Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*

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Professors Asch and Bell argue that Aboriginal title litigation presents a unique set of evidentiary problems both for Aboriginal plaintiffs and the courts. The elements of proof of title are themselves imbued with an ethnocentrism which serves to ignore Aboriginal systems of land ownership and property transfer. Furthermore, the common law and statutory rules of evidence are at odds with Aboriginal oral historical traditions. The result is the rejection of much of the evidence adduced by plaintiffs in support of title, as illustrated by the decision in Delgamuukw. *Our courts, they argue, will be appropriate* fora *for the just resolution of Aboriginal title claims only when the ethnocentric bent of Canadian law is acknowledged, and then replaced by an approach to fact-finding which starts from a premise of equality.*

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I have heard much at this trial about beliefs, feelings and justice. I must again say, as I endeavoured to say during the trial, that courts of law are frequently unable to respond to these subjective considerations. . . .

Instead, cases must be decided on admissible evidence, according to law. The plaintiffs carry the burden of proving by a balance of probabilities not what they believe, although that is sometimes a relevant consideration, but rather facts which permit the application of the legal principles which they assert. The court is not free to do whatever it wishes. Judges, like everyone else, must follow the law as they understand it.

What follows, therefore, is my best effort to determine whether the plaintiffs have proven, by a preponderance of admissible evidence, the facts which they have alleged in their pleadings, and whether such facts establish legal rights which are recognized by the law of this province.

— Chief Justice Allan McEachern[1]

Introduction

A finding about what the law recognizes as Aboriginal rights, like all findings of law, must, in the end, rest on a finding of fact. Under the existing legal framework, Aboriginal title claims are resolved by returning to historical relations between the First Nations and the Crown. Such claims are "woven with history, legend, politics and moral obligations."[2] The decision of a court

1. *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C. S.C.) [hereinafter *Delgamuukw*] at 201, rev'd [1993] 5 W.W.R. 97 (B.C. C.A.), application for leave to appeal to the Supreme Court of Canada filed 25 October 1993. The Court of Appeal reversed the British Columbia Supreme Court's finding of a pre-1871 "blanket extinguishment" of Gitskan and Wet'suwet'en aboriginal rights. They continued, however, to deny the plaintiffs' claims to ownership and jurisdiction. This paper addresses the process adopted by the B.C. Supreme Court in making findings of fact. The critique continues to be relevant because the problems encountered in *Delgamuukw*, which the B.C. Court of Appeal was unwilling to deal with, are commonplace in aboriginal title litigation. Macfarlane J.A., writing for the majority of the Court of Appeal, states at 177 that "the law does not permit this Court to interfere with the finding [of fact at trial] which involved an assessment of the whole of a great volume of evidence." Wallace J.A., in a concurring judgment, states at 197 that "[t]he Court of Appeal could not . . . be in as good a position as the trial judge with respect to weighing the evidence."

2. *Kruger* v. *R.*, [1978] 1 S.C.R. 104 at 109.

is preceded by a lengthy and complex historical fact-finding process which focuses on the nature of the culture of the First Nation claimant. The historical nature of the inquiry, the implicit challenge to the validity of British colonial policy, and the difficulty of translating Aboriginal world views into Canadian legal language have resulted in the production of enormous quantities of evidence reflecting differing understandings of Aboriginal society and the significance of historical transactions. The judge is then left with the difficult if not impossible task of sorting through the evidence to separate the subjective from the objective, and fact from belief.

The major difficulty faced by Aboriginal litigants in this process is the reluctance of a judge influenced by Canadian legal ideology to adopt a vantage point outside of his or her own culture from which to interpret historical fact. Legal reasoning is not viewed as culturally relative and, although token reference is made to the potential cultural bias of written historical records, the reasoning of the court often reveals a tendency to place a greater emphasis on the familiar. The myth of purely scientific investigation and objectivity invoked in legal discourse, coupled with a conscious or unconscious stereotype of Aboriginal culture as 'primitive,' leaves little room for significant weight to be given to non-traditional forms of evidence, such as the oral traditions of Aboriginal culture, in the absence of independent and familiar forms of verification. The unfamiliar is characterized as subjective cultural belief rather than as factual and objective, leaving Aboriginal assertions of truth to be seen as untrustworthy and beyond proper consideration in a court of law.[3]

In the *Delgamuukw* case, the volume of evidence combined with the complexity of legal argument provided "sufficient information to fuel a Royal Commission."[4] The trial was the longest civil trial in Canadian legal history, and was plagued with interlocutory

3. See C. Davidson, "Expert Discourse and the Production of Truth or Evidence, Aboriginal Litigation, and the Will to Ignorance" (LL.B. Paper, University of Alberta, 1990) [unpublished] at 9-13.

4. *Delgamuukw, supra* note 1 at 202.

applications on the admissibility and interpretation of evidence.[5] After eight months of sifting through it all, McEachern C.J. made findings of fact that rejected the legal arguments of the Aboriginal plaintiffs.

The Gitksan and Wet'suwet'en peoples claimed ownership and the right to govern 22,000 square miles of land in northwestern British Columbia. In the alternative, they asserted unspecified Aboriginal rights to the use of the territory. McEachern C.J. held that the plaintiffs were entitled to residence and sustenance rights in respect of some of the land, but that the evidence fell short of establishing ownership and the right to govern. He also concluded that the limited rights established by the plaintiffs had been extinguished by pre-Confederation colonial enactment. The only remaining Aboriginal rights enforceable in law were those promised at the time of extinguishment, namely the right to continue to use unoccupied Crown land.

The legal reasoning that denied 'ownership' of the lands rested on a finding that the evidence was not sufficiently persuasive to establish that the Gitksan and Wet'suwet'en 'owned' the land rather than having simply 'occupied' it. The judgment concluded that "the interest of the plaintiffs' ancestors . . . was nothing more than the right to use the land for aboriginal purposes."[6] With respect to the issue of jurisdiction, McEachern C.J. held that the factual evidence clearly indicated that

> what the Gitksan and Wet'suwet'en witness[es] describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves.[7]

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5. See: *Delgamuukw* v. *British Columbia*, [1990] 1 C.N.L.R. 20 (B.C. S.C.) [hereinafter *Delgamuukw* (1990a)]; *Delgamuukw* v. *British Columbia*, [1990] 1 C.N.L.R. 29 (B.C. S.C.) [hereinafter *Delgamuukw* (1990b)]; *Delgamuukw* v. *British Columbia*, [1988] 1 C.N.L.R. 188 (*sub nom. Uukw* v. *R.)* (B.C. S.C.) [hereinafter *Delgamuukw* (1988)]; and *Delgamuukw* v. *British Columbia*, [1986] 3 C.N.L.R 156 (*sub nom. Uukw* v. *R.)* (B.C. C.A.).

6. *Delgamuukw, supra* note 1 at 455.

7. *Ibid.* at 447.

Nonetheless, McEachern C.J. said that he would

> assume for the purposes of . . . [his] judgment that, in the legal and jurisdictional vacuum which existed prior to British sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages.[8]

However, he also stated (presumably in the absence of proof) that

> [he] would not make the same finding with respect to the rest of the territory, even to the areas over which I believe the ancestors of the plaintiffs roamed for sustenance purposes.[9]

Given the importance of findings of fact in the judgment, an assessment of the approach used in reaching them is critical.

This commentary assesses the approach of the Court in *Delgamuukw* in making findings of fact about Gitksan and Wet'suwet'en culture. In particular, we examine problems in the interpretation of fact arising out of cultural assumptions inherent in legal reasoning, legal tests which must be met to establish a claim to Aboriginal title, and selected problems relating to the admissibility and probative value of non-traditional forms of evidence.

The critique of legal reasoning is developed by comparing the approach in *Delgamuukw* to the way anthropology addresses similar issues.[10] Anthropology represents the primary approach developed in the Western intellectual tradition to understand a culture other than one's own. Although the Court's judgment asserts that anthropology, or at least the anthropological witnesses called, can add little that is relevant, we argue that the concepts, methods, and procedures of the discipline are pertinent to the issues which the judgment addresses. Many aspects of the fact-finding approach developed in anthropology find parallels among

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8. *Ibid.* at 452.

9. *Ibid.*

10. For an abbreviated discussion of certain ideas contained in this comment, please refer to M. Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Vancouver: Oolichan Books, 1992) 221 at 221-224.

other branches of Western thought, and in some cases, world thought. Anthropology provides an appropriate lens through which to examine the adequacy of an approach to a characterization of another culture undertaken by any member of a culture that subscribes to Western intellectual traditions.[11]

I. Evaluating Assumptions in Legal Reasoning: The *Delgamuukw* Premises

Our examination of the principles adopted in the *Delgamuukw* judgment to evaluate the Gitksan and Wet'suwet'en cultures is based on a comparison between statements in *Delgamuukw* and certain concepts which are central to anthropology. These include the concepts of culture, ethnocentrism, and cultural relativism. We define and discuss each of those concepts, and then compare them to the discussion of relevant topics in the judgment.

A. Culture

The concept of culture is universally accepted among anthropologists as central to the study of human society. Some aspects of the accepted definition of culture include:

- Culture is an attribute of all human societies;
- Culture includes rules and/or behaviour regarding virtually all aspects of human social life;
- Culture is passed from one generation to another by learning rather than by instinct; and

11. Throughout this commentary, reference is made to the judgment itself. At times the language adopted in the judgment creates the impression that it is animate and speaks for itself. Because we have not interviewed the author, we have no basis for attributing a motive to what has been written. Furthermore, we have not read the actual transcripts of the trial.

- Virtually all human social behaviour is based on patterns that are cultural and learned rather than inherited through biological processes.[12]

In contrast to cultural explanations for patterning in human social behaviour, of which institutions form a part, the *Delgamuukw* judgment relies on an analysis based on biology. For example, McEachern C.J. states:

> I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.[13]

This finding is important because it pertains to how the judgment addresses the questions of ownership and jurisdiction. In adopting the view that patterns of human social behaviour can be explained by reference to biological instinct rather than learning, the Court espouses a view of human society that stands in stark contrast to the cultural thesis developed and commonly accepted in anthropological theory and Western thought. In the past century, in fact, the premise that human behavioural patterns are based on instinct has virtually been discarded.[14] The acceptance of this thesis raises a serious question as to whether McEachern C.J.'s

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12. While tests indicate some variation, common points in the definition of culture are found in anthropological texts and standard usage dictionaries. These include: D. Bates & F. Plog, *Cultural Anthropology*, 3d ed. (New York: McGraw-Hill, 1990) at 7 and 18; M. Harris, *Culture, People, Nature: An Introduction to General Anthropology*, 5th ed. (New York: Harper & Row, 1988) at 123; K. Otterbein, *Comparative Cultural Analysis: An Introduction to Anthropology* (New York: Holt, Rinehart & Winston, 1972) at 1; A. Rosman & P. Rubel, *The Tapestry of Culture: An Introduction to Cultural Anthropology*, 3d ed. (New York: Random House, 1989) at 7; E. Schusky, *The Study of Cultural Anthropology* (New York: Holt, Rinehart & Winston, 1975) at 15; *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993) at 568.

13. *Delgamuukw*, *supra* note 1 at 441.

14. Certain sociologists might make this claim. However, none would assert that only certain human societies are based on instinct while others are not. Rather, they would argue that all human societies are so based, and to an equal degree. This would negate the implied comparative thrust of the judgment's assertion.

findings of law are based on relevant findings of fact. Even if we assume that the proper questions were considered, other significant problems remain, including an ethnocentric analysis and the weight given to evidence produced by the Gitksan and Wet'suwet'en in answering the questions posed.

B. Ethnocentrism

The term 'ethnocentrism,' as used in anthropology, refers to the belief that "one's own culture represents the natural and best way to do things"[15] and that it is, therefore, appropriate to evaluate other cultures on the basis of the precepts of one's own. Marvin Harris eloquently describes the concept of ethnocentrism in a manner relevant to the *Delgamuukw* judgment:

> Ethnocentrism is the belief that one's own patterns of behaviour are always natural, good, beautiful, or important, and that strangers, to the extent that they live differently, live by savage, inhuman, disgusting or irrational standards.[16]

Reasoning based on ethnocentric beliefs is generally considered to be unfounded, and hence fallacious. Anthropologists have concluded on the basis of much factual evidence that ethnocentric evaluations very frequently occur where people from one culture, for example European colonists, encounter for the first time people from another, very different culture, such as those in Aboriginal North America. Implicit in Western evaluations is an image of progress which sees Aboriginal societies as being at an earlier stage of development, with powerful negative implications for the nature and value of Aboriginal societies and their institutions. Although the distortion that can be caused by this kind of reasoning was recognized by the Supreme Court of

15. Rosman & Rubel, *supra* note 12 at 3. See also Bates & Plog, *supra* note 12 at 17.

16. Harris, *supra* note 12 at 123-125.

Canada as early as 1973, it is so deeply rooted that it continues to manifest itself in legal reasoning.[17]

The *Delgamuukw* decision contains many examples of ethnocentric reasoning. One is in the evaluation of the culture of the Gitksan and Wet'suwet'en. The judgment describes them, at the time of first contact, as "roaming" the countryside and "eking out an aboriginal life."[18] It determines that their ways of life are harsh and "far from stable."[19] The Aboriginal period is characterized as a time "prior to sovereignty," when humans merely maintained "bare occupation [of land] for the purposes of subsistence."[20]

Felix Cohen provides an interesting analysis of how cultural bias is reflected in such descriptions of Aboriginal culture and how the choice of language can justify a particular result in law:

> When, for example, a court begins an opinion in an Indian property case by referring to Indians moving from one place to another as *roaming, wandering,* or *roving,* we can be pretty sure that it will end up by denying the claimed property rights of the Indians. For these words are words which are commonly applied to buffalo, wolves and other sub-human animals. They suggest that the relation of an Indian to the land is purely a physical relation and not a social one. They are plainly 'out-grouping' or 'they' words to describe movements which most of us,

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17. In *Calder* v. *British Columbia (A.G.)* (1973), 34 D.L.R. (3d) 145 (S.C.C.) [hereinafter *Calder*], Mr. Justice Hall states at 169:

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.

See also *Simon* v. *R.* (1985), 24 D.L.R. (4th) 390 (S.C.C.) [hereinafter *Simon*]. Commenting on Mr. Justice Patterson's description of the Micmac in *R.* v. *Syliboy,* [1929] 1 D.L.R. 307 (N.S. Co. Ct.) as "uncivilized people" and "savages," Chief Justice Dickson states at 400:

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and, indeed, is inconsistent with a growing sensitivity to native rights in Canada.

18. *Delgamuukw, supra* note 1 at 452 and 248.

19. *Ibid.* at 256.

20. *Ibid.* at 282 and 440.

thinking of ourselves, would describe by means of such words as *traveling, vacationing, commuting*, words that we would not apply to animals, words distinctly human. These latter words connote purpose in movement. Only when we regard a person as strange or perhaps sub-human do we customarily impute aimless motion to him.[21]

A very clear example in *Delgamuukw* of a finding apparently based on ethnocentric reasoning is contained in the following passage:

It would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs [sic], that aboriginal life in the territory was, at best, 'nasty, brutish and short.'[22]

This passage is important because it relates to the determination of ownership and jurisdiction. The statement suggests that an assessment of the quality of life among the Gitksan and Wet'suwet'en at the time of first contact with Europeans will be based on certain characteristics: the presence of written language, the use of horses and wheeled vehicles, and the absence of slavery, starvation, and war. As it happens, these are characteristics which Western cultures possess, or at least strive to possess. This approach does not consider whether members of the culture in question would accept them as characteristics of a good life. It merely assumes that the values and technology of Western culture represent qualities universally desired by human beings. Because of such presuppositions, one cannot be certain that the judgment's findings of law are based on accurate findings of fact.

Another example of ethnocentric reasoning is illustrated in the understanding of the feast system and the factual accuracy attributed to evidence adduced at trial explaining the function of the feast. The dismissal of the claim for sovereignty was based on two significant findings. One was that the plaintiffs' laws and

21. F. Cohen, "The Vocabulary of Prejudice" in L.K. Cohen, ed., *The Legal Conscience: Selected Papers of Felix S. Cohen* (New Haven: Yale University Press, 1960) 429 at 434.

22. *Delgamuukw, supra* note 1 at 208.

customs were not sufficiently "certain to permit a finding that they or their ancestors governed the territory according to Aboriginal laws."[23] The other was that when sovereignty was asserted,

> the aboriginal system, to the extent it constituted aboriginal jurisdiction of sovereignty, or ownership apart from occupation for residence and use, gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems.[24]

The result is that self-government "is possible only with the agreement of both levels of government [federal and provincial] under appropriate, lawful legislation."[25] Our focus here is on the findings of fact relating to social organization. It is important, however, to note that the legal finding on the effect of the assertion of sovereignty is subject to criticism in light of the British government's practise of entering into treaties and not interfering with Aboriginal institutions and customary law.[26]

The Gitksan and Wet'suwet'en stated that an understanding of the feast system was critical to their claim because it performed a number of functions in their society, both at the time of initial European contact and today. They argued that

> [w]hen today, as in the past, the hereditary chiefs of the Gitksan and Wet'suwet'en Houses gather in the Feast Hall, the events that unfold are at one and the same time political, legal, economic, social, spiritual, ceremonial, and educational.[27]

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23. *Ibid.* at 449.

24. *Ibid.* at 453.

25. *Ibid.* at 455.

26. See *e.g.*: B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 732-736; M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alberta L. Rev. 498; B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681; and P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

27. "The Address of the Gitskan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia" [1988] 1 C.N.L.R. 14 at 29 [hereinafter "The Address"]. Gitskan and Wet'suwet'en witnesses identified their places in their respective societies with reference to a house or a clan at 26: "[a] person is born into a particular House and Clan by virtue of laws of

Furthermore,

> [t]he formal telling of the oral histories in the feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the chiefs of other Houses, constitute not only the official history of the House, but also the evidence of its title to its territory and the legitimacy of its authority over it.[28]

The feast was also a public forum for witnessing the transmission of chiefs' names, mediating disputes, managing credit and debt, verifying oral history through witness by chiefs and elders, and transmitting essential values of the culture.[29] The feast operated as a forum for the public recognition of title, verification of claims by the declaration before other chiefs and elders, and public witnessing of transmission of authority to the chief who traditionally was responsible for allocating property rights among house members and ensuring that the earth and inanimate resources were treated with respect.[30]

The judgment disregards the evidence led by the plaintiffs on the legal functions of the feast system. In doing so, it gives significant weight to the writings of fur traders and other Europeans who were present in the Gitksan and Wet'suwet'en territories during the early fur trade era. As a rule, the judgment accepts the factual accuracy of this information without questioning the cultural perspective of the authors. The writings of Mr. Brown, a fur trader who established Fort Kilmaurs on Babine Lake in 1822, were relied upon. The judgment states:

> As required by his employer, trader Brown filed numerous reports which are a rich source of historical information about the people he encountered both at his fort

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matrilineal descent." In the past, members of a House would live under one roof. A "House is a matrilineage of people so closely related that the members know their relationship." This can be contrasted with a Clan where there is an assumption "that all the Clan members are related, although the precise nature of that relationship may or may not be known."

28. *Ibid.* at 26.

29. *Ibid.* at 29.

30. *Ibid.*

and on his travels. *I have no hesitation accepting the information contained in them* [emphasis added].[31]

On this basis, the judgment disregards the oral testimony of elders and social scientists led by the plaintiffs because, in part, "Brown's reports in the 1820s . . . hardly mention the feast, particularly as a legislative body."[32] At another point, the written word of Trader Brown is used to support an assertion in the judgment about the status of Gitksan and Wet'suwet'en culture at first contact:

> Assuming Gitksan and Wet'suwet'en village customs furnished whatever social organization the law requires, I accept the opinion of Professor Ray that the minimal social organization described by trader Brown at Babine lake in the 1820s could not have been borrowed or developed just since contact.[33]

The weight given to the reports of Trader Brown is not surprising in light of the presumptions in Anglo-Canadian evidence law that individuals are self-interested and that the evidence of 'disinterested' observers is more trustworthy. Trader Brown had no financial or proprietary interest in the litigation and his observations were not made in contemplation of it. Such considerations must, however, be balanced against the fact that he made his observations at a time when the understanding of Aboriginal culture was more biased and less complete. No such balancing is apparent in McEachern C.J.'s treatment of the report. Although mention is made of the need to assess historical documents in light of present day research, at no point is the cultural perspective of the written record discussed in any meaningful way. Particularly when the written record concerns judgments about the specifics of another culture's institutions, such information must be scrutinized to ascertain the precise nature of any ethnocentric bias it may contain. One of the ironies in *Delgamuukw* is that such scrutiny is applied before giving weight to oral history and the expert testimony of cultural

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31. *Delgamuukw, supra* note 1 at 278.
32. *Ibid.* at 442.
33. *Ibid.* at 457.

anthropologists. The problems of admissibility and the weight to be given to familiar and unfamiliar forms of evidence are explored in further detail later in our discussion of evidentiary issues. The ethnocentric approach adopted in the assessment of fact suggests that the findings of fact in *Delgamuukw* may be distorted and the findings of law may not be based on accurate facts.

C. Cultural Relativism

Cultural relativism is the "ability to view the beliefs and customs of other peoples within the context of their culture rather than one's own."[34] It presumes the equality, rather than inequality, of peoples. The assumption is that each culture is "as worthy of respect as all the rest,"[35] and that the definition of what constitutes a satisfying life should rest, in the main, on the values of members of each cultural group. The use of an analytical framework based on cultural relativism can increase "objectivity, empathy, and informed judgment," qualities that are as "indispensable to the anthropologist, as they are to anyone who tries to understand the customs of another society."[36]

Cultural relativism stands in marked contrast to ethnocentrism. As anthropologists are well aware, this does not mean that cultural relativism guarantees against distortion; every approach contains its own biases and limitations. A cultural relativist's approach could conceivably allow for the defense of cultural patterns, such as those of Nazi Germany, which are condemnable on the basis of universal moral standards. Consequently, some anthropologists argue that the term 'cultural relativism' too strongly suggests a suspension of moral judgment, and so eschew the use of the term to describe their own approaches.[37] Most anthropologists would, however, agree that cultural relativism does not require a

34. Bates & Plog, *supra* note 12 at 466.
35. Harris, *supra* note 12 at 125. See also Schusky, *supra* note 12 at 15.
36. Bates & Plog, *supra* note 12 at 17.
37. See Harris, *supra* note 12 at 123-125.

surrender of "our own ethical and moral standards,"[38] but merely that ethical judgments must be based on a rigorous examination of specific cases.

Even anthropologists who do not specifically adopt the term cultural relativism to define their own stance agree that anyone seeking to understand another society must be "tolerant of and curious about cultural differences."[39] At the same time, anthropologists are aware that any approach, even cultural relativism, does not ensure that their work will be free from distortion and must therefore be subjected to scrutiny.[40]

In its reliance on ethnocentric logic, *Delgamuukw* necessarily rejects reasoning based on cultural relativism. It is our position that had the Court adopted a culturally relativistic approach, it would have reached fundamentally different findings of fact.

For example, with respect to the inheritance laws of the Gitksan and Wet'suwet'en, the Court specifically rejects the notion that their social organization included "laws of general application,"[41] a formal feast system, or any conscious management and conservation of resources in the territories claimed. The Court also asserts that while customs existed, they were not frequently honoured in practice. According to McEachern C.J.,

> It became obvious during the course of the trial that what the Gitksan-Wet'suwet'en witness[es] describe as the law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves.[42]

The fact is that Canadian law could similarly be characterized as highly flexible and not frequently followed by Canadian citizens.

Neither statutory law nor the common law is fixed and inflexible. Although codification of laws does provide some certainty, uncertainty and flexibility are introduced through

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38. Bates & Plog, *supra* note 12 at 17.

39. Harris, *supra* note 12 at 125.

40. See M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) at 131.

41. *Delgamuukw, supra* note 1 at 278.

42. *Ibid.* at 447; see also *ibid.* at 442.

selective enforcement, judicial interpretation of statutes, and application. Laws are nonetheless laws whether or not they are followed by the people.

It is also clear that the common law is not fixed or static, but is flexible, evolving, and uncertain. Principles of law are developed gradually by the courts in response to changing circumstances, priorities, and social mores of Canadian society. Flexibility and uncertainly are also infused into this system with the introduction of non-precedential or policy arguments which reflect these changes, and by the willingness of a particular judge to depart from precedent and respond to a changing social order.

In short, from a certain vantage point, the Court's assessment of Gitksan and Wet'suwet'en legal theory and practice could be applied to our own. The problems of adherence and enforceability adverted to in the *Delgamuukw* judgment exist as well in our own legal system. While certainty and flexibility may be dependent upon nothing more than who is sitting on the bench, anyone familiar with the operation of our system of law, and who takes it seriously, would be reluctant to deny its existence on the basis of these characteristics.

The finding that the Gitksan and Wet'suwet'en system of law is "really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves"[43] is supported by a series of statements by the plaintiffs which, on the Court's analysis, appear to indicate that a wide variety of means were used to transmit territorial and other rights from one generation to the next. Examples are given of the variation in the way rights are transmitted from father to son, and are said to provide sufficient evidence to substantiate the Court's findings of fact about the Gitksan and Wet'suwet'en legal theory and practice.

An approach based on cultural relativism would not assume that the existence of variation, even great variation, necessarily indicates that rules are generally not being followed, but would look instead for other explanations. In addition to examining the situation among the Gitksan and Wet'suwet'en in detail, such an inquiry

43. *Ibid.* at 447.

would compare their ways to equivalent practices found in other cultures, including our own. Such a comparative approach would generate at least three hypotheses which could explain the observed variation.

The first hypothesis is that variation in, for example, inheritance patterns either fit within the range considered acceptable by members of the culture or produced stable and predictable forms of transmission of property, or both.

The second hypothesis is that variation was significant, but was primarily due to pressures such as depopulation, the impact of colonialism, and the decline of certain areas used for hunting or fishing purposes. Such variation would show that the cultural system provided flexible means of accommodation for the benefit of its members, and would thus indicate that the rule system was working to maintain itself.

The third hypothesis is that the apparent variation represents predictable exceptions which actually confirm that the system is functioning well. Consider, for example, instances of father to son inheritance. The usual system of the Gitksan and Wet'suwet'en is matrilineal inheritance system utilized throughout the world, and common among Aboriginal peoples in British Columbia. Inheritance rights are normally transmitted, to give two examples, from mother to daughter or from mother's brother to sister's son, or both. The son usually does not inherit from his father, but looks to his mother or his mother's brother, while the male individual who normally inherits from a boy's father is the boy's father's sister's son. Although a matrilineal inheritance system may appear complex and confusing to members of Euro-Canadian culture, it is quite clear and functional to those who participate in it.

If the Gitksan and Wet'suwet'en inheritance is normally matrilineal, it is reasonable to assume that examples of father to son transmission will always represent special cases (for instance, when a more appropriate heir cannot be found). Since such cases are driven by circumstance, they are likely to display wide variation.

Regardless of which hypothesis best explains the apparent variation noted in the judgment, there is no indication that any of them were even considered. If the judgment failed to consider

these and other hypotheses regarding the question of inheritance, as well as many other matters related to determination of ownership and jurisdiction, a serious concern arises that the findings of law were not based on an adequately comprehensive interpretation of the facts offered in evidence.

II. Legal Tests and Issues of Evidence

In Canada, the system of Aboriginal title litigation places the onus on Aboriginal plaintiffs to prove the existence of title and the associated bundle of user and occupancy rights.[44] The Crown then has the onus of proving that these rights were legally terminated before the recognition and affirmation of Aboriginal rights in the Canadian Constitution.[45] In the context of this burden the courts presume that the relationship between the British Crown, and subsequently the federal and provincial Crowns, and Aboriginal peoples is that of sovereign and subject. Further, the courts presume that the rights of Aboriginal people are based in common law and can thus be "overridden or modified by legislation passed by a competent legislature, in the absence of constitutional barriers."[46]

Actions taken by the federal government to terminate or limit Aboriginal rights by legislation or regulation after 1982 must meet a justification test. Once Aboriginal claimants prove the existence of a right and interference with it by legislation, the onus then shifts to the government to justify its actions. The Crown must

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44. To date the issue of Aboriginal rights has arisen primarily in the context of land and land use rights. This has lead to a narrow view that Aboriginal title is a bundle of use and occupancy rights arising from original occupancy. An emerging concept of rights that receives some support from historical practice as well as reasoning in decisions like *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Sparrow*] is that Aboriginal rights are more than land use rights and extend to social, political, cultural, and other societal rights. Whatever the definition adopted, the onus remains on the plaintiffs to prove the existence and content of the right.

45. See *Sparrow, ibid.* at 401.

46. Slattery, "Understanding Aboriginal Rights," *supra* note 26 at 740.

prove a valid legislative objective and must further prove that the objective was attained in such a way as to uphold the honour and fiduciary obligation of the Crown.[47] A declaration that rights exist and have not been effectively terminated can have several effects. Entitlement to compensation is one such effect. Another is participation, with enhanced bargaining power in the political land claims negotiation process.

The burden of proof on Aboriginal plaintiffs is problematic in two crucial ways: the content of what must be proven and the method by which it is to be proved.[48] The latter difficulty relates not so much to admissibility of evidence as to the weight or probative value given to the forms of evidence available to the plaintiff. Again, we use *Delgamuukw* to illustrate these points.

A. What Must be Proved?

As do most common law judgments, the *Delgamuukw* judgment adopts an approach to findings of fact and law only after a careful and detailed discussion of relevant precedent. The analysis of which facts must be proved is based mainly on two leading precedents: *The Hamlet of Baker Lake* v. *Minister of Indian and Northern Development*[49] in the Federal Court of Canada and *Re Southern Rhodesia*[50] in the Judicial Committee of the Privy Council. The *Baker Lake* decision sets out four threshold tests for establishing Aboriginal title:

1. That [the plaintiffs] 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.

47. See *Sparrow*, *supra* note 44 at 410. *Sparrow* involved the application of a federal fishing regulation to the Musqueam band. It is unclear whether the *Sparrow* test can be used to justify provincial legislation which infringes Aboriginal rights. See B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 284-285.

48. See Davidson, *supra* note 3 at 24.

49. (1980), 107 D.L.R. (3d) 513 (F.C.) [hereinafter *Baker Lake*].

50. [1919] A.C. 211 (P.C.).

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.[51]

Although these tests have yet to receive definitive consideration by the Supreme Court of Canada, they have been consistently applied by lower courts in the context of land claims without much consideration of the many problems inherent in their application.

The Supreme Court of Canada has yet to render a definition of Aboriginal rights that embraces all of the uses of the term. To date, Aboriginal rights have been defined on a case-by-case basis arising from Aboriginal claims to land or land use rights. This has given rise to the view that Aboriginal rights are a bundle of rights inextricably linked to the title claims of Aboriginal groups to specific parcels of land. According to this view, Aboriginal rights are more than occupancy rights, but flow from original occupation. To put it another way, property rights to land may just be a subset in a bundle of interrelated rights including political rights that flow from Aboriginal title. On this view, the terms Aboriginal title and Aboriginal rights may be used interchangeably.

McEachern C.J.'s judgment reflects this theory of title-based rights. To help determine the bundle of rights and protected activities that form part of or flow from Aboriginal title, he invokes an additional test of "long-time aboriginal practises."[52]

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51. *Baker Lake, supra* note 49 at 542. In *Ontario (A.G.)* v. *Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.), aff'd on other grounds (1989), 58 D.L.R. (4th) 117 (C.A.) [hereinafter *Bear Island*], the tests were interpreted narrowly requiring social organization distinct to the claimant group, and continuity of exclusivity to the date of the action. However, the decision of the trial judge, that the plaintiffs lacked sufficient organization and exclusive occupation to establish a claim to Aboriginal title, was reversed by the Supreme Court of Canada in 1991: [1991] 3 C.N.L.R. 79. The Court did not elaborate on the basis of the reversal except to say that it agreed with the findings of fact but not the legal findings based on those facts. This suggests that the strict application of exclusivity and distinct organization found in the lower judgment was rejected. Cases are cited which refer for the need for a flexible application of the tests in light of impossible burdens, meagre evidence, and the contemporary exercise of rights.

52. *Delgamuukw, supra* note 1 at 456 and 457-458.

According to this test, the bundle of rights includes only those institutions and practices which "were carried on [for an indefinite or very long period of time] by the plaintiffs' ancestors at the time of contact or European influence and which were still being carried on at the date of sovereignty, although by then with modern techniques."[53] Once the bundle of rights has been identified, the issue becomes whether or not those rights continue to exist.

Proof of social organization is important in a title claim in two ways. First, the assertion of some minimal level of social organization at the date sovereignty is asserted, and the existence of an identifiable descendant group, are required as conditions precedent to the claim. Second, once the four tests articulated by Mahoney J. have been met, the content of Aboriginal title is ascertained by looking to the nature of social organization and Aboriginal activity of the ancestral group and determining which traditional activities and uses can be said to remain in existence.[54] This allowed McEachern C.J. to find sufficient social organization to establish a claim, and at the same time to conclude that the ancestral society was so low on the scale of social organization, and European influence so profound, that few of the alleged traditional practices and uses were precise enough to enforce in law. This analysis leads to the conclusion that the Aboriginal rights of the plaintiffs prior to their extinguishment were residential and sustenance gathering rights only. In the words of McEachern C.J., "[i]f it were necessary to find that the Gitksan and Wet'suwet'en as aboriginal peoples rather than villagers had

53. *Ibid.* at 457-458.

54. In *Sparrow*, *supra* note 44 at 397, the Supreme Court of Canada held that rights "must be interpreted flexibly so as to permit their evolution over time." In *Delgamuukw*, *supra* note 1 at 429, 'flexibility' is given a narrow interpretation and is limited to the exercise of a traditional practice. The example given is that present-day Indians may fish with modern gear rather than be limited to traditional methods. According to *Delgamuukw*, modification of the nature of the right arising from European influence, such as a change from hunting for sustenance to hunting commercially, as well as the abandonment of traditional practices, operates as a bar to the continuing existence of a right.

institutions and governed themselves,"[55] the required level of social organization would not have been satisfied.

The threshold requirement of an organized society is derived from *Calder*; in particular, the finding that Aboriginal title is based on original possession: "[w]hen the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[56] Mahoney J. in *Baker Lake* and McEachern C.J. in *Delgamuukw* state that the rationale behind the requirement of organized society is found in *Re Southern Rhodesia*. Both cases cite the following passage:

> 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 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.[57]

The assumptions inherent in this passage influenced findings of fact in the *Delgamuukw* judgment on the threshold question of social organization and the content of Aboriginal title. Even this brief exposition indicates that the assumptions are based on postulates that are distorted by ethnocentric reasoning and the misinterpretation of the nature of culture. There can be no people so primitive that they have no social organization or system of rules regulating behaviour. Nor is it appropriate to measure the

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55. *Delgamuukw, supra* note 1 at 456.

56. *Calder, supra* note 17 at 156. Cited in *Baker Lake, supra* note 49 at 543.

57. *Re Southern Rhodesia, supra* note 50 at 223-224, cited in *Baker Lake, supra* note 49 at 543, and in *Delgamuukw, supra* note 1 at 456.

existence and content of the rights of another culture on the basis of one's own cultural values and institutions.

When Mahoney J. articulated the threshold questions for proof of title he did, however, emphasize the need to apply this requirement in a flexible manner based on the functional needs of the society's members. In particular he states:

> It is apparent that the relative sophistication of the organization of any society will be a function of the needs of its members, the demands they make of it. While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory.[58]

The result is that the threshold test of organization necessary to claim occupancy and land use rights is not difficult to meet if the claim is limited to use and occupation and if the threshold requirement is applied flexibly. The difficulty lies in proving the nature of Aboriginal institutions in order to delineate the bundle of rights that constitute Aboriginal title. The existence of an organized society in possession of limited resources does not give rise to a legal presumption of land ownership, self-governance, or other rights associated with 'civilized society.' Rather, the requirement that Aboriginal institutions be "sufficiently defined to permit their recognition by the common law"[59] is the central question. Aboriginal plaintiffs must prove the existence of Aboriginal institutions and practices which existed over a century ago, rebut the stated or unstated presumption of inevitable change due to European influence, and trace a link to present institutions and practices. All of this must be accomplished based on oral history corroborated by limited archaeological and geological evidence and the expert opinions of social scientists, all of which are weighed against contrary opinions offered by experts for the Crown. Further complicating the burden of proof is the fact that

58. *Baker Lake*, *supra* note 49 at 543.
59. *Ibid.*

what little written record of history is available is based on ethnocentric evaluations of Aboriginal culture.

If the equality of peoples, rather than their inequality was the assumption underlying Canadian judicial reasoning on the need to prove social organization and incidents of Aboriginal title, it would make more sense to invoke a presumption of social organization and rights common to all self-determining peoples. As discussed earlier, this is in accord with mainstream anthropological thought and, indeed, world opinion as described in relevant United Nations documents.[60] Proof relating to organization should only be required of an identifiable plaintiff group which traces its ancestry to an indigenous Aboriginal society. This is in keeping with the notion that Aboriginal rights, including title, are a bundle of collective rights vested in a group arising from original occupation.[61] This does not mean that the plaintiffs would have to show the connection of each member of the present group to an ancestral society, as this would create an unbearable burden in the absence of written records. Rather, sufficient connection could be proved by tracing the ancestry of a sample of members of an existing collectivity. On the issue of the scope and content of Aboriginal rights, the onus should be on the Crown to prove that certain institutions and practices did not or do not exist and are not 'Aboriginal.' The plaintiffs should not be required to prove the existence of a catalogue of institutions and uses to rebut a presumption that their existing societies are no longer 'Aboriginal' or that their ancestral societies ranked so low on a scale of societal organization that their institutions were too imprecise to give rise to rights enforceable in Canadian law. In short, the existing burden of proof on Aboriginal plaintiffs relating to the existence of an organized society and the content of Aboriginal title is rooted in a discriminatory denigration of Aboriginal society.

Canadian law presumes that the Crown has, at some point in history, effectively asserted sovereignty over Aboriginal peoples,

60. See Asch, *supra* note 40.

61. See Slattery, "Understanding Aboriginal Rights," *supra* note 26 at 756.

with the legal consequence of vesting *prima facie*, inchoate title to land in the Crown. This forms the basis of the legal fiction that the Crown is the ultimate landlord and that all rights in the land are derived from a Crown grant. The legitimacy of the assumption of sovereignty and Crown title is not challenged by the courts, although it has been argued that the presumption of sovereignty is founded on the characterization of Canada as a political vacuum at the time British sovereignty was asserted. Factual Aboriginal occupation renders it impossible for the Crown to have legitimately acquired rights through fictional occupation because the only way to acquire territorial sovereignty over inhabited lands is with the consent of the occupant.[62] As Brian Slattery suggests, however, it is clear that Anglo-Canadian law "treats the question of when and how the Crown gained sovereignty over Canadian territories in a somewhat artificial and self-serving manner."[63] Nevertheless, it is also clear that the assertion of sovereignty did not automatically divest Aboriginal peoples of property interests in their lands or political rights based on Aboriginal title.[64]

The common law of Aboriginal title as articulated by Canadian courts recognizes that Aboriginal societies have unique interests in land based on actual possession which predates the Crown's assertion of sovereignty. The notion of possessory proprietary rights is reconciled with the notion of Crown title through recognition of the Aboriginal interest as a burden on Crown title, which burden can be eliminated in a number of ways, including statutory expropriation.[65] As the Aboriginal interest arises from actual possession, possession must be proved to rebut the presumption of necessity for a Crown grant.[66]

In our opinion the assumption of vacant lands is not a legitimate basis for the requirement of proof of possession, and

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62. See *e.g.* Macklem, *supra* note 26 at 397-406.

63. Slattery, "Understanding Aboriginal Rights," *supra* note 26 at 735.

64. See *supra* note 26.

65. See Slattery, "Understanding Aboriginal Rights," *supra* note 26 at 740-741.

66. See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 298-306.

provides yet another example of ethnocentric reasoning relating to modes of land use and the existence of Aboriginal government. Whatever the justification advanced at the date of colonization for characterizing Canada as vacant land, such justification is discriminatory when viewed in the context of contemporary values and should no longer be held operative.[67] On the other hand, proof of possession of a defined territory is important for establishing distinct areas of Aboriginal ownership and territorial jurisdiction in relation to the Crown and other Aboriginal societies. We accept the necessity of this requirement.

When articulating this criterion of possession in the context of land rights, Mahoney J. indicated that the issue is physical occupation and not possession at common law. In particular he emphasized that "[t]he nature, extent, or degree of the aborigines' physical presence on the land . . . is to be determined in each case by a subjective test."[68] In the opinion of Professor Slattery, this means that:

> In determining whether a group can be said to possess certain lands, one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed. It would be unrealistic to expect a group of hunters to possess their hunting grounds in the same way as a farmer occupies his fields, or to require that lands be used to their maximum potential with the best available technology.[69]

The difficulty in applying this test lies in its connection with the remaining criteria: proof that occupation by the ancestral society was to the exclusion of other organized societies and that the land was occupied at the time sovereignty was asserted. The requirement of exclusivity reflects an assumption in English law that property is a creation of law which depends on exclusion by law from interference. Further, it ignores the fact that Aboriginal

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67. See *e.g. Western Sahara Advisory Opinion*, [1975] I.C.J. Rep. 12, and *Mabo* v. *State of Queensland* (1992), 107 Aust. L.R. 1 (H.C.) [hereinafter *Mabo*]. See also R. Bartlett, "The Landmark Case on Aboriginal Title in Australia: *Mabo* v. *State of Queensland*" [1992] 3 C.N.L.R. 4.

68. *Baker Lake, supra* note 49 at 545.

69. Slattery, "Understanding Aboriginal Rights," *supra* note 26 at 758.

title in present Canadian law is a unique legal right derived from historic occupation, that the common law of Aboriginal title is a distinct body of law from the common law of property, and that concepts of general property law are inappropriate to describe Aboriginal interests in their lands.[70] A more appropriate source for determining territorial boundaries in a manner consistent with recent trends in Canadian law would be the actual institution of landholding by an Aboriginal society.[71] Shared lands could, for example, give rise to a form of joint or common title. Alternatively, entitlement may be established for different purposes as determined by the landholding systems and customs of the Aboriginal societies affected. A presumption of equality and social organization would also point to the laws of the ancestral and descendant group in order to ascertain boundaries, uses, and 'rights.' Even in *Delgamuukw*, the requirement of exclusivity is deemed uncertain given the Supreme Court's recent recognition of the Musqueam Aboriginal right to fish in an area used by many other tribes. However, McEachern C.J. limits the scope of his uncertainty to claims to sustenance rights, and maintains that exclusivity would be essential for ownership and jurisdiction.[72]

The date at which occupation must be established also creates difficulty. First, it should be noted that the criteria articulated in *Baker Lake* presume current occupation by the claimant group. Second, occupation must be continuous and flow from occupation by the ancestral group at the date sovereignty is asserted. Thus, Aboriginal plaintiffs carry the burden of tracing occupation back over centuries. Again, we agree with Professor Slattery that "[t]ime is less important for its own sake than for what it says about the nature of the group's relationship with the land and the overall merits of their claim."[73] Tracing occupancy to the date that sovereignty was asserted, or to a long time prior to that date, ignores the fact that the predominant policy of the British and

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70. See *Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 at 339 (S.C.C.).

71. See M. Asch, "Wildlife: Defining the Animals the Dene Hunt and the Settlement of Aboriginal Rights Claims" (1989) 15 Can. Pub. Pol. 205 at 217.

72. See *Delgamuukw, supra* note 1 at 455, 460-461, and 452-454.

73. Slattery, "Understanding Aboriginal Rights," *supra* note 26 at 758.

Canadian Crown has been to acquire land by treaty and contemporary land claims agreements by dealing with the group in actual occupation at the time the land is desired.[74] A presumption of equality, coupled with the understanding that the assertion of sovereignty alone is insufficient to terminate Aboriginal rights, would focus the factual inquiry on the connection of the land claimed to the existing society's economic, political, and cultural life.[75] How long is really only an issue if the Aboriginal group has had only recent association with the land claimed. If that group has been in occupation for a substantial time, the factual inquiry is more appropriately focused on the method and validity of termination by the Crown. In situations where Aboriginal people have been unlawfully and physically dispossessed of their lands, the issue of connection to the land could be assessed from the date of involuntary dispossession.

What, then, should have been the focus of the factual inquiry in *Delgamuukw*? In our opinion, all that the Gitksan and Wet'suwet'en should have had to prove in a common law court was that:

- the plaintiffs were identifiable collectivities of Aboriginal descent;
- they had a substantial connection to land over which they had previously asserted title; and
- the extent of the territorial boundaries asserted reflect actual patterns and laws of Gitksan and Wet'suwet'en landholding (exclusivity may be an issue if the plaintiffs did not recognize shared use and possession).

Meeting these criteria should give rise to a presumption of ownership and other social, political, and cultural rights. The onus should be on the Crown to prove that certain institutions or

74. See *ibid.* at 760-761.

75. A similar approach has recently been adopted by the Australian High Court in the *Mabo* decision, *supra* note 67. See discussion in Bartlett, *supra* note 67 at 10 and 13-14.

rights do not exist, have been abandoned, are not 'Aboriginal,' or are too imprecise to be enforced in Canadian law. The onus should continue to be on the Crown to prove the extinguishment of Aboriginal title by governmental action.

The inquiry, however, should extend beyond the examination of the validity and process of extinguishment in Canadian law to a critical assessment of the validity of the assertion of sovereignty by the Crown and the legitimacy of unilateral extinguishment. It has been argued that this will never happen because Canadian courts are loath to challenge the claims of the Sovereign which created them. This opinion is reflected in the view of McEachern C.J. who concluded that if Aboriginal ownership or sovereignty existed, it "gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems,"[76] and that no court has authority to make grants of constitutional jurisdiction in face of the clear power of the Federal parliament to legislate with respect to Indians under s. 91(24). If this continues to be the attitude of Canadian courts, any movement on findings of fact about the nature of Aboriginal society and the content of Aboriginal rights may be to no avail.

B. Method Of Proof

In *Bear Island*, the trial judge held that oral history should be admissible in an Aboriginal land claim, but that its admission should not detract from the "basic principle that the court should always be given the best evidence."[77] Such evidence is to be weighed like other evidence at trial and consideration is to be given to the "faultiness of human memory."[78] Noting that in most land claims decisions the case of the plaintiff is presented through "a concurrence of many voices with respect to the oral tradition of the band,"[79] Steele J. questioned the reliance of the

76. *Delgamuukw, supra* note 1 at 453; see also *ibid.* at 453 and 473.
77. *Bear Island, supra* note 51 at 336.
78. *Ibid.*
79. *Ibid.* at 337.

plaintiff on only one voice, that of Chief Potts, and questioned the weight to be given to his testimony. A good deal of evidence was presented by non-Indian experts; the "acknowledged 'old people', who knew the most about the oral history were inexplicably not called to give any such evidence."[80]

The strategy suggested by Steele J. is the presentation of oral accounts through "many voices" of the old people, corroborated by other forms of evidence such as archaeological findings, ancient documents, and opinions of experts. This was the strategy adopted by the plaintiffs in *Delgamuukw*. Counsel called on numerous elders and experts to support their case. The result was a vast amount of evidence to be heard by the Court and challenged by the defendants. The trial lasted 374 days over the course of three years. Legal argument alone lasted 56 days. The litigation teams consisted of nine counsel for the plaintiffs, eight counsel for the province of British Columbia, and five for the Attorney General of Canada. Many more were employed in research and preparation for litigation. Testimony was given by 61 witnesses at trial, and by about 70 more on commission or by affidavit. Transcripts of evidence totalled about 35,000 pages, and there were well over 50,000 pages of exhibits and dozens of binders of authorities.[81]

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80. *Ibid.*

81. In *Delgamuukw*, *supra* note 1 at 199-200, McEachern C.J. describes the volume of evidence as follows:

> A total of 61 witnesses gave evidence at trial, many using translators from their native Gitskan or Wet'suwet'en language; "Word Spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript evidence at trial; 5,898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross examination on affidavits . . . about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages. . . . All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.
>
> The plaintiffs filed 23 large binders of authorities. The province supplemented this with eight additional volumes, and Canada added one volume along with several other recent authorities which had not then been reported.

This description of the evidence reveals several inherent problems with the resolution of Aboriginal title claims by the courts. The vast amount of evidence, the nature of the evidence, and the number of lawyers required to develop argument, research facts, work with witnesses, and litigate the claim creates practical problems of organization, presentation, and scheduling. It is inappropriate that the formidable task of assimilating and familiarizing himself or herself with this huge body of material should be assumed by one person whose main frame of reference is Western legal theory and precedent. Complex and lengthy litigation also means expensive litigation, portions of which are paid for by federal and provincial taxpayers. The Gitksan and Wet'suwet'en claim is estimated to have cost $25,000,000 to bring to trial, and more costs will be incurred in negotiation or appeals to higher courts.[82]

Given the volume and nature of the evidence required to prove historical fact and to meet the tests for title set out above, special rules of evidence have been developed to assist the court in the fact-finding process. These rules have been developed under the rationale of necessity, in recognition of the fact that Aboriginal peoples do not have their own written histories, and the important role of historians and other social scientists in the fact-finding process. For example, exceptions have been created to the hearsay rule to allow the admission, through elders of a tribe, of oral history passed from generation to generation, and rules on opinion evidence have been relaxed to allow the opinions of social scientists, such as anthropologists, to be heard. In light of these developments, the difficulty faced by Aboriginal plaintiffs is not so much the admissibility of new and unfamiliar forms of evidence, but rather the weight or probative value to be given to such evidence.

Despite the creation of exceptions to rules of admissibility, judges continue to be influenced by familiar rules of evidence and the rationale for those rules, which render new forms of evidence

82. See K. MacQueen, "B.C. braces for ruling in $25M land claim trial" *Edmonton Journal* (26 January 1991) G3.

suspect. Of the various evidentiary problems associated with proving historical fact, we will limit our discussion to problems associated with hearsay evidence.

The hearsay rule prohibits the use of statements made out of court as "equivalent to testimony of the fact asserted, unless the assertor is brought to testify in court on oath."[83] The hearsay rule requires that witnesses speak in open court and only give testimony based on something which they themselves have perceived. The rationale for the rule is that the oath coupled with the opportunity to cross-examine allows the trier of fact to make reasonable inferences about trustworthiness. The witness's credibility can be assessed by observation of demeanour and cross-examination, a technique which has been revered in the adversarial system of fact-finding as "the greatest legal engine ever invented for the discovery of truth."[84]

It is trite to point out that in historical litigation eyewitness testimony is rare, if not completely unavailable. Consequently, most of the evidence admitted falls under exceptions to the hearsay rule. Such exceptions are made only when there are "circumstances surrounding the making of the statement which guarantee its trustworthiness" and "some grounds of necessity exist resident in the unavailability of the declarant or the inconvenience in requiring his attendance."[85] This reasoning underlies the rulings in *Delgamuukw* and interim decisions on both the admissibility and weight to be attributed to ancient documents, oral history of Aboriginal peoples, and expert opinions based on hearsay. What follows is a discussion of exceptions to the hearsay rule that are problematic in the *Delgamuukw* decision.

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83. P. Atkinson, ed., *MacRae on Evidence*, 3d ed. (Toronto: Carswell, 1976) at §437. For further discussion on the impact of the hearsay rule on admissibility and weight given to oral testimony, see C. McLeod, "The Oral Histories of Canada's Northern People" (1992) 30 Alberta L. Rev. 1277.

84. J. Wigmore, *Wigmore on Evidence*, vol. 5, 3d ed. (Boston: Little Brown, 1940) at §1367.

85. R. Delisle, *Evidence: Principles and Problems*, 2d ed. (Toronto: Carswell, 1989) at 364, commenting on Wigmore, *ibid.* at §1420.

(i) Ancient Documents

The ancient documents exception to the hearsay rule arises from the difficulty of proving handwriting by eyewitness accounts after a long period of time and from the fact that the attesting witnesses may be dead. The common law rule is that the document must be at least thirty years old, produced from proper custody, and otherwise free from suspicion.[86] Most provinces have passed legislation reducing the required age to twenty years. Two tests have been developed to address the issue of suspicion: the author of the document must be disinterested, and the document must come into existence before the claim has been contemplated or arises.[87] Once admitted, ancient documents are *prima facie* evidence of the facts stated in them. The document is not conclusive evidence in itself, and its value can be lessened by other admissible evidence. Once such a document is admitted, the burden lies on the party challenging it to convince the court that the document should not be given probative value.

In *Delgamuukw*, volumes of historical documents were adduced by the Crown. This placed on the plaintiff the difficult and costly burden of challenging either the admissibility or the weight of each document. This may be one of the reasons why an interim application was brought by counsel for the plaintiffs to prevent the admissibility of ancient documents on the grounds that the defendants could not prove their trustworthiness without the testimony of a qualified historian. The defendant's counsel argued that the documents were old enough and found in the right places, such as the Hudson's Bay Archives, and therefore should be admitted without further evidence of their trustworthiness. Further determination of trustworthiness was a question of weight to be debated at trial. In deciding the interim application, McEachern C.J. accepted the defendant's argument.[88]

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86. See *Delgamuukw* (1990a), *supra* note 5 at 23. See also *Delgamuukw, supra* note 1 at 244-245 and 254-256.

87. See *Delgamuukw* (1990a), *supra* note 5 at 23.

88. See *Delgamuukw* (1990a), *supra* note 5.

In this same decision, McEachern C.J. also made a ruling on the admissibility of historical opinion reports. Relying on *R.* v. *Zundel*,[89] he noted that historical treatises and expert testimony on historical facts are also admissible as exceptions to the hearsay rule.[90] He observed that where historical facts are clearly in issue, the general rule is that "opinion evidence may be given about topics of common or general knowledge, but conclusions based upon inferences drawn from unproven facts"[91] are not admissible. Applying the general principle to the interpretation of historical documents, he stated that while "experts cannot usurp the function of the court in construing written material," the fact-finding process "requires the assistance of someone who understands the context in which the document was created."[92] He drew a distinction between inadmissible broad generalizations of history, which may be the subject of disagreement, and admissible inferences that are linked to references in admissible documents. Admissible inferences are given significant probative value. Recognizing that the distinction may be difficult to make, he concluded that the task is difficult and he would have to do "the best [he] can."[93]

McEachern C.J.'s treatment of the reports of Trader Brown illustrate his approval. He saw them as "a rich source of historical information about the people he [Trader Brown] encountered," and had "no hesitation accepting the information contained in them."[94] The conclusions drawn by a historian, Dr. Arthur Ray, from the records of Trader Brown were characterized as the best "independent evidence adduced at trial."[95] Relying on this evidence, McEachern C.J. concluded that the Gitksan and Wet'suwet'en had a "rudimentary form of social organization."[96]

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89. (1987), 35 D.L.R. (4th) 338 (Ont. C.A.).
90. See *ibid.* at 26.
91. *Ibid.* at 27.
92. *Ibid.*
93. *Ibid.* at 28.
94. *Delgamuukw, supra* note 1 at 278. See also the discussion of historical opinion based on historical documents at 251.
95. *Ibid.* at 279.
96. *Ibid.*

The findings of law on the content of Aboriginal title flowed from this finding of fact.

The decision does not reflect an understanding of the unique problem of admitting ancient documents where the only documents available are written by non-Aboriginals and support a narrow interpretation of their rights. The result is to create an evidentiary imbalance. Unlike oral history, which has also been admitted as an exception to the hearsay rule, ancient documents do not need further corroboration to be given probative value by the court. Essentially, counsel for the plaintiffs sought equality of treatment of oral and written history, but this was not accepted by McEachern C.J. Instead, counsel was given the burden of rebutting a presumption that oral history is untrustworthy. The injustice of this approach to evidence is confirmed by a comparison with the treatment of anthropological testimony, discussed below.

(ii) Oral History

Oral history of Aboriginal people based on the successive declarations of deceased persons has been admitted in Aboriginal and treaty rights litigation under the rationale of necessity, because Aboriginal peoples do not have a written history.[97] In an interim ruling, McEachern C.J. suggested that oral history is admissible through existing exceptions to the hearsay rule concerning declarations of deceased persons and reputation.[98] The reputation exception allows for the admission of declarations made by deceased persons about ancient rights of a public or general nature commonly known by members of the community.[99] Examples in *Delgamuukw* include ownership, use of territory, ancestral culture, social organization, and spiritual connection to the land. A distinction is drawn between, on the one hand, particular facts known by individuals from which the existence of a public or general right can be inferred, and on the other hand, the reputed

97. See *e.g. Simon*, *supra* note 17 at 407, and *Baker Lake*, *supra* note 49 at 540.
98. See *Delgamuukw* (1988), *supra* note 5 at 190.
99. See Atkinson, *supra* note 83 at §§515-519.

existence of facts of a public or general nature commonly known by members of the community.[100] The principle upon which the reputation exception rests is that "such a reputation may be taken to be trustworthy because, all the community being interested, it would not exist unless true."[101] Thus, reputation as to public or general rights has been admitted as *prima facie* proof of the reputed right. Once admitted, the evidentiary burden shifts to the other party to refute the existence of the right.

In applying the reputation exception, McEachern C.J. disagreed that oral histories are *prima facie* proof of the public or general rights asserted in them. He insisted that the information in oral history is admissible only as proof of reputation or belief. For example, reputations as to ownership and use do not prove ownership and are not *prima facie* proof of ownership and use in fact. Consequently, further admissible evidence must be produced to corroborate oral history if it is to be given any probative value as to the truth of the belief asserted.[102]

McEachern C.J.'s restrictive and erroneous approach to the admission of oral history as 'reputation' appears to have been influenced by the fact that oral history is not organized or preserved in a way which is familiar to a court. For example, in his attempt to apply the reputation exception, he struggled with a distinction between history and anecdote. Counsel for the plaintiffs argued that such a distinction is contrary to "the approach taken by historians who are often persuaded to accept anecdotes as sufficiently reliable accounts of actual happenings."[103] An 'anecdote' may be accepted as historical 'fact' if scholars of repute are sufficiently satisfied with the accuracy of the source material; historical facts are always open to dispute and revision. Although McEachern C.J. agreed that the distinction between history and anecdote is contrary to how historians approach evidence, he concluded, "my answer . . . is simply that

100. *Ibid.*
101. *Ibid.* at §514.
102. See *Delgamuukw, supra* note 1 at 245 and 281.
103. *Delgamuukw* (1988), *supra* note 5 at 191.

we legal people have our own discipline and I think we must stick with it."[104]

Another distinction that McEachern C.J. struggled with was that between particular facts from which the existence of a right may be inferred and the reputed existence of rights based on facts of a general and public nature commonly known by all members of the community. Asserting, however, that he was exploring "unsurveyed legal ground"[105] in dealing with the difficulty of separating the public from the private in oral history, he was inclined to favour of admissibility in the hope that independent corroboration or confirmation through expert testimony would aid in the exercise at trial. As a practical consideration, he noted that it is necessary first to hear the evidence to determine if it is "a general historical fact or a particular or anecdotal fact."[106]

Whether considered as part of the threshold question of admissibility or the question of probative value, the distinctions raised by McEachern C.J. are problematic. The distinction between fact and anecdote may be foreign to an oral tradition given the interrelatedness of fact, legend, and religious belief in Aboriginal history. If emphasized in the context of admissibility, such distinctions are also morally repugnant because Aboriginal peoples would be forced to change their traditions so that their voice may be heard in court. Strict adherence to the reputation exception devalues the Aboriginal fact-finding process and denies Aboriginal peoples an account of their own history. Some recognition of this was shown by McEachern C.J. when he concluded in the trial judgment that the "witnesses do not respond easily to the concept of reputation evidence" and that he should not "disregard all the *viva voce* evidence which fails to comply strictly with the form of [his] reputation ruling," else "the plaintiffs could not otherwise embark upon the proof of their case."[107] Adopting this line of reasoning, he admitted much of the contested evidence, subject to objection and weight.

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104. *Ibid.* at 193.
105. *Ibid.* at 195.
106. *Ibid.* at 196.
107. *Delgamuukw, supra* note 1 at 254-255.

In the trial judgment, McEachern C.J. concluded that oral history is to be given little or no probative value. Concerns relating to the frailty of human memory, the accuracy of the oral record, and the role of culture (as distinct from historical fact) in the formulation of oral histories create a presumption that oral histories reflect subjective belief or "a romantic view of their history" which is "not literally true."[108] Quoting conflicting academic opinion on the accuracy of oral traditions and the influence of non-Indian narratives, McEachern C.J. concluded that oral history may only be useful "'to fill in the gaps' left at the end of a purely scientific investigation."[109] In his opinion, scientific investigation yields the best evidence; oral history is only useful in so far as it confirms other admissible evidence. Admitting that 'culture' may have a role in the formulation of opinion in these sciences, he admitted that a court may not be the best forum in which to resolve "such difficult and controversial academic questions."[110]

An examination of the law of evidence suggests that McEachern C.J.'s approach to the admissibility of oral history leads not only difficulty in practice, but is also wrong in law. In the recent decision of *R.* v. *Khan,* the Supreme Court of Canada suggested that it is inappropriate to admit hearsay through an exception which "deform[s] it beyond recognition and is conceptually undesirable."[111] The *Khan* case involved the admission of out of court statements made by a child to her mother relating to an alleged sexual assault by the accused. The testimony of the child did not fit within any of the established hearsay exceptions. Rather than exclude or distort the evidence, McLachlin J. held that it is open to the Court to create new hearsay exceptions where the circumstances meet the requirements of necessity and reliability.[112] In her rejection of the old approach to hearsay, McLachlin J. said:

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108. *Ibid.* at 247.
109. *Ibid.*
110. *Ibid.*
111. (1990), 59 C.C.C. (3d) 92 at 102 (S.C.C.) [hereinafter *Khan*].
112. See *ibid.* at 104.

> The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with *new situations* and *new needs* in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the *principle and the policy* underlying the hearsay rule rather than strictures of traditional exceptions [emphasis added].[113]

Given that the admission of oral history is a recent phenomenon, or, in the words of McEachern C.J., "unsurveyed legal ground,"[114] it is more appropriate to apply the reasoning in *Khan* than to make oral history fit within an existing exception.[115] Following *Khan*, the first question should be: is the reception of oral history "reasonably necessary?"[116] The Supreme Court of Canada and McEachern C.J. agree that it is.[117] The next question is whether the evidence is reliable, recognizing that the criteria for reliability will vary from case to case.[118] It may be that McEachern C.J.'s suspicions concerning the reliability of oral history led to his restrictive approach to the reputation rule.

It is useful to pause for a moment to consider the questions of reliability and the weight to be given to oral history. In *Delgamuukw*, the plaintiffs asserted that oral histories are trustworthy because of their antiquity and because "they are authenticated by public statement and restatement in accordance with the practice that what is stated at a feast must be challenged then and there, at once, or not at all."[119] Trustworthiness or reliability is ensured by exposing claims to rights to regular challenge and contradiction by elders and chiefs. Further, it was contended that the testimony of elders could be admitted as *prima facie* evidence of the facts stated therein because what they said was

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113. *Ibid.* at 100.

114. *Delgamuukw* (1988), *supra* note 5 at 195.

115. See McLeod, *supra* note 83 at 1287.

116. *Khan, supra* note 111 at 104.

117. See *Delgamuukw* (1988), *supra* note 5.

118. See *Khan, supra* note 111 at 105.

119. *Delgamuukw, supra* note 1 at 258-259. See also McLeod, *supra* note 83 at 1287-1288.

witnessed and acknowledged. In the words of counsel for the plaintiffs:

> Elders know that the important parts of their history, contained within the ada'ox [sacred oral stories of the Gitksan] or expressed through the kungax [spiritual songs of the Wet'suwet'en] have been told, heard and acknowledged many many times. This accumulated validation lies behind the present day chiefs [sic] insistence that a particular story is true and is not anything like mere hearsay.[120]

In short, the plaintiffs tried to illustrate that the reasoning underlying the admission of ancient documents and reputation evidence is equally applicable to oral history. Like the ancient documents of Trader Brown, oral history of the Gitksan and Wet'suwet'en came into existence before the claim was contemplated. Like reputation as to public rights, the rights asserted in oral history are commonly known by members of the community and have been exposed to contradiction. This suggests that such oral history would not exist unless it were true. McEachern C.J., however, disagreed. He pointed to the lack of uniformity in the telling of histories, the small size of verifying groups, the lack of detail about specific lands to which the histories related, the fact that the claim had been discussed for many years, and the fact that "much of the evidence was assembled communally in anticipation of litigation."[121] He concluded that oral history could only constitute proof of an early presence in the territory based on the evidence of archaeologists, linguists, and Trader Brown's records. He was satisfied that the elders honestly believed that everything they said was true and accurate, and he stated that when he did not accept their evidence, it was not because he thought "they [were] untruthful," but because he had "a different view of what is fact and what is belief."[122]

One has to question why it is more reasonable to expect fabrication in oral history than, as in *Khan*, in the testimony of a child. One can understand the desire for corroboration as a factor in assigning evidentiary weight, as expressed in *Khan* and

120. "The Address," *supra* note 27 at 35.
121. *Delgamuukw, supra* note 1 at 248.
122. *Ibid.*

Delgamuukw. However, the injustice to Aboriginal people becomes apparent when one considers the nature of additional evidence available in title claims. Given the meagreness of the written record and archaeological evidence, the main source of independent verification recognized by Western science is cultural anthropology. The lack of traditional forms of evidence suggests that a more relaxed approach to the probative value of oral history or anthropological testimony is required in order for justice to be served. In *Delgamuukw*, however, both oral history and cultural anthropology were treated as suspect, creating a cyclical pattern of doubt and an impossible evidentiary burden.

(iii) Anthropology and Ethics

As a general rule, expert opinions are admissible where an expert possesses some form of specialized knowledge, skill, or training sufficient for her to supply information and opinions not generally available to members of the public. Opinions based on hearsay — that is, opinions based on facts not known personally to the expert — are admissible subject to weight. A problem peculiar to the opinions of cultural anthropologists is that a substantial part of the testimony may be based on the testimony of others. Since Aboriginal title litigation involves a close study of people, their cultures, and their traditions, exceptions to the hearsay rule have been created to allow anthropologists to give opinions based on processes normal to their field of study, including statements made by others.[123]

Despite some flexibility regarding the traditional rules of admissibility, the weight given to anthropological testimony rests on the information upon which the opinion is based. The classical approach to evaluating opinions based on hearsay is to determine if the hearsay falls within an exception, such as ancient documents, or if it can be independently verified by admissible evidence. In

123. For a general discussion see I. Freckelton, "The Anthropologist on Trial" (1985) 15 Melbourne Univ. L. Rev. 360 at 368-370. See also *Milirrpum* v. *Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141 (N.T.S.C.).

R. v. *Lavallee*[124] the Supreme Court of Canada introduced a more relaxed standard: the Court held that it is not necessary that every single fact relied on be admissible in evidence. Rather, it is enough that some facts central to the opinion are admissible.[125] If the hearsay is not admissible because it does not meet the general tests of necessity and reliability, independent verification should be required. Consequently, anthropological opinions which rely in part on oral history should not be discarded as having little probative value merely because only parts of the history can be independently verified.

The problems created by strict adherence to the verification of facts upon which the opinion is based are evident in *Delgamuukw*. Noting differences in academic opinion on the reliability of oral history, McEachern C.J. concluded that the plaintiffs had a "romantic view of their history" and "that much of the plaintiffs' historical evidence [was] not literally true."[126] Further suspicion was cast on oral material because "the plaintiffs' claim has been so much discussed for so many years, and . . . so much of the evidence was assembled communally in anticipation of litigation" and "inconsistencies . . . are too great to be disregarded."[127] Such oral materials, he concluded, were not "reliable bases for detailed history"[128] and raised doubts as to the credibility of interviews with members of a culture as a detailed scientific method of investigation.

In contrast to its approach to anthropological testimony, the judgment generally accepted the factual accuracy of testimony by historians, linguists, and archaeologists, regardless of whether the expert appeared for the plaintiffs or the defendants. In certain cases, opinions were accepted even when conclusions were derived "[by] a mysterious process only properly understood by very learned persons."[129] It is clear that where expert opinion was

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124. (1990), 55 C.C.C. (3d) 97 (S.C.C.) [hereinafter *Lavallee*].
125. See *ibid.* See also McLeod, *supra* note 83 at 1288-1299.
126. *Delgamuukw, supra* note 1 at 247.
127. *Ibid.* at 248.
128. *Ibid.* at 281. See also discussion *ibid.* at 248-249.
129. *Ibid.* at 272.

based on hearsay in the form of ancient documents prepared by Europeans, McEachern C.J. had little difficulty assigning the opinion significant probative value. On the reliability of historical opinion, he said:

> Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves. Each side was able to point out omissions in the collections advanced on behalf of others but nothing turns on that.[130]

The difficulty of legitimizing anthropological opinion was exacerbated by the judgment's assumption that the evidence of cultural anthropologists engaged in participatory research was inherently biased. Although McEachern C.J. considered writings by anthropologists on the verification of oral history and theories of acculturation, he appears to have rejected all of the evidence of cultural anthropologists. There are a number of reasons identified in the judgment for the rejection of this evidence.

There is one primary reason for the rejection of virtually all of the testimony advanced by cultural anthropologists in *Delgamuukw*. The judgment presumes that they had a deep bias in favour of the plaintiffs that went beyond the normal biases associated with most witnesses. This deep bias leads the cultural anthropologist, unlike other experts, to become, in McEachern C.J.'s words, "more an advocate than a witness," and to be "very much on the side of the plaintiffs."[131] An apparently irreconcilable dilemma is created. Anthropology is the science in Western culture which is concerned with the workings of society and culture. As one writer has put it, anthropologists "can play a mediating role between the strangeness of an alien culture and the controlled arena of a court case by interposing a specialized, authorized Western discourse which seeks to express in Western terms aspects of other cultures."[132] For anthropologists to

130. *Ibid.* at 251.
131. *Ibid.* at 249.
132. See Davidson, *supra* note 3 at 28.

understand a culture, they must learn about it. However, once anthropologists engage in field study, a recognized technique of their profession, their objectivity is called into question. This is particularly so if their research is conducted in preparation for litigation, although that is commonly done by expert witnesses.

The judgment seems to imply that this lack of objectivity may be inherent in the discipline of anthropology and thus renders anthropological testimony unacceptable to the courts. The judgment speculates that the existence of pervasive bias, at least among the cultural anthropologists who appeared at the trial, "perhaps" stems from their adherence to the ethical standards of the profession as these are spelled out in the "Statement of Ethics of the American Anthropological Association."[133] This code states in part that:

> an anthropologist's paramount responsibility is to those he studies. Where there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honour their dignity and privacy.[134]

The reference to the Statement of Ethics implies that the evidence of cultural anthropologists must always be suspect because of an inherent conflict between the requirements of telling the truth demanded by the judicial system and an overriding ethical requirement to use whatever means necessary (perhaps lying) in order to protect the interests of the peoples with whom the anthropologist has worked. Regardless of the demands for truth, it may have been incumbent on the anthropologist to urge "almost total acceptance of all Gitksan and Wet'suwet'en cultural values" and that, in principle, their evidence would consequently "add little" to the accumulation of reliable facts.[135]

Most anthropologists would agree that "[e]thical issues are a major concern in anthropological work."[136] In a statement that points to the central issue raised in the judgment, Bates and Plog

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133. *Delgamuukw, supra* note 1 at 249.
134. *Ibid.*
135. *Ibid.* at 251.
136. Bates & Plog, *supra* note 12 at 455.

suggest that a "major ethical problem is how anthropological research should be used; and for whose benefit."[137] After a brief mention of concerns about objectivity and relevance to an examination of these issues, they conclude:

> Perhaps what is called for is a matter less of objectivity than of rigor. By using the most rigorous methods possible to evaluate their conclusions, anthropologists guarantee, if not absolute objectivity, at least comparability in the evaluation of theories and ideas.[138]

On this view, ethical conduct does not call for "protecting" members of a culture by any means possible, but, as is the case in all social science, for ensuring the rigor and comparability of results. That this view is compatible with the Statement of Ethics is supported by the fact that the statement of it by Bates and Plog appears in a popular introductory text written by two prominent American anthropologists. That statement alone provides sufficient factual evidence to counter any implication that all anthropological conclusions must necessarily advocate a client's point of view. The true issue is whether the method of study is in accordance with methods generally accepted in the field.[139] If the answer is yes, then there is no reason to presume that an anthropologist is more likely to distort the truth than any other scientist.

The *Delgamuukw* judgment does not recognize the problems inherent in the tailoring of written historical material and opinions based on such material as readily as it casts doubt on anthropological research. Expert research introduced in evidence is often commissioned solely for the purpose of litigation. The complexity of contemporary legal issues, for example, may force an interpretation of primary historical materials for a purpose not contemplated by the authors. In short, commissioned historians "look at history through the wrong end of the historical

137. *Ibid.* at 456.
138. *Ibid.*
139. See *Lavallee, supra* note 124.

telescope."[140] Robert Clinton describes the dilemma in the context of American Indian litigation as follows:

> They demand that legal history supply answers to contemporary questions possibly never asked in the distant era being studied. This perspective pervades their framing of hypotheses, their selection of historical materials, their analysis of the primary historical materials selected, and their conclusions. Rightly perceiving federal Indian law as the law of the conqueror, rather than of the conquered or displaced, such scholars tend to rely primarily or exclusively on the traditional non-Indian sources for their historical research. This approach frustrates efforts to understand Native American legal history as an on-going process of cross-cultural contact and adaptation. True, their work is relevant, but its very relevance clouds its objectivity. The demands or perceived demands of litigation have skewed sources and perspective.[141]

Clinton also argues that litigation pushes historical analysis into extreme positions. It tries to force a black and white interpretation of an ambiguous historical record.

If Canadian Aboriginal title litigation were reassessed in light of contemporary concepts of the equality of peoples, the need for interpreting the historical record would be substantially reduced but not eliminated. Rather than focus on proof of the existence of social organization past and present, this would be presumed and the questions of defining boundaries and extinguishment would be the focus of debate. However, these questions also require an historical analysis. One way to reduce the difficulties associated with commissioned expert opinion would be to give probative value to non-traditional historical sources and expert opinions in the assessment of historical fact. This would not resolve all of the problems raised by Clinton, but it would, at least, create a more balanced approach to the treatment of evidence by the court. The ideal role for experts as assistants in the resolution of claims is outside of an adversarial process, addressing defined questions and allowing room for minority opinion.

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140. R.N. Clinton, "The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation" (1986) 28 Arizona L. Rev. 29 at 38.

141. *Ibid.*

Conclusion

It is hoped that our comment on *Delgamuukw* illustrates the need for a new legal epistemology in Aboriginal title litigation. Although many would argue that law and justice are two distinct concepts, our view is that the goal of law should be justice. Justice requires an acknowledgement of the ethnocentric dimensions of Canadian law and legal institutions. We need to reject the myth that the law and legal process are value-neutral, and to construct a new jurisprudence which abandons outdated and inaccurate assumptions about culture and which adopts contemporary philosophies about the equality of peoples. Also needed is a critical analysis of 'reliable' and 'scientific' evidence. Opinions strongly influenced by ethnocentrism need to be displaced by opinions which begin from the premise that all societies are indeed organized and have their own institutions, which may or may not be radically different from our own. The law should cease to interpret historical fact in a way which favours the perceptions of one culture over those of another. The courts must do more than merely acknowledge the cultural bias in written accounts and must recognize the need to admit new forms of evidence.[142]

The tradition of relying on precedent to formulate the common law must also be reassessed where precedent is based on the discriminatory treatment of Aboriginal societies. The doctrine of precedent requires that like cases be decided alike. Underlying this process are concerns for uniformity, fairness, predictability, and impartiality. However, a reluctance to question previous rulings in the light of changes in society creates injustice. Reform requires the abandonment of existing criteria for proving Aboriginal title, as set out in the *Baker Lake* case and followed by McEachern C.J. in *Delgamuukw*.

Recognizing the difficulty associated with reconstructing the past, it is perhaps more appropriate to focus on results that promote the contemporary ethics of co-existence and equality,

142. We are advocating the development of an 'intercultural' concept of justice. We do not accept the presumption that cultural relativism implies that any practice of any society is necessarily appropriate.

rather than on legal rights based in historical fact. The approach we suggest would result in a radical shift in legal reasoning and legal process. For that reason, many would argue that Aboriginal rights cannot properly be addressed by Canadian courts. They would say that the role of a court is to decide facts and to rule on whether those facts establish legal rights. The relevant legal question, in their view, is not to what extent Canadian law *should* accommodate Aboriginal rights, but to what extent it *does* accommodate those rights.

Delgamuukw illustrates the many legal and intellectual impediments which distort the interpretation of fact and prevent the courts from accommodating diversity. Unless Canadian courts adopt a multidimensional perspective and begin to ask the right questions, law and justice may never meet in the courtroom. It would be a fitting legacy if *Delgamuukw* were to be remembered as a catalyst which led Canadian society as a whole, and the judiciary in particular, to make reform an immediate priority.