Ethnohistorical Evidence and First Nations, Métis, and Tribal Claims in North America: A Review of Past and Present Experiences with an Eye to the Future[i]

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Ethnohistorical Evidence and Aboriginal Claims in Canada and the United States

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Introduction

Aboriginal and treaty rights have been the subjects of litigation since the 19th century in Canada and United States.[1] Both countries also have tried alternative ways of resolving these claims, most notably claims commissions, albeit the courts still play the dominant role. In the United States, American Indian groups also petition the federal government, mostly through the Federal Acknowledgment Program [FAP], for recognition as tribes in order to become eligible for the political, social and economic benefits that flow from federal acknowledgement.[2] Regardless of the venue that native groups have used/are using, they, other parties to their disputes, and the public at large, have complained and are complaining that petitions are not dealt with in a timely, cost-effective and transparent (fair and predictable) manner. For example, Congress created the USICC in 1946 and expected it to deal in five years with all of the historical grievances that American Indian tribes held against the federal government. The commission operated for 32 years and its work was incomplete when Congress abolished it in 1978. The remaining cases were transferred to the Federal Court of Claims. History shows us that the problem with resorting to the courts, however, is that trials of major claims have become evermore lengthy and costly. In Canada for instance, initially claims trials lasted a few days at most, but recently, some have taken more than a year of court days and have cost in excess of $100 million.[3] The adversarial nature of litigation often is cited as the cause for drawn out trials.[4] Indeed, critics of the USICC complained that it failed to dispose of its cases in a timely fashion largely because operated like a court. The reasons were that Indian tribes insisted on having the right to make presentations and challenge those of the government and the Justice Department sought to minimize the federal government's liability. Also, the commissioners had looked to the Court of Claims for their precedents.[5]

The more recent experience of the FAP suggests, however, that the time-consuming decision-making that is characteristic of litigation and was a trait of the USICC proceedings cannot simply be attributed to their adversarial nature. The BIA's Branch of Acknowledgement and Research [BAR], which administers the FAP, operates more like an inquisitorial body than a North American court.

Petitioners present written briefs to the BAR, whose staff members make proposed findings. Their preliminary determinations are based on careful analyses of the evidence petitioners submit and/or additional information that BAR researchers collect. Before the Assistant Secretary of Indian Affairs makes a final decision, third parties are allowed to make interventions and the petitioners are given the opportunity to reply to them. Although battles in hearing rooms or courtrooms are thus avoided, critics fault the BAR for the glacial pace of its process. They point out that some tribal groups have had to wait more than twenty years for their applications to be completed.[6] Various explanations have been offered for these delays. Most often detractors say that BAR lacks sufficient staff to process applications[7] and the period for third-party interventions frequently is too drawn out.[8] Whatever the reason, delays in completing petitions have created a backlog of over two hundred cases.[9]

In addition to these problems of time and cost, Native and non-native critics of claims resolution processes and the FAP complain that the outcomes are not predictable. Frequently they assert that assessment procedures are inconsistent, similar lines of evidence are treated differently from case to case, or certain lines of evidence, most notably native oral histories and other non-textual records, are given little weight.[10]

This leads us to a basic question. Why do these problems arise regardless of the claims venue used? I believe that part of the answer lies in the nature of the applied ethnohistorical research Aboriginal and Tribal claims require for their resolution, the fundamental nature of the claims/FAP processes, and the diverse, often conflicting character of ethnohistorical evidence. These are issues that I will explore.

Applied Ethnohistory and Claims

Australian legal scholar Alex Reilly has noted that the historiographies generated by the scholarly community and the courts are fundamentally different because they serve wholly dissimilar objectives.[11] His observations would also apply to claims commissions/tribunals and the FAP. Academic scholarship does not seek to provide finality to historical interpretation. Rather, it is now widely, if not universally, accepted that our perceptions of the past are linked to the present because

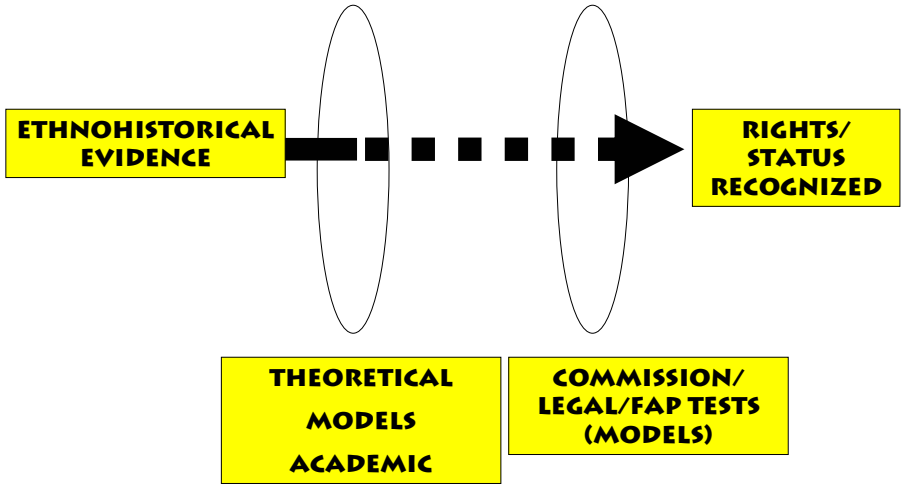
they are socially constructed and connected to current concerns. An analysis of the ethnohistorical literature regarding North American Aboriginal people makes this clear. Succeeding generations of scholars deployed different theoretical and methodological frameworks that have continually altered our understandings of Native history. In this way, scholarship has helped to keep the Aboriginal past alive in the academy and connected to its present interests.

Reilly points out that courts use history to bury the past rather than to continually revisit it. This is because they use historical 'evidence' to resolve disputes that arise from the contested past so that parties to litigation can move forward. History was/is also used in this way by claims commissions and the FAP. Given that adjudicators must provide resolutions in a timely fashion, they may have to invent historical 'facts' for decision-making purposes. Supreme Court of Canada Justice J. J. Binnie acknowledged this reality in *Regina v. Marshall* (1998), when he responded to criticisms from the academy about the way trial judges used Native history in their decisions.[12] Binnie pointed out to these critics: 'the law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus.'[13] Petitioners to claims commissions and the FAP also cannot wait indefinitely.

These dissimilar approaches to history have important implications for claims resolution proceedings. Reilly points out that historical evidence enters claims trials from the dynamic context of the academy, but 'the law's approach to history is far from dynamic' because it 'assumes that the past belongs to another realm of time' that can be separated from the present and understood on its own terms.'[14] For pragmatic reasons, claims commissions and the FAP must adopt a similar operating assumption. While this may be the case, the courts, claims commissions, and FAP construct models so they can imagine (create) a past to suit their needs. In this way their' view of history is, in fact, a very presentist one. Significantly, the models of the USICC, the courts, and FAP usually have been/are constructed in reference to extant jurisprudence and/or legislation rather in consideration of past or current academic

discourse. On the other hand, ethnohistorical experts who appear for or against Aboriginal claimants draw their theoretical (interpretive) perspectives mostly from the latter discourse. This means that claims litigation and FAP processes are exercises in which aboriginal pasts are filtered through multiple sets of academic and legal models, or lenses, and Aboriginal and tribal rights are acknowledged (created) or denied on that basis. Until very recently, Indian, First Nations, and Métis perspectives had little direct input.

FIGURE 1
INTERPRETIVE PROCESS IN CLAIMS/TRIBAL ACKNOWLEDGEMENT PROCEEDINGS



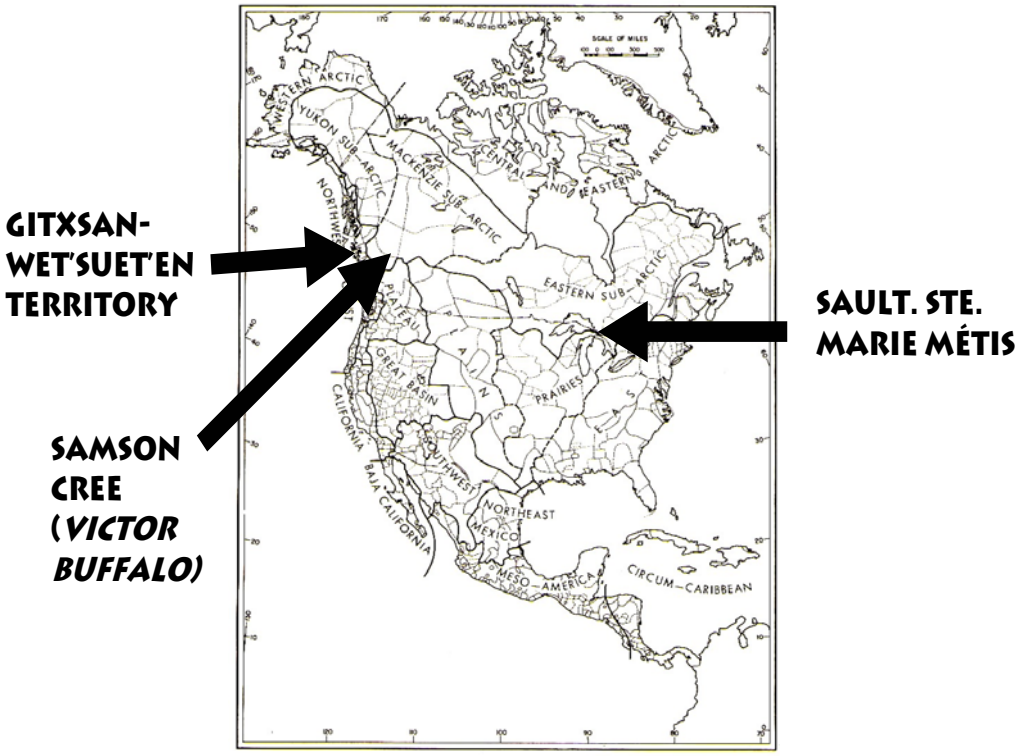
It is clear that discussions of the theoretical models that shape the evidence presented in claims proceeding should be a central aspect of expert testimony. In the 1950s, which were the formative years for the USICC, theoretical discussions were an important feature of the testimony of opposing experts. For example, in the California Indian Claims (Dockets 31 & 33), opposing anthropological experts debated the merits of interpreting the state's Indian past from the culture area framework, which dominated North American Anthropology during the first half of the Twentieth Century (and remains an influential perspective), or from the point of view of the cultural ecological approach, which, in the 1950s, was a relatively new way of looking as culture/environment relationships.[15] Parallel debates took place in

the Mid-Western claims that came before the Commission.[16] My recent experiences as an expert witness in several claims cases in Canada indicate, however, that too often such discussions are not a feature of Canadian trials. Rather, most experts spend their time contesting the details ('facts') about the past. As a result, too often trial judges are not provided with the information they need to appreciate the intellectual roots of the historical controversies that are brought before them in the courtroom, nor are they offered explanations of how and why experts identified certain 'facts' and omitted others.[17] It is not possible to determine the degree to which BAR personal take into account contrasting theoretical perspectives when they interpret historical evidence, because public hearings are not part of the FAP and the BIA does not provide transcripts of its in-house deliberations.[18]

A very important issue that Binnie and Reilly did not address is the fact that the claims processes tend to destabilize knowledge about local Native History. This is because one or both of the opposing parties (usually Aboriginal People as petitioners or defendants)[19] will undertake new empirical research and/or advance new interpretive/theoretical models. One important reason for this is that many Aboriginal groups had not been the focus of scholarly research prior to the time they filed their claim. Two landmark Canadian cases offer examples. One is the Gitxsan-Wet'suet'en's land claim registered as *Delgamuukw v. Regina* (1998) and the other is the Sault Ste. Marie Métis hunting rights case known as *Regina v. Powley* (2003). [**Figure 1]** The Gitxsan-Wet'suet'en live in the much-studied Northwest Coast Culture area, but their territory lies inland in the Skeena River basin. Prior to the 1980s, most of the extant ethnographic literature focused on their coastal Tsimshian neighbors living to the west, whom anthropologists regarded as being more typical Northwest Coast people, or the Sekani living to the east, who were considered to have a culture that was characteristic of the Subarctic culture area. Historians of the Métis, on the other hand, largely had ignored the Sault Ste. Marie community because they were more interested in the relatives of these people who lived in the prairie region of Western Canada. Also, they assumed that this community had been assimilated by the late 19th Century. [20] In this respect, the Sault Ste. Marie Métis found themselves in a situation that was similar to that of many eastern and southern United States FAP

applicants, who often have had to challenge popular and scholarly notions that their ancestors had assimilated to the point that they ceased to exist as an identifiable people or as a tribe.[21]

Figure 2: Gitxsan-Wet'suet'en and Sault. Ste. Marie Métis and Samson Cree homelands on Culture Area Map

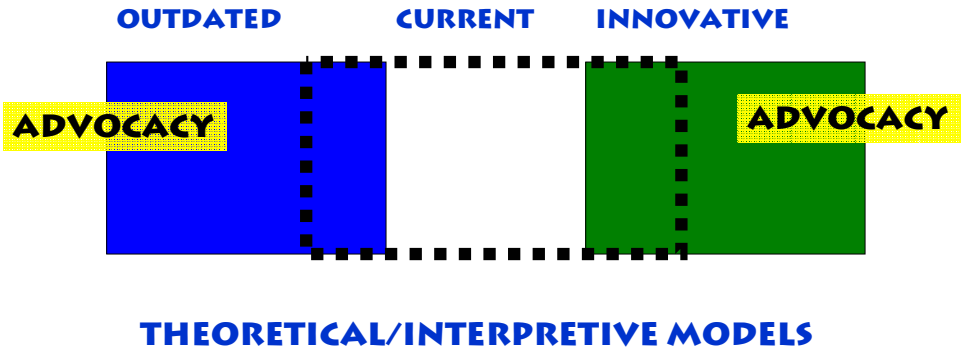


Theory and advocacy

From the above it is clear that when judges, commissioners, or BAR staff weigh the merits of competing historical interpretations they face a difficult task of sorting out pure advocacy from opinions that are based on currently accepted scholarship and/or from data generated by new claims-oriented research. Regardless of the venue where it unfolds, their challenge is further complicated by the fact that claims process typically involve having petitioners and their experts present interpretive theoretical frameworks that address the tests or recognition guidelines (models) that commissions, courts, or FAP have established in ways that maximize

the scope and value of the claim being put forward. Conversely, the government and any interveners who oppose the claimants, advance models that serve to undermine or limit the scope the claim being advanced and minimize its negative financial and/or economic implications. As the above discussion suggests, the ethnohistorical experts who are involved in these exercises usually have a potpourri of theoretical and methodological approaches to choose from. These include 'intellectual artifacts' that have been left behind by previous generations of scholars as the field of ethnohistory moved forward. These artifacts exist in the form of unpublished and published work. Many of the latter have an aura of legitimacy. This is because they had been peer-reviewed and carry the stamp of approval (however dated) of scholarly journals and/or institutions. In other words, it is not uncommon for adjudicators to have to choose from a range of theoretical models that include outdated (abandoned) outlooks at one end of the spectrum, through a range of models currently under consideration in the academy, to cutting-edge constructs that are based on new research. (Figure 2) At the extreme other end of the spectrum of possible interpretations are those that are based on pure speculation. This range of opinion was presented in *Delgamuukw*.[22]

Figure 3: Range of expert opinion



Although it may be clear which interpretations fall on opposite ends of the range and are mere advocacy, propositions that fall within the limits of currently acceptable scholarly discourse are harder to identify because these limits are continually shifting. For this reason, judges and other claims adjudicators need to know the intellectual pedigrees of the experts who appear before them and understand the origins and current academic status of the theories these specialists advance so that they are properly informed when making their determinations. It is especially important to indicate how particular frameworks and conceptual categories bias historical interpretations in ways that are relevant to the issues that are in dispute. Unfortunately, all too often this is not done. Partly this is because extensive historiographic discussions, such as the plaintiffs attempted in *Victor Buffalo*, add significantly to the length and expense of trials and hearings. This is one of the reasons why this case cost over $100 through the trial phase. Commonly another reason for the omission of lengthy historiographic presentations in court is that many judges have little interest in what they regard simply as ongoing 'academic debates.' Perhaps, as Binnie's comment cited above suggests, this attitude may arise in part from the judiciary's perception that these debates are never abandoned or resolved and, more importantly, the notion that documents are 'plain on their face' and facts exist independently from theoretical frameworks.[23]

Certainly it is risky for Aboriginal claimants not to address the genealogy of academic scholarship that is presented in court because traditional interpretations and outdated notions often have more appeal to judges than do those arising from newer claims-research. There are two primary reasons. The first is the understandable suspicion that new interpretations are mere advocacy. This was the case in *Delgamuukw,* where the trial judge opted for an interpretation that was based on older, mostly pre-1970s ethnographic literature. Ironically, it turns out that key elements of this literature, particularly notions of cultural ecology based on Steward's writing, were rooted in research undertaken for the United States Justice Department in opposition to claims Indian tribes brought before the USICC.[24] The second reason older perspectives have appeal to the courts is that they often suggest less disruptive remedies. This is because much of the older (pre-1970s) scholarship was rooted in

evolutionary theories and nation-building narratives that helped legitimate the colonial dispossession and marginalization that Aboriginal people seek to redress through their claims. If, for example, evolutionary economic outlooks are abandoned in favor of alternative perspectives it will be harder to reject Native people's claims for commercial harvesting rights. The *R. v. Van der Peet* (1996) fishing rights lawsuit involving the Stó:lō of British Columbia is an illustration. One of the several reasons the trial judge gave for denying full commercial fishing rights to this First Nation was that anthropological experts, including those who appeared for the plaintiffs, had testified that the ancestral Stó:lō had a 'band' rather than a 'tribal' culture. This led the judge to conclude that it was not likely that they had the capability of engaging in the kind of regular market exchange that was characteristic of more advanced societies.[25]

Métis rights cases offer another example. Most of the literature concerning the history of these people is cast in an evolutionary narrative. From the outset historians viewed them as a people who combined the 'primitive hunting and gathering life-style' of their aboriginal ancestors with the mercantile era fur trading economy introduced by their European relatives. Until recently it was commonly believed that the socio-economic conditions that were conducive to mixed economies/societies of this sort only existed in limited areas of Canada (the Great Lakes and Prairie West regions) and for short periods of time (the post-contact Mercantile era that ended in the late 19th Century).[26] This old orthodoxy not only implies that Métis communities did not form in many areas of Canada, but it also suggests that most of them would have ceased to exist when the mercantile era yielded to the industrial age in the late 19th Century. For these reasons, Métis claimants now face the difficult task of challenging key elements of the academic historiography about them. This was an important aspect of the *Powley* trial.

Model-driven research

The different ways that the academy and the courts approach history also means that scholarly and applied litigation-oriented research differ in significant ways. In the academy, ideally, scholars continually test their theoretical models of

aboriginal societies against data they collect in the field or archives. As noted, however, ethnohistorical expert witnesses and BAR staff are expected to find data and offer interpretive frameworks that 'prove' claimants do, or do not, fit the model of Aboriginal culture that has been established for the purpose of determining rights, awarding compensation, or granting tribal recognition. Given that these models are based on western legal and scholarly notions, Native claimants are put in the very difficult position of having to assert the aboriginality of their cultures in ways that resonate with these non-indigenous perspectives. Given that the models used by commissions, courts, and FAP drive claims research and the presentation of evidence, it is especially important to consider what these constructs have been/are and think about the implications that they have had/are having for gathering and interpreting ethnohistorical data. Because of space limitations, I will focus on three models, those of USICC, the FAP, and the Supreme Court of Canada.

The USICC model was a product of the 1946 claims commission act and American case law pertaining to Indians as it existed to the mid-1950s. For claimants to be successful they had to meet a four-part test. They had to prove that: (1) their ancestors were members of an 'identifiable group' that (2) communally owned a (3) distinct territory, which (4) they effectively used and occupied to the exclusion of other groups for (5) for a reasonable length of time prior to having been dispossessed unfairly or illegally (i.e., without the benefit of an equitable treaty or by conquest).[27] A number of anthropologists who agreed to appear as experts in USICC hearing complained that it was unreasonable to try and shoehorn the highly varied land tenure/land use schemes of American Indians into this single mold. They had not choice but to attempt to do so, however. As I have discussed elsewhere, this model, and the adversarial nature of the proceedings, drove anthropologists into two camps—one which appeared in support of Indian claims and the other which opposed them. **Table 1** summarizes the arguments and theories each 'camp' advanced. Considering the particular model experts had to address, and the era and dynamics of the USICC hearings, the arguments the opposing sides advanced are not surprising.[28]

The USICC model was an artifact of Lockean-based property theory, American jurisprudence to the 1950s, and the United States Indian Claims

Commission [USICC] Act of 1946.[29] From the outset, its key elements raised questions about aboriginal political organization and land tenure practices, particularly the scholarly meanings of such basic terms as band, tribe, and nation, the problems of identifying autonomous groups in documentary records, and searching for evidence that establishes or challenges the existence of territorial boundaries. Ethnohistorians deliberated all of these issues in USICC commission hearings for almost 30 years. The debate was especially heated in the 1950s, which was the formative decade when the first cases made their way before the commission. In 1955, Kroeber noted that there were two problems associated with using political anthropology terminology in claims cases.[30] First, anthropologists did not use their terms with the degree of consistency that the law required. Terminological confusion, particularly over the meaning and utility of the notion of the tribe continues.[31] Second, and more troublesome, he believed the terminology biased the presentation of evidence before the USICC. Kroeber noted, for instance, that the term 'band' implied a nomadic existence and a lower level of socio-political organization than the 'tribe'. It was for this reason that he coined the term 'tribelet' to describe the autonomous land-owning groups of California. Kroeber noted that latter groups were smaller in size than tribes.[32] He feared that if these groups were designated as bands, this would predispose the commission to think of the many small and autonomous land-using groups of pre- and early post-contact California as having been nomadic and lacking strong notions of territoriality.[33]

The Mid-Western treaty cases that came before the USICC in the 1950s raised this and other issues about using anthropological models to organize and present evidence in claims cases. In the Mid-Western cases it became clear that the most basic and persistent of all North American anthropological classification schemes, the culture area approach, filtered information in ways that could affect claims outcomes. In some culture areas, such as that of the Eastern Woodlands, the assumption was that Indians were not nomadic, especially those having horticulture, and that they had well-developed tenure systems, which included bounded and defended territories. This was also presumed to be true of the Southeast culture area. The Subarctic, on the other hand, was regarded as the region of 'band' societies; the Plains region was considered

to have been the domain of nomadic buffalo hunters; and for some anthropologists, the Great Basin was the region of primitive gatherers, where there was little social/political organization beyond the family and they lacked notions of ownership. In other words, the culture area model implied, among other things, that different regions represented different levels of political development and land tenure regimes.[34] So, for example, in the Iowa Tribe Claim (Docket 138), when government expert Margaret Wedel argued that her research indicated that the tribal boundaries of the Sac and Fox were fluid, overlapping and otherwise ill-defined on the eve of treaty-making in the area, Irving Hallowell objected. He replied that he was surprised to hear this. Hallowell added that these two tribes: 'are not considered nomadic primarily because they belong to this Eastern Woodlands Region or cultural area, in which there are no nomadic tribes.[35]

In 1978, when the BIA formalized its process for recognizing tribes whose relationship with the United States had lapsed or never been established, it identified seven criteria applicants must meet to be successful (**Table 2**),. The requirement that petitioners establish links with an 'American Indian entity,' which 'comprises a distinct community and has existed as a community from historical times' echoes the USICC's model, which had stressed that claimants had to demonstrate that they were descended from an 'identifiable group'. Criteria three and five constitute a significant departure from the USICC model in that they explicitly require petitioners to prove that their ancestor had acted as an autonomous political unit and that the community continues to do so. This is an understandable requirement given that the primary purpose of obtaining acknowledgement as a tribe is to establish a political relationship with the United States as a sovereign group (domestic dependent nation). In contrast, USICC emphasized 'identifiable groups' as being land-using/land-owning entities without explicitly specifying that they had to have been political in nature.

TABLE 1: USICC CLAIMS

Proposition/theory	Authorities/evidence cited/opinion	Examples of Cases where this was argued
EXPERTS FOR INDIAN CLAIMANTS		
Notions of ownership and tenure systems were universal.	New literature of human ecology that suggested all primates were territorial.	California Dockets 31/33
Groups lived in contiguously bounded territories.	It was a tradition in North American anthropology to map them that way. Linguistic, tribal, and culture area mapping practices were offered as examples.	California Dockets 31/33
Effective use and occupancy of territories has to be measured in esthetic, spiritual, and utilitarian [subsistence] terms.	Holistic approach to culture	California Dockets 31/33
Epidemics did not lead to the abandonment of territory due to depopulation.	Speculation by A. L. Kroeber	California Dockets 31/33
Migration and warfare did not lead to the creation of no-man's lands or to the sharing of territories	Speculation by A. Wallace	Iowa claims (Doc 138)
EXPERTS FOR JUSTICE DEPARTMENT		
Tribal territories often were neither contiguous nor well-defined.	Emerging literature of cultural ecology	California Dockets 31/33 and Great Basin cases
Effective use and occupancy was defined solely in utilitarian/subsistence terms.	Emerging literature of cultural ecology	
Notions of property were not universal but appeared only at certain stages of cultural evolution.	Multilinear evolution/cultural ecology of Julian Steward and Marxist perspectives of H. Hickerson	Great Basin Cases
Notions of property ownership and the political institutions needed to sustain them arose among many groups as a result of contact with Euro-Americans.	Speculation of J. Steward and conclusion of his based on interpretation of ethnohistorical data. Also a research-based conclusion of H. Hickerson.	Great Basin and Ojibwa cases
Post-contact trade, war, migration and epidemics led to the creation of contested 'no-man's lands' and vacant spaces.	Opinion of H. Hickerson and M. Wedel based on ethnohistorical research	Iowa and Ojibwa cases

TABLE 2
FAP RECOGNITION GUIDELINES

1	**The petitioner has been identified as an American entity on a substantially continuous basis since 1900.**
2	**A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.**
3	**The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.**
4	**The group must provide a copy of its resent governing documents and membership criteria.**
5	**The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes, which combined and functioned as a single autonomous political entity**
6	**The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian Tribe.**
7	**Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.**

In Canada, the Supreme Court began developing a general conception of aboriginal cultures and history in piecemeal fashion mostly through a series of landmark decisions beginning in 1990. The key components of relevance to the present discussion are listed in **Table 3**. Again, there are striking similarities to the USICC and FAP models. Petitioners must be descended from an 'identifiable group' that lived as an 'organized' society, or in the case of the Métis, as a distinct 'community'. Aboriginal title claimants must establish that they have sustained ties to their traditional territories, which their ancestors had exclusively used and occupied.[36] Claimants who are asserting aboriginal and treaty rights rather than title claims must prove that the rights claimed are based practices that derive either from pre-contact times in the case of First Nations and Inuit people, or from the post-contact-pre-Crown sovereignty era in the case of the Métis. In both instances the

traditional practices must be proven to be integral (defining) to the claimants' aboriginal cultures.

These three models are based on a number of fundamental assumptions: (1) *historical groups can be readily identified*, (2) these groups lived in clearly *definable (bounded) territories*, which they occupied to the near exclusion of their neighbors, (3) Aboriginal cultures can be meaningfully dissected into *identifiable components*, (4) the *relative significance* of each component for the whole can be clearly established, (5) the *essence* of each trait can be discovered, (6) traits or trait complexes can be ascribed to *historical peoples* and (7) the *persistence or disappearance* (continuity) of any trait or people can be readily determined. All of these are problematic notions when viewed from the perspective of the ethnohistorian.

TABLE 3
SUPREME COURT OF CANADA MODEL

1a	**Organized society**	First Nations claimant(s) are members of an organized society that has existed from the time before Europeans arrived. (*R. v. Sparrow* 1990)
1b	**Historic community**	Metis claimant(s) are members of Metis community that has existed from the time before the Crown exerted effective sovereignty locally. Community membership is determined by: [a] self-identification, [b] community acceptance, and [c] demonstrable historical connection. (R. v. Powley 2003).
2	**Aboriginal title**	to establish a claim to aboriginal title, the aboriginal group … must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty.… Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.. (*Delgamuukw v. British Columbia,* 1997
3a	**Defining cultural traits**	Rights are based on traditional practices [originating in the pre-contact era] that were 'of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive.' Furthermore, 'the practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.' (R. v. *Van der Peet* 1996
3b	**Defining cultural traits (Métis)**	The test for Metis practices 'should focus on those practices, customs and traditions that are integral to the Metis community's distinctive existence and relationship to the land.' This can be most appropriately done by focusing on post-contact but 'pre-control' [pre-Crown sovereignty] in a particular area. (R. v. Powley 2003
4	**Modern form of traditional practices**	Existing traditional practices (rights) are affirmed in a contemporary form 'rather than in their primeval simplicity and vigour'. The notion of 'frozen rights' must be rejected. (*R. v. Sparrow*
5a	**Continuity-title claims**	At sovereignty, occupation must have been exclusive… The requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. (Delgamuukw v. British Columbia, 1997
5b	**Continuity-rights claims (FN & Inuit)**	Traditional practices derive from those of the pre-contact era. (R. v. Sparrow 1990)
5c	**Continuity rights claims (Métis)**	Traditional practices derive from the post-contact-pre-Crown sovereignty era.

Terminology and evolutionary perspectives

The kinds of issues that arose fifty years ago because of the linkages of anthropological terminology with evolutionary notions remain a problem. This is abundantly clear from recent litigation in Canada, as the *Van der Peet* case cited above illustrates. It was also an issue in *Delgamuukw*. It is also likely to surface as a problem in future Métis cases. The reason for this probability is that most of the scholarly literature about the Métis is cast in evolutionary perspectives. The common thesis is that the Métis were a people who had one foot in the primitive world of hunter/gatherers and the other in the realm of mercantile capitalism, which was associated with the pre-industrial fur trade. It is widely assumed that Métis communities did not form where conditions were unfavorable for these worlds to mesh; it is also commonly supposed that the communities that had crystallized dissolved in the latter half of the 19th century with the passage of the mercantile age.[37]

Métis communities pose other very difficult challenges for the courts' perception of Aboriginal society. *Powley* established that Métis rights had to be linked to specific Métis communities, without defining the nature or limits of the latter or indicating how they might differ from the 'organized societies' of First Nations. Research makes it clear that no Métis' physical settlements were (are) sustained solely by the economic activities that took place within their built-up areas (on-site wage labour, gathering, farming, domestic work, etc.). Rather, community members engaged in spatially extensive activities, such as collecting, fishing, hunting, trapping, trading, and transportation work, which complemented those based in the settlement. The Métis commonly established seasonal out-camps to conduct these extra-settlement livelihood practices. Consequently, communities were spatially dispersed genealogical, sociological and economic entities that were anchored at sites where families maintained households. Frequently these regional communities overlapped with one another and the territories of the local First Nations.[38] In other words, except for their permanent and seasonal settlements, the Métis did not use and occupy territories to the exclusion of others. This means, of course, that after the formation of regional Métis communities, First Nations also did not exclusively use and occupy their territories.

Culture element outlook

The problem with viewing aboriginal cultures as collections of elements is that every aspect of this approach has been the subject of lengthy and, in most cases, unresolved scholarly debate. For example, the requirement that rights can be derived only from 'integral (culturally defining) traditional practices' implies that Aboriginal cultures were fundamentally different from those of European newcomers. While this is no doubt the case, the problem is that, since the birth of their discipline in the 19th century, anthropologists have held very different opinions about what the nature of these differences were (are). Leading historians of anthropology have noted that their field of scholarship initially was conceived of as the study of the 'primitive.'[39] In other words, 'native others' were thought to be culturally less advanced than Westerners, particularly in terms of their political and economic development. Although the search for the 'primitive' has long ceased to be fashionable, echoes of the search remain in ethnohistory debates about whether Aboriginal people were more spiritual and less materialistic than westerners, about whether Aboriginal people engaged in external exchange primarily for ceremonial/political reasons rather than for economic gain,[40] and about whether all Aboriginal people had well-articulated land ownership schemes before Europeans arrived.[41] These are all 'hot-button' issues in rights litigation.

The supposition that 'integral' or culturally defining traditional practices can be readily separated from other traditions for study and the determination of rights raises a host of other old issues. Essentially this is because it calls for a return to a 'culture element' approach, which was a perspective that held sway during the early 20th century and was a key feature of presentations before the USICC in the 1950s.[42] Anthropologists abandoned this outlook long ago, opting instead for more holistic perspectives that treat cultures as integrated and dynamic systems that amount to more than the sums of their components. The idea that certain practices can be defined as being more integral' or 'culturally defining' than others is even more problematic. This is because scholars have long recognized that the cultural elements a researcher identifies mostly reflect his/her theoretical dispositions and ideas about how the 'native other' is to be defined and cultures classified. One key area of

cleavage has been over the issue of whether one should emphasize materialistic dimensions or ceremonial/spiritual aspects. Experts drew this old debate into the hearing rooms of the USICC in the United States in the early 1950s and it is still with us.[43] Because early (pre-claims era) anthropology emphasized ceremonial, religious, and mythical aspects of Aboriginal culture,[44] First Nations and tribes often have to confront the old ethnographical literature when they assert Aboriginal and treaty commercial hunting and fishing rights.

Another weakness of the old cultural element approach was that definitions of the scope of trait was arbitrary and depended on whether the researcher was a 'splitter' or a 'lumper.' For example, should salmon fishing be regarded as a trait or included as a component of the trait of fishing? Issues of this type now are the subject of litigation under the regime that the Supreme Court of Canada has established. *Regina v. Powley* is a good example. At the trial of this case I was aggressively cross-examined on the question of whether Métis hunting rights should be determined on a species by species basis (the Crown's position) or defined more broadly as an aspect of the right to make a livelihood off of the land (my position). Undoubtedly, the most controversial aspect of defining the scope of Aboriginal livelihood practices concerns the question of whether these customs included a commercial component. This is often an issue in treaty rights claims. I addressed this question in the first claims case in which I was involved. This was the Treaty 8 hunting rights case of *Horseman v. Regina* (1990). I argued that commercial and subsistence practices were inseparable in 1899–1900 when the Northern Alberta Cree signed the treaty. [45] I cited the example of beaver, which was the staple commodity of the Pre-confederation fur trade. Aboriginal people ate the meat, used and sold castorum, and used and sold the pelt. With the proceeds they purchased their hunting and trapping outfits.[46] Similar questions arise with respect to West Coast fishing rights cases.[47]

In my opinion, Métis claimants pose particular challenges for the 'integral trait' approach to rights determination. This is because, as the court acknowledged in *Van der Peet,* Métis communities emerged after contact as a consequence of the melding together of Euro-Canadian and local Aboriginal cultural traditions. This raises a fundamental question: Can there be any integral cultural practices (perhaps

the Mitchif language for some groups) that define these peoples (are unique to them), or does their cultural distinctiveness arise from the way they combine these dual traditions? In the economic sphere, for instance, most historic Métis communities had mixed economies that combined making a livelihood off of the land through hunting, fishing, trapping and collecting for commercial and subsistence purposes, with permanent and/or seasonal wage labor, small-scale farming for commercial and subsistence purposes, and various types of entrepreneurial activities, most notably fur trading and operating various sorts of transportation services. They were opportunistic economies, which meant that the relative importance of each of these sectors to the whole, and of subsistence to commercially-oriented activities, varied regionally according to local ecological circumstances and temporally in reaction to fish and wildlife population cycles and local markets. This means one cannot determine whether a practice was integral based on a single snapshot in time, or even several of them.

Documenting Continuity

USICC proceedings, the Canadian courts, and FAP applications all have raised issues about the historical continuity of tribes, communities, and/or cultural practices. The arises from the notion in law that aboriginal rights are grounded in pre-sovereignty/pre-Crown polity or society and continue in force until expressly extinguished by actions of colonial or post-colonial states. This notion has had/has important implications for ethnohistorical experts who gather evidence for petitioners and defendants in claims. As noted above, petitioners before the USICC had to demonstrate that their ancestors had used and occupied their traditional lands for a 'reasonable length of time' before they had been dispossessed. The FAP, on the other hand, expects petitioners to prove they are a distinct community that has existed from historical times until the present. It further expects these applicants to establish that they have exerted political influence or authority over their members as an autonomous entity from historic times until the present (Table 2). Canadian courts, on the other hand, oblige First Nations claimants to demonstrate that they have occupied their territories and engaged in cultural practices there since pre-contact

times. The Métis must trace their communities' roots and cultural practices back to the post-contact-pre-Crown sovereignty era.

The requirements that applicants meet these various continuity tests raise a number of critical issues. One relates to that fact that some claimants are much more fortunate than others in terms of having suitably detailed and complete records to consult. Partly this is because of the fundamental fact that contact unfolded over differing lengths of time in North America. For example, contact on the east coast of North America began almost 400 years before it began in the Pacific North West and in British Columbia and 500 years ahead of when it began on the Canadian Central Arctic coast. This basic historical fact has a number of serious implications for the tasks eastern American and Canadian groups face when documenting their continuity. The farther back in time a group must reach to its pre- and early-post-contact past, the more likely there will be significant gaps in the oral, documentary, and other records that arise from the longer exposure to displacement and assimilation pressures and the accidental or deliberate destruction of documents.[48]

At the local level, the differential intensity of Aboriginal-non-aboriginal interaction can have a strong impact on the production of documentary records. In Canada, for instance, many Aboriginal and treaty rights cases concern economic rights, especially the right to make a livelihood off of the land through commercial and subsistence fishing, hunting, and trapping. Canada's colonial past, especially its fur trading past, means that the most important sets of documentary records for most of these claims are those of the fur trading companies, especially the archives of the Hudson's Bay Company. The latter archival records, which span more than 3,000 linear meters of shelf-space, are the critical documentary sources for the bulk of Aboriginal claims throughout the Canadian North, the Prairies, and portions of British Columbia. The company's posts, and those of its rivals, were, in effect, Euro-Canadian observation stations. Their location and position on lake shores and riverbanks of fur trading transportation networks strongly determined the size and quality of the documentary record that traders generated. District headquarters, transportation junction points, and major trading posts often produced vast records. York Factory on western Hudson Bay is a striking example. Records for this post

number in the thousands of volumes spanning the period from the 1680 to the 1950s. The First Nations and Métis communities that developed adjacent to major trading and transportation operations therefore have better prospects of collecting the documentary information they need for their claims than do those Aboriginal people who lived near small outposts on the extremities of the trading networks. For these more remote communities, oral histories likely will be the prominent, perhaps sole, line of evidence.

The *Powley* case serves to illustrate these kinds of evidentiary problems. As I have noted, game hunting practices were a key issue at trial. The problem we faced was that there are very few documentary records that describe the economy of the community's hinterland. Primarily this was because Sault Ste. Marie lay on the major fur trading route that connected the Canadian Northwest with the St. Lawrence valley. This meant that most visitors arrived during the summer by canoe and boat. Consequently, they did not witness inland life during the autumn, winter and spring where and when hunting and trapping took place. Also, Sault Ste. Marie primarily served as a transportation center. As a result, it produced fewer records pertaining to hunting and trapping than most Hudson's Bay Company posts generate. Finally, the few trading establishments that were located inland from Sault Ste. Marie were small outposts that were located on the northern extremity of its hinterland. They produced a broken and very limited documentary record.

While most Aboriginal people have experienced discrimination and forced acculturation, their suffering has not been uniform. Those who have born the brunt of particularly blatant and aggressive discrimination face the greatest difficulties in documenting their historical and cultural continuity. One of the most glaring examples of this problem concerns the Chickahominay of Charles City, Virginia. These people faced an impossible barrier because the director of the Bureau of Vital Statistics for the state of Virginia systematically expunged all references to Indians during the thirty-four year period from 1912 to 1946. [49] His actions were reinforced by the state's Racial Integrity Act of 1924 (which remained in effect until 1967) and the eugenics movement, which was endorsed by leading state universities. The 1924 law forced people to be registered at birth as being either 'white or colored'. This had

the effect of erasing the Chickahominay's ancestors from official state records during this lengthy period. Consequently, they could not prove their historical continuity for the FAP purposes. This forced the Chickahominay to seek recognition through a special act of Congress.

As with the Chickahominay, discrimination created major problems for the Métis in their efforts to document their past as became clear in the *Powley* case. The problem was that after the 1870 and 1885 Métis uprisings in Western Canada, Métis communities in Ontario suffered from growing intolerance toward them. Also, provincial game laws made no allowance for their Aboriginal background even though provisions were made for their First Nations relatives. This forced the Sault Ste. Marie Métis to develop an underground hunting and fishing economy in the late 19th century. Because they operated out of sight of government officials, the latter left hardly any records that the present-day Métis can use to make a continuity claim for the late 19th and early 20th centuries.

Tribal recognition and Métis rights also raise difficult and interrelated questions arise about the how we conceptualize historical 'communities' or 'tribes,' the importance of genealogical evidence, and racism. The 1978 FAP guideline also raised these issues by requiring that tribal petitioners demonstrate that their membership consists principally of individuals who descend from a historical Indian tribe or tribes. As American Indian rights advocate and lawyer Arlinda Locklear observed in her testimony before the Senate Committee on Indian Affairs [SCIA], this has posed two problems – proving the continuing existence of the community and establishing its linkage to a historic tribe. The 1978 guidelines did not specify precisely what proof of 'descent' would be needed to show a tribal community continued to exist. Accordingly, in 1994 the BIA refined the FAP guidelines somewhat by stating that a marrying-in rate of 50 percent would serve as automatic confirmation of an existing community. The problem was that no minimum standard was established. As a result, widely varying rates have been applied leading to charges that determinations are arbitrary.[50] More relevant to the discussion of evidentiary problems being discussed here, Locklear objected that individuals have not been able to prove their descent from relevant historical tribes through the family

names that are associated with them. Instead, 'members must show a genealogical connection...'[51] According to Locklear, this is an unreasonable requirement because complete documentation of this type extending back to the time of sustained contact with Euro-American rarely exists.[52] She observed that many of the tribes that already have federal recognition could not meet this test.

When the Supreme Court of Canada ruled that Métis individuals claiming aboriginal rights had to prove their connections to historical communities, it too raised all of these issues, albeit the different colonial history of Canada makes it somewhat easier for Métis to trace their genealogies.[53] The high court apparently was aware that this requirement could take on racial overtones given its proviso that: 'We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means.'[54] Although the court specifically ruled out 'blood quantum' measures for defining 'Métisness' or for proving the continued existence of a Métis community, it will be difficult to avoid falling into the 'blood quantum' trap.

Both FAP and Canadian court rulings raise the issue about the fluidity of membership in historical Aboriginal communities or tribes. The historical reality is that communities often persisted in spite of considerable inward and outward migration of their members. Some northern plains tribes [bands], for example, comprised individuals from various Aboriginal backgrounds.[55] One of the reasons for this was that inter-group marriages were one of the ways that Native People established and sustained economic and military alliances. It was also a way that the Métis extended their networks into new areas. This historical reality casts further doubts on the validity of using marrying-in rates or similar measures to gauge community persistence.[56]

The 'doctrine of continuity' also raises important questions about the ways we think about culture change and the native 'other.' In Canada, the Supreme Court intended that the notion would, in part, quash the wrongheaded legal theory that Aboriginal rights could only be derived from 'traditional practices' that had survived in their pure (pre-contact) form (the so-called 'frozen rights doctrine').[57] As noted,

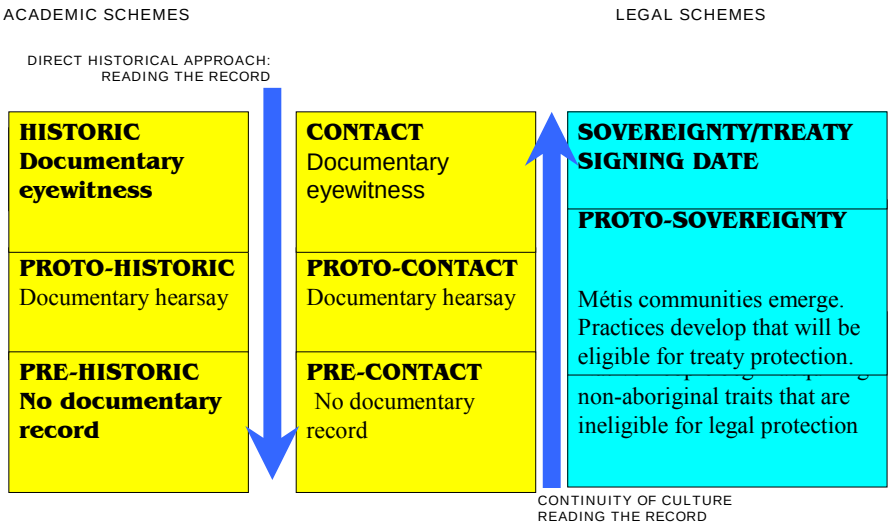
the court recognized that certain present-day Aboriginal practices are the modern manifestations of ancient customs. In my opinion, the continuity notion remains highly problematic, nonetheless, because it still conceptualizes the issue of rights determination in non-western/western cultural terms. This leaves claimants vulnerable to having the courts conclude that their aboriginality has been washed away by the 'tides of history,' to borrow a phrase from the High Court of Australia.[58] Framed in this way, the search for evidence of cultural continuity also leads claims researchers and the courts back to all of the old disagreements about defining the Aboriginal 'other' as discussed above, and it engages other long-standing ethnohistorical debates about how to study culture change in post-contact Aboriginal societies. In particular, it raises two related questions that have engaged scholars for many years. Did the key catalysts for change originate inside or outside of native cultures? Were changes superficial or fundamental?[59] There are extensive literatures that debate these broad topics from the perspectives of continuity and change, acculturation, assimilation, diffusion, authenticity versus the invention of tradition, migration, and the role of native agency. All of these approaches have been and remain the subject of divided opinions.

Periodization

The continuity doctrine engages another ongoing controversy about how Aboriginal history should be periodized. It is a crucial question because chronologies are based on key Western notions about Native history. For many years it was common practice for scholars to divide their chronologies into three basic units: the Prehistoric, the Protohistoric, and the Historic periods (**Figure 3**). This scheme was derived from archaeology and was intended to reflect two primary considerations – (1) the intensity of Native-European contact and the disruptions that resulted from it and (2) the absence or presence of documentary sources that can be used to facilitate the study of those processes. The basic premise, of course, was that aboriginal cultures had been largely static before European contact. For most Aboriginal people, contact influences initially came indirectly (the Protohistoric Period), primarily as a consequence of the diffusion of European goods through intertribal trade and demographic changes caused by epidemics, migration, and inter-group warfare.

European knowledge and writing about these events was based on second-hand reports (hearsay) the newcomers received from their native allies and trading partners. The Historic Period supposedly marks the time when the rate of culture change accelerated following the arrival of Europeans. This is also the time these newcomers begin writing eyewitness accounts of their interactions with Aboriginal people.[60]

Figure 3
CHRONOLOGICAL SCHEMES, CONTINUITY AND THE 'TIDES OF HISTORY''



North American Native people have long objected to this framework primarily for two reasons. First, it suggests that they were without history (their cultures were static) before Europeans arrived.[61] Second, it is a Eurocentric perception of their history that does not take into account varied aboriginal historical traditions. As a partial concession to their objections, it has become a common practice in recent years to use the terms Pre-Contact, Proto-Contact and Contact (**Figure 3**), but obviously this modification does not address Aboriginal concerns in a fundamental way.[62]

The problem of developing appropriate chronological frameworks is complicated further by the fact that ethnohistorical experts must relate their chronologies to those that the courts are developing. In litigation, the rarefied dates that researchers must consider are the times when 'contact,' 'effective sovereignty'

and or treaty signing took place. The courts regard contact as the benchmark time (hereinafter I will refer to it as 'effective contact') when interaction with Europeans led Native People to 'borrow' practices from the newcomers that are not eligible for protection as Aboriginal rights. As the above discussion makes clear, determining the date of 'effective contact' for many areas of Canada and the United States is not a simple task because it cannot be treated as a singular event that impacted all spheres of an Aboriginal culture equally. Courts do not consider the fact that a given Aboriginal people might have experienced effective contact at various times depending on the sphere of culture. The date when effective sovereignty (American, Canadian, or European) was established locally is equally difficult to determine. This is especially true if the courts make an honest effort to accommodate Aboriginal perspectives.

An additional complication ethnohistorical experts face when orienting their research to the law's periodization scheme is that the dates of effective contact and Crown sovereignty often are among the findings of 'fact' that the court must make based on the evidence presented at trial. This means that ethnohistorical experts often are asked to simultaneously present data to assist the court in making its determinations about when these events happened, while providing it with a snapshot of a claimant group's ancestral culture that is temporally broad enough in scope to bracket the datelines the court may select. In *Delgamuukw*, for example, at trial it was uncertain how long after the arrival of Russian fur traders in Alaska (late 18th century) and Captain James Cook on Vancouver Island (1778) that culture-transforming contact began. At the time of the trial it also was unknown when the Crown established effective sovereignty in Gitxsan-Wet'suet'en territory.[63] In *Powley* we faced similar difficulties. We argued that Métis communities began forming in the upper Great Lakes area sometime after the establishment of the earliest French trading posts in the area in the late 16th century; we also posited that effective British sovereignty probably was established after the merger of the Hudson's Bay Company and the North West company in 1821,[64] and certainly with the signing of the Robinson treaties in 1850. In Métis cases, the date of effective sovereignty is

especially critical because local communities must have been established before that date for them to have a valid claim.

At trial in *Victor Buffalo,* the possible dates for the commencement of effective contact for the Plains Cree ancestors of the Samson Cree plaintiffs experts advanced ranged from mid-17th century to the late 18th century. Remarkably, Justice Teitelbaum selected 1670, the year the Hudson's Bay Company was founded, as the date. In creating this 'fact' for the purposes of the law, the trial judge stated: 'of course I do not presume that the practices, customs and traditions of the Cree changed immediately at this point. However, this date marks the beginning of a cultural transformation which saw the Cree become immersed in the fur European fur trade upon the arrival of the Hudson's Bay Company and the establishment of their post at York Factory.' [65] By picking this date, which actually pre-dates the establishment of this post on the western shores of Hudson Bay by twelve years,[66] the judge placed the commencement of substantial changes to Plains Cree life that resulted from the fur trade at least one hundred years before sustained face-to-face interaction began locally. In my opinion there is no convincing evidence that supports this conclusion.[67]

The reason why the selection of the date for effective, or transformational, contact was so crucial in *Victor Buffalo* was that it related to a fundamental question at trial about whether it is likely that the ancestors of the Samson Cree had become familiar enough with western practices and modes of thinking to fully understand the Euro-Canadian legal language and concepts that were contained in Treaty 6 (1876). This is the kind of issue ethnohistorical researchers have long debated. That is, when Aboriginal People adopt many of the material dimensions of European culture, and engage in hybridized ceremonies with the newcomers, such as the gift-exchange ceremony, can we assume that they had made parallel changes in the ideological and intellectual spheres of their culture? Scholarly opinions remain divided on this issue partly because they go to the heart of definitions of the 'native other'. By deciding that Plains Cree culture had undergone major transformations two hundred years before treaty-signing as a consequence of the European fur trade, Justice Teitelbaum

warranted his assumption that the Cree who signed the treaty would have understood its terms as they had been explained (translated) at the time.

This case and the above discussion highlight the problems of meshing the chronological schemes of the academy, which treat post-contact culture change as an ongoing and cumulative process, which is only divisible into loosely defined periods, with those of the court, which imagines the process as being a series of singular and transformative events that led Indigenous people to acquire exotic cultural elements that are not eligible for legal protection and/or had learned to understand the newcomers, if not think like them.

Oral evidence

I noted at the outset that ethnohistorical evidence is highly varied. My discussion has mostly focused on issues pertaining to documentary records. This discussion also serves, however, to raise the issue of Aboriginal oral history/evidence. This line of evidence is essential primarily for two reasons. First, it provides crucial indigenous perspectives. Second, when there are substantial breaks in other lines of evidence, this type of history may enable claimants to breach those gaps.

Oral evidence always has been essential to claims adjudication and litigation, albeit, until the past few decades it mostly has entered the proceedings indirectly in the form of ethnographies that were based on ethnographic field work undertaken in the pre-claims era and for other purposes, mostly to address academic interests. The native voice was highly filtered in this work. Furthermore, until recently, native oral evidence mostly was interpreted by anthropologists. Speaking of her experience as an expert in USICC hearings in the 1950s, for example, anthropologist Nancy Lurie observed that the she and her colleagues served as surrogate Indians. This was because the lawyers and commissioners found that anthropologists answered their questions more directly and appropriately than native Elders did.[68]

Although academic experts still play major roles in claims hearings, litigation, and FAP proceedings, it is also widely recognized that Aboriginal people must be allowed to present their oral histories directly. In Canada, for example, as the Supreme Court developed the tests petitioners must meet to establish their claims, the

issues of evidence inevitably arose. It came to the fore in the landmark *Delgamuukw* trial and the appeals that followed. At trial, the plaintiffs departed from Canadian tradition by leading off with testimony from the elders (expert witnesses), which took a substantial amount of the court's time. They presented their evidence in their languages, through song, and in art. When they completed their presentations, the academic expert witnesses, (myself among them) made their presentations. The Gitxsan-Wet'suet'en were not successful at trial, however, largely because the judge paid little regard to the elders' testimony. They appealed. When their case reached the Supreme Court of Canada, it faulted the trial judge for not giving proper weight to Gitxsan-Wet'suet'en oral history testimony. The problem with the Supreme Court's judgment, however, was that did not take into account the practical problems this line of evidence poses in litigation, apart from the fact that it requires a substantial relaxation of the hearsay evidence rule. A key difficulty is that the veracity of this line of evidence is hotly disputed by parties to litigation. One reason is that it often juxtaposes Native views of their histories [insiders' perspectives], which I have often found are revisionist, against those of outsiders. In treaty rights cases, as happened in *Victor Buffalo,* these revisionist views of history challenge an older historiography about treaties that uncritically portrayed the government and its agents as acting largely in the best interests of the Aboriginal people.[69] Put simply, the older literature upheld the honor of the Crown, and the First Nations' oral histories often challenge it.

There is also a practical reason why oral history evidence has become so contentious. Opposing sides in rights litigation do not have equal access to oral history informants before going to trial. Given the adversarial nature of the process, it is not surprising that in Canada Aboriginal claimants are not willing to let the Crown undertake research in their communities if it will be used against them in court. This means that the Crown normally is not able to review this evidence until Aboriginal claimants have filed their reports or their elders and experts have testified in court. This heightens the adversarial aspect of the process because the Crown is limited to questioning the veracity of the oral evidence. The problem is, as Steward noted in the 1950s, elders and the field ethnologists whom Aboriginal claimants retain as their experts, are, to a considerable extent, <u>the</u> evidence. [70] This reality makes it very

difficult to depersonalize the cross-examination of these experts in court. The inability of the Crown to undertake its own pre-trial oral history research also forces its experts to rely heavily on published ethnographic studies to develop counter-interpretations. As discussed above, all too often this literature is based on fieldwork that was undertaken long ago, for different purposes, and it was directed by and/or filtered through Eurocentric (colonial/evolutionary) interpretive frameworks.

In Canada these problems have meant that battles about the weight that should be given to oral history vis-à-vis other lines of evidence have been an ever more central feature of claims cases in the post-*Delgamuukw* era. Perhaps the best two recent examples are the *Regina v. Benoit* (2003) and *Victor Buffalo*.[71] In the former case, the trial judge gave considerable weight to the plaintiff's oral evidence, but he was faulted for doing so on appeal.[72] In *Victor Buffalo*, on the other hand, the trial judge gave little weight to this line of evidence because he concluded that the Cree lacked a systematic way of establishing the veracity of their oral histories.[73] Ironically, he held up the Gitxsan-Wet'suet'en as having the kind of formalized procedure for evaluating their oral traditions that are acceptable to the courts.[74] I believe that the foregoing discussion makes it clear that unless these setbacks are overcome and the oral history evidence of Aboriginal people given significant weight, native communities/tribes will not be able to marshal the historical evidence they need to succeed in litigation, acknowledgement applications, or other claims forums, when continuity is a key dimension of their petitions.

Conclusion

The rights and acknowledgement tests established by the USICC, the FAP, and the courts were and are, of necessity, intended for universal application. The foregoing discussion has emphasized, however, that the nature of ethnohistorical evidence makes it very difficult to apply them in a timely and uniform manner. This is because the highly diverse cultures and historical experiences of North American Native groups have produced ethnohistorical records that very considerably from place to place in terms of comprehensiveness and continuity. Furthermore, the plethoras of theoretical frameworks scholars have used to filter these diverse sources

have compounded interpretation problems. In recent years, concerted efforts to accommodate Aboriginal perspectives have added to these difficulties. All of these factors add to the uncertainty about the likely outcome of any petition or trial.

The claims process, whether it took place before the USICC or unfolded/is unfolding through the courts or the FAP, compounds this difficulty and tends to make the process ever more time consuming. This is because claims processes generally accentuate the alternative possibilities for historical explanation by engaging parties who support and oppose petitions. To advance their respective positions, opposing sides emphasize supporting evidence and theoretical frameworks. This practice is most pronounced in litigation, of course, where the adversarial nature of the proceedings, especially at the cross-examination stage, tends to polarize the ethnohistorical experts. In theory, the FAP should avoid this problem given that BAR operates essentially like an inquisitorial body. In reality, however, its process does not seek to gain a consensus about historical interpretation advanced by competing interest groups that could lead to a determination that all parties would find acceptable. Rather, FAP allows differences to be expressed in stages and it acts as the final arbiter. The problem with this arrangement is that opposing sides are not able to challenge each other or the BAR staff directly.

The Waitangi Tribunal of New Zealand is sometimes held up as an example of a possible solution to these problems. Space precludes a lengthy discussion of its operations. For the present purposes it is sufficient to note that this institution, which was developed partly in response to the USICC experiment and the problems of litigation, blends the practices of the court with those of an inquisitorial tribunal. Parties to claims file briefs and submit evidence. The tribunal also undertakes its own research. It holds public hearings in the claimants' communities, during which time opposing sides can cross-examine those who appear to testify, albeit hostile challenges are discouraged. When the hearings are concluded, the tribunal, which includes members from the Maori and non-Maori communities, makes its determinations and recommendations. Although the Waitangi Tribunal certainly seems appealing, it too is the subject of mounting controversy in New Zealand. Critics fault it for many of the same problems that bedeviled the USICC and continue

to plague court proceedings and the FAP.[75] In addition, the Waitangi Tribunal's detractors charge it with 'fracturing' the nation's history as it rewrites it to accommodate Maori perspectives. So, in the end, perhaps a less radical solution might solve some of the problems discussed above.

As early as 1955, the badly divided group of American anthropologists who were engaged in the USICC process gathered in Bloomington Indiana to discuss their differences. Some of them proposed that the USICC should hold informal pre-hearing meetings of the experts involved in particular cases for the purpose of identifying and explaining the areas where they were in agreement and disagreement. This was never done. I believe the idea still has merit and is in keeping with the notion that the experts are 'friends of the court,' who are there to educate it. I think that it would also be useful in such pre-hearing meetings, especially in litigation, for the experts from both sides to come to an agreement about what evidence is relevant to the case at hand. In Canada, at present, there is a tendency for both sides to introduce massive amounts of evidence, much of which is only marginally relevant, to be sure that nothing is missed. Also, some material is not submitted in advance, but rather, is brought in at the last moment at the cross-examination phase in an effort to trip-up a witness. While this may be a cleaver and effective trial strategy, it does not permit the thoughtful reflection about the evidence that is introduced by this means. It is these practices that often lead to drawn out trials and in which judges are overwhelmed with an avalanche of evidence, much of which does not appear to inform their judgments, and .[76] Although suggesting pre-trial or pre-hearing gatherings of opposing experts is not a new idea, or represent a radical change, it may be a workable one nonetheless.

[1] Until after World War II, Aboriginal peoples' access to the courts was limited, however. In the United States, for example, Indian tribes could not sue the federal government without first obtaining congressional approval. In Canada, from 1927 to 1951 the *Indian Act (Section 141)* barred First Nations were from hiring lawyers to pursue their claims. The involvement of aboriginal people in World War II, and the civil rights movements that followed in its aftermath created a more favorable political climate for Aboriginal people to pursue their rights.

[2] These include a special sovereign to sovereign relationship with the federal government as a domestic dependant nation and eligibility for various federal social and economic programs for recognized tribes valued in excess of $4 billion annually in 2001. One of the most controversial economic benefits to flow from the special federal-tribal relationship is the right to operate casinos in states where these gambling operations are not banned by state law. Robin M. Nazzaro, Director of Natural Resources and Environment, GAO, 'Testimony Before the Committee on Resources, House of Representatives, 'Indian Issues: Timeliness of the Tribal Recognition Process had Improved, but it will Take Years to Clear the Existing Backlog of Petitions, 5.

[3] An example would be *Victor Buffalo v. Regina* trial of the Samson Cree treaty six claim before the federal court of Canada in Calgary. It costs the opposing sides over $100 million through the trial phase.

[4] Ethnohistorian Helen Tanner, who appeared often before the commission and continues to serve as an expert witness in litigation contends that the American legal system, especially its rules of evidence and adversarial dimension, is not capable of reaching decisions that are just in Indian terms. This is largely because it cannot deal properly with ethnohistorical evidence. Helen Hornbeck Tanner, 'History vs the Law: Processing Indians in the American Legal System,' *University of Detroit Mercy Law Review,* 76 (Spring) 1999: 694-708.

[5] H. D., Rosenthal, *Their Day in Court: A History of the Indian Claims Commission*. New York: Garland, 1990: 114-20. He notes also that the lawyers involved wanted to protect their interests. Anthropologist Nancy Lurie, who appeared before the commission in the formative period of the 1950s regretted that it did not act more like an inquisitorial tribunal by undertaking research of its own as it was authorized to do according to the terms of the 1946 Indian Claims Commission Act. Nancy Lurie, 'The Indian Claims Commission,' *Annals of the American Academy of Political and Social Sciences.* 436 (march) 1978: 97-110. Much earlier Lurie had commented on the problems that arose from the adversarial nature of the USICC proceedings and the fact that Indians as plaintiffs had carried the burden of proof whereas the government as defendant merely had to case doubt. See, Nancy O. Lurie, 'Problems, Opportunities, and Recommendations [Ethnologists as witnesses before Indian Claims Commission],' *Ethnohistory* 1955 2 (4): 357-75.

[6] John Barnett, Chairman, Cowlitz Indian Tribe of Washington, testified to the Senate Committee on Indian Affairs that it took his people 25 years to get recognized. Richard L. Velky, Chief of Schaghticoke Tribal Nation made a similar comment about his people's experience. Testimony before the Senate Committee on Indian Affairs on Federal Recognition of Indian Tribes, Wednesday, May 11, 2005 [hereinafter SCIAFR]. See, for example, the testimony of Prof. Kathleen J. Bragdon, William and Mary. **http://indian.senate.gov/2005hrgs/051105hrg/051105wit_list.htm> (accessed 8 January 2005)**

[7] Barry T. Hill, Director of Natural Resources and the Environment, Government Accounting Office [GAO], *Report to Congressional Requesters: Improvements Needed in Tribal Recognition Process*, November 2001, 14. In a follow-up report dated 10 February 2006 the GAO noted that the BIA had increased its staff, but problems remained due to the increased requests for information from third parties who had vested interests in the outcome of petitions. Nazzaro, 2-3.'

[8] For example, according to the guidelines, petitioners present their case to BAR and its staff makes a proposed finding based on the evidence submitted by the petitioners and/or additional information collected by staff researchers. A 180 day public commentary period follows when third parties are given the opportunity to submit evidence and arguments to support or rebut the proposed finding. The petitioners are then given 60 to reply to these interventions. Afterward, the Assistant Secretary of Indian Affairs has 60 days to make a determination. None of these time frames are rigid, however. Any or all of them may be extended indefinitely. See, GAO, *Improvements Needed*, 28.

[9] The status of all outstanding applications are listed at: http://www.indianz.com/adc20/adc20.html (accessed 6 April 2006).

[10] Connecticut Gov. M. Jodi Rell made this complaint in reference to the FAP's processing of the applications of the Historic Eastern Pequot Tribe and the Schaghticoke Tribe. SCIAFR. For an extended critique of the FAP see, Jack Campisi, 'Reflections on the last Quarter Century of Tribal Recognition,' *New England Law Review,* 2003 37(3): 506-15.

[11] Alexander Reilly, "The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title,' *Federal Law Review* Vol. 28: 3-5.

[12] He made specific references to critiques by Robin Fisher and Arthur J. Ray. Ray: Robin Fisher, "Judging History: Reflections on the Reasons for Judgment in Delgamuukw v. B.C.", *B.C. Studies*, XCV (Autumn 1992), 43-54 and Arthur J. "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, VI, 2 (1990), 13-29. SCC *R. v. Marshall* (5 November 1999).

[13] Supreme Court of Canada, Judgment, *Regina v. Marshall,* 1998: 35

[14] Reilly, 5. He was quoting from Bain Attwood, ed., *In the Age of Mabo,* 1996, xvi.

[15] Arthur. J. Ray, 2005 "Kroeber and the California Claims**:**Historical Particularism and Cultural Ecology in Court," in Richard Handler, editor, *Central Sites, Peripheral Visions: Cultural and Institutional Crossings in the History of Anthropology History of Anthropology, Vol. 11.* Madison: University of Wisconsin Press [Forthcoming November 2006]: 35 pp," in *Central Sites, Peripheral Visions: Cultural and Institutional Crossings in the History of Anthropology History of Anthropology, Vol. 11.* University of Wisconsin Press: 35 pp.

[16] Arthur J. Ray, "Anthropology, History and Aboriginal Rights: Politics and the Rise of Ethnohistory in North America in the 1950s," in Arif Derlik, ed., *From Colonialism to Globalism: Changing Times, Changing Spaces, and Our Ways of Knowing.* Savage, Maryland: Rowman & Littlefield, (Forthcoming autumn 2006) 35 pp.

[17] *Ontario v. Bear Island Foundation,* 1991 provides a good example of a case where groups of opposing experts represented two competing views of post-contact Subarctic history. This underlying cleavage was not discussed at trial.

[18] Personal communication, Mark E. Miller, 23 March 2006. FAP does give public notice of its proposed findings, however, which give a synopsis of the reasoning for them. A current list of these is available at: http://www.indianz.com/adc/adc.html (accessed 10 April 2006).

[19] Often claims arise when Native People are charged with violating fish and game laws. In these instances they appear as defendants.

[20] An example is the work of Jacqueline Peterson: "Prelude to Red River: A Social Portrait of the Great Lakes Métis," *Ethnohistory* 25 (Winter 1978): 41-67; "Many Roads to Red River: Métis Genesis in the Great Lakes Region, 1680-1815," in Brown and Peterson, *The New Peoples*, 38, 64. Peterson made this assumption based on the American experience, where large-scale immigration took place during the 19th Century. The research that informed her paper did not focus on the post-1850 Great Lakes area.

[21] Miller notes, for example, that most failed claimants are from the eastern and southern portions of the United States. In his view this reflects, in large measure, the fact that these Indians had experienced the longest period of intense interaction with Euroamericans. Mark E. Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process,* Lincoln: University of Nebraska Press, 2004

[22] I have discussed this in: Arthur J. Ray, 'From the United States Indian Claims Commission Cases to *Delgamuukw,*' Louis Knafla, editor, *Aboriginal Title and Indigenous Peoples: Comparative Essays on Australia, New Zealand, and Western Canada.* Calgary: University of Calgary Press, 25 pp.

[23] When I was being qualified as an historical geography expert in *Delgamuukw*, the Crown's lawyers argued that it was not necessary for me to interpret Hudson's Bay Company documents for the court because they were 'plain on their face.'

[24] Sheree Ronaasen, Richard O. Clemmer, and Mary Elizabeth Rudden, 'Rethinking Cultural Ecology, Multilinear Evolution, and Expert Witnesses: Julian Steward and the Indian Claims Commission Proceedings,' in Richard Clemmer, Daniel Meyers, and Mary Elizabeth Rudden, *Julian Steward and the Great Basin: The Making of An Anthropologist.* Salt Lake City: University of Utah Press, 1999, 171-2.

[25] Specifically, the Supreme Court of Canada noted that the trial judge concluded 'that there was no trade of salmon "in any regularized or market sense" but only "opportunistic exchanges taking place on a casual basis". He found that the Stó:lō could not preserve or store fish for extended periods of time and that the Stó:lō were a band rather than a tribal culture; he held both of these facts to be significant in suggesting that the Sto: lo did not engage in a market system of exchange. Subsequently, historian Keith Carlson provided linguistic evidence that suggests this First Nation did engage in regular trade. Keith Thor Carlson, " Stó:lō Exchange Dynamics," *Native Studies Review* 1997, 11(1), pp. 5-48.

[26] The classic expression of this idea is Olive Dickason, 'From "One Nation" in the Northeast to 'New Nation' in the Northwest: A look at the emergence of the Métis,' *The New Peoples: Being and Becoming Metis in North America*, J. Peterson and J. Brown, eds., (Winnipeg: University of Manitoba Press), 1985: 19-36

[27] 'A reasonable length of time' was not specified in the act. Rather, this flexible notion was adopted during the formative years of the commission. Initially, some of the government's experts thought they had to prove or disprove a group occupied an area from 'time immemorial'. Ralph Barney, who led the defense team for the justice department disabused his researchers of the latter idea. Ralph Barney to Erminie Wheeler-Voegelin, 29 August 1956, Great Lakes and Ohio Valley Ethnohistorical Research Porject Archives, Indiana University Archives, Box 1.

[28] See, Ray, 'Kroeber and the California Claims' and 'Anthropology, History and Aboriginal Rights.'

[29] Ray, 'California claims to *Delgamuukw*.'

[30] Kroeber's first publication on this issue appeared in 1955. See, A. L. Kroeber, 'Nature of the Land-holding Group,' *Ethnohistory* 1955 2 (4): 303-14. In the same issue, fellow anthropologist Nancy Lurie also noted the problems with using the concept in claims proceedings. See, nancy O. Lurie, 'Problems, Opportunities, and Recommendations [Ethnologists as witnesses before Indian Claims Commission],' *Ethnohistory* 1955 2 (4): 357-75.

[31] Twenty years after Kroeber and Lurie made their observations anthropologist Morton Fried revisited the concept of the tribe in a book-length monograph. He noted that there was no agreement about any of its various meanings, including that of the 'identifiable group' and as a political unit. Morton Fried, *The Notion of the Tribe.* Menlo Park: Cumings, 1975. Miller notes that the BIA used 39 different definitions of the term in its various programs in the 1970s. Miller, 7.

[32] Arthur J. Ray, 'Constructing and reconstructing Native History: A Comparative Look at the Impact of Aboriginal and Treaty Rights Claims in North America and Australia,' *Native Studies Review* 16 (1) 2005: 21. It should be mentioned that the academy never adopted Kroeber's concept.

[33] At the time anthropologists often used this term to imply notions of land ownership, or tenure. Bruce Rigsby notes that this practice reflected the discipline's practice of developing a different terminology for land tenure than that developed by the law. This has created terminological difficulties for anthropological experts who appear in land title cases. Bruce Rigsby, 'A Survey of Property Theory and Tenure Types,' *Customary Marine Tenure In Australia.* N. Peterson and B. Rigsby Editors, Oceania Monograph 48. Sydney: University of Sydney, 1998:22-46.

[34] I discussed this in: Ray, 'Politics of Ethnohistory…'

[35] Indian Claims Commission, Transcripts Docket No. 128, New York: N.Y. : Clearwater Pub. Co., c1973-c1988, 869-71

[36] It should be noted that the USICC initially emphasized exclusive use and occupancy, but eventually it allowed for joint occupation. Also, the SCC does allow for joint-tenure.

[37] A. J. Ray, 'Métis Economic Communities in the 19th Century,' Unpublished Report for Métis National Council, July 2005.

[38] The scholarly literature on this aspect of Métis offers another example where the scholarly literature likely will be problematic for the litigation of Métis rights. This is because academics have not used the terms 'settlement' and 'community' with any consistency. Sometimes they use the two words to refer to physical places, where Métis lived for extended periods and built permanent structures on the land. At other times they have used these terms to describe local social groups, which were comprised of related Métis families that interacted with each other frequently enough to have developed a sense of cohesiveness. Arthur J. Ray, 'Métis economic communities and settlements in the 19th century.' Ibid.

[39] Adam Kuper, *The Invention of Primitive Society: Transformations of an Illusion.* London: Routledge, 1988, 1. Kuper notes that the idea emerged in the 1860s and 1870s and through various transformations, remains with us today. This persistence is the subject of his book.

[40] Referred to in economic history and economic anthropology as the 'formalist'/ 'substantivist' controversy. See Ray and D. B. Freeman, *Give Us Good Measure.* Toronto: University of Toronto Press, 1978.

[41] Adrian Tanner's essay, 'Who Owns the Beaver,' *Anthropologica* 28 1986 is an example.

[42] Ray, 'Kroeber and the California Claims.' Anthropologist Bruce Rigsby also has explored the involvement of anthropologists in these and other USICC cases. See, Bruce Rigsby, 1997. "Anthropologists, Indian Title and the Indian Claims Commission: the California and Great Basin Cases," in *Fighting Over Country: Anthropological Perspectives*, *Centre for Aboriginal Economic Policy Research Monograph 12*. Edited by D. E. Smith and J. Finlayson, pp. 15-45. Canberra: Centre for Aboriginal Economic Policy Research, Australian National University.

[43] In the California USICC claims, the case pitted the utilitarian cultural ecology approach against that of the culture area anthropologists. The former stressed the importance of subsistence land use and the latter argued that all uses (economic, ceremonial, and spiritual) were significant. Ibid.,

[44] Ibid.

[45] At the time it was part of the North-West Territory.

[46] A. J. Ray, 1985, "Economy of the Peace River, 1870–1930," 25 pp. (Prepared for Alberta Indian Federation for use in *Regina* v. *Horseman.* Subsequently, this was published as: Arthur J. Ray, 1996, "Commentary on the Economic History of the Treaty 8 Area" *Native Studies Review* 10(2), pp. 169-95.

[47] For example, traditionally Aboriginal people in this region harvested salmon for ceremonial, exchange, and subsistence purposes.

[48] Discussions of these kinds of issues figured prominently before the Oversight Hearing Before the Senate Committee on Indian Affairs on Federal Recognition of Indian Tribes. See, for example, the testimony of Prof. Kathleen J. Bragdon, William and Mary, SCIAFR.

[49]Testimony of Chief Adkin before the Senate Indian Affairs Committee, SCIAFR.

[50] This issue arose, for example, with respect to the petitions of the Historic Eastern Pequot Tribe and the Schaghticoke Tribe of Connecticut. Given the difficulty of computing these rates, charges also have made the BAR calculations often are in error. See testimony of Gov. M. Jodi Rell before SCIAFR, 11 May 2005.

[51] Arlinda Locklear, 'Testimony of Arlinda Locklear on S.611, before the Senate Committee on Indian Affairs, May 24, 2000 on behalf of the Miami Nation of Indian, p. 6.

[52] Ibid. Locklear also notes that many recognized tribes could not meat this test, which demonstrates its arbitrary nature.

[53] Their involvement in the fur trade is a primary reason. Fur trading companies, especially the Hudson's Bay Company kept voluminous personnel and other records. Also, fur trading licenses, catholic church records, etc. also are extensive.

[54] *Regina v. Van der Peet,* paragraph 32.

[55] Susan Sharock, 'Crees, Cree-Assiniboine, and Assiniboines: Interethnic Social Organization on the Far Northern Plains,' *Ethnohistory* 21 (2) 1974: 95-122.

[56] It should be noted that in his analysis of the concept of the 'tribe,' Fried determined that the concept does not, with any consistency, refer to a 'breeding population.'

[57] This notion was still in play during the *Delgamuukw* trial.

[58] In this case the trial judge J. Olney of the Federal Court of Australia ruled: '"The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forbears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs." The High Court upheld Olney's decision. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002). <http://www.austlii.edu.au/au/cases/cth/HCA/2002/58.html> (accessed 18 January 2006).

[59] The latter issue, of course, also engaged the debate about how the native other was to be defined.

[60] In effect, this also marks the beginning of the erasure of aboriginal oral histories.

[61] This is one of the issues explored by Eric Wolf, *Europe and the people without history.* Berkeley : University of California Press, 1982.

[62] Australian anthropologist Peter Sutton, who has frequently appeared as an expert and has written about the use of anthropological evidence in litigation, suggests using 'classical' and 'post-classical' to demark Aborigines' cultures before and after contact. See, Peter Sutton, *Native Title in Australia: An Ethnographic Perspective.* Cambridge: Cambridge University Press, 2003. According to Rigsby, this notion has gained currency in Australia. Personal Communication, 19 April 2006.

[63] The court determined that it was 1846, the time of the Oregon Boundary Treaty.

[64] Until that time, the fur trade in the region was very competitive, and no outsiders had effective control.

[65] Teitelbaum, Paragraph 550. The rationale for choosing this date, which is at variance with the one used in *Powley*. In the latter case, the period of 1821–50 was selected because that was a time when trading company rivalries had largely ended (no European group had control before then) locally. In 1670 the Hudson's Bay Company had no effective control, but Teitelbaum concluded that this marked the beginning of significant cultural change resulting from European contact. He rationalized this by saying that the Supreme Court allowed a modification of the *Van der Peet* test for the Métis because they appeared after contact.

[66] The company did not establish the precursor to York Factory, which was Fort Nelson, until 1682.

[67] My early work, which emphasized cultural dynamics, would be included in this literature. Arthur J. Ray, *Indians in the Fur Trade*. Toronto: University of Toronto Press, 1998 [1974].

[68] Nancy Lurie, '

[69] This issue is discussed at length in Arthur J. Ray, J. R. Miller and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties.* Montreal: McGill-Queens University Press, 2000.

[70] Steward remarked: In using this secondary, or predigested evidence, both from the Indian informant and the historical source, the anthropologist redigests it according to his own point of view. He himself becomes 'evidence' in that his testimony is based to an incalculable extent upon his theory (explicit or implicit), his experiences among the people, his travels over the territory, his reading of the historic documents and his broader knowledge of primitive people.' Julian Steward, 'Theory and Application in a Social Science,' *Ethnohistory* 1955 (4)*:* 300.

[71] For discussions of this issue in these cases see: Frank Tough, 'Prof. vs. Prof in the Benoit Treaty Eight Tax Case: Some Thoughts on Academics as Expert Witneses,' *Native Studies Review* 2004 15 (1): 53-72 and Arthur J. Ray, 'History Wars' and Treaty Rights in Canada: the case of *Victor Buffalo et al. v. Regina,* A. Harmon, editor, *Text, Context and Meaning: Towards f New Understanding of Indian Treaties in the North American West.* Seattle, University of Washington Press, 25 pp.

[72] *Regina v. Benoit* (2003), Canada Federal court of appeal. http://decisions.fca-caf.gc.ca/fca/index.html (accessed 10 April 2006).

[73] Ironically, the judge used the Gitxsan-Wet'suet'en's scheme as his model even though the trial judge in *Delgamuukw* gave no weight to their oral histories. *Victor Buffalo v. Regina* (2005), Federal Court of Canada, http://decisions.fct-cf.gc.ca/fct/2005/2005fc1622.shtml (accessed 10 April 2006).

[74] *Ibid.*.

[75] It should be noted that the New Zealand's particular colonial experience made it possible to create a single tribunal. One overarching treaty (albeit there are written English and Maori versions) established the basis for subsequent Maori-Newcomer relations. In contrast, Native North America was much more diverse culturally;, it experienced diverse colonial and post-colonial regimes; it was blanketed with thousands of different treaties over several centuries; and yet, substantial areas remained where no treaties were ever concluded.

[76] To cite a recent example, in *Victor Buffalo* the number of documents submitted to the court totaled 2,958. Most of them were lengthy.