, respective, original, diverse, majority, creative, homosexual, non-pornographic, gang, drug, prison, inmate, aboriginal, political, individual, safety, respondent's, entrepreneurial, pervasive, popular, another, democratic, one's, particular, religious.

**d. Culture is used in conjunction with what other nouns?**

Table L (below) lists some examples, with frequency (if more than once) indicated in brackets. The clear favourite among them is “language and culture”, used 29 times. Most of this usage occurs in two minority-language education cases, *Mahe* (1990) and *Arsenault-Cameron* (2000).

**Table L: Other Nouns/Non-aboriginal Rights**

Language and culture (29), French culture and language (5), identity and culture (4), heritage and culture (4), language, culture and traditions (2), our culture and traditions (2), race and culture (2), language education and culture, blood and culture, religion and culture, values and culture.

**e. The adjective modifies what nouns?**

There are over 90 different nouns modified by ‘cultural’. Only those used more than once are listed in Table M (below). The frequent appearance of “identity” can be explained partly by its use in an oft-quoted (23 times) sentence<sup>10</sup> in the judgment of Dickson, C.J., in *R. v. Oakes* (1985). Most of the appearances of “heritage”, “object” and “property” can be attributed to one case, *Kitkatla* (2002). All of the uses of “centers” are from one case, *Re Canada Labour Code* (1992), which referred repeatedly to an American case about union certification of a German cultural center.

**Table M: Nouns/Non-aboriginal Rights**

Identity (38), heritage (17), groups (13), development (13), concerns (13), object (12), centers (11), context (8), differences (6), values (6), minorities (6), property (5), fabric (3), interests (3) traditions (3), institutions (3), assimilation (3), issue(s) (4), importance (3) messages (3), bias (2) belief (2), character (2), factors (2), matters (2), impact (2), security (2) fields (2), roots (2), problems (2), barriers (2), conditions (2), disadvantages (2)

**f. ‘Cultural’ is used in conjunction with what other adjectives?**

There are not many examples. However, the favourite combinations are clearly “social” (used 42 times), “economic” (35) and “political” (30). Here is an example from the judgment of La Forest, J., in *Lavigne v. Ontario Public Service*

<sup>10</sup> Reproduced in subsection 4.(i) below.

*Employees Union* (1991:317): “This interest [freedom of association] might be expressed as the interest of society at large in the contributions in political, economic, social and cultural matters which can be made only if people are free to work in concert”.

**g. Are specific cultures identified?**

The cultures named in capitals are as follows: European, Canadian, French, First Nations, Indian and East Indian.

**h. Is the term defined?**

There are no explicitly labeled definitions propounded by judges of the Court. In *R. v. Zundel* (1992:818), Cory and Iacobucci, J.J., rendered a dissenting judgment containing the phrase, “cultural design for living”. This could be characterized as a ‘shorthand’ definition: culture as a “design for living”. There is also a definition of the “particular culture” of a “person”, imported by way of a quote from a lower court decision. Heureux-Dube, in a child custody case, *P(D) v. S(C)* (1993:172), quoted extensively and with approval from the judgment of Reeves, J., of the Quebec Superior Court, in *Droit de la famille - 425* (1988:161-2). Reeves had this to say about “the abstract notion of ‘the child’s interest’”:

It can be said that the interest of a human being is nothing but the measure of his welfare [cite omitted]. There are generally four aspects to a person’s welfare: the physical or material, the emotional, the intellectual or educational, and finally, the moral or religious aspects. The combination of these aspects gives a person what may be called his particular ‘culture’.

However, Heureux-Dube herself made no reference to culture in the judgment, and the Court has not found occasion to refer to this quote in any subsequent decisions.

As a cross-check, I consulted the standard reference work, *Words & Phrases Judicially Defined in Canadian Courts and Tribunals* (1993 plus annual supplements), which contained only one entry under ‘culture’: *R. v. Smith*, a 1983 Alberta Provincial Court case in which judge Jones quoted an excerpt from the 1964 *Webster’s Third New International Dictionary* definition of “culture”.

**i. Are the terms used in legal tests?**

I have identified four candidates. The first is the presence of the word ‘cultural’ in this passage from the judgment of Dickson, C.J. in *R. v. Oakes* (1986: para.64), which was subsequently quoted with approval twenty two times in thirteen cases:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for *cultural* and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [emphasis added]

The second is the appearance of ‘cultural’ in the following sentence from the judgment of Sopinka, J., in *Danson v. Ontario (Attorney General)* (1990:1099), which was quoted with approval in three later cases: “Legislative facts are those that establish the purpose and background of legislation, including its social, economic and *cultural* context” [emphasis added].

The third is in *R. v. Beaulac* (1999), where the Court considered the situation of an accused who asserts French or English as her or his language of choice: “The court, in such a case, will not inquire into specific criteria to determine a dominant *cultural* identity, nor into the personal language preferences of the accused” (1999:para.34; emphasis added).

The case of *Arsenault-Cameron v. Prince Edward Island* (2000) reviewed the role of provincial ministers of education in the implementation of minority language education rights, and came to this conclusion: “The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and *cultural* concerns of the minority” (2000:para.53; emphasis added).

These four examples are all at what I consider to be the low end of the “use” scale, where the term is *used* only in the sense of being *present* in the test or maxim.

#### **j. How frequently are the terms used in each area of law?**

My first task was to establish the areas of law. The point-form summary appearing before the head-note in each case commences by identifying the general category (or categories) which best describes the case. In my data sheets I adopted these categories. When collating the cases<sup>11</sup>, I first divided the non-aboriginal rights cases into two broad categories: Charter and non-Charter. I then subdivided the Charter cases into seven sub-categories: freedom of religion

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<sup>11</sup> In cases fitting more than one category, I made a subjective decision as to which label to use.

(s.2.a), freedom of expression (s.2.b), freedom of association (s.2.d), criminal (ss.7-14), equality rights (s.15), language education rights (s.23) and miscellaneous. I sub-divided the non-Charter cases into six sub-categories: constitutional, criminal, family, human rights, immigration, and miscellaneous. Frequency of use of the terms within each area of law was compiled, and the results are reproduced in full on Table N (in the Appendix)<sup>12</sup>. The number of cases and the combined number of uses (culture + cultural) for each of the major categories are also displayed on a bar graph (Figure 3 in the Appendix).

Among the non-Charter cases, Constitutional had the highest total number of uses (87). In this category, two cases accounted for 80% of the usage: *Kitkatla Band v. British Columbia* (2002), with a total of 45 occurrences, plus *Reference re Secession of Quebec* (1998), with 25. The non-Charter category with the second highest total was family law, with 40 uses. The leading case in this category was *Van de Pere v. Edwards*, with 16, accounting for 40% of the total.

Among the Charter cases, freedom of expression had the highest total (101), followed closely by language education rights (90). Freedom of expression is a very broad category, encompassing pornography, hate literature and Quebec's language laws. Three cases (from a total of 17) account for 50% of the use: *Little Sisters Book and Art Emporium v. Canada* (2000), with 19, *R. v. Zundel* (1992) with 18, and *R. v. Keegstra* (1990), with 11. Two cases (from a total of only 5) account for 77 % of the use in the language education rights category: *Arsenault-*

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<sup>12</sup> For the sake of completeness, I added two categories, one to account for the cases in which the use of culture was strictly scientific, and a second for those with references consisting solely of titles (book and official).

*Cameron v. Prince Edward Island* (2000), with 35, and *Mahe v. Alberta* (1990), with 34.

The usage totals by category alone are not completely representative of the intensity of use, as some categories contain more cases than others. One way to allow for this is to calculate the average use per case for each category. Language education rights had the highest average by far (18). The second highest average was 10.8 for the constitutional law cases. Third was freedom of association, with 7.2, while freedom of expression had an average of 5.9 uses per case. The average for family law was 5.7 per case.

## **5. Summary and Discussion**

### **a. Overall Use**

With the exception of 1996, the overall results are not spectacular. The terms 'culture' and cultural' started to appear with some frequency in the 1970s, and the frequency of use has expanded gradually over the last twenty one years.

To gain some perspective on the relative use of similar pairs of terms, I ran searches of the Lexum Supreme Court database for the years 1985 to 2002, and came up with the following results: religion/religious (241 cases), politics/political (309), economics/economic (404) and society/social (806). It would seem that culture/cultural (at 165 for the period 1982-2002) is the least popular pairing.

## **b. Aboriginal rights cases**

The obvious result is the huge spike in the use of ‘culture’ in 1996, in *Van der Peet* and the other five Aboriginal rights judgments rendered that year. The term was most often used in those cases as part of the phrase, “distinctive culture”, referring to some aspect of the promulgation, explication and application of the “distinctive culture test”. On the other hand, the term ‘cultural’ was little used.

Almost every Aboriginal rights case refers to a named Aboriginal ‘culture’. This is no surprise, because the plaintiff or defendant in every case is either a First Nation, a member of a First Nation or individuals appearing on behalf of a First Nation. The Court maintained an almost exclusive focus on specific cultures. However, it is surprising that there is no concomitant discussion of ‘culture’ in the general sense, or explicit ‘working’ definition of the term, given the frequency with which the term is used, and its key role in the “distinctive culture test”.

## **c. Non-aboriginal rights cases**

Throughout the results section I have highlighted the instances of most frequent use. Some mention should be made of *least* use. For example, there was lower use than I expected in the areas of immigration and freedom of religion. In judgments dealing with immigrants and refugees, very little space was devoted to the ‘cultures’ of their countries of origin. Similarly, in judgments dealing with freedom of religion, there is almost no discussion of the ‘culture’ of religious communities.

In addition, I noticed how few cases named specific cultures, other than in broad terms such as “Canadian” or “French”. More commonly the noun was used with general referents, such as “prison culture” or “popular culture”. On the other hand, the adjective, ‘cultural’, was used twice as often as the noun, ‘culture’ (447 to 220). From this I conclude that the focus of the Court in the non-aboriginal rights cases is not on specific named cultures. It is hard to discern any focus in the Court’s use of the terms in the non-aboriginal rights cases. With few exceptions (discussed in the next chapter), the terms are used only in their popular sense.

As in the Aboriginal rights cases, there is no serious attempt at a definition, and no apparent discussion of the concept in general terms. I must insert a slight caveat, because there is some discussion of ‘culture’ in *Kitkatla Band v. British Columbia* (2002), which is dealt with in the next chapter. While ‘cultural’ appears in a few judicial tests or maxims, the noun ‘culture’ forms no part of any test in the non-aboriginal rights cases.

#### **d. Conclusions**

The first startling result is the concentration of the use of ‘culture’ in the judgments of Lamer, C.J. in the 1996 Aboriginal rights cases. The second major result is the absence of any serious definitions or discussions of culture in any area of law. The third important result is that there is no judicial test remotely comparable to the “distinctive culture test” in *Van der Peet* (1996). It appears to be unique.

Is it possible to conduct a “latent content analysis” based solely on the survey results? The first goal of a latent content analysis is to “...infer what the producer of the text meant by the words that appear in the text” (Holsti 1969:104). This process of ‘reading between the lines’ is appropriate at the “interpretation stage”, where the “...investigator is free to use all of his powers of imagination and intuition to draw meaningful conclusions from the data” (1969:12-13). However, the strength of ‘manifest data analysis’, its rigorous elimination of subjectivity, leaves stony ground for the cultivation of “imagination” and “intuition”. Also, the methodology runs counter to the anthropological preference for in-depth research and broad context. While research at that level is not possible in this preliminary project, I believe that the description of a few selected judgments can lead to further understanding of the Court’s use of culture. Therefore, based on the survey results I chose six cases for description and latent content analysis. The reasons for my selection are set out in the next chapter.

## CHAPTER IV: DESCRIPTION AND ANALYSIS OF SELECTED CASES

### A. Methodology

I have encountered only one study which uses ‘culture’ to analyze the text of judgments. This is an American study of selected decisions of the Supreme Court of the United States, by a professor of law and a “cultural psychologist” (Amsterdam and Bruner 2000). The aim of their study is “...to explore the ways in which human beings, including judges and lawyers, must inevitably rely upon culturally shaped processes of categorizing, storytelling, and persuasion in going about their business” (2000:7). After reviewing the anthropological literature on culture, they developed their own working definition and used it to identify the effect of “American culture” on judges in certain racial discrimination cases over the last century (2000:16). Their selection process was as follows: “The principal texts we chose are opinions of the Supreme Court of the United States in cases where the Court’s results struck us as unjust” (2000:7). The result is fascinating, but the similarity between their study and mine is superficial in most respects, with little potential for guidance or comparison.

In this study, the candidates for individual analysis are the cases with the most frequent use of ‘culture’ and/or ‘cultural’ in different areas of law. The final selection process was based on a mix of subjective considerations, such as my opinion of the legal prominence of the case and its potential to provide insight into the Court’s use of culture. *Mahe v. Alberta* (1990) was chosen because it is the leading case in the area of minority language education rights and includes a consideration of the relationship between “language and culture”. The *Reference re Secession of Quebec* (1998) is clearly an important constitutional case, and might yield insight into the

Court's notion of a "distinct culture". *Little Sisters' Book and Art Emporium v. Canada* (2000) is a freedom of expression case, which contains interesting *obiter* (or incidental) remarks on "gay and lesbian culture". *Van de Perre v. Edwards* (2001) is a high-profile custody case in which the Court identified a link between "race and culture". Finally, I included *Kitkatla Band v. British Columbia* (2002) for its repeated use of the phrase "cultural object", and its brief discussion of culture in general.

There are, of course, interesting cases not included in my selection. For example, I considered *Lovelace v. Ontario* (2000), *Corbiere v. Canada* (1999), *R. v. Gladue* (1999), *R. v. Zundel* (1992), and *R. v. Beaulac* (1999). They are all significant cases, but their use of culture or cultural was too diffuse in my opinion to provide a basis for review and assessment.

I decided to add one more case, to be selected from two categories with infrequent use of culture, namely 'freedom of religion' and 'immigration'. My review of the cases in both areas of law led me to choose *R. v. Big M Drug Mart* (1985). It is perhaps the leading case in the area of freedom of religion, and it talks about the place of the "dominant religious culture" in the values of Canadian society.

In my analysis of the cases, I propose to follow the approach of Borofsky, who sees culture as "a conceptual tool that can be applied in different ways for different ends with different effectiveness" (2001:433). This translates into three questions: in what ways has 'culture' been used, for what ends and with what effectiveness? To answer these queries I begin with a summary of each judgment, with special reference to the

use of the terms ‘culture’ and ‘cultural’<sup>13</sup>. Then I make inferences about the intended use of culture in the judgment. Finally, I proffer a critical analysis, drawing from the literature review and survey results where relevant. The cases are dealt with in chronological order, with the exception of *Mahe*. It will be considered last, and at greater length, because it is the leading case in minority-language education rights, the leading category among non-aboriginal rights cases in the survey. This permits a preliminary comparison of the Court’s use of culture in *Mahe* and *Van der Peet*.

As this study focuses on the written judgments of the Supreme Court of Canada, some general knowledge of the structure and rules of the Court is required before proceeding with an assessment of its use of ‘culture’. The ‘primer’ which follows is far from comprehensive, but will be of assistance in understanding the technical aspects of the judgments to be described and analyzed in this chapter.

## **B. Supreme Court of Canada: a Primer**

The ‘texts’ from which I propose to extract and analyze data are judgments. They do not exist in a vacuum, but are produced by judges who are members of a court. While this is not a study of the Court or its judges, an outline is needed of the context from which the judgments emerge. In this section I provide a Supreme Court primer, starting with some basic information about the make-up of the Court and its jurisdiction. Brief guides to the format of judgments and the art of statutory interpretation are also provided. A second, and just as important, purpose of the

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<sup>13</sup> For each case I used the Lexum search engine to highlight ‘culture’, ‘cultures’ and ‘cultural’, making it easy to locate them in the text.

primer is to make readers without legal training aware of the restrictions imposed on judges by the Court system, and thereby to inculcate a more sympathetic understanding, if not acceptance, of their decisions. This is in line with the anthropological practice of cultural relativism, which promotes understanding a ‘culture’ on its own terms, without giving up the ability to apply critical judgment (Asch & Bell 1994:516). However, let me hasten to add that this is not an ethnology of the Court.

I derived most of the information in the primer from the standard text, *Constitutional Law of Canada*, by Peter Hogg (4<sup>th</sup> edition, abridged, 1997)<sup>14</sup>

### **1. The Court**

The Supreme Court of Canada is now “the final authority on the interpretation of the entire body of Canadian law, whatever its source”. By the “doctrine of precedent”, the decisions of the Court are also binding on the decisions of all “inferior” courts (Hogg 1997:209-33).

In civil matters the Court has complete discretion over the grant or refusal of leave to appeal, while in criminal matters there is a right to appeal if at least one judge of the provincial appeal court has dissented. In addition, the Court must give “advisory opinions” on “reference questions” submitted to it by the federal and provincial governments (1997:209-33).

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<sup>14</sup> As I am a practicing solicitor, not a legal scholar, the primer may not be a completely accurate paraphrase of the legal principles, but it is an accurate description of my working understanding of them.

In references, provincial attorneys general are entitled to “intervene”(or present arguments) in the proceedings, and in other proceedings the Court may permit “interested” non-parties as interveners, usually special-interest groups such as unions, Aboriginal organizations, and civil liberties associations (Hogg 1992:56.6).

A trial court makes findings of fact on the basis of either sworn evidence or “judicial notice”. Judicial notice is taken of adjudicative “facts” which are so “notorious” as not to be in dispute, or capable of demonstration by resort to readily accessible sources such as dictionaries. For example, in *Van der Peet*, Lamer, C.J., referred to the *Concise Oxford Dictionary* (Thompson *et al* 1995) for definitions of “tradition” (1996:para.40), “distinct” and “distinctive” (para.71), and McLachlin, J., referred to *The Shorter Oxford English Dictionary* (Little *et al* 1973) for a definition of “integral” (1996:para.256). In constitutional cases judicial notice may be taken of “legislative” facts (“concerned with the causes and effects of social and economic phenomena”) contained in “unsworn statements by experts or unsworn extracts from books, articles and reports” (Hogg 1992:57.2.c). The weight to be given to such evidence is a matter of some dispute. In reference cases, such as *Reference re Secession of Quebec* 1998), the only way for the Court to receive information is by judicial notice of legislative facts. In other cases, the Court is reluctant to use legislative facts. For example, in *Mahe*, Dickson, C.J., specifically held that such evidence is of “minimal relevance” (1990:369). Grounds of appeal are normally limited to issues of law. Appeal courts are reluctant to reverse trial judges on findings of fact (Hogg 1992:57.2). However, in *Delgamuukw*, after much polite palaver,

Lamer, C.J., expressed his reservations about some of the trial judge's findings of fact, and sent the case back for re-trial (1997:paras.78-108)<sup>15</sup>

The Court consists of nine judges, three of whom come from Quebec, three from Ontario, two from the western provinces and one from the Atlantic provinces. For the relevant period the Chief Justices have been Bora Laskin (1973-84), Brian Dickson (1984-90), Antonio Lamer (1990-2000) and Beverly McLachlin (2000 to date)<sup>16</sup>. Five is a quorum, with "more important" cases being heard by seven or all nine judges. A full panel heard all the cases reviewed in this chapter of the thesis. The composition of each panel is at the discretion of the Chief Justice. Generally only one, two or three judges write reasons for judgment, the others merely indicating agreement with one of the judgment writers.

According to political scientist Peter McCormick, a written judgment "...represents a discursive explanation intended to persuade the relevant audience that the outcome is appropriate and justified, that any other answer would have been a poorer answer or even a wrong answer" (1998a:463). Judges typically justify their decisions by reference (in descending order of importance) to previous decisions of the Court itself or provincial courts of appeal, reference to well-known cases in other jurisdictions (England, the United States and Australia) and citations of the work of commissions and scholars (see McCormick 1995, 1997 & 1998a). Anthropologist Martin Chanock has noted a long-standing need for critical analysis of judicial reasoning, but

<sup>15</sup> The re-trial has never taken place. Thus, there is as yet no case in which aboriginal title to a specific territory has been proven at trial. However, the "Xeni Gwe'tin" or "Nemiah Valley" Aboriginal title case is scheduled for trial in September, 2003.

<sup>16</sup> The source for these dates is the Supreme Court of Canada website ([www.scc-csc.gc.ca/aboutcourt/judges/curformpuisne/index\\_e.html](http://www.scc-csc.gc.ca/aboutcourt/judges/curformpuisne/index_e.html))

concludes that, “In spite of this there is still no anthropology of judicial explanation” (2000:xxi). However, the internal machinations of the Court, the alliances and divisions among its members, while undoubtedly important (see McCormick 1994, 1998b & 2000), are decidedly beyond the reach of this project.

## 2. The Judgments

The official record<sup>17</sup> of the Court’s judgments is contained in the *Supreme Court Reports*. Most of the Court’s decisions are also reproduced in the *Dominion Law Reports*, and selected cases are reproduced in specialized reports, such as the *Canadian Native Law Reports*. The reporting of judgments follows a strict format, which is relatively unchanged over the last twenty-one years. The short form of the case name is followed by a complete list of the parties and interveners. Next comes the date of the judgment and a list of judges taking part. The next section is a point-form recitation of the area of law and issues in the case from general to specific. This is followed by a rather lengthy “head-note” or official summary of facts and findings. Next is a list of cases, statutes and authors cited in the text of the judgment. Then, all counsel are listed. Finally, the text of each judgment is reproduced.

Sometimes one judge is designated to write the decision of a unanimous Court.

Usually more than one judge will provide reasons for judgment, whether concurring in the majority result or writing in dissent. The written reasons of each judge also follow a set format. First is the judge’s version of the facts of the case. Then any relevant statutory provisions are reproduced. The history of the case in the lower

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<sup>17</sup> The Lexum on-line version is not official. The web-site is also careful to warn users that textual errors may have cropped up in the process of producing the on-line versions.

courts is reviewed and critiqued. This is followed by the judge's identification and analysis of the relevant legal principles. This is the longest part of the judgment, in which the judge considers earlier cases similar in fact or law for their precedent value, and reviews the authorities for their persuasive value. The final stage is the application of the legal principles to the facts of the case, climaxing in a brief statement of the judge's decision.

### **3. Statutory Interpretation**

In some cases, the Court is not called upon to consider the terms of a statute. An example is *Van der Perre v. Edwards* (2001) where the issue (according to the Court) was the weight to be given to the issue of race. However, in many cases the Court is called upon to review the validity of a statute. This is a far from straightforward process. Using Hogg (1997) as my guide, I attempt a much-simplified outline of the steps usually followed.

The first step in the process is to decide whether the law is within the "law-making power of the enacting body", in other words deciding if a provincial statute encroaches on an area of exclusive federal jurisdiction, or vice versa. The Court in *Kitkatla* (2002) undertakes this kind of analysis. If a statute has a feature (or aspect) that is provincial, and another which is federal, the Court must decide which is the dominant feature and which is incidental. To do this the Court inquires into "the social or economic purposes which the statute was enacted to achieve". For instance, the Court can enquire into "the defect in the law (the 'mischief') which the statute purports to correct" (Hogg 1997:337-81). The Court's characterization of the purpose

will determine the validity of the statute. How is a judge to resolve a difficult issue of characterization? According to Hogg,

...the judge has little to provide guidance and may tend to assume that his or her personal preferences are widely shared if not impliedly embodied in the Constitution. In that sense, judicial review can never be wholly neutral, wholly divorced from the predilections of the judges. (1997:356)

The second step, in Charter challenges, is to decide whether the law in question is consistent with the Charter. It may seem obvious, but it should be stated that because Part I (the Charter) and Part II (Aboriginal rights) of the *Constitution Act, 1982* are part of the Canadian Constitution, the Court does not have the jurisdiction to declare it or any of its provisions invalid. However, it does have the authority to interpret the Charter and to apply that interpretation to the facts of any case before it. For example, in *Mahe* (1990:363-4), the Court looked at the “defects” s.23 was intended to correct, not to determine the section’s validity, but only to interpret its purpose.

The review of legislation under the Charter takes place in two stages: first, does the challenged law infringe a Charter right, and if so, can the law nonetheless be “justified” under Section 1 of the Charter<sup>18</sup> (Hogg 1997:623-47)? Stage one requires the Court to decide if the purpose or effect of the impugned statute “abridges” a Charter right. This, of course, requires a prior understanding of the purpose of the Charter right. As Hogg points out, while some guidance is available from the pre-Charter history of the right and the legislative history of the Charter itself, “The actual purpose of a right is usually unknown, and so a court has a good deal of discretion in deciding what the purpose is, and at what level of generality it should be

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<sup>18</sup> Section 1 provides that Charter rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

expressed” (1997:643). This issue is particularly relevant when a right first receives constitutional protection. The interpretation of s.23 in *Mahe* (1990) and s.35 in *Van der Peet* (1996) are important examples.

If legislation is deemed to infringe a Charter right, it must then be subjected to the second stage, a s.1 justification test (often called the “Oakes test”<sup>19</sup>). This boils down to a balancing of the relative effects of restricting the right versus striking down the impugned legislation. In *R. v. Sparrow* (1990) Dickson developed a similar justification test to be applied when legislation is deemed to infringe s. 35 Aboriginal rights (see Eisenberg 1994, Newman 1999). If the infringement is adjudged to be unjustified, the offending legislation will be struck down. If the legislative infringement is deemed on balance to be justified, the applicant’s claim for the protection of the Charter right will fail. In *Big M Drug Mart* (1985), the challenged legislation was struck down, while in *Little Sisters Book and Art Emporium* (2000), the legislation was (with reluctance) upheld.

### C. Five Cases in Brief

#### 1. *R. v. Big M Drug Mart Ltd* (1985): “the dominant religious culture”

##### a. Case summary

Under the category of ‘freedom of religion’ I originally anticipated a rich harvest of cases struggling to resolve clashes of culture between the Canadian state and minority religious communities. However, I was to be disappointed. Freedom of

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<sup>19</sup> Dickson, C.J., in *R. v. Oakes* (1986) produced a comprehensive interpretation of s.1, setting out the steps to be followed in deciding whether a legislative infringement can be justified.

religion cases do not examine cultural issues in any detail. In fact culture is barely mentioned at all. *R. v. Big M Drug Mart* (1985) is typical in that regard. The judgment of the Court was delivered by Dickson, C.J.

There was a preliminary objection to Big M Drug Mart Ltd invoking s. 2.a of the Charter on the ground that, "...a corporation being a statutory creation, cannot be said to have a conscience or hold a religious belief". Dickson replied to this objection as follows: "Where, as here, the challenge is based on the unconstitutionality of the legislation...the particular effect on the challenging party is irrelevant" (1985:312-3). The judge added that, "...if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant"<sup>20</sup> (1985:315).

The *Lord's Day Act* contains a prohibition against any work or commercial activity on the "Lord's Day", namely Sunday. *Big M Drug Mart* was open for business on Sunday, May 30, 1982 and was charged with breach of the Act. In its defense the accused company challenged the validity of the *Lord's Day Act* on the ground that it infringed the right to freedom of religion in s. 2(a) of the Charter. Dickson reviewed the lower court decisions, making special reference to the sentiments of an appeal court judge opposed to the abolition of the Act: "Mr.

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<sup>20</sup> The issue of a claimant's entitlement to the protection of s.2(a) depending on the "nature of his belief" was raised in an Ontario High Court Case, *Salvation Army, Canada East v. Ontario (Attorney-General)* (1992). Henry, J., drew upon Dickson's remarks in *Big M*, plus extracts from other decisions to come up with the following test: "In order to attract the protection of the guarantee, the conduct impeded by the impugned legislation must be integral to the practice of the religion" (1992:239). This bears a considerable resemblance to the "distinctive culture test". However, the case has not been referred to in any subsequent decisions.

Justice Belzil said it was realistic to recognize that the Canadian nation is part of ‘Western’ or ‘European’ civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society” (1985:310). Dickson undertook a long review of the history of the legislation and the jurisprudence concerning it, and concluded that, “...the *Lord’s Day Act* must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance” (1985:336).

Dickson’s only use of the word ‘culture’ comes in a section where he examined the requisites for freedom of religion: “The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture” (1985:337). At the end of his examination, Dickson decided that the *Lord’s Day Act* was incompatible with the freedom of religion guaranteed by the Charter, and struck down the Act (1985:362).

#### **b. Intended use**

I believe Dickson’s reference to “the dominant religious culture” was intended to emphasize that Christianity could no longer retain its close identification with Canadian “civilization”. In contemporary Canada, “...to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians” (1985:337-8).

### **c. Critical analysis**

There was no discussion of the beliefs and practices of a specific religious minority in this case, because the defendant was a corporation. It was the “dominant” religion of the majority of Canadians, and its place in Canadian society that was under scrutiny. The Court decided that Christianity was no longer part of the definition of Canadian society, having been replaced by the values of religious tolerance and multiculturalism. This, in my opinion, is an example of treating Canadian society or culture as an homogenous entity, defined by the shared values of its members. The classic example is the catalogue of values in Dickson’s definition of “a free and democratic society” in *R. v. Oakes* (1986:para.64<sup>21</sup>). The problem with this kind of approach is that, “Trying to define what makes a German a German, an American an American, or a Canadian a Canadian by listing the values that citizens of those countries hold in common can only produce a caricature of a country” (Webber 1994:185).

## **2. Reference re Secession of Quebec (1998): “distinct culture”**

### **a. Case summary**

This case, because it originated as a direct reference to the Court from the Government of Canada, did not require the review of a set of facts, nor of earlier trial and appellate decisions. Three questions were submitted, but only the first need be reproduced here: “Under the Constitution of Canada, can the National

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<sup>21</sup> Quoted in full in Chapter III.C.4.i above

Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?” (1998:para.2).

The judgment mostly dealt with complex constitutional issues not relevant to my purpose. As a result I have not attempted to render them into plain English, but instead focus on three references to ‘culture’. After working its way through a number of issues the Court considered the relevance of federalism:

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possess a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province as a political unit. (1998:para.59).

The Court added that, “Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters” (1998:para.60). The third reference appeared in a discussion of the definition of “peoples” in international law: “...much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a ‘people’, as do other groups within Quebec and/or Canada...” (1998:para.125).

**b. Intended use**

The remarks concerning culture were intended as statements of accepted fact. The “social and demographic reality” of Quebec’s “distinct culture” was readily conceded. I believe the Court was anxious to avoid being drawn into the

politically sensitive “distinct society” issue<sup>22</sup>, preferring to base its decision on other grounds.

### **c. Critical analysis**

The French-speaking population within Quebec is deemed to share a common culture, as are the “other groups” within Quebec having the characteristics of a “people”, namely their own language and culture. There is an assumption by the Court that those who speak the same language share the same (uniform) culture. Provinces such as New Brunswick and Nova Scotia are also presumed to possess “individual” cultures. However, nothing more is said about these cultures, making it impossible to divine any criteria for telling them apart, other than political boundaries.

These simplistic notions encourage an essentialist view of culture as bounded, homogenous and static, and to a concomitant failure to recognize the permeable, diverse and mutable aspects of the cultures within Canada. As Jeremy Webber points out, “If one looks at any of the well-defined provincial identities in Canada, there are elements of disagreement and movement, themes and counter – themes”. He cites Quebec as an example: “Although outsiders may see French-speaking Quebec as a homogenous, strongly collectivist society...using the state to impose a single culture and language, there has always been a strongly liberal strain in Quebec politics, even within the ranks of the ‘nationalists’” (1994:188).

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<sup>22</sup> The recognition of Quebec as a “distinct society” was a very controversial provision of the failed Meech Lake and Charlottetown Accords (Hogg 1997:66-8)

### **3. *Little Sisters' Book and Art Emporium v. Canada* (2000): “gay and lesbian culture”**

#### **a. Summary of case**

The hearing before the Court was the end result of a long series of challenges by the bookstore against the repeated seizure of imported gay and lesbian erotica by Canada Customs. The plaintiffs advanced various arguments including breach of s. 2(b) (freedom of expression) and s.15 (equality rights) of the Charter. The majority of the Court (six of nine judges) agreed that Canada Customs had wrongfully delayed, confiscated and prohibited material imported by the plaintiff, but rejected the Charter challenges. Binnie, J. delivered the majority judgment.

One of the issues dealt with in the judgment is the definition of obscenity, and its application to gay and lesbian erotica. The “Butler test” (as developed by the Court in *R. v. Butler* 1992) adopts a “harm-based” approach to the determination of obscenity: material is obscene if it is “perceived by public opinion to be harmful to society”. The court’s task is to determine when the “harm that may flow from such exposure” exceeds the “community’s level of tolerance” (2000:paras.49-52). One of the interveners, LEAF (Women’s Legal Education and Action Fund) argued that, “...sado-masochism performs an emancipatory role in gay and lesbian culture and should therefore be judged by a different standard from that applicable to heterosexual culture” (2000:63). Binnie agreed with the trial judge’s conclusion that, “...while erotica plays a more central role in gay and lesbian culture than in heterosexual culture, the ‘harm-based’ *Butler* approach is applicable to both” (2000:67).

## **b. Intended use**

In general, I believe the Court was responding to the contentions of counsel for the plaintiffs, and interveners supporting the plaintiffs. For example, the interveners LEAF and EGALÉ argued that, "...sexual speech in the context of gay and lesbian culture is a core value..." (2000:para.53). Also, many of the Court's references to "gay and lesbian culture" consist of quotes or paraphrases drawn from the trial decision of Smith, J. He had heard evidence from several witnesses on the subject, including an anthropologist, Carole Vance (*Little Sisters Book and Art Emporium v. Canada* 1996:para.149).

## **c. Critical analysis**

The submissions made in evidence at trial about the nature of "gay and lesbian culture", seem to have been reduced in all the judgments to tautologies, such as this example by Smith, J.: "The defining characteristic of homosexuals – the element that distinguishes them from everyone else in society - is their sexuality" (*Little Sisters Book and Art Emporium v. Canada* (1996:para.128). However, as D'Andrade has noted, circular explanations of a culture are a "well-known problem" in anthropology (1999:86) and now, it would appear, in the law. The case does not even address the issue of whether "homosexuality" is biological or cultural or both. The experience of anthropology shows that culture is *always* complex, which means that "gay and lesbian culture", whatever it may be, is more than sexuality and erotica.

## **4. Van de Perre v. Edwards (2001): "Race and Culture"**

### **a. Summary of case**

Theodore Edwards is an “African-American” and was a professional basketball player. Kimberly Van de Perre is a “single Caucasian citizen living in Vancouver”. Edwards and Van de Perre have a son, Elijah. Edwards moved to North Carolina and Van der Perre commenced custody proceedings, which were contested by Edwards. The trial judge awarded custody to Van de Perre, but the Court of Appeal reversed that decision, granting custody to Edwards. The Court reinstated the trial decision and returned custody to Van de Perre. The judgment of the Court was delivered by Bastarache, J. After dealing with several other issues, he embarked upon a consideration of “The Importance of Race in the Custody Determination of a Child of Mixed Racial Heritage” (2001:paras.36-43). Bastarache, J., determined that, “Race can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the child” (2001:para.40). However, he noted that at trial, “...there was absolutely no evidence adduced which indicates that race was an important consideration” (2001:42). When pressed, counsel for Edwards admitted that, “neither of the parties wanted to touch it because it’s so politically incorrect to say that race has any bearing”. Bastarache, J., responded harshly: “This is an unacceptable reason for counsel to fail to raise evidence on a factor that he or she believes may impact on the best interests of the child”. He concluded that the Court of Appeal had made a decision based on race without the benefit of any evidence on the subject. In support of this contention, he quoted an extract from the Court of Appeal decision of Newbury, J.A.: “If it is correct that Elijah will be seen by the world at large as ‘being black’, it would obviously be in his interests to live with a parent or family who can nurture his identity...” (2001:43). The

Court felt unable to make that assumption, and accordingly restored the trial judgment.

**b. Intended use**

The Court was responding to a contention made by the three interveners, the African Canadian Legal Clinic, the Association of Black Social Workers and the Jamaican Canadian Association: “In essence, the interveners argue that race is always a crucial factor and that should not be ignored, even if not addressed by the parties”. The Court went so far as to say that the interveners “favour forced judicial consideration of race” (2001:para.38). The Court was not about to be “forced” to give that consideration in the absence of evidence.

**c. Critical analysis**

Culture as articulated in this decision seems to fit the “tradition or heritage” category of definition, emphasizing traditional behavior “characteristic” of a “certain race”, successively learned by each generation (Mead 1937, quoted in Kroeber & Kluckhohn 1966:90). This kind of definition assumes that a “race” is analogous to a culture, one with identifiable boundaries and internally homogenous .

I think that the Court could have benefited from some evidence on “race”, especially from recent anthropology, in light of Bastarache’s statement that race is a relevant factor in child custody cases because it is “connected” to culture. Race has more than a connection to culture, it *is* a “cultural construct” (Kuper 1999:14). An uncritical commingling of the concepts of culture and race is dangerous: it leads to the idea that a culture is “...evident to the naked eye, expressed to equal effect in skin color, facial characteristics, religion, morals,

aptitudes, accent, gestures, and dietary preferences”. Culture can then be used as a euphemism for race, “...fostering a discourse on racial identities while apparently abjuring racism” (1999:14).

## **5. *Kitkatla Band v. British Columbia* (2002): “Cultural Object”**

### **a. Summary of case**

I did not place this case in the Aboriginal rights category because it deals primarily with the division of powers between the provincial and federal government, and because counsel for the First Nation acknowledged that “...this Court was not faced with a claim of aboriginal rights and title” (2002:para.47)..

A forest company applied for a permit under the B.C. *Heritage Conservation Act* to cut some CMTs (“culturally modified trees”), and the Kitkatla Band applied to restrain the provincial government from granting a “site alteration permit”. The Band claimed that the relevant provisions of the Act represented a provincial intrusion into a matter of federal jurisdiction, and were thus *ultra vires* the Province. Lebel, J., delivered the judgment of the Court.

The Court first reviewed the *Heritage Conservation Act*, including the definition of “heritage object”: “heritage object, means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people” (2002:para.42). The Act provides for destruction of heritage objects after review by the minister responsible for enforcement of the Act. The Court identified the main issue in the case as follows: “Is the power to order the alteration or even destruction of a cultural object beyond provincial powers when

it affects native cultural objects?” (2002:para.45). After an analysis of the purpose and effect of the impugned provisions, the Court decided that they were within provincial jurisdiction, and thus valid. Having lost the division of powers argument, Counsel for the Kitkatla also argued that, “...the importance of the CMTs goes to the core of their cultural values and identity”. The Court concluded that, “Unfortunately, the evidence supporting these claims is sparse” (2002:para.50).

The Court went on to state its opinion that the destruction of “native cultural objects” could be justified because, “...the value of preserving an object may be greatly outweighed by the benefit that could accrue from allowing it to be removed or destroyed in order to accomplish a goal deemed by society to be of greater value” (2002:para.62). The Court then reviewed the provincial minister’s decision to allow the destruction of 40 out of 120 CMTs, and confirmed that he had struck a proper balance “...between the need and desire to preserve aboriginal heritage with the need and desire to promote the exploitation of British Columbia’s natural resources” (2002:para.64). The application was accordingly denied and the permit approved (2002:para.78).

#### **b. Intended use**

This case is unusual because ‘culture’ is used only six times compared with thirty-nine references to ‘cultural’. Of these, “cultural heritage”, “cultural object” and “cultural property” account for twenty-six references. The Court used these phrases as synonyms for artifacts, objects created or “culturally modified” by humans. In other words, the Court is merely distinguishing ‘cultural’ objects from ‘natural’ objects.

The case has another unique feature: it is the only one I have found that actually addresses some preliminary remarks to the issue of culture. For that reason they are worth reproducing in full:

The constitution of Canada does not include an express grant of power with respect to “culture” as such. Most constitutional litigation on cultural issues has arisen in the context of language and education rights. However, provinces are also concerned with broader and more diverse cultural problems and interests. In addition, the federal government affects cultural activity in this country through the exercise of its broad powers over communications and through the establishment of federally funded cultural institutions. Consequently, particular cultural issues must be analyzed in their context, in relation to the relevant sources of legislative power. In this case, the issues raised by the parties concern the use and protection of property in the province. The Act imposes limitations on property rights in the province by reason of their cultural importance. At first blush, this would seem to be a provincial matter falling within the scope of s. 92(13) of the *Constitution Act, 1867*. (2002:para.51)

The Court acknowledges culture as an “issue” (or “problem”, or “interest”) that can be raised in constitutional litigation. Faced with a cultural issue, the Court will assign it to a provincial or federal head of power, and then assess its importance relative to competing values. In this case, the importance of CMTs was placed in the “balance” and was outweighed by a societal goal of greater value, namely the exploitation of natural resources.

### **c. Critical analysis**

Consistent with its uncritical use of ‘culture’, the Court did not see the need to submit its use of ‘cultural’ to any form of critical enquiry. For example, it seemingly did not occur to the Court that a “*cultural object*” is not necessarily the same as a “*heritage object*”, or that a “*cultural object*” is not necessarily “*cultural property*”.

However, I am encouraged to see a judge finally giving some thought to culture. Unfortunately, the Court still has a long way to go before this budding interest matures into a fully informed awareness. Lebel's notion of culture, as inferred from his general remarks, seems to be a fuzzy mélange of popular and high culture. For example, he cites the federal power to affect "cultural activity" via "communications" and "federally funded cultural institutions". In my opinion he is following a "cultural studies" approach: "'Culture' in cultural studies includes the fine arts, literature, and scholarship...but it also takes in the black arts of the media, and the vaguely demarcated sphere of popular culture..." (Kuper 1999:229). Kuper points out two problems with this: first, "... when culture is restricted to the arts, the media, and the educational system, it deals with only some aspects of what anthropologists mean by culture..." (1999:231); and secondly, cultural studies has too much of a focus on "modern Western consumer society" (1999:232). In other words it is ill-suited as the basis for a culturally relative analysis of the place of CMTs in the lives of the Kitkatla people.

## 6. Conclusions

In *Big M Drug Mart* (1985) and *Reference re Secession of Quebec* (1998) the Court fell into the trap of describing culture, at the national and provincial levels, as bounded and homogenous. In *Little Sisters' Book and Art Emporium* (2000) and *Van der Perre v. Edwards* (2001) the Court yielded to the importuning of interveners to embark on ill-considered and flawed discussions of culture. In *Kitkatla* (2002) the Court was presented with a golden opportunity to come to grips with the complexities of culture, but failed to take up the challenge. From my review of these cases, the only common themes to

emerge are failure to engage with the complexity of the concept, and lack of awareness of the potentially serious consequences of that failure.

In each case I was able to identify an unconsidered problem with the Court's use of culture. However, the Court's use of culture in each case nonetheless sets a precedent to be cited and applied in the future. When that precedent is based on a simplistic, confused or flawed use of culture, the result in future decisions will be at best to increase confusion, at worst to contribute to an injustice.

#### **D. *Mahe v. Alberta* (1990): “language and culture”**

##### **1. Introduction**

Before describing *Mahe*, I will justify my choice of this case for in-depth analysis and comparison with *Van der Peet*. In *Kitkatla*, Le Bel, J. remarked that, “Most constitutional litigation on cultural issues has arisen in the context of language and education rights” (2002:para.51). The survey confirmed that he was almost right. Aboriginal rights is the one area of “constitutional litigation” with greater reference to “cultural issues”. The judgment of the Court in *Mahe*, delivered by Dickson, C.J., used the term ‘culture’ a total of twenty two times. This broke the previous record of six references in the 1985 Aboriginal rights case, *Jack and Charlie v. The Queen*. *Mahe* held the record for most use of the term until 1996, when it yielded the title to *Van der Peet*.

## 2. Case summary

The facts are brief: Jean Claude Mahe and two other parents of school age children claimed that the provision of French language education in Edmonton did not meet the requirements of s.23 of the Charter. Specifically, the relevant authorities had denied their request for an independent Francophone school board.

The following is a paraphrase of s. 23, intended to simplify its convoluted wording: parents whose first language is French or English, and who live in a province where that language is in the minority, have the right to have their children receive publicly funded primary and secondary schooling in that language and in “minority language educational facilities”, wherever the number of qualified children “warrants”.

Dickson briefly described why the claim of the parents was turned down at trial and on appeal, and moved on to his own “analysis”. For him, “The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada and their respective cultures....” He went on to say that, “My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language” (1990:362). He also highlighted the role of s. 23 as a “remedial provision”, designed to correct “the progressive erosion of official language groups” (1990:363).

Next he introduced a “sliding scale” to determine the extent of the obligation to provide minority language education. For example, in areas with a “small number” of minority language students, governments and school boards need do nothing, or at

most provide some “instruction” in French. At the higher end of the scale, “facilities” must be provided for eligible students, ranging from a separate school to a separate school board. Dickson acknowledged that the test lacks precision, but he did not want to impose “specific modalities”, requiring a specified number of students to trigger a particular level of instruction or facility. He justified the test as follows:

In some instances this approach may result in further litigation to determine whether the general requirements mandated by the court have been implemented. I see no way to avoid this result, as the alternative of a uniform detailed order runs the real risk of imposing impractical solutions. Section 23 is a new type of legal right in Canada and thus requires new responses from the courts. (1990:376)

Dickson was also able to infer that the obligation to provide “facilities” included providing the parents with some measure of “management and control” over those facilities. He reinforced the point as follows: “I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues”. He gave as examples, decisions about curricula, hiring and expenditures (1990:371-2).

With respect to the situation in Edmonton, he reviewed some statistics on present and potential enrollment, and decided there were enough “s. 23 students” to warrant the presence of “s. 23 parents” on the existing school board, but not enough to mandate the establishment of an independent Francophone school board (1990:386-9).

Dickson’s use of culture was reviewed and quoted with approval by his successor, Lamer, C.J., in *Reference re Public Schools Act (Man)* (1993), and by the full Court in *Arsenault-Cameron v. Prince Edward Island* (2000). It has remained unchallenged.

### 3. Intended use

I reviewed the reasons for judgment at the trial and appeal levels, and “culture” was not cited as any part of the purpose of s.23. Dickson, on the other hand, argues that the provision of education in French is vital for the survival of the French language minority in Alberta, which in turn is essential for the preservation of its culture. A “case comment” by Maurice Green confirmed this impression: “In reviewing the purpose [of s. 23] the Court was definite in its opinion that language had to be linked to culture” (Green 1990-1:208). My data sheet for *Mahe* certainly reinforces this link. The phrase “language and culture” is used eleven times and “linguistic and cultural” is used six times. Why did he make such a strong connection between these two terms?

One answer is suggested by Green who referred to a judgment of the Manitoba Court of Appeal, *Reference re s. 79(3), (4) and (7) of the Public Schools Act (Manitoba)* (1990), delivered just five weeks before *Mahe*. In the Manitoba case one of the judges had rejected the notion that the purpose of s.23 is to give constitutional status to biculturalism: “The fundamental thesis of the Commission on Bilingualism and Biculturalism has been repudiated by the adoption of the principle of multiculturalism” (1990:290; quoted in Green 1990-1:207). That opinion was something the Court in *Mahe* “emphatically rejected” (Green 1990-1:207). Dickson specifically referred to the Royal Commission, “a major force in the eventual entrenchment of language rights in the Charter”. Just to drive the point home, he followed with a quote from the Commission report: “Language is also the key to cultural development. Language and culture are not synonymous but the vitality of

the language is a necessary condition for the complete preservation of a culture” (1968, vol.2:8; quoted in *Mahe* 1990:262)<sup>23</sup>.

A second answer relates to Dickson’s decision that the reference to “facilities” in s. 23 includes “management and control”. He justified this very expansive interpretation by invoking culture: “Such management and control is vital to ensure that their language and culture flourish” (1990:372).

The *Reference re s.79(3), (4) and (7)*, above, eventually found its way to the Court (1993, *sub nom Reference re Public Schools Act (Man.), s.79(3),(4) and (7)*), and its unanimous decision was delivered by Lamer, C.J. He reviewed *Mahe* and confirmed that, “The rationale expressed for the specific guarantees of educational rights founded on language, links the preservation of a culture with the presence of minority language schools” (1993:849).

#### 4. Critical analysis

In *Mahe* the Court of its own volition introduced ‘culture’ to flesh out its concept of language, without a parallel consideration of the nature of culture. Even though he used ‘culture’ and ‘cultural’ a total of 34 times in the judgment, Dickson did not elaborate on what he meant by the terms in general, nor did he enquire into the membership, extent or content of French language culture in Edmonton. He

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<sup>23</sup> The Royal Commission reviewed the concept of culture in Volume I of their report, and came up with this definition: “...culture is the sum of the characteristics particular to a group and common to its individual members” (1967:xxxii).

assumed there was such a culture and that it was worthy of preservation by the imposition of publicly funded minority language education.

The role assigned by the Court to language in the “preservation” of the “health and survival” of culture, is reminiscent of the “functionalist” approach of Radcliffe-Brown: “The function of any element of culture, a rule of morality or etiquette, a legal obligation, a religious belief or ritual can only be discovered by considering what part it plays in the social integration of the people in whose culture it is found” (1930:3-4, quoted in Kroeber & Kluckhohn 1966:160). However, these phrases are also examples of the reification of culture, which in turn leads to essentialism. In this case the essentialism takes the form of (erroneously) viewing language communities as homogenous and static (Keesing 1994:303). The Court has compounded the problem by overemphasizing the interdependence of language and culture, leaving the impression that they are Siamese twins unable to survive separation. In sum, Dickson treated language and culture as if they were joined at the hip, and encouraged a ‘preserved in aspic’ concept of culture.

## **5. Comparison with Aboriginal Rights cases**

In 1990, the Court handed down landmark decisions in minority language education rights (*Mahe*), and Aboriginal rights (*R. v. Sparrow* 1990).. Both cases contained optimistic statements as to how the Court should interpret these rights. In *Mahe*, Dickson, C.J., explained his approach to s. 23 as follows: “Careful interpretation of such a section is wise; however, this does not mean that courts should not ‘breathe life’ into the expressed purpose of the section, or avoid

implementing the possibly novel remedies needed to achieve that purpose.

(1990:365). Did the Court make “novel” use of culture to “breathe life” into s. 23 rights? I argue that it did.

Dickson, C.J. and La Forest, J., in *Sparrow*, made a forceful declaration with respect to s. 35: “When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded” (1990:1106). However, *Sparrow* did not provide an interpretive framework for Aboriginal rights, nor did it contain many (only four) references to culture, compared to *Mahe* (with twenty-two). The task of interpreting the scope and content of Aboriginal rights was postponed until 1996, the year of the *Van der Peet* decision, which contained over two hundred references to culture. The majority judgment of Lamer, C.J., quoted the above statement of Dickson and La Forest (1996:para.23). Did the Court’s use of culture contribute to a “generous, liberal interpretation” of s. 35 rights? I argue that it did not.

First, I will list the obvious similarities between the rights enshrined in s.23 and s.35. Both sets of rights were granted constitutional status by the *Constitution Act, 1982*. Neither s. 23 nor s. 35 of the Act contains any reference to ‘culture’. In its interpretation of both sections, the Court introduced the term ‘culture’. The term is used extensively in both cases. It is not defined in either.

In both cases the Court developed “novel” tests: a “sliding scale” test in *Mahe* and a “distinctive culture” test in *Van der Peet*. The Court also acknowledged that the application of the tests to particular fact patterns might require further court applications. However, there are over six hundred First Nations, and only ten provinces<sup>24</sup>. Therefore, in that respect, the burden imposed on the First Nations in Canada is much more onerous than the one placed on the country’s (French and English) minority language communities. The burden on First Nations is more onerous in one other respect, as set out in the following paragraphs.

Unlike most Charter rights, minority language rights are not universal. They are available only to Canadian citizens who meet the eligibility criteria set out in s. 23 (subsections 1 & 2). Aboriginal rights also are not universal. They are available only to “the Indian, Inuit and Metis peoples of Canada” (s. 35.2). However, Lamer went on to further restrict the application of Aboriginal rights:

Aboriginal rights are not general and universal, their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community. (1996:para.69)

The right only comes into *existence* once an aboriginal community has satisfied the requirements of the “distinctive culture test”. The section of the thesis containing critical reaction to the test has demonstrated just how difficult it is

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<sup>24</sup> It could be argued that there is potential for hundreds of court applications from school boards across the country. However, to date it has required only one or two applications per province for the rest of the school authorities to fall into line.

ascertain with any certainty the requirements of the test, let alone how to surmount them.

On the other hand, all s. 23 parents “have the right to have their children receive primary and secondary school instruction in that language in that province” (s. 23.1). The application of the right does depend on “the number of children of citizens who have such a right” (s. 23.3.a & 23.3.b). However, culture is not used to restrict their entitlement to the enjoyment of the rights. Instead, culture is linked to language in a way that bolsters the importance of the rights, and justifies an expansive interpretation of their scope and content. The applicant minority language parents are assumed to belong to a culture. The culture is presumed to be worthy of “preservation”. No enquiry is made into the content of the culture.

I believe the comparison has identified significant differences in the treatment of culture in the two cases. The present consequences and future implications are dealt with in the Conclusion.

## CHAPTER V: CONCLUSION

The survey confirmed that *Van der Peet* was not unique in its absence of a definition of culture: no other Aboriginal rights or non-aboriginal rights case contained an explicit working definition. The survey did confirm that *Van der Peet* was unique in at least one respect: no other case contained an equivalent of the “distinctive culture test”. The survey also identified the non-aboriginal rights cases suitable for a more in-depth examination. It was possible to infer from the analysis of these cases that the Court consistently uses out-dated concepts of culture without any awareness of their critical shortcomings. This exactly parallels the situation in the Aboriginal rights cases.

The lack of a definition of culture in *Van der Peet* puzzled me for a long time. This absence was made all the more surprising by the fact that the judgments in *Van der Peet* do contain five definitions: Lamer resorted to *Le Petit Robert* (Robert 1990) for a definition of “ancestral”, to the *Concise Oxford Dictionary* for definitions of “tradition” (Thompson 1996:para.40), “distinct” and “distinctive” (1996:para.71), and McLachlin had recourse to *The Shorter Oxford English Dictionary* (Little *et al*) for a definition of “integral” (1996:para.256). Lamer even came up with a working definition of “aboriginal” as, “prior to the arrival of Europeans in North America” (1996:para.62). Nonetheless, counsel and lower courts are left with the problem of applying a test which depends on an undefined term, a term capable of almost infinite meanings. It finally occurred to me to search the results of my survey for any

reference to culture as a ‘concept’. Nothing. However, I did notice that in *R. v. Big M Drug Mart* (1985), Dickson acknowledged that “freedom of religion” is a “concept”. Not only that, he proceeded to define the concept (1985:336). I finally realized that a key difference in the Court’s approach to the two rights is this: while the Court treats freedom of religion as a concept, it treats Aboriginal culture as a fact. The corollary follows: concepts need only be defined, facts must be proven.

However, in *Mahe* the Court did not treat culture as either a concept to be defined or a fact to be proven. Perhaps the Court took “judicial notice” of culture: “Judicial notice may be taken only of ‘facts which are...so notorious as not to be the subject of dispute among reasonable persons...’” (Hogg 1992, vol. 2, ch.57:10). It may be an example of what Cross calls “tacit applications” of “judicial notice”, where “a great deal is taken for granted” (Cross 1974:143). My remarks may seem facetious, but I am at a loss otherwise to explain the Court’s oblivious attitude towards culture.

I have argued that the pairing of “language and culture” has paved the way for an expansion of minority language education rights, while the “distinctive culture test” has become a barrier to the achievement of Aboriginal rights. The survey found no equivalent to the “distinctive culture test” in any other area of law. It appears to be *sui generis*, a unique creation in Canadian law. I found no cases in the survey where claimants were required to prove anything about their ‘culture’ as a prerequisite for entitlement to rights. In other words, claimants to Aboriginal rights are held to a

higher standard than claimants to Charter or other rights. I believe that the creation of this double standard constitutes an injustice against the First Nations in Canada.

This paper is also a ‘cautionary tale’ about the uncritical use of ‘culture’ by the Court. Given the complexity of the concept, the Court should stoutly resist the introduction of the concept into their future deliberations. However, the Court may have no choice, if any of the current crop of residential school class actions come before it. The Statement of Claim in one, *Charles Baxter et al v. The Attorney General of Canada et al* (2002), claims damages on behalf of former Aboriginal residential school students (“Alumni”), on many grounds. One ground is that “...their culture and language was undermined and in some cases eradicated by the forced assimilation of the Alumni Class members into non-aboriginal culture through the Residential Schools” (2002:26). If any trials proceed on this ground<sup>25</sup>, counsel and judges undoubtedly will look for guidance to s. 23 cases, such as *Mahe*, and s. 35 cases, such as *Van der Peet*. Unfortunately, these cases have little to offer in the way of safe passage through the complexities of the concept of culture.

If judicial consideration of culture is unavoidable, it will be the responsibility of counsel and judges at all levels to canvas the current state of knowledge on the concept, and adopt an informed working definition suited to the task. Otherwise, I fear that a continuation of the Court’s simplistic and uncritical use of culture may well contribute to further injustices.

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<sup>25</sup> According to counsel for several claimants, no trial as yet has proceeded under this head of damage, because of a concern over limitation dates (Dumonceau 2003)

## LITERATURE CITED

Alfred, Gerald R.

- 1995 *Hearing The Voices Of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism*, Toronto: Oxford University Press.

Altheide, David L.

- 1996 *Qualitative Media Analysis*, Qualitative Research Methods, vol.38, Thousand Oakes: Sage Publications

Amsterdam, Anthony G. and Jerome Bruner

- 2000 *Minding The Law*, Cambridge, Mass: Harvard University Press

Asch, Michael

- 2000 "The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*", in *Review of Constitutional Studies*, vol.5, no.2, pp.119-137
- 1997 *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, edited by Michael Asch, Vancouver: UBC Press
- 1992 "Errors in *Delgamuukw*: An Anthropological Perspective", in *Aboriginal Title in British Columbia, Delgamuukw v. The Queen*, edited by Frank Cassidy, Vancouver: Oolichan Books, pp.221-43.

Asch, Michael, and Catherine Bell

- 1994 "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*", *Queen's Law Journal*, vol.19, no.2, pp.503-550.

Asch, Michael, and Patrick Macklem

- 1991 "Aboriginal Rights and Canadian Sovereignty: an Essay on *R. v. Sparrow*", *Alberta Law Review*, vol.29, no.2, pp.498-517.

Barsh, Russel Lawrence, and James Youngblood Henderson

- 1997 "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand", *McGill Law Journal*, vol.42, pp.993-1009.

Barth, Fredrik

- 2001 "Rethinking the Object of Anthropology", *American Anthropologist*, vol.103, no.2, pp.435-37.

Benedict, Ruth

- 1947 *Race, Science and Politics*, (Rev. ed.), New York: Viking.

Berg, Bruce L.

- 2001 *Qualitative Research Methods For The Social Sciences*, Fourth Edition, Boston: Allyn and Bacon

Blackburn, Rae, and Cheryl Finch, eds.

- 1993 *Words & Phrases Judicially Considered in Canadian Courts and Tribunals*, Toronto: Carswell

Borofsky, Robert

- 2001 "WHEN: A Conversation about Culture, Introduction", *American Anthropologist*, vol.103, no.2, pp.432-35

Borrows, John

- 1997 "The Trickster: Integral to a Distinctive Culture", *Constitutional Forum*, vol.8, no.2, pp.27-32.
- 2001 "Uncertain Citizens: Aboriginal Peoples and the Supreme Court", *Canadian Bar Review*, vol.80, nos.1 & 2, pp.15-41.

Canada: Royal Commission on Bilingualism and Biculturalism

- 1968 *Report of the Commission on Bilingualism and Biculturalism*, vol.2, Ottawa: Queen's Printer.
- 1967 *Report of the Royal Commission on Bilingualism and Biculturalism*, vol.1, Ottawa: Queen's Printer.

Canada: Royal Commission on Aboriginal Peoples

- 1996 *Final Report*, 5 vols., Ottawa: Minister of Supply and Services.

Chanock, Martin

- 2000 "Introduction", to *Law As Process: An Anthropological Approach*, by Sally Falk Moore, reprint of 1978 edition, Classics in African Anthropology, Hamburg: LIT, 2000

Christie, Gordon

- 1998 "Aboriginal Rights, Aboriginal Culture, and Protection", *Osgoode Hall Law Journal*, vol.36, no.3, pp.447-84.

Cowan, Jane K., Marie-Benedicte Dembour and Richard A. Wilson, eds.

- 2001 *Culture and Rights: Anthropological Perspectives*, Cambridge: Cambridge University Press.

Cross, Sir Rupert

- 1974 *Evidence*, London: Butterworths

Culhane, Dora

- 1998 *The Pleasure of the Crown: Anthropology, Law and First Nations*, Burnaby: Talonbooks.

D'Andrade, Roy

- 1999 "Culture Is Not Everything", *Anthropological Theory in North America*, edited by E.L. Cerroni-Long, Westport: Bergin & Garvey

Dumonceau, Ronald

- 2003 Personal Communication, Victoria, B.C., May 29, 2003

Eisenberg, Avigail

- 1994 "The Politics of Individual and Group Difference in Canadian Jurisprudence", *Canadian Journal of Political Science*, vol.27, no.1, pp.4-21.

Goodenough, Ward

- 1957 "Cultural Anthropology and Linguistics", *Language and Linguistics* 9, Wash. D.C.: Georgetown University.

Green, Maurice A.

1990-91 "The Continuing Saga of Litigation: Minority Language Instruction", *Education and Law Journal*, vol.3, pp.204-15.

Henderson, James Youngblood, Marjorie Benson and Isobel Findlay

2000 *Aboriginal Tenure in the Constitution of Canada*, Toronto: Carswell.

Herring, Sidney L.

1998 *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, Toronto: University of Toronto Press.

Herskovits, M.J.

1948 *Man And His Works*, New York: Knopf

Hogg, Peter

1997 *Constitutional Law of Canada*, 1997 Student Edition, Toronto: Carswell

1992 *Constitutional Law of Canada*, (Loose-leaf edition), vol. 2, Toronto: Carswell

Holsti, Ole R

1969 *Content Analysis for the Social Sciences and Humanities*, Reading, Mass: Addison-Wesley Publishing Company.

Kandel, Randy Frances, ed.

1992 *Double Vision: Anthropologists at Law*, NAPA Bulletin #11, Wash. D.C.: American Anthropology Association.

Keesing, Roger M.

1994 "Theories of Culture Revisited", *Assessing Cultural Anthropology*, edited by Robert Borofsky, pp.301-10.

1974 "Theories of Culture", *Annual Review of Anthropology*, vol.3, pp.73-97.

Kroeber, A.L., and Clyde Kluckhohn

- 1966 *Culture, a Critical review of Concepts and Definitions*, New York: Vintage Books (originally published 1952, in Papers of the Peabody Museum, Harvard University, 47).

Kluckhohn, Clyde

- 1951 "The Concept of Culture", *The Policy Sciences*, D. Lerner and H.D. Lasswell, eds., Stanford, pp.86-101

Kulchyski, Peter

- 1994 *Unjust Relations: Aboriginal Rights in Canadian Courts*, edited by Peter Kulchyski, Toronto: Oxford University Press.

Kuper, Adam

- 1999 *Culture, the Anthropologists' Account*, Cambridge, Mass.: Harvard University Press.

Kymlicka, Will

- 1997 *States, Nations and Cultures*, Assen: Van Gorcum
- 1995 *Multicultural Citizenship: A Liberal Theory Of Minority Rights*, Oxford: Clarendon Press

Little, William, H.W. Fowler and Jessie Coulson

- 1973 *The Shorter Oxford English Dictionary on Historical Principles*, 3<sup>rd</sup> edition, vol.1, Oxford: Clarendon Press

McCormick, Peter

- 2002 "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949-1996", *The Canadian Bar Review*, vol.81, no.2, pp.369-95.
- 2000 *Supreme At Last: The Evolution of the Supreme Court of Canada*, Toronto: James Lorimer & Co.

- 1998a "Do Judges Read Books, Too? Academic Citations By The Lamer Court, 1991-96", *Supreme Court Law Review* (2d), vol.9, p.463.
- 1998b "Birds of a Feather: Alliances and Influences on the Lamer Court, 1991-7", *Osgoode Hall Law Review*, vol.36.
- 1997 "The Supreme Court of Canada and American Citations, 1949-1994: A Statistical Overview", *Supreme Court Law Review*, (2<sup>nd</sup> series), vol.8.
- 1995 "The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989-1993", *Osgoode Hall Law Journal*, vol.33.
- 1994 "Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada", *Supreme Court Law Review*, (2<sup>nd</sup> series), vol.5.

McNeil, Kent

- 1989 *Common Law Aboriginal Title*, Oxford: Clarendon Press

Macklem, Patrick

- 2001 *Indigenous Difference and the Constitution of Canada*, Toronto: University of Toronto Press.

Marcus, George, and Michael M.J. Fisher

- 1986 *Anthropology as Cultural Critique*, Chicago: Chicago University Press.

Mead Margaret

- 1937 *Cooperation and Competition Among Primitive Peoples*, New York: McGraw-Hill

Merry, Sally Engle

- 1992 "Anthropology, Law, and Transnational Processes", *Annual Review of Anthropology*, vol.21, pp.357-79

Moore, Sally Falk

- 2000 *Law As Process: An Anthropological Approach*, Hamburg: LIT, 2000, (reprint of 1978 edition)

Nader, Laura, ed.

- 1997 *Law in Culture and Society*, Berkeley: University of California Press, (reprint of 1969 edition).

Newman, Dwight

- 1999 "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests", *Saskatchewan Law Review*, Vol.62, no.2, pp.543-66

Robert, Paul

- 1990 *Le Petit Robert I*, Paris: Le Robert

Proulx, Craig

- 2000 "Current Directions in Aboriginal Law/Justice in Canada", *The Canadian Journal of Native Studies*, vol.20, no.2, pp.371-409

Radcliffe-Brown, A.R.

- 1930 "Applied Anthropology", *Report of Australian and New Zealand Association for the Advancement of Science*, pp.1-14.

Sahlins, Marshall

- 1999 "Two Or Three Things That I Know About Culture", *Journal of the Royal Anthropological Institute*, (N.S.) vol.5, pp.399-421

Sanders, Deidre, Naneen Stuckey, Kathleen Mooney, and Leland Donald

- 1999 "What the People Said: Kwakwaka'wakw, Nuu-chah-nulth, and Tsimshian Testimonies before the Royal Commission on Indian Affairs for the Province of British Columbia (1913-1916)", *The Canadian Journal of Native Studies*, vol.19, no.2, pp.213-248

Shweder, Richard A.

- 2001 "Rethinking the Object of Anthropology and Ending Up Where Kroeber and Kluckhohn Began", *American Anthropologist*, vol.103, no.2, pp.437-42.

Simpson, J.A., and E.S.C. Weiner, eds.

- 1989 *The Oxford English Dictionary*, Second Edition, Vol. IV, Oxford: Clarendon Press.

Slattery, Brian

- 2000 "Making Sense of Aboriginal and Treaty Rights", *Canadian Bar Review*, vol.79, no2, pp.196-224.
- 1987 "Understanding Aboriginal Rights", *The Canadian Bar Review*, vol.66, pp.727-83

Starr, J., and Jane F. Collier, eds.

- 1989 *History and Power in the Study of Law: New Directions in Legal Anthropology*, Ithica, N.Y.: Cornell University Press.

Stolzenberg, Nomi Maya

- 2001 "What We Talk About When We Talk About Culture", *American Anthropologist*, vol.103, no.2, pp.442-44.

Supreme Court of Canada

- 2001 "Statistics: 1990 to 2000", *Bulletin of Proceedings*, Special Edition, [www.SCC-CSC.gc.ca/information/statistics/index\\_e.html](http://www.SCC-CSC.gc.ca/information/statistics/index_e.html)

Thom, Brian

- 1999 "Aboriginal Rights and Title in Canada After *Delgamuukw*: Anthropological Perspectives", <http://home.istar.ca> (subsequently published in *Native Studies Review*, 2001, vol.14, nos.1 & 2)

Thompson, Della, ed.

- 1995 *The Concise Oxford Dictionary of Current English*, Ninth Edition, Oxford: Clarendon Press.

Tully, James

- 1995 *Strange Multiplicity*, Cambridge: Cambridge University Press

Tylor, E.B.

- 1870 *Researches into the Early History and Development of Mankind*, London: John Murray

Vallance, Neil

2000 "The Past, Present and Uncertain Future of Solicitors", *The Advocate*, vol.58, no.2, pp.233-40

Venne, Sharon Helen

1998 *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights*, Penticton: Theytus Books Ltd.

Webber, Jeremy

1994 *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution*, Kingston & Montreal: McGill-Queen's University Press

Williams, Raymond

1976 *Keywords: A Vocabulary of Culture and Society*, London: Croon Helm.

Wolf, Eric

1982 *Europe and the People without History*, Berkeley: University of California Press.

## CASES CITED

*Adler v. Ontario* [1996] 3 S.C.R. 609

*A.G. (Que.) v. Quebec Protestant School Boards* [1984] 2 S.C.R. 66

*A. (L.L.) v. B. (A.)* [1995] 4 S.C.R. 536

*Arsenault-Cameron v. Prince Edward Island* [2000] 1 S.C.R. 3

*Aubry v. Editions Vice-Versa Inc.* [1998] 1 S.C.R. 591

*Augustus v. Gosset* [1996] 3 S.C.R. 268

*Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 1 S.C.R. 817

- Bell Canada v. Quebec (Commission de la Sante et de la Securite du Travail)* [1988] 1S.C.R. 749
- Bell ExpressVu Limited Partnership v. Rex* Neutral Citation: 2002 SCR 42
- Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307
- Brossard (Town) v. Quebec (Commission des Droits de la Personne)* [1988] 2 S.C.R. 279
- B(R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315
- British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3
- Calder v. Attorney-General of British Columbia*, (1973) 34 D.L.R. (3d) 145
- Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554
- Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689
- Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892
- Canadian Egg Marketing Agency v. Richardson* [1998] 3 S.C.R. 157
- Centre Communautaire Juridique de L'Estrie v. Sherbrooke (City)* [1996] 3 S.C.R. 84
- Chamberlain v. Surrey School District No. 36* Neutral Citation: 2002 SCC 86
- Chan v. Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593
- Charles Baxter, et al v. The Attorney General of Canada et al*, Ontario Superior Court of Justice, File No. 00-CV-192059CP, Amended Statement of Claim, Oct.25, 2002 ( [www.thomsonrogers.com/AmendedStatementofClaim.pdf](http://www.thomsonrogers.com/AmendedStatementofClaim.pdf) )
- Ciba-Geigy Canada Ltd. v. Apotex Inc.* [1992] 3 S.C.R. 120
- Commission de Transport de la Communaute Urbaine de Quebec v. Canada (National Battlefields Commission)* [1990] 2 S.C.R. 838
- Committee for the Commonwealth of Canada v. Canada* [1991] 1 S.C.R. 139
- Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203
- Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403

- Danson v. Ontario (Attorney General)* [1990] 2 S.C.R. 1086
- Delgamuukw v. British Columbia* [1991] W.W.R. 97 (B.C.S.C.)
- Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010
- Delisle v. Canada (Deputy Attorney General)* [1999] 2 S.C.R. 989
- Devine v. Quebec (Attorney General)* [1988] 2 S.C.R. 790
- Dick v. La Reine* [1985] 2 S.C.R. 309
- Droit de la Famille – 425* [1988] R.J.Q. 159
- Edmonton Journal v. Alberta (Attorney General)* [1989] 2 S.C.R. 510
- Egan v. Canada* [1995] 2 S.C.R. 513
- Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624
- Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712
- Fortin v. Chretien* [2001] 2 S.C.R. 500
- Frame v. Smith* [1987] 2 S.C.R. 99
- Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3
- Godbout v. Longueuil (City)* [1997] 3 S.C.R. 844
- Gosselin v. Quebec (Attorney General)* Neutral Citation: 2002 SCR 84
- Gould v. Yukon Order of Pioneers* [1996] 1 S.C.R. 571
- Harrison v. University of British Columbia* [1990] 3 S.C.R. 451
- Harvard College v. Canada (Commissioner of Patents)* Neutral Citation: 2002 SCC 76
- Harvey v. New Brunswick (Attorney General)* [1996] 2 S.C.R. 876
- H.(D.) v. M.(H.)* [1999] 1 S.C.R. 761
- Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927

*Jack and Charlie v. The Queen* [1985] 2 S.C.R. 332

*Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779

*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*  
Neutral Citation: 2002 S.C.C. 31

*Lakeside Colony of Hutterian Brethren v. Hofer* [1992] 3 S.C.R. 165

*Lavigne v. Canada (Office of the Commissioner of Official Languages)* Neutral  
Citation: 2002 SCC 53

*Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R. 211

*Lavoie v. Canada* 1 S.C.R. 769

*Law Society of British Columbia v. Mangat* [2001] 3 S.C.R. 113

*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996) 131  
D.L.R. (4<sup>th</sup>) 486 (B.C.S.C.)

*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R.  
1120

*Lovelace v. Ontario* [2000] 1 S.C.R. 950

*Mahe v. Alberta* [1990] 1 S.C.R. 342

*Mckinney v. University of Guelph* [1990] 3 S.C.R. 229

*Mitchell v. M.N.R.* [2001] 1 S.C.R. 911

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

*Moge v. Moge* [1992] 3 S.C.R. 813

*Moreau-Berube v. New Brunswick (Judicial Council)* [2002] 1 S.C.R. 249

*M. v. H.* [1999] 2 S.C.R. 3

*National Corn Growers Assn v. Canada (Import Tribunal)* [1990] 2 S.C.R. 1324

*Native Women's Assn. of Canada v. Canada* [1994] 3 S.C.R. 627

*New Brunswick (Minister of Health and Community Services) v. C.(G.C.)* [1988] 1  
S.C.R.

1073

*New Brunswick (Minister of Health and Community Services) v. G.(J.)* [1999] 3 S.C.R. 46

*New Brunswick (Minister of Health and Community Services) v. L.(M.)* [1998] 2 S.C.R.534

*Nova Scotia (Attorney General) v. Walsh* Neutral Citation: 2002 SCC 83

*Ontario English Catholic Teachers' Assn v. Ontario (Attorney General)* [2001] 1 S.C.R.470

*Ontario Hydro v. Ontario (Labour Relations Board)* [1993] 3 S.C.R. 327

*Osoyoos Indian Band v. Oliver (Town)* [2001] 3 S.C.R. 746

*P. (D.) v. S. (C.)* [1993] 4 S.C.R. 141

*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2S.C.R. 97

*Pioneer Hi-Bred Ltd. v. Canada (Commissioner of Patents)* [1989] 1 S.C.R. 1623

*Pointe-Claire (City) v. Quebec (Labour Court)* [1997] 1 S.C.R. 1015

*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)* [1999] 3 S.C.R. 845

*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)* [2000] 1 S.C.R. 44

*Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982

*Quebec (Attorney General) v. Canada (National Energy Board)* [1994] 1 S.C.R. 159

*Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse) v. Montreal (City); Quebec (Commission des droits de la Personne et des Droits de la Jeunesse) v. Boisbriand (City)* [2000] 1 S.C.R. 665

*R. v. Adams* [1996] 3 S.C.R. 101

*R. v. Advance Cutting & Coring Ltd.* [2001] 3 S.C.R. 209

- R. v. Andrews* [1990] 3 S.C.R. 870
- R. v. Beaulac* [1999] 1 S.C.R. 768
- R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295
- R. v. Butler* [1992] 1 S.C.R. 452
- R. v. Cinous* Neutral Citation: 2002 SCC 29
- R. v. Cote* [1996] 3 S.C.R. 139
- R. v. Creighton* [1993] 3 S.C.R. 3
- R. v. Crown Zellerbach Canada Ltd.* [1988] 401
- R. v. Daviault* [1994] 3 S.C.R. 63
- R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713
- R. v. Ewanchuk* [1999] 1 S.C.R. 330
- R. v. Genereux* [1992] 1 S.C.R. 259
- R. v. Gladstone* [1996] 2 S.C.R. 723
- R. v. Gladue* [1999] 1 S.C.R. 688
- R. v. Golden* [2001] 3 S.C.R. 679
- R. v. Hess; R. v. Nguyen* [1990] 2 S.C.R. 906
- R. v. Hill* [1986] 1 S.C.R. 313
- R. v. Horseman* [1990] 1 S.C.R. 901
- R. v. Jobidon* [1991] 2 S.C.R. 714
- R. v. Jones* [1986] 2 S.C.R. 284
- R. v. Jorgensen* [1995] 4 S.C.R. 55
- R. v. Keegstra* [1990] 3 S.C.R. 697
- R. v. Kokesch* [1990] 3 S.C.R. 3

- R. v. Lewis* [1996] 1 S.C.R. 921
- R. v. Liew* [1999] 3 S.C.R. 227
- R. v. L. (J.E.)* [1989] 2 S.C.R. 510
- R. v. M. (S.H.)* [1989] 2 S.C.R. 446
- R. v. Marshall* [1999] 3 S.C.R. 456
- R. v. Mills* [1999] 3 S.C.R. 668
- R. v. Morgentaler* {1988} 1 S.C.R. 30
- R. v. N.T.C Smokehouse Ltd.* [1996] 2 S.C.R. 672
- R. v. Oakes* [1986] 1 S.C.R. 103
- R. v. O'Connor* [1995] 4 S.C.R. 411
- R. v. Pamajewon* [1996] 2 S.C.R. 821
- R. v. Proulx* [2000] 1 S.C.R. 61
- R. v. Seaboyer; R. v. Gayme* [1991] 2 S.C.R. 577
- R. v. Sharpe* [2001] 1 S.C.R. 45
- R. v. Sparrow* [1990] 1 S.C.R. 1075
- R. v. Sundown* [1999] 1 S.C.R. 393
- R. v. Van der Peet* [1996] 2 S.C.R. 507
- R. v. Wells* [2000] 1 S.C.R. 207
- R. v. W (G.)* [1999] 3 S.C.R. 597
- R. v. Williams* [1998] 1 S.C.R. 1128
- R. v. Wise* [1992] 1 S.C.R. 527
- R. v. Yorke* [1993] 3 S.C.R. 647
- R. v. Zundel* [1992] 2 S.C.R. 731

- Ramsden v. Peterborough (City)* [1993] 2 S.C.R. 1084
- Re Canada Labour Code* [1992] 2 S.C.R. 50
- Reference re Education Act (Que.)* [1993] 2 S.C.R. 511
- Reference re Prov. Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158
- Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)* [1993] 1 S.C.R. 839
- Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313
- Reference re Secession of Quebec* [1998] 2 S.C.R. 217
- Reference re s. 79(3), (4) and (7) of the Public Schools act (Manitoba)* [1990] 2  
W.W.R. 289 (Man.C.A.)
- Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)* [1990] 1 S.C.R.  
1123
- R.J.R.-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199
- Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825
- Ross River Dena Council Band v. Canada* Neutral Citation: 2002 SCC 54
- Rumley v. British Columbia* [2001] 3 S.C.R. 184
- Salvation Army, Canada East v. Ontario (Attorney General)* (1992) 88 D.L.R. (4<sup>th</sup>)  
238
- Scowby v. Glendinning* [1986] 2 S.C.R. 226
- St. Mary's Indian Band v. Cranbrook (City)* [1997] 2 S.C.R. 678
- Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038
- Societe des Acadiens v. Association of Parents* [1986] 1 S.C.R. 549
- Starr v. Houlden* [1990] 1 S.C.R. 1366
- Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483
- Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3
- Symes v. Canada* [1993] 4 S.C.R. 695

*Theberge v. Galerie d'Art du Petit Champlain Inc.* Neutral Citation: 2002 SCC 34

*Therrien (Re)* [2001] 2 S.C.R. 3

*Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877

*Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R.  
772

*Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* [1999]  
1 S.C.R.10

*Van de Perre v. Edwards* [2001] 2 S.C.R. 1014

*Vriend v. Alberta* [1998] 1 S.C.R. 493

*Ward v. Canada (Attorney General)* [2002] 1 S.C.R. 569

*Wewaykum Indian Band v. Canada* Neutral Citation: 2002 SCC 79

*Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595

*Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] 2 S.C.R. 625

*Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* [1997] 3 S.C.R.  
925

*Young v. Young* [1993] 4 S.C.R. 3

## APPENDIX

TABLE A

All cases in alphabetical order.

case name	year	area of law	culture	cultural	combined
1 a(II) v b(a)	1995	charter criminal	1	0	1
2 a.g.(que)	1984	Language	0	1	1
3 adams	1996	Aboriginal	36	0	36
4 Adler	1996	Religion	3	4	7
5 advance cutting	2001	Association	1	9	10
6 andrews	1990	Expression	1	1	2
7 arsenault-cameron	2000	Language	14	21	35
8 Aubry	1998	Expression	0	1	1
9 augustus	1996	misc.	0	1	1
10 b(r) v childrens aid	1995	Religion	0	3	3
11 b.c.v. bcgseu	1999	human rights	0	1	1
12 baker	1999	immigration	2	0	2
13 beaulac	1999	Criminal	1	9	10
14 bell can v. que	1988	Titles	0	3	3
15 bell express vu	2002	misc.	0	5	5
16 big m drug mart	1985	Religion	2	1	3
17 blencoe	2000	charter crim	0	1	1
18 brossard	1988	human rights	0	2	2
19 butler	1992	Expression	1	0	1
20 can (crtc) v. ctv	1982	misc.	0	1	1
21 can v taylor	1990	Expression	2	5	7
22 can v ward	1993	immigration	0	1	1
23 can v. mossup	1993	human rights	0	1	1
24 can. egg market	1997	Association	1	3	4
25 can. labour code	1992	misc.	0	18	18
26 centre communaut	1996	titles	0	6	6
27 chamberlin	2002	misc.	3	5	8
28 Chan	1995	immigration	3	7	10
29 ciba-geigy	1991	titles	2	0	2
30 cinous	2002	criminal	1	0	1
31 comm de transport	1988	constitutional	0	1	1
32 comm for common	1991	titles	0	2	2
33 corbiere	1999	equality	7	17	24
34 Cote	1996	aboriginal	12	0	12
35 creighton	1993	charter crim	1	0	1
36 crown zellerbach	1988	scientific	2	0	2
37 Dagg	1997	human rights	1	0	1
38 danson	1990	misc.	0	2	2
39 daviault	1994	charter crim	1	2	3
40 delgamuukw	1997	aboriginal	53	5	58

41 delisle	1999	association	2	3	5
42 devine	1988	expression	0	6	6
43 Dick	1985	aboriginal	3	1	4
44 edmonton journal	1989	expression	0	1	1
45 edwards books	1986	religion	1	3	4
46 Egan	1995	equality	0	1	1
47 eldridge	1997	equality	2	0	2
48 ewanchuk	1999	criminal	0	3	3
49 Ford	1987	expression	0	4	4
50 Fortin	2001	misc.	1	0	1
51 Frame	1987	family	0	1	1
52 friends oldman river	1992	constitutional	1	5	6
53 genereux	1992	charter crim	0	1	1
54 gladstone	1996	aboriginal	61	1	62
55 gladue	1999	criminal	3	6	9
56 godbout	1997	human rights	0	1	1
57 golden	2001	titles	0	2	2
58 gosselin	2002	equality	0	8	8
59 Gould v. yukon	1996	human rights	3	12	15
60 h(d) v. m(h)	1999	family	3	2	5
61 harrison	1990	equality	0	1	1
62 harvard	2002	misc.	4	1	5
63 harvey	1996	titles	5	0	5
64 Hess	1990	charter crim	0	1	1
65 Hill	1986	criminal	1	1	2
66 horseman	1990	aboriginal	2	0	2
67 irwin toy	1989	expression	2	0	2
68 jack and charlie	1985	aboriginal	6	0	6
69 jobidon	1991	criminal	0	1	1
70 Jones	1986	religion	0	3	3
71 jorgensen	1995	expression	0	1	1
72 keegstra	1990	expression	2	9	11
73 kindler	1991	charter crim	0	2	2
74 kitkatla band	2002	constitutional	6	39	45
75 kokesh	1990	charter crim	1	0	1
76 l(je)	1989	criminal	1	0	1
77 lakeside colony	1992	human rights	0	1	1
78 lavigne v. canada	2002	human rights	3	4	7
79 lavigne v. ontario	1991	association	0	5	5
80 Lavoie	2002	equality	0	1	1
81 law soc v mangat	2001	immigration	0	2	2
82 Lewis	1996	scientific	1	0	1
83 Liew	1999	charter crim	1	0	1
84 little sisters' book	2000	expression	17	2	19
85 lovelace	2000	equality	3	16	19
86 m(sh)	1989	criminal	2	0	2
87 m.v.h.	1999	equality	1	2	3
88 Mahe	1990	language	22	12	34

89 marshall	1999	aboriginal	2	20	22
90 mckinney	1990	equality	1	0	1
91 Mills	1999	charter crim	0	2	2
92 mitchell	2001	aboriginal	35	8	43
93 mitchell v peguis	1990	aboriginal	1	0	1
94 Moge	1992	family	0	1	1
95 moreau-berube	2002	misc.	0	1	1
96 morgantaler	1986	charter crim	0	2	2
97 multiple access	1982	constitutional	0	1	1
98 n.b. v. c(gc)	1988	family	0	1	1
99 n.b. v. g.(j)	1999	charter crim	0	2	2
100 n.b. v. l(m)	1998	family	0	6	6
101 national corn grow	1990	scientific	3	0	3
102 native women	1994	equality	1	0	1
103 ntc smokehouse	1996	aboriginal	42	0	42
104 oakes	1986	charter crim	0	1	1
105 o'connor	1995	charter crim	0	1	1
106 ont. english cath.	2001	language	1	5	6
107 ont. hydro	1993	constitutional	2	1	3
108 osoyoos	2001	aboriginal	3	3	6
109 p(d) v s©	1993	religion	1	0	1
110 pamejewon	1996	aboriginal	21	2	23
111 phillips	1995	charter crim	1	0	1
112 pioneer hi-bred	1989	scientific	5	0	5
113 pointe-claire	1997	misc.	0	1	1
114 proulx	2000	criminal	1	0	1
115 pub sch (alta) #1	1999	misc.	0	1	1
116 pub sch (alta) #2	2000	misc.	0	1	1
117 pushpanathan	1998	immigration	0	3	3
118 que (comm droits)	2000	human rights	0	3	3
119 que.(a-g) v n.e.b.	1994	titles	0	2	2
120 racine	1983	family	5	5	10
121 ramsden	1993	expression	0	5	5
122 ref:amend of const	1982	constitutional	2	2	4
123 ref:educ act (que)	1993	constitutional	0	1	1
124 ref:prov electoral	1991	charter misc	0	3	3
125 ref:pub sch (man)	1993	language	10	4	14
126 ref:public service	1987	association	2	10	12
127 ref:s. 193 c.c..	1990	expression	1	3	4
128 ref:secession	1998	constitutional	7	18	25
129 rjr-mcdonald	1995	expression	2	5	7
130 ross	1996	expression	2	6	8
131 ross river	2002	aboriginal	0	1	1
132 rumley	2001	misc.	2	0	2
133 scowby	1986	constitutional	0	1	1
134 seaboyer	1991	charter crim	2	2	4
135 sharpe	2001	expression	1	3	4
136 shell oil	1982	misc.	0	1	1

137 slaight communic	1989 titles	0	2	2
138 societe acadiens	1986 charter misc	0	1	1
139 sparrow	1990 aboriginal	4	1	5
140 st. mary's	1997 aboriginal	0	1	1
141 Starr	1990 titles	3	0	3
142 stoffman	1990 equality	0	1	1
143 sundown	1999 aboriginal	1	0	1
144 suresh	2002 charter crim	0	1	1
145 symes	1993 equality	4	0	4
146 theberge	2002 misc.	0	1	1
147 therrien	2001 equality	0	1	1
148 thomson news	1998 misc.	1	1	2
149 Trinity western	2001 religion	0	1	1
150 van de perre	2001 family	6	10	16
151 van der peet	1996 aboriginal	210	3	213
152 vancouver society	1999 equality	1	7	8
153 vriend	1998 equality	0	4	4
154 w (g)	1999 titles	2	0	2
155 ward v can(a-g)	2002 aboriginal	0	1	1
156 Wells	2000 criminal	0	1	1
157 wewaykum	2002 aboriginal	2	0	2
158 whiten	2002 misc.	1	0	1
159 williams	1998 titles	0	2	2
160 winko	1999 charter crim	1	0	1
161 winnipeg v. g(d.f.)	1997 human rights	0	1	1
162 Wise	1992 charter crim	0	1	1
163 Yorke	1993 titles	0	1	1
164 young	1993 religion	2	1	3
165 zundel	1992 expression	9	9	18
<b>TOTALS</b>		<b>714</b>	<b>494</b>	<b>1208</b>

TABLE B

## Aboriginal rights cases in alphabetical order.

	case name	year		culture	cultural	combined
1	Adams	1996		36	0	36
2	Cote	1996		12	0	12
3	delgamuukw	1997		53	5	58
4	Dick	1985		3	1	4
5	Gladstone	1996		61	1	62
6	Horseman	1990		2	0	2
7	jack and charlie	1985		6	0	6
8	Marshall	1999		2	20	22
9	Mitchell	2001		35	8	43
10	mitchell v peguis	1990		1	0	1
11	ntc smokehouse	1996		42	0	42
12	Osoyoos	2001		3	3	6
13	Pamejewon	1996		21	2	23
14	ross river	2002		0	1	1
15	Sparrow	1990		4	1	5
16	st. mary's	1997		0	1	1
17	Sundown	1999		1	0	1
18	van der peet	1996		210	3	213
19	ward v can(a-g)	2002		0	1	1
20	Wewaykum	2002		2	0	2
<b>TOTALS</b>				<b>494</b>	<b>47</b>	<b>541</b>

TABLE C

## Non-aboriginal rights cases in alphabetical order.

	case name	year	area of law	culture	cultural	combined
1	a(II) v b(a)	1995	charter criminal	1	0	1
2	a.g.(que)	1984	language	0	1	1
3	Adler	1996	religion	3	4	7
4	advance cutting	2001	association	1	9	10
5	Andrews	1990	expression	1	1	2
6	arsenault-cameron	2000	language	14	21	35
7	Aubry	1998	expression	0	1	1
8	Augustus	1996	misc.	0	1	1
9	b(r) v childrens aid	1995	religion	0	3	3
10	b.c.v. bcgseu	1999	human rights	0	1	1
11	Baker	1999	immigration	2	0	2
12	Beaulac	1999	criminal	1	9	10
13	bell can v. que	1988	titles	0	3	3
14	bell express vu	2002	misc.	0	5	5
15	big m drug mart	1985	religion	2	1	3
16	Blencoe	2000	charter crim	0	1	1
17	Brossard	1988	human rights	0	2	2
18	Butler	1992	expression	1	0	1
19	can (crtc) v. ctv	1982	misc.	0	1	1
20	can v taylor	1990	expression	2	5	7
21	can v ward	1993	immigration	0	1	1
22	can v. mossup	1993	human rights	0	1	1
23	can. egg market	1997	association	1	3	4
24	can. Labour code	1992	misc.	0	18	18
25	centre communaut	1996	titles	0	6	6
26	Chamberlin	2002	misc.	3	5	8
27	Chan	1995	immigration	3	7	10
28	ciba-geigy	1991	titles	2	0	2
29	Cinous	2002	criminal	1	0	1
30	comm de transport	1988	constitutional	0	1	1
31	comm for common	1991	titles	0	2	2
32	Corbiere	1999	equality	7	17	24
33	Creighton	1993	charter crim	1	0	1
34	crown zellerbach	1988	scientific	2	0	2
35	Dagg	1997	human rights	1	0	1
36	Danson	1990	misc.	0	2	2
37	Daviault	1994	charter crim	1	2	3
38	Delisle	1999	association	2	3	5
39	Devine	1988	expression	0	6	6
40	edmonton journal	1989	expression	0	1	1

41	edwards books	1986	religion	1	3	4
42	Egan	1995	equality	0	1	1
43	Eldridge	1997	equality	2	0	2
44	Ewanchuk	1999	criminal	0	3	3
45	Ford	1987	expression	0	4	4
46	Fortin	2001	misc.	1	0	1
47	Frame	1987	family	0	1	1
48	friends oldman river	1992	constitutional	1	5	6
49	Genereux	1992	charter crim	0	1	1
50	Gladue	1999	criminal	3	6	9
51	godbout	1997	human rights	0	1	1
52	Golden	2001	titles	0	2	2
53	gosselin	2002	equality	0	8	8
54	gould v. yukon	1996	human rights	3	12	15
55	h(d) v. m(h)	1999	family	3	2	5
56	harrison	1990	equality	0	1	1
57	harvard	2002	misc.	4	1	5
58	harvey	1996	titles	5	0	5
59	hess	1990	charter crim	0	1	1
60	hill	1986	criminal	1	1	2
61	irwin toy	1989	expression	2	0	2
62	jobidon	1991	criminal	0	1	1
63	jones	1986	religion	0	3	3
64	jorgensen	1995	expression	0	1	1
65	keegstra	1990	expression	2	9	11
66	kindler	1991	charter crim	0	2	2
67	kitkatla band	2002	constitutional	6	39	45
68	kokesh	1990	charter crim	1	0	1
69	l(je)	1989	criminal	1	0	1
70	lakeside colony	1992	human rights	0	1	1
71	lavigne v. canada	2002	human rights	3	4	7
72	lavigne v. ontario	1991	association	0	5	5
73	lavoie	2002	equality	0	1	1
74	law soc v mangat	2001	immigration	0	2	2
75	lewis	1996	scientific	1	0	1
76	liew	1999	charter crim	1	0	1
77	little sisters' book	2000	expression	17	2	19
78	lovelace	2000	equality	3	16	19
79	m(sh)	1989	criminal	2	0	2
80	m.v.h.	1999	equality	1	2	3
81	mahe	1990	language	22	12	34
82	mckinney	1990	equality	1	0	1
83	mills	1999	charter crim	0	2	2
84	moge	1992	family	0	1	1
85	moreau-berube	2002	misc.	0	1	1
86	morgantaler	1986	charter crim	0	2	2

87	multiple access	1982	constitutional	0	1	1
88	n.b. v. c(gc)	1988	family	0	1	1
89	n.b. v. g.(j)	1999	charter crim	0	2	2
90	n.b. v. l(m)	1998	family	0	6	6
91	national corn grow	1990	scientific	3	0	3
92	native women	1994	equality	1	0	1
93	oakes	1986	charter crim	0	1	1
94	o'connor	1995	charter crim	0	1	1
95	ont. english cath.	2001	language	1	5	6
96	ont. hydro	1993	constitutional	2	1	3
97	p(d) v s©	1993	religion	1	0	1
98	phillips	1995	charter crim	1	0	1
99	pioneer hi-bred	1989	scientific	5	0	5
100	pointe-claire	1997	misc.	0	1	1
101	proulx	2000	criminal	1	0	1
102	pub sch (alta) #1	1999	misc.	0	1	1
103	pub sch (alta) #2	2000	misc.	0	1	1
104	pushpanathan	1998	immigration	0	3	3
105	que (comm droits)	2000	human rights	0	3	3
106	que.(a-g) v n.e.b.	1994	titles	0	2	2
107	racine	1983	family	5	5	10
108	ramsdén	1993	expression	0	5	5
109	ref:amend of const	1982	constitutional	2	2	4
110	ref:educ act (que)	1993	constitutional	0	1	1
111	ref:prov electoral	1991	charter misc	0	3	3
112	ref:pub sch (man)	1993	language	10	4	14
113	ref:public service	1987	association	2	10	12
114	ref:s. 193 c.c..	1990	expression	1	3	4
115	ref:secession	1998	constitutional	7	18	25
116	rjr-mcdonald	1995	expression	2	5	7
117	ross	1996	expression	2	6	8
118	rumley	2001	misc.	2	0	2
119	scowby	1986	constitutional	0	1	1
120	seaboyer	1991	charter crim	2	2	4
121	sharpe	2001	expression	1	3	4
122	shell oil	1982	misc.	0	1	1
123	slaught communic	1989	titles	0	2	2
124	societe acadiens	1986	charter misc	0	1	1
125	starr	1990	titles	3	0	3
126	stoffman	1990	equality	0	1	1
127	suresh	2002	charter crim	0	1	1
128	symes	1993	equality	4	0	4
129	theberge	2002	misc.	0	1	1
130	therrien	2001	equality	0	1	1
131	thomson news	1998	misc.	1	1	2
132	trinity western	2001	religion	0	1	1

133	van de perre	2001	family	6	10	16
134	vancouver society	1999	equality	1	7	8
135	vriend	1998	equality	0	4	4
136	w (g)	1999	titles	2	0	2
137	wells	2000	criminal	0	1	1
138	whiten	2002	misc.	1	0	1
139	williams	1998	titles	0	2	2
140	winko	1999	charter crim	1	0	1
141	winnipeg v. g(d.f.)	1997	human rights	0	1	1
142	wise	1992	charter crim	0	1	1
143	yorke	1993	titles	0	1	1
144	young	1993	religion	2	1	3
145	zundel	1992	expression	9	9	18
<b>Totals</b>				<b>220</b>	<b>447</b>	<b>667</b>

TABLE D

## Top 32 cases ranked according to combined use.

	case name	year	area of law	culture	cultural	combined
1	van der peet	1996	Aboriginal	210	3	213
2	gladstone	1996	Aboriginal	61	1	62
3	delgamuukw	1997	Aboriginal	53	5	58
4	kitkatla band	2002	constitutional	6	39	45
5	mitchell	2001	Aboriginal	35	8	43
6	ntc smokehouse	1996	Aboriginal	42	0	42
7	adams	1996	Aboriginal	36	0	36
8	arsenault-cameron	2000	Language	14	21	35
9	mahe	1990	Language	22	12	34
10	ref:secession	1998	constitutional	7	18	25
11	corbiere	1999	Equality	7	17	24
12	pamejewon	1996	Aboriginal	21	2	23
13	marshall	1999	Aboriginal	2	20	22
14	little sisters' book	2000	Expression	17	2	19
15	lovelace	2000	Equality	3	16	19
16	zundel	1992	Expression	9	9	18
17	can. labour code	1992	misc.	0	18	18
18	van de perre	2001	Family	6	10	16
19	gould v. yukon	1996	human rights	3	12	15
20	ref:pub sch (man)	1993	Language	10	4	14
21	cote	1996	Aboriginal	12	0	12
22	ref:public service	1987	Association	2	10	12
23	keegstra	1990	Expression	2	9	11
24	racine	1983	Family	5	5	10
25	chan	1995	Immigration	3	7	10
26	advance cutting	2001	Association	1	9	10
27	beaulac	1999	Criminal	1	9	10
28	gladue	1999	Criminal	3	6	9
29	chamberlin	2002	misc.	3	5	8
30	ross	1996	Expression	2	6	8
31	vancouver society	1999	Equality	1	7	8
32	gosselin	2002	Equality	0	8	8

TABLE E

## Top 24 cases ranked according to use of 'culture'

	<b>case name</b>	<b>year</b>	<b>area of law</b>	<b>culture</b>
1	van der peet	1996	aboriginal	210
2	gladstone	1996	aboriginal	61
3	delgamuukw	1997	aboriginal	53
4	ntc smokehouse	1996	aboriginal	42
5	adams	1996	aboriginal	36
6	mitchell	2001	aboriginal	35
7	mahe	1990	language	22
8	pamejewon	1996	aboriginal	21
9	little sisters' book	2000	expression	17
10	arsenault-cameron	2000	language	14
11	cote	1996	aboriginal	12
12	ref:pub sch (man)	1993	language	10
13	zundel	1992	expression	9
14	ref.secession	1998	constitutional	7
15	corbiere	1999	equality	7
16	kitkatla band	2002	constitutional	6
17	van de perre	2001	family	6
18	jack and charlie	1985	aboriginal	6
19	racine	1983	family	5
20	harvey	1996	titles	5
21	pioneer hi-bred	1989	scientific	5
22	harvard	2002	misc.	4
23	sparrow	1990	aboriginal	4
24	symes	1993	equality	4

TABLE F

## Top 34 cases ranked according to use of 'cultural'.

Case name	year	area of law	cultural	culture	combined
1 kitkatla band	2002	constitutional	39	6	45
2 arsenault-cameron	2000	language	21	14	35
3 Marshall	1999	aboriginal	20	2	22
4 ref: secession	1998	constitutional	18	7	25
5 can. labour code	1992	misc.	18	0	18
6 Corbiere	1999	equality	17	7	24
7 Lovelace	2000	equality	16	3	19
8 Mahe	1990	language	12	22	34
9 gould v. yukon	1996	human rights	12	3	15
10 van de perre	2001	family	10	6	16
11 ref: public service	1987	association	10	2	12
12 Zundel	1992	expression	9	9	18
13 Keegstra	1990	expression	9	2	11
14 Advance cutting	2001	association	9	1	10
15 Beaulac	1999	criminal	9	1	10
16 Mitchell	2001	aboriginal	8	35	43
17 Gosselin	2002	equality	8	0	8
18 Chan	1995	immigration	7	3	10
19 vancouver society	1999	equality	7	1	8
20 Gladue	1999	criminal	6	3	9
21 ross	1996	expression	6	2	8
22 centre communaut	1996	titles	6	0	6
23 Devine	1988	expression	6	0	6
24 n.b. v. l(m)	1998	family	6	0	6
25 delgamuukw	1997	aboriginal	5	53	58
26 Racine	1983	family	5	5	10
27 chamberlin	2002	misc.	5	3	8
28 can v taylor	1990	expression	5	2	7
29 rjr-mcdonald	1995	expression	5	2	7
30 friends oldman river	1992	constitutional	5	1	6
31 ont. english cath.	2001	language	5	1	6
32 bell express vu	2002	misc.	5	0	5
33 lavigne v. ontario	1991	association	5	0	5
34 Ramsden	1993	expression	5	0	5

TABLE G

Aboriginal rights cases sorted by year from 1982<sup>26</sup> to 2002.

	case name	Year	culture	cultural	combined
1	Dick	1985	3	1	4
2	jack and charlie	1985	6	0	6
3	horseman	1990	2	0	2
4	Mitchell v peguis	1990	1	0	1
5	Sparrow	1990	4	1	5
6	Adams	1996	36	0	36
7	Cote	1996	12	0	12
8	gladstone	1996	61	1	62
9	ntc smokehouse	1996	42	0	42
10	pamejewon	1996	21	2	23
11	van der peet	1996	210	3	213
12	delgamuukw	1997	53	5	58
13	st. mary's	1997	0	1	1
14	marshall	1999	2	20	22
15	sundown	1999	1	0	1
16	Mitchell	2001	35	8	43
17	Osoyoos	2001	3	3	6
18	ross river	2002	0	1	1
19	ward v can(a-g)	2002	0	1	1
20	wewaykum	2002	2	0	2
<b>TOTALS</b>			<b>494</b>	<b>47</b>	<b>541</b>

<sup>26</sup> There are no cases for the years 1982-84 inclusive.

**FIGURE 1**

Aboriginal Rights Cases - Annual usage from 1982 to 2002

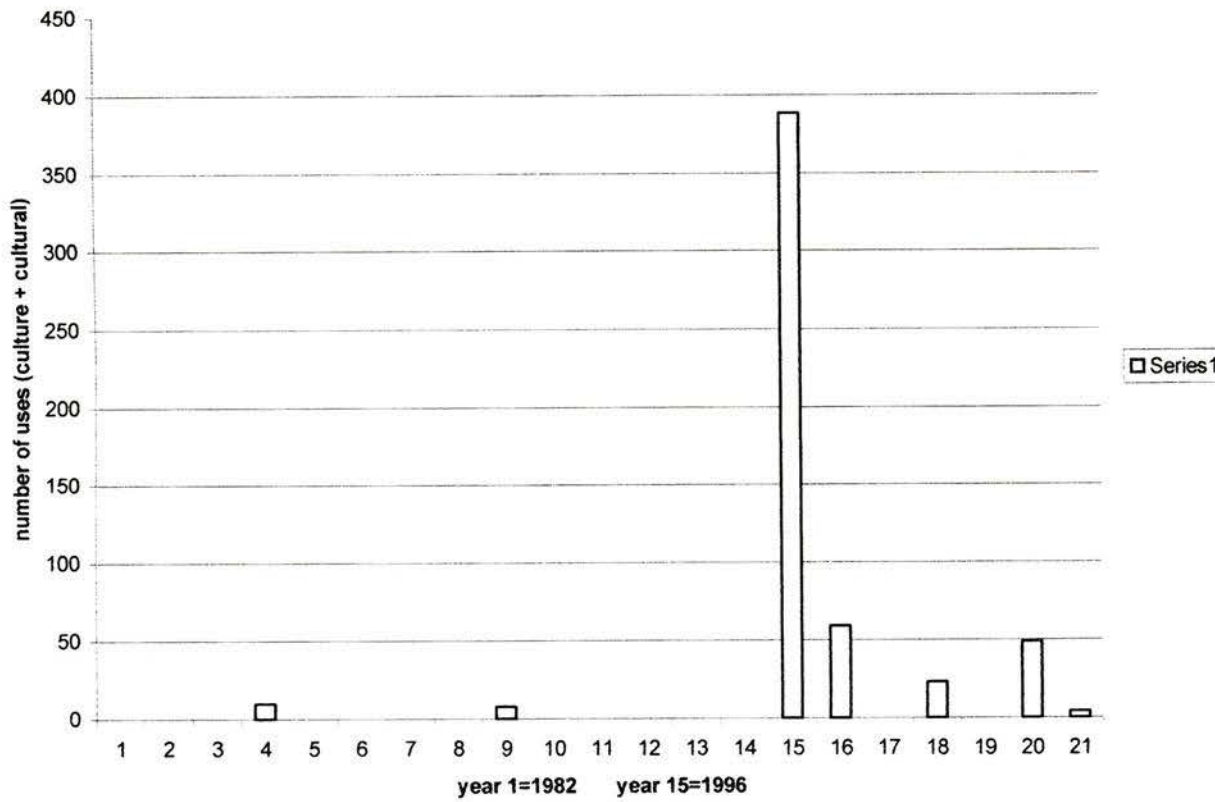


TABLE J

## Non-aboriginal rights cases sorted by year (1982-2002)

case name	year	area of law	culture	cultural	combined
1 can (crtc) v. ctv	1982	misc.	0	1	1
2 multiple access	1982	constitutional	0	1	1
3 ref:amend of const	1982	constitutional	2	2	4
4 shell oil	1982	misc.	0	1	1
5 Racine	1983	Family	5	5	10
6 a.g. (que)	1984	Language	0	1	1
7 big m drug mart	1985	Religion	2	1	3
8 edwards books	1986	Religion	1	3	4
9 Hill	1986	Criminal	1	1	2
10 Jones	1986	Religion	0	3	3
11 morgantaler	1986	charter crim	0	2	2
12 Oakes	1986	charter crim	0	1	1
13 scowby	1986	constitutional	0	1	1
14 societe acadiens	1986	charter misc	0	1	1
15 Ford	1987	Expression	0	4	4
16 Frame	1987	Family	0	1	1
17 ref:public service	1987	association	2	10	12
18 bell can v. que	1988	Titles	0	3	3
19 brossard	1988	human rights	0	2	2
20 Comm. de transport	1988	constitutional	0	1	1
21 Crown zellerbach	1988	Scientific	2	0	2
22 devine	1988	Expression	0	6	6
23 n.b. v. c(gc)	1988	Family	0	1	1
24 edmonton journal	1989	Expression	0	1	1
25 irwin toy	1989	Expression	2	0	2
26 l(je)	1989	Criminal	1	0	1
27 m(sh)	1989	Criminal	2	0	2
28 pioneer hi-bred	1989	Scientific	5	0	5
29 slaight communic	1989	Titles	0	2	2
30 andrews	1990	Expression	1	1	2
31 can v taylor	1990	Expression	2	5	7
32 danson	1990	misc.	0	2	2
33 harrison	1990	Equality	0	1	1
34 Hess	1990	charter crim	0	1	1
35 keegstra	1990	Expression	2	9	11
36 kokesh	1990	charter crim	1	0	1
37 Mahe	1990	Language	22	12	34
38 mckinney	1990	Equality	1	0	1
39 national corn grow	1990	Scientific	3	0	3
40 ref:s. 193 c.c..	1990	Expression	1	3	4
41 Starr	1990	Titles	3	0	3
42 stoffman	1990	Equality	0	1	1

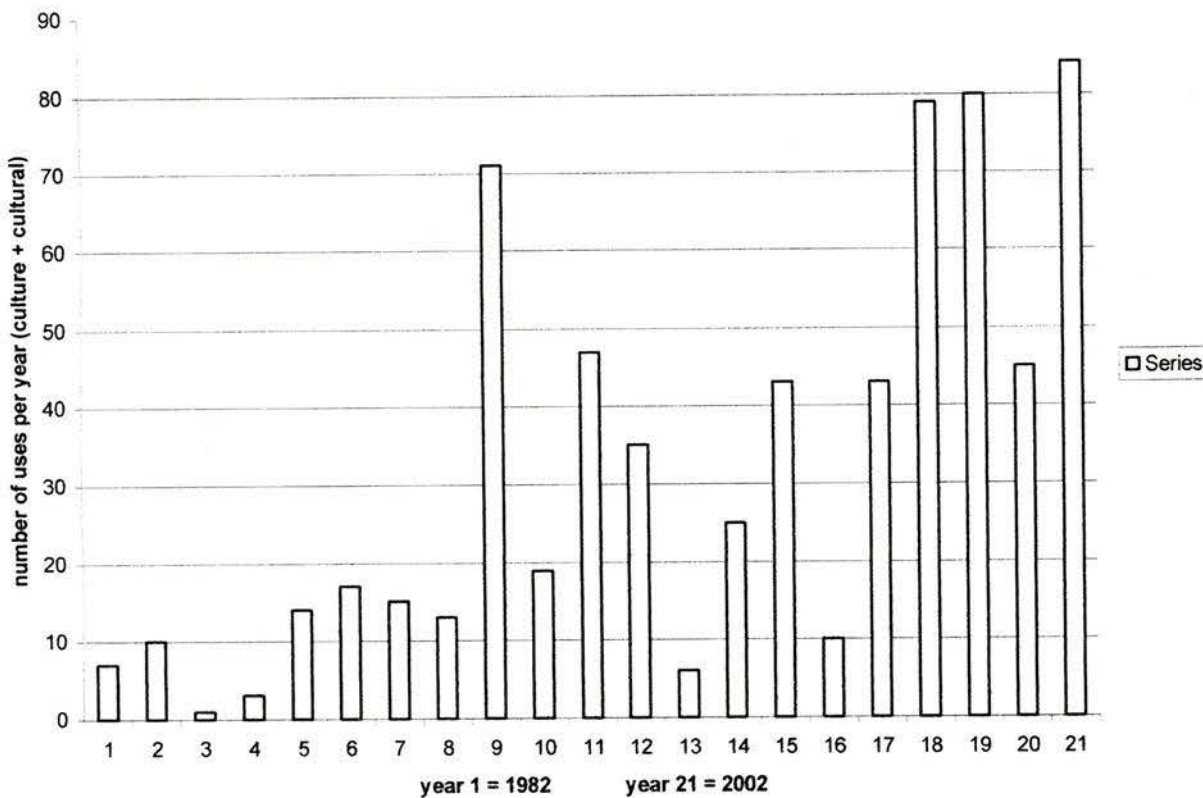
43 ciba-geigy	1991	Titles	2	0	2
44 Comm. for common	1991	Titles	0	2	2
45 jobidon	1991	Criminal	0	1	1
46 kindler	1991	charter crim	0	2	2
47 lavigne v. ontario	1991	association	0	5	5
48 ref:prov electoral	1991	charter misc	0	3	3
49 seaboyer	1991	charter crim	2	2	4
50 Butler	1992	Expression	1	0	1
51 can. labour code	1992	misc.	0	18	18
52 friends oldman river	1992	constitutional	1	5	6
53 genereux	1992	charter crim	0	1	1
54 lakeside colony	1992	human rights	0	1	1
55 Moge	1992	Family	0	1	1
56 Wise	1992	charter crim	0	1	1
57 zundel	1992	Expression	9	9	18
58 can v ward	1993	immigration	0	1	1
59 can v. mossup	1993	human rights	0	1	1
60 creighton	1993	charter crim	1	0	1
61 ont. hydro	1993	constitutional	2	1	3
62 p(d) v s©	1993	Religion	1	0	1
63 ramsden	1993	Expression	0	5	5
64 ref:educ act (que)	1993	constitutional	0	1	1
65 ref:pub sch (man)	1993	Language	10	4	14
66 symes	1993	Equality	4	0	4
67 Yorke	1993	Titles	0	1	1
68 Young	1993	Religion	2	1	3
69 daviault	1994	charter crim	1	2	3
70 Native women	1994	Equality	1	0	1
71 que.(a-g) v n.e.b.	1994	Titles	0	2	2
72 a(II) v b(a)	1995	charter criminal	1	0	1
73 b(r) v childrens aid	1995	Religion	0	3	3
74 Chan	1995	immigration	3	7	10
75 Egan	1995	Equality	0	1	1
76 jorgensen	1995	Expression	0	1	1
77 o'connor	1995	charter crim	0	1	1
78 phillips	1995	charter crim	1	0	1
79 rjr-mcdonald	1995	Expression	2	5	7
80 Adler	1996	Religion	3	4	7
81 augustus	1996	misc.	0	1	1
82 Center communaut	1996	Titles	0	6	6
83 Gould v. yukon	1996	human rights	3	12	15
84 harvey	1996	Titles	5	0	5
85 Lewis	1996	Scientific	1	0	1
86 ross	1996	Expression	2	6	8
87 can. egg market	1997	association	1	3	4
88 Dagg	1997	human rights	1	0	1
89 eldridge	1997	Equality	2	0	2
90 godbout	1997	human rights	0	1	1

91 Pointe-claire	1997	misc.	0	1	1
92 winnipeg v. g(d.f.)	1997	human rights	0	1	1
93 Aubry	1998	Expression	0	1	1
94 n.b. v. l(m)	1998	Family	0	6	6
95 pushpanathan	1998	immigration	0	3	3
96 ref:secession	1998	constitutional	7	18	25
97 thomson news	1998	misc.	1	1	2
98 Vriend	1998	Equality	0	4	4
99 williams	1998	Titles	0	2	2
100 b.c.v. bcgseu	1999	human rights	0	1	1
101 Baker	1999	immigration	2	0	2
102 beaulac	1999	Criminal	1	9	10
103 corbiere	1999	Equality	7	17	24
104 Delisle	1999	association	2	3	5
105 ewanchuk	1999	Criminal	0	3	3
106 gladue	1999	Criminal	3	6	9
107 h(d) v. m(h)	1999	Family	3	2	5
108 Liew	1999	charter crim	1	0	1
109 m.v.h.	1999	Equality	1	2	3
110 Mills	1999	charter crim	0	2	2
111 n.b. v. g.(j)	1999	charter crim	0	2	2
112 pub sch (alta) #1	1999	misc.	0	1	1
113 vancouver society	1999	Equality	1	7	8
114 w (g)	1999	Titles	2	0	2
115 Winko	1999	charter crim	1	0	1
116 arsenault-cameron	2000	Language	14	21	35
117 blencoe	2000	charter crim	0	1	1
118 little sisters' book	2000	Expression	17	2	19
119 lovelace	2000	Equality	3	16	19
120 Proulx	2000	Criminal	1	0	1
121 pub sch (alta) #2	2000	misc.	0	1	1
122 que (comm droits)	2000	human rights	0	3	3
123 Wells	2000	Criminal	0	1	1
124 advance cutting	2001	association	1	9	10
125 Fortin	2001	misc.	1	0	1
126 golden	2001	Titles	0	2	2
127 law soc v mangat	2001	immigration	0	2	2
128 ont. english cath.	2001	Language	1	5	6
129 rumley	2001	misc.	2	0	2
130 sharpe	2001	Expression	1	3	4
131 therrien	2001	Equality	0	1	1
132 trinity western	2001	Religion	0	1	1
133 van de perre	2001	Family	6	10	16
134 bell express vu	2002	misc.	0	5	5
135 chamberlin	2002	misc.	3	5	8
136 Cinous	2002	Criminal	1	0	1
137 gosselin	2002	Equality	0	8	8
138 harvard	2002	misc.	4	1	5

139 kitkatla band	2002 constitutional	6	39	45
140 lavigne v. canada	2002 human rights	3	4	7
141 Lavoie	2002 Equality	0	1	1
142 moreau-berube	2002 misc.	0	1	1
143 suresh	2002 charter crim	0	1	1
144 theberge	2002 misc.	0	1	1
145 whiten	2002 misc.	1	0	1
<b>Totals</b>		<b>220</b>	<b>447</b>	<b>667</b>

**FIGURE 2**

**Non-Aboriginal Rights Cases - Annual Usage from 1982 to 2002**



**TABLE N**

## All cases sorted by area of law

case name	year	cultural	culture	combined	area of law
1 marshall	1999	20	2	22	aboriginal
2 mitchell	2001	8	35	43	aboriginal
3 delgamuukw	1997	5	53	58	aboriginal
4 van der peet	1996	3	210	213	aboriginal
5 osoyoos	2001	3	3	6	aboriginal
6 pamejewon	1996	2	21	23	aboriginal
7 gladstone	1996	1	61	62	aboriginal
8 sparrow	1990	1	4	5	aboriginal
9 dick	1985	1	3	4	aboriginal
10 ross river	2002	1	0	1	aboriginal
11 st. mary's	1997	1	0	1	aboriginal
12 ward v can(a-g)	2002	1	0	1	aboriginal
13 ntc smokehouse	1996	0	42	42	aboriginal
14 adams	1996	0	36	36	aboriginal
15 cote	1996	0	12	12	aboriginal
16 jack and charlie	1985	0	6	6	aboriginal
17 horseman	1990	0	2	2	aboriginal
18 wewaykum	2002	0	2	2	aboriginal
19 mitchell v peguis	1990	0	1	1	aboriginal
20 sundown	1999	0	1	1	aboriginal
21 ref:public service	1987	10	2	12	association
22 advance cutting	2001	9	1	10	association
23 lavigne v. ontario	1991	5	0	5	association
24 delisle	1999	3	2	5	association
25 can. egg market	1997	3	1	4	association
26 seaboyer	1991	2	2	4	charter crim
27 daviault	1994	2	1	3	charter crim
28 kindler	1991	2	0	2	charter crim
29 mills	1999	2	0	2	charter crim
30 morgantaler	1986	2	0	2	charter crim
31 n.b. v. g.(j)	1999	2	0	2	charter crim
32 blencoe	2000	1	0	1	charter crim
33 genereux	1992	1	0	1	charter crim
34 hess	1990	1	0	1	charter crim
35 oakes	1986	1	0	1	charter crim
36 o'connor	1995	1	0	1	charter crim
37 suresh	2002	1	0	1	charter crim
38 wise	1992	1	0	1	charter crim
39 creighton	1993	0	1	1	charter crim
40 kokesh	1990	0	1	1	charter crim
41 liew	1999	0	1	1	charter crim
42 phillips	1995	0	1	1	charter crim
43 winko	1999	0	1	1	charter crim

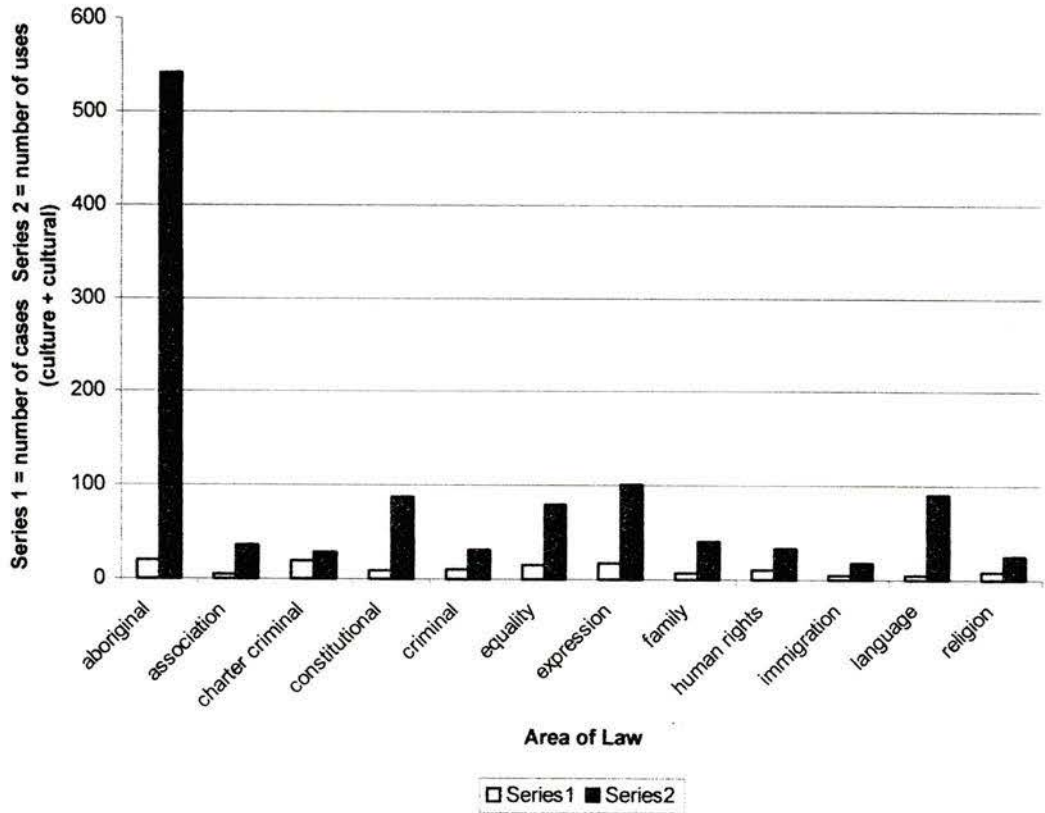
44 a(II) v b(a)	1995	0	1	1	charter criminal
45 ref:prov electoral	1991	3	0	3	charter misc
46 societe acadiens	1986	1	0	1	charter misc
47 kitkatla band	2002	39	6	45	constitutional
48 ref:secession	1998	18	7	25	constitutional
49 friends oldman river	1992	5	1	6	constitutional
50 ref:amend of const	1982	2	2	4	constitutional
51 ont. hydro	1993	1	2	3	constitutional
52 comm de transport	1988	1	0	1	constitutional
53 multiple access	1982	1	0	1	constitutional
54 ref:educ act (que)	1993	1	0	1	constitutional
55 scowby	1986	1	0	1	constitutional
56 beaulac	1999	9	1	10	criminal
57 gladue	1999	6	3	9	criminal
58 ewanchuk	1999	3	0	3	criminal
59 hill	1986	1	1	2	criminal
60 jobidon	1991	1	0	1	criminal
61 wells	2000	1	0	1	criminal
62 m(sh)	1989	0	2	2	criminal
63 cinous	2002	0	1	1	criminal
64 l(je)	1989	0	1	1	criminal
65 proulx	2000	0	1	1	criminal
66 corbiere	1999	17	7	24	equality
67 lovelace	2000	16	3	19	equality
68 gosselin	2002	8	0	8	equality
69 vancouver society	1999	7	1	8	equality
70 vriend	1998	4	0	4	equality
71 m.v.h.	1999	2	1	3	equality
72 egan	1995	1	0	1	equality
73 harrison	1990	1	0	1	equality
74 lavoie	2002	1	0	1	equality
75 stoffman	1990	1	0	1	equality
76 therrien	2001	1	0	1	equality
77 symes	1993	0	4	4	equality
78 eldridge	1997	0	2	2	equality
79 mckinney	1990	0	1	1	equality
80 native women	1994	0	1	1	equality
81 zundel	1992	9	9	18	expression
82 keegstra	1990	9	2	11	expression
83 ross	1996	6	2	8	expression
84 devine	1988	6	0	6	expression
85 can v taylor	1990	5	2	7	expression
86 rjr-mcdonald	1995	5	2	7	expression
87 ramsden	1993	5	0	5	expression
88 ford	1987	4	0	4	expression
89 ref.s. 193 c.c..	1990	3	1	4	expression
90 sharpe	2001	3	1	4	expression
91 little sisters' book	2000	2	17	19	expression

92 andrews	1990	1	1	2 expression
93 aubry	1998	1	0	1 expression
94 edmonton journal	1989	1	0	1 expression
95 jorgensen	1995	1	0	1 expression
96 irwin toy	1989	0	2	2 expression
97 butler	1992	0	1	1 expression
98 van de perre	2001	10	6	16 family
99 n.b. v. l(m)	1998	6	0	6 family
100 racine	1983	5	5	10 family
101 h(d) v. m(h)	1999	2	3	5 family
102 frame	1987	1	0	1 family
103 moge	1992	1	0	1 family
104 n.b. v. c(gc)	1988	1	0	1 family
105 gould v. yukon	1996	12	3	15 human rights
106 lavigne v. canada	2002	4	3	7 human rights
107 que (comm droits)	2000	3	0	3 human rights
108 brossard	1988	2	0	2 human rights
109 b.c.v. bcgseu	1999	1	0	1 human rights
110 can v. mossup	1993	1	0	1 human rights
111 godbout	1997	1	0	1 human rights
112 lakeside colony	1992	1	0	1 human rights
113 winnipeg v. g(d.f.)	1997	1	0	1 human rights
114 dagg	1997	0	1	1 human rights
115 chan	1995	7	3	10 immigration
116 pushpanathan	1998	3	0	3 immigration
117 law soc v mangat	2001	2	0	2 immigration
118 can v ward	1993	1	0	1 immigration
119 baker	1999	0	2	2 immigration
120 arsenault-cameron	2000	21	14	35 language
121 mahe	1990	12	22	34 language
122 ont. english cath.	2001	5	1	6 language
123 ref:pub sch (man)	1993	4	10	14 language
124 a.g.(que)	1984	1	0	1 language
125 can. labour code	1992	18	0	18 misc.
126 chamberlin	2002	5	3	8 misc.
127 bell express vu	2002	5	0	5 misc.
128 danson	1990	2	0	2 misc.
129 harvard	2002	1	4	5 misc.
130 thomson news	1998	1	1	2 misc.
131 augustus	1996	1	0	1 misc.
132 can (crtc) v. ctv	1982	1	0	1 misc.
133 moreau-berube	2002	1	0	1 misc.
134 pointe-claire	1997	1	0	1 misc.
135 pub sch (alta) #1	1999	1	0	1 misc.
136 pub sch (alta) #2	2000	1	0	1 misc.
137 shell oil	1982	1	0	1 misc.
138 theberge	2002	1	0	1 misc.
139 rumley	2001	0	2	2 misc.

140 fortin	2001	0	1	1 misc.
141 whiten	2002	0	1	1 misc.
142 adler	1996	4	3	7 religion
143 edwards books	1986	3	1	4 religion
144 b(r) v childrens aid	1995	3	0	3 religion
145 jones	1986	3	0	3 religion
146 big m drug mart	1985	1	2	3 religion
147 young	1993	1	2	3 religion
148 trinity western	2001	1	0	1 religion
149 p(d) v s©	1993	0	1	1 religion
150 pioneer hi-bred	1989	0	5	5 scientific
151 national corn grow	1990	0	3	3 scientific
152 crown zellerbach	1988	0	2	2 scientific
153 lewis	1996	0	1	1 scientific
154 centre communaut	1996	6	0	6 titles
155 bell can v. que	1988	3	0	3 titles
156 comm for common	1991	2	0	2 titles
157 golden	2001	2	0	2 titles
158 que.(a-g) v n.e.b.	1994	2	0	2 titles
159 slaight communic	1989	2	0	2 titles
160 williams	1998	2	0	2 titles
161 yorke	1993	1	0	1 titles
162 harvey	1996	0	5	5 titles
163 starr	1990	0	3	3 titles
164 ciba-geigy	1991	0	2	2 titles
165 w (g)	1999	0	2	2 titles
<b>TOTALS</b>		<b>494</b>	<b>714</b>	<b>1208</b>

**FIGURE 3**

Total Number of Uses (and Cases) by Area of Law (1982-2002)





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Author

Neil William Vallance

July 23, 2003