AFTER DELGAMUUKW:

ABORIGINAL ORAL TRADITION AS EVIDENCE IN ABORIGINAL RIGHTS AND TITLE LITIGATION

by

Maureen Ann Simpkins

A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy
Department of Adult Education, Counseling Psychology
and Community Development

Ontario Institute for Studies in Education of the
University of Toronto

After Delgamuukw:
Aboriginal oral tradition as evidence in Aboriginal rights and title litigation

Table of Contents — Page

Abstract i
Acknowledgments iii

CHAPTER 1 - INTRODUCTION

1.1 Introduction to the Study 1
1.2 Aboriginal Oral History and Aboriginal Rights and Title Litigation 4
1.3 Purpose of the Study 5
1.4 Research Perspective 5
1.5 Personal Perspective 7
1.6 Researchers Assumptions 9
1.7 Definition of Key Terms 11
1.8 Summary 14

CHAPTER 2 - LITERATURE REVIEW

2.1 Introduction 17
2.2 *Delgamuukw v. British Columbia* 19
2.2.1 Exception to the rule of hearsay 22
2.2.2 Judge McEachern's treatment of evidence 23
2.2.3 Aboriginal rights: frozen in time 25
2.2.4 Primitive versus civilized comparisons 25
2.2.5 Oral versus written evidence 26
2.3 The Great Divide: Literacy versus Orality
2.3.1 Introduction 27
2.3.2 Growth of literacy: foundations of the "great divide" 28
2.3.3 Writing as truth 30
2.3.4 Primitive versus civilized 32
2.3.5 Social context of literacy 33
2.3.6 In summary 35
2.4 Approaches to Cross-Cultural Understanding of Aboriginal Oral Histories 37
2.4.1 In summary 42
2.5 Land, Law and Aboriginal Rights 43
2.5.1 Aboriginal rights or Crown rights? 46
2.5.2 In summary 49

CHAPTER 3 - LEGAL-HISTORICAL BACKGROUND: ABORIGINAL RIGHTS/CROWN RIGHTS AND ABORIGINAL ORAL HISTORIES AS EVIDENCE

3.1	Introduction	51
3.2	Foundations of Aboriginal Rights	52
3.3	Aboriginal Rights and Title	55
3.4	Aboriginal Perspective	56
3.5	Issues in Aboriginal Rights and Title Litigation	57
3.6	Role of Precedent in Legal Reasoning	58
3.7	A Selected Review Of Cases, Statutes and Reports Informing Aboriginal Rights and Title Litigation and Delgamuukw (1991, 1997) in Particular	60
	3.7.1 Time line of cases, statutes and reports relevant to Aboriginal rights and title litigation.	61
	3.7.2 Selected cases informing Delgamuukw (1991, 1997): A Table	62
	3.7.3 Royal Proclamation of 1763	64
	3.7.4 *Worcestor v. Georgia* (1832)/ *Johnson v. McIntosh* (1823) *St. Catherines Milling* (1888)	66
	3.7.5 *Baker Lake* (1980)/ *Re: Southern Rhodesia* (1919)	70
3.8	Chronological Leap	73
	3.8.1 *Calder v. Attorney General of British Columbia* (1973)	75
	3.8.2 Canadian Constitution Act 1982: Sections 25 and 35	77
	3.8.3 *R. v. Sparrow (1990)/ Guerin v. Queen* (1984)	78
	3.8.4 *A.G Ontario v. Bear Island* (1989)	81
	3.8.5 *Delgamuukw v. British Columbia* (1991)	84
	3.8.6 In summary	86
3.9	Post *Delgamuukw v. British Columbia*	
	3.9.1 *Mabo v. Queensland* (1992)	89
	3.9.2 *Van der Peet* Trilogy (1996): *R. v. Van der Peet; R. v. Gladstone; R. v. N.T.C. Smokehouse Ltd.*	90
	3.9.3 Royal Commission on Aboriginal Peoples (1996)	93
	3.9.4 In summary	94
3.10	Supreme Court Recommendations *Delgamuukw* (1997)	
	3.10.1 Reactions to *Delgamuukw v. British Columbia*	96
	3.10.2 Oral history and the *Delgamuukw* (1997) recommendations	97
	3.10.3 The judgment: some of the main issues	100

CHAPTER 4 - METHODOLOGY

4.1	Situating the Research Methodology	104
	4.1.1 Insider-outsider	105
	4.1.2 Qualitative approaches	108
4.2	The Research Process	
	4.2.1 Research questions	111
	4.2.2 Research objectives	112
	4.2.3 Methods of research	112
	4.2.4 Multiple research methods	113
4.3	The Interviews	
	4.3.1 Elite interviews	115

	4.3.2 Criteria for selection of interviewees	116
	4.3.3 Consent of interviewees	118
	4.3.4 The interviewees	119
	4.3.5 Selection and recruitment	121
4.4	Interview Protocol	
	4.4.1 First contact	122
	4.4.2 Framework for questioning	122
	4.4.3 Testing of questions	124
	4.4.4 Interview structure	125
4.5	Reflections on Data Organization and Interpretation	126
4.6	In Summary	128

CHAPTER 5 - AFTER DELGAMUUKW: INTERVIEWEE RESPONSES

5.1	Introduction	131
5.2	What do you believe are the advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence?	132
	5.2.1 Interviewees' responses: advantages	132
	5.2.2 In summary	134
	5.2.3 Interviewee's responses: disadvantages	134
	5.2.3.1 Interpretation	135
	5.2.3.2 Evaluation	136
	5.2.3.3 Treatment of oral histories	139
	5.2.3.4 Location and situation of Aboriginal communities	139
	5.2.3.5 Lack of respect	140
	5.2.3.6 Time limitations	141
	5.2.3.7 Limitations of the rule of law	141
	5.2.4 In summary	142
5.3	Supreme Court recommendations in Delgamuukw: As they pertain to the use of Aboriginal oral histories as evidence	143
	5.3.1 What is your opinion regarding the Supreme Court recommendations in Delgamuukw, particularly with reference to the use of oral histories in the courts?	144
	5.3.2 In summary	148
5.4	Fundamental Changes to the Canadian Legal System	148
	5.4.1 In summary	151
5.5	Shifting the Ground	151
	5.5.1 In summary	154
5.6	Are you optimistic about the future of Aboriginal rights and title in the courts?	154
	5.6.1 Table	155
	5.6.2 In summary	157
5.7	Cross-cultural Understanding of Oral Histories	158
	5.7.1 In summary	160
5.8	Educating the Judge	160
	5.8.1 In summary	163

5.9 The Culture of the Courtroom/The Culture of Aboriginal Communities 164
5.9.1 In summary 166
5.10 Chapter Summary 166

CHAPTER 6 - A CRITICAL REVIEW OF EMERGING ISSUES

6.1 Introduction 171
6.2 Systemic Legal Issues: Aboriginal Oral Histories and Aboriginal Rights and Title Litigation 172
6.2.1 Tests 173
6.2.2 Frozen rights 175
6.2.3 Extinguishment 177
6.2.4 Sovereignty 180
6.2.5 In summary 182
6.3 Contextual Issues: Interpretation, Evaluation and Comparison of Oral Histories as Evidence 184
6.3.1 Advantages/disadvantages table 185
6.3.2 Interpretation and evaluation 185
6.3.3 Comparison of the written and the oral 190
6.3.4 Community validation 191
6.4 Chapter Summary 193

CHAPTER 7 - CONCLUSIONS/RECOMMENDATIONS

7.1 Conclusion 195
7.2 Aboriginal Rights and Title Litigation 196
7.3 Approaches to Cross-Cultural Understanding 198
7.4 Areas of Future Research 200

REFERENCES 202

APPENDIX A: Thesis Abstract (sent to interviewees) 220

APPENDIX B: Letter of Informed Consent 221

APPENDIX C: Guidelines for Interview Questions 222

After Delgamuukw:
Aboriginal oral tradition as evidence in Aboriginal rights and title litigation.

A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy
Department of Adult Education, Counseling Psychology
and Community Development

Ontario Institute for Studies in Education of the
University of Toronto

Maureen Ann Simpkins 2000

ABSTRACT

The integration of Aboriginal oral tradition within many academic disciplines, legal cases and land-use disputes means that Euro-Canadian institutions now have to examine their relationship to and their understanding of Aboriginal oral tradition. Both the legal and the contextual issues involved in cross-cultural interpretation of oral and written historical materials have implications for how Aboriginal communities may chose to share, validate and evaluate their oral traditions. As well the identification of these issues have implications for how Euro-Canadian institutions may choose to approach Aboriginal oral tradition as evidence.

The eight people interviewed gave their thoughts and opinions about the use of Aboriginal oral tradition as evidence, using the Supreme Court recommendations in *Delgamuukw* (1997) as a focus. The interviewees had either; a) given evidence in the form of Aboriginal oral histories in a court case; b) been involved in a court case where Aboriginal oral histories were called upon as evidence; or c) done research/writing in the area of Aboriginal oral histories. Their opinions represent a particular segment of

informed opinion post-*Delgamuukw* (1997). The combination of the issues that emerged from the legal research and the interviews contributes to two main bodies of research and literature:

1. Aboriginal rights and title litigation: systemic barriers were identified that make it difficult for Aboriginal oral histories to be evaluated equally alongside written historical evidence. A number of issues such as testing for Aboriginal rights, frozen rights, how rights can be extinguished by the Crown and how the Crown rationalizes assertions of sovereignty, emerged as systemic barriers within Aboriginal rights and title litigation.

2. Cross-cultural communication: issues such as interpretation, evaluation and comparison of Aboriginal oral histories alongside of written historical documents were identified as some of contextual issues that need to be dealt with. These issues have more to do with the nature, the content and the role that Aboriginal oral histories play not just in the courts, but in other forums where Aboriginal oral histories are being evaluated and compared in cross-cultural contexts.

ACKNOWLEDGEMENTS

Researching and writing this thesis has been a long process and I have many people to thank. First of all I would like to dedicate this work to two people in particular. The first is my father, Clifford Simpkins who passed away just as I began my course work over 5 years ago. I know he is smiling down on me now as I complete this work. The second person is Dr. Nathan Kaufman whose encouragement and faith in me helped me make the decision to do a Ph.D.

Of course there would be no Ph.D without a committee and mine has been ever changing. I would like to thank Barbara Burnaby for sticking with me the last few years and providing much needed guidance and advice. I would also like to thank Elizabeth Smyth for coming on board at the last minute and providing editorial expertise and insight. Also thanks to Jack Quarter, Budd Hall, Hesh Troper, Peter Gamlin, Laara Fitznor and Peter Homenuck.

The eight people interviewed for this study were all very generous with their time and their thoughts. Those discussions were extremely stimulating for me and pushed my research into new areas. Thanks to: John Borrows, Marlene Brant-Castellano, Ted Chamberlin, Julie Cruikshank, Dara Culhane, Mark Dockstator, Gary Potts and Don Ryan.

This thesis was completed with more than "a little" help from my friends. For their unconditional love and support during some very difficult times, my heartfelt thanks goes to: Lynda Ashley, Zsa Zsa Balogh, Michael, Judith and Hannah Kaufman, Rita

and Nathan Kaufman, Carol-Ann O'Brian, Karen O'Gorman, Louise Owen, Maggi Redmonds, Richard Simpkins, Florence Simpkins, Mariana Valverde and David Wilson.

Several people acted as my "legal advisors" and gave of their time to discuss issues and read various drafts: John Borrows, Mark Dockstator and Kate Hughes. Lynda Ashley also gave of her time to edit and proof the whole thesis.

For the past four years, I have met regularly with three people in a thesis support group. Each has given me more than they will ever know: thank-you to Gordon Ball for your insight and humour; to Elizabeth Wallace-Williams for your stamina, encouragement and for simply being there; and, to Jayne Butler for your patience and wisdom. There would not be a thesis without these people.

And last but never least, my son Liam has always been an inspiration to me. He is hard-working, creative and has provided constant encouragement. This thesis is also for him. Cheers.

CHAPTER 1

1.1 Introduction

> Stories connect people in such a world, and they unify interrupted memories that are part of any complex life. Rooted in ancient traditions, they can be used in strikingly modern ways. (Cruikshank, 1998, p. 46)

Stories rooted in Aboriginal oral tradition[1] face new challenges in modern cross-cultural contexts such as law. While Aboriginal peoples from many different cultures use oral tradition to teach their children, to validate land stewardship, to celebrate births and honour deaths, Euro-Canadian culture honours the written word as an aspect of what it is to be "civilized". This difference in perspective has led the Euro-Canadian power structure to dismiss and degrade the Aboriginal oral tradition. For example, amendments to the Indian Act in 1884 outlawed the potlatch ceremony, a ceremony of which oral performance and histories were an intricate part (Miller, 1991c, p. 325). Similarly, due to the prohibition on fund raising for land-claims [2](Dickason, 1997, p. 248) and the rule of hearsay evidence within legal cases[3], Aboriginal oral tradition was rarely heard within the courts until fairly recently. These are only a few of the factors which served to silence the voice of Aboriginal peoples.

Much of the collective power of Aboriginal communities is embodied in oral

---

[1] See p. 12 for a definition of oral tradition.

[2] In 1924 the Indian Act was amended to prohibit 'Indians' from using band funds for land claim actions without the approval of the Department of Indian Affairs. In 1927 this was strengthened by also prohibiting unauthorized soliciting for outside funds, a measure that remained in law until 1951.

[3] "Evidence of the oral statements of a person other than the witness who is testifying and statements in documents offered to prove the truth of what was asserted. In general, hearsay evidence is inadmissible, but this principle is subject to numerous exceptions" (Martin, 1983, p.188).

tradition (Borrows, 1999a), and this knowledge is central to their understanding of Aboriginal rights and title within a legal context. A crucial issue in this thesis is whether the collective power that lies within oral traditions can be translated in a cross-cultural context. After many years of the courts sometimes accepting Aboriginal oral tradition as evidence, sometimes not, and sometimes dismissing them after they have been heard, the Supreme Court of Canada recommendations in *Delgamuukw v. British Columbia* (1997) have provided some guidance for the use of oral tradition as evidence. The legal system and particularly *Delgamuukw* (1991, 1997) is used as a focus for this thesis and the issues identified in chapters 5 and 6 such as community validation and control of Aboriginal oral tradition, also pertain to the use of Aboriginal oral traditions in other cross-cultural contexts.

There were two significant decisions made regarding *Delgamuukw v. British Columbia*. The first took place in 1991 in the British Columbia Supreme Court. The Gitxsan and Wet'suwet'en claimed ownership and jurisdiction over their traditional territories, using their oral traditions as a significant part of the evidence. In that case Judge McEachern dismissed their claims for ownership and jurisdiction and stated that he was "unable to accept adaawk, kungax, and oral histories as reliable bases for detailed history, but they could confirm findings based on other admissible evidence" (*Delgamuukw v. British Columbia* [1991], 3 W.W.R 97). The Gitxsan and Wet'suwet'en eventually took their case to the Supreme Court of Canada, after an appeal in the British Columbia Supreme Court.

In December of 1997, the Supreme Court of Canada released a set of

recommendations in the case of *Delgamuukw v. British Columbia*. A section of the recommendations pertain to the use of Aboriginal oral tradition in the courts. These recommendations were used as a focus for the interviews and the subsequent conclusions made in chapters 6 and 7.

Among many other kinds of evidence that non-Aboriginal power structures are beginning to take seriously, the Supreme Court as part of the *Delgamuukw* (1997) case has granted equal weight to Aboriginal oral tradition alongside written historical evidence. What are the advantages and disadvantages of Aboriginal oral tradition being evaluated equally alongside written historical evidence? Also, what are the contextual issues that need to be considered when using Aboriginal oral tradition in cross-cultural contexts?

Now, in the aftermath of *Delgamuukw* (1997), is the time to take stock and identify the possibilities as well as the problems of bringing Aboriginal oral tradition into cross-cultural contexts. One possible problem, for example, is that Aboriginal oral tradition is meant to be told and validated in a certain community context. When the state takes an interest in Aboriginal interpretation, there is the risk that Aboriginal control will be lost and reinterpreted by the state for its own purposes. Community control and validation are only two areas of discussion. Issues such as evaluation, interpretation and the comparison of oral and written evidence will also be examined.

Within the legal system, the power and control of cross-cultural interpretation remains within a Euro-Canadian framework. The integration of Aboriginal oral tradition within many academic disciplines, legal cases and land-use disputes means that Euro-

Canadian institutions now have to examine their relationship to, and understanding of, Aboriginal oral tradition. Both the legal and the contextual issues involved in cross-cultural interpretation of oral tradition and written historical materials have implications of how Aboriginal communities may chose to share, validate and evaluate their oral traditions.

1.2 Aboriginal Oral Tradition and Aboriginal Rights and Title Litigation

In cases where an Aboriginal group is trying to prove its Aboriginal title to the land, there is typically an assumption within the legal system that Crown sovereignty already exists (Kellock & Anderson, 1992, p. 98-99). Therefore the burden of proof falls to the Aboriginal group to prove land-use and occupation prior to contact and consistently after. Judges typically use a test in order to evaluate certain criteria that the court sets out. The criteria will vary from case to case, and are based on precedent from previous similar cases as well as concepts and comments that may not have been part of the final judgment, expounded on by judges, lawyers and academics.

As there is a legal requirement for historic evidence to prove land-use and occupation, and there may be no written historical documents, oral tradition have become extremely important. Oral tradition has always been important for all Canadian Aboriginal cultures as a validation of historic systems of governance, land tenure, and social systems; however, it is only recently that these ancient traditions are being used in modern ways (Cruikshank, 1998, p. 46).

1.3 Purpose of the Study

The primary purpose of this investigation is to identify the advantages and disadvantages of Aboriginal oral tradition being evaluated equally alongside written historical evidence.

There are four questions related to this prime purpose: What are some current, informed opinions regarding the Supreme Court recommendations in *Delgamuukw*, particularly with reference to the use of oral histories in the courts? Do judges need a 'cultural hearing aid'[4], so to speak, to evaluate evidence such as Aboriginal oral traditions, which are typically outside their own culture and experience? What issues emerge as a result of the contextual differences identified between the culture of the courtroom and the culture of Aboriginal communities? And how do these issues affect community validation and control of Aboriginal oral tradition?

1.4 Research Perspective

It is necessary to consider the research framework to determine the angle of perspective, and then to consider my personal perspective. Since I am a non-Aboriginal person studying Aboriginal issues, it is particularly important for me to be clear about my approach. I must also be able to place myself either inside or outside of the research, depending on which approach is appropriate.

---

[4] The term 'cultural hearing aid' comes from an article written by Walt Taylor (Wednesday, July 15, 1987) in *The Three Rivers Report*. Taylor was referring to Judge McEachern's 'cultural hearing problems' when he refused to listen to Chief Mary Johnson's song. Judge McEachern said "I can't listen to your Indian song, Mrs. Johnson. I've got a tin ear." Mrs. Johnson replied, "That's okay, your highness, I've got a can opener."

First of all, in terms of content, this is not a study of Aboriginal oral tradition in itself. It is a study of the advantages and disadvantages of Aboriginal oral tradition being evaluated equally alongside of written historical evidence. Secondly, it is a study of legal precedents which have played a role in Aboriginal rights and title cases, and the contentious issues which emerge from both legal precedents and from informed opinion. And thirdly, this is a study of the contextual issues that arise when Aboriginal oral tradition is taken out of the context of the community and evaluated and compared with written historical documents.

My evidence in response to the primary research question is experiential and opinion oriented. To collect data I utilized the unstructured or semi-structured interview approach as recognized by qualitative researchers (Merriam, 1988; Douglas, 1985; Marshall & Rossman, 1995; Kirby & McKenna, 1989) as a style appropriate to accommodating "insights and understandings" (Merriam, 1988, p. 74). Using a framework based primarily on qualitative interviews, but which also integrates legal case materials and other literature. I have provided a measure of internal validity and a variety of perspectives on the research questions (Bailey, 1996, p. 78) through "triangulation": the use of multiple investigators and multiple sources data to confirm the emerging findings (Merriam, 1988, p. 169).

My thesis is based on the premise that policies, images and interactions with Aboriginal people historically and currently are often founded in an unfavourable comparison of the ways that Aboriginal peoples are not like Euro-Canadians'. The history of cultures which are based in an oral tradition are often heard (or not heard)

with a 'tin ear'. One premise of qualitative research is the fact that there are only "perspectives rather than truth per se" (Merriam, 1988, p.168). In this type of research it is important to "understand the perspectives of those involved in the phenomenon of interest, to uncover the complexity of human behavior in a contextual framework, and to present a holistic interpretation of what is happening" (Merriam, 1988, p. 168). By bearing witness to Aboriginal viewpoints, the analysis here can begin to challenge earlier distortions.

1.5 Personal Perspective

Why am I interested in Aboriginal oral tradition? I have had a number of experiences that did not seem very significant at the time, but pieced together form the foundation of my interest in this topic.

In 1983-84, I was working with the Participatory Research Group and I had the opportunity to lead several week-long workshops in the community of Big Trout Lake in Northern Ontario. These workshops were experientially oriented in order to teach community research skills. Many of the participants were community members who chose to do taped interviews with Elders regarding some historical questions to which they sought answers. After these interviews there was a transformation concerning the attitude of the group. For the first few days, the group was withdrawn and seemingly disinterested; however, after doing the oral historical interviews, the group was both stimulated and yet sometimes angry at what they were finding out. Some of the participants were listening to stories about how their relatives were treated by Hudson

Bay store managers or local priests. It was an incredible learning experience for me for two reasons; these stories (a) pulled the participants into their community history; and (b) it helped them understand current policies in an historical context. The power and the knowledge contained in this community's oral histories were quite evident to me and to the workshop participants.

Within a few years I was putting proposals in to C.B.C[5] radio's "Ideas" program. I was fascinated by the art of listening and the fact that our society rarely has the opportunity to listen to the experience and stories of people from Aboriginal communities. I completed three series for "Ideas", traveling to Aboriginal communities in many parts of Canada (Simpkins, 1990, 1991). In British Columbia, I visited the Gitxsan and the Wet'suwet'en to talk with them about their struggles with both the provincial and federal governments to gain jurisdiction over their traditional territories. This visit took place during the famous summer of 1990 when Aboriginal communities across Canada were in constant contact over the confrontation at Oka. This was also just before the final decision was announced in the *Delgamuukw* (1991) case.

In the short time I spent with the Gitxsan and Wet'suwet'en, the importance and reliance on oral tradition became quite evident to me. At one point, I was invited to a planning meeting for an upcoming naming potlatch. The organization and recitation of stories and songs at that meeting had been handed down from generation to generation. If someone could not remember his or her part, an Elder was behind him or

---

[5] Canadian Broadcasting Corporation.

her to give support and encouragement with centuries-old words and stories.

Also in 1991, as the final judgment was handed down in the *Delgamuukw* case, I was teaching a course in Aboriginal oral history methodology[6] in the Native Studies Department at Trent University. I am continuing to teach that course into 2000. Some of the issues that I focus on in this thesis are a result of many discussions with both Aboriginal and non-Aboriginal students in that course.

My perspective comes from being a participant, an observer, an interviewer, a writer and also an outsider in the Aboriginal communities and organizations that I have worked and spent time in. The experiences that I cite, woven together, have influenced who I am today and have shaped why I have adopted certain perspectives. I am researching and writing this thesis as an academic striving to apply the practical knowledge and importance of Aboriginal oral tradition to Aboriginal/ non-Aboriginal relations in Canada.

1.6 Researcher's Assumptions

From my experience, I assume that much can be learned about a culture through its oral traditions. Oral traditions can teach young community members about their culture, and can also be used as a powerful tool for community change (Slim &

---

[6]Course description N.S 383a: "this course introduces the theory, practice and critical issues involved with using community-based oral history methodology. Weekly topics include: practical approaches to oral history, interview techniques, story-telling, appropriation, ethics, and oral history as evidence in court cases. Students are given the opportunity to carry out an oral history project."

Thompson, 1995, p. 95-139). Examples range from community immunization programs in Somalia, where oral traditions provided much needed information about traditional health practices and historical problems, to the Dene in northern Canada, who documented traditional environmental knowledge to be integrated with western scientific methods in order to develop a community-based natural resource management system (Slim & Thompson, 1995, p. 116).

I undertook this research under the assumption that the inclusion of Aboriginal oral tradition in Canadian courts held the possibility of educating the judiciary about Aboriginal oral traditions, hence furthering the cause of Aboriginal rights and title. I knew that this would not be an easy process, but I was interested in identifying exactly what some of the contentious issues are. The identification of these issues will, in turn, be useful in a variety of venues where Aboriginal oral tradition is being heard as evidence, or where it is being evaluated and compared with written historical evidence.

When I read Judge McEachern's final judgment in *Delgamuukw* in 1991, I despaired, as many other people did. The words he used invoked the same colonial sentiments set out in *Re: vs. Rhodesia* in 1919[7]. Yet, when the Supreme Court of Canada made positive recommendations in *Delgamuukw* in 1997, I felt it was a huge step forward for the inclusion of Aboriginal oral histories[8] in Canadian courts. At the

---

[7] "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized societies" (*Re: Southern Rhodesia*, 1919, A.C. 211 at 233-4)

[8] When referring to legal cases, the term "oral histories" will be used as opposed to "oral tradition" as oral history is the term used in Canadian court cases.

same time, I remain a bit cynical about whether the Canadian legal system can truly respect and accommodate the uniqueness of Aboriginal oral histories as evidence. I could see the possibility that these recommendations would eventually result in a more equitable assessment of Aboriginal rights and title cases, but I wanted to talk to those who had more experience in the area. I also wanted to identify some of the contextual issues involved with the use of Aboriginal oral tradition in cross-cultural settings.

In essence, I assumed that there were both advantages and disadvantages to Aboriginal oral tradition being evaluated equally alongside written historical evidence, and that the issues identified may be transferable to venues outside of the courts where Aboriginal oral tradition is being evaluated and compared. I decided that doing elite interviews along with legal case research would add to the richness of the data and the analysis.

1.7 Definition of Key Terms

There are a number of key terms that appear throughout the thesis. A brief discussion of these terms may be helpful for understanding intended definitions.

Terms such as Indian, First Nation, Native, Indigenous and Aboriginal are commonly used in academic texts and the media. The word "Indian" typically has a derogatory connotation, as it is associated with Christopher Columbus believing that he reached India when he arrived in North America. Yet, Indian people are one of the three groups of peoples (Indian, Inuit and Metis) recognized as Aboriginal in the *Constitution Act*, s.35 (2),1982. The term Indian remains embedded in legislation such as the *Indian*

Act. (R.S.C 1970). "First Nation" is a new term which is widely used across Canada and refers to the Indian people of Canada, both status and non-status. The term First Nation is often used to replace the word "band" in the name of a community (www.inac.gc.ca/pub/information, December 16, 1999).

Both the terms "Native" and "Indigenous" tend to be used interchangeably; Native is defined as "a member of an indigenous people of a country or region; descended from the original inhabitants of a region or country" (Barber, 1988, p. 967). Similarly, indigenous means "pertaining to or concerned with the aboriginal inhabitants of a region" (Barber, 1998, p. 718).

I have chosen to mainly use the term "Aboriginal" throughout this thesis for reasons of consistency. The term Aboriginal peoples refers to all those peoples considered indigenous to North America, including Inuit, Metis, status and non-status Aboriginal peoples.

Trying to find a term which relates to people who are non-Aboriginal is quite problematic, as the term 'Canadian' refers to people with a multitude of cultural backgrounds. I have chosen the term *Euro-Canadian*, for lack of a more accurate term. Euro-Canadian refers to those original immigrant cultures who most influenced the underlying foundations of the Canadian legal and governmental systems (English and French).

The term *literacy* can also be problematic because of the cultural connotations that the term tends to infer. David Olson lists a number of assumptions about literacy which are currently under debate, such as: 1) Writing is the transcription of speech; 2)

Writing is superior to speech; 3) The alphabetic writing system is technologically superior to non-alphabetic forms of writing (Olson, 1994, p. 3-4). Particularly in the context of this thesis, which is focused on Aboriginal oral tradition and Aboriginal peoples who did not possess an alphabetic mode of literacy before contact with Europeans, the term literacy has cultural implications. *Literacy* can also simply refer to "the ability to read and write" (Barber, 1998, p. 836).[9]

The terms oral history and oral tradition are often used interchangeably, which tends to create some confusion. von Gernet (1996) notes that scholars often object to the dichotomy between oral history and oral tradition because a "single oral narrative may include traditions, eyewitness accounts, hearsay and other forms of evidence, and that narrators may conflate various pasts or a past with a present" (p. 5.1). While this is a legitimate concern, there is still a need for a distinction between the two. Typically *oral history* is based on first hand experience occurring during the lifetime of an eyewitness (Cruikshank, 1994, p. 404). One example might be a father relating his own childhood experiences to his progeny. *Oral tradition* on the other hand, typically refers to a "process by which information is transmitted from one generation to the next" (Cruikshank, 1994, p. 404). Often this information is second or third hand. Yet, in practice the definitions of oral tradition and oral history are not so rigid. Julie Cruikshank elaborates on this:

> Oral tradition is more than a body of stories to be recorded and stored

---

[9] The definition and cultural connotations and assumptions regarding written literacy will be further discussed in chapter 2.

> away. It is not always passed on in the form of complete narratives. In communities where I have worked, oral tradition is discussed and debated as part of a lively process, a way of understanding the present as well as the past. More important than the search for a body of reliable orally narrated texts, then, is the question of how oral tradition is used to discuss the past. The same question must be asked of written records. (Cruikshank, 1993, p. 2)

In many Aboriginal rights and title cases, Aboriginal witnesses are asked to recite or relay oral tradition, which is the knowledge and the stories that have been passed down from generation to generation. Yet oral tradition is often referred to as oral history in legal contexts (*Delgamuukw vs. Queen* 1991, 1997).

Oral *testimony,* as Ted Chamberlin describes, is people telling a story informally about what they heard. This differs from oral history, which for the Gitxsan and Wet'suwet'en is the adaaks and the kungax, a highly formalized tradition of sequences of stories and songs. Chamberlin describes this formalized tradition as "the discursive tradition itself, its language and its styles, its verbs and its nouns, its ceremonial requirements, the appropriate people speaking and singing in the proper places with their customary chests and blankets and headgear...is the ultimate guarantor of truth" (Chamberlin, 1996, p. 7). For some communities oral traditions are highly formalized, but for others they are less formalized but no less important.

1.8 Summary

The purpose of a thesis introduction is to frame and give context to the subsequent study. The evolution of Aboriginal/ non-Aboriginal relations in Canada is part of this framing, but it also entails a focus on the fact that there was not much

listening going on from Euro-Canadians. Cross-cultural communication is a learned practice, and there is not much evidence to show that when Aboriginal policy was being created in Canada in its various forms, the history and aspirations of Aboriginal peoples were listened to or taken into consideration.

After years of land claim court trials and government negotiations, the Supreme Court of Canada has come out with some recommendations regarding the use of Aboriginal oral histories in the courts. Within the courts, the term oral tradition is referred to as oral history. While these recommendations are a giant step forward for Aboriginal relations within a legal context, it opens up a number of issues, such as cross-cultural interpretation and evaluation of oral as compared to written historical evidence. This thesis identifies some of the issues involved with granting equal weight to Aboriginal oral histories alongside of the written historical evidence through the use of elite[10] interviews and legal case research.

Chapter 2, the Literature Review presents some perspectives: on what has been written about *Delgamuukw* (1991) in connection to the use of Aboriginal oral histories as evidence; on the foundations of oral versus written debates based in 'Great Divide' theories which have in turn influenced how evidence is accepted within the legal system; approaches to cross-cultural understanding of Aboriginal oral histories; and perspectives on the history of land acquisition in Canada and the evolution of Western

---

[10] Elite interviewees are "considered to be the influential, the prominent, and the well-informed people in an organization or community and are selected for interviews on the basis of their expertise in areas relevant to the research" (Marshall & Rossman, 1995, p.83).

perspectives on Aboriginal rights, which form the foundations of thought and precedent used in land claim cases.

Chapter 3 discusses some of the legal issues touched upon in Chapter 2, such as Aboriginal rights and title and the reasons that Aboriginal oral histories are often called upon in Aboriginal rights and title litigation. Much of Chapter 3 is a selected review of legal cases, the precedent they set and their eventual influence on *Delgamuukw* (1991) and *Delgamuukw* (1997).

Chapter 4 outlines in detail the research process, from identifying the type of research methodology to the data organization and interpretation. Chapter 5 contains the interviewees' responses from the interviews, and Chapter 6 takes the interviewees' responses and the legal research from Chapter 3 and provides a more critical discussion of the emerging issues. Chapter 7 is a summary of conclusions made and recommendations for future research.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

The story of my own evolving interest in oral history, oral tradition and the law began with my visit to Gitxsan and Wet'suwet'en territory in north-central British Columbia and the final judgment in *Delgamuukw vs. British Columbia* (1991). After completing a documentary for C.B.C. radio called *Holding Their Ground* (Simpkins, 1991), of which the Gitxsan and Wet'suwet'en were a part, I waited to hear the final judgement in their case. Along with many Aboriginal and non-Aboriginal peoples across the country, I was shocked and saddened not just by the judgment[1] itself regarding Aboriginal title, but also with the racist descriptions and archaic language that the judge used.[2] I knew then that I wanted to know more about how this could happen in the 1990s. Gradually it became clear to me that the use of Aboriginal oral histories as evidence would be the focus of my thesis research. First of all I wanted to know more about *Delgamuukw* (1991) and particularly the evidentiary issues which allowed

---

[1] In the final judgment, Justice McEachern ruled that "the plaintiffs' Aboriginal interests in the territory were lawfully extinguished by the Crown during the colonial period". He also stated that he was "unable to accept oral histories as reliable bases for detailed history, but they could confirm findings based on other admissible evidence" (*Delgamuukw v British Columbia* [1991], 3 W.W.R. 97). These are only two aspects of the judgment. *Delgamuukw v British Columbia* 1991, will be discussed in more detail in Chapter 3.

[2] Judge McEachern stated that "'the Gitxsan and Wet'suwet'en were by historical standards a primitive people.....The defendants ...suggest the Gitxsan and Wet'suwet'en civilizations, if they qualify for that description, fall within a much lower, even primitive order" (*Delgamuukw v British Columbia* [1991], 3 W.W.R. 97).

"oral history"[3] to be heard, but later discarded.

This review progresses into four sections and begins with *Delgamuukw v. British Columbia* (1991) and in particular with: (a) an explanation of exceptions to the rule of hearsay; (b) a review of Judge McEachern's treatment of evidence; (c) Aboriginal rights which are frozen in time; (d) a discussion of the primitive versus civilized comparisons in *Delgamuukw*; and (e) a brief overview of the distinction between oral versus written evidence in *Delgamuukw*.

Secondly, due to the judge's reference to the fact that the Gitxsan and Wet'suwet'en had no written language as a criterion to conclude they were a "primitive" people, I felt it was important to gain some understanding of the "Great Divide", literacy versus orality debates which may have influenced law. These sub-sections are entitled: (a) writing as "truth"; (b) "primitive" versus "civilized" debates; and (c) the social context of literacy.

It was also clear that Judge McEachern had difficulty listening to and comprehending Aboriginal oral tradition. Thirdly, I felt it was important to review what had been written about cross-cultural approaches to understanding, particularly with reference to cultures without a written language historically.

And finally, the *Delgamuukw* (1991) case was being fought to assert Aboriginal rights and title in British Columbia, a province that until recently would not acknowledge the existence of Aboriginal rights. Some of the questions that I had in relation to

---

[3] Technically the term should be "oral tradition", but the courts use the term "oral history".

Delgamuukw (1991) were: what are Aboriginal rights as opposed to Crown rights? What is the history of Euro-Canadian land acquisition, and how did that affect Aboriginal peoples, particularly in British Columbia?

2.2 *Delgamuukw vs. British Columbia* (1991)

On May 11, 1987, the case of *Delgamuukw vs. British Columbia* began. Together the Gitxsan and Wet'suwet'en have lived on 22,000 square miles of territory governed by their chiefs. They have never signed a treaty and, in their view, their Aboriginal right to this land has never been extinguished. The Gitxsan and Wet'suwet'en sought ownership and jurisdiction over this territory (Monet & Wilson, 1992, p. 187). At that time, the province of British Columbia would not acknowledge the existence of Aboriginal rights, claiming that anything outside of reserve lands was Crown land.

The Gitxsan and Wet'suwet'en peoples have a rich and enduring oral tradition that includes a particular philosophy of law and social organization.

> Our histories show that whenever new people came to this land they had to follow its laws if they wished to stay. The Chiefs who were already here had the responsibility to teach the law to the newcomers. They then waited to see if the land was respected. If it was not, the newcomers had to pay compensation and leave. (Monet & Wilson, 1992, p. 22-23)

One of the biggest challenges in this case was for the courts to truly try to understand and overcome the law's tendency to view Aboriginal societies as existing at an earlier stage of evolutionary development (Gisday Wa, 1989, p.21). The *Calder*

case of 1973 was a case in point. The judgment of the Court of Appeal in the *Calder* case stated that the Nisgaa (a neighbour of the Gitxsan and Wet'suwet'en) "were undoubtedly at the time of settlement, a very primitive people with few of the institutions of civilized society and none at all of our notions of private property" (Gisday Wa, 1989, p. 21). On the other hand, one of the expert witnesses, an anthropologist named Wilson Duff, stated, "It is not correct to say that the Indians did not 'own' the land but only roamed over the face of it and 'used' it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but they nonetheless were clearly defined and mutually respected" (*Calder v A.G. B.C* [1973], 34 D.L.R. (3d) 145(S.C.C). Land claim cases often pit European ownership and utilization of land against that of Aboriginal peoples.

In the *Calder* case, the Nisgaa Indian Tribal Council went to court in "search of a declaration that they held an unextinguished Aboriginal title to their traditional territories. Both the lower court and the British Columbia Court of Appeal ruled against them" (Kulchyski, 1994, p. 61). This "primitive" versus "civilized" comparison as stated in *Calder*[4] is quite common in Aboriginal title cases and emerged in *Delgammuukw*. The judgment in the *Calder* appeal to the Supreme Court was also handed down in 1973. Even though the Nisgaa did not gain recognition of their Aboriginal title[5], an

---

[4] "The Nishga were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society and none of our notions of private property" (*Calder v. A.G.B.C.* [1973] 34 D.L.R. (3d) 145 (S.C.C).

[5] Aboriginal title: "A legal term that recognizes Aboriginal interest in the land. It is based on their long-standing use and occupancy of the land as descendants of the original inhabitants of Canada" (D.I.A.N.D, 1997)

acknowledgement by several judges of Aboriginal rights in British Columbia represented a precedent that the Gitxsan and Wet'suwet'en hoped that they could build upon in the B.C. provincial court.[6]

Historically, as well as currently, each Gitxsan and Wet'suwet'en person is born into a House group.[7] This House group, and hence the individual has certain roles and responsibilities. The Gitxsan and Wet'suwet'en world view is embodied in the witnessing and validation of the House's historical identity, territorial ownership, and the spirit power that is integral to the Feast. The Feast represents a significant part of social organization that may validate the roles imparted when a new name is given, to celebrate a marriage or to mourn the death of a house member. The formal telling of the oral histories in the Feast, together with the display of crests and the performance of the songs, witnessed by the House Chiefs, is the official history of the House (Gisday Wa & Delgamuukw, 1989, p.26). Time is not linear but cyclical; the events of the past are not just history, but affect the present and the future (Gisday Wa & Delgamuukw, 1989, p.22).

By asserting jurisdiction over the territory that they have used since time immemorial, the Gitxsan and Wet'suwet'en were faced with the task of educating the

---

[6] In spite of fact that the Nisgaa lost the case, the Calder decision was seen as a major victory in the recognition of Aboriginal title. Six Supreme Court Justices had agreed that Aboriginal title existed in law and, where it was not extinguished, continued to have force. The seventh judge dismissed the appeal on a technicality (Kulchyski, 1994, 62).

[7] The Gitxsan and Wet'suwet'en describe several principles that underpin their system. The first is the connection between a high Chief's name and territory. Then that succession to the name gives authority over the territory. That succession, the name, territory, and authority must be witnessed and validated by the other Houses (Gisday Wa & Delgamuukw, 1989, p. 36).

judge and the Canadian legal system regarding their world view. The way they did this was by recitation and translation of their oral histories. The Gitxsan and Wet'suwet'en had no written language before contact with Europeans. To this day, they have a formalized, strong oral tradition. This oral tradition was extremely important to their case. Their strategy was to use these oral histories along with archival written evidence presented from historians and anthropologists. It was their hope that the oral historical testimony would be given equal weight along side other types of evidence. Just as European ownership and utilization of land had been juxtaposed with that of the Nisgaa in the *Calder* (1973) case, Gitxsan and Wet'suwet'en oral histories could be compared favourably with the literate traditions of Euro-Canadian society.

2.2.1 Exception to the rule of hearsay

In Canadian law, testimony based on oral tradition falls under the category of hearsay. The hearsay rule requires that witnesses only give testimony based on something that they themselves have perceived. Consequently, most of the evidence admitted in *Delgamuukw vs. British Columbia* (1991) falls under exceptions to the hearsay rule. Exception to hearsay is an area where more discretionary power is used to stretch the limits of law and give equal weight to oral historical testimony, when no written records are available from the Aboriginal group in question. McLeod (1992) argues that the exception to the hearsay rule should be an area of flexibility, with an appropriate amount of weight. He cites the case of *R v. Khan* (1990) where the court admitted the hearsay evidence of a child's statements to her mother because it was

considered both necessary and trustworthy (McLeod, 1992, p. 1286). This logic could also be used in Aboriginal land dispute cases when there is no written history of a particular group, and when the historical occupation of a territory is in question.

At times there has been a 'catch 22' type situation around the use of oral historical testimony. In the *Bear Island* case (1989), a land claims trial, the judge remarked: "how disappointed I was that there was so little evidence given by Indians themselves...In a matter of this importance I expected that all of the older people in the Temagami Band who were able to give useful evidence would have been called" (*Ontario A.G v Bear Island Foundation* [1989], 68 O.R. (2d) 394, 38 D.L.R (4^{th}) 117). Aboriginal groups across Canada choose particular strategies in land-claim or sovereignty cases, most often based on the precedents that have been set. With the expense and time involved in these court cases, some feel it is better to present only evidence that the courts are familiar with, to the exclusion or partial exclusion of Aboriginal oral historical voice. Yet, the exception to hearsay rule provides the opportunity for Aboriginal oral histories to be heard alongside of other types of evidence.

2.2.2 Judge McEachern's treatment of evidence

At the beginning of *Delgamuukw v. B.C.*, Judge McEachern ruled that "there is little doubt that the oral history of a people based upon successive declarations of deceased persons may be given in evidence... for [the matter in question] could not otherwise be proven"(*Delgamuukw v British Columbia* [1991], 3 W.W.R. 97). As Sherrott argues, it is one thing to admit the evidence for consideration, and quite

another for that evidence to be given equal weight alongside the historical written documents (Sherrott, 1992, p. 445).

Asch and Bell (1994) write that the question of weight became apparent when McEachern accepted documents from the Hudson's Bay archives as reliable and trustworthy. There was no discussion of the bias of the writer. McEachern saw these documents as a "rich source of historical information about the people he [Trader Brown] encountered" (Asch & Bell, 1994, p.536). The judge went on to say that this archival evidence was the best independent evidence presented at the trial. Based solely on this archival evidence and not considering the oral histories, Judge McEachern concluded that the Gitxsan and Wet'suwet'en had a "rudimentary form of social organization " (Asch & Bell, 1994, p. 536).

The judge stated that he had concerns regarding the use of oral historical testimony. These concerns relate to the frailty of human memory, the accuracy of the oral record and the role of culture (as separate from historical fact). Judge McEachern stated that oral histories reflect a subjective or "romantic view of their history which is not literally true" (*Delgamuukw v British Columbia* [1991], 3 W.W.R. 97). Facts as defined by Judge McEachern can only be produced by historical documents and written records. Hence, he suggested that if what the Gitxsan and Wet'suwet'en had to say had been written down at the time of each event of history, they would have had "a rock solid case" (Cox, 1992, p. 148). Even though Judge McEachern admitted oral historical evidence under exceptions to the rule of hearsay, he had difficulty granting it equal weight.

2.2.3 Aboriginal rights: frozen in time

In *Delgamuukw vs. British Columbia* (1991), the onus was on the Gitxsan and Wet'suwet'en to prove that they had been an organized society and that they continued to occupy their traditional territories from time immemorial. Meeting these criteria could have theoretically then proven that their Aboriginal right to land title had never been extinguished.

In *Delgamuukw v. British Columbia* (1991), the judge modified earlier versions of tests for Aboriginal title.[8] There are two interconnected aspects of this test that involve the use of Aboriginal oral histories as evidence: 1) that their traditional lifestyle has been consistent over time ; 2) that they consistently had an 'organized' society.

For the Gitxsan and Wet'suwet'en to prove that they lived a traditional Aboriginal life consistently over time called into question cultural change or the use of anything modern. In Judge McEachern's view, eating a pizza, driving a car, using a hunting license or using electricity was enough to prove that the Gitxsan and Wet'suwet'en no longer lived an Aboriginal life. On the basis of their lifestyle, their Aboriginal rights were frozen in time as if their culture was not changing and evolving.

2.2.4 Primitive versus civilized comparisons in *Delgamuukw v British Columbia*

In the case of *Delgamuukw v. British Columbia* (1991), the judge also asserted

---

[8] Based on earlier tests from *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al* (1980) and *A.G. Ontario v. Bear Island Foundation* (1989).

that they lived a primitive life at the time of contact, denying any sort of societal organization. B. Douglas Cox (1992) explores in detail how the judge in the *Delgamuukw* case constructed the evidence and the use of legal precedent to support the idea of the Gitxsan and Wet'suwet'en as primitive peoples, thus incapable of holding proprietary interests (p.141).

In *Delgamuukw v. British Columbia* (1991), testing for Aboriginal rights set up a comparative strategy whereby Euro-Canadian culture was seen as superior, organized and civilized. In anthropological and literacy studies, these primitive versus civilized comparisons are no longer acceptable, yet this notion lingers on in the courts.

2.2.5 Oral versus written evidence

While it may be difficult to maintain a clear distinction between those cultures which employ the written word and those that do not, Judge McEachern distinctly separates the two and in fact gives more weight to the written word. Judge McEachern states "I am unable to accept adaawk, kungax, and oral histories as reliable bases for detailed history, but they could confirm findings based on other admissible evidence" (*Delgamuukw v. British Columbia* [1991], 3 W.W.R. 97). The admissible evidence he refers to is based on the written journals of early traders in the area. However, the evidence contained in traders' journals also holds the cultural bias and judgments of the writer and shows a limited understanding of the Aboriginal cultures with which they came into contact (Asch & Bell, 1994, p. 515). von Gernet (1996) also makes the point that both written and oral evidence are "selective characterizations of events, both are

subject to bias, and both can easily perpetuate fictions" (p. 5.2.2).

Judge McEachern was even suspicious of cultural anthropologists because they lived along side the Gitxsan and Wet'suwet'en. The judge concluded that the views of these individuals were biased because they got too close to those whom they studied (Asch & Bell, 1994, p. 545). In the judge's view, those anthropologists had "gone Native" which, in a sense, put them in the same primitive or illegitimate category as the Aboriginal peoples.

There is no doubt that there are cultural and historical differences in the ways people think about themselves and the world around them. By excluding Aboriginal oral histories in legal cases, an understanding of the cultural and historical differences between Aboriginal and non-Aboriginals is skewed in the direction of Euro-Canadian superiority as the dominant history. Lack of literacy was part of signifying a lack of societal organization, which in turn discounted Aboriginal rights.

2.3 The Great Divide: Literacy Versus Orality

2.3.1 Introduction

> When people wish to make a basic distinction between different societies or historical periods, one of the commonly invoked criteria is literacy. In particular those who wish to avoid the connotations of 'primitive', 'uncivilized', 'aboriginal' tend to turn to a description in terms of 'non-literate' or 'pre-literate'. Certainly, other characteristics are also employed (particularly that of technology) but that of the absence or presence of literacy is increasingly stressed. (Finnegan, 1973, p. 112)

In western thought literacy has come to symbolize opportunity, civilization,

superiority, truth and logic. In *Delgamuukw v. British Columbia* (1991) an historic lack of written literacy was one of the criterion which suggested to the judge that the Gitxsan and Wet'suwet'en fell "within a much lower, even primitive order" (*Delgamuukw v. British Columbia* [1991], W.W.R. 97). Therefore several areas relevant to literacy studies will be reviewed: (a) the growth of literacy and how that affected western thought; (b) writing as truth; (c) the foundations of primitive versus civilized comparisons; and (d) the social context of literacy.

All of these areas entwine to form the basis of particular aspects of western thought, which influence the approaches that the Canadian legal system has taken toward the use of Aboriginal oral tradition as evidence in land claim cases.

2.3.2 Growth of literacy: foundations of the 'great divide'

Although a number of civilizations in much of the world have possessed, for thousands of years, their own symbolic systems of writing, only in the 19th and 20th centuries has literacy become more universally accessible. It was the Greeks who created the first full alphabetic system of writing in the 5th and 6th century B.C.; however it would be centuries before literacy would be accessible across barriers of class, gender and race (Goody ,1968, p. 3 ; Graff ,1987, p. 18). Goody (1968) also acknowledges problems in the definition of literacy. "Few traditional societies can be described as non-literate", as they clearly had their own systems of record keeping (p. 19). This was often in the form of symbols, pictographs, knots or beadwork. Yet to the European, literacy would be defined as reading and writing in the alphabetic mode of

communication.

It was not long ago that anthropologists equated civilization with literacy. "Yet, the evidence from Africa and the New World reveals that complex societies can exist without fully developed (initially logosyllabic) writing systems and that those early civilizations that lacked writing were of comparable complexity to those that had it..." (Graff, 1987, p.2).

Finnegan (1973) also points out how easy it is for western culture to slip into ethnocentric ways of thinking about other cultures, particularly those that are non-literate:

> Further, we all only too easily slip into the habit of mind, which assumes that those apparently very different from ourselves necessarily have less wisdom, less sensitivity to the beauties or tragedies of life than we have ourselves - and to this extent at least must perforce be said to think differently. This kind of feeling too makes us ready to embrace a view which sets non-literate societies and their inhabitants on the far side of a great chasm separating them from more familiar cultures which rely on the written word. (p. 113)

Finnegan (1973) argues that, "here and elsewhere we may find that the established and respected tradition is that of literacy, but oral literature is still a living art and there is constant interplay between oral and written forms" (p. 115).[9]

Graff (1987) stresses the fact that literacy grew out of oral cultures and that the dichotomies between the two are not sharp and separate. Instead of orality being seen

---

[9] Finnegan gives examples of this interplay from: medieval Europe, the nineteenth-century Sudan or modern Thailand and the former Yugoslavia (See Chaytor, H.J.(1945) *From Script to Print.* Cambridge: Heffer Publishing; Finnegan, *R.* (1970) *Oral Literature in Africa.* Oxford: Clarendon Press; Lord, A.B. *(*1960) *The Singer of Tales.* Cambridge: Harvard University Press).

as a romantic and somehow pure form of communication, he points to the oral origins of literacy and the continuing interactions of these two modes. This is particularly relevant when discussing the use of Aboriginal oral tradition as evidence. Many Aboriginal cultures have their feet in both worlds, the oral traditional and the western written one. The interpretation and the context of the oral and the written may be vastly different, but the everyday intersection of the two is commonplace.

It is not only Aboriginal cultures that are rooted in oral traditions. Clanchy's (1979) research into literacy in England from 1066-1307 noted that it was customary to establish the age of individuals by collective oral testimony and that the medieval reliance on memory rather than the written record was well documented (p. 175). It was later that written documents came to embody proven truth or fact.

2.3.3 Writing as truth

At this point it is important to understand some of the historic processes involved in the evolution of alphabetic literacy. Goody (1968) makes the point that the spread of literacy and of books to traditionally oral cultures most often took place via the spread of literate religions, or religions "of the book" (p. 2). The guru, priest or holy person combined the oral and literate modes of communication. Religious literacy was associated with positions of power and knowledge. The "truth" came from knowledgeable persons, those who could read sacred truths and pass them on to those restricted from access. The truth became embedded in the mystical powers of reading and writing.

Goody uses the example of Tibetan Buddhism, where "reading is taught by monks; instructional material is religious in content; the turning of pages is an essential part of the most effective ritual observance; possession of books is a matter of status; in sum, literate activity is a means of grace, a method of achieving virtue and eventual liberation because it opens the way to the learning of new prayers" (p. 5). In this context, the written word is the ultimate form of grace and truth.

Graff (1987) uses the term "religions of the Word", which then develops into "religions of the book". These religions began orally as the "theology of the Word of God", then developed into the written (p.29). Although the written Torah as an object of study is read, it is also learned by heart or repetition for recital (p.30). In essence, the oral and written are not always two separate modes of learning; they are often inter-related in both historical and present contexts.

Finnegan (1988) expands on this notion, stating that writing made possible the transmission of various religious revivals based on an appeal to the original "true faith" (p. 23). The current relevance of that historic spread of religion and literacy can be seen in Aboriginal communities today. When the spread of European colonialism hit North America, various missionary groups began vying for Aboriginal converts. They often did this by teaching Aboriginal peoples to read and write by using the Bible with its stories, ethics and morals. It was clear during the colonial period that literacy was seen as an important aspect of what it was to be civilized[10]. The legal system bought into this

[10] Street (1995) provides examples from around the world of missionaries who used literacy to civilize, and to exert political power and instill hierarchy.

notion of literacy as truth.

2.3.4 Primitive versus civilized

It is widely accepted that categories such as primitive and civilized are outdated (Goody, 1968; Graff, 1987; Finnegan, 1988; Olson 1994; Street, 1984) particularly in anthropological circles. In fact, Street (1984) makes the point that primitive versus civilized has been replaced by literate and non-literate, terms which he says are a continuation of the 'the great divide' (p.5). The term, "great divide", has since been used to refer to those studies which have set out to establish a division between the thinking processes of different social groups, using categories such as logical/pre-logical, primitive/modern and concrete/scientific. Street (1984) reviews some of the problems that occurred when studying other cultures prior to the 1960s; there were often misunderstandings by ill-informed European commentators on the meaning of what was being said and done. Sometimes this was simply due to a lack of fluency in the language; other times it was due to a lack of sufficient time spent living in the particular area. Regardless, all too often the conclusions made about primitive/modern were simplistic and ethnocentric. It was often the fault of the observer's understanding of what other people's statements, actions or rituals meant (p.24-25).

Rosaldo (1989) describes the period prior to the 1960s as the time of the 'lone ethnographer':

> The lone ethnographer depicted the colonized as members of a harmonious, internally homogenous, unchanging culture. When so described, the culture appeared to "need" progress, or economic and moral uplifting. In addition, the "timeless traditional culture" served as a self-congratulatory reference point against which Western civilization

> could measure its own progressive historical evolution. The civilizing journey was conceived more as a rise than a fall, a process more of elevation than degradation (a long, arduous journey upward, culminating in "us"). (p. 31)

There was almost universal acceptance of the idea that Western, industrialized society had produced (or been produced by) men of higher intellect than the 'primitive' other that they were studying (Colby & Cole, 1973, p. 64). There was a belief in the evolution of intellectual functions, whether culturally or racially mediated (Colby & Cole, 1973, p. 64)... a journey upward "culminating in us" (Rosaldo, 1989, p. 31).

While Street (1984) and others (Evans-Pritchard, 1981; Horton, 1967; Levi-Strauss, 1962) have challenged primitive/modern or primitive/civilized comparative studies, the simplistic conclusions made in early studies still appear in the guise of legal rationale in land claim cases. In the widely written about final judgment of *Delgamuukw vs British Columbia*, Judge McEachern stated that:

> The evidence suggests that the Indians of the territory were, by historical standards, *a people without any form of writing*, [italics added] horses, or wheeled wagons...The defendants...suggest the Gitxsan and Wet'suwet'en civilizations, if they qualify for that description, fall within a much lower, even primitive order. (*Delgamuukw v British Columbia*, [1991], 3 W.W.R. 97)

The term "primitive" is reminiscent of great divide theories from an earlier era, and used as if it were an acceptable and definitive term today without historical, social or cultural context.

2.3.5 Social context of literacy

Street (1984) asserts that literacy is not a neutral technology detached from social contexts. Street approaches an analysis of literacy by comparing what he calls

the ideological and the autonomous models.

Street sees Goody's work as part of the autonomous model. Goody (1968) describes the importance and potential of writing, while Street argues that Goody overstates the significance of literacy, while understating the qualities of oral communication, thus polarizing the differences between the oral and the written (Street, 1984, p. 44-45). Goody (1968) bases some fundamental and far reaching aspects of human reasoning and achievement on the distinction between oral and written cultures (Street, 1984, p. 47). Some of these notions originate with Malinowski, whom Street assesses as believing that primitive societies classified and organized their intellectual world simply in terms of their 'crude needs' (Street, 1984, p. 48).

Goody and Watt (1968) sum up versions of the 'great divide' between primitive and modern societies by stating that:

> Nevertheless, although we must reject any dichotomy based upon the assumption of radical differences between the mental attributes of literate and non-literate peoples and accept the view that previous formulations of the distinction were based on faulty premises and inadequate evidence, there may still exist general differences between literate and non-literate societies. The fact that writing establishes a different kind of relation between the word and its referent, a relationship that is more general and more abstract, and less closely connected with the particularities of person, place and time than obtains in oral communication. There is certainly a great deal to substantiate this distinction in what we know of early Greek thought...It was only in the days of the first widespread alphabetic culture that the idea of 'logic' appears to have arisen. (p. 44)

One of the main aspects of the autonomous model is the distinct differentiation between the oral and the written. The ideological model, on the other hand, is less interested in the divisions between the two and more interested in understanding the

social practices in which different literacy practices are embedded. In other words, context and experience play a larger role in the ideological model.

Ruth Finnegan (1988) argues against the great divide in favour of "specific characteristics or consequences likely to be associated with orality and literacy" (p. 6). Finnegan explains this in terms of challenging divisions:

> Once the idea of this kind of basic division is challenged it is no surprise to see that interaction between written and oral modes of communication not as something strange - representing, as it were, two radically different types or even 'evolutionary stages' of human development - but as a normal and frequently occurring aspect of human culture. It is true that differing cultures lay different emphases on, say, written learning and that the specific uses and purposes of oral media vary at different times and places - but this is the kind of situation that demands detailed investigation rather than defining out of existence. (p. 6)

The autonomous versus ideological models that Street (1984) describes include many complex issues and arguments. It is not possible nor necessary to review all points of view in this type of review. To synthesize some of the larger arguments, the autonomous model represents studies that attempted to divide and compare the written and the oral, to differentiate in terms of logical/pre-logical, primitive/modern and concrete/scientific. The ideological model, on the other hand, is more interested in understanding the social, cultural and historical contexts of literacy.

2.3.6 In summary

Literacy became a reference point "against which Western civilization could measure its own progressive historical evolution" (Rosaldo, 1989, p. 31). Written forms came to embody truth, particularly in the context of the growth and spread of religion.

Studies which compared literate and non-literate cultures tended to divide and dichotomize the two. Many (Street, 1984; Evans-Pritchard, 1981; Horton, 1967; Levi-Strauss, 1962) have challenged the "primitive" versus "civilized" comparisons, although these distinctions linger on, particularly in the courts.

Finnegan (1988) and Street (1984) argue that there is much interplay between the oral and written forms. Graff (1987) particularly stresses that literacy grew out of oral cultures.

Street (1984) asserts that literacy is not a neutral technology detached from social contexts. He contrasts the ideological model to the autonomous model of literacy. The autonomous model tends to polarize the differences between the written and the oral, typically not taking the social context into consideration, whereas the ideological model is much more contextually based.

Studies to contrast and determine abstract and logical thought, written versus oral, and connections to racial difference, are no longer acceptable. However, these debates or studies often linger in how non-Aboriginal people define and compare themselves against Aboriginal peoples during colonial exploration and expansion in North America and around the world. The colonial legacy in Canada is very much part of the context of current Aboriginal/ non-Aboriginal relations. How does one go about bridging that cultural gap that has been built up over centuries between the dominant Euro-Canadian culture and oral Aboriginal cultures?

There are attempts presently in different government, legal and non-governmental forums to mediate, understand and take into consideration cross-cultural

differences and bring together oral historical knowledge and written historical knowledge and stories:

> We need to find better ways of putting these stories together, of mediating between both their two realities and their two imaginative traditions, and of understanding such stories and songs--truth tellings--not by hearing them in isolation but by seeing where they meet each other, and the world. (Chamberlin, 1996, p. 32)

2.4 Approaches to Cross-cultural Understandings of Aboriginal Oral Histories

> If anthropologists, folklorists, linguists, and oral historians
> are interested in the full meaning of the spoken word
> then they must stop treating oral narratives as if they were reading
> prose when in fact they are listening to dramatic poetry.
> (Tedlock, 1983, p. 123)

One of the keys to approaching cross-cultural understanding of oral histories is examining how we listen and how we don't understand what we hear. Brian Street (1984; 1995) has written extensively about cross-cultural approaches to literacy and education. He often touches on the subject of understanding orality as opposed to written texts. He describes the "if I were a horse" approach to understanding other cultures within the study of anthropology (Street, 1995, p. 76). This, in essence, implies putting yourself in the other person's place (as well as culture). Street (1995) believes this approach is at the heart of the autonomous model of literacy mentioned earlier, and that this approach attempts to treat literacy (or orality) as an independent variable, detached from its social context (p. 76). "In colonial times those non-European societies that lacked western forms of literacy were seen as thereby lacking rationality,

logic etc. Their rituals and beliefs were seen as evidence that they were 'unscientific' and incapable of detached reflection on their state of being" (Street, 1995, p. 76). Street points out that elements of those assumptions continue in twentieth-century encounters or communication with non-European societies, particularly when the observer knows nothing about the culture and context of those whose thinking he or she is presuming to represent.

Ong believes that he cannot ever know oral cultures since he himself is from a literate culture (Ong, 1982, p. 2). If this is the case, then the courts granting equal weight to Aboriginal oral histories along side of written historical documents would mean very little if the judge was incapable of understanding oral evidence outside his or her literate culture. Others such as Ross (1992) and Spielmann (1998) believe that certain specific cross-cultural factors need to be taken into consideration for a fuller understanding of oral histories.

In Ross's (1992) description of Anishinaubaeg[11] culture for example, a community regards a person who is worth listening to with the highest distinction. "The highest compliment paid to a speaker is to say of him or her, "w'daeb-wae", meaning that he or she is correct, accurate, truthful" (p. xii). Speech and credibility are closely associated. In order to understand Anishinaubaeg culture, Ross suggests learning certain ethics, such as: non-interference, non-demonstration of anger, respecting praise and gratitude, and the notion that the time must be right (p. v). While these points are

---

[11] This is the spelling that Ross (1992) uses. Anishinaubaeg is also spelled Anishnabai and Anishinabe (Barber, 1998, p. 49).

specific to Anishinaubaeg culture, perhaps learning cultural ethics is a precursor to learning how to truly listen.

Spielmann (1998) describes various aspects of Algonquin culture in the hopes of encouraging cross-cultural understanding. He describes different examples in Algonquin culture of specific cultural values, conversation analysis and linguistic discourse analysis (p. v). He cautions that one:

> can easily fall into the trap of failing to really listen to what one is being told and thus miss the wealth and richness of native cultures, languages, and traditions. A people's stories and texts may be approached as cultural settings, and the concept of culture itself offers one a kind of 'living document' which describes culture-specific ways of thinking and doing things. (p. 24)

Again truly listening is identified as an important aspect of cross-cultural understanding. Spielmann adds that the "truth about the traditional values and ways of life of Aboriginal people are to be found in what the Elders do, think and say today, rather than what has been written in books and academic articles by non-native people" (p. 24).

Rosaldo (1989) also believes that it is possible to learn and understand those outside of one's own culture:

> The translation of cultures requires one to try to understand other forms of life in their own terms. We should not impose our categories on other people's lives because they probably do not apply, at least not without serious revision. We can learn about other cultures only by reading, listening, or being there. Although they often appear outlandish, brutish, or worse to outsiders, the informal practices of everyday life make sense in their own context and on their own terms. Cultures are learned, not genetically encoded. (p. 26)

There a number of studies on Native discourse and interaction patterns written

by Aboriginal people that encourage cross-cultural understanding, by identifying and learning the differences in Aboriginal behaviours and values. James Dumont (1993) wrote an article, "Justice and Aboriginal People", which identifies traditional values of Aboriginal people, then compares and contrasts these with the behavioural and interaction patterns between Aboriginal and non-Aboriginal people. Clare Brant (1990), the late Mohawk psychologist, identified some potential areas of misunderstanding between Aboriginal and non-Aboriginal people based on value differences and ethics which could also be used to further cross-cultural understanding[12].

Anthropologists have often written about their experiences and the process involved with understanding Aboriginal oral histories and oral tradition. Julie Cruikshank (1990) describes how she wanted to learn specific details of the social history of Indigenous peoples in the Yukon Territory. Mrs. Sidney, the woman whom she was recording, kept telling stories that Cruikshank felt were taking them further from her objectives.

> Despite my initial sense that we were moving further and further from our shared objective of preparing an orally narrated life history, I gradually came to realize that she was consciously providing me with a kind of cultural scaffolding, the broad framework I needed to learn before I could begin to ask intelligent questions. (p. 27)

Cruikshank identifies the preparation and the time involved before actually beginning to understand the context and the meaning of Aboriginal oral histories. In

---

[12] Also refer to Lisa Philips Valentine, (1995) *Making It Their Own: Severn Ojibwe Communicative Practices*, (Toronto: University of Toronto Press), for an in-depth discussion of Ojibwe discourse, literacy practices and story-telling.

Richard Preston's (1975) work among the James Bay Cree, he also acknowledges that his willingness to understand narrative in the Cree context, rather than trying to get specific answers to specific questions, contributed to his understanding of Cree culture (p. 12). Tedlock (1983), Vizenor (1998) and Chamberlin (1996) all also write eloquently and poetically about the context and time involved with understanding or beginning to understand oral histories outside of one's own culture.

In the context of community development work with oral cultures, Slim and Thompson (1995) advocate adapting to oral communication and accepting its value:

> This is not as simple as it might seem. Many literate people lack the skills needed in an oral culture - skills like listening, asking, telling, using ritual expressions, memorizing and handing on information by word of mouth alone. An international oracy campaign for development workers would be a useful complement to the world's many literacy programmes. (p. 20)

It is also important to adapt to the specific cultural traditions involved with oral histories. Every Aboriginal group has depended on its oral histories for different reasons, manifested in different forms. For the Gitxsan and Wet'suwet'en the adaawk and kungax take a very formalized shape, being recited at specific times, in front of specific people for specific reasons. The Gitxsan adaawk are "oral histories comprised of a collection of sacred reminiscences about ancestors, histories and territories that document House ownership of land and resources"(Culhane, 1998, p. 120). Dara Culhane (1998) further explains that the Wet'suwet'en kungax are "songs about trails between territories"(p. 120). The rights to perform particular adaawk and kungax are part of the privileges and responsibilities that are inherited by individuals and House groups when they take ownership and responsibility for the specific territories the oral

histories tell about (Culhane, 1998, p. 120).

The Iroquois also have a formalized tradition connected to the Longhouse tradition (Thomas & Boyle, 1994, p. 1-2). For other groups such as the Ojibway or Algonkian, oral histories may be less formalized, but no less important to their social, political and spiritual systems (Spielmann, 1998, p. 43).

2.4.1 In summary

There are several main points that come out of this section. To understand oral histories outside of one's own culture, it takes: (a) considerable time; (b) specific skills such as listening and memorizing; and (c) learning the cultural context.

While Ong (1982) does not believe that he can ever know oral cultures since he himself is from a literate culture (p. 2), others such as Ross (1992) and Spielmann (1998) believe that one can learn the specific cultural ethics, values and interpersonal interactions in order to begin to understand oral histories. Experiences of anthropologists such as Julie Cruikshank (1990) also identify the kind of preparation necessary and the time involved.

James Dumont (1993) and Clare Brant (1990) have also identified traditional values and ethics of Aboriginal peoples to encourage cross-cultural understanding. Others such as Tedlock (1983), Vizenor (1998), Chamberlin (1996) and also Slim and Thompson (1995) emphasize learning cultural context as well as specific skills such as listening and memorizing.

2.5 Land, Law and Aboriginal Rights

Differing attitudes towards land utilization and ownership are tied into understanding oral histories and the history of Aboriginal/ non-Aboriginal relations. The spiritual, physical and economic relationship to land is at the heart of Aboriginal cultures. A predominant contentious issue in land claim cases is that Aboriginal peoples have always, since time immemorial, lived on the land with their own systems of law and government. For the Gitxsan and Wet'suwet'en peoples,

> The ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, and plants, the animals and the people all have spirit. They all must be shown respect. That is the basis of our law. (Monet & Wilson, 1992, p. 22)

Land is also central to the European world-view. Land is viewed as a commodity to be used in a capitalist sense. Patricia Doyle-Bedwell (1993) argues that, since contact, the relationship of Aboriginal peoples and the European newcomers was shaped by the European need to control the land (p.195). When speaking specifically about the signing of Treaty Number 9, in 1905, Louis Bird, a Cree Elder, said,

> The Native people did not understand the white man's value system, so there could not be a just treaty because the Native person did not measure the land square foot or square area. He did not look at the tree as a five dollar tree or a twenty dollar tree, or how much money I can make out of this tree, but the white man did already have that, and that's where the Native people again lost almost the last .(Simpkins, 1990, p.10)

Even though Louis Bird was reflecting specifically on the signing of Treaty Number 9, this difference in world-view permeates the history of Aboriginal and Euro-Canadian contact.

The European view was that the land had to be "used" in ways consistent with their lifestyles to be productive or for people to lay claim to it. The land could not just be used to travel across or for hunting and trapping. It needed to be cleared and ploughed. This was seen as productive and civilized work. Cheryl I. Harris (1993) asserts that only particular forms of possession would be legitimized and recognized in the legal system, those characteristic of white settlement. "This racist formulation [of property possession] embedded the fact of white privilege into the very definition of property, marking another stage in the evolution of the property interest in whiteness" (p.1721-22).

Volume One of the *Final Report of the Royal Commission on Aboriginal Peoples* (R.C.A.P, 1996) included a description of the historical differences in how land was viewed by the non-Aboriginal newcomers:

> Over the course of time, however, the concept of terra nullius was extended by European lawyers and philosophers to include lands that were not in the possession of 'civilized' peoples or were not being put to a proper 'civilized' use according to European definitions of the term. The following passage from the sermon of a Puritan preacher in New England in 1609 captures the essence of this re-interpretation of the idea of land empty of civilized human habitation:
>
> Some affirm, and it is likely to be true, that these savages have no particular property in any part or parcel of that country, but only a general residency there, as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their own lusts and sensuality. There is not meum and teum [mine and thine] amongst them. So that if the whole land should be taken from them, there is not a man that can complain of any particular wrong done unto

him. [13]

> Upon the 'discovery' of the North American continent by Europeans, according to this doctrine, the newcomers were immediately vested with full sovereign ownership of the discovered lands and everything on them. When faced with the fact that the lands were inhabited by Aboriginal peoples, European commentators, such as the preacher Gray, popularized the notion that Aboriginal peoples were merely in possession of such lands, since they could not possibly have the civilized and Christian attributes that would enable them to assert sovereign ownership to them. Over time these ethnocentric notions gained currency and were given legitimacy by certain court decisions. The argument made by the attorney general of Ontario in St. Catharines Milling and Lumber Co. v. the Queen, for example, is part of this tradition. (R.C.A.P, 1996, vol. 1,)

These kinds of arguments converted differences into superiorities and inferiorities which had surprising longevity in policy documents and in court proceedings, continuing to the present day (R.C.A.P. 1996, volume 1,).

Kulchyski (1994) describes this process as totalization: "the process by which objects, people, spaces, times, ways of thinking, and ways of seeing are ordered in accordance with a set of principles conducive to the accumulation of capital" (p.1), and the acquisition of land as property is one of those principles that Canada was founded upon.

Edward Said's (1978) study of "Orientalism" also helped frame particular aspects of totalization. Even though Said is referred to a theory based upon an encompassing comparison between "the Orient" and "the Occident", there are many similarities to how Aboriginal peoples were viewed and treated by the French and English in Canada.

---

[13] Gray, Robert as quoted in Porter, H.C.(1979). *The Inconstant Savage: England and the North American Indian 1500-1600*. London: Duckworth Publishing, p. 357.

Orientalism controls, manipulates and incorporates what is different or novel (Said, 1978, p. 12). It creates the "other" in order to justify cultural and economic control. Just as the Orient was created in the colonial mind and in colonial enterprise, so too was the North American Indian. Stereotypes and images which are reinforced every day took root hundreds of years ago when the French and British competed for furs and land, pushing aside the Aboriginal other. As anthropologist Harvey Feit (1995) points out, "the idea of the Indian is one of people who are not European, like the Oriental. The universal feature of the idea of the Indian was that whether judged virtuous or degraded, Indians were defined by what they didn't have, by the absence of civilization" (Feit, 1995). The absence of a written language was one point of negative comparison.

In Macklem's (1993) article on ethno-nationalism and Aboriginal identity, he reiterates this negative comparison by stating that the "inequality of peoples was asserted by seizing upon Native difference and devaluing Native difference" (p.14). Thus came one of the justifications for the assertion of Canadian sovereignty over lands occupied by Aboriginal peoples.

This difference in how land is viewed by Aboriginal peoples and non-Aboriginal peoples is at the heart of some of the contentious issues surrounding Aboriginal rights.

2.5.1 Aboriginal right or Crown right ?

In order to understand the final judgment in *Delgamuukw vs. British Columbia*, it is important to review the evolution of the Crown's policy toward Aboriginal lands.

Brian Slattery (1983) describes the evolution of the Crown's right to Aboriginal

lands in terms of four distinct stages. The first period is that before contact when Aboriginal peoples were distinct self-governing peoples, "the undisputed possessors of the soil" (p. 31-35). The second stage began with European contact with Aboriginal peoples. During this stage, the first "discovering" country gained exclusive rights to take the land from the Aboriginal inhabitants, according to Crown assertions of sovereignty. The third stage of this evolution occurred as the Crown increased its control, through force of arms and by treaty (p. 31-35).

A number of anthropologists and historians believe that Aboriginal peoples became economically dependent during this period (Krech 1984; Bishop 1984; Ray 1974). In Canada, this period began after 1821 when the Hudson Bay Company amalgamated with the Northwest Company and gained the trade monopoly. Some trading posts were closed and game populations were greatly depleted, leaving many Aboriginal peoples dependent on an outside economic system that no longer worked for them. This is the period when, according to Slattery, the Crown asserted rights which were directly enforceable against the Indians, and which affected Indian sovereignty and land rights (Slattery, 1983, p. 31-34). In other words, it was a time when the Europeans solidly gained the power. They no longer needed Aboriginal peoples as military allies or as trappers or middlemen in the fur trade. It was at this point that Aboriginal peoples were clearly seen as "a problem to be dealt with", a problem that got in the way of land acquisition.

John Mohawk (1992) also describes the period beginning around 1830 as a time when scientific racism began, a time when Europeans began to believe that the

reasons that they were successful in conquest around the world was because they were biologically superior. He writes, "Europeans began to look about and see primitive societies as less than civilization" (p. 441). This coincides with a time when Aboriginal peoples were greatly weakened by epidemics and, as mentioned earlier, they were not needed by the newly dominant society.

The fourth and final stage of the Crown acquisition of Aboriginal lands takes place when the Aboriginal right of occupancy is extinguished in favour of the state. In the view of the Crown, this extinguishment can occur through war, treaty, abandonment of lands, and white settlement (Slattery, 1983, p. 31-34). The evolution of the Crown's right to particular lands has been upheld by, and reinterpreted in the courts.

In the case of British Columbia where few treaties were signed, the Crown's assertion of sovereignty comes at the point of contact. Borrows (1999b) says "Words, as bare assertions, are pulled out of the air to justify a basic tenet of colonialism: the settlement of foreign populations to support the expansion of non-indigenous societies". Borrows goes on to describe the Crown's *mere* assertion of sovereignty in British Columbia as some magical incantation not based on legal principles, but meant to validate the appropriation of Aboriginal land for non-Aboriginal people (Borrows, 1999b, p. 33-34). In other words, the Crown simply asserted its sovereignty and that made it so.

One of the issues in Aboriginal land claim cases today is that the reasons for extinguishment are left up to the individual judgment and discretion of the judge. In *Delgamuukw vs. British Columbia* in 1991, Judge McEachern ruled that extinguishment

was based on "European occupation and settlement, [which] gave rise to a right of sovereignty" (Monet & Wilson, 1992, p.189). In Canadian courts, Aboriginal title is defined as a "burden" on underlying crown title. Crown ownership of all land is an accepted legal fact, and Aboriginal peoples merely have some undefined legal interest in it (Kulchyski, 1994, p. 2). The acknowledgement of Aboriginal rights remains a struggle that Aboriginal people must fight to prove in an arena outside of their culture and world-view.

2.5.2 In summary

For the Euro-Canadian, land is viewed as a commodity to be bought, sold and used productively. For Aboriginal peoples, culture is inexorably linked to the land spiritually, socially and economically. This difference in how land is viewed has created conflict in defining and litigating Aboriginal rights cases.

Slattery describes the evolution of the Crown's right to Aboriginal lands in four stages: first came the period prior to contact; second, the period of contact when the "discovering" country gained exclusive rights; third, when the Crown increased control through force of arms and treaties; and fourth, when the Aboriginal right of occupancy was extinguished in favour of the state.

Several of the main issues identified in Aboriginal rights and title cases were reasons for extinguishment of Aboriginal rights, and the Crown's assertion of sovereignty.

The Crown's assertion of sovereignty is an accepted and assumed fact within the Canadian legal system. It is the starting point for Aboriginal land claim cases. It is this

attitude and this approach which pulls in and calls into question a group's historic lack of a written language to prove that a group was disorganized, and therefore did not possess Aboriginal rights to land title. This approach calls into question the validity of Aboriginal oral histories as a non-literate source of historical validation.

CHAPTER 3

LEGAL-HISTORICAL BACKGROUND: ABORIGINAL RIGHTS/CROWN RIGHTS AND ABORIGINAL ORAL TRADITION AS EVIDENCE

3.1 Introduction

Despite Slattery's (1983) orderly four phases which describe the evolution of the Crown's right to lands in Canada[1], Aboriginal rights litigation in Canada has not run a steady path. The judgments and precedents that have been set have provided many twists, turns and inconsistencies, making Aboriginal rights litigation one of the most contentious bodies of law in Canada[2] (McNeil, 1997, p.117). In some ways, the Canadian legal system's decisions and recommendations on Aboriginal rights are a bit like an unsteady toddler learning how to walk, stubbornly insistent about following an instinctual path. Slattery (1983) describes this path beginning at first contact when Europeans claimed exclusive right upon "discovery"; increasing that control through force of arms and by treaty, and later when Aboriginal right of occupancy was extinguished in favour of the state (p. 31-34). The legal system generally falls back on historic precedent to inform legal decisions, and has only recently begun to create new precedent and accepting Aboriginal oral histories as evidence alongside of written historical documents.

The Supreme Court recommendations in *Delgamuukw* (1997) may be the

---

1 Refer to pages 46-48 for a description of Slattery's four phases.

2 While this chapter provides a selected review of judgments and precedents concerning Aboriginal rights and title litigation, there are obvious limitations when trying to summarize such a contentious area of law in 30 or so pages.

beginning of paving the way for a more equitable legal system in which the history and traditions of Aboriginal peoples are truly given equal consideration. Or the recommendations pertaining to the use of oral histories in this case may be only symbolic gesture. This thesis will ultimately look at the problems and the possibilities for the use of Aboriginal oral histories as evidence in land-claim cases. Many of the issues identified will also be applicable to other forums where Aboriginal oral histories are called upon to be compared and evaluated in cross-cultural settings. In light of recent literature and court cases, this chapter will provide the legal background in order to understand the issues discussed in the interviews which appear in later chapters.

This chapter will include: an introduction to Western legal definitions of Aboriginal rights and title; some of the main problems and issues in Aboriginal rights and title litigation from Western legal and Aboriginal perspectives; why Aboriginal oral tradition has been brought before the courts as evidence in Aboriginal rights and title litigation; a selected review of cases and their legal precedent in relation to Aboriginal rights and title litigation and in particular the *Delgamuukw* case; and a chapter summary.

3.2 Foundations of Aboriginal Rights

Early discussion of legal rights amongst Europeans in relation to Aboriginal peoples began in the 1500s during the 'Age of Discovery' (Morse, 1985, p. 20). As stories of enslavement and brutality towards Aboriginal populations in the New World reached Europe, a debate ensued concerning the rights of Aboriginal peoples.

Morse writes of the actions of Francisco de Vitoria, who is particularly noted for

his ideas on international law and Aboriginal rights theory during the sixteenth century. Vitoria rejected the position that lack of Christianity constituted grounds for dispossessing Aboriginal peoples of their land. The right of discovery was also advanced at that time, which Vitoria also rejected (Morse, 1985, p. 22). Even though many colonizing powers did exactly as they pleased in the New World, Vitoria's views were influential in international law and among subsequent legal scholars for years thereafter. His work is still referred to as a reference point in articulating contemporary concerns, legal principles and western understandings of Aboriginal rights (Morse, 1985, p. 24).

In 1493, the first Papal Bulls on this subject declared that Indians were human, "even if infidels" (Richardson, 1993, p. 38). In 1537 a Papal Bull said that Indigenous peoples were "truly men" and should not be enslaved. Sakej Henderson argues "that gave us certain rights... Aboriginal rights" (Richardson, 1993, p. 38). It was the early sentiments of Vitoria and others who shaped the wording and the philosophy behind those Papal Bulls, which later lay the foundations for the Royal Proclamation of 1763. This Royal Proclamation of 1763 forbid settlement upon Indian lands and stated that such lands be obtained by purchase or cession (Cumming & Mickenberg, 1970, p. 16).

Most current legal cases involving Aboriginal title issues still call into question either the jurisdiction or the intent of the Royal Proclamation of 1763. Culhane (1998) states, a "key debate surrounds the question of whether or not the Proclamation should be interpreted as having *recognized* already existing Aboriginal rights, or having created these rights" (p. 54). The former, which has come to be known as "inherent

rights", is based on the assumption that Aboriginal rights exist out of the sovereignty of nations that pre-existed European colonization. The latter, "delegated rights", argue that in law, no rights can exist except those created by the will of the sovereign (p. 54). And what can be created by the will of the sovereign, can also be taken away at "the pleasure of the Crown" (p. 54).

Kellock and Anderson (1992) posed the same debate in slightly different terms. They described "delegated rights" as the positivist theory: if a court was to find that an Aboriginal right exists, it must do so on an express or implied recognition of the right whether "legislative, executive or judicial" (p. 98-99). They articulated inherent rights as the colonization theory: based on the notion that Aboriginal rights existed in Canada prior to the arrival of Europeans (p. 98-99). Debates regarding inherent versus delegated rights or positivist versus colonization theory continues on in the courts today, an effort to more clearly define Aboriginal rights and title.

3.3 Aboriginal Rights and Title

> **Aboriginal rights**: "rights enjoyed by a people by virtue of the fact that their ancestors inhabited an area from time immemorial".
> **Aboriginal title**: "the communal right of Aboriginal peoples to occupy and use the land inhabited by their ancestors from time immemorial"[3]
> (Barber, 1998, p. 4).

Whether the Aboriginal rights of many Aboriginal peoples were extinguished by

---

3 There are many definitions of Aboriginal rights. The Oxford Canadian Dictionary provided the most up to date version for general use. Many judges in recent legal cases involving Aboriginal rights have also come with their own definitions, which are all quite contentious (*R. v. Van der Peet* [1996] 2 S.C.R. 507; *R. v. Sparrow* [1990], 1 S.C.R. 1075; *Delgamuukw v. British Columbia* [1997] 3 S.C. R. 1010).

treaty in Canada is still a contentious issue. Typically, the Canadian government argues that when Aboriginal groups signed treaties, they signed away their Aboriginal rights. Many Aboriginal groups do not believe that they signed away their Aboriginal rights when signing a treaty.

In many parts of Canada there have been no treaties signed and any land rights which Aboriginal peoples possess (according to Euro-Canadian legal principles) are dependent upon the extent to which the theory of Aboriginal rights is accepted by the courts and legislatures of Canada[4] (Cumming & Mickenberg, 1970, p. 13). The theory of Aboriginal rights has always been controversial[5], and in Canada it was not raised in the courts by Aboriginal peoples until the 1970s. Aboriginal rights were one of the main issues in *Calder v. Attorney-General of British Columbia*, argued first in the British Columbia Supreme Court in 1969 and decided in January of 1973 by the Supreme Court of Canada (Sanders, 1996, p. 80).

Within legal cases, it is important to differentiate between Aboriginal rights and Aboriginal title, as some cases are clearly about one or the other and some are about both. While an Aboriginal group may not be claiming a specific territory, it can still claim Aboriginal rights. Judge C.J.C. Lamer in *R. v. Adams* and *R. v. Cote* decided that Aboriginal title is a sub-set of Aboriginal rights, so a free-standing Aboriginal right, such

---

4 Very few treaties were signed in British Columbia and the Maritimes and no treaties were signed in Quebec, the Yukon and parts of the Northwest Territories with Inuit or Aboriginal peoples.

5 Particularly during the 1960s, Pierre Trudeau is quoted as saying "Aboriginal claims are so general and undefined that it is not realistic to think of them as specific claims capable of remedy..." (Former Prime Minister Trudeau as quoted in Cumming and Mickenberg, 1970, p. 13).

as a right to fish for food, can exist independently of Aboriginal title (McNeil, 1997, p. 119).

Definitions of Aboriginal rights and title within the courts are dictated by the delegated versus the inherent rights debates which originate outside the Aboriginal community. The Aboriginal perspective is quite different.

3.4 Aboriginal Perspectives

At the 1983 First Ministers Conference on Aboriginal Rights, John Amagoalik, co-chairperson of the Inuit Committee on National Issues, stated: "Our position is that Aboriginal rights, Aboriginal title to land, water and sea ice flows from Aboriginal rights and all rights to practice our customs and traditions, to retain and develop our languages and cultures, and the rights to self-government, all of these things flow from the fact that we have Aboriginal rights...In our view, Aboriginal rights can also be seen as human rights, because these are the things that we need to continue to survive as a distinct people in Canada" (Canada, 1983, p. 134).[6]

Many Aboriginal people view Aboriginal title as a very broad concept that encompasses more than rights to use and occupy ancestral land. It includes rights to self-government and jurisdictional rights to make laws, rendering it equivalent to the concept of underlying title in Canadian legal theory (Asch & Zlotkin, 1997, p. 214). Asch and Zlotkin go on to say that Aboriginal people often describe Aboriginal title as

---

6 Summarizing "Aboriginal Perspectives" in one page is clearly a limitation. Just as recent court decisions on Aboriginal rights are contentious, there are also many Aboriginal perspectives as a result of the broad spectrum of political, cultural and geographical differences between Aboriginal cultures in Canada.

something that is given to them by the Creator and is dependent on their relationship with the land. As Aboriginal title flows from the Creator, it is inherent; it is not something granted to Aboriginal people by a system outside their own (p. 215). Nonetheless, Aboriginal peoples are still put in the position by the courts of having to prove the existence of Aboriginal rights and title.

3.5 Issues in Aboriginal Rights and Title Litigation

Morse (1985) outlines a set of four questions that sum up what some of the key issues are with regards to the clarification and definition of Aboriginal rights and title:

> i) *A question of legal status*: To what extent is Aboriginal title recognized in law? And to what extent has Aboriginal title been recognized in the various sources of law (prerogative, judicial, legislative or other)? What status has been accorded Aboriginal title in relation to ordinary legislation?
> ii) *A question of scope and content*: What is the actual scope and content of the rights derived from Aboriginal title?
> iii) *A question of termination or restriction*: What, if anything, can put an end to or extinguish Aboriginal title or restrict the rights derived from it?
> iv) *A question of compensation*: to what extent, if any, is there a legal obligation on government to pay compensation for termination or restriction of Aboriginal title? (p. 51)

There are a number of sources of law concerning the question of legal status, "The most significant prerogative instrument respecting the status of Aboriginal title is the Royal Proclamation of 1763 issued by King George III of Britain with respect to the governing of British North America"(Morse, 1985, p. 52); "The second major direct source of law is the decisions of the courts of law, the common law" (p. 56); And there is also legislation, such as the Canadian Constitution Act, Sections 35 and 37(1) 1982

(p. 84).

All of the issues and problems that are specifically cited later in this thesis, such as extinguishment of rights, testing for Aboriginal title, frozen rights and sovereignty assertion, come particularly under the first three of Morse's question areas.

3.6 The Role of Precedent in Legal Reasoning

According to the doctrine of *stare decisis* in common law, "lower courts must follow like decisions of higher courts within the same judicial hierarchy to the extent that they apply to the case before them "(Bell & Asch 1997, p. 39). Continuity, fairness, certainty and predictability are the rationale for this doctrine, which is meant to maintain legal objectivity (p. 39). While making decisions based on precedent reinforces continuity in decision making, it may also prevent judges from doing what they *feel* might be the just or right thing. Particularly due to the unique nature of Aboriginal rights and title cases, precedent does not always have the answers and in fact, it has the potential to reinforce ethnocentric judgments from the past and reproduce them in the present (p. 39).[7]

Decisions are not always based solely on precedent. Decisions may be based on a combination of precedent, evidence and academic advice, but have also attempted to find new definitions and new avenues to solve outstanding land claims.[8]

---

7 Bell & Asch also refer to: Schauer, Precedent (1987) 39 *Stanford L.R.* 571.

8The term land 'claim' is a controversial term as it implies that Aboriginal peoples are trying to 'claim' something new, or something that was not theirs to begin with. Rick Ponting also points out that "Indian leaders reject the term 'claim' as a code word or shorthand designation for a much broader governmental orientation that their rhetoric

In order to understand the significance of the Supreme Court recommendations in Delgamuukw (1997)[9] as they pertain to the use of Aboriginal oral histories, it is important to identify the cases and the precedents that led up to that decision. These cases represent judgments and precedents in the areas of Aboriginal rights and title. It was impossible to simply isolate cases where Aboriginal oral histories were heard or discussed, since so many issues in Aboriginal rights and title litigation are intricately linked. The following review is selective and is meant to set the stage for the discussion in Chapter 6 , and to give the reader some legal reference points.

3.7

A Selected Review of Cases, Statutes and Reports Informing Aboriginal Rights Litigation And *Delgamuukw* (1991, 1997) in Particular

The following cases and the precedents they set provide some of the background necessary to understand the critical analysis of the research data which is to come later in this thesis. Morse's first three areas[10] question: legal status, scope and content, and termination or extinguishment of Aboriginal rights, and act as a framework for this review and the issues that emerge. It is important to identify these issues as they are intricately linked to the use of Aboriginal oral histories in land claim cases. This review lists both cases of concern to Aboriginal rights and to Aboriginal title, as

---

labels 'genocidal'"(Ponting, 1986, p. 236-237). Despite the controversy, the term is used in a variety of articles, hence it is used in this thesis.

9 The Supreme Court recommendations in Delgamuukw will be discussed at length later in this chapter.
10 Refer to pages 57-58.

some of the key concepts have been used as precedent in both settings. This is not meant to be an exhaustive review of cases, but a selective one based on the fact that these cases and precedents are continually referred to in Aboriginal rights and title litigation. Given the complexity of each of these cases, it would be impossible as well as inappropriate to analyze all aspects relevant to Aboriginal rights and title litigation. These cases and precedents are selected according to their influence on *Delgamuukw* (1991) (1997). The brief summaries on the next three pages are followed by more detailed analysis.

3.7.1 Time-line of cases, statutes and reports relevant to Aboriginal rights and title[11]

***Delgamuukw v. British Columbia* (1997)**

Report on the Royal Commission on Aboriginal Peoples (1996)

R. v. Van der Peet (1996)
R. v. Gladstone (1996)
R. v. N.T.C. Smokehouse Ltd. (1996)

Mabo v. Queensland (1992)

Delgamuukw v. British Columbia (1991)

Canadian Constitution Act (1982)

R. v. Sparrow (1990)

A.G. Ontario v. Bear Island Foundation (1985)

Guerin v. The Queen (1984)

Hamlet of Baker Lake et al v. Minister of Indian Affairs and Northern Development et al (1979)

Calder v. A.G.B.C. (1973)

St. Catherine's Milling and Lumber Company v. The Queen (1888)

Worcestor v. Georgia (1832)

Johnson v. McIntosh (1823)

Royal Proclamation of 1763

---

11 This is my own listing/time-line of selected precedents, statutes and reports for reference purposes.

3.7.2 Selected cases, statutes and reports informing *Delgamuukw* (1991, 1997)[12]

Cases	Precedent/ Relevant Comments
Royal Proclamation of 1763	- Force of statute. - recognizes Aboriginal rights[13] in specific areas where treaties have not been signed.
Johnson v. McIntosh 21 U.S. (8 Wheat) 543 (1823)	- Crown sovereignty diminished Indian rights to sovereignty. - used doctrine of discovery.
Worcestor v. Georgia 34 U.S. (4 S.G.U.S.) 762 (1832)	- limits doctrine of discovery. - only way to acquire land is through purchase or cession.
St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 A.C. 46 (P.C.)	- Aboriginal title is a burden on the Crown. Aboriginal title could be granted or taken away by the Crown. - Crown title is underlaying and preceded signing of treaties.
Re: Southern Rhodesia [1919], A.C. 211	- informed Baker Lake test, particularly the concept of proof of an 'organized' society.
Calder v. Attorney-General of British Columbia, (1973), 34 D.L.R. (3d) 145 (also reported: [1973] S.C.R. 313, [1973] 4 W.W.R.1)	- Aboriginal title exists in law and in B.C. - split on whether the Nishga possessed Aboriginal title. - Federal government forced into dealing with Aboriginal title and land claims where no treaties had been signed.
Hamlet of Baker Lake et al v. Minister of Indian Affairs and Northern Development et al (1979) [1980] 5 W.W.R.	- test for Aboriginal title - affirmed Aboriginal rights based on immemorial use that has not been extinguished.

12 The commentary provided in the chart is my own. It is not meant to be exhaustive. It is meant as a quick reference to the significance of particular cases, statutes and reports.

13 While the Royal Proclamation of 1763 does not use the term "Aboriginal rights", this is the term that is used today. The Royal Proclamation of 1763 refers to Indian "nations" which infers rights, "And whereas it is just and reasonable and essential to our interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds..."(1763, by King George).

Canadian Constitution Act (1982) Canadian Charter of Rights and Freedoms Sections 25 (a), 35 (1)	- guarantee of rights and freedoms recognized by the Royal Proclamation of 1763. - existing Aboriginal and treaty rights of Aboriginal people are recognized and affirmed.
Guerin v. the Queen, S.C.C. (1984), 13 D.L.R. (4th) 321 (S.C.C.)	- confirmed Aboriginal title as a valuable asset. - Crown's responsibility for Aboriginal peoples is enforceable and trust-like.
R v. Sparrow, S.C.C. [1990] 1 S.C.R.; (1990), 70 D.L.R. (4th) 385 (S.C.C.)	- intention must be 'clear and plain' on question of extinguishment. - affirms federal responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.
Attorney-General Ontario v. Bear Island Foundation [1985], 49 D.R. (2d) 353, 15 D.L.R. (4th) 321 (Ont. H.C.)	- Aboriginal title had been extinguished - judge commented on lack of Aboriginal oral histories. - test for Aboriginal title based on Baker Lake test, but modified in some aspects. - only possessed personal and usufructuary right.
Mabo v. Queensland (1992) 175 C.L.R 1; (1992), 107 A.L.R. 1 (H.C.)	- recognized inherent native title in cases where it has not been extinguished. - rejects theory of terra nullius (that the land was uninhabited when colonizers first arrived).
Van der Peet (trilogy) [1996] 2 S.C.R. *R. v. Van der Peet* (1996) *R. v. Gladstone* (1996) *R. v. N.T.C. Smokehouse* Ltd. (1996)	- Aboriginal right to fish did not include fishing for commercial purposes. - Aboriginal right frozen at time of contact. - in Van der Peet, judge acknowledges Aboriginal land rights as an aspect of Aboriginal rights in common law.
Royal Commission on Aboriginal Peoples 1996	- links modern land claims and negotiated arrangements to self-government. - to establish through negotiation a new relationship based on principles: mutual recognition, mutual respect, sharing, mutual responsibility. - advocates negotiation over litigation.

3.7.3 Royal Proclamation of 1763

The Royal Proclamation of 1763 is considered a 'fundamental document' in First Nations and Canadian legal history (*Calder v A.G.B.C*, [1973], 34 D.L.R. (3d) 145). The Aboriginal rights which were articulated through the Royal Proclamation live on to sustain the foundations of the First Nation/Crown relationship and inform modern treaty making (Borrows, 1997c, p. 156). The Proclamation of 1763 has the force of a statute in Canada, and has never been repealed (Cumming & Mickenberg, 1970, p. 30). While the Proclamation does have the force of statute, its interpretation has always been a matter of dispute (Williams, 1987, p. 425).

Prior to 1763, the French and British in North America were fighting the Seven Years War. At the conclusion of this war in 1763, a peace treaty, the Treaty of Paris, was signed by the British and the French. Following this treaty, the Royal Proclamation of 1763 was issued to establish a new system of government in British North America (Crystal, 1996, p. 111).

The several passages that gave rise to questions of the extent of its jurisdictional applicability are as follows:

> And whereas it is just and reasonable and essential to our Interest and the security of our Colleagues, that the several *nations* or Tribes of Indians with whom we are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, *not having been ceded to or purchased by Us are reserved to them or any of them as their Hunting Grounds* - We do therefore... declare it to be our Royal Will and Pleasure... no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present to grant Warrants of Survey or pass

> Patents for *any Lands beyond the Heads of Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North* West, or upon any Lands whatever, which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any others.
> *And we do hereby strictly forbid... all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Land above reserved*, without our special leave and Licence for that Purpose first obtained.
> We do,... strictly enjoin and require that *no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians*, within those parts of our Colonies where we have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us in our Name at some public Meeting or Assembly of the said Indians. [italics added]
> (Royal Proclamation of 1763 as quoted in Williams, 1987, p. 426).

To sum up some of the main points: colonial governments were forbidden to survey or grant any unceded lands; colonial governments were forbidden to allow British subjects to settle on Indian lands or to allow private individuals to purchase them; there was an official system of public purchases developed in order to extinguish Aboriginal title (Borrow, 1997c, p.160).

As Borrows (1997c) outlines, there were many implications stemming from this policy. The fact that the Proclamation refers to Indian *nations* presumes respect and a nation-to-nation relationship. Two of the main issues which are often referred to concern Aboriginal autonomy and jurisdiction. Particularly in British Columbia, where few treaties were signed, Aboriginal groups have questioned whether the Royal Proclamation pertained to that region[14](Williams, 1987, p. 433), but the jurisdiction of

---

14 As in *Calder v A.G of B.C.* (1973).

the Proclamation has also been called into question in Quebec[15] (Richardson, 1993, p. 80) and Ontario[16] (Williams, 1987, p. 440).

The Royal Proclamation remains an important document, which is being tested and reinterpreted in ongoing ways in the courts.

3.7.4 *Worcester v. Georgia* (1832) *Johnson v. McIntosh* (1823) *St. Catherines Milling* (1888)

Johnson v. McIntosh (1823), *Worcestor v. Georgia* (1832), and *St. Catherines Milling and Lumber Co. v. Queen* (1888) are three of the older cases which Aboriginal title cases still refer.

Johnson v. McIntosh (1823) is an American case which is frequently cited. In this case, Justice Marshall basically "invented a body of law which was virtually without precedent" (McNeil, 1989, p. 301). Marshall recognized Aboriginal title as existing independent of the Proclamation of 1763, yet he considered that the Crown's title and sovereignty diminished Indian rights to sovereignty and Indian people's power to alienate their lands (Morse, 1985, p. 59). Bell and Asch (1997) note that Marshall's conclusions on the effects of discovery have been adopted as fundamental principles in Canadian Aboriginal rights law[17]. The authors summarize the effects of the doctrine of

---

15 As in the case of the James Bay Cree Agreement (1975).
16 As in *A.G. Ontario v Bear Island Foundation* (1985).
17 The Supreme Court of the United States in *Johnson v. McIntosh* (1823) ruled that the principle of discovery was acknowledged by all Europeans because it was in the interest of all to acknowledge it, and "gave the nation making the discovery the sole right of acquiring the soil and establishing settlements on it." The Court went on to say that indigenous peoples' power to dispose of the soil at their own will, to whomsoever they pleased, was denied "by the

discovery in the following judicial presumptions:

1. Sovereignty and legislative power is vested in the British Crown.
2. Ownership of Aboriginal lands accompanies sovereignty over Aboriginal territory.
3. Aboriginal peoples have an interest in land arising from original occupation that is less than full ownership.
4. The British Crown obtained the sole right to acquire the Aboriginal interest.
5. Aboriginal sovereignty was necessarily diminished.

(p. 47).

Going back to Morse's (1985) four question areas regarding the clarification and definition of Aboriginal rights[18], the precedent that comes out of *Johnson v McIntosh* addresses questions of legal status, as well as the scope of Aboriginal title and questions of termination or extinguishment. This case establishes the legal precedent that Aboriginal lands could be considered vacant and subject to discovery, because of how Aboriginal peoples used the land, as opposed to the superiority of English cultivation and settlement.

In *Worcestor v. Georgia* (1832), also an American case, the court's decision limited the doctrine of discovery and clarified that the only legitimate way to acquire title to lands occupied by Aboriginal peoples was through purchase or cession. The court accepted that the Crown acquired sovereignty but argued that the principle of discovery did not affect the right of those already in possession *(Worcester v. Georgia*, 6 Pet. (U.S.M.C.) 515 (1832). While both *Johnson v. McIntosh* and *Worcestor v. Georgia* are American cases, *St. Catherine's Milling and Lumber Co. v. Queen* brings this

---

original fundamental principle that discovery gave exclusive title to those who make it" (543).

18 Refer to p. 57-58 for Morse's four questions that sum up key issues with regards to the clarification and definition of Aboriginal rights and title.

discussion back to Canada.

St. Catherines Milling and Lumber Co. v. Queen (1888) (*St. Catherine's Milling*) developed when the federal government granted the St. Catherines Milling company a permit to cut lumber on land that had been surrendered to the Crown through Treaty 3 in Northwestern Ontario. Although the St. Catherine's Milling and Lumber Company was the defendant, charged by the Ontario government with taking lumber without a valid Ontario permit, the federal government intervened and effectively took over the defense of the case (*St. Catherines Milling and Lumber Co. v. Queen*, (1888) 14 AC 46 (PC). This case was heard by the Judicial Committee of the Privy Council of the House of Lords in Britain on appeal from the Supreme Court of Canada[19]. The Judicial Committee upheld the decision of the Supreme Court, on the basis that "the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the Sovereign" *(St. Catherines Milling and Lumber Co. v. Queen*, (1888) 14 AC 46 (PC).

This case is often referred to in contemporary Aboriginal title cases, as it was the basis of the federal argument that the Ojibway people who had negotiated Treaty 3 had, prior to the signing of the treaty, held full title to their land, and therefore the federal government was actually purchasing the land out-right from its owners through the treaty process. The federal government asserted that the Aboriginal title guaranteed by the Royal Proclamation of 1763 was full title to the land (*St. Catherines Milling and Lumber Co. v. Queen*, (1888) 14 AC 46 (PC). Again, going back to Morse's

---

19 "Until 1949, decisions of the Supreme Court of Canada could be appealed to the Judicial Committee of the Privy Council" (Kulchyski, 1994, p. 21).

question areas[20], *St. Catherines Milling* addressed questions of legal status and the extent to which Aboriginal title had been recognized in various sources of law, as well as scope, content and extinguishment of Aboriginal title.

This case represented the first extensive early discussion of the Royal Proclamation of 1763, the treaties (Treaty 3), the British North America Act (1867) and the Indian Act (1876) as they pertain to Aboriginal title. The Judicial Committee of the Privy Council also cited the decision in the *Johnson v. McIntosh* (1823) case, which gave Marshall's interpretation of Aboriginal rights some weight in Canadian jurisprudence. Some of the main points cited from this case that were given weight in future cases, was that *St. Catherine's Milling* (1888) decided that Aboriginal title was a 'burden' on Crown title, and that Crown title was underlying and preceded the signing of treaties, and that Aboriginal title could be granted or taken away by the Crown (Kulchyski, 1994, p. 22).

3.7.5 ***Hamlet of Baker Lake et al v. Minister of Indian Affairs and Northern Development et al*** **(1980)**
Re: Southern Rhodesia **(1919)**

Baker Lake v Minister of Indian and Northern Development case (1980) (*Baker Lake*) concerned a request by the Inuit of Baker Lake to obtain an injunction to stop the exploration activities of certain mining interests. The basis for the request was their

---

20 Refer to p. 57-58 for Morse's four questions that sum up some of the key issues with regards to the clarification and definition of Aboriginal rights and title.

view that these mining activities negatively affected their Aboriginal right to occupy the land specifically for the purpose of fishing and hunting, especially for caribou (Bell & Asch, 1997, p. 59). This case took place in 1980, before the Canadian Constitution was passed in 1982, in which 'existing Aboriginal Rights' were recognized. Therefore the application came out of a common law right which, it was presumed, had not been extinguished through legislation (p. 59).

Justice Mahoney, the judge presiding in the *Baker Lake* case, denied the injunction on the grounds that the mining activities were not interfering sufficiently with an Aboriginal right to occupy the land to hunt caribou. Mahoney did conclude, though, that the Inuit still possessed a common law right to occupy their lands for the purpose of fishing and hunting, particularly for caribou (Bell & Asch, 1997, p.59). What is of major significance, from the Baker Lake case to cases such as *Delgamuukw* (1991), is that the judge developed a 'test' to be used in the determination of the rights of the Aboriginal peoples. This test contained four elements:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the Aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England (*Baker Lake v. Minister of Indian Affairs and Northern Development* [1980], 5 W.W.R. 193).

These elements are asserted primarily with reference to common law principles

of Aboriginal title contained in past cases (McConnell, 1996, 105). According to Morse, (1985), this type of test is attempting to clarify a number of concerns such as: what extent is Aboriginal title recognized in law; what is the actual scope and content of the rights derived from Aboriginal title; and if these rights existed, were they extinguished at some point or could they be extinguished at some point? (p. 51)

The interpretation of the meaning of an 'organized society' is a key point. Justice Mahoney in the *Baker Lake* case derived their interpretation from *Re: Southern Rhodesia*. This case took place in 1919 in what was then colonial Rhodesia (now independent Zimbabwe). The following is a description by the Privy Council in that case:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not be to reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe.' On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.(*Baker Lake v. Minister of Indian Affairs and Northern Development* [1980], 5 W.W.R. 193)

"The institutions or the legal ideas of a civilized society" seem to connote that the claimant must have that minimum "threshold of legal sophistication that would entail a

rudimentary idea of 'property'" (McConnell, 1996, p. 105).

While the Baker Lake test, seems quite straightforward, the use of Aboriginal oral histories to prove societal organization and occupation is a double edged sword. Yes, oral histories can be heard, but precedents such as *Re: Southern Rhodesia* (1919) which are from another era, can be used to assess elements of the test, such as whether or not they were an 'organized society'. In relying on *Re: Southern Rhodesia* (1919) in the final judgment in *Baker Lake* (1980), the courts uncritically adopted the framework for understanding the nature of culture as it existed at the time of that decision (Bell & Asch, 1997, p. 58).

The *Baker Lake* decision affirmed that Aboriginal rights were based on immemorial use of land and those rights had never been extinguished (McConnell, 1996, p. 99).

3.8 The Chronological Leap

At this point there is a chronological leap in the legal narrative. The reasons for this are numerous: assimilationist policies towards the Aboriginal peoples of Canada post Indian Act (1876 - 1960s) (Tobias, 1991, p. 131-141); from 1927 until 1951, Parliament made it illegal to raise money for the defense of an Aboriginal land claim (Richardson, 1993, p. 289). Aboriginal people remained isolated from the mainstream legally and politically due to racist policies within the federal government and racist attitudes within the courts. The fact that Aboriginal people and organizations were almost entirely absent from the courtroom during this period indicates how much the

cases were dictated by government, legal and business interests (Richardson, 1993, p. 289) and the extent to which the Aboriginal population was legally and otherwise oppressed.

Few other pieces of legislation would attempt to shackle and control the Indian population as the federal Indian Act. The Indian Act, first created in 1876 (*Indian Act*, SC 1876, c.18) established the federal government as legal guardian for Indian peoples. The Indian Act created the differentiation between status Indians, those under federal guardianship; and non-status Indians, those who had never signed treaty or were never registered with the federal government (*Indian Act*. R.S., c. 149, s.2 (1). There was one law for Indian people and another for the rest of Canada, which kept the power and control of Aboriginal legal issues under the domination of the federal government.

Patterson (1972) calls the era when the Indian Act was created, the "colonial" period, a time when "the Indians became a colonial people whose continent had been invaded and wrestled from their control by foreigners" (p. 40). Foster and Grove (1993) argue that this period represented a "reluctance of governments to permit Indian title issues to be judicially resolved" and that it also took years for "Aboriginal people to accumulate the experience, power and resources to overcome political and legal obstacles to settlement" (p. 219).

Assimilationist policies towards Aboriginal peoples have been a part of Aboriginal/ non-Aboriginal relations for the past 150 years (Frideres, 1988, p. 20). It was not until The *Statement of the Government of Canada on Policy, 1969 (White*

Paper) was released, that assimilationist policies changed. The *White Paper* advocated the repeal of the *Indian Act*, and any other special legislation relating to Indians, particularly those considered to be status Indians by definition of the Indian Act, and the complete devolution of federal responsibility for status Indian people (Tobias, 1991, p. 141). The huge protest that ensued marked the beginning of a new era. The federal government proposed a new approach that described, "an equality which preserves and enriches Indian identity and distinction; an equality which stresses Indian participation in its creation and which manifests itself in all aspects of Indian life" (Canada, 1969). At the same time, Aboriginal peoples were rallying to create their own responses across the country. Those responses together with legal and political action on the part of Aboriginal peoples, led to significant changes in the government's approach. While there remained many differences in goals and strategies between Aboriginal cultures, women's groups and regional Aboriginal organizations, Aboriginal peoples were becoming active participants in their legal strategies and political goals (Frideres, 1988, p. 124-125).

3.8.1 ***Calder v. Attorney-General of British Columbia* (1973)**

The Nishga [21] Indian Tribal Council of Northwestern British Columbia, wanted a declaration that they held an unextinguished Aboriginal title to their traditional territories. However, in British Columbia the government refused to recognize Indian title and few

---

21 Nishga is currently spelled Nisgaa, but this old spelling will be used when referring to cases or articles that use the original spelling.

treaties were signed[22]. Aboriginal people asserted that they owned their lands and objected to their placement on reserves, which began in the 1850s and 1860s (Miller, 1989, p. 146). The Nishga, as well as their neighbors, the Gitxsan, "had been engaged in a legal struggle with British Columbia over their lands and their fisheries from the origin of the colony" (Harring, 1998, p. 188).

Both the lower court (*Calder et al v. A.G.B.C.* (1970), 8 D.L.R. (3d), 59 [S.C.B.C]) and the British Columbia Court of Appeal ruled against them, so they appealed to the Supreme Court of Canada (*Calder v. A.G.B.C.* [1973], 34 D.L.R. (3d) 145). This decision was handed down in January of 1973, and had profound implications for the future of comprehensive land-claims and Aboriginal rights litigation generally.

Two of the Supreme Court of Canada judges in this case would discuss extensively the Royal Proclamation of 1763, *St. Catherine's Milling (1888), Johnson v. McIntosh (1823), Worcestor v. Georgia* (1832) and the nature of Aboriginal title and the process of extinguishing it. The Supreme Court Justices were divided on whether the Royal Proclamation had jurisdiction in British Columbia. Justice Judson wrote:

> Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. (*Calder v. A.G.B.C.* [1973], S.C.R. 313)

All the judges, excluding one, stated that Aboriginal title existed in law, but they were split on whether the Aboriginal title of the Nishga had been extinguished even

---

22 The Douglas treaties were signed on parts of Vancouver Island between 1851 to 1864 (Miller, 1989, p. 145).

though there had been no treaty, no agreement to surrender their title and no federal or provincial legislation that said their title was extinguished (*Calder v. A.G.B.C.* [1973], S.C.R. 313). The appeal was dismissed on a technicality, but the acknowledgment that Aboriginal title existed in British Columbia and in Canadian law would live on. While the court would not declare that the Nishga possessed an unextinguished Aboriginal title to their territories, several judges did acknowledge more generally the existence of Aboriginal title in British Columbia.

Due to this acknowledgment of Aboriginal title by the courts, as well as the previous outcry against the federal government's *White Paper* of 1969, the federal government was forced into dealing with Aboriginal claims to land in areas where no treaties had been signed. The government was now prepared to consider comprehensive claims based on Aboriginal title (Miller, 1991a, p. 410-411). A year after the Nishga decision, an Office of Native Claims was set up to advise the

Department of Indian Affairs and Northern Development (DIAND) on how to settle them (Miller, 1991a, p. 410-411).

3.8.2 Canadian Constitution Act 1982: Canadian Charter of Rights and Freedoms, Sections 25 and 35

After 1982, when the Canadian Constitution was repatriated from Britain in the form of the *Constitution Act*, many legal cases involving Aboriginal rights and title would refer to sections 25 and 35 of the Canadian Charter of Rights and Freedoms.

Section 25 states:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including:
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that may be acquired by the original peoples of Canada by way of land claims settlement.

Section 35 provides that:

> (1) the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed;
> (2) in this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Metis Peoples of Canada.
> (The *Constitution Act*, 1982)

In many senses, section 35 of the *Constitution Act* still remains open to interpretation. Patrick Macklem's (1997a) article entitled, "Aboriginal Rights and State Obligations" is one example of some of the interpretational issues involved with these two sections of the constitution. Macklem acknowledges that section 35 (1) is another step towards affirming Aboriginal rights, but acknowledges uncertainty as to whether these rights are negative or positive. Macklem (1997a) states that a "negative right creates an obligation of inaction or non-interference", meaning "as against the state, a negative right requires government not to interfere with its exercise." While a "positive right requires action instead of inaction". For example, "positive rights often require government to provide certain benefits to the right-holders in question" (p. 100). While "these purposes or interests include respect for Aboriginal identity, territory, and sovereignty", does "this support the view that federal, provincial, and territorial

governments ought to provide certain social and economic benefits to Aboriginals?" (p. 97). While Macklem asserts that both negative and positive rights should be interpreted through constitutional recognition, the courts would be called on to interpret what these rights mean in actuality. *R. v. Sparrow, S.C.C.*(1990) would be one of the first cases to assert an Aboriginal right based on Section 35 of the *Canadian Charter of Rights and Freedoms*, 1982.

3.8.3 *R. v. Sparrow* (1990)
Guerin v. the Queen (1984)

In *R. v. Sparrow* (1990), Reginald Sparrow, a member of the Musqueam Band in British Columbia, was caught fishing with a drift net that was longer than had been permitted by the band's food fishing licence. Sparrow defended himself by saying he was exercising an 'existing Aboriginal right' as protected by Section 35 of the Constitution Act (1982). Sparrow was found guilty in provincial court, but the British Columbia Court of Appeal overturned the conviction because they found Sparrow's Aboriginal right to fish had not been extinguished prior to 1982; but on the other hand, the court limited the protection of Section 35 so that the net restriction was not inconsistent with it. Both the Crown and Sparrow, for different reasons, appealed to the Supreme Court of Canada (*R. V. Sparrow* [1990], 1 S.C.R. 1075). The Supreme Court ordered a new trial, but the decision was significant for its affirmation of Aboriginal rights.

The Supreme Court decision in the Sparrow case is significant because it contained an extensive discussion of how the phrase from the *Canadian Charter of Rights and Freedoms* (1982) 'existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed' is to be interpreted. Particular emphasis is placed on interpreting the word 'existing' and the phrase 'recognized and affirmed' (Kulchyski, 1994, p. 212). The Supreme Court rejected any attempt to fix a definition or change any prior interpretations of Aboriginal rights. This allowed for a much broader interpretation of existing Aboriginal rights. When discussing the words 'recognized and affirmed', the justices added "the nature of s. 35(1) itself suggests that it be construed in a purposive way. 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" (*R. V. Sparrow* [1990], 1 S.C.R. 1075).

There are a number of precedent setting areas with regards to this decision. For example:

> 1. On the question of extinguishment, the justices write "that the intention must be clear and plain". The implication is that laws of general application would not be sufficient to extinguish an Aboriginal right.
> 2. This case affirms the findings in *Guerin* (see below), that "the government has a responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the government and Aboriginals is trust like, rather than adversarial".
> 3. They establish a general principle for the allocation of scarce resources where an Aboriginal right remains in effect. This means "that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing" (*R. V. Sparrow* [1990], 1 S.C.R. 1075).

In the final Supreme Court recommendations in *Delgamuukw v. British Columbia*

(1997), Sparrow is frequently cited as a reference point or stepping stone in further defining issues such as the extinguishment of Aboriginal rights. *Guerin v. Queen* (1984) then builds on the findings regarding the federal government's fiduciary responsibility with respect to Aboriginal peoples.

The case *Guerin v. Queen* (1984) has its origins in January of 1958, when a lease was signed in which lands of the Musqueam Indian Band were leased to the Shaughnessy Heights Golf Club of Vancouver. The Musqueam Band believed that they were strongly influenced to accept the terms of the lease, which were well below market standards of the time, by members of the Department of Indian Affairs. The band did not receive a copy of the lease until 1970, and sued the government for damages in 1975 (*Guerin v. R.* [1984], 2 S.C.R. 335).

This case raised questions about Aboriginal title and the nature of the government's (Department of Indian Affairs) legal responsibility towards Aboriginal peoples. The trial judge held that the Crown had not lived up to its responsibility, and awarded the band ten million dollars in damages. The Federal Court of Appeal overturned this decision. It was then appealed to the Supreme Court of Canada. The Supreme Court was unanimous in allowing the band's appeal. Two issues that this case is noted for are that it confirmed both that Aboriginal title was a valuable asset, and that the Crown's responsibility for First Nations is enforceable and trust-like. This acknowledgment of the federal government's fiduciary responsibility towards the status

Indians[23] of Canada would be cited in future cases.

3.8.4 *A.G. Ontario v. Bear Island* (1985)

The Attorney General for The Province of Ontario v. the Bear Island Foundation and Gary Potts, William Twain and Maurice McKenzie Jr. on behalf of themselves and on behalf of all other members of the Teme-agama Anisnabay[24], and the Temagami Band of Indians (1989) is typically referred to as the "*Bear Island*". This is an unusual case, as it was initiated by the Crown to get a decision on whether the Crown owned some 4,000 square miles of land in the Lake Nipissing region of Ontario, or whether a group of Indians owned it by virtue of the Royal Proclamation and by virtue of Aboriginal title at common law (Williams, 1987, p. 435).

Several times during the 1920s and 1930s, Aboriginal residents of Bear Island petitioned for a reserve to be set aside for them, as the residents of Bear Island were not signatories of the Robinson-Huron Treaty signed in 1850 (Hodgins & Benidickson, 1989, p. 214). The Crown's expert witnesses argued that in the early nineteenth century various Chippewa (Ojibwa) Indians from Lake Huron moved into vacant Temagami lands and that relatives of these Ojibwa had accepted the Robinson-Huron Treaty in 1850 (Hodgins & Benidickson, 1989, p. 214). The Teme-Augama Anishnabay had a different interpretation of the past. Their evidence showed "that they had existed as a self-governing community in 1763 at the time of the Royal Proclamation, that they

---

23 The term "Indian" is used here as it refers the federal government's responsibility under the Indian Act.
24 Teme Augama Anishnabay is also spelled Anishabai in some publications.

had not signed any treaty with the Crown, and that they therefore had a valid Aboriginal claim to the land" (Hodgins & Benidickson, 1989, p. 268).

The defendants, *Bear Island et al.*, argued that Crown title was burdened by Aboriginal title recognized by the Royal Proclamation of 1763, and by unfulfilled obligations under the Robinson-Huron Treaty signed in 1860 (Culhane, 1998, p. 97). The Crown fundamentally, wanted the court to relieve it of this burden so that development could proceed. The Teme Augama Anishnabay had a land caution put on the territory under dispute so that development could not take place until the question of Aboriginal title was settled.

The question of expert witnesses and the use of oral histories were two of the main issues coming out of this case. Justice Steele commented:

> Indian oral history is admissible in Aboriginal land claim cases where their history was never recorded in writing. However, this does not detract from the basic principle that the courts should always be given the best evidence. The court has an obligation, first, to weigh the evidence and consider what evidence is the best evidence and, second, if such best evidence is not introduced, to consider making an adverse finding against the person who has failed to produce it. (A.G. Ontario v. Bear Island, [1985], 15 D.L.R. (4th) 321)

Justice Steele later said, "how disappointed I was that there was so little evidence given by Indians themselves" and it was obvious that he considered the presentation of the case for the Indians to have been weakened by this failure (Williams, 1987,p. 435).

The judge in the *Bear Island* case modified the Baker Lake test[25] into a more

---

25 Refer to p.70-71 for details of the Baker Lake test.

complex three-part test which added requirements for proof of the nature of Aboriginal rights enjoyed prior to 1763, evidence of a system of land-holding, and a system of social rules and customs (Culhane, 1998, p.99). The Bear Island test also added, "continuity of exclusive occupation must be evident up to the date of commencement of the court action" (Culhane, 1998, p. 99). This meant that the Bear Island claimants had to prove exclusive occupation from the 18th century until the time their land claim action began. This would be a daunting task, as no doubt there would have been others who would have used that area for various purposes.

In the end, Judge Steele decided that most of the claim area was subject to the Royal Proclamation and that Aboriginal rights thereunder were personal and usufructuary; that is, dependant on the will of the Crown and limited to those purposes and uses enjoyed in 1763, the date of the Royal Proclamation (Williams, 1987, p. 440). Judge Steele also ruled that the evidence presented did not prove that the Teme-Augama Anishnabay were members of an organized society in 1763 (Culhane, 1998, p. 98).

Culhane points out that the language and reasoning used in the *Bear Island* case closely resembled that of Justice Patterson in *R. v. Syliboy* (1929)[26]. In 1985 Justice Steele rejected the Teme- Augama Anishnabay claim to Aboriginal title, stating that Aboriginal title had been extinguished in that area. On appeal in 1991, the Supreme Court of Canada rejected Steele's finding that the Teme-Augama Anishnabay

---

26 Justice Patterson in *R v. Syliboy* in 1929, found that an agreement between the Crown and the Micmac in 1752 was not a treaty representing the "unconstrained act of independent powers", but rather an agreement "between a civilized power and savages" (Patterson as quoted in Culhane, 1998, p. 98).

had "failed to prove that their ancestors were an organized society in 1763", yet the judges also ruled that they were unable to find any "palpable and overriding error" in Justice Steele's finding of facts (Culhane, 1998, p. 99). The Crown argued successfully that any Aboriginal title within this area of Ontario had been extinguished.

3.8.5 *Delgamuukw v. British Columbia* (1991)

Delgamuukw v. British Columbia is one of the most written about cases in Canadian law[27] due to the language and severity of the final judgment. In 1984, Gisday Wa and Delgamuukw, on behalf of their Houses and all other Gitxsan and Wet'suwet'en Houses and hereditary chiefs, filed suit in the British Columbia Supreme Court, hoping to force the provincial government into recognizing Gitxsan and Wet'suwet'en ownership and jurisdiction title to 22,000 square miles of territory in north-central B.C (Gisday Wa & Delgamuukw, 1989, p. 1). As described in Chapter 2 of this thesis, the land claim trial lasted three years, and throughout that time many Gitxsan and Wet'suwet'en presented their oral histories as evidence of their historic societal

---

27 Refer to: Culhane, Dara (1998). *The Pleasure of the Crown: Anthropology, Law and First Nations.* Burnaby, B.C: Talon Books; Monet, Don and Wilson, Ardythe (1992). *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case.* Gabriola Island, B.C: New Society Publishers; *B.C. Studies,* (1992) No. 95, Autumn; Asch, Michael and Bell, Catherine (1994). Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw. *Queen's Law Journal 19:* 2, Spring. 503-550; Cox, Douglas, B.(1992). The Gitksan-Wet'suwet'en as 'Primitive' Peoples Incapable of Holding Proprietary Interests: Chief Justice McEachern's Underlying Premise in Delgamuukw. *Dalhousie Journal of Legal Studies 1:* 1, 141-160; Doyle-Bedwell, Patricia (1993). The Evolution of the Legal Test of Extinguishment: From Sparrow to Gitksan. *Canadian Journal of Women and the Law 6:* 1,193-204; Fortune, Joel (1993). Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History. *University of Toronto Faculty of Law Review 51:* 1, 80-117; Sherrott, Geoff (1992). The Court's Treatment of the Evidence in Delgamuukw v. B.C. *Saskatchewan Law Review 56:*2, 441- 450; Mills, Antonia (1994). *Eagle Down is our law: Witsuwit'en law, feasts, and land claims.* Vancouver: U.B.C.Press.

organization and land-use in their traditional territories. Still, in 1991, Justice McEachern ruled against their claim. One of the main reasons he cited was, "I am unable to accept adaawk, kungax, and oral histories as reliable bases for detailed history, but they could confirm findings based on other admissible evidence" (*Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97).

Justice McEachern cites the fact that they had no written language as a reason or rationalization to classify the Gitxsan and Wet'suwet'en as falling "within a much lower, even primitive order" (*Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97). One of the main reasons for relying on oral historical evidence was to prove societal organization and land use as in the *Baker Lake* test as modified in the *Bear Island* case. The discounting of the validity of oral histories, and classification of the Gitxsan and Wet'suwet'en as primitive because they had no written language, undermined much of their case.

Judge McEachern cited cases such as *Johnson v. McIntosh* (1823) in support of his ruling: "The underlying purpose of exploration, discovery and occupation of the new world, and of sovereignty, was the spread of European civilization through settlement. For that reason the law never recognized that the settlement of new lands depended upon the consent of the Indians" (*Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97). He also cites the *Sparrow v. Queen* (1990) case as demonstrating that the British Crown announced its "clear and plain intention" to extinguish Aboriginal title (*Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97).

Justice McEachern also acknowledged the judgments in *Re: Southern Rhodesia*

(1919) and *St. Catherine's Milling* (1888):

> Although not binding upon me but deserving deference, is the opinion of the Privy Council in *Re: Southern Rhodesia*...The right of the Imperial Crown to proceed with the settlement and development of North America without aboriginal concurrence was confirmed by the Privy Council in the *St. Catherine's Milling* case. This was expressed in practical terms by stating that 'Indian title' existed at the pleasure of the Crown. (*Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97)

3.8.6 From the Royal Proclamation to *Delgamuukw* (1991): A summary

The Royal Proclamation of 1763 has the force of a statute or delegated right via legislation. The Proclamation remains a fundamental document which has initiated much debate within Aboriginal Canadian legal history. It did not entirely resolve the question of jurisdiction and applicability in specific areas of Canada where no treaties have been signed, for the purposes of Aboriginal title cases. There is also some question as to whether the Proclamation is the source of inherent rights (Aboriginal rights that pre-exist European colonization) or delegated rights (created by the will of the Crown).

Re: Southern Rhodesia (1919) in particular is referred to when tests for Aboriginal title are used. The idea of having to prove that an Aboriginal society was 'organized' at the time of contact or at the time of the Royal Proclamation began with *Re: Rhodesia* and was used and modified in *Baker Lake* (1979), *Bear Island* (1982) and in *Delgamuukw* (1991).

The three earliest cases that still influence Aboriginal rights and title definitions

today are *Johnson v. McIntosh* (1823), *Worcestor v. Georgia* (1832) which are American cases and *St. Catherines Milling* (1888), a Canadian case. All of the judgments in these cases come out of the positivist or delegated rights theory: that underlaying sovereignty remains with the Crown. *Johnson v. McIntosh* (1823) asserted the doctrine of discovery in which Crown sovereignty diminished Indian rights to sovereignty. *Worcestor v. Georgia* (1832) limited the doctrine of discovery, saying that the only way to acquire land is through purchase or cession. *St. Catherine's Milling* (1888) asserted that Aboriginal title is a burden on Crown title. In all these early cases, Crown sovereignty is the starting point for determining whether Aboriginal title was extinguished, or whether it in fact existed at all.

By the time the *Calder* decision came down in 1973, much had changed in Aboriginal/ non-Aboriginal relations in Canada. Aboriginal groups were more organized and politicized, particularly after the response to the federal government's *White Paper* of 1969. Calder was a turning point for how Aboriginal rights would be viewed in the courts. In Calder the judges recognized Aboriginal rights in British Columbia generally, but they were split on whether to recognize the Nishga's Aboriginal title in particular. Still, the recognition of Aboriginal rights in British Columbia and in law pushed the federal government into creating the Office of Native Claims to advise the Department of Indian Affairs and Northern Development.

The Canadian Constitution Act of 1982; the Canadian Charter of Rights and Freedoms, Sections 25 and 35 created another avenue for Aboriginal rights to be argued. There was no fixed definition in 1982 for the terms 'existing' Aboriginal and

treaty rights, and 'recognized and affirmed'. These terms would be further argued in subsequent court cases.

R. v. Sparrow (1990) was the first case to assert the 'existing' Aboriginal right of a status Indian to fish under the *Constitution Act* of 1982. While the Supreme Court ordered a new trial, there was much discussion regarding the extinguishment of Aboriginal rights. The judge in Sparrow stated that the intention to extinguish Aboriginal rights must be 'clear and plain'. As in *Guerin* (1984), Sparrow also confirmed that the federal government had a responsibility to act in a fiduciary capacity with respect to Aboriginal people.

The *Bear Island* case (1985, 1991) would have some similarities to *Delgamuukw* (1991). In both cases it was ruled that Aboriginal title had been extinguished due to the assertion of Crown sovereignty. In both cases the use of Aboriginal oral histories was discussed extensively; in the *Bear Island* (1985) case the judge criticized the Aboriginal peoples for not putting Aboriginal Elders on the stand, and in *Delgamuukw* (1991) the judge listened to many people give evidence in the form of oral histories, yet refused to grant equal weight to the oral histories alongside of written historical evidence.

It is very difficult to make any sweeping statements about a time period that spanned the late 1800s to the late 1970s. *The Royal Proclamation* of 1763, along with all the cases previously cited, would be referred to as precedent and authority in Aboriginal rights and title litigation for years to come.

3.9 Post *Delgamuukw* (1991)

3.9.1 *Mabo v. Queensland* (1992)

Mabo v. Queensland (1992) (*Mabo)* is an Australian case, yet it is within common-law jurisdiction and therefore it is given weight in Canadian law.

In *Mabo v. Queensland* the decision included the following principles:

> 1. The theory of *terra nullius* [28] is rejected by the common law of Australia.
> 2. The common law of Australia rejects the proposition that, when the Crown acquired sovereignty over territory which is now part of Australia, it thereby acquired the universal and absolute beneficial ownership of all the land therein.
> 3. The common law accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty; and those antecedent rights and interests thus constitute a burden on the radical title of the Crown. (Radical title is a title adapted from feudal theory that was called a radical, ultimate or final title).
> 4. The common law of Australia recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.
> (As quoted in Lockhart, 1993, p. 206)

One of the significant aspects of this decision is the break from the idea of delegated rights to inherent, yet common law rights; the fact that the "common law accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty" (*Mabo v. Queensland* [1992] 175 C.L.R. 1).

---

28 Terra Nullius means 'uninhabited land', but "claims were often advanced that lands occupied by certain tribal populations properly fell within the scope of the term. Judgments of this kind were based on the supposed inferiority of such societies and their inability or unwillingness to exploit the land in a 'civilized' way"(Morse, 1985, p.36).

Mabo v. Queensland was one of the cases considered by Justice Lamer in the Supreme Court recommendations in *Delgamuukw* (1997) with regards to Aboriginal title and Crown sovereignty. Justice Lamer stated that "in *Mabo*, supra, the High Court of Australia set down the requirement that there must be substantial maintenance of the connection between the people and the land. In my view, this test should be equally applicable to proof of title in Canada" (*Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010).

3.9.2 Van der Peet Trilogy

R. v. Van der Peet (1996) (*Van der Peet*), *R. v. Gladstone* (1996), *R. v. N.T.C. Smokehouse Ltd. (1996)* are often referred to as the 'Van der Peet trilogy' as they all took place in British Columbia in 1996, were about Aboriginal fishing rights and all contained decisions relevant to Aboriginal rights. In the *Van der Peet* case, Dorothy Van der Peet, a member of the Sto:lo First Nation was charged with selling salmon under an Indian food fishing licence. This is an offence under the British Columbia Fishery Regulations. The main issue in this case was whether her Aboriginal right to fish included the right to sell the fish. At trial, she was convicted and fined $50.00. On the first appeal, the B.C. Supreme Court held that the Aboriginal right to fish included the right to sell or barter the catch. Justice Selbie concluded that "since Aboriginal rights are not frozen they must be able to change their way of using fish, which included selling their fish, as times change; therefore, First Nations can sell fish as an Aboriginal right" (*R. v. Van der Peet* , British Columbia Supreme Court: (1991), 58 B.C.L.R. (2d)

392). On further appeal to the B.C. Supreme Court, the majority held that the Aboriginal right to fish did not include fishing for commercial purposes. It found that commercial fishing was not a protected Aboriginal right because it had not been integral to Sto:lo society and its distinctive culture prior to the arrival of Europeans, but became prevalent merely as a result of their influences after contact; hence, Aboriginal rights became frozen once again (*R. v Van der Peet*, British Columbia Court of Appeal: (1993), 80 B.C.L.R. (2d) 75). Borrows argues that the effect of interpreting Aboriginal rights in a way that limits their recogniton to pre-contact practices will only provide very narrow and restricted rights [29] (Borrows & Rotman, 1997c, p. 34).

In *R. v. Gladstone*, the appellants were charged under the fisheries act with attempting to sell herring spawn on kelp caught without the proper licence. One of the accused, on arrest, produced an Indian food fishing licence (*R. v. Gladstone* [1996] 2 S.C.R. 723). *R. v. N.T.C. Smokehouse Ltd* is similar in that it is also about fish caught and sold under an Indian food fishing licence. The appellant, a food processor, was charged under the Fisheries Act with selling and purchasing fish not caught under the authority of a commercial fishing licence (R. v. N.T.C. Smokehouse Ltd. [1996] 2 S.C.R. 672).

In all three cases, *R. v. Van der Peet, R. v. Gladstone,* and *R. v. N.T.C. Smokehouse Ltd.*, the Aboriginal right to catch and sell fish is at issue. In each of these cases the appellants were asserting their broad or collective Aboriginal right, and in

---

29 This point will be expanded on later in this chapter.

each case the courts reduced that collective right to an individual right. In *Van der Peet* this translated into whether Mrs. Van der Peet had an Aboriginal right to sell fish for fifty dollars rather than whether Mrs. Van der Peet, as a member of the Sto:lo Nation, was able to sell the fish as part of a broader Aboriginal fishing right (Rotman, 1997, p. 3).

Even though these three cases are about the Aboriginal right to fish and sell fish, they also have a bearing on Aboriginal title litigation. In the *Van der Peet* case, Chief Justice Lamer stated that "Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land; it is the way in which the common law recognizes Aboriginal land rights" (*R. v. Van der Peet* , British Columbia Supreme Court: (1991), 58 B.C.L.R. (2d) 392). He goes on to say, "Aboriginal title and Aboriginal rights arise from the existence of distinctive Aboriginal communities occupying 'the land as their forefathers had done for centuries'"(*R. v. Van der Peet* , British Columbia Supreme Court: (1991), 58 B.C.L.R. (2d) 392). While the judgment in *Van der Peet* encourages the idea of rights frozen at the time of contact, it also acknowledges Aboriginal land rights in common law, as the Australian judgment in *Mabo* did.

3.9.3 The Report of the Royal Commission on Aboriginal Peoples (1996)

Even though the *Report of the Royal Commission on Aboriginal Peoples* (R.C.A.P. 1996) is obviously not a legal case, it has been used as a non-case authority on particular issues. R.C.A.P was created "in the troubled months following the demise of the Meech Lake Accord and the confrontation, in the summer of 1990, between Mohawks and the power of the Canadian state at Kanesatake (Oka), Quebec"

(R.C.A.P, 1996, Vol. 1, s1-s4).

The R.C.A.P report acknowledges that previous strategies for settling land claims were obviously not working. Specific claims as well as comprehensive claims have been backed up for a long time, with few actually being settled. There are currently about 210 negotiations on land claims underway. These range from small, specific claims to large comprehensive claims (Purvis, 1999, p. 6).

The Royal Commission on Aboriginal Peoples conducted hearings across the country, compiled research and commissioned analytical papers. The commission then came up with a number of recommendations and conclusions in the area of land claims. The Commission acknowledged that the changes to the Canadian Constitution (1982) which "recognize and affirm existing Aboriginal and treaty rights" provides some assurance. It also acknowledges some of the new principles set out recently by the courts, such as the recognition of the fiduciary obligations owed by federal and provincial governments to Aboriginal peoples and the fact that any violation of treaty promises would be seen by the courts as dishonouring the integrity of the Crown (R.C.A.P, 1996, Vol. 2, chap. 1, s1-s4).

The R.C.A.P (1996) report describes the Aboriginal understanding of Aboriginal rights:

> Aboriginal claims are not entreaties against the Crown's superior underlying title. Aboriginal claims are assertions of Aboriginal rights - rights that inhere in Aboriginal nations because of time-honoured relationships with the land, which predate European contact. Aboriginal rights do not exist by virtue of Crown title; they exist notwithstanding Crown title. They are recognized by section 35(1) of the Constitution Act, 1982, and they protect matters integral to Aboriginal identity and culture,

> including systems of government, territory and access to resources. Any remaining authority the Crown may enjoy is constrained by the fact that it is required by law to act in the interests of Aboriginal peoples. Instead of readily invoking the public interest to oppose Aboriginal interests, the Crown should uphold Aboriginal interests. (R.C.A.P, 1996, Vol.2, Chap.4, s6.3)

The Commission links modern land claim settlements and negotiated arrangements for Aboriginal self-government. "In either case, the aim will be to establish through negotiation the basis for a new relationship between Aboriginal and non-Aboriginal people based on the principles of: mutual recognition, mutual respect, sharing and mutual responsibility" (R.C.A.P, 1996, Vol. 1, Chap.3, s16.1).

3.9.4 In summary

The post *Delgamuukw* (1991) period gave rise to some very significant changes regarding the nature and the definition of Aboriginal rights and title. The *Mabo* (1992) decision in Australia is quite extraordinary as it veers somewhat from the positivist view of Aboriginal rights. While it is impossible to summarize such a complex and significant judgment in a few paragraphs, two elements will be emphasized here: the fact that the theory of *terra nullius* was rejected by the common law of Australia; and the fact that the common law of Australia recognized a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs to their traditional lands. (*Mabo v. Queensland* [1992] 175 C.L.R. 1)

While the *Mabo* (1992) decision still holds that any antecedent or Aboriginal

rights constitute a burden on the radical title of the Crown, *Mabo* also represents a precedent within common-law.

Even though the three cases known as the *Van der Peet* (1996) trilogy are about the Aboriginal right to fish and sell fish, they also have a bearing on Aboriginal title litigation. In the *Van der Peet* case, Lamer stated that, "Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land; it is the way in which the common law recognizes Aboriginal land rights" (*R. v. Van der Peet* [1996] 2 S.C.R. 507). While the judgment in *Van der Peet* encourages the idea of rights frozen at the time of contact, it also acknowledges Aboriginal land rights in common law, as the judgment in *Mabo* did.

The *Report of the Royal Commission on Aboriginal Peoples* acknowledges that the changes to the *Canadian Constitution Act* (1982) which "recognize and affirm existing Aboriginal and treaty rights" provide another avenue for the recognition of Aboriginal rights. It also acknowledges some of the new principles set out recently by the courts which recognize the fiduciary obligations owed by federal and provincial governments to Aboriginal peoples, and the fact that any violation of treaty promises would be seen by the courts as dishonouring the integrity of the Crown (R.C.A.P, 1996, Vol. 2, Chap. 4, s6.3).

The Commission links the modern land claim settlement and negotiated arrangements for Aboriginal self-government. "In either case, the aim will be to establish through negotiation the basis for a new relationship between Aboriginal and non-Aboriginal people based on the principles of: mutual recognition, mutual respect,

sharing and mutual responsibility" (R.C.A.P, 1996, Vol. 2, Chap. 4, s6.3). The Supreme Court judgment in *Delgamuukw* (1997) quoted from the R.C.A.P report in its definition of Aboriginal oral histories.

There are many significant aspects of the Supreme Court recommendations in *Delgamuukw* (1997). Only a brief quote will be highlighted here concerning the use of Aboriginal oral histories in the courts. Aboriginal oral histories must be given equal weight in any subsequent legal proceedings. "A court must take into account the perspective of the Aboriginal people", and Aboriginal rights "demand a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples" (*Delgamuukw v. British Columbia* [1997] 3 S.C.R.1010).

3.10 Supreme Court Recommendations in *Delgamuukw* (1997)

3.10.1 Reactions to *Delgamuukw v. British Columbia* (1997)

In December 1997, the long awaited Supreme Court judgment was announced in the *Delgamuukw* case. On the Aboriginal side, the reaction was generally jubilant. One of the most often quoted comments came from Herb George, a Wet'suwet'en lawyer: "It's a great day for Aboriginal people across Canada. We were given a diamond for Christmas instead of a lump of coal" (Aubry, 1997, A1). However in some non-Aboriginal sectors of B.C. society, others were not so jubilant. Melvin H. Smith, a former constitutional advisor and deputy minister in the B.C. provincial government, was one of the most vocal critics of the *1997 Delgamuukw* decision. He is the author of *Our Home or Native Land?*, in which he opposes Aboriginal land claims. Smith (1995)

claims that "there is no judicial support in Canada for such an idea [Aboriginal title] and yet the provincial government has unreservedly accepted the concept of 'Aboriginal title'. But by whose definition?" (p.75)

The *Globe and Mail* newspaper accentuated the *Delgamuukw* recommendations in relation to their acceptance of Aboriginal oral history as evidence, by including an excerpt from the recommendations in the commentary section (*Globe and Mail*, Dec. 15, 1997, A17). Many aspects of the recommendations regarding the definition and the testing of Aboriginal rights and title were seen as another milestone on the road to greater recognition of Aboriginal rights. The recommendations regarding the use of Aboriginal oral histories were clearly seen as a victory, yet it remains to be seen whether this was a symbolic victory or one which could have an impact on the future use of Aboriginal oral histories in the courts.

3.10.2 Oral history and the *Delgamuukw* (1997) recommendations

The following is an excerpt from the *Delgamuukw* decision written by Chief Justice Antonio Lamer. It is important to first look at the actual wording of the recommendations in *Delgamuukw* before getting into a discussion of the issues that these particular recommendations raise.

> This appeal requires us to ...adapt the laws of evidence so that the Aboriginal perspective on their practices, customs and traditions and on their relationship with the land [is] given due weight by the courts.
>
> In practical terms, this requires the courts to come to terms with the oral histories of Aboriginal societies, which for many Aboriginal nations are the only record of their past. Given that the Aboriginal rights

recognized and affirmed by Section 35(1) [of the Constitution Act, 1982] are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of Aboriginal rights (Para. 86).

Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of [that] culture" (McLeod, 1992, p. 1279).

[Mr. Justice Brian Dickson] recognized as much when he stated in *Kruger v. The Queen* (1978)...that "claims to Aboriginal title are woven with history, legend, politics and moral obligations." The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial - the determination of the historical truth.

Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular Aboriginal nation to the present day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay (Para 86).

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, *the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.* This is a long-standing practice in the interpretation of treaties between the Crown and Aboriginal peoples ... to quote [Judge Dickson], given that most Aboriginal societies "did not keep written records," the failure to do so would "impose an impossible burden of proof" on Aboriginal peoples, and "render nugatory" any rights that they have.[emphasis added]
(*Delgamuukw v. British Columbia* [1997] 3 S.C.R.1010)

Chief Justice Lamer then refers to the *Report of the Royal Commission on Aboriginal Peoples* for a "useful and informative description of Aboriginal oral history":

> The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centered in the same way as in the Western scientific tradition, for it does not assume that human beings are anything more than one - and not necessarily the most important - element of the natural order of the universe.
> Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.
>
> In the Aboriginal tradition the purposes of repeating oral accounts from the past is broader than the role of written history in Western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige ...
>
> Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are 'facts enmeshed in the stories of a lifetime' (Cruikshank, 1994, p. 408). They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people. (*Royal Commission on Aboriginal Peoples*, 1996, Vol. 1, p. 33)

Using this description as a reference point, the Supreme Court recommendations in *Delgamuukw* (1997) come across as quite revolutionary in the context of the Canadian legal system. This was the first time that the Supreme Court had addressed the issue of using Aboriginal oral history as evidence in such a detailed and sympathetic way. The sentence, "Notwithstanding the challenges created by the use

of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and *placed on an equal footing with the types of historical evidence that the courts are familiar with*, [emphasis added] which largely consists of historical documents",(*Delgamuukw v. British Columbia* [1997] 3 S.C.R.1010) gives rise to a sense of cautious hope for future changes in the legal system; however there are still many questions regarding how an oral system of knowledge that is so culturally and historically different from written historical documents can be used and evaluated equally.

3.10.3 The judgment: some of the main issues

The issues that Persky (1998, p. 11) cites from the Supreme Court recommendations in *Delgamuukw* (1997) will be used as a reference point for discussion in later chapters:

1. Is the Court able to decide on the claims for Aboriginal title and self-government?

2. What is the ability of this Court to interfere with the factual findings made by the trial judge of the Court of Appeal for British Columbia?

3. What is the content of Aboriginal title, how is it protected by section 35(1) of the Canadian Constitution, and what is required for its proof?

4. Did the appellants make a substantial claim for self-government over the land they were claiming?

5. Does the province have the power to extinguish Aboriginal rights?

The following is a review of some of the main aspects of the decision and recommendations that the Supreme Court released in December of 1997: (a) the court ordered a new trial, although stressed that negotiated settlement was strongly encouraged; (b) Aboriginal title is recognized in both common and constitutional law. "The content of Aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the rights to engage in specific activities which may themselves be Aboriginal rights." Such title "confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies" (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R.1010); (c) it is Stan Persky's opinion that Lamer's definition of the content of Aboriginal title is clearer than anything "heretofore in Canadian jurisprudence"(Persky, 1998, p. 19), but it is the remarks about oral history that are some ways more ground-breaking. Aboriginal oral histories must be given equal weight in any subsequent legal proceedings. "A court must take into account the perspective of the Aboriginal people", and Aboriginal rights "demand a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples" (*Delgamuukw v British Columbia,* [1997] 3 S.C.R. 1010); (d) the source of Aboriginal title arises from: occupation of Canada by Aboriginal peoples prior to the *Royal Proclamation of 1763* (under common law principles, the physical fact of occupation is proof of possession in law); and the relationship between common law and pre-existing systems of Aboriginal law (*Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010); Lamer also sets out the test for proof of Aboriginal

title. "In order to make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria: the land must have been occupied prior to sovereignty; if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and at sovereignty, that occupation must have been exclusive" (*Delgamuukw v. British Columbia,* [1997] 3 S.C.R 1010).

The previous list indicates but a few examples of recommendations made in *Delgamuukw v. British Columbia* (1997). It is the comments and recommendations on the use of oral history in Aboriginal rights and title litigation that is the central focus of this thesis. Persky comments that:

> I'm deeply struck, as have been other observers, by the Court's recognition of Aboriginal oral history. This recognition has practical consequences, since such histories are the primary means by which Native nations can prove their claims to Aboriginal title. But on a deeper level, what I read in the Court's decision on oral history is a more profound effort to reconcile how different peoples with different cultural traditions see the world (Persky, 1998, p. 13).

Sharon Venne (1998) also comments that the Supreme Court recommendations in *Delgamuukw* (1997) regarding the use of Aboriginal oral histories was one of the more positive aspects of the recommendations: "The implicit acceptance of the oral evidence by the Chiefs and their Houses has been commented on positively in the press and by the legal establishment, and the Gitxsan and Wet'suwet'en themselves have said that they are satisfied with that acceptance of their traditions" (p. 8).

Chapter 5 summarizes the interviewees' responses to the Supreme Court

recommendations in *Delgamuukw* (1997) regarding to Aboriginal oral history and oral tradition. While no one can actually look into the future to see whether these recommendations will have a positive effect in future legal cases involving Aboriginal rights and title, some issues are identified for further discussion.

CHAPTER 4

RESEARCH METHODOLOGY

4.1 Situating the Research Methodology

Pyke and Agnew (1969) point out that "the aims, purposes or goals of the research dictate selection of a qualitative rather than a quantitative approach", and they add that if the "purpose of the research is to describe or understand, rather than to predict and control, qualitative methods may be more appropriate" (p. 135). While much of the research for this thesis is based on legal precedent which is more positivist in approach and philosophy, the interviews are based more in a qualitative tradition. It is assumed in positivist or quantitative approaches that 'truth' can transcend opinion and personal bias (Carey as quoted in Denzin & Lincoln, 1994, p. 4). Traditional quantitative research is "based on the assumption that there is a single, objective reality that we can observe, know and measure. Positivist research connotes certainty or the provision of clear-cut answers which equal the facts (Pyke & Agnew, 1969, p. 135). Within the tradition of law, precedent is also based on the premise of "continuity, fairness, certainty and predictability" (Bell & Asch, 1997, p. 39), and has the potential to reinforce ethnocentric judgments from the past.

Qualitative research, on the other hand, assumes that there are multiple realities, "that the world is not an objective thing out there but a function of personal

interaction and perception" (Mirriam, 1988, p. 17). In this thesis, elite[1] interviews provide multiple perspectives based on personal and professional experiences. The interviews balance the more positivist philosophy of legal precedent with the more qualitative approach of elite, semi-structured interviews.

4.1.1 Insider-outsider ?

In most research projects there are layers of what makes a researcher an insider or an outsider because we all have many different facets to our personalities and to our background experience. Being an insider or an outsider is often not clear-cut.

There are two main types of research presented in this thesis: legal research based on precedent and elite interviews. It is the elite interviews that brought me face to face (or by telephone) with the interviewees. I am a non-Aboriginal, female graduate student who interviewed both Aboriginal and non-Aboriginal people. I am set apart from both groups simply because I am a student interviewing them as experts in a particular area. I interviewed five Aboriginal and three non-Aboriginal informants to get at some of the cross-cultural interpretational issues involved when Aboriginal oral histories are taken out of the community. I felt that there were two commonalities between the interviewees and me. First of all, the educational background between us was similar. Everyone I interviewed had either gone to law school, was currently in law

[1] Elite interviewees are "considered to be the influential, the prominent, and the well-informed people in an organization or community and are selected for interviews on the basis of their expertise in areas relevant to the research" (Marshall & Rossman, 1995, p.83).

school, had a university education or was well educated in land-claim issues. Secondly, my background working with Aboriginal organizations and communities and/or awareness of Aboriginal issues provided a point of commonality.

Who is considered an outsider or an insider when discussing the use of Aboriginal oral histories as evidence? Again, there is no clear-cut answer, only observation and opinion. On the one hand, the Aboriginal interviewees could be considered to be the insiders as they may have the closest connection culturally and experientially to Aboriginal oral histories. But the non-Aboriginal interviewees also have a lot of experience, but not necessarily the cultural connection. My perception of the interview process was that I was viewed as an ally by both the non-Aboriginal and Aboriginal interviewees, and as somewhat of an insider because of my experience working with Aboriginal communities and organizations. It was this commonality that helped to establish a trusting and respectful rapport. I think the outsider status was more self-imposed; I, the student in relation to interviewees as the experts. I feel that that was the major area that separated us.

I acknowledge that I am not an impartial researcher; indeed I feel passionately about the research question. Marshall and Rossman (1995) argue that the success of qualitative researchers is dependent on their interpersonal skills (p. 65). They cite building trust, maintaining good relations, respecting norms of reciprocity and sensitivity to ethical issues as criteria for good qualitative interpersonal skills (p. 65). While it could be said that my background in Native Studies contributes to particular biases, it is this background that made it possible to build trust and develop a comfortable rapport

with the interviewees.

In Gail Winter's (1996) Ph.D. thesis, she argues that if the researcher and participant share certain characteristics, share a common ethos, then the researcher will be more attuned to the manner in which the participant interprets experiences (p.149). Winter also states that "there are degrees of 'insideness and outsideness'" (p.151). While one may not be an Aboriginal person interviewing Aboriginal people, there may still be other commonalities such as educational background or experience living or working in Aboriginal communities that provide a degree of 'insideness'. So, I believe that my background working for Aboriginal organizations and communities contributed to putting the interviewees at ease and gave me somewhat of an insider status.

The insider-outsider debate can be discussed via several different positions. The first position is the one that says that only people matched along the same cultural, gender or age characteristics can study each other, as someone outside that group could not possibly understand or have empathy for another. A second position is the one that argues that the commonalities of human nature are sufficient to allow for communication between insiders and outsiders. Post-structuralists and post-modernists say that "there is no clear window into the inner life of another [and that] any gaze is always filtered through the lenses of language, gender, social class, race, and ethnicity" (Denzin & Lincoln, 1994, p. 12). The question remains as to whether this filter should stop one from studying others outside ones's own cultural group or gender, or

whether difference is something that can be acknowledged and integrated into the methodology.

4.1.2 Qualitative approaches

Within the area of qualitative approaches there are particular techniques dependent on the specific research question and the goals of the research. The primary research question is: What are the advantages and the disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence? The goal of the research is to elicit a variety of perspectives that will identify both the possibilities and the problems with evaluating Aboriginal oral histories alongside written historical evidence.

Legal research in the form of precedent represents a very positivist research tradition, whereas elite semi-structured interviews attempt to elicit multiple perspectives that cannot be quantified in the same way. There are a number of qualitative approaches that may be appropriate.

Phenomenology is one possibility. The circumstances surrounding the use of Aboriginal oral histories in the courts could be considered a phenomenon or event. Patton defines phenomenology as the "study of experiences and the ways in which we put them together to develop a world-view. It carries an assumption that there is a 'structure and essence' to shared experiences that can be determined" (Patton, 1990, p. 70). Phenomenological interviewing, though, is a specific type of in-depth interviewing grounded in the theoretical tradition of phenomenology.

Ethnography is an approach developed by cultural anthropologists for doing field research. "The goal of ethnography, as with field research, is to uncover both the tacit and the explicit cultural knowledge of group members being studied" (Bailey, 1996, p. 9). While I am studying a cultural issue, Aboriginal oral histories which are outside of my own culture, I am not doing fieldwork. Fieldwork is the systematic study, primarily through long-term observations, of everyday life (Bailey, 1996, p. 2). Again this does not describe the approach taken in this study, as it is more short-term and not focused on everyday life.

Grounded theory comes closest to the goals and purposes of my research. The main premise of grounded research is that the research and the analysis be grounded in the experience of the participants (Kirby & McKenna, 1989, p. 149). Kirby and McKenna (1989) specifically advocate 'research from the margins': "based on the commitment to advancing knowledge through a process of exploration grounded in the experience of people who have usually been treated as the objects of research" (p. 61). Certainly the Aboriginal interviewees are also treated as objects of research herein, but the "research from the margins"[2] approach acknowledges that the topic, Aboriginal oral histories, and the Aboriginal informants, cannot be separated from the social and historical context of Aboriginal/non-Aboriginal relations in Canada.

Aboriginal communities in Canada can certainly be described as being on the

---

[2] Refer to Kirby, S. & McKenna, K. (1989) *Experience Research Social Change: Methods from the Margins*. Toronto: Garamond Press.

margins of the dominant Canadian society. Aboriginal oral histories as a source of evidence within the legal system could also be viewed as being on the margins of the legal system.

In order for the research to be grounded in the experience of the interviewees the interview questions, the data organization and the analysis must also be grounded in their experience. The interview questions emerged, first by determining issue areas that came out of the legal research, and secondly by defining the questions within those issue areas during the first few interviews.

The semi-structured interview is time consuming to analyze as it does not provide the same question-answer format of a more structured interview. The decision to do elite interviews meant that I was choosing people for their expertise and knowledge and hence their ability to handle a semi-structured interview. Perhaps more importantly, the decision to do elite interviews was based on who could best answer the primary research question and the subsequent questions that arose from that.

Kirby and McKenna (1989) describe a method for beginning to sift through the data of an unstructured or semi-structured interview. "The data is examined for patterns, worked, moved and worked again, until patterns emerge" (p. 149). There are a variety of ways to physically organize the data such as color coding emerging themes; photocopying each transcript excerpt and placing them into groupings; placing transcript excerpts into computer files of emerging themes, then working and reworking the data for broader themes and sub-groupings etc. This is the method that I used to sift through and organize the interview data. Kirby and McKenna (1989) describe this

as "living with the data", then stepping back and reflecting, then reworking and analyzing again (p. 150). This method allows the voices of the interviewees or the research data to be heard and assessed on their own terms. In other words, it is the data that directs the analysis, possibly into areas that the researcher had not considered.

It is a qualitative approach that this research is taking by: using multi-methods (elite interviewing and legal research); using semi-structured interviews where the analysis will be determined by using a grounded approach.

4.2 The Research Process

4.2.1 Research questions

The primary research question is: what are the advantages and the disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence? Related questions are: what are some current informed opinions regarding the Supreme court recommendations in *Delgamuukw*, particularly with reference to the use of oral histories in the courts? Do judges need a "cultural hearing aid", so to speak, to evaluate evidence such as Aboriginal oral histories, which are typically outside their own culture and experience?[3]

What issues emerge as a result of the contextual differences identified between the culture of the courtroom and the culture of Aboriginal communities? And how do

[3] While this may seem to be a question that would only elicit a yes or no answer, the interviewees elaborated at great length, so the question was left the same.

these issues affect community validation and control of Aboriginal oral histories?

4.2.2 Research objectives

The study had two research objectives. The first was to review the precedents and judgements of past legal cases that inform present day Aboriginal rights and title cases and particularly the *Delgamuukw* case: the history of land acquisition; Aboriginal rights; and the connections to Aboriginal oral histories and the law. The second was to identify and analyze the advantages and the disadvantages of Aboriginal oral histories being granted equal weight alongside of written historical evidence in land claim cases.

4.2.3 Methods of research

There were three stages of research. Stage one was the review of relevant academic literatures as background for the research question and the interviews. Stage two was the review of legal cases and judgements that have been cited as precedent or have informed legal opinion in Aboriginal rights and title cases and, in particular, the *Delgamuukw* case. *Delgamuukw vs. British Columbia* (1991 & 1997) are specifically reviewed as the 1997 recommendations are a focus for the interviews. Stage three was conducting the elite[4] interviews to gather professional, experiential and current perspectives on the issues involved with the use of Aboriginal oral histories in land claim cases.

---

[4] Refer to footnote #10 on page 15.

4.2.4 Multiple research methods

The literature review and the legal research provide historical context both politically and legally in Canada. The elite interviews provide Aboriginal and non-Aboriginal experiential perspectives from a variety of disciplines and community perspectives. Elite interviewees are people who are well-informed in the area of study, in this case, Aboriginal oral history, with academic backgrounds in areas such as law, anthropology and Native Studies. Some have participated in a legal cases where Aboriginal oral histories were called upon as evidence. These people are best equipped to answer the primary research question: what are the advantages and disadvantages of granting equal weight to Aboriginal oral histories alongside of written historical evidence?

The use of multiple investigators or multiple sources of data have the advantage of establishing "validity through pooled judgement" (Foreman, 1948, p. 413). Merriam (1988) describes the use of multiple research methods as triangulation (p. 169). This process is particularly useful when the interview question is one of current concern, as there is the need to cross-check findings. The findings from the elite interviews can be strengthened by comparing them against the emerging issues found in the legal research. Having several methods of research can help construct a "plausible explanation about the phenomena being studied" (Mathison, 1988, p. 17).

There are a number of advantages to using a qualitative multi-method approach to address the primary and secondary research questions.

This research is multidisciplinary in approach. Aspects of this research link historical, legal, Native Studies and educational research. Denzin and Lincoln (1994) describe qualitative research as a methodology that "crosscuts disciplines, fields, and subject matter" (p. 1).

The interview content is contemporary. The central focus of the interviews are the Supreme Court recommendations in the *Delgamuukw* case (1997) regarding the use of Aboriginal oral histories. Very little has been written about this judgement as of yet; therefore it is important to talk to those who have been actively engaged with the issues connected to the research questions. These people are anthropologists, historians, lawyers and community members who have been involved in court cases where oral histories were used as evidence, or who have done research and writing in this area. Marshall and Rossman (1995) point out that elite interviewees are "able to report on an organizations' policies, past histories, and future plans, from a particular perspective" (p. 83). Elite interviewees are participants in the research issue, so their views and perspectives are as current a source of information as one could hope to get.

The interviews are experiential in nature. The semi-structured or informal qualitative interview approach advocated by Bailey (1996, p. 72) and Merriam (1988) "assumes that the individual respondents define the world in unique ways" (p. 73). It is the experiences and perspectives of the interviewees that form a significant part of the data.

4.3 The Interviews

4.3.1 Elite interviews

Elite interviews focus on a particular type of interviewee.

> Elite individuals are considered to be the influential, the prominent, and the well-informed people in an organization or community and are selected for interviews on the basis of their expertise in areas relevant to the research. (Marshall & Rossman, 1995, p. 83)

Measor (1985) also supports the idea of elite interviews by emphasizing the uniqueness of those chosen for interviewing:

> Theoretical sampling (an idea first explicitly discussed by Glaser and Strauss, 1967) is a form of sampling in which phenomena or people are chosen for study, not under the stricture of randomness, but because they are the most fruitful avenues for the development of theory... In other words, sampling in practitioner research might not be about representativeness but about uniqueness. (p. 192-193)

The elite interviews in this study were focused on the interviewees' experience, opinion and expertise[5]. In light of the Supreme Court decision in *Delgamuukw vs. British Columbia* (1997), elite interviews provide a forum for current perspectives on the recommendations. A significant part of this decision concerns the use and weight given to Aboriginal oral histories. Marshall and Rossman (1995) point out that "elites respond well to inquiries about broad areas of content and to a high proportion of intelligent, provocative, open-ended questions that allow then them freedom to use their knowledge and imagination" (p. 83). Typically elite interviewees thrive on interplay with

---

[5] These categories were roughly based on the assumption that a person's knowledge of a topic ranges from fact to opinion (Patton ,1980, p. 207-209). Merriam lists six kinds of question areas that will elicit different types of information from the respondents. Experience, opinion and knowledge are part of that list (Merriam, 1988, p. 78-79).

the interviewer (Marshall and Rossman, 1995, p. 83). Elite interviews are usually semi-structured rather than formal, due to the willingness or experience of the interviewees with participatory interviews.

Kirby and McKenna (1989) also state that "it is the diversity of the creators of knowledge that accounts for the diversity of research and understanding about human lives" (p. 54). The diversity in the background and experience of the interviewees can be a strength within qualitative research as it is within this experience that a breadth of human feelings and understandings can be integrated into the research. In particular, Aboriginal understandings and current perspectives of those closest to the topic can be integrated into the research.

4.3.2 Criteria for selection of interviewees

To be included in this study, participants had to be able to answer yes to one of the following questions: Have you ever given evidence in the form of Aboriginal oral histories in a court case? Have you ever been involved in a court case where Aboriginal oral histories were called upon as evidence? Have you done research/writing in the area of Aboriginal oral histories?

Interviewees designated as elite are defined, in this thesis, as well-informed people with specific expertise in an organization or community (Marshall & Rossman, 1995, p. 83) in relation to the use of Aboriginal oral histories in the courts. I either knew that they were "well-informed" in the area of Aboriginal oral histories from my own work or from the recommendation of someone well-respected in the area of oral history and

oral tradition. Those who had given evidence in the form of oral histories were the obvious first choice. Their experience was first hand, and they in a sense are the closest to the topic, due to their experience and their knowledge of Aboriginal oral histories in a court case. However, it was felt that the study would be too narrow if it only included those who had given evidence in the form of oral histories. There was a variety of people, including lawyers, professors and community leaders who possessed a range of experience, on whom I could also draw.

Another group included those who had done research and writing in the area of Aboriginal oral histories in the courts. While this experience was sometimes of a more theoretical nature, these individuals had thought a lot about the research question. Furthermore the data that could be elicited using those three criteria offered a range of experiential, professional and theoretical perspectives. The data then offered the possibility of providing not just theoretical results, but results which may also be practical at the community level.

Paulo Freire (1990) has written about the idea of 'praxis'. This is the concept that action and reflection equal praxis. He writes:

> Within the word we find two dimensions, reflection and action, in such radical interaction that if one is sacrificed, even in part, the other immediately suffers. Thus, to speak a true word is to transform the world. (p. 75)

While it is clearly overly ambitious and futile to talk about transforming the world in a Ph.D. thesis, it is possible to produce some understandings and recommendations that are a result of action and reflection. The combination of perspectives offered by

using these three criteria for interviewee selection created the possibility of moving beyond the theoretical answers to ones that offer more of a praxis. It is this praxis that has the possibility of offering ideas and solutions which are useful and practical at the community level.

4.3.3 Consent of interviewees

Each interviewee was given a consent form to sign before the beginning of the interview[6]. The consent form gives permission for the interviewer to use the written and audio materials gathered for purposes of research and scholarly publication. For those interviewees who were interested, any transcript material that was to be used in the final thesis would be given back to them for comment. The interviewees could decide at any time to withdraw from participation in this research. As the interviewees were chosen for their elite expertise and are well known within the area under study, they were made aware that their names would appear in the study.

---

[6] Refer to Appendix B.

4.3.4 Interviewees

John Borrows is a professor at the University of Toronto Law School. He teaches courses in the area of Aboriginal legal issues and has written extensively on the topic of Aboriginal rights, and oral history and the law. He is one of the few people who has critiqued the Supreme Court recommendations in the *Delgamuukw* case. He is from the Cape Croker First Nation of the Chippewas of the Nawash in Ontario.

Marlene Brant-Castellano is the former director of research for the Royal Commission on Aboriginal Peoples and the former Chair of Native Studies at Trent University. She is very much in touch with issues surrounding the use of Aboriginal oral histories in her own community, Tyendinaga Mohawk Territory, Ontario.

J. Edward (Ted) Chamberlin is a professor of English Literature at the University of Toronto, specializing in Aboriginal oral tradition. He directed the Aboriginal History Project for the Royal Commission on Aboriginal Peoples. He was also one of the authors of the federal government's policy on comprehensive claims, which came out in the early 1970s.

Julie Cruikshank is an Anthropology professor at the University of British Columbia. She has written frequently on the significance of oral histories in the Yukon Territory. She has also written several articles about the *Delgamuukw* case (1991) as it pertains to the use of oral histories.

Dara Culhane is an Anthropology/Sociology professor at Simon Fraser University. She is the author of The Pleasure of the Crown: Anthropology, Law and First Nations (1998).

Mark Dockstator is a lawyer and professor in the Native Studies Department at Trent University. He teaches Aboriginal law and has written extensively about Aboriginal knowledge systems and Aboriginal self-government, and also worked with the Federal Land Claims Commission. He is from the Oneida First Nation.

Gary Potts is the former Chief of the Teme Augama Anishnabai of Bear Island in Lake Temagami, Ontario. He has given evidence in the form of oral histories at his community's land claim trial. He has a vast array of community-based and legal experience in the area of Aboriginal oral histories and Aboriginal rights and title cases.

Don Ryan is the Chief Negotiator for the Gitxsan First Nation in British Columbia. He was the Speaker for the Hereditary Chiefs during the original *Delgamuukw* case in the B.C. court. The collection and analysis of Aboriginal oral histories is of personal interest to him. He also has a vast background in community-based and legal experience in the area of Aboriginal rights and title litigation.

It is clear even from these brief biographies of the interviewees that they meet the criteria for selection many times over. Each person possesses layers of related expertise, which can only add to the multi-disciplinary nature of this study.

4.3.5 Selection and recruitment of interviewees

This sample consists of:

5 Aboriginal interviewees, 3 non-Aboriginal

5 men and 3 women

3 from B.C. and 5 from other regions.

When selecting participants I wanted to talk to people with a range of backgrounds and experiences. The type of people who fit the criteria for selection are primarily lawyers, professors and community leaders. I wanted to interview both men and women and Aboriginal and non-Aboriginal people. I also felt it was important to interview several people from British Columbia, since the *Delgamuukw* case was central to the interview. The history of Aboriginal groups' struggle for the recognition of Aboriginal rights and title in British Columbia is quite different from that of other parts of Canada. It was only a few years ago that the provincial government in British Columbia acknowledged the existence of Aboriginal rights in that province. A number of significant Aboriginal rights and title cases have also taken place in British Columbia.

There was a snow-ball type of selection of participants, meaning that the original two interviewees passed on names of several other people, and those people also mentioned others to whom they thought I should talk . The great majority of interviewees are people whom I had previously met. My background in Native Studies and Aboriginal community training programs provided me with a pool of people from which to draw. Typically, researchers interview people whom they do not know, and are usually from a different class, but Platt (1981) writes about the advantages of

interviewing one's own peers (p. 83). For instance, establishing a comfortable and reciprocal rapport is sometimes easier with those we know or those who know of our reputation. Despite some of the similarities between us, during the interview I was the student and they were the experts.

4.4 Interview Protocol

4.4.1 First contact

Typically, I made first contact with potential interviewees by phone or e-mail, then I faxed them an abstract of my thesis proposal[7], a letter of consent[8] and a sample of the interview questions[9]. I gave them time to read the abstract and the interview questions to decide whether they wanted to participate. I then called them again to learn their decision. There was only one person who declined to participate, due to her busy court schedule, and one person who did not answer my messages, so I decided to try someone else.

4.4.2 Framework for questioning

Out of the *Delgamuukw* Supreme Court recommendations came the question, "What are the advantages and disadvantages of Aboriginal oral historical evidence

---

[7] Refer to Appendix A.

[8] Refer to Appendix B.

[9] Refer to Appendix C.

being evaluated equally alongside of written historical evidence?"

The literature review in Chapter 2 looked first at *Delgamuukw vs. British Columbia* (1991) to review the original judgement in the case regarding the use of oral histories. The three secondary issues that emerged out of that case were: (a) the use of oral histories as evidence; (b) references to literacy versus orality and "primitive" versus "civilized" comparisons as legal rationale; and (c) a historical overview of how the Canadian government and the legal system dealt with Aboriginal title and Aboriginal policy more generally. Out of this literature review and out of the legal research on cases and precedents that informed the judgement in both *Delgamuukw vs. British Columbia* (1991) and (1997) emerged a number of issue areas that repeatedly appeared:

Within the area of Aboriginal rights litigation:

What fundamental changes could eventually be made to the legal system that would affect the way that Crown sovereignty is asserted?

Are those who have been involved with court cases concerning Aboriginal rights and title optimistic about the future of Aboriginal rights in the courts?

Within the area of Aboriginal oral histories in the courts:

What are some current opinions regarding the Supreme Court recommendations in *Delgamuukw*, particularly with reference to the use of oral histories in the courts?

Do judges need a 'cultural hearing aid', so to speak, to evaluate evidence such as Aboriginal oral histories, which are typically outside their own culture and experience?

Within the area of Aboriginal / non-Aboriginal relations:

What issues emerge as a result of the contextual differences identified between the culture of the courtroom and the culture of Aboriginal communities? And how do these issues affect community validation and control of Aboriginal oral tradition?

These issues were used as a guideline for the questions in the interview.

4.4.3 Testing of questions

The interview questions[10] emerged from noting which issues kept recurring in legal cases, in articles written about those cases and from the Supreme Court recommendations in *Delgamuukw* (1997).

The first two interviews served to test, refine, and/or modify the secondary questions. I began with some broad questions relating to each person's experience with Aboriginal oral histories before narrowing it the specifics of the primary and secondary questions. I refined the wording, particularly concerning the more legal oriented questions, as a result of those first two interviews. I was struck by how differently the first two interviewees answered the questions. Those first two interviews gave me the assurance that the questions were open-ended enough to elicit answers based on the informants' experience.

---

[10] Refer to Appendix C.

4.4.4 Interview structure

> I realized quite early in this adventure that interviews, conventionally conducted, were meaningless. Conditioned cliches were certain to come. The question-and-answer technique may be of some value in determining favored detergents, toothpaste and deodorants, but not in the discovery of men and women. (Studs Terkel as quoted in Douglas, J.D., 1985, p. 7)

After the interviewee had agreed to be interviewed, an interview time and place was arranged. As the interviewees had busy schedules it was often not possible to meet more than once. I was able, though, to meet with several of the interviewees who live in the Toronto area, more than once. Three of the interviewees live in British Columbia, so those interviews were conducted by phone. Whether in person or on the phone, interviews typically lasted from one to two hours. I specifically kept in touch with the interviewees who requested final copies of the thesis.

The amount of desired structure in an interview determines the type of interview that will be chosen for the study (Merriam, 1988, p. 73). One could chose a highly structured questionnaire-driven interview, a semi-structured interview or an open-ended conversation format. There are also many variations in between these three types of interviews.

"Less structured formats assume that individual respondents define the world in unique ways" (Merriam, 1988, p. 73). Marshall and Rossman (1995) point out that a fundamental assumption of qualitative research is that the "the participant's perspective on the phenomenon of interest should unfold as the participant views it, not as the researcher views it" (p. 80). Again, the semi-structured or open-ended structure allows

the interviewee to "frame and structure" his/her own unique responses (Marshall & Rossman, 1995, p. 80).

Merriam(1988) describes the semi-structured interview:

> In the semi-structured interview, certain information is desired from all the respondents. These interviews are guided by a list of questions or issues to be explored, but neither the exact wording nor the order of the questions is determined ahead of time. This format allows the researcher to respond to the situation at hand, to the emerging world-view of the respondent, and to new ideas on the topic. (p. 74)

I chose to do semi-structured interviews; a primary question was asked of all the interviewees, while the secondary questions were used to guide the interview according to each interviewee's areas of interest. Some of the secondary questions were intentionally broad, yet they served as a guide to "stay close to the research focus and [to] help the participant respond to questions about her or his own experience in an insightful and thoughtful way" (Kirby & McKenna, 1989, p. 74). Upon first glance it may seem that some of the questions would only get a yes or no answer, yet due to the experiences of the interviewees, this was not the case. Each interviewee elaborated at great length according to his/her own experience.

4.5 Reflections on Data Organization and Interpretation

Just as the interviewee shapes the interview in the semi-structured interview, the interview material also shapes the data and the analysis. The organization and analysis of data from a semi-structured interview may seem like an daunting task as it takes time and patience to work with the data and "focus on seeing patterns, arrangements...

behind the totality of what's being studied" (Carney, 1983, p. 58). Kirby and McKenna (1989) advocate living with the data and getting comfortable with it. They list six steps in understanding the data:

1. Coding bibbits[11] into category files
2. Describing the categories analytically
3. Living with the data, hurricane thinking
4. Describing the relationships between categories
5. Doing the overall analysis
6. Presenting the data (p. 129).

It is these six steps that informed my own method of data organization. I spent many hours reading the interview transcripts, rereading them, taking notes, trying out different categories for the bibbits, hurricane thinking or brainstorming ideas about links to other categories or the creating new categories. It is within this phase that patterns emerged.

Kirby and McKenna (1989) strongly advocate some critical reflection on the social context of the data (p.129). This involves an examination of the social reality of the interviewees or a look at the context of the facts learned. They describe context as, "the fabric or structure in which the research, or the research participants' experiences, has occurred" (p. 129). I see this as a challenge of 'research from the margins'. It is not easy to acknowledge your own context and then try to take yourself out of it to

[11] A Bibbit is a passage from a transcript, a piece of information from field notes, a section of a document or snippet of conversation recorded on a scrap of paper that can stand on its own but, when necessary, can be relocated in its original context (Kirby and McKenna, 1989, p. 135).

understand the interviewee's context. As discussed earlier in this chapter in the section entitled 'Insider/Outsider', my own background working with Aboriginal organizations and communities provided some commonality between the interviewees and me. This made it somewhat easier to come up with data categories that I felt were fairly reflective of the intent of the interviewees.

4.6 In Summary

This chapter began with a broad contextual overview which situated the research within the qualitative versus the quantitative research methodology. A brief discussion of insider/outsider bias was introduced into the research methodology before I located my particular research approach. Several approaches, such as phenomenology and ethnology were reviewed, but a grounded approach was found to be most suitable. As my research used several methods: literature and legal research and elite semi-structured interviews, it was felt that the best way to organize and analyze the data was through a grounded approach. A grounded approach lets the issues and the voices of the interviewees emerge to shape the research conclusions. The interviews were rich with experiential information, thus leading me in specific directions. The fruits of those interviews will become apparent in the following chapter.

The framework for questioning came from the literature and legal reviews and represented three issue areas: 1) Aboriginal rights litigation, 2) Aboriginal oral histories in the courts, 3) Aboriginal / non-Aboriginal relations. The primary research question was asked to each of the interviewees, while the secondary questions were used to

guide the interview in the direction of each interviewee's specific interests.

It was decided that a semi-structured interview was appropriate for interviewing elite respondents. This approach most likely allowed the interviewees' perspectives to shape the interview and the analysis.

The criteria for selection of interviewees was determined as:

a) those who have given evidence in the form of Aboriginal oral histories in a court case;

b) those who have been involved in a court case where Aboriginal oral histories were called upon as evidence;

c) those who have done research/writing in the area of Aboriginal oral histories.

The cultural, political and geographical bias of the interviewer and interviewees was acknowledged as part of the interview process. The decision to do elite interviews with people with very specific experience meant that their bias was also their strength. The uniqueness of their backgrounds and expertise is what made the information gathered in the interviews so valuable.

The organization, interpretation and analysis of the research was modeled on Kirby and McKenna's (1989) "research from the margins". The organization of the interview material flowed from the groupings, which became evident after reading, rereading, taking notes and "living with the data" (Kirby & McKenna, 1989, p. 128). A critical reflection on the social context was acknowledged as being very important when trying to make sense of the data. The data categories were narrowed down by determining what information was directly relevant to the primary and secondary

research questions. The selected data emerging from the interviews is cited and discussed in the following chapter. As much as possible, the interviewees are directly quoted to keep the integrity of their individual voices.

CHAPTER 5

AFTER DELGAMUUKW: INTERVIEWEE RESPONSES

5.1 Introduction

One of the main strengths of conducting semi-structured interviews is the possibility of capturing personal experience and individual perception (Slim & Thompson, 1995, p. 143). This chapter provides the opportunity to listen to the individual voices of the interviewees. Up to this point, this thesis has provided an overview of the literature, the legal-historical background and the methodology. Now it is time to listen. Of course these voices have been transcribed and transferred onto paper, becoming written text. Still, their experiences, frustrations, opinions and recommendations come through. Each section in this chapter contains a summary of the interviewee's responses to specific questions, and comments on specific issues. Excerpts from the interviews are included to provide the reader with some of the individual context of the interviewee[1]. The interviewee responses are organized around the interview protocol.

[1] Both endnotes and footnotes are used when referring to interviewees, so that reading will not be cumbersome.

5.2 "What do you believe are the advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence?"

This question was asked to all the interviewees in hopes of eliciting a range of perspectives. Some of the interviewees' perspectives pointed toward problems regarding to cross-cultural interpretation of history, common law rules, problems of evaluating oral histories as evidence or the risks of comparing oral histories alongside of written historical documentation. The aim of the question was to elicit answers in terms of advantages and disadvantages.

5.2.1 Interviewee's responses: advantages

Out of the eight interviews there were only five people who felt that there were advantages to evaluating Aboriginal oral histories alongside of written historical evidence. The one advantage that was mentioned by several people was simply that it gets the information into the courts and gives some independent weight to Aboriginal oral histories.

> Well, the advantage is we'll get some historical evidence in there. I think that's the simple advantage. There's no other way of getting it in, so if they want historical evidence, that's the surest.
> (Ted Chamberlin, January 21, 1999)

> One of the advantages of having equal evaluation of the evidence is that you can put it into court, if they are talking about Aboriginal court process, without having it be supported by anthropological and historical accounts. I think that kind of independence is important because there is many things that anthropologists were never there to record or historians have had biases through the years that didn't take account of and didn't

> observe what was going on in a society. So it opens up new matters, again talking about courts but it opens up new matters that might not be considered part of the Aboriginal evidence otherwise. So I think that's a good thing. It's expansive; it gets more on the table.
> (John Borrows, November 5, 1998)

Aboriginal oral histories also give the judiciary the opportunity to hear information that they otherwise would not have the chance to hear.

> The advantage is that it gets in front of the judiciary the issues that they are not, in my opinion, educated in a formal way. That is, it gets the judges and judiciary the opportunity to actually hear from those who they would not hear from before. Not necessarily because they are forced to, but because they have to give it weight. So it is an opportunity for First Nations to actually educate and to perhaps have movement within a judiciary which otherwise would not occur.
> (Mark Dockstator, November 11, 1998)

It also provides an opportunity for Aboriginal communities to educate the judiciary. It can also be seen as an important symbolic statement or a sentiment that shows that the courts are willing to listen and to take the unique nature of Aboriginal rights and title cases seriously. Ted Chamberlin points out that it "also reinforces the credibility of the community" (January 21, 1999).

> I think the primary advantage is the symbolic statement of the courts that oral history should be accorded equal respect. So I think the articulation of that principle of equality and respect is important.
> (Dara Culhane, February 10, 1999)

Ted Chamberlin recounts a story that illustrates the importance of oral histories as a source of validation in relation to land and place. The inference is that oral histories or the stories of place contain knowledge that constitutes "a kind of jurisdiction ownership":

> The story that Peter Usher, the geographer, told me about being in a community in the N.W.T. A meeting between a group of government foresters and the Simpson Indian community. And they were arguing over jurisdiction over the forest, and each side was baffled by the inability of the other side to recognize the forest, that they have authority over it. Neither side could figure out what the other side was going on about... until one of the Indians said "If these are your forests, where are your stories"? And they had an agreement within about 5 minutes. Because everyone understood, immediately what was going on here. They understood right away that if you have stories, the place in some sense is yours. And I think that's the other element, those oral histories provide a kind of evidence of ownership. They are stories bound into the dynamics of place, the naming of the flora and the fauna, the naming of places, the naming of people and so forth, and that constitutes a kind of jurisdiction ownership. (January 21, 1999)

5.2.2 In summary

The advantages to granting equal weight to Aboriginal oral histories alongside of written historical evidence; (a) gets the oral information into the courts; (b) the judiciary is given the opportunity to hear information that it would otherwise not hear; (c) independent weight is given to Aboriginal oral histories; (d) the granting of equal weight to Aboriginal oral histories is an important symbolic statement; (c) oral histories constitute a kind of jurisdiction ownership or community validation.

5.2.3 Interviewee responses: disadvantages

One of the obvious differences between the advantages and disadvantages is simply that there were a lot more disadvantages voiced by the interviewees. This is not to say that the interviewees were advocating against the inclusion of Aboriginal oral histories in the courts. It does mean though, that people have a lot of concerns and

questions that were not addressed in the Supreme Court recommendations in *Delgamuukw*. It is these concerns and questions that are important to synthesize post-*Delgammukw*. The following issues represent a starting point for further debate and analysis.

There were approximately seven main disadvantages cited in the interviews. I say, 'approximately' because some of these disadvantages overlap with others, but these seven categories help identify and explain the issues relevant to the disadvantages[2].

5.2.3.1 Interpretation

The interpretation of Aboriginal oral histories within the court setting was cited by most interviewees as a possible problem area. If the courts are going to try to understand Aboriginal oral histories: (a) the community context was identified as being very important; (b) there should be an acknowledgment of the cultural screen that the information has to pass through; and (c) there is no formal training for the judiciary in cross-cultural interpretation of Aboriginal oral histories.

> The primary disadvantage is the cultural screen of which that information has to pass... being the judge hearing that information and using it and interpreting it however they want to interpret it. The disadvantage being that without significant or I should say without formal training in that area of oral tradition and how to use it and having no experience essentially in that area since it's not really one that is taught in law school or sort of general knowledge within the judiciary, that it has to pass through that cultural filter which can change very significantly that information in a way

[2] The advantages and disadvantages are further analyzed in Chapter 6..

> that's not intended. If you can't understand it, which I don't think a lot of judiciary can then it's not only wasted, but it's used in a way that's not intended and so it's a disadvantage in the long run.
> (Mark Dockstator, November 11, 1998)

5.2.3.2 Evaluation

Closely linked to the issue of interpretation is the evaluation of Aboriginal oral histories as evidence. This was seen as being problematic: (a) it is a matter of context. The courts need to try to understand how oral tradition operates in the context of the particular Aboriginal community; (b) the Aboriginal community and the courts are not on a level playing field. There is no equality of power or equality of access to resources, so the notion of being evaluated equally is problematic:

> I don't think that Aboriginal and non-Aboriginal people and the Crown when they are in court are on a level playing field, so I don't think the legal forum is one where there is an equality of power, or an equality of access of resources to be there and to articulate one's position. So, from that point of view I think the notion of it being evaluated equally is problematic.
> (Dara Culhane, February 10, 1999)

(c) The two modes of evidence, the written and the oral are two very distinct and very separate types of evidence:

> And also the idea as it's put forward in the judgment of looking at written history as a European artifact and oral history as an Aboriginal artifact and seeing them as two very separate and two very distinct forms of knowledge, I also think is problematic because it tends to assume a kind of uniformity and a kind of standard to the two that I don't think are necessarily there.
> (Dara Culhane, February 10, 1999)

> I think that the oral histories should be treated as a discreet body of evidence and it shouldn't be put up against written history to compare it or to see whether they are valid. I don't think that we should do that. We should try to separate them. So if you are going to put them alongside of

> each other for weighing the evidence, that's sort of a disadvantage for the oral histories, because the people that you are dealing with in terms of written history are coming from another perspective. That's why I am advocating that we look at oral histories in the context of the culture of the people that are involved and how those oral histories are used, how they are recounted, what is the context of recounting those oral histories. (Don Ryan, January 13, 1999)

(d) The communal nature of validation is not present in the courts:

> The validation of particular perspectives on events is tested, modified and confirmed within the context of the oral community. There aren't any rules that have been articulated, although there are rules that exist in the community context in the oral tradition for validation. When you try to take it out of that context there aren't any rules that apply across contexts. (Marlene Brant Castellano, February 11, 1999)

Also one of the main concerns, voiced by all the interviewees in varying ways, was that the two modes of evidence, written documentation and the Aboriginal oral histories could not or should not be compared: (a) some felt that how the oral histories are used and recounted would be too out of context within the courts. Courts need to take context more seriously, so that the different types of oral histories, such as the presentation of artifacts, masks, and the wearing of regalia, can also be taken into consideration:

> The words have their own kind of authority, and the history comes to life in those words told by certain people in certain places, with certain regalia, to certain people. And that to certain people is very important. Certain people must be there to listen for the history to be history, otherwise it's just words. And unless one takes all of that seriously, and unless the court is willing to go to the places where those stories must be told... unless the courts are willing to do that, then it's a sham. (Ted Chamberlin, January 21, 1999)

(b) it is better to try to understand Aboriginal oral histories, not to weigh them against

another form of evidence:

> I prefer to keep them separate. I think that the oral histories should be treated as a discreet body of evidence and it shouldn't be put up against written history to compare it or to see whether they are valid or whatever. I don't think that we should do that. We should try to separate them. So if you are going to put them alongside of each other for weighing the evidence, that's sort of a disadvantage for the oral histories, because the people that you are dealing with in terms of written history are coming from another perspective. That's a disadvantage for us [and] that's why I am advocating that we look at oral histories in the context of the culture of the people that are involved and how those oral histories are used, how are they recounted, [and] what is the context of recounting those oral histories. (Don Ryan, January 18, 1999)

(c) the two modes of evidence are like "apples and oranges, they can't be compared. Oral histories should be looked at as 'parallel to history rather than parallel to documents"[3]; (d) if oral and written histories are compared and evaluated, the oral histories "run the risk of being treated like data which reduces their value"[4]:

> I think the parallel should be that oral history will be looked at as parallel to history rather than as documents. And so I think that the problem is that it is looked at as data, or if oral tradition is evaluated as data then it is made parallel merely to records.
> I think when the Gitxsan and Wet'suwet'en went to court with *Delgamuukw* they said, "yes you can look at these as historical truths but it is more than just historical data". It is about a larger picture; about how disputes are resolved for instance. So that's one of the things. The other thing that I think is problematic with this is that again, it's bringing oral tradition into courts and I'm not sure that a better parallel wouldn't be to try and understand how oral tradition operates in context, in the communities. If oral history is regarded as data and they are going to be evaluated against written records, I think it's like apples and oranges. They are really quite different.
> (Julie Cruikshank, January 13, 1999)

---

[3] Julie Cruikshank, January 13, 1999.

[4] Julie Cruikshank, January 13, 1999.

There is the "danger of a trivialized notion of oral history"[5].

> I think one of the dangers is we're going to have a trivialized notion of what oral history is about. Oral history is what grandpa says...that's not oral history. That's maybe very interesting and a very important part of the testimony and it may be part of an oral history but oral history as an historical tradition within these communities, as I say, [is] highly formalized. And has its own, often very strict dynamics of confirmation and disputation and modification and so forth. In some traditions the fierceness of the attention to particular words being used is just as strict as one would find anywhere.
> (Ted Chamberlin, January 21, 1999)

5.2.3.3 Treatment of oral histories

Ted Chamberlin points out another side of the evaluation coin. He feels that there is the risk of Aboriginal oral histories being treated with kid gloves.

> We don't need to handle them with kid gloves, but we do need to contest them if we are going to on their own terms. And because they have been contested for thousands of years on those terms.
> (January 21, 1999)

5.2.3.4 The location and situation of Aboriginal communities

Another point mentioned by an interviewee concerned the nature of Aboriginal communities. Where communities are scattered and less homogenous, the oral histories will be subject to more challenges[6]. In essence, this means that Aboriginal communities are in many different states at the moment. Some, like the Gitxsan and Wet'suwet'en, have had a consistent and continued relationship to their oral traditions. Others have gone through great upheaval and dysfunction and are only now trying to

---

[5] Ted Chamberlin, January 21, 1999.

[6] Marlene Brant Castellano, February 11, 1999.

piece together oral traditions. Aboriginal communities are culturally, historically, socially, economically and geographically different. This makes it difficult to make blanket statements regarding the use of Aboriginal oral histories in the courts. Some communities would be at a disadvantage and not as ready or as organized as others in the preparation of their oral histories for use in the courts.

> Where there is a community and there are many minds in effect negotiating the version, the version still may not be literally identical with the version that was agreed upon two generations ago, but I think what happens is the core knowledge stays. There is an integrity to the core knowledge that survives the communal discussion. And at least there is commonality in the details. But when you are entrusting a single individual who is far from home , I think that there are lots of things that happen to memory and interpretation.
> I think that where communities are more scattered and less homogenous...that it might be subject to more challenges.
> (Marlene Brant Castellano, February 11, 1999)

Again this point highlights the fact that all Aboriginal communities are unique. The oral histories of the Gitxsan and Wet'suwet'en are very different from those of the Iroquois, the Cree, the Ojibway or even other Aboriginal groups in British Columbia. The courts would need to familiarize themselves with the unique qualities of the specific type of oral histories as well as the history of the community itself.

5.2.3.5 Lack of respect

> A lack of respect in the courts for Aboriginal Elders was also cited.
>
> We had concluded before the case even started that bringing the people forward as individuals was not helpful. We had talked to Billy Diamond around 1978 and he told us stories about how their Elders were treated by the lawyers on the stand. And though the Elders did well, there was a tremendous lack of respect.
> (Gary Potts, November 24, 1998)

5.2.3.6 Time limitations

The time limitation was cited as being an impediment to understanding Aboriginal oral histories. Typically the skills for learning, listening and understanding Aboriginal oral histories take a long time[7]. A court case takes place in a condensed time period which also takes the oral histories out of context.

> In the court room, it's just such a hard gulf to cross because you only have the original people in front of you for maybe a day or a week, perhaps, three years at the most as in the *Delgamuukw* case. And that might not be enough time to develop the skills necessary to engage in that kind of process. So you have a limitation of time in the courts and you also have the limitation of the rules, and even though the courts broadened out the rules, the conversation is still a staged conversation that takes place according to another person's, another culture's view at how you arrive at truth. (John Borrows, November 5, 1998)

5.2.3.7 Limitations of the rule of law

Lastly, there are the limitations of the rule of law. While this is a huge topic, I will attempt to summarize it in relation to the interviews. This topic ties into points noted in Chapter 6, "Aboriginal Oral Histories and Aboriginal Rights Litigation". Even though the Supreme Court recommendations in *Delgamuukw* state that Aboriginal oral histories should be granted equal weight alongside of written historical documents, there is no significant change in the basic assumptions underlying Aboriginal rights and title litigation. While the judge may listen to oral histories as evidence and want to treat them equally with the written evidence, the Crown still claims sovereignty first. As stated in the recommendations in *Delgamuukw v. Queen* ([1997]3 S.C.R 1010): "Aboriginal title

---

[7] John Borrows, November 5, 1998.

crystallized at the time sovereignty was asserted" (Introduction to the recommendations). Crown sovereignty is seen as paramount to Aboriginal sovereignty, putting Aboriginal sovereignty and Crown sovereignty immediately at odds.

> One of the disadvantages is that when that evidence is evaluated, it's evaluated in a way that's not supposed to strain the Canadian constitutional and legal structure. And that means that there's just some things that are understood or they can't be articulated because it's quite possible there are many things in Aboriginal oral tradition that would strain the way that Canadians look at things, particularly the way the courts look at things. So I can see why the court put it in there because they are saying that we can only understand what we can understand, but it also puts a limit on being able to communicate across cultures. That's one disadvantage.
> (John Borrows, November 5, 1999)

5.2.4 In summary

The disadvantages to granting equal weight to Aboriginal oral histories alongside of written historical evidence, were:

Cross-cultural interpretation of Aboriginal oral histories was cited as being problematic. The context of the Aboriginal community was identified as being an important consideration when taking oral tradition into the courts. At present there is no formal training for the judiciary in cross-cultural interpretation of Aboriginal oral histories.

Evaluation and comparison of the oral and the written was also cited as being problematic as : (a) oral tradition is being heard outside the community context; (b) Aboriginal communities and the courts are not on a level playing field; (c) the two modes of evidence are distinct and different; d) the courts are outside of the communal nature of validation; (e) there are many different types of oral histories depending on the

culture; and (f) it may be better to understand oral histories on their own, rather than to weigh against each other.

In the treatment of oral histories, there is the risk of Aboriginal oral histories being treated with kid gloves. The location and situation of Aboriginal communities has an effect on the consistency of oral traditions and how they are passed down. There has also sometimes been a lack of respect shown to Aboriginal Elders in the courts.

There are time limitations when recounting oral traditions in the courts. The skills necessary for learning, listening and understanding Aboriginal oral histories take a long time. There are limitations of the rule of law, particularly concerning assertions of Crown sovereignty as paramount to Aboriginal sovereignty.

5.3 Supreme Court Recommendations in *Delgamuukw*: As they pertain to the use of Aboriginal oral histories as evidence

Perhaps the most discernible way to illustrate some of advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence is to look at the comments and opinions from the interviewees about *Delgamuukw*. The following question gave the interviewees a chance to elaborate on what they had touched on in the previous question. The interviewees also tended to provide more context to their answers.

"What is your opinion regarding the Supreme Court recommendations in *Delgamuukw*, particularly with reference to the use of oral histories in the courts?"

Opinion on the Supreme Court recommendations in *Delgamuukw* regarding to the use of Aboriginal oral histories was generally cautious. Many of the interviewees reiterated that the equal inclusion of Aboriginal oral histories as evidence was a good opportunity to educate the public and the judiciary, and simply to ensure that oral histories are heard. More of the comments and opinions tended to identify what the recommendations did not cover.

The assumption of Crown sovereignty as a basis for Aboriginal title was the biggest bone of contention. Aboriginal oral histories could be heard and even given equal weight, but would it do any good in the long run if the Crown assumptions of sovereignty couldn't be tested the way that Aboriginal sovereignty had to be?

Don Ryan is the Chief Negotiator for the Gitxsan:

> We didn't get a determination on our title and I was really disappointed with that because I thought there was enough evidence for us to deal with the Gitxsan title.
> I think that the court didn't have a choice on this issue. The courts themselves set out the principles and some of the previous cases. The precedent was there and by taking the issue to the court, using the oral histories, is one of the pieces that we had for the case. We could see that the court was going to have to deal with this and they couldn't avoid it because of the precedent already in terms of Aboriginal rights and title. The attitude that came forward was that the Aboriginal rights and title was just a concept and it didn't exist on the land. That's what you heard from Canada and B.C., and you still hear that, and this whole approach on dealing with the legitimate title and rights of the peoples, the Indigenous peoples in the Americas, has been abused.
> The Gitxsan laws disappeared at the time of sovereignty... far from that, we showed in *Delgamuukw* that the Gitxsan law is still in place. It is still taking place. It has a place in the system. It's protected by section 35 of

> the constitution so there has to be a place where it's accommodated.
> (January 18, 1999)

Don Ryan's opinions concern the Gitxsan and Wet'suwet'en, the communities at the center of the *Delgamuukw* case. He highlights the recommendations regarding the use of Aboriginal oral histories as a victory. He specifically highlights the strength of Gitxsan law and oral histories as taking their place in all aspects of community self-government. Ryan also feels that Aboriginal groups need to be aware that they have to do a lot of research so that the uniqueness of their own oral histories will be given due credit.

Rights frozen in time was also seen as a possible impediment to any gains that the equal inclusion of Aboriginal oral histories may have in the courts. Mark Dockstator goes back to the issue of frozen rights. He does not feel that the recommendations get Aboriginal communities any further ahead if there is still the risk of rights which are frozen in time.

> So I know that a lot of lawyers say that this is a great decision because it actually sets out the rules as to how you prove it [Aboriginal title]. First Nations say we don't like it at all, because of the concept that our rights are frozen in time. So the legal perspective, ya, it's great. It sets the rules and standards and certainly it will be worked out in time. First Nations' perspective is we would rather not have it thanks. It's a good opportunity to educate and also to get our information across and to give our respect to the information held by the Elders, but in the long run we would rather not have it. We would rather have it that our rights are evolving and developing and growing just as western society's rights are. So we would rather be based on an equal footing than to have an unequal footing and then allow oral tradition in.
> (November 11, 1998)

The possibility of being "swallowed up" by a system outside of the cultural and historical context of Aboriginal communities was cited as a possible reason for seeking negotiated settlements over settlements through the courts. The biased nature of the legal system could also work against Aboriginal people, even if oral histories are granted equal standing alongside of other types of evidence.

> I think the disadvantages are again....the problem with the courts themselves being overwhelmingly biased in just about every way against Aboriginal people to begin with....makes it likely that the hearing of oral history within that kind of a forum, unless there are significant changes made within that forum...it's likely that the courts will hear and interpret them in terms of the courts thinking as opposed to on their own terms...in terms of the Aboriginal cultures that create them. So I think that's the main disadvantage.
> (Dara Culhane, February 10, 1999)

John Borrows questions the usefulness of the common law legal system for resolving land disputes. Borrows also acknowledges the possibilities for communities when using their oral traditions as historical evidence and cultural knowledge.

> I think it's great that other things can now be considered by the court and I think that's going to help some communities make points that they weren't otherwise able to make. But on the other hand, it's a nice big fat juicy worm on a hook because you take that notion and then you are swallowed up in the common law system and you are giving your disputes to that system to resolve and you become more firmly entrenched within the system.
> So I guess, I would like to see reform in the legal system so that things could be accepted, people could see there is a real issue here, not just the specifics of the issue, but the whole big issue of sovereignty, title. So that the legal system could then be exited. The legal system for me is only a place of recognition of the problem. It's not necessarily the best place to resolve it and so if you can show through the legal system what the problem is, maybe people would then be willing to exit it and solve it on other grounds that are less stilted, less formal, have more opportunity for creativity etc.
> (November 5, 1998)

Ted Chamberlin in particular feels that the recommendations encourage or accentuate a distinction between written history as 'serious' history and oral history as 'mushy stuff'. This distinction and the language used in the recommendations could contribute to general misunderstandings about Aboriginal oral historical traditions.

> I think they [the Supreme court recommendations in *Delgamuukw*] are on the side of the angels. I think they're poorly written and invite precisely what they are trying to avoid which is a distinction between serious history which is the written history and oral history which is this kind of mushy stuff...which folks have who aren't really up to written history. I think that the language is very unfortunate. There's a part of me that says "with friends like that who needs enemies?" I mean because they have laid out the character of oral histories in a way that plays to all of the ways in which a lot of people deliberately or otherwise misunderstand oral histories. I don't blame the judges for it. I blame the circumstances. They certainly were trying to do the right thing.
> (January 21, 1999)

Both Chamberlin and Brant Castellano underline the importance of the collective memory and collective validation of oral histories within Aboriginal communities, something that is not present in the courts. Issues of cross-cultural interpretation and the context of the community in the telling of oral histories was seen as being very important, yet not all were covered in the recommendations.

> Well, it seems to me that the oral histories of the Gitxsan and Wet'suwet'en meet many of the criteria for validity that I have been talking about because these are the histories which have been recounted and validated in public performance over generations. So that if a family claims this mountain slope and that river and this fishing goes way back, and that version of history has survived the telling of it in potlatches over the years, then I would guess that it's pretty reliable.
> It seems to me if you are going to explore the validity of oral history, to take a coherent group that has occupied a particular territory which has a tradition of public validation, of knowledge, and rights, and territories and

> family lines, that this is a very good environment to argue for the validity of history. So I am pretty pleased that the Supreme Court saw that.
> (Marlene Brant Castellano, February 11, 1999)

As far as whether the Supreme Court judgment will make a difference in the long run, Julie Cruikshank comments that:

> The courts will balance what it sees as beliefs with the needs of the larger population, and both of those in quotes. And so it can't really fear oral traditions. I don't think it will really make a big difference at all.
> (January 13, 1999)

5.3.2 In summary

Many of the comments and opinions tended to identify what the recommendations did not cover such as: the assumption of Crown sovereignty in Aboriginal rights and title cases; rights frozen in time; the possibility of being "swallowed up" by a system outside of the cultural and historical context of Aboriginal communities; the distinction between written history as "'serious' history and oral history as 'mushy stuff'"[8]; and, the importance of collective memory and validation of oral histories within Aboriginal communities.

5.4 Fundamental Changes to the Canadian Legal System

Having identified some gaps in the recommendations and some of the general concerns, is it possible for fundamental changes to be made within the legal system to accommodate the just and respectful use of Aboriginal oral histories, and hence the just

---

[8] Ted Chamberlin, January 21, 1999.

and respectful settlement of Aboriginal title cases?

It is clear from the interviews that everyone would like to see fundamental changes to the legal system and in particular changes regarding the Crown's assumptions of sovereignty, yet interviewees either think that it is impossible, or it will take a very long time and that Aboriginal communities have to keep challenging the system.

Don Ryan says that challenging the Crown's assertion of sovereignty is key to fundamental changes in Aboriginal rights and title litigation.

> Like I said, the tests and things from the Supreme Court of Canada on *Delgamuukw* have to be challenged. I don't think we should be happy or satisfied with some of the things that the court said in the case. I think we have to be very firm in challenging the Crown's assertion of sovereignty. That's the key. If you take a look at the whole treatment of Aboriginal title and rights you know you can spend all your time setting out the tests, but what's missing in all of this is the tests for sovereignty.
> (January 18, 1999).

Ted Chamberlin talks about "changing the constitutional story line and shifting the notion of underlying title from Crown title to Aboriginal title".

> I think one of the things that may have to happen is for us to change the constitutional story line and shift the notion of underlying title from crown title to Aboriginal title. I think until that happens it's going to be hard....tough slogging, because everything is going against a story that's so bound into the system. So I just think that story needs to change.
> (January 21, 1999).

It's this idea of shifting the ground on which Aboriginal rights and title are argued or negotiated that keeps coming up over and over again. This was one of the issues which were common to all of the interviewees.

Certainly when we get to the negotiating table the government's position on fundamental change is a lot different than First Nations'. So from a First Nations perspective, will there be enough change so that there will be a consideration in the mainstream of Aboriginal sovereignty and the acceptance of that sovereignty in the legal system? I would say to a limited extent it might be possible.
But, absolutely not from the government's perspective. They are saying that that change is occurring now and that's their inherent right policy and the government - First Nations negotiations that are going on. They say that is fundamental change....devolution to a municipal self-government. So from the government's perspective that's already occurring. From the First Nations perspective, no. (Mark Dockstator, November 11, 1998)

I think changes can occur in each generation. My notion is that this is a seven generation event. We are not going to come to that recognition as quickly as though it may look like I am suggesting in the *Delgamuukw* article[9]. I am just trying to paint the whole picture if I can but then the changes that need to be taken to deal with that are just not a one off shot. (John Borrows, November 5, 1998).

I would say that it is wonderful that they acknowledge the principle of equality and mutual respect but you know when you begin to think about what it would take to really do that and you know, the kind of time pressures involved...First Nations don't have two more generations to wait while they train and while the judiciary figures out how it has to reform itself. You know we don't have that many trees left... we don't have that many fish left ... You know time is an issue, so of course it's not that each individual judge has to do this. It's also the purpose of relying on experts etc. But I still think it's a very big challenge to move beyond the symbolic recognition to the actual practice of revising the legal system sufficiently. (Dara Culhane, February 10, 1999).

9

Borrows, John(1999) Because it does not make sense: a comment on *Delgamuukw* v. the Queen. *Osgoode Hall Law Journal*, Fall.

5.4.1 In summary

With respect to the time involved, several interviewees point out that it will probably take several generations to make the necessary fundamental changes to the legal system. The key challenge seems to be the idea of shifting the notion of underlying title from Crown to Aboriginal title. All the interviewees see this as a long-term solution. The interviewees are generally cautious in their comments about whether this is even a possibility.

5.5 Shifting the Ground

One of the most interesting aspects of doing qualitative research and interviewing is often the emergence of the unexpected. Throughout the discussion of the disadvantages and advantages of granting equal weight to Aboriginal oral histories in the courts, all the interviewees voiced concern over how Aboriginal rights and title are litigated. All of the interviewees also felt that the starting point for Aboriginal rights and title litigation was archaic and unjust. Crown sovereignty was assumed, where Aboriginal sovereignty had to be proven. This has become fact in Canadian law over time, but many feel it is time to question this assumption. I was surprised at the consistency of comments that recognized this as a fundamental problem and how many used phrases such as 'shifting the ground' or 'changing the starting point' for discussion on sovereignty.

While many also feel that the recommendations in *Delgamuukw* represent a step forward for equalizing the approach taken to Aboriginal rights litigation, it still does not

go far enough because it does not question the Crown's assumption of sovereignty. One of the few people who has written about this in connection to *Delgamuukw* is John Borrows. He points out that:

> In the assertion of Crown sovereignty you get the same issue occurring because what happens is that the court subjects Aboriginal assertions of sovereignty to great degrees of scrutiny...asking for all sorts of evidence, whereas Crown sovereignty is just accepted ...it's just assumed. There's not even any scrutiny that's given to that, and so once again it draws on this notion of "primitive" and "civilized" because it assumes that Aboriginal peoples were not sophisticated in their governance and didn't have powers and it assumes that non-Aboriginal governance does have these wide ranging powers of sovereignty.
> (November 5, 1998).

Mark Dockstator, a lawyer like John Borrows, also feels that this shift in legal thinking is important, although he is not optimistic about such changes.

> I think it's hard for the court to sort of strike at the fundamental premise of sovereignty for European society. And that is to say we have to question it. I don't think that the courts would ever come to the idea that they say we question our own sovereignty in these particular issues and to do so would open the door to say perhaps Aboriginal sovereignty as something that they have to look at. It's not an issue you ever discuss. It's an assumption. It's an absolute assumption and it's one that you can't question. To go back that far and to question it essentially they just tune out, turn off and say well you can say whatever you want, but you can't change the fact that we have ultimate sovereignty and ultimate ownership. You can discuss anything from that point in time, but you can't go back to that point in time to question that assumption.
> (November 11, 1998).

Ted Chamberlin talks about making this shift via the use of oral histories (Gitxsan Adaawk):

> I think what needs to happen is what the Gitxsan argued, is that it's not

> that the scientific account confirms the Adaawks[10], it's the other way around. The Adaawks confirm the scientific story and I think the courts need to shift that burden of proof as it were, so that verification is provided by the oral history, rather than provided by written documentation. That's tough, really tough. A real imaginative stretch to do it and it's not just bloody minded judges and courts, it takes big stuff ...and I don't think the Supreme Court has helped much at all in that kind of off hand instruction. (January 21, 1999).

Marlene Brant Castellano talks about this shift in terms of politics and rhetoric. There has been a lot of talk about "shifting the relationship" coming from the government of Canada and the legal system, but not a lot of fundamental change is actually taking place.

> I have just finished writing an article about the progress that appears to have been made in the two years since the commission report [R.C.A.P report] was released in actually shifting the relationship...the big picture...shifting the relationship to a more respectful, reciprocal partnership. And there's lots of rhetoric about that and in the statement of reconciliation in the "Gathering Strength" policy framework that the government of Canada announced, there's the rhetoric of partnership... of shifting the relationship... of making the assumptions that would permit an equitable accommodation of differences, for example, around comprehensive claims. But when it comes down to the wire... in spite of the rhetoric that Jane Stewart [former Minister of Indian and Northern Affairs Canada], who I think is a very sincere person, when it comes down to it, she will go only as far as her cabinet colleagues and treasury board will consent to support her.
> (February 11, 1999).

Phrases like "shifting the relationship" and words like "reconciliation" are encouraging and probably quite heartfelt, but one has to dig deep to find examples of the types of changes that truly address the colonial roots of Crown sovereignty. As

---

[10] Adaawks are the Gitxsan oral histories.

many of the interviewees pointed out, it would take a monumental shift in legal thinking and reasoning to level the playing field.

5.5.1 In summary

To the interviewees, shifting the ground of Aboriginal, non-Aboriginal relations means: shifting the notion of Crown sovereignty and recognizing Aboriginal sovereignty; that Aboriginal oral histories confirm the scientific story instead of the other way around; shifting the relationship between Aboriginal communities and the courts to a more equitable accommodation of differences.

In Chapter 6 ideas for shifting the ground of Aboriginal / non Aboriginal relations will be examined.

5.6

"Are you optimistic about the future of Aboriginal rights and title in the courts"?

This question was simply designed to test the climate at this point in time. Are people feeling optimistic post-*Delgamuukw* about the future of Aboriginal rights and title litigation? Or are people leaning more towards negotiated settlements at this point in time?

I have organized the responses in chart form to show that there were many more optimistic responses than pessimistic, which was surprising to me, and to show the optimistic ones side by side. The responses generally point to the determination and optimism exhibited by Aboriginal peoples about their communities.

5.6.1

"Are you optimistic about the future of Aboriginal rights and title in the courts?"

YES	NO
Yes, I have to be. I wouldn't be teaching in a law school otherwise. I am trying to point out the weaknesses and challenges in doing this and maybe moving the ground of the conversation out of courts and into another dispute resolution forum.[11]	I am not optimistic at all about the future of Indigenous peoples' rights in the court. I am in law simply because I want to understand what's behind this mask that they call law and have imposed on us. [12]
The whole context of the racist view and the colonialist view is still dominant in the system. And what we are going to have to do is to continue to put forward what we see as Aboriginal rights and title and challenge the whole court on how it treats us...[13]	I am not. I think negotiations are a better way to do it. If I could observe more I might see a difference, but my sense would be to try and keep it out of the courts as much as possible, partly because it is an adversarial system and there are different ways of speaking about these things than you might have in a negotiation, but I may be too optimistic about negotiations or naïvely optimistic about negotiations.[14]

[11] John Borrows, November 5, 1998.

[12] Gary Potts, November 24, 1998.

[13] Don Ryan, January 18, 1999.

[14] Julie Cruikshank, January 13, 1999.

In a long term way, yes. In the short term, I think we want to take a cue from some of the Aboriginal people who, one of them I heard interviewed just after *Delgamuukw*. The interviewer was saying, "won't this be nice for him to see the change"...and he said, "Oh I'm not even sure it will be for my children, but I think my grandchildren. I think they're going to be in better shape". I think we have got to [be optimistic]. This is a big transformation.[15]	
I guess I would say that I am optimistic that Aboriginal people will continue to push the courts further and further as they have done in the past. Whether the courts are ready willing and able to move any further than they already have...I don't know. So depending on how they interpret that balancing of interests and how they interpret the extent of their fiduciary obligation in relation to the commitment to balancing interests...we'll see. I think those are the pushes and pulls on the courts.[16]	
I am optimistic that Aboriginal people are going to continue to transmit their distinct ways of being human in the world. But the mold within that which those values, and that world view [and how] those traditions are transmitted ...I think is probably going to transform more particularly in communities like the one I live in where change and cultural interchange is going on at a very intense level.[17]	

[15] Ted Chamberlin, January 21, 1999.

[16] Dara Culhane, February 10, 1999.

[17] Marlene Brant Castellano, February 11, 1999.

5.6.2 In summary

While many feel that it is important to keep challenging the legal system regarding aspects that are seen as unjust, such as the Crown's assumption of sovereignty, some of the interviewees lean towards negotiated settlements. It must also be taken into consideration that the situation for groups in B.C. with the B.C. Treaty Commission is quite different from the situation in other parts of Canada. The interviewees from B.C. (Don Ryan, Dara Culhane and Julie Cruikshank) all are cautious if not downright disappointed with the current results of that commission.

It is interesting to note that while most of the interviewees showed some kind of optimism regarding the future of Aboriginal rights and title litigation, they seemed more optimistic about the perseverance, adaptability and strength of Aboriginal peoples than they were about the legal system. All of the interviewees could be considered seasoned activists, leaders or advocates of Aboriginal rights, so it is interesting to note the reasons for optimism. Certainly it was this strength and optimism that came through in the interviews.

John Borrows recommends or advocates that the courts should be a place for recognizing or identifying the problem, while other avenues such as out of court negotiation may be preferable in the long run. Several other of the interviewees believe that the courts must continue to be pushed on Aboriginal rights and title cases and subsequently on issues surrounding the extinguishment of Aboriginal rights and the Crown's assertion of sovereignty in particular. While these issues clearly need long-term solutions, the interviewees also talked about the need for cross-cultural

understanding, in the short and long-term.

5.7 Cross-cultural Understanding of Oral Histories

Is it possible to understand another culture's oral histories? The interviewees were generally optimistic about the possibilities for cross-cultural understanding of Aboriginal oral histories. The time involved to learn, listen to and understand Aboriginal oral histories was one of the major considerations in cross-cultural understanding, as there is so little time within a court setting for learning to take place.

John Borrows believes it is possible for people to learn through understanding over time:

> I don't believe in a radical cultural difference and divide that can never be crossed. I do believe that there are great cultural differences that are hard to understand, and might take some people a life-time to do so, but you can, through association, through learning, through understanding over time come to that point. So I do think that is a human possibility and I think it's been done in the past in some instances, but in the court room it's such a hard gulf to cross because you only have the original people in front of you for maybe a day or a week, perhaps three years at the most as in the *Delgamuukw* case. (November 5, 1998)

Mark Dockstator also believes that cross-cultural understanding is possible, but again, that it is a lengthy process.

> It took me a long time to understand what an Elder says. I mean we speak English that's true. It's a common language and so it's communication, but is there understanding? And I would say "yes, I understand what you are saying." They said, "you don't." But it was never explicit. It was never stated that you don't understand. And it took a long time to understand for me, a process that you have to go through in order to pull out those concepts, and to translate the information from one to the other. (November 11, 1998)

Several areas were pointed out as challenges to cross-cultural understanding.

The first area was learning how to listen:

> One of my points is that it's the height of presumption to think that you and I can sit down, and by hearing one of these oral histories, can understand it... just because we can hear. We need to learn how to listen, just as we need to learn how to read. I think it's exactly the same process. We need to learn about that gap between what we hear and what's meant. And that's a long serious process, but it's one that I don't see how we can possibly expect judges to do it unless we give them some help. (Ted Chamberlin, January 21, 1999)

Learning about the specific type of Aboriginal oral history connected to a particular culture and the variation of interpretation both inside and outside of that culture was also pointed out as a challenge to cross-cultural understanding.

> And the second is to begin to learn about the particular culture and the particular oral history that are being examined or that are being presented as some kind of evidence in court. And that's another big challenge because of course these are unique nations, so for Supreme Court of Canada judges for example to be able to really hear the oral histories of say the Haida, and the Micmac is like asking somebody to become fully knowledgeable in both French and Italian history and culture. So those are big demands and expectations and big challenges. (Dara Culhane, February 10, 1999)

> The other issue is around variation. You see this in quite dramatic form . I was some years ago reading primary documents, you know transcriptions of oral traditions around Serpent Mounds and what the history of Serpent Mounds represented. And reading the transcription of Ojibway oral history from the perspective of a Mohawk was VERY interesting, because the Ojibway stories of the encounters around the Serpent Mounds speak of hostile encounters between the Iroquois. It was the Ojibway who were triumphant and the Mohawks who turned tail and were driven back south toward the lake. And I was saying how very interesting ... the oral tradition about the same events...it's like the two solitude's of the French and English talking about the origins of Canada and so on. (Marlene Brant Castellano, February 11, 1999)

5.7.1 In summary

In answer to the question 'can one understand another culture's stories?', the interviewees believed that, yes, it is possible. They also pointed out some of the challenges to cross-cultural understanding such as: the time involved; the need to learn how to listen; the need to learn the particulars of the specific type of Aboriginal oral history; and the variation of interpretations both inside and outside of Aboriginal cultures.

5.8 Educating Judges

Do you think that judges need a 'cultural hearing aid', so to speak, to evaluate evidence such as Aboriginal oral histories which are typically outside their own culture and experience?

This question provoked a lot of discussion. The two main questions which seemed to flow out of this question were: Would a 'cultural hearing aid' help? What types of strategies or training would aid a judge trying to understand Aboriginal oral histories?

Many of the interviewees felt that any sort of cross-cultural training should begin in law schools, and that there should be a range of aids.

> I think the court would be helped by hearing aids, plural. I would be concerned about the court thinking they have got the culture down by listening to one person when a culture is necessarily a complex matrix of relationships and differing interpretations on things. I think it would be important for the court that the judges themselves are able to understand

the range of meaning that is possible within in culture. You would need different people to talk to, different educational experiences [and] different personal experiences and that complicates it, because one model you could have someone sitting there with the judge translating as it were what the cultural experience is, but I think the court and the judge needs to go beyond that because that could reify things in another problematic way. And you actually need broader understanding than just that.
(John Borrows, November 5, 1998)

It's very difficult for judges, and certainly judges which we refer to as the old guard, who have been around for awhile and come through the legal system to have been trained or been exposed to the issues with respect to Aboriginal rights and the development of those rights within the last 20 years. Certainly law schools in the last 5 years perhaps have had courses which relate to contemporary issues of Aboriginal rights. With respect to the judiciary there is a general reluctance to have what they see as interest groups try to influence them, such as women, minorities, and other groups such as Aboriginal people, and therefore I wouldn't say they actively resist education in this particular area, but certainly they are not open to having, for example, seminars or educational forums where they can be educated by First Nations on these particular issues. So their ideas, beliefs, opinions and concepts come from a time which predates a lot of these initiatives and their evolution.
But it's valuable for them to understand how to interpret this information. I don't know how this would be done, which is in any way acceptable to them, but certainly I think it's a step that has to be taken.
(Mark Dockstator, November 11, 1998)

I think so. One of the objectives that we had for *Delgamuukw* was to do that. The judges have to be educated, the lawyers, people in law school, they all have to be educated. They have to understand a lot of what the different groups are doing across the country and it isn't just in Canada, but it's world wide now that the Indigenous peoples are standing up and saying "Listen , this is our view of world and this view has to be accommodated."
So it's going to grow and you'll see different schools, like law schools will begin to take a look at this. You are seeing lots of interest now by some of the museums around the world that are starting to do conferences and workshops and other things to deal with oral histories.
(Don Ryan, January 18, 1999)

I think it needs to begin in the law schools. I think the law schools need to

> find ways of bringing in, as part of their programs, some ways in which the students can understand the different character of different oral traditions, and to do that I think they need to draw widely across the country. Because there is no question that Iroquoian traditions are very different from the Tsimshian traditions, and Athapaskan traditions, different yet again. (Ted Chamberlin, January 21, 1999)

> I do think they need a cultural hearing aid. And I think that has to start with a very clear understanding and appreciation of the very deeply rooted ethnocentrism of the law to date. And an understanding of the colonial experience and an understanding of the history of Canada from the perspective of First Nations, and the experience and history of the law from the perspective of First Nations. In other words, I think that judges have to first understand themselves and their relationship to the law and the laws relationship to First Nations before they can be open to receiving training and education and more specific education and training on how to understand and listen to specific oral histories of specific First Nations. (Dara Culhane, February 10, 1999)

Marlene Brant Castellano specifically advocates that training in Aboriginal oral histories should be area of specialization.

> I think that Aboriginal law and the legal weight of oral history is a specialization. You would not ask somebody whose background was family court to make a ruling, to write a judgment on taxation. I am thinking about the Supreme Court and I would imagine that in the Supreme Court they try to achieve a certain balance. And I think that it should be recognized that oral history and cultural arguments is an area of specialization that requires specific training and preparation in order to be able to weigh the issues. (February 11, 1999)

Julie Cruikshank emphasizes how the courts differentiate between beliefs and jural truths. For this reason she thinks that the changes need to be more fundamental than just 'cultural hearing aids'.

> When judges go out to the communities and the hearing is in a situation where it's a local context, but it still seems to be that that might be one

> step beyond what happens when oral tradition is brought into the culture of the courtroom.
> There is some level where I think, first, if judges could understand that the court is a system of beliefs and the court is a cultural context, I don't think that that's likely. But it seems to me the best thing would be [if] judges could think of the anthropological study of the courtroom, then I think if that were first, then I would say yes. I think otherwise it's still this notion of the judge doesn't necessarily believe people....he may believe that people belief it, in many cases.
> One that I am thinking about. The beliefs that people in the Yukon have about glaciers and glacial surges and so on, I don't think judges would believe that the glaciers listen, that the glaciers respond to humans, but he might believe that people believe that. There is some level in which judges could really imagine themselves understanding that these are ways of thinking about things. They are not just beliefs; they are ways of thinking productively about how humans relate to each other and to the land.
> So I guess I am a little pessimistic about that. I think that judges who get courses in cultural understanding maybe more sympathetic, but I don't know quite where that gets us, except to a more liberal response to things. I think there needs to be something more fundamental before it would really work. (January 13, 1999)

Gary Potts simply felt that 'cultural hearing aids' would not help. Like Julie Cruikshank, he felt that more fundamental changes were necessary.

> No, they cannot understand no matter how extensive the cultural hearing aid is. And even if they did understand, they could not deviate from the framework of law that has built up in ignorance. They have no way of breaking that common law harness that they have on them right now. (November 24, 1998)

5.8.1 In summary

Do you think that judges need a cultural hearing aid, so to speak, to evaluate evidence such as Aboriginal oral histories which are typically outside their own culture

and experience? In response to this question, the interviewees variously responded:

There should be many types of 'hearing aids'; cross-cultural training should begin in the law schools; judges and lawyers need a deeper appreciation and understanding of the ethnocentrism in the law to date; expertise training in Aboriginal oral histories should be an area of specialization in the legal profession; and, because the courts differentiate between what it considers to be beliefs and jural truths, cultural hearing aids may not help. The changes need to be more fundamental to the legal system.

5.9 The Culture of the Courtroom/The Culture of the Aboriginal Community

Much of the emphasis of this thesis has been on the use of oral histories in the courts, yet as Mark Dockstator points out there needs to be work and preparation at the community level before the case gets to the courts.

> What I am interested in, as well, is how does oral tradition makes it into the legal system, because there is a way that it gets into the legal system through lawyers in order to be presented to the courts. So I look at the step before that, (1) with the lawyers and (2) the community itself. How do they get ready for that?
> So I don't think lawyers necessarily have that background either. How do they get ready in order to present or to organize that information to the people that are representing them so that it gets into the court system? So I don't see the focus on the front end of it. I think that's where a lot of the work has to be done for First Nations, to understand this, to get ready for it and for their advisors essentially to develop the rules which will then feed into the system.
> That won't be done in a different way unless the communities as well as the people who are advising the communities have that understanding first and then work with the system from the other way around, so essentially the tail doesn't wag the dog.
> So I go back to the first step and say, the community can do that before it gets into the system, so that if the person that's leading or the community works on it , they can actually do that before it gets into the system, so the

> judges don't have to worry about that. But to wait until it gets into the system I think it's too late at that point.
> (November 11, 1998)

Again, the cultural context of the Aboriginal community needs to be more fully taken into consideration when interpreting or evaluating Aboriginal oral histories. This point seems to come up over and over again.

> I think when the Gitxsan and Wet'suwet'en went to court with *Delgamuukw* they said, yes, you can look at these as historical truths but it is more than just historical data. It is about a larger picture... about how disputes are resolved for instance. So that's one of the things. The other thing that I think is problematic with this is that again it's bringing oral tradition into courts and I'm not sure that a better parallel wouldn't be to try and understand how oral tradition operates in context, in the communities.
> (Julie Cruikshank, January 13, 1999)

> I think in practice it means understanding oral histories and oral traditions as being created, and as being transmitted and heard and used within the context of the communities in which it lives. So I think in practice, for example, inviting judges to attend a potlatch might be a way of beginning to try to understand oral traditions or oral histories on their terms, i.e. in the places where and in the contexts in which and for the purposes for which and in the modes in which Aboriginal people themselves tell their histories and learn their histories and affirm their histories. So in a very kind of concrete way, that might be a way, but of course it also requires a bigger conceptual project.
> (Dara Culhane, February 10, 1999)

John Borrows takes the concept of interpretation and evaluation in the community context one step further, advocating stories being evaluated by their own stories. This reinforces some of the concepts discussed earlier by Marlene Brant Castellano concerning community validation of oral histories.

> One of the points I try to make in my *Delgamuukw* article as well is so far what the courts have done is they received evidence of Aboriginal history, law etc., to prove that they were a society, to prove that they had rights

> etc. That's only maybe a quarter or half of the story because it's when those stories are evaluated by their own stories, not necessarily just by legal stories about evidence etc., that you actually move on to new ground. That's where the promise lies for me is that perhaps at some point there will be a recognition that in evaluating these stories, those stories themselves have criteria within them by which you can then judge and make sense of what's being heard.
> (November 5, 1998)

5.9.1 In summary

Throughout the interviews, the discussion often veered toward the context of the Aboriginal community and how to take that into consideration when interpreting and evaluating oral histories. Mark Dockstator talked about how the focus of interpretation and evaluation should begin with the community, before it gets to the courts. John Borrows expands on this idea by advocating a recognition that Aboriginal oral histories already have the criteria to be evaluated by their own stories within a particular community. Perhaps Dara Culhane sums up these sentiments best by saying that:

> So I think in practice, for example, inviting judges to attend a potlatch might be a way of beginning to try to understand oral traditions or oral histories on their terms, i.e. in the places where and in the contexts in which and for the purposes for which and in the modes in which Aboriginal people themselves tell their histories and learn their histories and affirm their histories. (February 10, 1999)

5.10 Chapter Summary

This chapter summarizes the comments and opinions of the interviewees. It was organized in such a way that verbatim excerpts from the interview transcripts were readily available for the reader to refer to the source.

Many of the interviewees' responses concerned the Supreme Court recommendations in *Delgamuukw v. British Columbia* (1997) as they pertain to the use of Aboriginal oral histories in the courts. Later in the chapter the discussion branched off to address cross-cultural understandings of Aboriginal oral histories generally and within the judiciary, and community validation and contextual interpretive issues.

The Supreme Court recommendations specifically state that "*the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents*[18] (*Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010).

This leads into the primary research question: "What do you believe are the advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence?" The reader can see that the interviewees believe that there are more disadvantages than advantages to Aboriginal oral histories being evaluated alongside of written documentation.

The interviewees emphasized the issues that they felt must be dealt with first in order for Aboriginal oral histories to be treated equally. Some of these issues centered around interpretation, evaluation and the comparison of the oral and the written. The area of cultural context was cited under several headings. Many of the interviewees stated that the fact that Aboriginal oral histories were heard outside of the context of

---

[18] This is my emphasis as this is one of the central questions asked in the interviews.

the community, within the courts, was problematic. This in itself creates problems when community validation is not present, and the witnessing is done by the courts, not by the community.

Opinion on the Supreme Court recommendations in *Delgamuukw* (1997) was guarded; not strongly optimistic nor strongly pessimistic. Some issues such as the assumption of Crown Sovereignty were identified as stumbling blocks to the recognition of Aboriginal rights and title in litigation. Interviewees mainly identified fundamental or systemic areas that need long-term change within the legal system.

The general theme of 'shifting the ground' of Aboriginal/ non-Aboriginal relations ran through all the interviews. As mentioned earlier, shifting the notion of Crown sovereignty and recognizing Aboriginal sovereignty was a key point. But shifting the ground also referred to shifting the relationship between Aboriginal and non-Aboriginal peoples to a more respectful, reciprocal partnership that is connected to leveling the playing field or equalizing the starting point in Aboriginal rights and title litigation and land-claims negotiation.

Interviewees were generally more optimistic about the strength and perseverance of Aboriginal peoples than they were about the future of Aboriginal rights and title litigation. Some of the comments stated, (a) the courts are a place for recognizing and identifying the problems, but not necessarily the place for solving the problem; (b) negotiation may be preferable in some cases, but the courts still need to be pushed on the recognition of Aboriginal rights and title.

The final section of this chapter summarized responses in the areas of cross-

cultural understanding, educating the judiciary and the culture of the courtroom/the culture of Aboriginal communities.

The interviewees pointed out some of the challenges to cross-cultural understanding of Aboriginal oral histories, such as: the short time involved in a court setting; the need to learn how to listen; the need to learn the particulars of the specific type of Aboriginal oral history; and the variation of interpretations both inside and outside of Aboriginal cultures. Some of these points overlapped with the possibilities for educating the judiciary, as this is very much a cross-cultural interpretation issue.

The interviewees were asked, "Do you think that judges need a cultural hearing aid, so to speak, to evaluate evidence such as Aboriginal oral histories which are typically outside their own culture and experience?", and they responded: that there should be many types of hearing aids; that cross-cultural training should begin in law schools; judges and lawyers need a deeper appreciation and understanding of the ethnocentrism in the law to date; expertise training in Aboriginal oral histories should be an area of specialization in the legal profession; that because the courts differentiate between what they consider to be beliefs and jural truths, cultural hearing aids may not help. The changes need to be more fundamental to the legal system.

Throughout the interviews, the discussion often focused on the context of the Aboriginal community and how to take that into consideration when interpreting and evaluating oral histories. Mark Dockstator talked about how interpretation and evaluation should begin within the community before it gets to the courts. John Borrows expanded on this idea by advocating a recognition that Aboriginal oral histories already

have the criteria to be evaluated by their own stories within a particular community. This brings the discussion and the findings out of the courts and back into the community. Both Mark Dockstator's and John Borrow's points are closely linked to community control and community validation of Aboriginal oral histories. The main issues cited as being the major stumbling blocks in the settlement and recognition of Aboriginal rights and title litigation are long-term fundamental changes within the legal system (assumptions of Crown sovereignty and the issues arising out of that assumption). Many interviewees acknowledged the difficulty and challenge in trying to shift notions of Crown sovereignty to the recognition of Aboriginal sovereignty. This is no doubt part of a long-term strategy to address fundamental legal assumptions that continue to stand in the way of full recognition of Aboriginal rights and title in the courts.

Work at the community level that addresses some of the concerns about interpretation and evaluation of Aboriginal oral histories has not been widely written about, yet (a) community context comes up over and over again in the interviews, and (b) unlike the legal system which is outside the culture, history and decision-making structures of Aboriginal communities, work in the context of the community holds out the hope of greater Aboriginal control in shaping and determining how Aboriginal oral histories will be interpreted and evaluated once outside the community.

CHAPTER 6

A CRITICAL REVIEW OF EMERGING ISSUES

6.1. Introduction

> Speaking to the Manitoba Aboriginal Justice Inquiry, Elijah Harper said:
>
> Without understanding there cannot be justice. Without equality there can be no justice. With justice we can begin to understand each other. With justice we can work and live with each other...Aboriginal people want a judicial system that recognizes the native way of life, our own values and beliefs, and not the white man's way of life.
> (Manitoba, 1991, p. 251)

While it is easy to view Aboriginal oral history simply as evidence or data separate from community, culture and history when in the context of the courtroom, to Aboriginal peoples oral history embodies a system of indigenous knowledge based on traditional beliefs and values. The themes that emerged from the interviews show that although the issues discussed are linked to the legal system, oral histories are intricately a part of the community and the culture in which they originated.

There are particular themes which emerged over and over again in the interviews. The first area specifically pertains to issues seen as being problematic to the use and understanding of Aboriginal oral histories in the courts and the way that Aboriginal rights and title are litigated. The second area pertains to the use and preparation of Aboriginal oral histories before and after being heard in the courts. This chapter is organized according to the following issue areas:

First, issues *systemic* to the legal system and the way that Aboriginal rights and title are litigated will be discussed. Second are *contextual* issues regarding the use of

Aboriginal oral histories such as cross-cultural interpretation, evaluation and comparison of the written and the oral which is also closely tied to *community* validation and control.

The focus of this chapter is to identify issue areas that are common to the interviews and the legal research, and to provide some contextual analysis. The point is not necessarily to come up with answers, but to identify at this point in time (post *Delgamuukw* 1997) the advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence. The issues identified represent the beginnings of a larger discussion that is likely to go on for as long as Aboriginal groups choose to use the courts to prove ownership, jurisdiction or stewardship over ancestral lands and more generally, for as long as Aboriginal oral histories are called upon in cross-cultural settings to be compared and evaluated.

6.2. Systemic Legal Issues: Aboriginal Oral Histories and Aboriginal Rights Litigation

Aboriginal rights litigation in Canada is extremely complex. Aboriginal groups in different parts of Canada have varying priorities and legal strategies according to their own histories and needs. The following are simply the issues which sifted down through the cases listed in Chapter Three, combined with what came up repeatedly in the interviews. Particularly in the interviews, it was noted that these systemic legal issues would have to be reformed or changed before the equal inclusion of Aboriginal oral histories would have a positive effect on Aboriginal rights and title litigation.

The issues under review will be: firstly, the way that the courts have used *tests*

to determine Aboriginal rights and title; secondly, how using tests have often produced rights which are *frozen* at the time of contact or when sovereignty was asserted; thirdly, how both testing for Aboriginal rights and the concept of frozen rights have led to *extinguishment* of rights; and fourthly, the assumption of Crown *sovereignty* as a basis for extinguishment. Aboriginal rights and title litigation have put Aboriginal communities in the position of having to prove historic land occupation, land use and societal organization, which has then necessitated the use and also the testing of Aboriginal oral histories in land claim trials.

6.2.1. Tests

"Snow houses leave no ruins".
(*Baker Lake v. Minister of Indian Affairs and Northern Development* [1980], 5 W.W.R. 193)

In order to make Aboriginal rights cognizable in the courts, there must be a means of proving their existence, so tests or a set of criteria are used for this purpose (Elliott, 1980, p. 657). The Baker Lake test is often referred to and it was specifically used and modified in *Delgamuukw v. British Columbia* (1991) [1]. In *Baker Lake*, Mahoney suggests that in cases involving claims for Aboriginal rights, the claimants' legal burden of proof is lower than in other cases:

> The evidence...is extremely meagre, so meagre that in other circumstances, I should feel that the burden of proof had not been

1 The Baker Lake test was supported by propositions from the *Supreme Court of Canada in Kruger v. R.* [1978] 1 S.C.R. 104; [1977] 4 W.W.R. 300; 34 C.C.C. (2d) 377; 75 D.L.R (3d) 434; 15 N.R. 495, and *Calder v. A.G.B.C.* [1973] 34 D.L.R (3d) 145 (S.C.C), and the United States Supreme Court in *Johnson v. McIntosh* (1823), 8 Wheaton 543, *Worcester v. Georgia*, supra, and *U.S. v. Santa Fe Pac. Railroad Co.* (1941), 314 U.S. 339.

> discharged. The meagreness of the evidence is...inherent in its subject-matter... Snow houses leave no ruins. (*Baker Lake v. Minister of Indian Affairs and Northern Development* [1980], 5 W.W.R. 193)

Due to the meagreness of historical evidence it is often necessary to call upon Aboriginal oral histories. "Documentation of Aboriginal title brings the court into a realm where written records are rare, where judges must rely on anthropological, historical and archaeological evidence, and make judgments of a subjective nature" (Elliot, 1980, p. 658). Yet, tests within Aboriginal rights litigation are interpreted in terms 'cognizable' to the Canadian legal and constitutional structure which has tended to limit the subjective nature of such judgments.

It is not the tests as such that are the issue, but how the criteria are interpreted differently by the courts and Aboriginal groups. While tests are put in place in order to create consistency and in order to have certain standards or criteria to prove a point, tests also insert their own bias. What may seem 'provable' to one group within its own cultural traditions may be interpreted quite differently outside those cultural norms, as in the case of *Delgamuukw* (1991) where the judge interpreted "Aboriginal life [as] far from stable" (*Delgamuukw v. British Columbia* [1991] 3 W.W.R. 97). What seemed to prove consistency of customs and land-use over hundreds of years to the Gitxsan and Wet'suwet'en was interpreted otherwise by Judge McEachern.

Of the four criteria set out in the Baker Lake test, the one most relevant to this thesis is proof that "they and their ancestors were members of an organized society" [2] (*Baker Lake v. Minister of Indian Affairs and Northern Development* [1980], 5 W.W.R. 193). This immediately puts the Aboriginal group on the defensive having to prove

---

2 Refer to Chapter 3, sub-section on "*Baker Lake v Minister of Indian Affairs and Northern Development*" for the four elements laid out in that test.

something which to most seems obvious, namely that to survive as a society, a group must have had its own system of organization. In *Delgamuukw v. British Columbia* (1991) Judge McEachern, quoting from Hobbes, came to the conclusion that life for the Gitxsan and Wet'suwet'en was "nasty, brutish, and short". He goes on to say that "they more likely acted as they did because of survival instincts which varied from village to village"(*Delgamuukw v. British Columbia* [1991] 3 W.W.R. 97) and so he dismissed the idea that Aboriginal social institutions, and not simply instinct, existed to organize activity (Miller, 1992, p. 61).

A number of academics have acknowledged the absurdity and also the inherent racism of being put in the position of having to prove that you and your ancestors were part of an organized society (Culhane, 1998; Fisher, 1992; Fortune, 1993).

The organized society criterion is only one example of an area used within tests for Aboriginal rights and title. Testing is one of the areas identified by the interviewees as problematic in Aboriginal rights and title litigation. Testing is also closely tied to a number of other areas articulated by the interviewees as problems which are systemic to the legal system.

6.2.2 Frozen rights

> So, it's a saw off between their concept of saying it's a very limited right, but there is substance to it so we have to allow you to prove it and therefore we have to allow your oral traditions. (Mark Dockstator, November 11, 1998)

Once a group has decided to pursue Aboriginal rights litigation where tests are being used, they also run the risk of having their Aboriginal rights frozen at the time of contact. One of the main reasons that Aboriginal groups have decided to use their oral

histories as evidence in land claim cases comes out of the previously mentioned tests. In *Delgamuukw* (1991), oral histories were used to prove societal organization and territorial land use and occupation prior to and at the time of contact. Once daily practices were proven as a form of societal organization prior to contact with Europeans, Aboriginal rights could be asserted. At the same time, the judge in the *Delgamuukw* (1991) case then said that those traditional practices have changed over time due to contact with Europeans, and hence are no longer Aboriginal rights. Ergo, daily practices, at the time of contact, were then frozen in time by Judge McEachern, as he questioned contemporary practices such as buying a fishing license, using electricity or driving a car to negate people's current Aboriginality and hence their Aboriginal rights and title today.

Even though tests for Aboriginal rights have adapted and evolved over time, some feel that the way Aboriginal rights are litigated still produces rights which are frozen in time. *Van der Peet v. Queen* (1996) sets out that "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". Judge Lamer goes on to explain that "the concept of continuity is the means by which a 'frozen rights' approach to s. 35(1) will be avoided" (*Van der Peet v. Queen*, [1996], 2 S.C.R. 507). The need for traditional practices to remain the same post-contact is given some flexibility by including continuity. On the surface, this looks like the courts are moving away from the concept of frozen rights, but some interpret this differently:

> The courts most recently in the case of *Van der Peet* talked about Aboriginal rights can only be things that are integral to distinctive culture...prior to the arrival of Europeans, which is very much a concept of

> primitive...those things that arose as the result of European contact cannot be claimed as rights and so what it effectively does is it freezes many practices that Aboriginal peoples developed to respond to others arriving, to respond to colonialism. [There is] just no way that those can be given the same force and so it compromises Aboriginal peoples' ability to exercise economic rights, [which is] the broader survival of communities (John Borrows, November 5, 1998).

Sharon Venne (1998) agrees with John Borrows, and adds that "Indigenous peoples themselves are the best judge of our "traditions, practices and customs". Moreover, by focusing in this manner on Indigenous culture, one actually undermines any potential for Indigenous self-determination (and any control by Indigenous peoples over their lands and resources) (p. 8).

The concept of frozen rights is quite controversial; as John Borrows points out, it is tied to a concept of "primitive" versus "civilized", which limits the ability of Aboriginal people to exercise rights today. The concept of rights which are frozen in time essentially stops any further discussion of Aboriginal rights in the present, rendering the use of Aboriginal oral histories as evidence a moot point.

6.2.3 Extinguishment

It's just old wine in new bottles.
(Dara Culhane, February 10, 1999)

Extinguishment is perhaps the biggest stumbling block to land claims negotiation and Aboriginal rights litigation (Don Ryan, January 18, 1999; Mark Dockstator, November 11, 1998; Gary Potts, November 24, 1998; Asch & Zlotkin, 1997). There are a number of ways that extinguishment of Aboriginal title takes place.

Extinguishment literally means "to destroy; to put an end to; to abolish or wipe out; in law to render void" (Allen, 1990, p. 414). Extinguishment in the context of Aboriginal rights or title means that typically the Crown has rendered those rights void, historically and currently. Asch and Zlotkin (1997) point out two ways that extinguishment of Aboriginal rights and title have occurred in Canadian law: "The first involves extinguishment by unilateral government action. The second involves extinguishment with the alleged consent of an Aboriginal party"(p. 210). Prior to the Constitution Act of 1982, any Aboriginal right derived from the common law could be extinguished unilaterally and without the consent of Aboriginal people, if an act of Parliament contradicted it (Asch & Zlotkin, 1997, p. 210). In *Calder v. Attorney General of British Columbia* (1973), Justice Hall acknowledged that ,Aboriginal title being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation" and he goes on to say that intention must be "clear and plain" (*Calder v A.G.B.C.* [1973] 34 D.L.R. (3d) 145 S.C.C.). Justice Hall rejected the premise that Aboriginal rights and title can be extinguished unilaterally by legislation. This was later reinforced in *R. v. Sparrow* ([1990], 1 S.C.R. 1075).

While the courts acknowledged that Aboriginal rights and title could not be unilaterally extinguished, groups such as the James Bay Cree would deny that they freely agreed to such clauses in the James Bay Agreement of 1975. In the more recent settlements, such as Nunavut, Aboriginal groups have agreed to terms that include the extinguishment provision. The federal government is insistent on this provision, which has led to divisiveness among Aboriginal peoples.

Don Ryan, the Gitxsan Chief negotiator, comments on extinguishment:

> In fact the whole requirement for extinguishment and surrender has not changed. [This is] the objective in the land claims settlement process and the treaty process in B.C. and the Gitxsan are not prepared to do that. That was part of the reason why we did *Delgamuukw*, was to say that the whole issue of how Aboriginal rights and title have been accommodated in this country is the coexistence of the two... the Gitxsan title and rights and the Crown's rights have evolved and they can coexist and it isn't required for people to cede and surrender. Canada is certainly not going to cede and surrender its sovereignty to us, but we are expected to do that. (January 18, 1999)

Dara Culhane, author of *The Pleasure of the Crown* (1998), also feels that extinguishment is still problematic, even though the federal government has changed the wording set out in the recent Nisgaa agreement:

> Certainly the issues of extinguishment continues to be problematic and there's a lot of debate about whether the new language of 'certainty' as in the Nisgaa treaty...as you know does not use the words, 'cede' and 'surrender' or 'extinguish', but rather uses the term 'certainty' or the goal of achieving 'certainty of title'. Now you know some people feel satisfied with that and others say it's just old wine in new bottles. It's still extinguishment. So certainly the issue of extinguishment is still problematic. (February 10, 1999)

The issue of extinguishment in land claim settlements continues to be controversial and divisive. Asch and Zlotkin (1997) propose the negotiation of settlements without extinguishment. The process should be one where Aboriginal rights and title are affirmed. They believe that this approach is consistent with recommendations of reports either commissioned by, or agreed to, governments within the last decade (p. 225). As Don Ryan points out, the co-existence of the two, Aboriginal title and rights and the Crown's rights, has evolved and it shouldn't be required that people cede and surrender (January 18, 1999).

6.2.4 Sovereignty

It's a concept without a foundation.
(John Borrows, November 5, 1998)

There are many issues that get caught in the complex web of Aboriginal rights and title litigation and negotiation. One issue is often very much interconnected to the next through legal precedent, historical events or constitutional change. It is difficult to talk about the extinguishment of Aboriginal title and rights without addressing the Crown's assertion of sovereignty.

When and how Crown sovereignty was asserted seems to be a matter of debate and judicial opinion. Brian Slattery (1983) describes four stages in the evolution of the Crown's right (or the Crown's rationalization of their right) to Aboriginal lands[3]. He describes the second stage as beginning at contact between Aboriginal and non-Aboriginal peoples. During this stage, according to Crown assertions of sovereignty, the "discovering" country gained exclusive rights to the land (p. 34-35).

The evolution of Common law precedent is often based on the assumption that the Crown asserted sovereignty, which in turn extinguished Aboriginal rights or title. Even though a group like the Gitxsan and Wet'suwet'en may go through a trial on the basis of trying to prove that they can meet the criteria set out in a test such as *Baker Lake*, the judgment often goes back to when and how the Crown asserted sovereignty. It is the view of a number of academics that common law precedent founded on Crown assumptions of sovereignty needs an ultimate reversal of logic in order for Aboriginal

---

3 Refer to p. 46-48 for Slattery's four stages describing the evolution of the Crown's right to Aboriginal lands.

rights and title to be litigated justly (Bell & Asch, 1997, p. 55; Borrows, November 5, 1998; Ryan, January 18, 1999; Dockstator, November 11, 1998).

Richardson (1993) points to the judgment in the *St. Catherine's Milling* (1888) case as a starting point for the Crown's assumption of sovereignty in law:

> In short, the St. Catherine's Milling judgment legitimized the law's assumption that simply by arriving here, Europeans legally became owners of the lands of Canada. Right up to the present day, the law has leaned on that judgment. When Indians enter Euro-Canadian courts to argue land issues, they are not, to use the current catch-phrase, on a level playing field. One side is assumed from the beginning to have simply taken ownership of the land of the other side, and the law interprets everything in light of that assumption. (p. 290)

Macklem (1997b) states that, "the fiction of original Crown occupancy was originally developed to legitimate feudal land-holdings in England, along with another fiction that actual occupants of land at the time enjoyed rights of ownership as a result of grants from the Crown". Macklem continues this historical narrative:

> Since the law had imagined the Crown as granting lands to landholders, the Crown was no longer the full owner of granted land. Ownership, or fee simple, passed as a result of these grants to landholders. This was not true in fact: the Crown was not the original occupant and therefore owner of the land. At the outset too, there were not, by and large, actual grants effected by the Crown to landholders. These were fictions developed to rationalize the existing pattern of land-holdings in England, and they served this purpose well. (p. 133)

So, upon coming to Canada, the Crown "brought with it this imagined truth...that they were the original occupants of all of Canada, not recognizing original occupancy and granting third party interest to whomever it chose to" (Macklem, 1997b, p. 133), hence giving Crown sovereignty ultimate authority.

The one thread that wove in and out of all the interviews is everyone stated in

his or her own way that this assumption of Crown sovereignty needed to be reversed if there was ever going to be a truly just legal system in Canada with regards to the litigation of Aboriginal rights and title. Most interviewees, in fact, were adamant that the basic assumption of Crown sovereignty was very problematic and imposed a barrier to the types of changes that would make a difference to Aboriginal rights and title litigation.

Gary Potts, the former chief of the Teme Augama Anishnabai at Bear Island, stated that:

> [Crown sovereignty] is there to ensure that their institutions have a credible attachment to our lands, even though it is an imposed one from England, based on their notion of discovery. That doctrine of discovery gave the land to the European who discovered it, which is absolute nonsense. But that is still being applied, [and] that is still the basis of Canadian law as being applicable to Indigenous lands. (November 24, 1998)

6.2.5 In summary

Four issues, the testing of Aboriginal rights, frozen rights, extinguishment of rights, and Crown assertions of sovereignty are certainly not new or revelatory to critics of the way that Aboriginal rights and title are litigated. As one can see from previous references, many have articulated the flaws in how these concepts are litigated in relation to Aboriginal rights and title and also in extension, how land-claims are negotiated (Bell & Asch, 1997; Borrows, 1999b; Culhane, 1998; Kulchyski, 1994). The analysis of data in this study identifies the four salient issues as a framework for appreciating the role of Aboriginal oral histories in cross-cultural settings. While the focus of this thesis is Aboriginal oral histories as evidence in legal cases, many of the

issues that have emerged are relevant in a variety of cross-cultural settings such as treaty negotiations, environmental assessments or anywhere that Aboriginal oral histories are being evaluated and compared, particularly outside of Aboriginal communities.

After the final judgment in *Delgamuukw* (1991), there was a lot of reason to be discouraged about the future role of Aboriginal oral histories and tradition in the courts. In the end, Judge McEachern completely disregarded the history and knowledge contained in the recitation of the Gitxsan and Wet'wuwet'en oral histories. So, how the rule of law was interpreted by Judge McEachern in the *Delgamuukw* case (1991) did not bode well for the future of Aboriginal oral histories in the courts. But since then several cases and reports have come out that have given Aboriginal communities and others sympathetic to the cause of Aboriginal rights and land-claims cause for encouragement. Two events that have had an impact on precedent, and hence the use of Aboriginal oral histories in the courts, are the *Final Report of the Royal Commission on Aboriginal Peoples* (1996) and the Supreme Court of Canada recommendations in *Delgamuukw* (1997).

Both the Supreme Court Recommendations in *Delgamuukw* 1997 and the *Final Report of the Royal Commission on Aboriginal Peoples* advocate changes to the way that Aboriginal rights and title are litigated, and in fact advocate negotiation over litigation. It remains to be seen whether judges in future cases will take heed, and whether more Aboriginal groups will choose negotiation over litigation. The four issues identified here (testing for Aboriginal rights and title; rights frozen in time; extinguishment of Aboriginal rights and assumptions of Crown sovereignty), all remain

complex issues ingrained in the legal system.

6.3 Contextual Issues: Interpretation, Evaluation and Comparison of Oral and Written Evidence

Issues such as interpretation, evaluation and comparison of the written and the oral loosely fall within the category of contextual issues. These issues take us away from the *way* in which Aboriginal rights and title are litigated, to the *contextual* differences between the culture of the courtroom and the culture of Aboriginal communities. At this point the discussion also becomes relevant to other cross-cultural settings where Aboriginal oral histories are being compared and evaluated.

The interviewees in this study were asked to discuss the advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside written historical evidence. The concerns represented in the following chart provide a reference point for the discussion in this section.

6.3.1
What do you believe are the advantages and disadvantages of Aboriginal oral historical evidence being evaluated equally alongside of written historical evidence?

Advantages	Disadvantages
1. Getting oral histories into the courts.	1. Problems of interpretation: a) cultural screen that the information has to pass through. b) no formal training in cross-cultural interpretation or oral histories. c) time limitation put on understanding oral histories in the courts.
2. Educating the judiciary.	2. Problems of evaluation: a) context outside of Aboriginal community. b) no equality of power and resources c) the written and oral are separate and distinct. d) communal nature of validation is not present in the courts. Rules which exist in the community do not exist in the court setting.
3. Important as a symbolic statement.	3. Comparison: a) oral history is out of context in the courts. b) like trying to compare apples and oranges. - risk of oral histories being treated like data. - puts into confrontation two different modes of language and thinking. - risk oral histories being treated with kid gloves.
	4. Treatment of oral histories: a) risk the courts not treating Elders with respect. b) risk of treating all oral histories as if they are based in the same tradition.

6.3.2 Interpretation and evaluation

Issues emerging through cross-cultural interpretation of non-literate cultures have been discussed extensively in anthropological field work studies, but not as much in connection to the courtroom (Henige, 1982; Tonkin, 1992; Finnegan & Horton, 1973;

Rosaldo, 1989; Basso, 1990; Cruikshank, 1990).

After the judgment in *Delgamuukw* (1991), Julie Cruikshank wrote that: "the inescapable lesson seems to be that removing oral tradition from a context where it has self-evident power and performing it in a context where it is open to evaluation by the state poses enormous problems for understanding its historical value" (Cruikshank, 1998, p. 64). This sentiment was also reiterated by the interviewees. There are a number of reasons why the evaluation of oral tradition by the state poses problems. Perhaps the most obvious is simply the inequality of decision-making power and the access to resources that the state has, in comparison to Aboriginal communities.

Dara Culhane (1998) makes the point that cultural difference in interpretation may not be the main problem, but the "unequal distribution of wealth, power and property may be" (p. 179). This unequal distribution of power is an over-riding reality when pursuing legal approaches to land claims, but the fact still remains that Aboriginal oral histories will continue to be brought into the courtroom when it is necessary to prove issues such as land-use or societal organization.

On the level of cross-cultural interpretation of Aboriginal oral tradition in the courtroom, there are two questions that should be asked: What are the impediments to cross-cultural understanding of oral tradition in the courtroom? Are there ways to encourage cross-cultural understanding of Aboriginal oral traditions in a legal setting?

In terms of impediments, there are a number of factors that were discussed by the interviewees. One of the best sources of current debate concerning these questions comes out of the *Talking on the Page: Editing Aboriginal Oral Texts* conference that was held at the University of Toronto in November of 1996. Several of the interviewees

gave papers at this conference, including Julie Cruikshank and Ted Chamberlin.

Ted Chamberlin pointed out that: "just as we learn how to read, so we learn how to listen; and these learnings do not come naturally. Nor are they the same across different traditions, listening to which may be as different as reading English and Chinese and Arabic" (Chamberlin, 1999, p. 76). Learning to listen and the time it takes to truly learn about and understand Aboriginal oral histories was cited by the interviewees as an area that needs more attention. It is also important not just to learn to listen, but to learn about the specific Aboriginal culture, as all oral traditions are unique to that particular Aboriginal culture.

A number of people have written about the specific cross-cultural factors that need to be taken into consideration for a fuller understanding of Aboriginal oral traditions such as Ross (1992), Spielmann (1998), Rosaldo (1989), Dumont (1993) and Brant (1990).[4]

Simon Ortiz (1977) says that as participants in a story, "we must listen for more than just the sounds, listen for more than just the words and phrases; we must try to perceive the context, meaning, purpose" (p. 9). Taking Aboriginal oral histories from the community to the courtroom is not an easy transition. Some of the interviewees advocated taking the judge to the Aboriginal community to participate in significant cultural events such as a potlatch. While this is no doubt a step in the right direction in trying to get the judge to think outside of his or her own culture, it does not necessarily ensure identical understandings of oral histories.

Maybe it is impossible to create the perfect circumstances for understanding

---

4 Refer back to Chapter 3 for examples of some of these cross-cultural factors.

when so much is dependent on the skill and background of the listener and the cultural context of the original telling, but it is possible to identify some elements that encourage cross-cultural understanding of oral histories.

Part of understanding oral histories in their proper context is knowing that they often come with a complex set of rules. These rules stipulate when stories should be told, who has the right to tell the story and restrictions as to how much interpretation the teller can add (Spielmann, 1998, p. 184). In the context of the courtroom some rules of this type may be compromised particularly due to time limitations. In creating circumstances that are true to oral histories being told outside of the context of the community, concessions must be made for non-Aboriginal listeners and for the courts in particular.

One of the biggest challenges to cross-cultural interpretation of Aboriginal oral histories is the variety of interpretations. The courts have a tendency to make a distinction between what is viewed as 'historical fact' and what is viewed as 'beliefs' (Culhane, 1998, p. 123); thus differing interpretations of Aboriginal oral histories risk being categorized as 'beliefs' which do not hold the same legitimacy in the courts as 'historical facts'.

Cruikshank also identifies the difference between 'beliefs' and 'facts' as an important interpretive issue:

> The judge doesn't necessarily *believe people*....[my emphasis] he may believe that people belief it. [For] example, the beliefs that people in the Yukon have about glaciers and glacial surges and so on. I don't think judges would believe that the glaciers listen, that the glaciers respond to humans, but he might believe that people believe that, but then he is assessing the beliefs rather than understanding that these are ways of

> thinking about things. They are not just beliefs. They are ways of thinking productively about how humans relate to each other and to the land. (Cruikshank, January 13, 1999)

In trying to get away from this imposed differentiation between beliefs and facts, are there ways to accommodate the variety of stories and the variety of interpretations of events within Aboriginal oral histories, within a court setting?

This question takes us back to considering varying interpretations. Even if the courts provide the time, and are willing to consider stories in their community contexts, this does not necessarily ensure understanding. But at the same time, providing the opportunity for the judiciary to hear Aboriginal oral histories, or introducing an Aboriginal perspective to history should not be underestimated or given up due to the limitations of time and context. Foster and Grove address some of the problems of educating the judiciary:

> Controlling, or more accurately, educating, the imagination of the fact-finder therefore becomes key. A judge who equates oral history with his or her own experience of family history may not appreciate that pre-literate culture "have a more highly developed and institutionalized oral history capacity" (1993, p. 223).

While educating the judiciary was seen as being an advantage to including Aboriginal oral histories as evidence, the interpretation given by a judge is still likely to be based on his or her own experience and background.

Greg Sarris (1993) comments on how our cultural and personal situation affects how we listen:

> Basically, in whatever form or manner we deal with oral texts, whether orally or literally, we continue their life in very specific ways. This is just as true about an oral exchange within a single culture as it is about an oral exchange that is cross cultural. No two personal worlds are identical anywhere. This does not mean that we are not, or cannot be, distanced

> or critical, for critical response is part of hearing. We sort out what we hear, unconsciously and consciously, and this sorting has to do with our cultural and personal histories and the situation of our hearing. (p. 40)

Many of the interviewees advocated some training in Aboriginal oral histories in law schools and/or as an area of specialization.

6.3.3 Comparison of the written and the oral

Street (1984) makes the point that literacy is not a neutral technology detached from social contexts (p. 3). The same could be said of Aboriginal oral tradition. Each comes with its own social, historical and cultural contexts and it is difficult, if not impossible and inappropriate, to compare them outside of those contexts.

A number of the interviewees felt that the written and the oral should not be compared side by side; that they were two very distinct modes of language and thinking. Belich (1989) also discuss this point:

> Unlike a document, it [oral history] is not frozen in time at the point of writing, but bears the added imprint of those who passed it down through the generations. Nor is it necessarily the function of oral tradition to reflect empirical reality. Religion, genealogy, and support for claims of land ownership may be more important. The scholar who uses such data without due caution is in danger of forcing a square peg into a round hole. (p. 13)

While it may not be the function of Aboriginal oral history to reflect empirical reality, it is being called upon in the courts for that purpose. This is reflected in the way that oral history is compared to other types of evidence. Don Ryan in particular links the comparison of written and oral historical evidence to the cultural context from which they came:

> I think that the oral histories should be treated as a discreet body of evidence and it shouldn't be put up against written history to compare it to see whether they are valid. I don't think that we should do that. We should try to separate them. So if you are going to put them alongside of each other for weighing the evidence, that's sort of a disadvantage for the oral histories, because the people that you are dealing with in terms of written history are coming from another perspective. I am advocating that we look at oral histories in the context of the culture, of the people that are involved and how those oral histories are used, how are they recounted, what is the context of recounting those oral histories. Those are the things that I think that are important for people to understand, rather than to weigh written history.
> (January 13, 1999)

Perhaps the participation of the community in validating differing interpretations of oral histories before it gets to the courts would strengthen community control and reflect Aboriginal modes of evaluation, systems of ownership and jurisdiction.

6.3.4 Community validation

Alice Hoffman defines validity as, "the degree of conformity between the reports of the events and the event itself as recorded by other primary resource material such as documents, photographs, diaries, and letters" (Hoffman, 1996, p.89). von Gernet (1996) classifies tests for validity into two types: internal and external. Internal tests evaluate an oral history in terms of its own self-consistency. This may involve cross-checking and collation of multiple versions. External tests compare oral history with other evidence, such as written accounts or archeological data (p. 5.3.3).

The interviewees propose a break particularly from external testing for validity to models where the community validates and evaluates its own oral histories on its own cultural terms. For one community certain types of oral histories such as treaty stories

can only be validated through a particular family line, as they are the keepers for those oral histories. For another community it may be a House or clan group that validates the oral history.

In an article called *Living Between Water and Rocks: First Nations, environmental planning, and democracy*, John Borrows (1997b) says that a fuller "understanding of First Nations law will only occur when people are more familiar with the myriad stories of a particular culture and the surrounding interpretations given to them by their people" (p. 455). Perhaps then the differing interpretations of stories could be viewed for their rich interwoven context that involves the whole culture of the community, instead of being seen as a weakness.

> So far what the courts have done is they received evidence of Aboriginal history, law etc., to prove that they were a society, to prove that they had rights etc. That's only maybe a quarter or half of the story because it's when those stories are evaluated by their own stories, not necessarily just by legal stories about evidence etc., that you actually move on to new ground. That's where the promise lies for me is that perhaps at some point there will be a recognition that in evaluating these stories, those stories themselves have criteria within them by which you can then judge and make sense of what's being heard. (Borrows, November 5, 1998)

Marlene Brant Castellano (1999) describes how the community both creates the oral history and validates it:

> That in an oral society the validation of particular perspectives on events is tested, modified and confirmed within the oral community, with people talking about what is being talked about. And then as the event recedes in time, what emerges from the discussion in the community becomes the oral history. If you don't have those functioning small communities who understand their possibility and their responsibility to talk about and to synthesize the communities perspective on that event, to sort of solidify the history. The written record then takes on, just because of being attached to a literate tradition of authenticity and authority, the written version becomes the real thing. (February 11, 1999)

Julie Cruikshank discusses how oral traditions have social histories and they acquire meaning in the situations in which they are used. Meanings shift according to how fully cultural understandings are shared by the teller and the listener (Cruikshank, 1998, p. 40). In other words, if Aboriginal oral histories are treated like data or simply compared to the written historical evidence in the courtroom, they run the risk of losing something when they are not validated by the community. On the other hand, one could also make the case that the courtroom is just a new situation where a new meaning or understanding could take place. Cruikshank underlines the importance of acknowledging that interpretation can and should be contested by other community members (Cruikshank, 1998, p. 41).

6.4 Chapter Summary

The first part of this chapter identified some of the contentious issues in Aboriginal rights and title litigation, issues systemic to the legal system. These contentious issues emerged both from legal precedent and from the interviews. These issues included: testing for Aboriginal rights, frozen rights, extinguishment of rights, sovereignty assertion, and some analysis about how these issues dictate and inform the use of Aboriginal oral tradition in the courts.

The next section, "Interpretation, Evaluation and Comparison of Oral and Written Evidence", took a critical look at the advantages and disadvantages of Aboriginal oral histories being evaluated equally alongside of written historical evidence. Some of the areas identified as impediments to cross-cultural understanding of oral histories in the courtroom include: learning how to listen to Aboriginal oral histories; learning the

uniqueness of individual Aboriginal cultures and their oral histories; how to bring Aboriginal context into the courtroom and/or how to bring the courtroom to the community; how to accommodate variation in interpretation and the importance of community validation. The interviewees also felt that the written and the oral forms of evidence should not be compared side by side, that oral histories should be evaluated on their own merit along with other community oral histories. Many of these areas are relevant to other forums where Aboriginal oral histories are being interpreted and evaluated in cross-cultural settings. These were some of the areas identified for further discussion.

The recommendations in the Supreme Court judgment in *Delgamuukw v. British Columbia* (1997) represents positive movement within the Canadian legal system in beginning to accommodate the uniqueness of Aboriginal oral histories as evidence. While many of the recommendations in *Delgamuukw v. British Columbia* (1997) show a willingness to move forward into new interpretations of the law's handling of evidence, only time will tell how far, and how quickly, this will occur.

CHAPTER 7

7.1 Conclusion

One of the threads woven in and out of this research and particularly the interviews was optimism. This was not so much optimism about the legal system, but optimism about the strength and tenacity of Aboriginal peoples. No matter what happens with Aboriginal oral histories in the courts in the future, they will remain an integral part of Aboriginal communities; the stories, the testimonies, the reminiscences will continue on for their own purposes and in their own ways.

While the issues that emerged from this research are not new or revelatory, they do represent a unique blending of research at a specific time in history. The eight people whom I interviewed gave their thoughts and opinions about the use of Aboriginal oral tradition as evidence, using the Supreme Court recommendations in *Delgamuukw* (1997) as a focus. All the people interviewed are well acquainted with the use of Aboriginal oral histories in the courts and/or issues of community validation and evaluation of oral histories. Their opinions represent a particular segment of informed opinion post-*Delgamuukw* (1997).

The combination of the issues that emerged from the legal research and the interviews contributes to two main bodies of research and literature. The first is the area of Aboriginal law and Aboriginal rights and title litigation in particular, and the second is the area of interpretation, evaluation and comparison of written and oral evidence in cross-cultural settings. The issues discussed in the second area are relevant in a

variety of settings such as treaty negotiations, environmental assessment or anywhere where Aboriginal oral tradition is being called upon as evidence in cross-cultural settings.

It should also be noted that there was a change in research focus part way through the thesis. When the research began, I was interested in exploring the origins of the "primitive" versus "civilized" debates and the connections to written literacy as a symbol or step towards being "civilized", and examples of that within Aboriginal rights and title litigation. As the interviews were completed, however this area of interest seemed less important in relation to the issue areas that were identified by the interviewees. At that point I decided to pursue the areas that sifted down from the interviews. The area of cross-cultural interpretation, evaluation and comparison of written and oral evidence is relevant not just in the courts, it is also relevant to community-based projects that involve the collection of Aboriginal oral history

7.2 Aboriginal Rights and Title Litigation

Chapter 3 deals solely with a particular evolution of Aboriginal rights and title cases within the Canadian legal system. Two cases mentioned are from the U.S. and Australia, as they are cases that have informed Canadian legal cases involving Aboriginal rights and title. That review of cases is only the tip of the iceberg but it is meant to illustrate the complex nature of Aboriginal rights and title litigation and how outcomes and legal definitions have been dependent on precedent. Several cases such as *Bear Island* (1985) and *Delgamuukw* (1991) introduced Aboriginal oral histories as

evidence alongside the written historical evidence and expert witnesses etc., but in the end the judges in both these cases did not give it equal weight.

Both the literature and the interviewees addressed issues in Aboriginal rights and title litigation that presented systemic barriers, such as testing for Aboriginal rights, frozen rights, how rights can be extinguished by the Crown and how the Crown rationalizes assertions of sovereignty. Essentially, Aboriginal oral histories may be granted equal weight alongside written historical evidence, but if the foundations of Western legal principles do not change, then the inclusion of Aboriginal oral histories as evidence will not make much of a difference.

In particular, the assumption of Crown sovereignty in Aboriginal rights and title cases was seen as being a major stumbling block. All the interviewees felt that there needs to be a different starting point for Aboriginal rights and title litigation in order to be on a level playing field. Should not the Crown have to prove its sovereignty, too?

The following are some of the recommendations that came from the interviewees themselves:

The Comprehensive Land Claims process must be changed: specifically the prerequisite of extinguishment of Aboriginal rights should be changed (Don Ryan, January 18, 1999). Land claim settlements should be able to take place without extinguishment or surrender of rights, but a recognition or acknowledgment of rights instead.

Crown assumptions of sovereignty: need to be challenged. This is the key to shifting the colonial basis of sovereignty assertion and Aboriginal rights and title

litigation (Don Ryan, January 18, 1999; Mark Dockstator, November 11, 1998; Gary Potts, November 24, 1998; John Borrows, November 5, 1998).

There needs to be training in cross-cultural interpretation of Aboriginal oral histories for lawyers and judges. This should also be an area that is covered in law schools[1].

7. 3 Approaches to Cross-Cultural Understanding

While the identification of issues within the legal system were central to the interviews, it was the contextual issues that push the discussion further, into other cross-cultural forums. The contextual issues touch on questions that people at the community level are dealing with when Aboriginal oral tradition is compared or evaluated with written historical documents. This is a discussion that has more to do with the nature, content and role that Aboriginal oral histories play not just in the courts, but as a tool for community change more generally.

This is an exciting, yet challenging area because so many communities are now looking to Aboriginal oral tradition as a form of historical evidence to be used in a variety of forums connected to self-government and community change. At the same time that communities are looking to Aboriginal oral tradition as a form of historical evidence as well as an educational resource, it opens up many questions regarding interpretation and community validation. Each community has its own cultural and historical

---

[1] This is something that all the interviewees endorsed, although some felt that cross cultural training would not make a dent in the colonial based rules of law.

traditions. It would be impossible to come up with standardized rules for the use of Aboriginal oral tradition in cross-cultural settings, yet the areas that the interviewees identified are universal enough, in a sense, for communities to have their own discussion and identify their own specific cultural rules and strategies for collecting and sharing their oral traditions.

Also, how the community decides to control what is shared and how it is shared are important areas for further discussion. Many Aboriginal cultures have their own distinct ways of validating oral histories within the community. Many communities are now grappling with how to adapt traditional methods of validation to contemporary issues and settings. This is a fascinating community-based process that will benefit from a sharing of knowledge and strategies, and further discussion and research.

The following are a few recommendations from the interviewees themselves:

The use of stories: to be evaluated by their own stories, not necessarily by legal stories about evidence. There should be a recognition that in evaluating Aboriginal oral histories and oral tradition, that those stories have criteria within them by which you can judge and make sense of what's being heard[2].

The use of Aboriginal oral histories as evidence: (a) there needs to be considerable community preparation before the oral histories get into the courts or into negotiation. It should be the community that decides and validates what will be heard in

---

[2] John Borrows, November 5, 1998.
Julie Cruikshank, January 13, 1999.

the courts[3]; (b) the community context of the telling and validation of Aboriginal oral histories needs to be taken into consideration.

7.4 Areas for Further Research

While it is impossible to come up with solutions or strategies that would be useful in all Aboriginal communities and cultures, perhaps examining: how specific cultures pass on oral histories and tradition; cultural rules for the recitation of oral histories such as when, where and to whom; the experiences of communities that have brought their oral traditions into cross-cultural settings; experiences of evaluating and comparing oral traditions inside and outside the community setting; and, some lessons learned or broad principles that may be useful across cultures.

Understanding the cultural context of the community and how oral tradition operates within that setting is key to cross-cultural approaches to Aboriginal oral tradition. Also understanding the individual situation and location of the community is important. All Aboriginal communities are at different stages regarding the use and retention of their oral traditions, as well as economically, politically and socially. It is the unique culture, history and oral traditions of the community that should be examined in order to strategize and come up with ways to share, interpret, evaluate oral traditions in cross-cultural settings.

The interviewees all talked about "shifting" the relationship between Aboriginal

---

[3] Don Ryan, January 18, 1999.

and non-Aboriginal societies. Whether that means shifting Crown assumptions of sovereignty in Aboriginal rights and title cases, or using Aboriginal oral histories to confirm the scientific story[4], the basis of this shift in thinking is the acknowledgment of the rightful place of Aboriginal rights, knowledge and oral traditions within Canadian society.

[4] Ted Chamberlin, January 21, 1999.

References

Abel, Kerry (1993). *Drum Songs: Glimpses of Dene History*. Kingston, Ontario: McGill-Queen's Press.

Ahenakew, Freda and H.C. Wolfart (1992). *Our Grandmothers' Lives as Told in Their Own Words*. Saskatoon, Saskatchewan: Fifth House Publishers.

Allen, R.E. (ed.) (1990). *The Concise Oxford Dictionary of Current English*. Oxford, England: Clarendon Press.

Asch, Michael and Bell, Catherine (1994). Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw. *Queen's Law Journal 19:* 2, Spring. 503-550.

Asch, Michael (ed.) (1997). *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*. Vancouver, B.C.: University of British Columbia Press,

Asch, Michael and Zlotkin, Norman (1997). Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations. In Asch, M. (ed.) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, Vancouver, B.C.: University of British Columbia Press. p. 208-229.

Aubry, Jack, (Dec. 12, 1997) Major Victory on Land Claims, *The Montreal Gazette*. A1.

Babbie, Earl R. (1992). *The Practise of Social Research*. Belmont, California: Wadsworth Publishing.

Bailey, Carol A. (1996). *A Guide to Field Research*. Thousand Oaks, California: Pine Forge Press.

Barber, Katherine (ed.) (1998). *The Canadian Oxford Dictionary*. Toronto: Oxford University Press,.

Basso, Keith (1990). *Western Apache Language and Culture: Essays in Linguistic Anthropology*. Tucson, Arizona: The University of Arizona Press.

Bauman, Zygmunt (1992). *Intimations of Postmodernity*. London: Routledge Publishing.

Belich, J. (1989). *The Victoria Interpretation of Racial Conflict: The Maori, the British, and the New Zealand Wars*. Montreal, Quebec: McGill-Queen's Press.

Bell, Catherine and Asch, Michael (1997). Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation. In Asch, M.(ed.) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, Vancouver, B.C.: University of British Columbia Press. p. 38-74.

Bishop, Charles (1984). The First Century: Adaptive Changes among the Western James Bay Cree between the Early Seventeenth and Early Eighteenth Centuries. In Krech III, Shepard. (ed.) *The SubArctic Fur Trade*. Vancouver, B.C: University of British Columbia Press. p. 21-53.

Boas, Franz (1901). The Mind of Primitive Man. *The Journal of American Folklore*. 14: i-11.

Borrows, John J. (1996). With or Without You: First Nations Law (in Canada). *McGill Law Journal 41*. 629 - 659.

Borrows, John J. (1997a). The Trickster: Integral to a Distinctive Culture. *Constitution Forum 8*: 2. 27-32.

Borrows, John J. (1997b). Living Between Water and Rocks: First Nations, Environmental Planning, and Democracy. *University of Toronto Law Journal 47*: 4. 417-468.

Borrows, John J. (1997c). Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government. In Asch, M. (ed.) *Aboriginal and Treaty Rights in Canada*. Vancouver, B.C.: U.B.C. Press. p. 155-172.

Borrows, John J. (1999a). Oral Traditions Versus Court Room Practices. A lecture at the *History Goes to Court* symposium, Osgoode Hall, Toronto, June 18th, 1999.

Borrows, John J. (1999b). Because it does not make sense: A comment on Delgamuukw v. the Queen. *Osgoode Hall Law Review*, Fall 1999.

Borrows, John J. and Leonard I. Rotman (1997). The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference? *Alberta Law Review 36*: 1, 9-45.

Brant, Clare (1990). Native Ethics and Rules of Behaviour. *Canadian Journal of Psychiatry 35*: 534-9.

Brown, Jennifer and Vibert, Elizabeth (ed.)(1996). *Reading Beyond Words: Contexts for Native History.* Peterborough, Ontario: Broadview Press.

Byrnes, G.M. (1998). Jackals of the Crown? Historians and the Treaty Claim Process in New Zealand. *The Public Historian 20:* 2, 9-23.

Calmore, John (1992). Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World. *Southern California Law Review 65*: 5, July, 2129-2230.

Canada, Government of (1969). *Statement of the Government of Canada on Policy, 1969 (White Paper).* Ottawa: Queen's Printer.

Canada, Government of (1983). *First Ministers' Conference on Aboriginal Constitutional Matters: Unofficial and Unverified Verbatim Transcript.* Vol. 1, March 15, Ottawa.

Carillo, Jo (1995). Identity as Idiom: Mashpee Reconsidered. *Indiana Law Review 28:* 511-545.

Carney, T.F. (1983). *Qualitative Methods in Communication Studies: A New Paradigm Research Manual.* Windsor: Department of Communication Studies, University of Windsor.

Cassidy, Frank (ed.) (1992). *Aboriginal Title in British Columbia: Delgamuukw v. The Queen.* Lantzville, B.C/ Montreal, Quebec.: Oolichan Books and The Institute for Research on Public Policy,.

Chamberlin, J.E (1996). Culture and Anarchy: Truthtelling in Oral and Written Traditions, *Legal Theory Workshop Series*, Faculty of Law, University of Toronto.

Chamberlin, J.E. (1999). Doing Things With Words. In Murray, L. J. and Rice, Keren (eds.) *Talking on the Page: Editing Aboriginal Oral Texts.* Toronto: University of Toronto Press. p. 69-90.

Chaytor, H.J. (1945). *From Script to Print.* Cambridge: Heffer Publishing.

Churchill, Ward (1994). In the Matter of Julius Streicher. In Churchill, Ward (ed.) *Indians Are Us? Culture and Genocide in Native North America.* Toronto: Between the Lines Press. p. 73-87.

Clanchy, M.T. (1979). *From Memory to Written Word: England 1066-1307.* London: Edward Arnold Publishing.

Clifford, James (1988). *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art.* Cambridge, Massachusetts: Harvard University Press.

Colby, Benjamin and Cole, Michael (1973). Culture, Memory and Narrative. In Finnegan, R. and Horton, Robin (eds.) *Modes of Thought: Essays on Thinking in Western and Non-Western Societies.* London: Faber and Faber, p. 63-91.

Corrigan, Samual and Sawchuk, Joe (eds.) (1996). *The Recognition of Aboriginal Rights.* Brandon, Manitoba: Bearpaw Publishing, Brandon University.

Cove, John (1987). *Shattered Images: Dialogues and Meditations on Tsimshian Narratives.* Ottawa: Carlton University Press.

Cox, B. Douglas (1992). The Gitksan-Wet'suwet'en as 'Primitive' Peoples Incapable of Holding Proprietary Interests: Chief Justice McEachern's Underlying Premise in Delgamuukw. *Dalhousie Journal of Legal Studies 1*: 1, 141-160.

Cruikshank, Julie (1990). *Life Lived Like a Story: Life Stories of Three Yukon Native Elders.* Vancouver: University of British Columbia Press.

Cruikshank, Julie (1992). Invention of Anthropology in British Columbia's Supreme Court. *B.C. Studies 95*, p. 25-42.

Cruikshank, Julie (1993). Claiming Legitimacy: Oral Tradition and Oral History. A discussion paper prepared for the *Royal Commission on Aboriginal Peoples History Workshop*, February 26-28.

Cruikshank, Julie (1994). Notes and Comments: Oral Tradition and Oral History: Reviewing some issues. *Canadian Historical Review 75: 3* ,403-418.

Cruikshank, Julie (1996a). Discovery of Gold on the Klondike: Perspectives from Oral Tradition. In Brown J. and Vibert, E. (eds). *Reading Beyond Words: Contexts for Native History.* Peterborough, Ontario: Broadview Press. p. 433-458.

Cruikshank, Julie (1996b). The Social Life of Texts: Editing on the Page and in Performance. In Murray, L. and Rice, Keren (eds.). *Talking on the Page: Editing Aboriginal Oral Texts.* Toronto: University of Toronto Press. p. 97-119.

Cruikshank, Julie (1998). *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory.* Vancouver: University of British Columbia Press.

Crystal, Melvin M. (1996). The Recognition and Affirmation of Treaty and Aboriginal Rights in Canada: The Constitution Act, 1982 and Regina v. Sparrow. In Corrigan, S. and Sawchuk, Joe (eds). *The Recognition of Aboriginal Rights*. Brandon, Manitoba: Bearpaw Publishing, Brandon University. p. 111-120.

Culhane, Dara (1998). *The Pleasure of the Crown: Anthropology, Law and First Nations*. Burnaby, B.C.: Talon Books.

Cumming, Peter A. and Mickenberg, Neil H. (1970). *Native Rights in Canada*. Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Co.

Denzin, Norman K. and Lincoln, Yvonna S. (1994). *Handbook of Qualitative Research*. Thousand Oaks, California: Sage Publications.

Department of Indian and Northern Affairs Canada. www.inac.gc.ca/pubs/information/ (December 16, 1999).

Dickason, Olive Patricia (1997). *Canada's First Nations: A History of Founding Peoples from Earliest Times*. 2nd ed. Toronto: Oxford University Press.

Doyle-Bedwell, Patricia (1993). The Evolution of the Legal Test of Extinguishment: From Sparrow to Gitksan. *Canadian Journal of Women and the Law 6:* 1, 193-204.

Douglas, Jack D. (1985). *Creative Interviewing*. Beverly Hills, California: Sage Publications.

Duff, Wilson (1964). *The Indian History of British Columbia: The Impact of the Whiteman*. Victoria, B.C.: British Columbia Provincial Museum.

Dumont, James (1993). Justice and Aboriginal people. In *Aboriginal Peoples and the Justice System, Report of the National Round Table on Aboriginal Justice Issues*. Toronto: Canada Communication Group. p. 44-61.

Dunaway, David K. and Baum, Willa K. (1996). *Oral History: An Interdisciplinary Anthology*. (2nd ed.) London: Altamira Press.

Elliott, David W. (1980). Baker Lake and the Concept of Aboriginal Title. *Osgoode Hall Law Journal 18:* 4, p. 653-663.

Essed, Philomena (1991). *Understanding Everyday Racism: An Interdisciplinary Theory*. London: Sage Publications.

Evans-Pritchard, E. E. (1981) *A History of Anthropological Thought*. London: Faber and Faber.

Feit, Harvery (1995). *Northern Studies Lecture Series*. Peterborough, Ontario: Trent University.(February).

Finnegan, Ruth (1970). *Oral Literature in Africa*. Oxford: Clarendon Press.

Finnegan, Ruth (1973). Literacy versus Non-Literacy: The Great Divide? Some comments on the significance of 'literature' in non-literate cultures. In Finnegan R. and Horton, Robin (eds.) *Modes of Thought: Essays on Thinking in Western and non-Western Societies*. London: Faber and Faber Publishing. p. 112- 144.

Finnegan, Ruth and Horton, Robin (eds.) (1973). *Modes of Thought: Essays on Thinking in Western and non-Western Societies*. London: Faber and Faber Publishing.

Finnegan, Ruth (1981). *Orality and Literacy: Some Problems of Definition and Research*. Unpublished Manuscript.

Finnegan, Ruth (1988). *Literacy and Orality: Studies in the Technology of Communication*. New York: Basil Blackwell Press.

Fisher, Robin (1992). Judging History: Reflections on The Reasons for Judgment in Delgamuukw v. B.C. *B.C. Studies 95*, Autumn, p. 43-54.

Fitzpatrick, Peter (1992). *The Mythology of Modern Law*. London and New York. Routledge.

Foreman, P.B. (1948). The Theory of Case Studies. In *Social Forces* 26: 4, p. 408-419.

Fortune, Joel (1993). Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History. *University of Toronto Faculty of Law Review 51*: 1, 80-117.

Foster, Hamar and Grove, Alan (1993). Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and their Employers. *University of British Columbia Law Review 27*: 2, p. 213- 253.

Foster, Hamar (1998). Aboriginal Title and the Provincial Obligation to Respect it: Is Delgamuukw v. British Columbia "Invented Law"? *The Advocate 56*: 2, p. 221-231.

Freire, Paulo (1990). *Pedagogy of the Oppressed*. 32nd printing. New York: Continuum Press.

Frideres, James S. (1988). *Native Peoples in Canada: Contempory Conflicts*. (3rd edition), Scarborough, Ontario: Prentice-Hall Canada.

Gisday Wa and Delgamuukw (1989). *The Spirit in the Land*. Gabriola Island, B.C.: Reflections Press.

Globe and Mail (1996)(editorial), Wednesday, February 14, p.A18.

Globe and Mail (1997) (Commentary), Monday, December 15, A17.

Goody, Jack (ed.) (1968) *Literacy in Traditional Societies*. Cambridge: Cambridge University Press.

Goody, Jack and Watt, Ian (1968). The Consequences of Literacy. In Goody, Jack (ed.) *Literacy in Traditional Societies*. Cambridge: Cambridge University Press. p. 27-68.

Gover, Brian and Macaulay, Mary (1995). Snow Houses Leave No Ruins: Unique Evidentiary Issues in Aboriginal and Treaty Rights Cases. *Canadian Bar Association Colloquium*, Tuesday, October 24.

Graff, Harvey (1987). *The Legacies of Literacy: Continuities and Contradiction in Western Culture and Society*. Bloomington and Indianapolis: Indiana University Press.

Hamley, Jeffrey (ed.) (1995). *Native Heritage: Personal Accounts by American Indians 1790 to the Present*. New York: MacMillan Publishing.

Harring, Sidney L. (1998). *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History.

Harris, Cheryl I. (1993). Whiteness as Property. *Harvard Law Review 106:* 8, June. 1707-1791.

Henderson, James Youngblood `sakej' (1992). The Marshall Inquiry: A View of the Legal Consciousness. In Mannette, Joy (ed.) *Elusive Justice: Beyond the Marshall Inquiry*, Halifax, Nova Scotia: Fernwood Press, p.35 -61.

Henige, David (1982). *Oral Historiography*. New York: Longman Publishing.

Hill, Johnathan D. (ed.) (1996) *History, Power, and Identity: Ethnogenesis in the Americas, 1492-1992.* Iowa City, Iowa: University of Iowa Press.

Hill, Jane H. and Judith T. Irvine (ed.)(1993). *Responsibility and Evidence in Oral Discourse.* Cambridge: Cambridge University Press.

Hodgins, Bruce and Benidickson, Jamie (1989). *The Temagami Experience.* Toronto: University of Toronto Press.

Hoffman, Alice (1996). Reliability and Validity in Oral History. In Dunaway, David K. and Baum, Willa K. (eds.) *Oral History: An Interdisciplinary Anthology.* London: Altamira Press. p. 87-93.

Horton, R. (1967). African Traditional Thought and Western Science. *Africa*, 37, Nos. 1 and 2.

Hurley, Mary (1998). *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia.* Ottawa: Parliamentary Research Branch, Law and Government Division, Government of Canada,

Isaac, Thomas (1995). *Aboriginal Law: Cases, Materials and Commentary.* Saskatoon, Saskatchewan: Purich Publishing.

Jaenen, Cornelius J. (1991). French Sovereignty and Native Nationhood during the French Regime. In Miller, J.R. (ed.) *Sweet Promises: A Reader on Indian-White Relations in Canada.* Toronto: University of Toronto Press. p. 19-42.

Johnson, Leslie (1997). *Health, Wholeness and the Land: Gitksan Traditional Plant Use and Healing.* Unpublished doctoral dissertation, University of Alberta.

Kellock, Burton H. and Anderson, Fiona C.M. (1992). A Theory of Aboriginal Rights. In Cassidy, Frank (ed.) *Aboriginal Title in British Columbia.* Lantzville, British Columbia: Oolichan Books, p. 97-113.

Kirby, Sandra and McKenna, Kate (1989). *Methods from the Margins.* Toronto: Garamond Press.

Korsmo, Fae L. (1996). Claiming Memory in British Columbia: Aboriginal Rights and the State. *American Indian Culture and Research Journal 20*:4, 71-90.

Krech, Shepard (1984). The Trade of the Slavey and Dogrib at Fort Simpson in the Early Nineteenth Century. In Krech III, Shepard (ed.) *The SubArctic Fur Trade*, Vancouver,B.C.: University of British Columbia Press. p. 99-146.

Kulchyski, Peter (ed.)(1994). *Unjust Relations: Aboriginal Rights in Canadian Courts.* Toronto: Oxford University Press.

Laghi, Brian, (1997). *Getting into the Spirit of Things.* Globe and Mail, Saturday, August 9, p. D1, D2.

Levin, Michael D. (ed.) (1993). *Ethnicity and Aboriginality: Case Studies in Ethnonationalism.* Toronto: University of Toronto Press.

Levy-Bruhl, Lucien (1966). *The "Soul" of the Primitive.* Chicago: Henry Regnery Company.

Levi-Strauss, Claude (1962). *The Savage Mind.* Chicago: The University of Chicago Press.

Lockhart, Justice (1993). Parenoultja v Tickner. *Alberta Law Review 117,* 206.

Lord, A.B. (1960). *The Singer of Tales.* Cambridge: Harvard University Press.

Lummis, Trevor (1987). *Listening to History.* London: Hutchinson Publishing.

Macklem, Patrick (1991). First Nations Self-Government and the Borders of the Canadian Legal Imagination. *McGill Law Journal 36:* 381-404.

Macklem, Patrick (1993). Ethnonationalism, Aboriginal Identities, and the Law. In Levin, Michael D. (ed.) *Ethnicity and Aboriginality: Case Studies in Ethnonationalism.* Toronto: University of Toronto Press, p. 9 - 28.

Macklem, Patrick (1997a). Aboriginal Rights and State Obligations. *Alberta Law Review* 36: 1, 97-116.

Macklem, Patrick (1997b). What's Law got to do with it? The Protection of Aboriginal Title in Canada. *Osgoode Hall Law Journal 35*: 1, 125-137.

Mander, Jerry (1991). *In the Absence of the Sacred: The Failure of Technology and the Survival of the Indian Nations.* Sierra Club Books: San Franscisco.

Manitoba (1991). *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.* Vol. 1. Winnipeg, Manitoba: Queen's Printer.

Mannette, Joy (ed.)(1992). *Elusive Justice: Beyond the Marshall Inquiry.* Halifax, Nova Scotia: Fernwood Press.

Marshall, Catherine and Rossman, Gretchen B.(1995). *Designing Qualitative Research.* London: Sage Publications.

Martin, Elizabeth (ed.) (1983). *A Concise Dictionary of Law.* Oxford, England: Oxford University Press.

Mathison, S. (1988). Why triangulate? *Educational Researcher* 17, p. 13-17.

Matsuda, Mari (1989). When the First Quail Calls: Multiple Consciousness as Jurisprudential Method. *Women's Rights Law Reporter 11:* 1, Spring. 7-10.

McLeod, Clay (1992). The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past. *Alberta Law Review 30:* 1276-1290.

McClintock, Anne (1995). *Imperial Leather: Race, Gender, and Sexuality in the Colonial Context.* Routledge, New York.

McConnell, W.H. (1996). The Baker Lake Decision on Aboriginal Rights. In Corrigan, Samuel W. and Sawchuk, Joe (eds.) *The Recognition of Aboriginal Rights*, Brandon, Manitoba: Bearpaw Publishing, Brandon University, p. 98-110.

McKee, Christopher (1996). *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future.* Vancouver: University of British Columbia Press.

McMillan, Alan D. (1988). *Native Peoples and Cultures of Canada.* Toronto: Douglas and McIntyre.

McNeil, Kent (1989). *Common Law Aboriginal Title.* Oxford: Clarendon Press.

McNeil, Kent (1997). Aboriginal Title and Aboriginal Rights: What's the Connection? *Alberta Law Review 36*: 1, 117-148.

Measor, L. (1985). Interviewing: A strategy in qualitative research. In Burgess, R.G. (Ed.) *Strategies of Educational Research: Qualitative Methods*, London: The Falmer Press.

Merriam, Sharan B. (1988). *Case Study Research in Education: A Qualitative Approach.* San Francisco: Jossey-Bass Publishers.

Miller, Bruce G. (1992). Common Sense and Plain Language. *B.C. Studies 95*, Autumn, p. 55-65.

Miller, J.R. (1989). *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*. Toronto: University of Toronto Press.

Miller, J.R. (1991a). *Sweet Promises: A Reader on Indian-White Relations in Canada*. Toronto: University of Toronto Press.

Miller, J.R. (1991b). Aboriginal Rights, Land Claims, and the Struggle to Survive. In Miller, J.R. (ed.) *Sweet Promises: A Reader on Indian-White Relations in Canada*. Toronto: University of Toronto Press. p. 405-420.

Miller, J.R. (1991c). Owen Glendower, Hotspur, and Canadian Indian Policy. In Miller, J.R. (ed.) *Sweet Promises: A Reader on Indian-White Relations in Canada*. Toronto: University of Toronto Press. p. 323-352.

Mills, Antonia (1994). *Eagle Down is our Law: Witsuwit'en law, feasts, and land claims*. Vancouver: U.B.C. Press.

Mohawk, John (1992). Looking for Columbus: Thoughts on the Past, Present and Future of Humanity. In Jaimes, M. Annette(ed) *The State of Native America:Genocide, Colonization, and Resistance*. Boston: South End Press. p. 439-444.

Monet, Don and Wilson, Ardythe (1992). *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case*. Gabriola Island, B.C.: New Society Publishers.

Monture-Okanee, Patricia A. (1992). The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice. *Saskatchewan Law Review 56*, 237-266.

Morantz, Toby (1992). The Judiciary as Anthropologists: New Insights into Social Organization: The Teme-Augama Anishnabay Case. *Papers of the Twenty-Third Algonquian Conference*. Cowan, William (ed.), Ottawa: Carleton University, p. 285 -297.

Morse, Bradford W. (1985). *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*. Ottawa: Carleton University Press.

Murray, Carol Elizabeth (1993). *Oral History and the Delgamuukw Case*. Unpublished M.A. Thesis, University of Alberta.

Murray, Laura and Rice, Keren (eds.) (1999). *Talking on the Page: Editing Aboriginal Oral Texts*. Toronto: University of Toronto Press.

Ng, Roxana (1993). Racism, Sexism, and Nation Building in Canada. In McCarthy, Cameron and Crichlow, Warren (eds) *Race, Identity and Representation in Education.* New York: Routledge Press. p. 50-59.

Olson, David R. (1994). *The World on Paper.* Cambridge: Cambridge University Press.

Ong, Walter (1982). *Orality and Literacy: The Technologizing of the Word.* New York: Routledge Press.

Ortiz, Simon (1977). *Song, Poetry, and Language: Expression and Perception.* Tsaile: Navajo Community College Press.

Patton, M.Q. (1990). *Qualitative research and evaluation methods.* (2nd ed.) Newbury Park, California: Sage Publications.

Perks, Robert and Alistair Thomson (eds.) (1998) *The Oral History History Reader.* New York: Routledge.

Patterson, E. Palmer (1972). *The Canadian Indian: A History Since 1500.* Don Mills, Ontario: Collier-Macmillan Canada.

Persky, Stan (1998). *The Supreme Court of Canada Decision on Aboriginal Title - Delgamuukw.* Vancouver: Greystone Books.

Platt, Jennifer (1981). On Interviewing One's Peers. *British Journal of Sociology 32*: 1, 75 - 91.

Ponting, Rick (ed.) (1986). *Arduous Journey: Canadian Indians and Decolonization.* Toronto: McClelland and Stewart.

Porter, H.C. (1979) *The Inconstant Savage: England and the North American Indian 1500-1600,* London: Duckworth Publishing.

Preston, Richard (1975). *Cree Narrative: Expressing the personal meanings of events.* Ottawa: National Museums of Canada.

Price, John A. (1978). *Native Studies: American and Canadian Indians.* Toronto: McGraw-Hill Ryerson Limited.

Purdy, Jeannine (1996). Postcolonialism: The Emperor's New Clothes? *Social and Legal Studies 5:* 3, 405-426.

Purvis, Andrew (1999). *Delgamuukw.* Time Magazine, February 15, 153: 6.

Purvis, Andrew (1999). *Whose Home and Native Land?* Time Magazine, February 15, 153:6.

Pyke, Sanda W. and Mck. Agnew, Neil (1969). *The Science Game: An Introduction to Research in the Social Sciences.* (5th edition) Englewood Cliffs, New Jersey: Prentice-Hall Publishing.

Raunet, Daniel (1984). *Without Surrender Without Consent: A History of the Nishga Land Claim.* Toronto: Douglas and McIntyre.

Ray, Arthur (1974). *Indians in the Fur Trade: their role as hunters, trappers and middlemen in the lands southwest of Hudson Bay: 1660-1870.* Toronto: University of Toronto Press.

Razack, Sherene (1998). *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms.* Toronto: University of Toronto Press.

Ridington, Robin (1992). Fieldwork in Courtroom 53: A Witness to Delgamuukw v. B.C.. *B.C. Studies*, No. 95, Autumn, p. 12-24.

Richardson, Boyce (1993). *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada.* Vancouver/Toronto: Douglas and McIntyre.

Rosaldo, Renato (1989). *Culture and Truth: The Remaking of Social Analysis.* Boston: Beacon Press.

Ross, Rupert (1992). *Dancing with a Ghost: Exploring Indian Reality.* Markham, Ontario: Octopus Publishing Group.

Ross, Rupert (1996). *Returning to the Teachings: Exploring Aboriginal Justice.* Toronto: Penguin Books.

Rotman, Leonard I. (1997). Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada. *Alberta Law Review 36:* 1, 1-8.

Royal Commission on Aboriginal Peoples (1996). *Report of the Royal Commission on Aboriginal Peoples*, [on-line] www.inac.gc.ca/rcap.

Said, Edward (1978). *Orientalism.* New York: Vintage Books.

Said, Edward (1994). *Culture and Imperialism.* New York: Vintage Books.

Sanders, Douglas (1996). The Nishga Case. In Corrigan, S. and Sawchuk, J. (eds.) *The Recognition of Aboriginal Rights*. Brandon, Manitoba: Bearpaw Publishing, University of Brandon, p.80-97.

Sapir, Edward (1921). *Language: An Introduction to the Study of Speech*. New York: Harcourt, Brace and World, Inc.

Sarris, Greg. (1993). *Keeping Slug Woman Alive: A Holistic Approach to American Indian Texts*. Berkeley, California: University of California Press.

Schauer, F. (1987) Precedent. *Stanford Law Review 39*: 571-605.

Scribner, Sylvia and Cole, Michael (1981). *The Psychology of Literacy*. Cambridge: Harvard University Press.

Sherrott, Geoff (1992). The Court's Treatment of the Evidence in Delgamuukw v. B.C.. *Saskatchewan Law Review 56:2*, 441- 450.

Simpkins, Maureen (1990). *Memories of Contact*. C.B.C. Radio: Ideas Program. Broadcast March 22, 29.

Simpkins, Maureen (1991). *Holding Their Ground*. C.B.C. Radio: Ideas Program. Broadcast May 9, 16.

Slattery, Brian (1983). *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: Native Law Centre, University of Saskatchewan.

Slim, H. and Thompson, Paul (1995). *Listening for a Change: Oral Testimony and Community Development*. Gabriola Island, B.C.: New Society Publishers.

Smith, Melvin H. (1995). *Our Home or Native Land? What Governments' Aboriginal Policy Is Doing To Canada*. Victoria, B.C.: Crown Western Press.

Spielmann, Roger (1998). *You're So Fat! Exploring Ojibwe Discourse*. Toronto: University of Toronto Press.

Street, Brian (1984). *Literacy in Theory and Practice*. Cambridge: Cambridge University Press.

Street, Brian (1995). *Social Literacies: Critical Approaches to Literacy in Development, Ethnography and Education*. London: Longman Publishing Group.

Taylor, Walt (1987). A Cultural Hearing Aid. In *The Three Rivers Report*, Wednesday, July 15.

Tedlock, Dennis (1983). *The Spoken Word and the Work of Interpretation*. Philadelphia: University of Pennsylvania Press.

Thomas, Jacob and Boyle, Terry (1994). *Teachings from the Longhouse*. Toronto: Stoddart Publishing.

Thompson, Paul (1978). *The Voice of the Past: Oral History*. Oxford: Oxford University Press.

Titley, E. Brian (1986). *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. Vancouver, B.C.: University of British Columbia Press.

Tobias, John L.(1991). Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy. In Miller, J.R. (ed.) *Sweet Promises: A Reader on Indian-White Relations in Canada*. Toronto: University of Toronto Press. p. 127-144.

Tonkin, Elizabeth (1992). *Narrating Our Pasts: The Social Construction of Oral History*. Cambridge: Cambridge University Press.

Valentine, Lisa Philips (1995). *Making It Their Own: Severn Ojibwe Communicative Practices*. Toronto: University of Toronto Press.

Vansina, Jan (1985). *Oral Tradition as History*. Madison, Wisconsin: The University of Wisconsin Press.

Venne, Sharon (1998). Whose Law, Whose Land. *Overview Magazine*, May, p. 8.

Vizenor, Gerald (1998). *Fugitive Poses: Native American Indian Scenes of Absence and Presence*. Lincoln, Nebraska: University of Nebraska Press.

von Gernet, Alexander (1996). *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literatures on Oral Traditions and Oral Histories*. Ottawa: Department of Indian Affairs and Northern Development.

Wall, Bob (1992). Analyzing the Marshall Commission: Why It was Established and How it Functioned. In Mannette, Joy (ed.) *Elusive Justice: Beyond the Marshall Inquiry*. Halifax, Nova Scotia: Fernwood Press. p. 13-34.

Walters, Anna Lee (1992). *Talking Indian: Reflections on Survival and Writing.* Ithaca, New York: Firebrand Books.

Warren, C. (1988). *Gender Issues in Field Research.* Newbury Park, California: Sage Publishers.

Wax, R. (1971). *Doing Fieldwork: Warnings and Advice.* Chicago: University of Chicago Press.

Weaver, Sally (1981). *Making Canadian Indian Policy: The Hidden Agenda 1968-1970.* Toronto: University of Toronto Press.

Wickwire, Wendy (1994). To See Ourselves as the Other's Other: Nlaka'pamux Contact Narratives. *The Canadian Historical Review LXXV:* 1, 1-20.

Williams, David R. (1987) *Native Land Claims - Rule of History or Rule of Law?* Unpublished paper presented at the Canadian Law in History Conference, Ottawa: Carlton University.

Williams, Patricia J. (1991). *The Alchemy of Race and Rights: Diary of a Law Professor.* Cambridge: Harvard University Press.

Williams, Paul (1994). *Oral Tradition on Trial.* Presented to the Champlain Society and Walpole Island First Nation, September 23.

Wilson-Kenni, Dora. (1992). Time of Trial: The Gitksan and Wet'suwet'en in Court. *B.C. Studies No.95*, Autumn, 7-11.

Winter, Gail D. (1996). *Breaking the Camel's Back: Factors influencing the progress of First Nations post secondary students in Thunder Bay, Ontario, Canada.* Unpublished doctoral dissertation, Department of Adult Education. Ontario Institute for Studies in Education of the University of Toronto.

Legal Case Reference

A. G. Ontario v. Bear Island Foundation [1985], 49 O.R. (2d) 353; [1985] 15 D.L.R. (4th) 321 (Ont. H.C.).

A.G. Ontario v. Bear Island Foundation [1989], 68 O.R. (2d) 394.

Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al. [1980], 5 W.W.R. 193.

Calder v. Attorney General of British Columbia (1970), 8 D.L.R. (3d), 59 [S.C.B.C].

Calder v.Attorney General of British Columbia [1973], 34 D.L.R. (3d) 145 (S.C.C); [1973], S.C.R. 313; [1973], 4 W.W.R. 1.

Delgamuukw v. British Columbia [1991], 3 W.W.R 97; [1991], 79 D.L.R. (4th) 185.

Delgamuukw v. British Columbia [1997], 3 S.C.R.1010; [1997], S.C.J. 108.

Guerin v. R. [1984], 2 S.C.R. 335.

Johnson v. McIntosh (1823), 21 US (8 Wheat.) 543.

Mabo v. Queensland [1992],175 C.L.R. 1.

R. v. Gladstone [1996], 2 S.C.R. 723. (Supreme Court of Canada Appeal)

R. v. N.T.C. Smokehouse Ltd. [1996], 2 S.C.R. 672. (Supreme Court of Canada Appeal)

Re: Southern Rhodesia [1919], A.C. 211.

R. v. Sparrow [1990], 1 S.C.R. 1075.

R. v. Van der Peet, British Columbia Provincial Court: [1991], 3 C.N.L.R. 155. (Original Trial)

R. v. Van der Peet, British Columbia Supreme Court: (1991), 58 B.C.L.R. (2d) 392; [1991], 3 C.N.L.R. 161. (British Columbia Supreme Court.)

R. v. Van der Peet, British Columbia Court of Appeal: (1993), 80 B.C.L.R. (2d) 75; 29 B.C.A.C. 209; 48 W.A.C. 209; 83 C.C.C. (3d) 289; [1993], 5 W.W.R. 459; [1993], 4 C.N.L.R. 221. (B.C. Court of Appeal)

R. v. Van der Peet [1996], 2 S.C.R. 507. (Supreme Court of Canada Appeal)

St. Catherines Milling and Lumber Company v. R. (1885), 10 or 196 (Ont.Ch.); (also reported: 4 Cart. B.N.A. 214); (1888), 14 AC 46 (PC).

Worcester v. Georgia, 6 Pet. (U.S.S.C.) 515 (1832); 34 U.S. (4 S.G.U.S.) 762 (1832).

Statutes

Indian Act. R.S.C 1970, c.1-6.

The Royal Proclamation of 1763, by the King, George R., "Revised Statutes of Canada 1970".

Key

A.C. (Appeal Court)

B.C.L.R. (British Columbia Law Reports)

C.C.C. (Canadian Criminal Courts)

C.N.L.R. (Canadian Native Law Reports)

D.L.R. (Dominion Law Reports)

P.C. (Privy Council)

S.C.R. (Supreme Court Reports)

S.C.C. (Supreme Court of Canada)

W.A.C. (Western Appeal Courts)

W.W.R. (Western Weekly Reports)

APPENDIX A

Abstract

(Given to interviewees before the interview)

Between 1987 and 1991 Chief Justice McEachern, in the case of *Delgamuukw v. British Columbia* (1991), listened to a multitude of witnesses, many of whom were giving testimony in the form of traditional oral histories. In the now famous final judgment, Judge McEachern rejected oral histories saying, "I am unable to accept addaawk, kungax, and oral histories as reliable bases for detailed history, but they could confirm findings based on other admissible evidence." The other admissible evidence was based on written records of Euro-Canadians from the post-contact period. Judge McEachern makes it clear in his final judgment that he thinks the Gitxsan and Wet'suwet'en were "by historical standards, a people without any form of writing, horses, or wheeled wagons... The defendants... suggest the Gitxsan and Wet'suwet'en civilizations, if they qualify for that description, fall within a much lower, even primitive order" (*Delgamuukw v. British Columbia* [1991], 3 W.W.R.97).

Where does the idea originate that a people who traditionally had no system of writing equal a primitive peoples? I want to explore the origins of the 'primitive' versus 'civilized' debates and the connections to written literacy as a symbol or step towards civilization. Do these notions still permeate the legal system in the 1990s? In lights of the 1997 Supreme Court recommendations in the *Delgamuukw* case, what are the advantages and disadvantages of Aboriginal oral histories being granted equal weight along side of written historical evidence?

Within Canadian society, Aboriginal oral tradition is being called upon as historic evidence in a number of legal cases. In most cases, Aboriginal traditions are expected to provide answers to questions created by modern states in terms convenient for modern states (Cruikshank, 1994, p. 405). Within the legal system, the power and control of inter-cultural interpretation remains within a Euro-Canadian framework. The integration of Aboriginal oral tradition within many academic disciplines, legal cases and land-use disputes means that Euro-Canadian institutions now have to examine their relationship to and their understanding of Aboriginal oral tradition. Although a central focus of this research will be within a legal setting, *Delgamuukw v. British Columbia* (1991, 1997), the research and the conclusions have implications for Aboriginal/non-Aboriginal relations in Canada more generally. Issues such as cross-cultural interpretation of oral and written historical materials and the possibilities for new forums for negotiation of land claims which incorporate Aboriginal oral tradition in a fair and equitable way, are part of the bigger picture which looms over this research.

APPENDIX B

Letter of Informed Consent
Prepared by Maureen Simpkins

I am a graduate student in the Department of Adult Education at the Ontario Institute for Studies in Education (OISE), which is the Graduate Department of Education at the University of Toronto. As part of the requirement for the Ph.D program in Education, I am required to complete a research study.

The purpose of my research is to review the advantages and disadvantages of Aboriginal oral histories being granted equal weight along side of written historical evidence; and to explore the origins of the 'primitive' verses 'civilized' debates and the connections to written literacy as a symbol or step towards 'civilization'.

As part of my research I will be interviewing a number of people who have been involved in legal cases where Aboriginal oral tradition has been used as historical evidence; or who have done research and writing in this area. Their interviews will provide personal and professional perspectives and opinions on the issues involved in using Aboriginal oral tradition as evidence.

For these interviews, I will need to use a tape recorder to ensure accuracy. The interviewee can decide at any time to withdraw from participation in this research.

This research will add a broader perspective to the review and analysis of the issues that both encourage and possibly limit the use of Aboriginal oral tradition in Aboriginal rights and title cases. In the process I hope this research will contribute to current debates on the use of Aboriginal oral tradition and judicial decision making.

I agree to be interviewed and recorded for purposes of research and scholarly publication.

Signature.....

Date.....

APPENDIX C

Guideline for Interview Questions

1. What is your experience of Aboriginal oral histories in the courts? (Have you participated in a court case where Aboriginal oral histories were heard as evidence? Or is this an area you have done some research and writing on?)

2. Do notions of 'primitive' versus 'civilized' particularly in Aboriginal rights/title cases, still exist in the legal system in the 1990s? Explain...

3. Are these notions tied to the way the courts evaluate Aboriginal rights and the assertion of Crown sovereignty?

4. What do you believe are the advantages and the disadvantages of Aboriginal oral historical evidence being evaluated equally along side of written historical evidence?

5. What is your opinion regarding the Supreme Court recommendations in *Delgamuukw*, particularly with reference to the use of oral histories in the courts?

6. Do you think that judges need a 'cultural hearing aid' so to speak, to evaluate evidence such as Aboriginal oral histories which are typically outside their own culture and experience? (For example: more training or what type of training?)

7. Do you think it is a real possibility that fundamental changes will eventually be made to the legal system, so that sovereignty cannot be judged/measured by the Crown's mere assertion?

8. Where do you think the future of comprehensive claims settlements are going? (Outside the courts? Changes to the system?)

9. Are you optimistic about the future of Aboriginal rights in the courts?