

**Aboriginal Rights and Title in  
Canada After *Delgamuukw*:  
Part One, Oral Traditions and Anthropological  
Evidence in the Courtroom**

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*The 1997 Delgamuukw decision of the Supreme Court of Canada has been an important moment in determining the nature and extent of Aboriginal rights and title in Canada. This paper (which is the first part of a two-part essay) critically reviews this decision, drawing on anthropological and legal scholarship to put into context how oral histories and anthropological expert witness testimony have been conceived by the Supreme Court. This paper reviews the continuing importance of social science research in general and anthropology in particular for contributing to Aboriginal rights and title debates.*

*La décision Delgamuukw de 1997 de la Cour suprême du Canada a été un moment important dans la détermination de la nature et de l'étendue des droits autochtones et du titre d'autochtone au Canada. Cet article (qui est la première partie d'une dissertation en deux parties) examine cette décision de façon éclairée en se servant du savoir anthropologue et juridique pour mettre en contexte la manière dont les récits oraux et les témoignages de témoins experts en anthropologie ont été conçus par la Cour suprême. Cet article examine l'importance continue des recherches scientifiques en général et de l'anthropologie en particulier pour contribuer aux débats sur les droits des autochtones et sur leur titre.*

## Introduction

On 11 December 1997, the Supreme Court of Canada issued its landmark decision on the claim to Aboriginal title and self government made by the Hereditary Chiefs of the Gitksan and Wet'suwet'en Nations. The Supreme Court's Reasons for Judgement in the *Delgamuukw* case have major implications for the lives of Aboriginal people living in British Columbia, where Aboriginal title to the land has never been extinguished (McNeil 1997:134), and has set the political stage for re-defining the

fundamental relationship between the Canadian state and Aboriginal peoples. The judgement pronounces upon the value of social sciences, and defines much of the territory within which future social science research will be conducted.

Contrary to popular criticism after judgement day (i.e., editorials in the *Vancouver Sun* 20 December 1997 & *Vancouver Courier* 15 February 1998) these decisions of the Supreme Court of Canada have not been made in isolation. The courts have responded to the long standing political and legal limbo in which Aboriginal people in Canada have been held by self-serving, paternalistic Federal and Provincial governments (Boldt and Long 1985). The judges have also rendered their decision in the context of western legal narratives, oral and historical traditions of Aboriginal people, and a discourse of social science which is engaged in constructing, testifying to, and critiquing these narratives. To appreciate the implications of this judgement the discourse surrounding Aboriginal rights and title issues in Canada must be explored.

I have developed this essay into two parts, following the order of the reasoning of Chief Justice Lamer in the *Delgamuukw* decision. Though these parts can stand alone, it is intended that they are read together to provide the broadest context and critique of the reasoning in the Supreme Court's *Delgamuukw* judgement. The first part, published here, begins with a brief summary of the *Delgamuukw* decision, focusing on the majority judgement of Chief Justice Lamer. I then investigate the nature of the kinds of evidence that Lamer has come to accept as valid and that which was rejected, specifically oral histories and anthropological testimony. I provide a critique of the court's conception of these kinds of knowledge, and consider the theoretical and political difficulties inherent in using oral histories and anthropological evidence in an adversarial legal setting.

This paper will set the stage for part two, in which I investigate the Supreme Court's conception of aboriginal rights and title, the tests for proof required by a First Nation making a claim, and the ability of the Crown to justifiably infringe on these rights and title in certain contexts. Part two concludes with a review of how aboriginal rights and title issues have been argued in contexts outside the court, particularly in treaty negotiations, resource management and economic development, and suggestions for the resolution of outstanding aboriginal rights and title issues. I hope that on the way to the end of the two parts of this essay, I will

have provided something of a guide for social scientists pursuing Aboriginal rights and title research. I hope that by critically outlining both the theoretical and methodological playing fields, that future social scientific discourse will be tuned to the current legal situation of Aboriginal rights and title in Canada.

### *Delgamuukw*: Judgement Day

The Supreme Court of Canada's majority decision in *Delgamuukw* was written by Chief Justice Lamer. He had the complete concurrence of four of the other seven judges, the other two taking him to task on some of the finer points of law. Chief Justice Lamer has been central in defining the nature and scope of Aboriginal rights at the end of this century. He has authored decisions in other important Aboriginal rights cases including *R. v. Van der Peet* ([1996] 4 C.N.L.R. 177), *R. v. Gladstone* ([1996] 4 C.N.L.R. 65), *R. v. N.T.C. Smokehouse* ([1996] 4 C.N.L.R. 672), *R. v. Adams* ([1996] 4 C.N.L.R. 1), *R. v. Pamajewon* ([1996] 4 C.N.L.R. 164), and *R. v. Côté* ([1996] 4 C.N.L.R. 26). Chief Justice Lamer should be considered an author, participating in a discourse around how the relationship between Aboriginal peoples and the state should unfold. The difference, as I will point out, is that as Chief Justice, Lamer is a uniquely powerful voice in the discourse. His writing, unlike the academics who publish in scholarly journals or the Aboriginal people who make speeches in their communities and to the government, clarifies the law of the land in Canada. When Lamer writes, government officials, elected politicians, Aboriginal leaders, practising lawyers, newspaper columnists, business leaders, and academic scholars all perk up and listen, adjusting their lives accordingly. So I begin this review by perking my ears up to Lamer's Reasons for Judgement and posing some questions to consider in the review of the larger, though somewhat less powerful discourse which follows.

After reviewing the facts of the case, and the decisions made in the courts below him, Chief Justice Lamer had five major points of analysis: (1) can the appeal from the BC Appeal Court be considered by the Supreme Court of Canada? (2) how may the facts of Aboriginal rights and title cases be interpreted? (3) what are the content and requirements for proof of Aboriginal title? (4) what can be made of the arguments for self-government? and (5) can the Province extinguish Aboriginal title? The

first point and last two can be dispensed with very briefly here. On the first point, the appeal could not be considered because the appellants had changed their suit from one of "ownership" and "jurisdiction" to one of "Aboriginal rights" and "self government" (Lamer CJ., *Delgamuukw* [1998] 1 C.N.L.R. 44). Thus, the case was sent back to trial and the Gitksan and Wet'suwet'en were left to either negotiate a settlement with the Provincial and Federal governments or bring another costly case to trial (the first trial was supposed to have cost somewhere in the order of \$25 million (Asch and Bell 1994:533)). In his fourth point, Lamer reasoned that the claims made for self-government were too general, and thus could not be considered by the courts (Lamer CJ., *Delgamuukw* [1998] 1 C.N.L.R. 80). On the last point, the Province clearly has no jurisdiction to extinguish Aboriginal title with reference to previous case law, common law, and the Canadian Constitution (*ibid.*, 81-86). Questions of the interpretation of the facts presented and the content and proof of Aboriginal title, however, engage more directly the broader discourse of Aboriginal rights and title and must be looked at more closely.

*Interpreting the Facts: Oral Histories, Life Stories, and Anthropology*

In his consideration of the issues of the interpretation of facts of Aboriginal rights and title cases, Lamer has consistently held that the courts must consider equally the perspectives of the common law and of Aboriginal people themselves in assessing the evidence given (*ibid.*, 50). So, in offering a broad admission of evidence to the courts, Lamer has been willing to listen to and "come to terms with the oral histories of Aboriginal societies, which for many Aboriginal Nations, are the only record of their past" (*ibid.*, 48). Lamer has recognized that oral histories both embody historical knowledge and express cultural values, and sees some difficulty in treating such evidence under the strict rules of a torts law court (*ibid.*, 49). Thus, when the Gitksan presented their *adaawk*, and the Wet'suwet'en presented their *kungax*, these must be thought of as Aboriginal common law, and constitute acceptable evidence for a claim to Aboriginal title (*ibid.*, 52-3). The testimony of personal reminiscences of land use is acceptable to the courts as evidence of physical occupancy of the land (*ibid.*, 53-4).

Other types of evidence did not fair so well in Lamer's judgement. Though Lamer completely reversed BC Supreme Court Chief Justice Alan McEachern's controversial views on oral histories, he did not chal-

lence McEachern's "hotly contested" interpretation of the anthropological testimony: "I need only reiterate what I have stated above, that findings of credibility, including credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts" (*ibid.*, 51). Lamer also suggested that oral histories may be the only credible account of pre-sovereignty title or pre-contact rights (*Ibid.*, 48). Given that Lamer did not challenge McEachern, and that he suspects that oral histories are the only credible records of the past, the roll of anthropologists, archaeologists, linguists, and historians are put into serious question for future litigation.

#### *Content of Aboriginal Title*

On the question of the content of Aboriginal title, Lamer provided the first clear, definitive legal definition. Aboriginal title is a *sui generis* right in land, something between fee simple title and a personal and usufructuary right (*ibid.*, 57). Aboriginal title is inalienable, except to the Crown (*ibid.*, 58). Aboriginal title has its legal source in prior occupation of the land (*ibid.*, 58). Aboriginal title is held communally, not by any one member of an Aboriginal Nation (*ibid.*, 59). Although Aboriginal title is a right in land, and not tied to any particular "Aboriginal use," there is an inherent limit on the possible uses that can be made of the land: "if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship" (*ibid.*, 63). Finally, Aboriginal title may be infringed on by either provincial or federal governments if the infringement satisfies a compelling legislative objective, including for example the "development of agriculture, forestry, mining, hydroelectric power, ... general economic development, ... the protection of the environment or endangered species, the building of infrastructure, and so on" (*ibid.*, 78). If there is to be an infringement on Aboriginal title, the government must recognize its fiduciary relationship with Aboriginal people, and ensure that there is as little infringement as possible, that fair compensation is made available and that the Aboriginal group has been consulted (*ibid.*, 78-9).

#### *Proof of Aboriginal Title*

To establish proof of Aboriginal title, Lamer outlined a three-point legal test, which he added to his previous test for Aboriginal rights (Lamer CJ., *Van der Peet* [1996] 4 C.N.L.R. 177).

- (1) The claimant must first prove occupancy at time of sovereignty. This is a major distinction from the *Van der Peet* test, which requires the claimant to prove that the practice or custom being claimed as an Aboriginal right was integral to their distinctive culture at the time of contact. With the *Delgamuukw* test, it is assumed that if the land is occupied, then it is integral to the distinctive culture (Lamer CJ., *Delgamuukw* [1998] 1 C.N.L.R. 69).
- (2) The second aspect of the test requires the claimants to show that there be continuity with present and pre-sovereignty occupation. This evidence does not have to prove conclusively that there is an unbroken chain of continuity, but rather that the present occupancy is rooted in the past. This occupancy may be shown through both physical evidence on the ground, such as houses, enclosed fields and regular exploitation of resources and Aboriginal laws which govern the area claimed under Aboriginal title (*ibid.*, 72).
- (3) Finally, the test requires that the claimant show that occupancy is exclusive to the group claiming the land. This exclusivity of occupation is conceived by Lamer as one in which others might trespass on the land, or one where an Aboriginal Nation gives permission for their territory to be shared. The fact that the exclusivity could be enforced on the land is the important point for Lamer (*ibid.*, 73).

### Summary

This decision has obvious importance to the scholars who support struggles for Aboriginal rights and title. Following the order of analysis that Lamer provided in his judgement, I will now review the discourse which surrounded his analyses of the kinds of evidence which can be considered in Aboriginal rights and title claims, the nature and content of Aboriginal title, and the tests which must be met to make rights and title claims. Lamer's ruling has conceptual difficulty which has gone unheeded, and has swept aside important issues of interpretation. Even thus flawed, the consequences of this decision have clear implications for the continued relationship between Aboriginal people and the Canadian state.

## Evidence and Techniques: The Practice of Oral Tradition and Anthropology in the Courtroom

### *Oral Histories*

Lamer's explicit overturning of BC Supreme Court Chief Justice Alan McEachern's ruling on the use of oral traditions for claims to Aboriginal rights and title was a highly significant mark in judicial history, even making the cover page of *The New York Times* ("Canadian Indians Celebrate Vindication of Their History", 9 February 1998). The chiefs of the Gitksan and Wet'suwet'en Nations described in their opening statements to the court how the evidence of their oral histories was going to be presented to show the interconnectedness of the people to their land and their laws (Wa & Uukw 1992). Speaking as chief of his house, Delgamuukw stated in his opening testimony:

My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances are performed, and the crests are displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory, and the Feast become one (Wa & Uukw 1992:7).

This had been rejected by McEachern as not having significant legal weight as "fact", as determined by his reading of evidentiary law (McEachern CJ., *Delgamuukw* [1991] 3 W.W.R. 97).

The introduction of a significant body of oral tradition into the court record was a challenge to the judiciary. It presented the problem of dealing with Aboriginal societies on their own terms (Fortune 1993). Kew (1989:98) observes that this evidence was unique, as, for a change "... it is given in the words and under direction of the people themselves. It is not a construction by outsiders." Though not regarding their presentation of history as a construction by outsiders, McEachern saw the oral histories of the Gitksan and Wet'suwet'en chiefs as their own construction, merely suited to support their land claim. After McEachern's 1991 decision, the reaction of scholars, lawyers and First Nations was swift and damning (Asch and Bell 1994; Cassidy 1992; Cruikshank 1992; Culhane 1998, 1992; Fisher 1992; Fortune 1993; Foster 1991; Henderson 1997;

McLeod 1992; Miller 1992; Mills 1994a, 1994b; Monet and Skanu'u 1992; Ridington 1992; Slattery 1992). Monet and Skanu'u (1992), utilizing cartoon illustrations as powerful a critique as the dismissive words of the judge they satirize, document how poorly, in their view, and disrespectfully these oral histories and the Aboriginal people presenting them were received by McEachern.

Though the acceptance of oral histories as a critical kind of evidence in Aboriginal rights and title claims has been solidified by the Supreme Court, Lamer has given little guidance in how these oral histories are to be interpreted. Understanding how—in the Gitksan and Wet'suwet'en case—histories, songs, dances, crests and feasts form the customary laws which are the source of Aboriginal rights, is the task faced by the courts when such evidence is now presented. Fortune (1993) sees this as a profound challenge for the judiciary, for in presenting their oral histories to the courts, the chiefs have asked the law to examine and challenge how it sees and understands both history and law, so that claims to Aboriginal title can be considered on fair grounds. Looking at how courts have received oral histories in the past, it would seem that the judiciary is ill equipped to interpret and make fair judgements on a case based on a history that is not their own (Fortune 1993:88). This is not a simple matter of learning a history that one has never heard, but acknowledging the way history is embedded in different systems of knowledge and understanding it from the First Nation people's perspectives.

At the most basic level, oral histories must be seen as "cultural forms that organize perceptions about the world", not merely containers of brute fact which may be laid on the table for judges to interpret in a "common-sense" way (Cruikshank 1992:40). Cruikshank, an anthropologist widely respected for her work on native oral traditions, argues that neither oral traditions nor written documents "speak for themselves", but must be understood in the context of their performance in native societies (Cruikshank 1992:31). They are deeply embedded in social processes where "the listener is part of the storytelling event ... [being] expected to bring different life experiences to the story each time he or she hears it and to learn different things from it at each hearing. Rather than trying to spell out everything one needs to know, it compels the listener to think about ordinary experience in new ways ... [and] requires a receptive audience." (Cruikshank 1992:34).

In the *Delgamuukw* trial judgement, Chief Justice McEachern was

unable "to recognize the linkages among narrative, song, dance, and place." McEachern's attempt to understand oral histories based on "common-sense" is, anthropologist Bruce Miller argues, "part of what Bordieu calls the 'dominant discourse' which, relying on the 'common-sense' of the layman, is by definition ethnocentric, over-simplified, and logically flawed." (Miller 1992:65).

Far from taking a naively common-sense approach, Cruikshank points out that scholars commonly "pay more attention to the ways people *use* orally narrated accounts to talk about their past. More important than the search for a body or orally narrated texts deemed inaccurate within a restricted western discourse, they say, is the question of how historical consciousness is constructed in societies where essential knowledge has always been passed on by word of mouth." (Cruikshank 1992:38).

Even now that they have been accepted and valued by the judiciary, oral histories risk facing the "hierarchy of truth" which judges have exhibited in the past, with scientific knowledge on top and Aboriginal knowledge far down the scale (Fortune 1993:116; Foster and Grove 1993:221). If judges adopt the approach of mainstream historians who see oral histories as brute containers of fact which can be mined for nuggets of truth, oral histories will be poorly understood and will not hold the power and value that they have for Aboriginal communities (Henderson 1997:48). Given these problems in interpreting oral histories, judges will likely continue to write the poor histories that they often have in the past when explaining their reasons for judgement in Aboriginal rights and title cases (Lane 1988:10).

Responding to the difficulty of understanding oral traditions in the legal system, Ridington asks us to see oral history as a discourse set in a very different social frame than court rooms and lawyers' offices (Ridington 1990). This difference in discourse continues to produce a conflict of culture between Aboriginal people and the nation state. Ridington sees the meaning of oral histories as embedded in the experience of Aboriginal people: "The discourse of Native people is meaningful because they share a common and complementary point of view, a common time and place in the world, a common or complementary set of ideas about how to interpret experience, and a common responsibility to the land and its government" (Ridington 1990:276). Interpreting meaning into oral histories, therefore, is not simply an open book for anyone to read. "Discourse," he states, "within such oral cultures is highly con-

textual and placed on complex, mutually understood (but often unstated) knowledge" (*ibid.*). This knowledge is widely distributed in small-scale societies, coded in "storied speech" evoked creatively and meaningfully on a mutually understood totality of common history, common knowledge, and common myth (Ridington 1990:278). Ridington's example of the *Apsassin v. the Queen* case where an elder's testimony was dismissed by the judge as "wish being father to the thought," is a vivid example of this. When the listener hears oral histories from a very different perspective than the tellers', these oral histories will not and can not be meaningfully understood.

Though on the surface it appears that Lamer has taken a radical departure in accepting oral histories as evidence in Aboriginal rights cases, the position is not entirely new (McLeod 1992), nor is it without important problems of interpretation. Standing at one side of the bench and opening their "sacred box" of histories, legends and systems of laws, Aboriginal people may find themselves continually faced with people on the other side who are ill-equipped to hear and understand what is being spoken. Unless the courts are *truly* willing to engage Aboriginal societies, where truth is conceived of by somewhat different standards, (for example, "[f]or the Wet'suwet'en, it is entirely possible for a human to leave his or her body and to manifest him or herself as a bird or animal; for most westerners it is not" (Mills 1994b:73)), and customary laws are manifest in the practice of culture and tradition in communities, oral traditions alone may not provide sufficient evidence for Aboriginal common law to be understood in the courtrooms (or boardrooms) of the state. These concerns ring alarm bells with more conservative thinkers who see the acceptance of oral histories in the courts as a way for Aboriginal people to lie and deceive the judiciary in order to win their claims (e.g., editorial, *Vancouver Sun* 19 December 1997). Those traditions that are accepted and reified as law risk alienating the counter-discourses that exist in Native communities. As codified laws, they may be inadequate to handle the kinds of complex social problem facing contemporary native communities (McDonnell 1992). Leaving aside for the moment notions of total native sovereignty, the common law practised in the oral traditions and institutions of Aboriginal people may be more readily understood by judges if they are placed in a wider discursive frame through the testimony of anthropologists and ethnohistorians.

*Anthropology*

Beginning when Wilson Duff was asked in 1963 to present evidence in the *R. v. White and Bob* case, it has long the strategy for Aboriginal people to utilize anthropologists to present a perspective on their culture and history in support of their rights. The strategy for entering anthropological testimony into the *Delgamuukw* trial record was to provide the context the judge needed to understand the oral histories being presented to him (Jackson 1994:xviii). The anthropologists themselves spent their time discussing the particulars of their argument, leaving their role as culture brokers implicit. McEachern dismissed anthropology as participant observation which was not credible, amounting to mere advocacy (Culhane 1998:30). Heedless of the outcry from the scholarly community, Lamer left McEachern's decisions of the credibility of the anthropologists up to the trial judge. Neither judge saw the anthropological testimony as reconciling two different world views when they were asked to comprehend another culture's concepts of history (Fortune 1993:89).

The most serious criticism of anthropology is that the practitioners are biased advocates. I reviewed fourteen Aboriginal rights and title cases which involved anthropological testimony (*R. v. White and Bob*; *Calder v. R.*; *Baker Lake v. Indian Affairs*; *MacMillan Bloedel v. Mullin*; *R. v. Bear Island*; *R. v. Sparrow*; *R. v. Van der Peet*; *R. v. N.T.C. Smokehouse Ltd.*; *R. v. Gladstone*; *R. v. Côté*; *R. v. Adams*; *Delgamuukw v. R.*; *R. v. Seward*; and *Apsassin v. R.*). In the reasons for decision given by judges at various levels of trial and appeal where anthropology was cited, anthropological testimony was rejected as biased advocacy four times (*Baker Lake*; *Bear Island*; *Delgamuukw*; *Apsassin*). This critique of anthropologists as advocates has been rejected by legal scholars and anthropologists alike. The essence of this response is summed up by Storrow and Bryant who have pointed out that the "contradiction inherent in these statements [made of anthropology in *Bear Island* and *Baker Lake*] lies in the inability to obtain compellable evidence otherwise. ... To disregard evidence because a witness has become submerged in a native culture presumes that the cultural experience perverts the evidence itself" (Storrow and Bryant 1992:186).

As a solution to the problem of accepting or rejecting anthropological evidence, Culhane has argued that it "behoves the judiciary to at least respect the criteria for credibility adopted by the academic institutions of their own culture" (Culhane 1998:289). This, however, would only be an

admissible process in law if the academy intervened in the case or the appeal, claiming that there had been a substantial misinterpretation of the facts. Because there were no such interventions from the academy in the *Delgamuukw* appeals, the courts did not seriously consider a review. Courts can claim to not engage in academic debates, as legal procedure dictates that arguments must be made in the courtroom, with only "facts of law" being able to be taken into account from beyond these chambers. (Of course, judges do have the powerful privilege of judicial notice, which allows them to take into account things deemed to be of common public knowledge.) Clearly then, the usefulness and importance of participant observation methodology to successful social science research must at the least be made clear during testifying (Kew 1994:xiv). Academics may have done a great service to the communities they study had they actively engaged as interveners in the appeal, on the grounds that the trial judge had misinterpreted the facts.

Another critique of anthropology has been that the kind of testimony presented simply does not speak to the judge, who is thinking about the case from an entirely different perspective. One can see from Hugh Brody's experience as an expert witness in *Apsassin v. R.*, that the anthropologist is not in an ideal position to make his or her arguments:

When I got on the stand, I was led by Art [council for the Dunneza], very skillfully, through what it was I had to say about leadership and decision making, and as always, when talking about these things, I got excited about it. Enthusiastic. . . . So I tried to take him, as it were, through a hunting trip. I tried to take him out hunting by telling him a typical hunting trip story, and as I remember it, I told it very fully, and at considerable length, and with a great deal of excitement. . . . So, far from managing to take the judge on a hunting trip, far from succeeding in bringing him into some sort of connection with Dunneza culture and thinking, I managed to alienate him, I think very deeply. And when I read his judgement, that suspicion was somewhat confirmed. I mean, he dismissed my evidence, sort of out of hand. (in Ridington 1990:285)

Mills and Daly also alienated McEachern with their evidence presented in *Delgamuukw*. They attempted to present Gitksan and Wet'suwet'en

knowledge systems, by presenting how feasting is integrated with Aboriginal law. However, in Daly's characterization of the Gitksan connection to the land as "part of the living organism which is the earth ... subject to the changes that the earth brings to all its creations and substances" (Daly 1988:5), he steps away from the kind of knowledge-sharing that could be appreciated by a fact-seeking, truth-valuing judge, using language that is more mystical than scientific. Mills tries to bring an understanding of the connection between the land and the Wet'suwet'en people in symbolic terms: "Passing [beaver meat] out to everyone reaffirms that the land that it came from belongs to that clan and to its high chiefs" (Mills 1994a:61). Though an interesting and useful analysis in anthropological discourse, drawing symbolic connections in this way can alienate, rather than bridge understandings of other systems of knowledge in a judge who may not value these connections.

Brody critiques the court "set-up" as being "terribly at odds with Dunne-za/Cree and other hunter-gatherer and probably all other Indian cultures," in "the extent to which the court procedure is a game. ... [L]awyers for the Crown, when cross-examining, or all lawyers when cross-examining, neither trust nor mistrust. It hasn't anything to do with believing or not believing. It's simply a game that's being played with facts—with arguments. The job of a cross-examining lawyer is to discomfort, to unsettle, to confuse." (in Ridington 1990:286). From Brody's experience, it is clear that if anthropologists are going to continue to participate in the endeavour of providing expert testimony in the courts, they must make efforts to understand their audience, and present their evidence in a discourse which is both professionally rigorous, yet satisfying to the judge who may not share the theoretical background held by the discipline. Foster and Grove have suggested that one way to get around this "set-up" is to have experts collaborate and submit joint reports, or to have court-appointed researchers submit expert witness testimony (Foster & Grove 1993:224).

In the cases where anthropology has been rejected as valid evidence, the judiciary has been left to come up with their own understanding of the cultural and historical context given to argue the case. The rejected anthropology in *Delgamuukw* was replaced by one of McEachern's own making, characterizing the lives of people in historic Gitksan and Wet'suwet'en societies as "nasty, brutish and short" (Cruikshank 1992:25). In *Bear Island*, trial judge Steele wrote his own history of the Anishnabay/

Tamagami using his powers of judicial notice (McNeil 1992). This history ignored many problems in the data and suited the bias the judge had against the claim being made. When the Supreme Court rejected Steele's version of history, it was the first time that the judiciary acknowledged "openly that a legal outcome may rest on a question of historical interpretation" (Fortune 1993:1988). Lane (1988:18) outlines another case where the judge felt he was competent in assessing the facts presented by the Aboriginal claimants and did not admit any expert testimony at all. He then ruled on the case making judgements about facts which were in error and had inconsistencies "which would have been pointed out by an expert witness".

Most judges have not had expert training in the social or historical sciences, nor have many of them spent a great deal of time in the Aboriginal communities they are trying. Anthropology claims as one of its hallmarks that it can provide a perspective on "other" cultures that make them reconcilable or at least understandable with our own—"our own" being shared with the judiciary. This, however, is not a simple "common-sense" endeavour. Anthropologists go through their ritual by doing doing years of course-work, going into the field for a period of time, and writing a dissertation. That is the beginning of a career. A respected anthropologist makes a life work of this project. So how can judges become experts in social science, history and Native culture in the course of a single trial? Anthropologist Barbara Lane, who has testified in many Aboriginal rights court cases herself, emphasizes the importance of anthropologists and historians to interpret oral testimonies and documents where "[t]he judge may not possess sufficient or sufficiently accurate information regarding the particular Indian culture of the relations between Indians and non-Indians at the relevant time and place" (Lane 1988:11). At the outset, it seems that anthropologists have failed miserably at getting across in the space of a trial, some of the discipline's basic concepts. It is clear that both the concepts and the techniques for making them clear must be reassessed.

Anthropology presented in the courts draws on the concepts of culture and ethnocentrism to place the history and practices of Aboriginal people in contrast with that of dominant western society (Cruikshank 1992). These concepts have been mistaken by the courts as bias. However, failure to take these concepts into perspective has left the judiciary with their own faulty notions. As pointed out by Ridington (1992:16),

McEachern was "critically unaware of his own bias" as to "primitive" cultures and "civilized" cultures, one being less evolved (and thus with fewer rights) than the other. Anthropology, Ridington suggests, "begins with an assumption that Aboriginal people have evolved complex and meaningful adaptations to their environment [and] assumes that culture is a dynamic and living entity that continues to change and adapt to changing circumstances." McEachern (and, in turn, Lamer) mistook this acceptance as bias on the part of the anthropologists testifying on behalf of the plaintiffs. Other underlying assumptions which Ridington uncovered in McEachern's judgement include notions that primitive societies naturally (and necessarily) evolve to superior, civilized ones, and that the latter have the right to dominate the former (1992:17) and have greater right to "unused" resources (1992:12), and that primitive societies are unorganized and do not use the extent of the land (1992:18-19).

Testifying for the Crown or an Aboriginal group involves making a political decision. There are moral and intellectual burdens in doing work that will end up in litigation, or in the area of social impact assessments which are inevitably adversarial (Kew 1993/4:94-5). Ultimately, researchers have to choose which side of the fence they will be on. To deal with this, Dyck (1993) has given anthropologists clear direction that "telling it like it is" about Native communities is a more powerful, substantial position than self-censorship in anthropological writing and testimony (Dyck 1993). Foster and Grove (1993:232) consider in considerable detail the ethical choices researchers must make in working on Aboriginal rights and title cases. Their recommendations also emphasize the importance of being credible, regardless of what ethical stance one thinks they may be taking. Asch (1983) questions if anthropology is ready to credibly engage this political realm. He argues that anthropology presented in the courts on the basis of very brief field work is particularly weak. He suggests that to engage in political spheres, we must build the discipline both theoretically and methodologically (Asch 1983:209).

To get over the hurdle of ethics, rigour is more the key than "objectivity" or "ethical accountability" (Asch and Bell 1994:547). In my review of fourteen cases, judges accepted anthropological expert testimony, figured it as critical evidence in their decision, and found on the basis of that evidence in favour of Aboriginal claimants twenty times (out of a total of thirty judges who cited anthropological evidence in the following cases: *White & Bob*; *Calder*; *MacMillan Bloedel*; *Sparrow*; *Van der*

*Peet; N.T.C. Smokehouse; Gladstone; Côté; Adams; Seward*). It should be noted that in many of these cases, the final ruling was made on legal, not factual grounds. This is an overwhelming support of anthropological expert testimony.

Experts such as Wayne Suttles, Wilson Duff and Bruce Trigger, who have successfully testified in these cases, have had long histories of professional relationships with the communities, and have established academic credentials. The evidence they relied on was mostly a materialist, economic anthropology, with much less weight being given to symbolic anthropology or cultural evolutionary theory. In every case, ethnohistoric evidence was critical. In both *White & Bob* and *Calder*, Berger (the counsel for the Aboriginal groups) characterizes Duff's contribution as critical, based on "his profound knowledge of Indian ideas of tribal title, and the fact that those ideas were not moribund, but still informed Indian notions of their own past and present" (Berger 1981:49). In *Sparrow, Gladstone and Seward*, Wayne Suttles was recognized as an "eminent scholar [with] extensive academic fieldwork in the Northwest Coast [with] a large number of publications to his credit" (Pryce 1992:36). In *MacMillan Bloedel v. Mullin*, Arcas Archaeological consultants were hired by the logging company to investigate Aboriginal use of the forest on Mearns Island. The judge was impressed by the impartiality of their evidence for extensive use of the forest by the Nuuchah-nulth: "It is an independent study and an impressive study. I see nothing to indicate that the authors were influenced by the source of their instructions" (Seaton J., *MacMillan Bloedel* [1985] 1 C.N.L.R. p. 66). These examples, among others, are arguably the rigorous perspectives needed for successful litigation, at least as long as they continue to be in keeping with the dominant culture's own materialist, economic "common-sense" models for understanding society.

Though much anthropological testimony has been successfully argued in the courts (not being dismissed as mere advocacy), a troubling trend can be seen. Again, reviewing the fourteen cases cited earlier, there were six instances (out of thirty judges citing anthropological evidence) where judges accepted anthropological testimony, yet found the facts ruled against the Aboriginal claimants (this occurred in the following cases: *Calder; Baker Lake; Van der Peet; N.T.C. Smokehouse; Côté*). In the last two cases listed, the judges found inadequate ethnohistorical evidence to conclude definitively in favour of the existence of an Aboriginal right

(though sufficient evidence was found by four judges at higher levels in *N.T.C. Smokehouse* and by one judge above and one below in *Côté*). Of the remaining cases, judges use cultural evolutionary models as evidence to find against Aboriginal people.

In *Calder*, though the trial court found the evidence presented by Duff credible (Berger 1981:62), the BC Supreme Court judge found that on the evidence the Nisga'a were too primitive to have had a system of property ownership analogous to English common law property ownership (Gould J., *Calder* [1970] 8 D.L.R. (3d), 59). This was later overturned by Hall's dissenting opinion at the Supreme Court, stating that "the Nishgas in fact are, and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law, having, in the words of Dr. Duff, 'developed their culture to higher peaks in many respects than in any other part of the continent north of Mexico'" (Hall J., *Calder* [1973] D.L.R. (3d), 145).

In *Baker Lake*, the Federal Court of Canada (rejecting the social science evidence of Usher as advocacy and Freeman as inconsistent with the facts established by archaeologists Harp and Wright) accepted the cultural evolutionary models presented to them by the archaeologists arguing for both the Crown and the Inuit on the point where they both agreed—that the Inuit were very low on the cultural evolutionary scale (Mahoney J., *Baker Lake* [1980] 1 F.C.T.D. 518). Combined with the scientific evidence of biologists which questioned the effect of the contested mining on caribou herds, the judge "preferred to rely on his own 'common-sense' interpretation of Native testimony, supported by carefully chosen 'factual' confirmation by 'ordinary white people,' and professionals selectively labelled 'scientists'" (Culhane 1998:95).

Again, a simple model of cultural evolution was debated in *Van der Peet* where Crown witnesses Stryd (an archaeologist) and Dewhirst (an anthropologist) argued that the Stó:lo were band-level societies which could not have had regularized trade other than ceremonial or opportunistic exchanges. Daly, an anthropologist called as expert witness for the Stó:lo, argued that they were a tribal-level society, with all the trappings of a market economy associated with such. All of the experts had very limited experiences in the Stó:lo community, and relied on theoretical assumptions which dominated (though seriously critiqued) the archaeological literature of the day. Hudson notes that "what was being argued

about were interpretations of Marshall Sahlins' book, *Stone Age Economics*, and that the courtroom was an awkward place for such a debate" (Hudson 1990:33). These evolutionary models were clearly inadequate to describe the social organization of the Stó:lo, a complex Northwest Coast society. However, the evidence was upheld by the majority of judges at the Supreme Court, led by Lamer who was reluctant to re-evaluate findings of fact by trial judges. Justices L'Heureux-Dubé and McLachlin both provided dissenting opinions which saw the evidence as clearly in favour of there being an Aboriginal right to sell fish, criticising the trial judge for making "no findings of fact, or insufficient findings of fact, as regards to the Stó:lo's distinctive Aboriginal culture relating to the sale, trade and barter of fish."

Kew cautions that we must not assume that "courts, any more than the public, will reject anthropological or other theories and conclusions because they have been discredited within the discipline" (Kew 1993/4:93-4). These cultural evolutionary models were used uncritically on the witness stand, long after being rejected in the larger anthropological discourse. In fact, judges who refuse to consider anthropological testimony have invoked cultural evolutionary models to dismiss Aboriginal rights and title claims. Steele did just this in *Bear Island* where he found that "the defendants have failed to prove that their ancestors were an organized band level of society" (Steele J., *Bear Island* [1984] 15 D.L.R. (4<sup>th</sup>) 373). Like the primarily symbolic interpretations which failed to reach out to judges as valid "objective" evidence, evolutionary models fail to provide adequate context for the kinds of particularistic, and historic understandings of Aboriginal societies the courts need to make fair judgements.

Regardless of the theoretical or methodological rigour with which the expert witnesses testify, there are broader politics which become a factor in the decisions made by the judiciary. Culhane has suggested that the court ruled against the Stó:lo in *Van der Peet* because of the many competing interests for sockeye, while awarding a judgement in favour of the Heltsiuk in *Gladstone* because there was no competing interests for commercial herring roe (Culhane 1998:342). This political element was born out in part by the Supreme Court decision in *Sparrow*. In considering whether an Aboriginal right to fish is a right to fish commercially, the Chief Justice recognized Aboriginal bartering by the Musqueam (who share the same watershed, language and culture as the Stó:lo) as

possibly being a commercial right. However, the "presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between Aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon" (Dickson, C.J., *Sparrow* [1990] 1 S.C.R. 1100-1101). The Supreme Court left the matter undecided given that it was not the question put before them in the case. While there may have been some difference in the quality of expert testimony given in these cases, it is clear that one of the major factors may continue to be the political implications of ruling in favour of controversial Aboriginal rights.

Anthropologists have a moral obligation to watch how their discourse is being interpreted by the courts, and protest within the system in cases where it has been grossly misused or misunderstood. After McEachern's dismissal of anthropological testimony in *Delgamuukw*, the Canadian Anthropological Association considered becoming an intervener in the appeal to the Supreme Court (Mills 1994a:191, note 4). If they had filed as an intervener, contesting how McEachern interpreted the expert testimony presented, Lamer would have had to consider the original material more carefully. As it stands, no professional organization of anthropologists has become an intervener in a case where the anthropological testimony is obviously misunderstood by the trial or lower appeal court judges, and like in the recent suite of cases handed down by the Supreme Court (i.e., *Van der Peet*, *N.T.C. Smokehouse*, *Delgamuukw*), the dismissive opinion of the trial judge has held.

## Conclusions: Future Use of Evidence

*Delgamuukw* has opened the door for Aboriginal rights to be defended on new evidentiary territory. By accepting oral histories as key to defining Aboriginal common law, Canadian society now has the option of embracing the social and political processes which surround and embed oral histories, and give them their meaning and significance: "for Native societies, the oral format is itself the embodiment of their history, in addition, the telling of history is usually accompanied by what might be termed a 'public ceremony' with the attendant gravity that such a forum suggests" (Fortune 1993:92). This opens the way for a dramatically dif-

ferent interface of the customary laws of Aboriginal people and those of the dominant Canadian society (Fortune 1993:96). The law must indeed expand its terms, or it will simply continue to suppress and subjugate dissenting voices in Native communities. But how exactly this opening of the law to "respond to culturally different priorities, interpretations and realities" will work is an open question (*ibid.*). It brings forward the political nature of the customary laws of Aboriginal people, and how oral traditions continue to be used to give meaning to multiple perspectives in any native communities.

Anthropologist Jo-Anne Fiske asks, "who in the First Nation will be empowered to verify traditional rights? Will the careful avoidance of coding traditional law be undermined as the dominant courts unilaterally assume the right to do the opposite?" (Fiske 1997/8:288). She has seen the process of reasserting customary laws in Aboriginal communities and comments that in doing this, "internal battles among Aboriginal people over the exercise of traditional authority" come into being (*ibid.*). This new class of lawmakers would construe law which "is likely to reflect conflict and institutional change within the shifting formations of Aboriginal nations" and they will be "in a position to exclude the possibility of alternative meanings and other discourses that might arise within their communities" (Fiske 1997/8:287-8).

Fiske accounts how the customary laws of Aboriginal people continue to be subjugated through the powerful and privileged discourse of western law (Fiske 1997/8). Historical narratives of missionaries and colonial functionaries show that early in the colonization of British Columbia, "Indian Law" as practised in the feast houses of Aboriginal communities were assaulted first by Christian laws, and then laws of the colonial magistrates. The Aboriginal laws, which were de-legalized, became the inflexible, exotic tales recorded by salvage ethnographers as oral traditions, social custom and moral obligation (Fiske 1997/8:285-6). She reiterates the concern that today, when oral histories are being used by Aboriginal people to assert their rights from their own perspectives, they risk becoming a "reified 'truth discourse' devoid of the flexibility and process inherent to the legal order [discourse] from which it emerged" (Fiske 1997/8:288).

Another problem emerges when societies who have undergone years of assimilation and language loss come to present their case for Aboriginal title in the courts. Not every Aboriginal community has remembered

their version of *adaawk*. Culhane observes that "the rights of different First Nations, with diverse histories of relationships with academics—particularly archaeologists and historic ethnographers—could be determined by the presence or absence, reliability or weakness, of the academic record" (Culhane 1998:341). In fact, the potency of this observation is highlighted by Lamer's decision, which keeps expert witnesses in a limbo and promotes oral histories as highly credible, if not the only, admissible evidence for pre-sovereignty occupation. If there has been massive language loss, depopulation or urbanization—all results of colonial processes which Aboriginal people are struggling to reconcile with the contemporary state—oral histories may not exist in the detailed form that communities could use to substantiate their legitimate claims to Aboriginal title or rights.

Given that it does not seem likely in the immediate future for the law to be put entirely back into native communities, claims for Aboriginal rights and title will continue to be played out in the courts. The acceptance of oral histories into these courts has opened the difficulties of communicating across the rift of entirely different cultural discourses—those of the many and diverse Native communities and those of the Canadian judiciary. Can the judges, who do not come from these communities, or have many experiences in them, be expected to readily grasp the complex and deeply embedded meanings given in oral traditions? Anthropology is the discipline which has developed around bridging understandings between communities and cultures, and thus is in a good position to facilitate unpacking these meanings in judicial settings.

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