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LIVING IN TIME IMMEMORIAL

CONCEPTS OF "TIME" AND "TIME IMMEMORIAL":
Why Aboriginal Rights Theory is Problematic
in the Courts and around the Negotiating Table

by

Helen Stone, B.A.

A thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfillment
of the requirements for the degree of
Master of Arts
in Canadian Studies

Carleton University
OTTAWA, Ontario
2 June 1993, Helen Stone

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Living in Time Immemorial. Concepts of "Time" and
"Time Immemorial": Why Aboriginal Rights Theory is
Problematic in the Courts and around the Negotiating Table

submitted by Helen Stone, B.A.
in partial fulfilment of the requirements for
the degree of Master of Arts

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ABSTRACT

Why are judicial and non-judicial methods of mediating aboriginal rights problematic? A seeming incongruence of indigenous-based knowledge structures with western-based structures, with different underlying assumptions about the meaning of history and the nature of truth in knowledge, lead to a shared incomprehension. Concepts of "time immemorial" as a basis for rights recognition, and "time" as a basis for notions of history, are examples of such incongruence. Two cases highlight the problem: comprehensive claims/litigation by the Mi'kmaq in Newfoundland, and a legal challenge by the Gitksan-Wet'suwet'en in British Columbia.

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INTRODUCTION

This thesis is about differences. It is about epistemology, or how we know what we know, and beneath that, ontology, or what or who we are. Broadly, it seeks to show a bit of the connectedness beneath our ideas about the nature of our worlds and how we arrange our knowledge about those worlds. From the early Greek thinkers to modern Canadian courtrooms, perhaps not a lot has changed. Our essential formulations remain. For aboriginal peoples, too, their basic world-view has been sustained within their cultures. Their knowledge systems rely on early formulations. But the differences between the cultures make for pragmatic difficulties in the field of aboriginal rights in Canada.

Recently, Canadians have made a tangible effort to come to terms with the idea of "inherent rights". The 1992 Charlottetown Accord made constitutional provision for the recognition of inherent rights. Failure to pass the Accord did not detract from the eventual possibility of recognition. The Royal Commission on Aboriginal Peoples supports this idea of inherent rights and sees the position as oppositional to "created rights". The schematic diagram below shows how these oppositional idea of rights

evolve.

¹Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary*, p. 12

The Assembly of First Nations, a political organization representing registered Indians, expresses the relationship between inherent rights and "time immemorial":

Our Creator, Mother Earth, put First Nations on this land to care for and live in harmony with all her creation. We cared for our earth, our brothers and sisters in the animal world, and each other. These responsibilities give us our inherent, continuing right to self-government. This right flows from our original occupation of this land from time immemorial.²

We can see that the idea of "inherent rights" and "time immemorial" rights are conceptually very similar. In cultural fact, there is no difference between the two concepts. "Time immemorial rights": This is a cultural definition which we aren't ready to accept. Some Canadians can accept that "time immemorial" rights are really "inherent rights"; nevertheless, the courts keep rejecting this idea. Are the courts making racist decisions? And how about the federal government? The federal government is also having problems with "time immemorial" in terms of its exclusionary land claims policy.

Do these rejections point to real differences in the concept of "time immemorial" and "time", and finally "history"? For the most part, it is assumed that rights flow from a notion of territoriality, or occupancy of lands. Two concepts are basic to territoriality. "Time immemorial" is one; it has become a key phrase appended to virtually any discussion of aboriginal rights. It is the most significant claim for aboriginal title, and hence rights. The concept is strongly defended by indigenous peoples. It is referred to

²Assembly of First Nations First Circle on the Constitution. *First Nations and the Constitution: Discussion Paper*. Ottawa: 21 Nov. 1991, p. 8. Emphasis added.

authoritatively by the courts. It is a cornerstone of the federal government's comprehensive land claims policy.

This thesis will show that "time immemorial" is at once many things to different peoples. In particular, for the Canadian federal government it is a criterion which has evolved into a stringent policy barrier. It withholds the "granting" of aboriginal rights to certain groups of indigenous peoples in Canada. In contrast, aboriginal people (at least in Canada) have a wholly different concept of this phrase, a concept which relates back their epistemology. For these nations, the restrictive government definition is irrelevant to their relationship to "time immemorial".

The concept of "time", as the underlying assumption for our notions of "history", is also differently understood and used by North American aboriginal peoples and peoples of western-European heritage, the heritage of the colonizers of North America. The way in which "time" is used as a base for western epistemological systems appears to differ from the way in which it is used in aboriginal epistemology. The deeper divisions lie in differing ontologies. How we look at what we are, and what our universe is, dictates how we will regard another's system of knowing. We know, for example, from the Mayan calendar that some southern indigenous peoples embrace a cyclical notion of time. This thesis further explores the notion's relevance to more northern aboriginal peoples.

This thesis will show how expressions of aboriginal rights theory are problematical, given the differing concepts of "time immemorial" and "time". It will show the inter-relatedness of the two concepts and how they can be regarded together to get a comprehensive idea of the difficulties attending their use in the courtroom and at the negotiation table. The focus of use is aboriginal-rights theory as expressed in the treatment of comprehensive land claims, by the courts and in federal government policy.

Chapter I enfold the theoretical argument within the circle of history as it has been perceived since the beginning of time, or Creation. It offers an assumption of differing conceptual frameworks and the inevitable dominance of the Euro-Canadian one. Chapter II briefly outlines the evolution of "time immemorial" through the judicial process into a federal government policy criterion. Chapter III focuses on aboriginal voices. Expressions of "time immemorial" and "time" concepts illustrate how indigenous peoples in Canada relate to them.

Two examples show how aboriginal rights theory is problematical within this context. Although both bear directly on the main argument, their illustration of the problems forms a differing body of content. In Chapter IV, I will focus on the situation of the Conne River Mi'kmaq in Newfoundland and that of the Federation of Newfoundland Indians. The Newfoundland Mi'kmaq have to date been excluded from comprehensive claims process; the government will not accept that they have occupied lands in Newfoundland from "time immemorial". In Chapter V, I will highlight the ongoing legal

case of the Hereditary Tribal Chiefs of the Gitksan and We'tsuwet'en in British Columbia. Recently, the B.C. Supreme Court denied the Chiefs' declaration of aboriginal rights. Nor did Justice McEachern accept their tribal history of occupation of their lands as valid evidence, as his Reasons for Judgment show.

The Conclusion looks at the idea of adapting rights theory to reflect indigenous reality. It searches the international judicial-political scene for any evidence of accommodation to aboriginal needs.

CHAPTER I THE CONCEPTUAL ARGUMENT

Recent failures in both the judicial and non-judicial mediating of aboriginal rights point to a need to examine why and how these processes are unworkable. Since aboriginal rights continue to develop in an international context, it is fair to look to the example of other countries.

Vine De Loria, a Sioux theologian and lawyer, has pointed to difficulties of understanding concepts that are basic to an indigenous culture. Recently he analyzed a 1988 U.S. Supreme Court decision concerning protection of traditional sacred religious sites in California¹. De Loria shows how the nature of an aboriginal right to practice religion was completely misunderstood by the court, which ruled that the government could build logging roads in the area of these sacred sites. In his ruling, the judge had to deal with the content and meaning of a previous Congressional Resolution. The Resolution identified "lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations" behind the need for protection of the right to practice traditional religions.² De Loria concludes that the reasons for judgment stemmed from a judicial analysis within a western conceptual framework, geared to western organized religion:

¹*Lyng v. Northwest Indian Cemetery Protective Association*. (1988) 1085 S.C. 1319. Dissenting opinion by Justice Brennan.

²1978. Joint Resolution - American Indian Religious Freedom Act. Cited in V. de Loria Jr. "Sacred Land and Religious Freedom", *Encounters* No. 10 (1992), 12.

"Justice O'Connor observed that 'A broad range of government activities - from social welfare programs to foreign aid to conservation projects - will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activity deeply offensive, and perhaps incompatible with their own search for spiritual fulfilment and with the tenets of their religion.' Thus ceremonies and rituals performed for some thousands of years were treated as if they were personal fads or matters of modern emotional personal preference based upon the erroneous assumption that belief and behavior can be separated....These problems in understanding highlight the great gulf that exists between individual conscience and commitment (western) and communal tradition (Indian)..."³

He goes on to describe the importance of sacred sites, not only for American Indians but also for world spiritual renewal. The framework of analysis available to the court did not make this kind of information open to understanding.

Kierulf, a lawyer for the indigenous Sami of Norway, relates the Sami experience in the courtroom, where they are confronted by a system in no way related to their usual activities or constructs. He, too, points to the need to recognize the cumulative effect of cultural differences, which puts the Sami at a distinct disadvantage. Decisions are based on "hard" evidence; however, the attitudes and behaviour which Sami people bring to court mean that providing evidence which the court understands is difficult. Even the experience of a different time-notion interferes with a comprehension of the courtroom experience:

"The Sami culture concept of time is different from the Norwegian. ... Of much greater significance is the Sami perception of time in other respects, and the consequences of it not being known, or fully understood and respected. Norwegians regard time as a line. The course of life stretches ahead from one point to another. Our experiences and memories are connected with this line. For the Sami, however, time is something which fills a vessel. When the vessel is full, time is at an end. Down in the vessel memories are stories all in a jumble. It is obvious that this difference is

³De Loria in *Encounters*, 12-13.

extremely important and goes a long way to explain why it is so difficult for counsel and judges to pinpoint the dates of the various incidents in a case.⁴

On the Canadian scene, Rupert Ross, a Crown Attorney in northwestern Ontario who has worked in many aboriginal communities, brings a wealth of courtroom experience to his conclusion:

...we have not approached Native people with the expectation of difference which is essential for communication and understanding to commence. Not having perceived that a gulf divides us, we have never truly tried to bridge it. Unless we do, it is my fear that we are doomed to increasing mutual frustration and ...[as at Oka in 1990] overt hostilities.⁵

The Newfoundland and British Columbia examples in Chapters Four and Five show some problems in understanding concepts which serve to articulate rights. But where do we start to look at the difference in understanding? Why not begin where our histories start?

Theoretical background of the argument: working from the centre out and back

Before the concept of "history" was developed, people told stories, as they continue to do so. But the very basis for these narratives, as they may be called, is that they have a beginning, some content, and an end. This is the formation for narratives told in the "modern" western tradition. By this is meant a tradition arising from Judaeo-

⁴H. Kierulf, "Linguistic and cultural differences encountered by Indigenous People in Court", [1990] 2 *Canadian Native Law Reporter* (hereafter C.N.L.R.), 7.

⁵R. Ross, *Dancing with a Ghost: exploring Indian reality* (Markham, 1992), xxiii-xxiv.

Christian, biblical narration. In contrast, aboriginal traditions about narratives often involve ideas or things which are ongoing, which are continuous, rather than discrete --to borrow from the terminology of the scientific story-tellers.⁶

In trying to come to terms with the ontological and therefore epistemological differences between aboriginal cultures and western European culture/s, the language of discourse is necessarily cross-bred. Admittedly, referencing leans heavily on the western culture, where the researcher (and reader) is more at home. Much may be lost in the translation, but the attempt must be made.

The main argument embraces certain points, which also serve to encircle it. A core of the argument is the notion of how western-based academic/scientific traditions perceive aboriginal histories as invalid. Part of the criticism of tribal histories is that they are inexact as to the time factor. At the very centre of our ideas about time, are our stories of the beginning of the world, of creation time -- our origins. This is similar in both Western European cultures and aboriginal cultures. However, there is a vast divergence in the manner in which these stories have been treated, and evolved, how they have come to be perceived. The concept of time and origins has been treated in a certain fashion by the "western" peoples, while it is differently thought about in aboriginal cultures.

⁶Also, language itself is a story. The words that Pueblo people use in stories have stories of their own. Thus, "one story is only the beginning of many stories, and the sense that stories never truly end." L. Silko, "Language and Literature from a Pueblo Indian Perspective", in L. Fiedler & H. Baker, *English Literature: Opening up the Canyon* (Baltimore, 1979): 56.

The telling of narratives in different ways separates some people from others. Some groups' stories appear fluid in form, and this is disturbing to their neighbours. George Lovell, a Queens University historical geographer, relates that the academic community was upset by the manner in which indigenous Mayan people recounted the Guatemalan government's atrocities against them. The academics wanted precise numbers of people and dates. Numbers and dates were less important to Mayans, who were more in tune with the general story of the persecutions than the exactitude which the others wanted.⁷

In that very centre of our world, our universe as we know it, are our beginnings or origins. The telling of how these origins influenced our modern notions of "validity", of how this western scientific notion somehow assumed a place of importance within the western legal paradigm, and has dominated the legal discourse, is a peculiar and yet quite understandable tale. The consequences - for we still think in terms of 'A' influencing 'B'- have been an unwieldy, con-straining model for aboriginal epistemology to work within.

Although it was not his goal, Adler, a theological historian, has made a valuable contribution to this story. His purpose was to examine non-Christian sources used by the Christian historiographer Syncellus in the 9th Century A.D.; but his explanation speaks to wider concerns. He shows us the roots of the division of stories into (a) real

⁷G. Lovell. Symposium talk: "Maya - 500 Years of Conquest and Survival". Carleton University, Nov. 1992.

facts or truth, and (b) mere myths. He shows how, from the beginning of recorded history on the Eurasian and African continents, an intellectual dichotomy emerged which still exists today, in all our recordings of "history", in the very idea of events which occurred and are no more. The story Adler recounts is a story in which no truth value is ascribed to "myths" because they are outside time. His story also reveals the search for certainty, in epistemology and practice, which continues today in the courtrooms of our country.⁸

Chronography: myth versus real-time (history)

In his examination of "archaic" historiography, Adler records the orientation of chroniclers⁹ to date events and establish a sort of baseline for all history. By the 5th Century A.D., Greek custom strongly established this baseline to be the reign of Ninus of Assyria in the 9th Century B.C. This is because he was the first ruler associated with certain events which chronographers agreed were facts of existence. Thus, chronologers assumed that Assyria was the oldest 'datable' civilization. For example, they knew that the first Olympiad was 776 B.C.E. Beyond this baseline, things were unknown and therefore uncertain.¹⁰

⁸W. Adler, *Time Immemorial: Archaic history and its sources in Christian chronography from Julius Africanus to George Syncellus* (Washington, 1989). The goal of land claims settlement is also to achieve "certainty", in this case of state title.

⁹The notion of time is so intimately involved with history that a historian is a person who records times, a "chronicler".

¹⁰Adler, 15-17. Early histories consisted of significant events concerning rulers; they were histories of kings, not the common people.

Adler makes it clear that these early chronographers were developing chronological theory, not fact. Their theories held together because they found a need to synchronize the reigns of several kings of various countries in order to talk about events.

Everything coming before these chronologies or "histories" was termed "primordial" and "archaic". For third-century B.C. Greeks, all events prior to the Trojan war might be "primordial".¹¹ For Eusebius, an early chronographer, that might mean events prior to Adam's expulsion from Paradise, or events before Abraham. The boundaries of this primordial area were flexible.

Who first argued against oral tradition as valid history? The Babylonians and Egyptians, who wanted to detract from Greek historiography, long ago declared that these Greek traditions were merely fanciful stories of individuals rather than a common body of knowledge.¹² In the ancient world, the antiquity of a civilization, its record-keeping abilities, and cultural propensity to use these meant a higher perceived status on the scale of civilization. The Chaldeans boasted a chronology of over 300,000 years. They derided the Greeks, who earlier had no written method of recording events. These events were forever erased by the deaths of their knowers, in periodic catastrophes which

¹¹Adler, 9, 11. Eratosthenes, 3rd Century Greek, said that everything prior to the Trojan War (1184 B.C.E.) was "mythical".

¹²This is uniquely ironic, for a common body of knowledge is one way in which to define oral tradition.

befell their culture.¹³ To those of us who think of the Greeks purely in terms of their historical descriptives as the first rational logicians, this seems strange.

There is a strong parallel between how the ancient world regarded the Greek culture's early historiography, and how the modern western European world views aboriginal cultures' oral traditions. The argument against keeping a purely oral tradition has remained with us; but the argument of the superiority of ancient civilization has been turned on its head in North America, where aboriginal peoples pre-date European ancestors, yet maintain an undervalued oral traditional historiography.

Babylonian and Egyptian histories were, aside from Genesis, regarded as "documentary evidence".¹⁴ The latter note tells us about an early attitude of both near Eastern and Western peoples; an obsession or rigid concern with getting the "facts" right as a political tool; a concern that things must be categorized, named, put right and placed on a scale of discrete points in linear fashion.

Today, in North America, the debate about our origins continues. In the United States, creationists (Christian religious fundamentalists) are among a small minority who

¹³Ibid., pp. 22-22. Similar disasters - disease, famine, war - have decimated indigenous elders in the Americas.

¹⁴For Jewish and Christian historians, the main sources of these areas until Renaissance times were two translations, of a Babylonian and Egyptian history respectively. Their remains were fancifully edited by the Christian chronologers, who were only interested in proving a Biblical interpretation of chronology, and exercised selective bias. These questionable works were written by priests who supposedly had access to church documents. Ibid, pp. 23-35.

place credence in a fundamentalist interpretation of all Biblical events. Outside these groups, the Christian story of Creation is assigned no validity as historical fact; rather, it exists in the grey area of myth and allegory, food for poetic license, psychoanalysis, and literary analysis.

In the context of present arguments, Vine de Loria Jr. makes an interesting distinction about our ideas of aboriginal history. In one sense, the distinction between "history" and what came before it, is applicable. Tribal peoples' histories have traditionally not relied on a chronological accounting of events, following through the same themes year after year. But if the definition is broadened, to mean significant events people have lived through, then of course they had history.¹⁵ This is due to the distinction of what was deemed important to record, rather than when it occurred.

Epistemological Differences

The early chronologers or men of knowledge started out with a search for certainty, much like the scientists of today. The vast universe appears quite an uncertain place. That search for certainty, for control, is what underlies the scientific drive today. Call it security. Aboriginal peoples do not question the certainty of their knowledge in the same manner as science. They do not call the same doubts into existence. This is because of an emphasis on experiential knowledge.

¹⁵V. de Loria Jr., *God is Red* (New York, 1973), 142-3.

The courts draw from the distinction made by historians between history and myth. Judges continue to distinguish between traditional recountings of aboriginal occupation and historical documentation, weighing the former and often finding it historically lacking. This seems to be why the courts, and government negotiators at a policy level, operate in a counter-discourse. This discourse appears to stem from a different idea of history and therefore, origins.

Perhaps this can explain why judges and negotiators fail to reach an understanding with indigenous peoples about their rights. This thesis assumes the tentative existence of an effective dichotomy of differing conceptual worlds: traditional aboriginal knowledge systems and western or Euro-Canadian knowledge systems. Differing assumptions about how the world/s can be perceived or known seem to be basic to the systems. As well, they offer differing methods of reality-testing (verification). The essential methods of transmission also differ.

We can talk about these differences in terms of **origins** and **time**. The emphasis on origins should appear clearer after reading the traditional material in Chapter III. When we speak of time, the western system works within it as a linear concept, whereas aboriginal systems use a cyclical time concept which has a spiritual referent. We are perhaps familiar with more southerly indigenous peoples' time-sense. Ronald Wright has brought the cyclical Mayan Calendar into focus in his book, Time among the Maya¹⁶.

¹⁶R. Wright, *Time among the Maya: Travels in Belize, Guatemala and Mexico* (Markham, 1990).

But such extreme, developed examples of cyclical time have echoes in the northern part of the Americas. While not so clearly articulated, a cyclical notion of time is apparent in the lives of Canadian indigenous peoples. In Chapter III, aboriginal Elders speak about their time-concepts.¹⁷

Originating has two different meanings: originating as a people or culture, versus originating physically from a particular place in time as known by scientists. Originating culturally in a specific place is important to indigenous people; whereas originating physically is more important in the west.¹⁸ This difference affects all dialogue we attempt and seems to be the heart of the confusion. As we have seen from Adler's work, the comparable idea of "beginnings" is western-based and linear-historical-documentary in nature; whereas "origins" in aboriginal systems are spatial/orally based. Cultural origins, or Creation-tales, are classed as myths in western systems; whereas in aboriginal systems they are true Creation stories. When we speak about the origin of human beings, western systems rely on the scientific methodology of archaeology and paleontology. Aboriginal systems refer back to Creation stories. When we speak about the origin of places, western systems are archaeologically-based; whereas aboriginal systems refer to creation and/or migration stories. When we speak about the migration

¹⁷There is a third kind of time which a tribe of Brazilian Indians (Yanomani) call "spiral" time. This is what happens when their way of life is impacted by the linear time of the world outside their community, their forest lands. [Interview with S. Brascoupé]

¹⁸S. Brascoupé, personal communication.

of peoples, again, western systems rely on archaeology, bolstered by anthropology and ethnology. In contrast, aboriginal systems rely on migration stories told by the Elders.

In the aboriginal world, histories are teachings transmitted as stories, stories that people agree by consensus are true. They become part of the common body of knowledge of the particular community, or larger tribal grouping. There is a story for everything. For a group of young children, a story will be told one way. As the audience gets older, the story is told in a slightly different manner so as to give the teachings within it.¹⁹ So levels of awareness advance, as age advances.

An aboriginal way of knowing is expressed in these explanations:

Without knowledge to share, you're not of much use to anybody. The old people are the libraries of that time.²⁰

...the old people would talk and he [her grandfather] would listen. And he remembered those stories. ...I got a little older, and I had heard those stories, and I'd talk about them to my grandmother and I realized after awhile they were valuable. They were teaching us about our history, our legacy, our movements, our wars, everything.²¹

Knowledge in the aboriginal world is based on primary experience. If you have not experienced something, you cannot talk about it. Similarly, someone from another community would not tell the stories of that community. They belong to the experience

¹⁹Interview with Anishnabe Elder.

²⁰Anonymous speaker, "Haida Gwai", television production aired September 1992.

²¹Interview with Ojibway Elder.

of the other community. Every Indian tribe has its own unique cultural explanations, its own unique histories, and origin stories. And so they will be presented in a different way in each tribe.²²

As an Elder expressed it, knowledge - the whole universe - is inside of us. Everything in the earth is inside of us, but our perceptions put it outside of us. We make the world. We become cut off from the Earth, and from our knowledge that everything is already inside of us, that we make it all. The unconscious is very important in explaining aboriginal people's knowledge system. As this Elder expressed it, does anyone have to tell a leaf how to grow? It already has inside it all the knowledge to grow perfectly. For example, a person in Labrador can look at an airplane part that doesn't work and make it work, even though he's never seen one before. This is one way in which Elders see a difference between the world of science and the world of aboriginal peoples, with the loss of that close Earth connection. That connection is vital to knowledge of the world.²³

How we relate to the Earth is reflected in aboriginal systems. De Loria explains that for Indians, philosophical orientation is primarily to a spatial existence, not a temporal history. Sacred places, where ceremonial knowledge may be received from higher spirits, have an absolute importance for all tribal communities. Aboriginal

²²Interview with Interior Salish Elder.

²³Interview with Odawa Elder.

traditions or histories are replete with place stories: what made them important, why people may have migrated to a certain area, where a certain tribe originated. Their whole orientation is to a spatial existence, not a temporal history.²⁴

Ceremonial knowledge is available to all in the Indian community. An effort has sometimes been made to translate the system into terms understandable to non-aboriginal ears:

...The Indian community passes knowledge along over the generations as a common heritage that is enriched by the experiences of both individuals and groups of people in the ceremonies. Both the ceremony and the people's interpretation of it change as new insights are gained. By contrast, the non-Indian communities establish educational institutions which examine, clarify, and sometimes radically change knowledge to fit their needs. Knowledge is the possession of an exclusive group of people -- the scholars and the professionals who deeply believe that the rank and file of their communities are not intelligent enough to understand the esoteric truths of their society.²⁵

De Loria provides us with one explanation of what we might call "generic validity", found in the relationship between space and truth:

In shifting from temporal concepts to spatial terms, we find that a revelation is not so much the period of time in which it occurs as the place it may occur. Revelation becomes a particular experience at a particular place, no universal truth emerging but an awareness arising that certain places have a qualitative holiness over and above other places. The universality of truth then becomes the relevance of the experience for a community of people, not its continual adjustment to evolving scientific and philosophical conceptions of the universe.²⁶

²⁴De Loria, *God is Red*. Chap. 5: "Thinking in Time and Space".

²⁵De Loria in *Encounters*, 13-14.

²⁶De Loria, *God is Red*, 80.

What do we know of aboriginal teachings? There is an obvious difference in methodology -- almost sole reliance on oral transmission in aboriginal cultures. These teachings involve the emotions, percepts, the metaphysical. Western-based rationalist²⁷ teachings purport not to impinge on con-sciousness in the same way, but rather to involve the taught in an objectively-considered epistemological approach; although in recent years this objectivity has been recognized to be a construct.

The knowledge base of the western system has its roots in Greco-Roman thought, based on the logic of discourse, aided always by rationalist underpinnings. It is based on data from sensual material but with an underlying prominence of the visual. This bias led to a Christian rejection of civilizations like the early Greeks as primitive, because they didn't have enough visual material (i.e. the written word) which could be preserved. The idea of cultural - evolutionary, linear, time-line - superiority is associated with the beginnings of history and science.²⁸ Both of the latter demand an exactness of measurement which derives from a set of common ideas about time.

²⁷Rationalist in the classical sense of the heritage of 18th-century philosophers such as Descartes.

²⁸Adler links this notion of primitivism with the idea that since a society is primitive, it has not evolved into a kingship yet. Therefore, history has no evolved, since it was only the advent of a culture with a king that knowledge was discovered. Nothing noteworthy happened before the advent of kingdoms. (Adler, 108-110.)

Scientific Constructs

Because knowledge in the scientific world is not always based on individual experience, there is continual uncertainty about what is the truth, what is the answer. We are forced to make constructs such as "validity" and "reliability", in order to somehow render this knowledge certain. Because of the uncertainty of scientific methodology, the system has set up rigorous rules. Because of the reliance on the visual and other senses, it has set out rules about replicability, to ensure that we can always get the same information by going about things in the same manner. We find ourselves farther and farther in a realm where we are trying to share scientific knowledge among many people, and lack sure ways of sharing it, with the exception of these constructs. We make them the backbone of this knowledge system, and say that without them the knowledge is not true knowledge.²⁹

Western scientific striving for objectivity has been based on the working assumption of an empirical reality "out there":

Truth (or what provisionally passes for truth at a particular time) is...bounded by both the tolerance of empirical reality and by the consensus of the scholarly community.³⁰

²⁹Ridington & Ridington agree with this interpretation: "Myth and science are polar opposites, not because one is wrong and the other right, but because myth portrays reality as it is experienced while science postulates a reality that is thought to exist but can never be experienced. Myth unveils what is known to be true, while science experiments to built realities that are thought not to be untrue." In "The Inner Eye of Shamanism and Totemism", in Tedlock & Tedlock (eds.) *Teachings from the American Earth* (Toronto, 1975), 191.

³⁰J. Kirk & M. Miller, *Reliability and Validity in Qualitative Research*. (Beverly Hills, Ca., 1986), 11-12.

Under courtroom conditions, approaches to constructs such as validity and reliability in evidence testing are problematic, because of their underlying assumptions. The scientific world of knowledge, based as it is upon the rock-hard assumption of things we perceive through sensual data only, falters when applied to testing of extra-cultural phenomenon. It seems to fail because the basic assumptions differ. Tooker has given us evidence of the manner in which the Western mind tests reality versus the manner in which the aboriginal mind tests reality. An example is the concept of "Persons", who may be understood to actually be "beings-other-than-human", if the Winnebago concept has been adequately translated. However, western anthropologists cannot find this definition if they persist in testing reality primarily by the intellect, with an emphasis on visual sensual data. They see something like smoke:

"...it seems difficult for them to imagine that it can be so except by virtue of some intimate connection with a definite spirit, and if that can not be demonstrated, then the only solution left is to fall back upon the "magic power" idea. By doing this they clearly show that for them the test of individualization is corporeality of a fairly definite kind, dependent mainly upon visual sensations."³¹

This discussion does not seek a global explanation, but only points to differences. It evolves down to a question not only about epistemology, or **how** we come to know about what is in the world, but also to a deeper question of ontology, or **being** in the world. But this much larger discussion belongs to other works than the present.

³¹Radin, "The Winnebago Tribe", *Annual Report of Bureau of American Ethnology* 37 (1923), quoted by E. Tooker in *Intro to Native North American Spirituality of the Eastern Woodlands* (Ramsay, 1979), 55. This interpretation is acceptable to aboriginal teachers; it is reprinted in Dumont, *Culture, Behavior, & Identity of the Native Person*. (Sudbury, 1989). Section II, p. 72. See also R. Ross, *Dancing with a Ghost*: 82-987. Also E. Burch Jr., "The Nonempirical Environment of the Arctic Alaskan Eskimos", *Southwestern Journal of Anthropology* 27 no. 2 (1971), 148-165.

Articulating Aboriginal Rights: Dominance of Conceptual Material in western Institutions

Some of the basic assumptions of rationalist-based methodologies have changed within the last fifteen or twenty years. We tend more to accept that there are many valid approaches to knowledge. In the fields of archaeology, history, and anthropology, to name a few, debate rages about the best way to search for, interpret, and structure knowledge.

But all this activity is taking place within academia. It has little to do with the entrenched institutions of our government, especially the judicial arm, where a conservative ideology traditionally reigns. There is a basic orientation lag in the courts and government bodies. It is within this lag that aboriginal rights are presently being mediated.

Traditionally, the courts and government negotiators have relied on evidence in support of aboriginal land claims from the fields of archaeology and history. Although historians would dispute its being classed within a scientific paradigm, the idea of history, like archaeology, seems to depend upon a causality inherent in a linear time-notion. Also, we speak of historical evidence in terms of its "validity" as criteria in support of or against aboriginal claims. The language and concepts of science are used to assess the truth of history.

The issue of the validity of oral evidence becomes crucial in aboriginal evidence concerning time-span of territorial occupation. Anthropologists caution us that indigenous peoples sometimes have little interest in accurate dating. Despite these cautions, use of scientific methods to "validate" the knowledge continues. In turn, lawyers for aboriginal groups use anthropologists to authenticate the traditional knowledge base.

Some positive moves have been made in terms of what kinds of evidence the Justice Department³² and the courts will now accept. Historical documentation is no longer the sole source of verification of a claim. Judges are beginning to accept aboriginal sources such as physical archives: e.g. treaty belts. Very recently in judicial history, oral traditions have been heard in the courts as evidence of traditional occupation of territory. Courts are interpreting historical documents with a broader approach than previously.³³ On the international scene, an Australian court recently ruled that a historical, local traditional system of individual land rights was valid and served to establish an aboriginal occupation of the relevant lands prior to colonization.³⁴ While

³²Justice Department determines which comprehensive claims submissions will be accepted for negotiation. If there appears to be legal basis for a claim, they advise Indian Affairs.

³³See for example, *R. v. Sioui* [1990] Supreme Court Reporter [S.C.R.] 1025. The judge ruled that a document which the defense argued was only a war-time safe conduct, constituted a valid treaty.

³⁴The landmark case of *Mabo v. State of Queensland* [3 June 1992] (available via Australian High Commission) acknowledges for the first time that Australian courts must recognize that aborigines had and have their own traditional law and customs relating to land occupation.

this movement is encouraging, there remains a vital issue: who is talking here? Whose words are being used in the argument over rights?

The hegemony of dominant, often ambiguous, conceptual material within western legal and government structures is still a source of confusion and frustration for both sides in aboriginal rights mediation/litigation. An increasing body of anthropological analysis shows how government officials unwittingly dominate the discourse in rights negotiations. Often they are unaware that concepts, apparently shared with indigenous representatives, in fact have completely different referents.³⁵

The material in Chapter Three will show that, for Canadian aboriginal peoples, what is meant by "time immemorial" is not what the government or courts understand. "Time" is also different. It will show that, even though exacting indigenous time measurement systems exist, they differ from western measurement systems. Even though timing is very important, the emphasis on what is measured is different. In some instances, the cumulative differences make it difficult to sustain acceptable evidence of aboriginal rights to land.

Congruence of knowledge systems?

³⁵See for example, D.R. Hudson, "Fraser River Fisheries: Anthropology, the State and First Nations" and P.D. Elias, "Wage Labour, Aboriginal rights and the Cree of the Churchill River Basin, Saskatchewan", both in *Native Studies Review* 6 no. 2 (1990), especially pp.39 and 56. Also P. Morrow & C. Hensen, "Hidden Dissension: Minority-Majority relationships and the use of contested terminology", *Arctic Anthropology* 29 no. 1 (1991), especially p.40.

Despite the foregoing discussion on differences, many feel that there can be a bridging of aboriginal and western-based structural knowledge systems. For the purposes of this thesis, this cross-fertilization of knowledge is labelled "congruence". The focus is narrowed to questions of time-construction, of "making" prehistory or history.³⁶ Can oral traditional methodology help to establish a specific time-frame, which is the object of historical/scientific enquiry?

There are arguments both pro and con. It is to the advantage of lawyers for aboriginal groups to find congruence within the two systems, and so attempts are usually made to correlate oral traditional material with data deriving from archaeological and historical research. See the case law example in Chapter V, where expert witnesses try to tie an oral tradition about a monstrous bear to a specific geological occurrence in time, a landslide.

Some academics believe that congruence works. Metis historian Olive Dickason³⁷, archaeologist Knut Fladmark³⁸, and to some extent, anthropologist Julie Cruikshank³⁹ feel it is a workable idea. Others, whom I am inclined to identify with, see real problems with it. Cruikshank herself notes that use of this technique may

³⁶It has implications for questions of "form" as well; see the example in Chapter V, p. 151-2.

³⁷Interview with O. Dickason, Ottawa, 22 Sept. 1992.

³⁸K. Fladmark, *British Columbia Prehistory* (Ottawa, 1986), 11.

³⁹J. Cruikshank, "Legend and Landscape: Convergence of oral and scientific traditions in the Yukon Territory", *Arctic Anthropology* 18 no. 2 (1981), 67-93.

confuse archaeological dating systems. Anthropologists D.H. Hones and Jan Vansina document problems in constructing tribal chronologies.⁴⁰

This chapter has shown that there are difficulties in articulating aboriginal rights theory, which appear to stem from cultural differences in framing meanings underlying the theory. Chapter II offers an understanding of "time immemorial" from a legal and claims policy viewpoint.

⁴⁰D.H. Hones, "Problems of African Chronology", *Journal of African History* XII no. 2(1970), 177-201 & 161-172. Also J. Vansina, "Once Upon a Time: Oral Traditions as History in Africa", *Daedalus* (1971), 442-467. Anthropologists have become adept at constructing chronologies from oral traditions supplemented by other data, but caveats attach to such constructions. The resort to scientific methodologies results in such oddities as the "average dynastic generation" as a generator of "confidence: or security in a genealogical table.

CHAPTER II
TIME IMMEMORIAL AS DOCTRINE AND POLICY:
DEFINITION BY JUDICIARY & ADMINISTRATIVE ARM OF GOVERNMENT

Is the concept of "time immemorial" so different for the two cultures, aboriginal and Euro-Canadian? Perhaps we can differentiate between the original idea, and present applications. This chapter provides a historical overview of the use of "time immemorial" as a concept subsequently used in Canadian jurisprudence. We follow its development to emerge as a comprehensive land claims policy criterion.

Current Definition of "Time Immemorial"

The current articulation of "time immemorial" territoriality as a basis for aboriginal rights in Canada happened in two decisions of 1973 and 1979 respectively.

Calder v. Attorney-General of British Columbia:

In the 1973 *Calder* case, the Nisga'a Tribal Council sought a declaration that their aboriginal rights to lands they traditionally occupied had not been extinguished. The decision was split but the declaration was denied, based on a technicality (failure to obtain a Fiat). Central to the dissenting views of Justice Hall and others, was the validity of occupation since "time immemorial":

...6. The Defendant [British Columbia] admits that the bands referred to ... are the descendants of Indians who have inhabited since time immemorial the area delineated ...

7. The Defendant admits that the ancestors of persons referred to ... in this action had obtained a living since time immemorial from the lands and waters delineated ...¹

¹*Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (d) 145, at p. 170.

Hall stressed that this was not a prescriptive claim, since that would mean a "prior right in some other person or authority."² Thomas Berger, lawyer for the Nisga'a, referred to Nisga'a land as "ancient territory."³

Even Justice Judson, who denied the declaration, recognized the occupation argument:

The fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.⁴

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

Inuit living at Baker Lake, their hunting and trapping association and the Inuit Tapirisat of Canada sought a caveat and injunction against various government officials and mining companies, based on their aboriginal right to the lands in the N.W.T. Mining activities were disturbing the two caribou herds and interfering with the aboriginal right to hunt.

Against a background of defence arguments of either a non-existent or extinguished right, Justice Marshall evaluated conditions necessary for the existence of aboriginal right. He cited the criteria basic to proof:

²Ibid., at p. 174.

³Ibid., at p. 177.

⁴Ibid., at p. 156. There is a sense of judicial concern with criterion which Judson later terms "exclusive occupancy..by a group". This in turn evolved into one of the *Baker Lake* criteria, and later comprehensive claims policy.

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.⁵

The court relied largely for its interpretation of "time immemorial" occupation on archaeological studies. These studies concluded that the area of Baker Lake had at one time been occupied by the pre-Dorset culture, but not the Dorset culture, as well as the Thule culture, Chipewyan Indians, and the current Caribou Inuit. The Caribou were characterized as descendants of the Thule people. Notwithstanding, Justice Maloney found that the latest residents of the territory, the Caribou, had a case for "time immemorial" occupancy.

In a portion of that interpretation, where Indian and Inuit occupation collided, the court used a baseline of colonial sovereignty:

I take it that, in this context, "time immemorial" runs back from the date of assertion of English sovereignty over the territory which was probably no earlier than 1610 and certainly no later than May 2, 1670.⁶

So, two aspects of "time immemorial" emerge. Time immemorial can be flexibly interpreted in areas of confusion, and may in fact refer only to date of colonial authority in the area. A corollary **might** be that you do not necessarily have to be the original peoples in the territory.

⁵*Hamlet of Baker Lake et al v. Minister of Indian Affairs and Northern Development et al* [1979] 3 C.N.L.R. 17, at p. 45.

⁶*Ibid.*, at p. 49.

Although the courts continue to refine it, the strength of the "time immemorial" concept, which has achieved almost doctrinal status in the courts, comes from its roots. These roots emerged prior to our relationship with indigenous peoples in the Americas, and shaped the questions which would be asked about that relationship.

Historical Precedents

When documenting the historical antecedents of the current legal concepts of aboriginal rights, writers invariably present a dichotomized system of laws which developed in differing manners: natural or divine law versus positive law. Natural law refers to the naturally-ordered principles of the universe, or pre-existing rules, operating before the development of states, which can be recognized as divinely ordered. In contrast, positive laws are created by the will of the peoples. Both imply the use of a reasoned process to arrive at basic principles; but positivist thought is an essentially human creation.⁷

As for the provenance of the phrase "time immemorial",

Continuous use and possession of land 'from time immemorial' as a basis for title dates back to Roman times, when jurists considered it to be a self-evident rule of natural law. It was recognized in Justinian's code, and continued under feudalism in common law.⁸

⁷See Dickason's chapters in O. Dickason & L. Green, *The Law of Nations and the New World* (Edmonton, 1989).

⁸A. Snow, quoted in Dickason, *Ibid.*, at p. 249. Snow notes that this usage interfered with the politics of expansion, and so was circumvented." It is perhaps fitting that it was Spain who later refined the philosophy. Spain had itself been under Roman laws prior to the invasions of several "barbarian" and/or "infidel" peoples. The Catholic reconquest succeeded only by 1492, the year of Columbus's first voyage to America, in controlling the last remaining Mahommedan state (Granada). [See "Spain - History", in *Encyclopedia Britannica*].

In the "age of discovery", laws relating to indigenous peoples were formulated in the context of a developing body of international law. The French, Dutch, Germans, Portuguese and British did not seek a moral philosophy to accompany their explorations; Spain appeared unique in this approach to legal problems.⁹ The basis of the Law of Nations, of *Jus Gentium* as it was known, was natural law. As they developed, positivist notions lent greater weight.

The problem was that European colonizers regarded the laws of indigenous peoples as being outside *their* definition of what constituted the laws of nature. This facile conclusion was the product of cultural biases against Amerindian behaviours.¹⁰

The first formulator of international law, Francisco de Vittoria, a 16th century monk teaching at the University of Salamanca, applied the emergent philosophy of humanism to the question of validity of possession by the Spanish Crown of lands in the newly-discovered Americas. Although today he is regarded as an apologist who rationalized the brutal conquests of his country, his philosophy concerning the rights of indigenous peoples was revolutionary and earned him enmity. The teachings of Vittoria and others established a foundation for modern international jurisprudence.

⁹E. Nys, in Intro. to Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* (E. Nys ed.), (Washington, 1917), 98-9. Spain had a background of slavery; even at the time of conquest, Moors, Jews, and white slavery existed. (84).

¹⁰Dickason, 242. Also J.B. Scott, *The Spanish Origin of International Laws: Francisco de Vitoria and his Law of Nations* (Oxford, 1934), 131.

Vittoria's reflections on aboriginal occupation noted that Indians were "true owners, before the Spaniards came among them, both from the public and the private point of view."¹¹ Nevertheless, his primary concern was formulating laws examining - and not incidentally, justifying - Spain's formal title to the new lands. His doctrine of "discovery" flowed from the assumption that:

...those regions which are deserted become, by the law of nations and the natural law, the property of the first occupant... Therefore, as the Spaniards were the first to discover and occupy the provinces in question, they are in lawful possession thereof.¹²

This relies on the *terra nullius* doctrine, in which the colonizers perceived lands as desert and uninhabited. We will see how this doctrine was enlarged in the 18th century.

Vittoria commented on the impracticality of requiring proof of occupation, quoting Aristotle's Ethics:

...if any one were to be continually inquiring, settlement would be indefinitely postponed; and sovereigns and their advisors could not attain security and certitude of conscience, and, if they had to trace the title of their rule back to its origin, they could not keep anything they discovered.¹³

Both the Dominican Bartolemew de las Cases, a contemporary of Vittoria's, and Vera Cruz, a student of Vittoria and professor at the University of Mexico, made similar arguments:

¹¹Vittoria, Nys edition, 128.

¹²Ibid., at p. 138-9. The doctrine of *terra nullius* stated that a state could acquire title to lands which were empty or unoccupied.

¹³Ibid., at p. 116. Note the similarity to the concept of "certainty" in extinguishing aboriginal rights in current federal comprehensive claims policy.

Amerindians had been true lords of their lands since time immemorial, and ...Europeans had unjustly deprived them of their dominium. Neither pope nor monarch had any right under natural law to make grants of Amerindian lands without the express consent of the peoples whose territories were involved.¹⁴

Emer de Vattel, a Swiss diplomat of mid-eighteenth century, linked politics to philosophy in an enlargement of the law of nations first formulated by Vittoria. Vattel was a part of the positivist tradition, which developed mostly after the new continents had been discovered and settled or vanquished. The basis of positivist arguments came from their conception of law as stemming from cumulative state practice. Legal analyst Green presents previous philosophical efforts in natural law as amounting to more of an ad hoc effort developed out of the perceived need of clerics to justify the actions of monarchs.¹⁵

Vattel provided a telling comment on immemorial prescription and by extension, immemorial possession:

Where would we stand if it were permitted to question a right recognized from time immemorial when the means of proving its validity have been lost in the course of time? Immemorial possession is therefore an indefeasible title, and immemorial prescription ... can not be overruled; both are founded upon a presumption which the natural law required to be taken as incontestable truth.¹⁶

¹⁴Vera Cruz, from *Writings of Alonso de la Vera Cruz*, II.X.718, quoted in Dickason, 197.

¹⁵Green, 65. At the time of early colonial exploitation, the Law of Nations was based usually on customs of the sovereigns, e.g. a series of international treaties in practice meant a law regarding what had been assented to in the treaties, establishing boundaries and possessions. (p. 62)

¹⁶E. de Vattel, *The Law of Nations or the Principles of Natural Law. Text of 1758, Books I-IV, Vol. II*. Tr. by C.G. Fenwick (Washington, 1916), 158. Prescription he defines as "the exclusion of all claim to a right from the fact that the right has been neglected during a certain length of time." (156)

Notwithstanding this notion, which appears favourably disposed towards indigenous rights recognition, Vattel broadened the *terra nullius* doctrine to attach an occupational definition. If the indigenous people were not "using" their lands by farming them, then they were not actually occupying them. He promoted the allied myth of indigenous peoples as "wandering" tribes who had no real use for all those vast "waste" or "deserted" lands.¹⁷ From there it was only a step to finding that aboriginal peoples were not "civilized" enough to have proper - i.e. European - laws and social organization, and therefore without proprietary rights to land.

International and Canadian Case Law

As legal historian Cohen notes, to prove that Spanish philosophy was the forerunner of basic legal principles on aboriginal rights, one must do more than show similarities in the systems, which might be coincidental or a product of reaction to similar legal situations.¹⁸ The evidence may be found in nineteenth-century legal decisions, in which judges make direct reference to Vattel, who in his philosophy makes direct reference to the works of Vittoria. The philosophical chain is quite strong.

This section presents a brief selection of decisions which have exercised a major influence on aboriginal rights issues. It is neither random nor by any means complete. U.S. examples are chosen because Canadian courts have relied heavily on these decisions. It

¹⁷Ibid., at p. 85.

¹⁸F. Cohen, in L.K. Cohen (ed). *The Legal Conscience - Selected Papers of Felix S. Cohen* [reprint] (1970), 247.

would be equally valid to use former British colonial cases, some of which have been very important in the development of rights theory, but a brief discussion precludes their use. The sole intent is to follow "time immemorial" as it has been used in the courts.

Johnson & Graham's Lessee v. M'Intosh

In 1823, U.S. courts recognized the validity of occupation since "time immemorial", giving indigenous peoples a new common law basis for rights, outside of any rights expressed by the Royal Proclamation of 1763. *Johnson v. M'Intosh* concerned who has the right to alienate lands. The dispute here was that in 1773 and 1775 in present-day Illinois, certain British settlers, some ancestors of Johnson, had received a grant of land from the Plankeshaw Indians in what was then known as "Indian Territory" pursuant to the Royal Proclamation. A few years later, under American Independence, the U.S. granted the same lands to William M'Intosh.

In the decision it appears as almost a non sequitur that the Indians are acknowledged to have rights resulting from occupation since time immemorial. In fact, such statement appears in the reporting of background facts, prior to Chief Justice Marshall's decision, as if it were a given:

That from time immemorial, and always up to the present time, all the Indian tribes or nations of North America ... holding, possessing and inhabiting the said countries ... held their respective lands and territories each in common ... and that there [sic] sole method of selling their lands, whether to governments or to individuals, always has been from time immemorial and now is for certain chiefs ... to represent the whole tribe ...¹⁹

¹⁹*Johnson & Graham's Lessee v. M'Intosh* (1823) 8 Wheat. [21 U.S.] 543, see 549-550, 554.

Nevertheless, such rights, which were characterized as stemming from natural law, gave way before principles of positive law "which our own government has adopted in this particular case, and given us as the rule for our decision."²⁰ Marshall struggled to find a unifying principle upon which to base government title, and proposed a convoluted argument for the doctrine of discovery converted into the doctrine of conquest. The conclusion was that Indians could only alienate land to the Crown, which possessed dominion and thus underlying title. The good news was that Indians had rights; the bad news was that they did not survive in a form strong enough to guarantee them ownership of their lands.

The Cherokee Nation v. The State of Georgia

The Cherokee Nation figured in an 1831 case in which they claimed to be a foreign state, immune to jurisdiction of the State of Georgia.²¹ They appealed to the federal court to uphold treaties the federal level had entered into with them; and also invoked their sovereignty rights, which they claimed from "time immemorial ... the Cherokee Nation have composed a sovereign and independent State...".

The statement went on:

...That the Cherokees were the occupants and owners of the territory in which they now reside before the first approach of the white men of Europe to the western continent; 'deriving their title from the Great

²⁰Ibid., at p. 572.

²¹In response to intense demands for land and faced with the discovery of gold on Cherokee lands, Georgia had passed legislation annexing the lands of the Cherokees as well as abolishing all Cherokee laws. The Cherokee Nation, who were politically revitalized and had developed a written Constitution and a Supreme Court, were perceived as a threat by Georgians, as they were too "civilized." The federal program to get Cherokees to remove to western U.S. was not completely successful. The Cherokees sought a federal injunction to prevent execution of the relevant Georgia act. In Clinton et al, *American Indian Law* (3rd ed.) (Charlottesville, 1991), 12-13.

Spirit, who is the common father of the human family, and to whom the whole earth belongs.' Composing the Cherokee Nation, they and their ancestors have been and are the sole and exclusive masters of this territory, governed by their own laws, usages and customs.²²

Furthermore, Chief Justice Marshall stated, the land

...is consecrated in their affections from having been immemorially the property and residence of their ancestors, and from containing now the graves of their fathers, relatives, and friends.²³

These are important statements further explaining the concept of "time immemorial". In this aboriginal view, title comes from the spiritual realm, and has political connotations of conferring sovereignty. Note also the reference to pre-contact times.

The decision was that the Cherokees were a "domestic dependent nation" and the court could not interfere with State jurisdiction.

Worcester v. The State of Georgia

In 1832, Indian rights were further elaborated. The State of Georgia had enacted legislation compelling any white person living within the Cherokee Nation to register or get a permit, as well as take a loyalty oath. This was as a result of Georgia legislating to extend legal ownership and jurisdiction to Cherokee lands and annul all Cherokee laws. Worcester, a missionary, was prosecuted and convicted for refusal to take oath and leave the Nation.²⁴ The writ of Error stated that the Georgia legislation re: Cherokee lands and laws was

²²*The Cherokee Nation v. The State of Georgia*. (1831) 5 Pet. 25 [alternate citation 30 U.S. 1]. Quoting from the Bill presented by the Cherokees, at p. 28.

²³*Ibid.*, at p. 28.

²⁴Clinton et al, Chap I, 18.

unconstitutional and in opposition to treaties taken, as only the federal government had jurisdiction to legislate re: Indians. The missionary won a verdict of void conviction.

In the supporting Writ of Error on behalf of Worcester, the claim was that

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception [that they could only treat with the European nation claiming discovery]...²⁵

Time immemorial is given context by the phrase:

...the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. ...²⁶

The latter part of this quote explains the much later decision in *Baker Lake*. One need not be the original occupant, as long as the move to the present area took place in the archaeological times of "pre-history". This forever relegates to a position of inferiority, claimants to the rights process who occupied their present lands subsequent to contact times, or the "beginning of history" as it were, from the point of view of the colonizers.

Time Immemorial for Whom?

An ironic note on notions of occupancy comes to us in *Rex v. Syliboy*, a 1928 case involving Mi'kmaq (Micmac) in Nova Scotia who were asserting the validity of a 1752 compact. Justice Patterson declared that the "savages" were never recognized as having rights of sovereignty or of ownership in Nova Scotia. The latter belonged to Great Britain,

²⁵*Samuel A. Worcester (plaintiff in error) v. The State of Georgia* (1832) 6 Pet. 483 (alternatively 31 U.S. 512), at p. 486.

²⁶*Ibid.*, at p. 495.

who had acquired rights over it from France, "which had acquired it by priority of discovery and ancient possession; and the Indians passed with it."²⁷ This strange application of the principle of "time immemorial" stems from the European doctrine of *terra nullius*²⁸.

The 1992 Australian decision in *Mabo v. State of Queensland* rejected the *terra nullius* doctrine as a framework on which to hang European rights. It throws out the racist notion of "waste" lands, held only by people too uncivilized to have their own laws. The lands in question lie in the Torres Strait off the coast of Queensland, where the Murray Islanders live. The decision recognizes that the lands were not only occupied, but the Islanders were indeed agriculturalists - an occupation of which Vattel would undoubtedly have approved.²⁹

Relationship of claims policy to legal decisions

How are federal land claims policies related to jurisprudence? One might venture that each has had a parallel, perhaps interdependent development, historically; for as colonial and later federal administrations chose courses of action, the courts were appointees of those administrations. Yet federal policies often reflected the development of a growing body of case law.

²⁷Justice Patterson in *Rex v Syliboy* [1929] 1 D.L.R. 307 at 313.

²⁸See Dickason's comments on *terra nullius* and *vacuum domicilium*, 234-5.

²⁹*Mabo v. the State of Queensland* [3 June 1992]. Australian High Commission.

In legal analyst Green's analysis of the Royal Proclamation, he links its implementation to a British common law right in which lands may not be expropriated by the Crown without compensation. The latter may take the form of sale or "an act of cession [surrender] which might almost be regarded, depending on the consideration flowing from the Crown, as an outright gift." Similarly, English citizens may not be displaced without monetary recognition of their property right.³⁰ In *Calder*, Justice Hall (dissenting) noted that the principle of compensation was extended to Canada.³¹

It is accepted that the 1973 *Calder* decision was the major spur in changing federal attitudes to include implementation of a formal INAC³² claims policy recognizing aboriginal and treaty rights. Other factors, such as a post-1969 upsurge in aboriginal political organization activities and timing, contributed to the policy change. Clearly, political activity led to constitutional gains in 1982 with sec. 35 (1-4) of the new *Constitutional Act*. This directly influenced jurisprudence. Again, both *Guerin*³³ in 1984 and *Sparrow*³⁴ in 1990 were immediate factors in re-evaluating claims policy, in terms of whether aboriginal rights had been properly safeguarded and clearly extinguished in some manner. Here we see

³⁰Green, 102, 104.

³¹*Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (d) 145, at p. 173. He cites *City of Montreal v. Montreal Harbour Com'rs* [1926] 1 D.L.R. 840.

³²INAC = Department of Indian and Northern Affairs Canada.

³³*Guerin v. the Queen* (1984) 13 D.L.R. (4th), S.C.C. 321.

³⁴*Sparrow v. The Queen*, 49 S.C.J. 1990. May 31, 1990.

a circular, ripple effect as we might well ask, what influenced the justices on the Supreme Court.

Claims policy in general is not always judicially-driven. For example, the 1991 policy change in specific claims, admitting pre-Confederation treaties for consideration, opens the door for new policy definitions. The previous position making such claims inadmissible was not based in law.³⁵ Extra-legal as well as legal factors influenced the March 1993 policy announcement, which offers a (promised) third category of claims.

In a letter to a concerned Chief in Kamloops, B.C., regarding the Newfoundland Conne River's claim rejection, a federal negotiator stated that:

"There is no official appeal process for the validation of comprehensive claims since the criteria for acceptance or rejection are not of a legal nature."³⁶

This would appear to directly contradict what many officials and public knowledge share: that the relationship between law and land claims policy is becoming very direct.

Policy Development:

In the early 70's when comprehensive claims policy development was in the early stages, recommendations acknowledged that there would be a problem with current movement from one area of Canada to another. It was felt that it might be hard to exclude

³⁵Internal communication from Departmental official, 1990, Indian & Northern Affairs Canada (hereafter INAC).

³⁶O. Gobeil, Senior Negotiator, C.A.M. & Nfld/Lab. Claims, to Chief C.T. Jules, Kamloops Band. Letter, 4 Sept. 1986. Dept. of Indian and Northern Affairs Canada [hereafter INAC] file B8245-116(NS), Vol. 13.

Indians who had moved from other points into an area where negotiations were taking place. The problem for officials was that such migrants appeared to be part of the native community and differentiation might be very difficult. The idea of a possible cut-off date, possibly as per the beginning of negotiations, was discussed. Conversely, the federal level recognized the problem of people leaving an area under negotiation.

By 1978, Departmental officials did not even perceive occupancy since "time immemorial" to be an issue. Other items such as extinguishment, supercession by law, self-determination, litigation, and overlapping claims were of greater importance.³⁷

Over the years, the federal level has hinted at possible policy changes. Certain groups, whom Indian Affairs had excluded from the comprehensive claims process, on the basis of the "time immemorial" occupancy criterion, held hopes of a change in policy after the Coolican report came out in 1986. These hopes were not fulfilled; policy remained essentially the same after Coolican's review process. The effects of the latest policy remain to be seen.

Inconsistent Position on Time Immemorial Rights

In its use of "time immemorial" criterion as an entry to the rights recognition process, the federal government has ignored history. Both before and after contact -- as if that itself were a static concept, which it is not by any means -- indigenous peoples were not fixed like

³⁷Interview with INAC official, 1992.

pins on a map, frozen forever in time in a certain location. The first aboriginal peoples encountered by Columbus, the Taino, had themselves not originally occupied the area where they met him.³⁸ This concept of static occupation is subsumed within imported European notions of how aboriginal peoples lived, i.e. they were simple people, part of the landscape. European peoples themselves also moved, with constant mixtures of populations. The colonizers of North America expanded westward in the U.S. and to the west, north and even east in Canada, which meant many people were on the move. This idea of fluidity has not been granted to indigenous people, either in the law or in the claims process. Caught up in these attitudes is the idea that aboriginal peoples "migrated" - perhaps like the antelope migrate on an African plain - to other regions, without purpose. The negation of motivation leads to this conclusion. Movements were purposeful and only done for essential reasons.³⁹

Examples of anomaly and inconsistency within claims/treaty policy abound. There have been treaty negotiations in many tribes, where the government of the day disregarded the tribe's non-status as occupants since "time immemorial". A treaty rights example is the

³⁸Sale notes that these peoples "had migrated to the islands from the mainland at about the time of the birth of Christ, occupying the three large islands we now call the Greater Antilles and arriving at Guanahani...and the end of the Bahamian chain probably sometime around A.D. 900." K. Sale, *The Conquest of Paradise: Christopher Columbus and the Columbia Legacy*. (New York, 1990), p. 97.

³⁹A partial inventory of motives might be: Before-contact -- political difficulties with neighbouring tribes; expended resources dictating a move to a more fruitful area; or relocation for spiritual reasons. Post-contact -- pressure from colonists; relocation to be closer to trading posts, or to areas better resourced for the fur trade; political alliance with various colonial powers; or necessity of refuge after failed wars.

Huron-Wendat in Quebec. The 1990 legal decision on their rights forced a change in policy.⁴⁰ The federal and earlier, colonial governments have not felt it problematic to acknowledge rights, by agreements (historically treaties, currently comprehensive claims agreements) or land grants, with tribes who we know have moved from their aboriginal territory, whether by expansion, warfare, or from other motives. The colonial government granted land in southern Ontario to some peoples of the former Iroquois Confederacy after their alliance with the British against the Americans.⁴¹ Following their dispersal northward due to American settler pressure in the 1700's, Pottawatomies settled around Georgian Bay, Ontario, and received reserve land in the early twentieth century.⁴² The federal government accepted the Métis claim in the Northwest Territories more or less on social grounds because they are also Dene descendants and are integral members of the N.W.T. communities.⁴³ The land claims Agreement dealing with the western Arctic peoples, the

⁴⁰The Huron-Wendat of Wendake, presently living around Lorette, Quebec, were originally from the lands between Lakes Huron and Simcoe. Political warfare with the Iroquois almost eradicated them. Remnants of the tribe arrived in Quebec. Just prior to the Capitulation of Montreal, they signed an agreement with the British. About one hundred years ago, the local Indian agent at Lorette described these people as almost like the white men in the adjacent city of Quebec. Yet the Hurons launched a successful legal action to have their 1760 agreement declared a valid treaty. As the Justice remarked in May 1990, they certainly were not occupants of their lands since "time immemorial"; yet they clearly had rights. See *Sioui v. The Queen*. 48 S.C.J. 1990, May 24, 1990. Indian Affairs is now implementing a process of "treaty definition" with the Huron-Wendat, which they are careful not to label of re-definition (a goal of the AFN). Moreover, the federal government is to negotiate a self-government agreement with them.

⁴¹Six Nations and Tyendinaga reserve communities.

⁴²Moose Deer Point reserve community.

⁴³J.R. Goudie, ADM, to DM of Indian Affairs. Memo, 4 July 1985. INAC File B8245-116(NS), Vol. 13.

Inuvait, includes as claimants people who immigrated to the claimant area only recently.⁴⁴

More examples could be cited.

In an interesting twist, the federal government made a series of treaties with the Cree of the Canadian plains in the late nineteenth century. Based on a historiographic error, compounded over the years, historians believed that the Cree peoples, over a period of perhaps one hundred years, had migrated from their original woodland area in Northern Ontario/Quebec all the way west as far as Alberta. The moves were assumed to be a response to Cree dependence upon European goods as a result of the fur trade relationship. This dependence seemingly led to the Cree depleting fur resources in their original area of occupation, seeking more animals ever westward. Archaeologist Dale Russell has challenged this myth. Simply because there was no historical documentation in the seventeenth century about western Cree, traders, travellers and later, academics, believed that the later reports of greatly scattered populations of Cree observed meant that Cree from Ontario woodlands had dispersed other tribes in a series of westward moves. In reality, the Cree had always occupied a broad range of territory and were never confined to the eastern woodlands.⁴⁵ In similar fashion to the Newfoundland Mi'kmaq we will see in Chapter IV, what historians **believed** about the Cree became for all purposes their sole truth or history. The Cree have no way in which they can prove they have always lived in the same area, to counter the

⁴⁴INAC. The Western Arctic Claim: A Guide to the Inuvait Agreement (Ottawa, 1984).

⁴⁵D.R. Russell, *Eighteenth-Century Western Cree and their Neighbours*, Archaeological Survey of Canada, Mercury Series Paper 143 (Ottawa, 1991).

myth, which was adopted even by Diamond Jenness, an early and very influential anthropologist. Yet the government made opportunistic treaties with the Cree despite this migration story.

Conversely, the government has also refused to deal with aboriginal peoples who cannot prove "time immemorial" occupancy, like the Newfoundland Mi'kmaq. In 1975, they rejected the claim of the Mohawks of Caughnawaga, Kanesatake, and St. Regis to lands along the St. Lawrence and Ottawa Rivers, south and east to the U.S. border and north to a point near the Saguenay River. Officials cited the time immemorial criterion.⁴⁶

The last kind of inconsistency is the actual form that "time immemorial" definition assumes in government practice. Since "prehistory" remains relatively unknown to colonial descendants, a flexible interpretation of "time immemorial" criterion demands the application of a sub-criterion in areas of confusion: the date of colonial establishment of sovereignty in the area under claim. This "date" is in itself highly variable, and sometimes very argumentative. Thus, for a mosaic of claims laid out across the Canadian landscape, picture the disjointed, non-serial areas of establishment of colonial authority, which reflect actual rather than asserted dates. The picture becomes very hazy. The concept appears to have holes in it.

⁴⁶Interview with INAC official.

Chapter III will offer another perspective on "time immemorial" occupancy. Aboriginal voices will express what it means to their nations.

CHAPTER III IN TIME IMMEMORIAL

This chapter may bring us a closer understanding of why indigenous people rely on a *cultural notion*, usually *place- oriented*, rather than on *physical markers* which are *time-oriented*, to express their origins. Methodological notes appear in Appendix "A". Elders talked to me about many things, but I particularly want to talk about three headings: origins (time immemorial), history, and time.

Recall that in the Introduction, I stated that there is a direct relationship between "inherent" and "time immemorial" rights. "Time immemorial" is a cultural concept which has a qualitatively different meaning to many indigenous people, as opposed to what judges think it is. We will see Justice McEachern's definition in Chapter V.

Origins: "Time Immemorial" as Ongoing Creation

How do we know what aboriginal people may understand by "time immemorial"? Similarly to histories, people are agreed upon a particular definition. Consensus dictates what is true. Of the elders who expressed a view on the meaning of "time immemorial", all but two of them said it meant "since the Creation", or "time from the beginning"; one said it meant "forever", another referred to "time from way back when, before we can remember". There were elders who had never heard of such a phrase; the political message had not spread to their homes in such a way as to invest meaning into the words. That, more than anything, was an indicator that this is a phrase foreign to some aboriginal peoples.

To talk about "time immemorial" would mean with reference to their own cultural paradigms. The discourse shifted to stories about "the beginning of time" or the Creation, an idea of immediate relevance and comprehension to the Elders. This hopefully set up a dialogue wherein both myself as interviewer and individual Elders could understand what the other was trying to communicate.

When Elders translate "time immemorial" into their cultural referents, it evokes a deep resonance which seems to echo beyond consciousness. It is the "beginning of time", in the Creation time. The Beginning of Time or Creation seems to explain the World. It is a catchment for an immense reservoir of knowledge, of "history", or telling. In the way it is revealed or told, the knowledge is dispersed to the many in the community. To open up the cultural equivalent of "time immemorial" is to open up the knowing of an entire range of peoples. Like an egg, once opened, it reveals vast possibilities, which are the teachings within. There is a place of beginning, but there is no ending -- it circles back to the beginning, like a great wheel -- the Medicine Wheel of aboriginal teachings. That beginning still is; those traditions continue.

An Elder clearly expressed the cultural basis of origins: "I am called the Beginning of Time; I represent the Beginning of Time."¹ He is a transmitter of knowledge, an embodiment of the racial memory of his people. Another medicine-carrying Elder received a name, formerly carried by an elder now passed on, which carries the meaning of "the

¹Interview with Chippewa Elder.

beginning of time". So that when this Elder smokes tobacco she is given, she does it for the woman who preceded her, whose name she carries.² What this means is a responsibility on the part of these Elders to represent and maintain their inherited traditions. As I was told, the Beginning of Time has not been treated well. People disregard it, people don't pay heed to it. So that they go downhill; bad things are happening.³

Whether we wish to acknowledge it or not, some aboriginal peoples are living "the past in the present".⁴ The usual argument, that there no longer are Indian or Inuit peoples who follow a "traditional" lifestyle, belies the fact that for many, teachings of a particular nature are still of great significance. Many aboriginal people respond on a deep level to the teachings from within "time immemorial" as they understand it.

At the most basic level, there are the stories of Creation itself, stories of origin. Just as these stories, serve to show people the boundaries of their existence, they give the people an identity. Stories are usually grounded in place. Often in the stories, people first emerge from a particular place, which assumes ongoing significance. From an individual's childhood, they are rooted in the certainty of place. A child may grow up knowing, "we are the people who came down from the north." Creation stories may also identify clans, so that the people within each clan have a strong sense of their origins. For example, in a Pueblo

²Smoking tobacco is regarded as a direct spiritual link to the Creator.

³Interview with Chippewa Elder.

⁴Taken from M. Bloch's title, "The Past in the Present in the Present", *Man* (N.S.) 12, no. 2 (1977), 278-292.

Creation story, Antelope and Badger (two Pueblo clans), help the people to emerge from a hole in the earth.⁵ Because the origins of each tribal grouping are culture-and-place-centred, a wide variety of creation stories are taught. Each is meant for a particular audience who find cultural relevance in their own beginnings. People think of themselves as belonging to their stories, as the Antelope Clan belongs to the story of the Antelope who aids in Creation.

Some creation stories are universally recognized, like the variations of the flood histories. These flood histories are always characterized as Creation stories. Others have the theme of the four races of human beings, each given a designated area and gifts. No creation story would be complete without mention of the four Directions, which represent a myriad of concepts within their teachings.

The Okanagan people have a Creation story about How the Mountains and Other Things Emerged, in which local animals figure:

There were four animals and the Creator. The Earth was a globe, just like a crystal. There was water all over it, only the lily pads on the surface. The four creatures were Muskrat, Mink, Otter, and Beaver-- he was the youngest, the chubby one. The Creator told them to dive down. The first three animals were only able to dive down three-quarters of the way. Only the Beaver made it all the way to the bottom. He scooped up some sand and rose to the surface. By the time he got to the surface, he saw he had no sand left. But the Creator said, you have a grain of sand under your nail. Put it out onto the waters. And he did. And that grain of sand grew, until

⁵L. Silko, "Language and Literature from a Pueblo Indian Perspective", in A. Fiedler & H. Baker (eds.) *English Literature: Opening up the canyon* (Baltimore, 1979), 57.

it became the mountain peaks and the mountain formations, and the other forms on the surface of the Earth.⁶

Other creation stories tell of people's affinity with the animals in the Creation:

All the animals that lived in the world, once existed within Original Man. For Original Man to make himself into a real human..he started to spin out these parts of himself. And that created all the different animals. These were all components of him. So that story...my grandfather told me...that's how the animals came about. And that's why when we see certain animals, we have an affinity towards them, it's still a part of us, like when you see the animal on the outside, and you like the animal, and you're interested and curious about the animal, it is something about your own self, your own origins, that you're curious about and that you study. So that's why these beautiful creatures are out in the world and our people consider them relatives.⁷

Some creation stories tell of the first Anishnabe coming to Earth: In the beginning there was nothing, there was darkness. And the Creator called out into that darkness. The sound that he made -- the reason why the round wooden rattle is used is because that is what the Indian people feel is closest to the sound that the Creator made. Before man was created, the first Man-spirit was created, the spirits of all the animals and all the plants were already created. All the animals and all the plants were already created, put on Earth. Everything was there that man would need. Plants, animals, flowers, the waters. This man who came down was called Anishnabe, meaning 'he who was dropped down'. The first Man-spirit landed on his tip-toes, because he didn't want to disturb the beautiful grasses and things that were growing already. So they say he landed with his toes pointed. The Creator told the Anishnabe to go out and give everything a name, to name what he say. So everything had a name, but the man didn't know his own name. He had to find out what that was. Because the Creator had already given him a name but he didn't know what it was.

⁶Field notes - interview with an Okanagan Elder's assistant.

⁷Field notes - interview with northern Ojibway woman Elder --- as told to her by her grandfather.

Naturally, the names of plants and other "things" are culturally-specific to the people.

The larger Creation finds continuity in the newest Creation - a child, who is "placed" and so finds identity in the world:

Just like when every child is born, they already have a name the Creator has for them, but they must discover that name. And until they know their name, they are not really placed. When a child is named, his name is found -- often a person would go to [a wise person] and ask them to find out the name of the child. This person will go on a vision quest and the name will come to them in their vision. They can tell the name back to the parents of the child. Then the parents take the child and introduce him to all the spirits. To the rocks, to the waters, to the trees, to the animals, and they tell them his name.⁸

The Haida of West Coast British Columbia speak of their origins in a giant shell by the ocean. The shell is the symbol of Life -- the original life in the ocean-- for several North American indigenous peoples:

Raven was flying [he had created the Earth]. At first he saw nothing. But as he scanned the beach again, a white flash caught his eye. When he landed he saw between his feet, half-buried in the sand, a giant Clam-shell. When he looked more closely, he saw that the Shell was full of little creatures, cowering in terror under his enormous shadow. The Raven leaned his great head close to the Shell. With his smooth Trickster's tongue he coaxed and cajoled and coerced the little creatures to come out to play in his wonderful shiny new world. So it wasn't long before one and another of the little shell dwellers timidly emerged. Some of them scurried back when they saw the immensity of the sky and the sea and the overwhelming blackness of the Raven. But eventually curiosity overcame caution and all of them crept out or scambled out. Their descendants built on its beaches the strong, beautiful homes of the Haidas and embellished them with the

⁸Field notes - interview with an Elder of the Medewiwin Society, a spiritual teaching body.

*powerful, heraldic carvings which told the legendary beginnings of the great families.*⁹

Connected with these traditions from the Beginning of Time, or the Creation Time, are teachings which further clarify identity and provide cultural explanations of origins. These naturally differ among the various indigenous peoples of Canada, but, again, have broad similarities in their natures. Two teachings in particular will be presented, from an Okanagan and an Ojibway tradition.

Among the Okanagan, an Interior Salish people, are the Seven Changes (they may be called the Seven Gifts). They are presented in a linear fashion when written down, but are cyclical in nature, because each one is connected to the Earth; each one has happened many times:

- [1] *Klx-trear: the unravelling of beginning - rights*
- [2] *Chip-chap-tlkilxth: creation: minerals, plants*
- [3] *Stil-skeltuxlh: ripped/created from Earth*
- [4] *Xat-xas-skeltutxlh: First organizing societies*
- [5] *Skeicuxlh: organized societies (customs, traditions)*
- [6] *Alt-nas-skelcuxlh: descendants of all above*
- [7] *tka-sitch: Future generation*¹⁰

It appears to be a historical progression in terms of, say, from [5] to [6] to [7]; but Elders say that it is not linear. Also, there is an implicit eighth one, and that is the end of time.¹¹

⁹Told by Bill Reid, west coast Haida artist, for TV program "The War Against the Indians", aired on CBC 4 Oct. 1992.

¹⁰Notes of Okanagan Elder, a hereditary Tribal Chief.

¹¹In Abenaki culture there is a similar notion; they speak of "the end of that" [the 7].

This relates to the fact that there could be a loss of all these Seven Gifts and the teachings within them, in a crucial period which seems to be happening now. All these things might be lost, but this is only expressed as a possibility. The elders express it politically as the possibility of "losing our rights due to assimilation". Most aboriginal cultures do not have an interest in the end of time.¹²

Within each of the Seven Gifts or Changes, there are many teachings, of a different nature for each one. And within each of the Seven Changes there are related prophecies. So, the Beginning of Time has within it all these gifts which were given by the Creator, all the teachings which are coming from the gifts, and the prophecies; all these are continuing.¹³

Some Northern Ojibway teachings about the Creation or the Beginning of Time revolve around the Six Gifts, which were given to all races:

A human being is made up of these six Gifts: Tree, Rock, Fire, Water, Wind, and the Four-legged, Winged and Water Life. Each of those six Gifts, in turn, has six Gifts within it. Once you discover what is within all of these Gifts, you receive the Seventh Gift, which is Ourselves, the human being. So this is self-knowledge, which is the last Gift. Once we have this knowledge, we can speak for all the Gifts. They take care of us; and in turn, we are the caretakers. Human beings alone were given the power of speech; so we speak for all the other Gifts. It's a cyclical concept.

¹²De Loria, *God is Red*.

¹³For example, the stories about Coyote, the trickster-hero, are stories which come from the Second Gift--stories of the taming of the World, how Coyote came and had to tame things down. People often have false representations of Coyote and don't really understand him. He is a runner, a worker--he works with the Creator. He teaches us how to behave.

This is an illustration of some of the Six Gifts inside of us:

90% of our body is water. The fire we have inside us is the warmth that we show to other people and that we feel between other people. The wind is our voice. The rock is our strength. From the Four-legged and the Winged and Water creatures, we get the kinds of movements that we make. We have that inside us as well. And the trees -- our skin is like the bark of trees; it's on the outside. What the Creator gave to the seventh Gift was speech, the ability to talk. So it is our responsibility to speak for all the other gifts.

Each one of the six Gifts we have within us, we have four kinds of that gift within us. For example, the Wind. We have four kinds of voices, from the softest to the loudest. ...¹⁴

In this epistemology, everything relates back to the Six Gifts. As in the Okanagan example, the gifts of Creation are ongoing. The lessons they impart are part of a continuing heritage which informs the people's daily behavior in the community and long-term planning in a larger sense.

The two examples above show one way in which the gifts that the people receive as part of the Creation, and bear responsibility toward, are what aboriginal spokespersons refer to when they talk about rights that are "inherent" or stem from "time immemorial". They translate cultural referents into the political terms which are the closest in meaning.

¹⁴Field notes - interview with northern Ojibway woman Elder.

As a last note about origins, some Elders decided at an Elders conference a few years ago that they don't like the word "aboriginal". They don't like the prefix "ab", which has no meaning for them. They would prefer to be called the "Original people".¹⁵

Indigenous History

Many Original cultures in Canada say that the peoples were always part of the "Great Turtle Island", or North America.¹⁶ This is counter to western-based history, which relies on explanations from physical anthropology and archaeology to inform the Beringia theory. This theory says that all America's indigenous peoples migrated from the Asian continent across a frozen land bridge, some prior to and others between various Ice Ages. When I asked one Elder about what people described as Turtle Island, and if it was a new definition, she replied that the world was originally an island. It split apart as a result of the first purification (the flood). That's why people are finding on the other side of the earth, bones and artifacts of people who are similar, because the Earth was one. And it was in the shape of a Turtle. And it's still in the shape of a turtle: California, Alaska, Newfoundland and Florida being the limbs of the turtle.¹⁷

Relationships between the the so-called "four races" - Red, Yellow, Black, and White - form a part of aboriginal histories. A Blackfoot cultural explanation is one of many:

¹⁵Field notes - interview with Ojibway/Pottawatomi Elder.

¹⁶West Coast cultures differ from this explanation.

¹⁷Interview with northern Ojibway woman Elder.

The Indians have always been here. As far as the Indians know, Creation started here. Human beings came into existence here. They've been here from time immemorial. You will find that in some of the mythology of the Indians, just like my people, talk about Creation starting with the stars, the Cosmos. And some of those spirits up in the sky, the stars and so on, marrying. They had, in our case, ...two sons out of a particular marriage. One of those sons stayed here in North America [Turtle Island] and the other son, it simply says in the story, went across the water, where the sun rises. Now, that son that went across the water was going to return. So, when the Europeans appeared on the shores, it was the expectation, and that's the reason why they were welcomed with open arms.¹⁸

This same person provides a footnote to Western perception of indigenous history.

This example amounts to a rebuttal of the Beringia theory by traditional history, which says that the peoples have been here a very long time:

Recently some professor found some material which indicates 40,000 years ago [Pueblo remains] that is down south of here because the Pueblo people came from the South. And we came from out of Mexico, maybe the Tiohuacan area of Mexico after the cultivation of corn, which was 34,000 B.C. And after corn was cultivated, that made it possible for people to travel, to take corn with them.¹⁹

Migration²⁰ stories are important in aboriginal histories because, like origin stories, they provide a sense of identity, rooted in space. If you're from a particular place, culturally migration stories are a part of that sense.

¹⁸Told by Leroy Littlebear, Blackfoot from Alberta, professor of Native Studies at U. of Alberta. In TV production, "The War Against the Indians", aired on CBC, 4 Oct. 1992.

¹⁹Ibid.

²⁰Although this word is fraught with what some would say is non-purposive descriptive, it at least conveys the idea of population movements on a large scale.

Some Elders told stories of the dispersal of the Pottawatomi Nation northward from their original lands in Michigan and Illinois. Their grandparents or great-grandparents had been part of this movement. Usually the stories had more to do with arresting events on the search for a new homeland than with a specific time-frame.²¹

Other migration stories have a different kind of motive. An example is the story behind a northern Ojibway people's move from an island location to the mainland:

This is my grandmother's. She told me, when I went to see her and talked to her about why our people left the island. ...I said, Grandma did our people leave the island because they wanted to cut logs for the steamships? She said, yeah, that's what some old people around here say, but I'll tell you the real story. ...Most of the stories relating our history...are very lengthy stories. We commit them to memory. They take long to tell.

The people fled the island out of fear of contact with a huge white wolf that had been conjured up by a woman who had come to take the Chief's daughter. And the Chief had destroyed her family, her relatives, her small little tribe and she was left. And he injured the grandson so she sought him out. And her recompense for the injury to her grandson was to take his daughter. But she played the game fair and square, only the daughter was betrothed to another...and...the grandmother turns the grandson into the world to terrorize the people. When threats didn't work, he began to eat the people, kill and eat. And this frightened the people. They realized that they were dealing with a very strong force and the wolf wasn't going to stop till he got the girl. ...They attempted to flee the island with the girl but the girl didn't make it. But the people did. And they were told through dreams to flee the island. And water birds told them to get off the island; the Wolf couldn't pursue them through the water. No, he couldn't go in the water; he would burn. He was the grandson but he was transformed into the Wolf.²²

²¹Interviews with Pottawatomi and Pottawatomi/Ojibway Elders. One story told how the two founding families of a community received their last names.

²² The move is from Wa-wash-ken-a-geh to Birch Island, which is really on the mainland and known also as Whitefish Falls. Interview with northern Ojibway woman Elder.

The story contains elements of what we label the "supernatural", but remains a historical account of the move. Some stories also tell of large movements of peoples "a very long time ago":

[my Grandpa] told me that our people travelled from the area which is known today as West Virginia...from that coast, our people came inland...And he said that a Shell came out of the ocean. Our people had been travelling on the ocean and a Shell came out of the ocean when they landed, and they didn't know which way to go or what to do....The Shell instructed our people to follow it. And it went inland, and it just kept going until it came to the Great Lakes. And that's where the Shell stopped, and went back into the water and didn't come back out. So that's where our people stayed. They believed the Shell, the Megis Shell ...And they put their faith in the Megis to lead them to where they were supposed to be. ...his memory only went back to our journey through the ocean, and then the landing on the coast, and when the Megis appeared, the journey inland.

And when I tried to ask him, when did this happen, he said "a long time ago". It said, how long? It was a very, very long time ago. That's all he could tell me. Grandpa wouldn't talk to me about 200 years ago, 300 years ago. When he talks, "long time ago", I could safely put that in the three hundred year range. "Very long time ago" maybe, I don't know, 500-600 years. "Very, very long time ago" could be anywhere from that point backwards to who knows how many thousands of years. So he could never explain to me time, you know, just using the terms long time ago, very long time ago.²³

Stories of the origin of places show a compelling vitality but little or no sense of time-frame. Like this Pottawatami tale of origins, there may be an intimate connection between the story and a geological or human-made landmark:

There was an Indian man who had become stuck on the island and he couldn't get to the mainland. He couldn't get off the island and he had no food. He didn't know what to do, being stuck there. He had a vision in

²³Interview with northern Ojibway woman Elder.

which he was told to look for a Snake; and the Snake would save him and take him to safety.

So he went to look for a Snake. But all he could find was one that was pretty small (maybe a couple of feet). His instructions were to straddle the Snake. He thought, this is funny, what is this going to do for me? So he did it anyway. And when he did, the Snake started to grow. It got bigger and bigger. It got so big that it was able to take him across the water to safety, to the mainland.

To mark his being saved by the Snake, he drew a Serpent on a rock. This very rock is a well-known story. It is common knowledge that the Serpent was placed on this rock. Unfortunately, the Jesuits defaced the Serpent rock.... This is a true story.

Nowadays, children are warned not to swim in the river too long, or the Serpent will take their spirit and they will die.²⁴

Stories such as these support what Leslie Silko, Vine de Loria Jr., and many other indigenous authors theorize about the cultural importance of place in history/stories. De Loria has articulated a spiritual link to places on the land; others have talked about a moral link. In many indigenous cultures, stories transform the physical landscape into a moral landscape. It is part of why history is *teachings*. Cautionary tales, which people in a community use to direct perceived wrong-doers into more acceptable behavior, are often attached to a named geographical landmark, where a part of the tribe's history occurred.²⁵

²⁴Field notes - Told by a Pottawatami Elder of the Serpent River Reserve community. This elder is going to have an artist draw the Serpent story. After the artist renders it in two dimensions, she would like to then commission a carver to carve the man astride the Serpent to commemorate this tradition.

²⁵K.H. Basso, "'Stalking with Stories': Names, Places, and Moral Narratives among the Western Apache", in E. Bruner (ed.) *Text, Play, and Story* (Washington, D.C., 1984), 1-19.

In the above example, the children who swim too long (and risk drowning) are advised to beware of the Serpent in the river.

Time

The enormous diversity of aboriginal culture groups and hence, languages, precludes any but the most generalized discussion of time-concepts. Given these limitations, the writer has tried to keep the talk grounded within a narrow sphere, which emphasizes the shared aspects of time-concepts among indigenous peoples.

Aboriginal epistemology is wholistic in nature. It seems incomplete to speak of "time immemorial" without contextualizing it within the circle of time-concept. Often, when I asked Elders about the concept of time, they would first draw a circle and tell me that aboriginal time is circular. In the next breath they would sometimes tell me a Creation story. The link between Creation and the circle of time appears inescapable.

This section explores ideas of time which are meaningful for an understanding of history/ies.

In contrast to western-based assumptions about linear causality, time is perceived and therefore experienced/lived as cyclical in indigenous cultures. Inevitably, talk about the concept of time involves a larger theme of aboriginal ontology, with time as a sub-text existing throughout, laced through the fabric of being in the world. The meaning of time must include reference to the inner world of perception and feeling as well as the world which is more apparent to the outer eye, to make a crude assumption.

Time-concept is many-faceted. In the traditional teachings, time is an outward expression of a spiritual journey:

Time is really a journey, and life. Time is travelling. It's a circle that we travel. Journey that souls make. The soul comes from the Creator and comes into the body of the woman, while a vessel is being prepared for the soul. Inside the womb, is life. ...When a child is born its soul is in the purest form, before it has received other outside influences on it. Thus, as we go down the trail in life, it becomes harder to stick to the trail. The trail becomes narrower...The idea is to stay to the trail by following the directions the Creator has given to us. These directions are passed on through people who have been given the knowledge and receive it in various ways....The trail does not end with death. After death there are four days of teachings. The teachings are for the spirit that goes to the Sky... once the spirit goes up into the Spirit World, the Sky World, it lives forever. The spirit is always there. It is only the vessel [body] which goes back to the earth [burial] and is used by the earth. And time is a journey and about life.²⁶

Other aboriginal groups have differing ideas. Some believe that the soul returns to earth. But the idea of a spiritual journey which is circular remains. This is the teachings of the Medicine Wheel, which is another way of talking about the Sacred Circle.

In aboriginal concepts, time stays still but it rotates through the four seasons. Picture, for example, a circular disk which can rotate, laid over the face of a second disk. The disk below is the time. The circular disk is the seasons, perhaps, or it might be the other way around: the circular disk is time and in the background is the seasons, the piece

²⁶Field notes - interview with Ojibway Medewiwin Society Elder.

or disk it would be laid over. The circular disk can be rotated, but the background disk (paper) remains the same.²⁷

To restart that circle again, with reference to the Four Directions of aboriginal teachings, in the North part would be Winter. Winter is when the waters of Mother Earth are frozen. Spring is when Mother Earth cleanses herself (in the East). The waters rush through all her waterways, like her bloodstream. In the South there is summertime, when more water falls on Mother Earth. It collects again. And in the West, or Fall, Mother Earth prepares herself for Winter again. There is a gathering together, a freezing together, so that in the Spring the Earth may be cleansed again.²⁸ R. Ross, a non-aboriginal author, has conveyed his interpretation of indigenous cyclical experience of time and endless renewal in similar fashion²⁹.

To mark the seasons and how the cycle of time is apprehended, there may be no actual word for "season". For example, in Ojibway the phrase would be "the passing of the four". That refers to when a cycle of seasons is completed-- winter, spring, summer, and fall.³⁰ When asked about how time is marked through ceremonies and the like, Elders invariably reply with the cycle of the seasons. So that telling histories, Elders may place

²⁷Interview with Okanagan Elder.

²⁸Ibid.

²⁹R. Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, 1992), 88-93.

³⁰Field notes - interview with an Ojibway Elder.

them in time by reference to a certain seasonal ceremony or moon cycle. For example, an event may refer to the time of the ducks returning, or of the Moon of the Little Bear, markers to which the community can easily relate.

The continuity of time is actualized by keeping certain ceremonies. For example, the Sunrise Ceremony of the Ojibway marks the re-Creation. People greet the Sun as the Oldest Brother. They greet the Water, which has been purified, as the Second Creation, and the Earth as the Third Creation, because you have to have water before you can have the Earth. The Eagle is called four times, in the four directions.³¹

An Iroquois expresses his feelings about the ceremonies:

*When we stop and cease the sun ceremonies, the moon ceremonies, the thunder ceremonies, that's the time when the sun will not shine anymore, when the moon will not produce the birth of children to the nations of the world anymore. And I believe that's true for all the nations in the world, it's the same. It's just that [man-made] things got in the way.*³²

While it is not within the bounds of this discussion to elaborate upon, note must be taken that not all activity takes place in the familiar world above the Earth's surface that Euro-Canadians know. In aboriginal cultures, other worlds exist. The Sky World, the World Beneath the Earth, are some of those worlds; worlds which figure in many stories.

³¹Interview with Ojibway Elder. The Eagle is a spiritual symbol, because he flies closest to the Creator.

³²Tom Porter (advised by his uncle), Haudenosaunee (Iroquois) member of the Aboriginal Circle on the Constitution speaking to the Beaudoin-Dobé Committee. Videotape. Jan. 1992.

The purpose of exposing these ontological differences is to show that time can operate differently on different levels of experience. The very first Elder I spoke to about this project, when I asked him about the concept of time, replied with a story:

In other times, a group of Mohawk set out to travel from their Iroquois Country, around the Lakes, in the direction of the Sun setting. They travelled all the way to where the Sun sets on the furthestmost part of Turtle Island. In their travels, they were a smaller group who arrived at the place of the Sun setting. Instead of going under the Earth and coming up around again, they went with the Sun into the Sky. When they returned to the land of the Mohawks, they found that things were different. The land had the same rivers, they recognized them but the village had moved to another place. They went to the village and searched until they found an old man. The old man wanted to test these newcomers to see if they were who they said they were, so he asked them the name of the Chief. They told him. This man had the same name as that Chief .[The bearer of the office always holds the name of the first person to hold that office. There are 50 chiefs in Haudenosaunee Confederacy and Grand Chief. He always has the same name - Atotarho or the Entangled One.] The returned people thought that they had journeyed in the Sky only a few months-- but back in the village they found that many years had passed.³³

So, there is the time of the Sky World --"beyond where the Sun goes, beyond where the Moon goes"-- which some call the Spiritual World³⁴, and the time on the Earth, which is different. One Elder expressed it this way:

What may be one year in the world below, it ten years in the Spirit world. So you may be gone a long time and do many things, whereas in the other world you're not gone for too long it seems.

³³Field notes - interview with Mohawk Elder.

³⁴One reason people call it the Spirit World is because spirits can be anywhere.

Such a story as the one above would not be immediately comprehensible to a non-indigenous listener. Moreover, it would not inform that listener as to how many months, years, etc. the people were gone.

Indigenous peoples have sometimes looked critically at Euro-Canadian time-concepts and found them to come from an essentially foreign epistemology. Academics also recognized, as early as 1916, that there are problems in attaching a time-frame to events.³⁵ One way in which time-concepts differ is in the manner of time measurement. An Elder offers an analysis of non-aboriginal measurement:

Another concept of this [western] linear concept of time is that each unit of time is totally different and independent of similar units. Consequently, each day is considered a different unit, and thus a different day...From this the reader can readily understand why there is a felt need among Western society to have names for days and months, and numbers for years.³⁶

Western ideas demand proof of age on a linear continuum. For example, Iroquois people have said that their Constitution is a thousand years old, and are not understood. In a presentation by the Aboriginal Circle on the Constitution to the Beaudoin-Dobé Committee, an Iroquois spokesman, advised by his uncle, replied to the question, "How do you know [the Constitution] is thousand years old?:"

³⁵E. Sapir, *Time Perspective in Aboriginal American Culture, A Study in Method* (Ottawa, 1916).

³⁶Glenn Douglas, Interior Salish Elder. Unpublished paper on aboriginal title (1992). Chapter II: Ownership and Title - Concepts, 4.

I don't. That's what my grandfather and all our ancient leaders said. When they talk about it, that's what they said. And I said, what do you mean long ago? Maybe a thousand, give or take a few centuries here or there. ... in our tradition says, when we say yesterday, it can mean fifty or two hundred years ago, it's not important, it's just that our grandfather's time, that's what they did, and that's what we have inherited to embrace that. ... So this whole world is not hooked on 1492 or 1794 [Jay treaty] or stuff like that. In fact, after awhile there's going to be a treaty belt presented here and that goes back they say 1610 to 1620. But the only reason we know that is because the European insisted that there be a date hook to it. And so instead of arguing with the European I said, OK we remember 1610 to 1620, but as far as the Constitution that predates any European contact by hundreds and hundreds of years, so, they just say, about a thousand years ago.³⁷

Another quality of time measurement is its reference not to dates or hours but in terms of *circumstances*. For example, the northern Ojibway speak of the time of the Great Sickness, referring to an epidemic which spread across their territory. There are stories about the time of the Great Sweep:

[For dating purposes, it was the early 1700's.] It was sometime after the Hurons had been driven out of Huronia by the Iroquois and had been defeated and had fled.] This was when the Iroquois got it into their heads that they needed more people for marriage into the clans, because you cannot marry within your same clan....so the Iroquois used to take captives for marriage purposes and adopt them into the particular clan of the Iroquois. So they came up from their area around present Albany, N.Y. to what was a great Ojibway area, on the north shore of Lake Superior. [names several areas of territory]... So they attacked scattered Ojibway settlements. There was rather a great loss. ... So the Ojibway had to rise up. They got together with the Pottawatomis and the Odawa to drive these Iroquois out. That was known as the Great Sweep.³⁸

³⁷Tom Porter. Speaking to the Beaudoin-Dobé Committee. Videotape: "Parallel Process" Jan. 1992.

³⁸Field notes - interview with northern Ojibway Elder.

Moon of the Wild Rice -- August
Moon of Changing Colour -- September
Moon of Falling Leaves -- October
Moon of Ice Cracks Containers -- November
Moon of Lesser Spirits -- December⁴⁰

Historians like to point to the Winter Count of the Plains Indians as evidence that Indians have the same sense of time as non-Indians. De Loria, a Sioux, explains the nature of the Winter Count:

...A large animal hide, usually buffalo, would be specially tanned, and each year a figure or symbol illustrating the most memorable event experienced by the community would be painted on the hide. Gradually the hide became filled with representations of the years, and it would be maintained as long as there were people who could remember what the figures and symbols meant.

One could not find a very accurate concept of history in the winter counts. In general they indicated the psychic life of the community - what was important to that group of people as a group. The chances of a continuous subject matter appearing on a winter count were nil. One year might be remembered as the year that horses came to the people, the next year might be the year when the berries were extremely large, the year after perhaps the tribe might have made peace with an enemy or visited a strange river on its migrations. The chances of a series of political or military events being recorded year after year as in the Western concept of history was so remote as to preclude the origination of history as a subject matter of importance. One recent Sioux winter count...does not mention a number of important treaties, and one does not even mention the Custer massacre.

...⁴¹

⁴⁰Field notes - interview with Ojibway Elder. Similarly, the Barren Grounds Inuit of north-central Canada express their year as a lunar cycle of 16 moons. Each of the 16 names bear reference to the intimate ties to the cycle of the caribou on whom they depend. See P. Knudtson & D. Suzuki, *Wisdom of the Elders* (Toronto, 1992). Chap. 8: "Time as a Circle". 142-157.

⁴¹De Loria, *God is Red*, 112.

An Elder explains why the basis of measurement is different than a western basis:

Now why didn't my people do that? [compute weeks] Why didn't they take the circular flow of existence and fragment it into a million pieces? Non-Indian scholars have been inclined to assume we weren't smart enough to invent time. But the Mayans and Aztecs both had calendars more accurate than the one now universally in use. My people were very observant. They knew the circumference of the circle you call a day, and that of a month, and that of a year. They kept their appointments with the earth, with the sun, and with each other. But they did not invent artificialities and impose these on life. They had no weeks -no hours, minutes or seconds - because there is no such thing in nature.⁴²

The final word on Time measurement comes from an Elder who has had occasion to live in both worlds, the aboriginal and white communities:

For them [my people], time is a kind of living history, held between the latest infant born and the oldest resident - a living flow of experience, issuing from what has happened, into what is happening now, and on it what is about to happen. And there is no point at which anyone can lay a yardstick of units on that river and accurately measure its flowing. For my people, time is implicit in environment and experience. We are never going to join the dominant white society back there, where it was, in their historical, rear-view mirror. Nor are we going to be sucked into their beautiful, wide-screen, full-colour projection of where it will be. We are going to stay where its at. In environment - which is here, and in experience - which is now.⁴³

He was partially correct. But aboriginal people have been forced to peer searchingly into that historical mirror and look for proofs of their existence - proofs which are subject

⁴²Wilfred Pelleter (Wawashkesh), Odawa Elder. "Time". A Wise Man Speaks (Toronto, 1967) [out-of-print], p. 55.

⁴³Pelleter, in "Time", pp. 53-66.

to the jurist's eye and the Department of Justice's legal criteria. In Chapters IV and V, we will see the difficulties encountered when aboriginal people's concepts of time immemorial and time clash with the dominant politico-legal definitions.

CHAPTER FOUR NEWFOUNDLAND MI'KMAQ AND THE BARRIER OF TIME IMMEMORIAL POLICY

The government's definition of "time immemorial", as expressed in comprehensive claims policy, has been an impenetrable barrier to *Mi'kmaq* (Micmac) peoples of Newfoundland. Both provincial and federal governments have rejected such claims as invalid and contest that the *Mi'kmaq* peoples have only occupied Newfoundland after European occupation.

Newfoundland *Mi'kmaq* peoples' entire search for recognition of aboriginal rights has been framed within the context of the "time immemorial" policy. Whether *Mi'kmaq* have occupied the island since time immemorial, by federal government definition, is immaterial to certain aboriginal definitions. For some Micmacs, whether they can prove it to the satisfaction of governments does not have a bearing on their reality; which is that they originated on the great Turtle Island and have a claim by virtue of that heritage. Whether or not they migrated to Newfoundland in post-contact times currently affects such a claim. Given the aboriginal definition, the migration theory becomes secondary. However, the *Mi'kmaq* do in fact argue that their ancestors have always occupied parts of Newfoundland. It has been difficult to sustain proofs adequate to meet official definition. It is not the intention of this chapter to prove that, but to document the difficulties associated with their struggle for recognition. One might rethink the argument in another way: the definition itself is not a problem for many *Mi'kmaq* people, only for the government as they perceive and use it.

Mi'kmaq have clearly stated their understanding of "time immemorial" occupancy in Newfoundland:

"The Micmac nation of Ektakemkuk is endowed with aboriginal rights stemming from its very essence as a non-european[sic] nation;
 The Micmac people...have a personal and societal rights with the land and the territory where they are found. Such a right can only be denied if the Micmac people of Ektukemkuk (Newfoundland) are proved not to exist...
 ...we are the descendants of the pre-european nations that occupied an insular territory known to Europeans as Terra Nova and the continental territory known to Europeans as Labrador and the Maritimes [sic]. Our forefathers always had a wholistic approach to land and life and never considered Ektakemkuk as being different from the surrounding sea and continent..."¹

This chapter explores the conflicting evidence of Mi'kmaq occupation as per the government's "time immemorial" claims criterion, in terms of historical, oral traditional, and archaeological presentation. It looks briefly at different concepts of "occupation" within the Mi'kmaq dilemma. It explains the historical development of the problem and shows how provincial and federal attitudes culminated in a lack of official recognition of such claims. It details how government policies were able to split the Mi'kmaq into two groups, the Conne River people and the Federation of Newfoundland Micmac. It shows the parallel divisions which exist between Newfoundland Mi'kmaq and their counterparts in Nova Scotia, and the internal conflicts which exist in that province. Nova Scotia is presented because of the tradition that Newfoundland Mi'kmaq derive from that province. It shows how Newfoundland Mi'kmaq claims are faring in comparison to claims in adjacent areas of Labrador. It outlines the arguments of the Conne River Band in the past and analyzes their

¹F.N.I. *Ektakemkuk: Terra Ancestra for Us- Terra Nova for you. Micmac Aboriginal Land Claims in Newfoundland. Position Paper, 1 Feb. 1979. Dept. of Indian and Northern Affairs Canada [hereafter INAC] File B8245-116(NS), Vol. 1.*

present strategy. It documents the exclusion of the Federation of Newfoundland Indians from both the claims process and the registration process.

Background of the Recognition Issue

The Conne River people, who were legally constituted as a Band under the Indian Act in 1984, are the first Mi'kmaq people to claim aboriginal rights to Newfoundland. The Conne River Band claim states that:

"It has been our homeland since time immemorial. The fact that Europeans did not know of us and the extent of our tribal homelands in the Southern interior [of Newfoundland] until the 1800's reflect their own lack of settlement in our territory and contact with our forefathers as the historical text we are submitting with documents....

The claim covers several possible crucial dates of the establishment of British sovereignty:

...And whereas we have been in possession of our homelands prior to the founding of the small French colony of Placentia, a name our ancestors had given to that area. And whereas we were in possession of our homelands before the French lost the opportunity to colonize Newfoundland to the British in 1713 And whereas we were in possession of our homelands...while the British fishermen murdered and wiped out the poor Beothucks, our neighbours to the North.

And whereas we were in possession of our homelands in 1822 when Cormack came to our land in search of information about the Beothucks. He was the first white man to see our homelands in the interior.

And whereas we were in possession of our homelands in 1824 when the British officially recognized Newfoundland as a colony of theirs.

And whereas we were in possession of our homelands when the first British settlers came to the South coast in 1836. ..."²

The chain of recognition extends to 1904 recommendations by Governor William McGregor on his visit to the village at Conne River. He noted that the people "have claims in Newfoundland by right of a century of Micmac occupation."³

²Conne River - Statement of Agreement in Principle accompanying their claim of July 1980. National Archives of Canada (hereafter NAC), Records of the Dept. of Indian Affairs, RG10, Acc. 1990-91/249, Box 12, f. 121/42, pt. 26.

³W. MacGregor, *Report by the Governor on a visit to the Micmac Indians At Bay d'Espoir*. London: Darling & Sons, 1908, at p. 4. Cited in Wetzell, J., Anderson, P., Sanders, D. et al (ed. P.J. Usher) *Freedom to Live our Own Way (Conne River, 1980)*, p. 28.

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Note: Since 1993, the claim covers all of Newfoundland except the Avalon Peninsula.

In 1872 the federal government set aside tracts of land in severalty for resident Conne River Mi'kmaq; but they always treated the land as common land for the use of all residents.⁴ The British colonial government may have recognized the rights of Mi'kmaq living at Baie St. Georges, in the western part of Newfoundland, by granting land perhaps a decade later. It is still unclear whether or not grants of land were made for Mi'kmaq living in other areas of Newfoundland.⁵ See page 76a for a map of the claimant area; and page 107a for a location map of Mi'kmaq residents outside Conne River in Newfoundland.

The "time immemorial" conflict: Historical, oral traditional, and archaeological proofs of Occupation and Recognition

A qualifier of "time immemorial" occupation is that Newfoundland Mi'kmaq are obliged to show that "use and occupancy...was not achieved by displacing a previous aboriginal group (i.e., the Beothuk) or any European settlement."⁶ In other words, as well as showing they were the indigenous occupants, they have to prove they were the aboriginal [i.e., latin definition of 'before the original'] ones as well. One might ask, what does

⁴J.G. McGilp, Operations Director, to P.C. Mackie, ADM, Indian & Eskimo Affairs. Memo, 13 Feb. 1976. NAC RG10, Acc. 1990-91, Box 12, f. 121/42-1, pt. 23.

⁵Oral tradition says that the colonial government granted land at Baie St. George and other locations. So far, archival searches have failed to locate any grants, but documentation makes clear reference to the Baie St. George grant. D. Bartels. "Micmac Claims to Land and Status", *Native Studies Review* 7/2 (1991), p. 43-51. Also interview with ethnologist D. Anger. Also F.N.I. proposal, note 103.

⁶G.N. Faulkner to J. Wetzell. Letter, 20 June, 1979. INAC File B8245-116(NS), Vol. 1.

'aboriginal' mean and to whom? This type of confusion is related to ideas about what it means to be an Indian, Innu, or Inuk person and have aboriginal rights.

There are two sides to this coin: If you are an aboriginal person, then nothing can impede that identification. If on the other hand your existence is predicated on federal or provincial definitions, it may be extremely tenuous.

Federal and provincial governments and Newfoundland Indians have agonized over proofs to document whether the Mi'kmaq have been occupants since time immemorial, or at some respectably early date before the lands fell under colonial sovereignty.⁷ A great deal of energy has gone into such dissection. Historical evidence of traditional occupation has remained tainted by a not-too-subtle reliance on what has been called by various historians, the "Micmac mercenary myth". This relates to motives attributed to the Mi'kmaq people for their assumed part in the extermination of the Beothuk, who are generally assumed to be the only original occupants of Newfoundland. Highly problematic in nature, the continuance of this historical attitude has led, the Mi'kmaq contend, to a present-day prejudicial attitude toward their claim. The Mi'kmaq representation is supported by academics with long familiarity with the historical background.⁸

⁷Indian Affairs officials feel that "in practical terms, this [time immemorial] really means before the onslaught of the Europeans." [J.R. Goudie, ADM, to DM of Indian Affairs. Memo re: Newfoundland and Time Immemorial, 4 July 1985. INAC File B8245-116(NS), Vol. 13.]

⁸Wetzel, J. *The Mi'kmaq Mercenary Myth: Past Prejudice and Current Policy*. Unpublished paper. (St. John's, 22 May 1992). Also Bartels, "Micmac Claims", pp. 43-51.

At present, federal negotiators do not accept Mi'kmaq occupation as accurately documented by colonial records before 1705, even though express mention of "Micmacs" in Newfoundland has been found. This is insufficient to meet the federally-defined criterion for "time immemorial" occupancy.

The difficulty with establishing the "time immemorial" magic date is that, unlike many parts of North America, Newfoundland had been a place of temporary but intense activity for Europeans and early settlement was discouraged. Was it to be 1824, when the first Crown Colony was established? Was it to be when there was a colonial governor? As the Federation of Newfoundland Indians counsel argued:

"... 'time immemorial' is not an absolute concept and... consideration should be given to using as the crucial date 'the date of effective dealings between the Micmacs and the Europeans', obviating the need to prove continuous occupation since perhaps the Portuguese or French set foot in Newfoundland."⁹

Documentary evidence of Europeans having stopped at Newfoundland exists from 1534, and so the federal government, at least up until 1979, took that as the date of European occupation. However, from June 1979, the date of 1650 began to appear as "acceptable" for occupancy.¹⁰ It was obvious that both negotiating parties were unclear on what they took to be dates of "effective settlement" of their group.

⁹Office of Native Claims. Notes on Meeting with FNI. 18 April 1979 INAC File B8245-116(NS), Vol. 2.

¹⁰G.N. Faulkner, Exec. Dir., O.N.C., to J. Wetzel, F.N.I. Letter, 20 June 1979. INAC File B8245-116(NS), Vol. 1. "The year 1650 is acceptable as an approximate "earliest" date or starting point, though any proof of MicMac occupancy before that time would provide additional strength to the claim."

The Mi'kmaq position, at least by 1982, was that 1713 (Treaty of Utrecht) or, more acceptably, 1763 (Royal Proclamation) marked the beginning of British sovereignty in Newfoundland.¹¹ The Conne River Band has offered various proofs of early occupation. European sources document unspecified Indians living at St. Georges Bay in 1594, and seen at White Bear Bay in 1538 and Placentia Bay in 1594. Sources have documented seasonal fishing in Newfoundland in mid-16th Century by Mi'kmaq.¹²

The problem of untapped archival sources remains. The coast of Newfoundland was such a cosmopolitan area in the early years of exploration that all records have scattered to different geographical areas-- France, Britain, Portugal, etc. Historical evidence of visits by Europeans as early as 1483 supports this view. Some headway has been made in the Basque, British, and French records area. Any references to Newfoundland Mi'kmaq occupation in earliest times is possibly within those records, scattered in various places. Even records kept at Louisbourg were divided up from the records of early Quebec (New France). Some material may still be in the Quebec City archives.¹³

¹¹In the Treaty of Utrecht, France ceded Newfoundland to Britain. In the Royal Proclamation, the British Crown placed protections on Indian rights in lands designated as their territory. [At a 1982 Negotiation meeting with federal level.] B. Dewar, N.W.T. & Labrador Claims negotiator. Memo to File, 25 Mar. 1982. INAC File B8245-116(NS).

¹²J. O'Reilley, counsel for Ktamqkuk Ilnui Saqamawoutie. *Consolidation of Historical Material*, p.4, 13. 22 Mar. 1982. INAC file B8245-116(NS).

¹³Interview with Ed Tompkins, Archivist at the National Archives of Canada. Oct. 1992.

Oral Tradition

The passage of time and the death of elders has clouded the dispute between oral traditional knowledge and documentary-based knowledge. Chronic racial prejudice over the last two centuries may partially explain the perceived loss of oral traditions among the Newfoundland Mi'kmaq. Elders were formerly reluctant to even speak their language; a lot may have been lost because of this.

Three recorders of Mi'kmaq oral history between 1839 and 1922 document oral traditions that Mi'kmaq ancestors came to Newfoundland before European contact on the island, and intermarried with later Mi'kmaq coming over from Cape Breton Island. The Indian and Inuit Support Group of Newfoundland and Labrador correctly point out that at the times of these recordings, there was no Mi'kmaq motive to alter the truth in favour of early Newfoundland occupation, which could be argued if these traditions had been recently recorded.¹⁴ Some living elders place the time of these *sa'yewedjkik* or "ancient ones" as before the Beothuk arrival.¹⁵

The relationship between Beothuk and Mi'kmaq peoples remains somewhat unclear. "Mainland" or Maritime Mi'kmaq in Nova Scotia attribute several meanings to the word "Beothuk". According to some elders in Nova Scotia, "Beothuk" is a bastardization of the

¹⁴Indian & Inuit Support Group of Newfoundland & Labrador. *The Newfoundland Government's Rejection of the Micmac Land Claim*. (1982), pp. 12-13. This is an aboriginal rights advocacy group composed of academics and general public.

¹⁵Wetzel, J., Anderson, P., Sanders, D. et al (ed. P.J. Usher) *Freedom to Live our Own Way in our Own Land* (Conne River, 1980), p. 1.

Mi'kmaq word "pemchajegaak", meaning "people living by the bay".¹⁶ According to others, "Beothuk" is a word for "upriver". People were known by which rivers they lived around. This same source says that the Beothuk were separate but allies.¹⁷

Elders have told stories about Mi'kmaq pushed south due to the Ice Age, when Newfoundland was covered with ice. Afterward, they returned and saw that the land had been scraped clear. Vegetation developed afterwards and was given Mi'kmaq names. However, some Mi'kmaq themselves dispute these stories.¹⁸ The prevalence of very early European maps of nearby areas, as early as 16th century, with Mi'kmaq placenames, adds to the puzzle.

In a 1982 analysis, the Office of Native Claims did not dispute the Mi'kmaq evidence concerning a tradition of "prehistoric" [sic] habitation as reported in late 19th century tradition. It acknowledged the "possibility of an ancient and accurate oral tradition" but found it difficult to comment on information gathered in the early 1900's on "prehistoric" matters.¹⁹

¹⁶Interview with Don Julian, Research Manager for Confederacy of Mainland Micmacs.

¹⁷Interview with S. Henderson, advisor to the Grand Council of the Micmacs and instructor at University College of Cape Breton.

¹⁸Ibid.

¹⁹Office of Native Claims. Analysis of References included in the paper "Consolidation of Historical Material". 16 Aug. 1982. INAC file B8245-116(NS), Vol. 10.

The Conne River people forwarded their position vis-a-vis validity in their second claim submission:

"Since this report must stand as a record of Micmac history in Newfoundland for some time to come, it would have been our preference to rely much more heavily on the oral tradition of the people, and especially on the knowledge and wisdom of the elders. The federal government's denial of the legitimacy of the Micmac claim, however, and its predisposition to accept the prevailing myth rather than the words of the Micmac people, forced us to rely very largely on non-Native documentation to prove our case. We had to fight fire with fire."²⁰

This illustrates the lack of integration of the two approaches to knowledge, as well as the faithless relationship between negotiating parties. However, it may also indicate a disappointing lack of available oral tradition on which to rely.

Recently, Mi'kmaq have cited anthropological data regarding Mi'kmaq knowledge of Newfoundland and recognition of the Newfoundland Micmac by the Cape Breton Mi'kmaq. Recorded oral tradition, again of the late 19th century, names Cape Breton people as *Tayamkukewax*, or "people of the land across the water".²¹ Historians have bitterly contested the tradition that Mi'kmaq regularly crossed the 65-mile distance in canoes. This belies the fact that, as early as 30,000 years ago, people had the capacity of crossing bodies of water as wide as the Bering Strait.²²

Critiques of oral history centre around this philosophy, offered by the Government of Newfoundland to refute the 1980 claim:

²⁰Wetzel et al, *Freedom*, p. x.

²¹F. Speck at p. 119, cited in Wetzel, *Mi'kmaq Mercenary Myth*, at p. 5-6.

²²O. Dickason, citing archaeologist Knut Fladmark. *Canada's First Nations: A history of Founding Peoples from Earliest Times*. (Toronto, 1992), p. 23.

"without the level of rigidity imposed by ceremony or strict religious observance, the gap of generations is marked by the gradual elaboration or distortion of the original event. Interpretation of oral history often involves the delicate task of removing the allegorical crust, reaching backwards into the past through the frequently opaque shrouds of myth and legend."²³

What is reality for one party is not for another.

Archaeological Debate

Archaeological tradition holds that the earliest culture in Newfoundland, the Maritime Archaic Tradition (Indian) of about 8,000 years ago, was superceded by the Dorset (Inuit) presence. In turn, it records a Beothuk presence from about 1,000 years ago.

Even archaeologists debate internally over the puzzle of pre-contact occupation by Beothuk or Mi'kmaq people. G. Penny, who has searched for Mi'kmaq sites for at least a decade, maintains that no pre-contact Mi'kmaq sites have been discovered to date.²⁴ He believes that one can distinguish between the Beothuk and Mi'kmaq material cultures. According to S. Brown of Memorial University, archaeologists have yet to define Beothuk material culture:

"Until quite recently, prehistoric artefacts [sic] that could not be ascribed to the Maritime Archaic or Dorset Eskimo cultures became Beothuk by default. In recognition that there may be a pre-historic Micmac presence in the southern part of the island and that the immediately prehistoric situation may be more complex than previously suspected, most archaeologists ...prefer to use the neutral term 'recent Indian' for such finds."²⁵

²³A. Jones, *Assessment & Analysis of the Micmac Land Claim in Newfoundland*. (Newfoundland, 1982), p. 92.

²⁴Interview with G. Penney, who is presently under contract to Conne River Band. However, the Support Group stresses that the Mi'kmaq only need to prove occupancy prior to the establishment of British sovereignty.

²⁵Dr. S.C. Brown, quoted in Indian & Inuit Support Group, *The Newfoundland Government's Rejection of the Micmac Land Claim* (St. John's, 1982), p. 14.

Controversy over findings presently precludes a definitive answer to this ancient puzzle.

The myth of secondary occupation

Discussions about the comparative lateness of Mi'kmaq occupation overlook a primary myth: that there are no surviving Beothuk. This can be prejudiced in two possible ways. Little evidence exists showing a distinction between Beothuk and Mi'kmaq peoples. Contradictory archaeological theory may or may not point to a difference among cultural remains. The same could be said about the archival records (most of the early settlers couldn't tell the difference between the two peoples). Taken together with Mi'kmaq oral traditions about their relationships, all this points to a possibility that there are still Beothuk in Newfoundland today. The historical records says that they died out over a hundred years ago. But this overlooks the almost certain intermarriages which take place among neighbouring peoples, relatives or not. In fact, some oral traditions say that the two are indeed relatives.²⁶ Furthermore, census material is notoriously inexact. Consider the small number of Mi'kmaq alleged to inhabit Newfoundland at the time of Confederation²⁷; no doubt this reflects the wish on some parts that, given time and assimilation, they would die out. Governments talk of the "disappearing" Mi'kmaq and historically of the "disappeared" Beothuk; but are these similar myths? They seem to be identical. Both constructs underlie the entire argument that the Mi'kmaq cannot have time immemorial rights

²⁶As told by Noel Doucette, founder of Union of Nova Scotia Indians, to S. Brascoupé.

²⁷The 1945 Census put the Labrador/Newfoundland numbers as 701 "Eskimos", 431 Indians and 527 "half-breeds"; but these numbers were almost all from Labrador. [Moss, p. 1].

- a view which we must discard if the Mi'kmaq actually ARE part of the aboriginal (or original) population. They could be descendants of the original population by virtue of Beothuk intermarriage, a conservative theory. Or else they may have lived on the land contiguous to the early Beothuk occupation, a riskier but perhaps true proposition.

Discarding the myth is difficult. The Mi'kmaq situation is similar to that of the Cree people discussed in Chapter II. The Cree find themselves unable to explain that they have indeed never migrated out west and were aboriginal occupants of their broad-ranging traditional territory.

A Treaty Relationship?

Researchers have placed varying emphases on some of the several treaty arrangements that Chief Jeannot Piquidalawet, Chief of Cape Breton made with the British colonial government in the latter part of the 18th century. To date, Newfoundland Mi'kmaq have made no formal claim of a treaty relationship, relying on aboriginal title.

Mi'kmaq oral tradition has much to offer for clarification. There is controversy as to whether or not Newfoundland was part of a district or *sakamowti*, which according to oral tradition was one of the seven Mi'kmaq Districts created in the re-organization around 1600, after conflict with the Haudenosaunee. In turn, each *sakamowti* was subdivided into various *wikamow* or clans, each led by a *sakamow* or chief, along with a spiritual leader and a war chief. Representatives of the heads of *wikamow* constituted the religious Grand Council

(holy gathering or *Sante' Mawi'omi*), perhaps dating from the tenth century. Rock carvings at Kejimikukik Lake in Nova Scotia uphold the tradition in physical nature: a circle of seven hills, for the districts, and seven crosses, for the chiefs, appears, encircling the sun and moon (who jointly mean Niskam, the Creator).²⁸ The Unimaki District or "foggy lands" comprised Cape Breton Island, Newfoundland, St-Pierre/Miquelon, and St. Paul's. Documentary back-up for the tradition of districts and Grand Chief exists from the traditional recordings of Jukes in 1842.²⁹

The larger Mi'kmaq community of the Atlantic Provinces did not regard provincial boundaries as real; but concessions had to be made to colonial and later federal political exigencies. Oral tradition has it that around the time of Confederation, when it became obvious that Newfoundland was not to be a part of the process, the Grand Chief moved from Cumberland County (present-day Amherst) Nova Scotia, to present-day Eskasoni in Cape Breton Island. This left the Chief of the Unimaki District free to go live in Newfoundland, and not be involved in the daily affairs of Cape Breton Island.³⁰ Church records of 1960 and 1900 confirm that Chiefs in Newfoundland received their authority from the Grand Chief

²⁸Grand Council of the Mi'kmaw Nation, "The Covenant Chain", in Assembly of First Nations, *Drumbeat* (Ottawa, 1989), p. 75-6. "The Mikmaw Nation is an alliance of many aboriginal peoples who inhabited Mikmakik. The meaning of 'Mi'kmaq' is 'the allied people'; 'Mikmaw' is singular. Mikmakik" means "the land of friendship," and covers present-day Newfoundland, St. Pierre et Miquelon, Nova Scotia, New Brunswick, the Magdalen archipelago, and the Gaspé peninsula of Quebec.

²⁹Jukes, *Excursions in and about Newfoundland in 1839 and 1840*, p. 176; quoted in D. Anger, *Potential Eligibility of Native People on the Island of Newfoundland outside of Conne River as Status Indians* (Ottawa, 1984), p. 2-29.

³⁰Interview with Sa'ke'j Henderson, advisor to Grand Council of the Micmacs.

at Sydney, Cape Breton Island, adding documentary strength to the relationship framed in oral tradition.³¹

The most recent available research indicates a consensus that some form of treaty activity took place with Chief Jeannot Piguidawalet, who was based first in Cape Breton and later in Newfoundland. However, the reconstructions vary in their emphasis. Jerry Wetzel, a former band councillor at Conne River, submitted a presentation to the Royal Commission in 1992, asserting a treaty relationship stemming from a 1761 compact or, even more strongly worded, "adhesion" to an earlier treaty.³² The documentary evidence appears in earlier researchers' work, but this is the first assertion that such a treaty bound the colonial government to a pact with the Newfoundland Mi'kmaq. This angle will doubtless undergo severe scrutiny by opposing factions if put to the test. Wetzel's presentation was submitted in a purely individual capacity, not as part of Miawpukek Band policy.

Bartels, an independent academic, and Henderson, an advisor to the Grand Council of the Mi'kmaq and academic, agree that there was a treaty renewal at Codroy Island in Newfoundland in 1764, although the treaty document itself is as yet unfound.³³ Although the two analyses appear outwardly different, they are really two aspects of a consistent

³¹B. Roberts, *The Micmacs of Conne River, Newfoundland*. (1979), p. 24. INAC File B8245-116(NS).

³²Wetzel, *Mi'kmaq Mercenary Myth*; see especially pp. 16-18.

³³Admiralty Captain Samuel Thompson wrote the Admiralty on 16 April 1764 verifying that the treaty had taken place. See D. Bartels, "Micmac Migration to western Newfoundland", *Canadian Journal of Native Studies* 10/1 (1990), pp. 71-96.

approach. Bartels looks at the treaty as a discrete aspect of the Mi'kmaq-British relationship. Henderson, who has done extensive historical and oral research³⁴, places this 1764 treaty within the context of the long chain of the covenant referred to by the Grand Council. The Mi'kmaq are part of the larger Wabanaki Confederacy, but did not sign a 1725 Boston treaty between Wabanaki peoples and the colonial government. In 1726 at Annapolis Royale in Nova Scotia, the Cape Breton Mi'kmaq chief signed a ratification of the 1725 treaty. Cape Breton had not taken part in 1725, because it was still French territory under the 1713 Treaty of Utrecht. Oral tradition has it that the District Chief signed in 1726 on behalf of the Newfoundland Mi'kmaq of his district, because the only lands in British jurisdiction at the time were in Newfoundland. The 1764 Codroy Island treaty was signed because the Chief wanted a direct link to the Crown. Bartels characterizes the 1764 treaty as a possible affirmation of an earlier one in 1759/60 in Nova Scotia with Chief Jeannot³⁵. At any rate, although documented adequately, the missing 1764 Codroy Island treaty complicates the issue.

The choice of treaty emphasis (1761 or 1764) entails a choice of legal strategy. Differing analyses bely an underlying consistency; discussions of the 1761 and 1764 treaties may refer to a series of ratifications of the same basic treaty relationship. In the case of a key missing treaty, strategic choice applies with even greater force. Wetzel, formerly on

³⁴His voluminous work (about 1,000 pages) on Mi'kmaq traditional hunting grounds is to be published shortly.

³⁵This took place between Chief Jeannot and General Whitmore, the military representative in Cape Breton Island. Although the island was in French hands, the British military presence enabled a compact to be taken, in Halifax.

the Conne River Band Council, relies on the 1761 treaty, giving it the stronger connotation of Newfoundland Mi'kmaq political alliance with the British. In law, a treaty in hand is worth two in the bush, however well alluded to in other sources.

Occupancy: your definition or mine?

When the Federation of Newfoundland Indians met with government negotiators in 1979, they could not provide archaeological evidence as to Micmac occupation of the Island. Nevertheless, they were in the same case as the Naskapi-Montagnais occupation in Labrador. "Seasonal" use of areas on the island was similar to that of other aboriginal groups such as the Naskapi-Montagnais, and the Dene in the N.W.T. -- both of whose claims have been accepted for negotiation.³⁶

At the time, the government's criteria of occupation referred back to legal cases such as *Baker Lake*: continuous, exclusive occupation of a definable area.

The FNI pointed to the inconsistency in federal policy, which was settling land claims with other indigenous groups displaced by colonization:

"The Mackenzie Mountain people are now in Fort Norman, their claim is in this area as "Dene". The Ungave [sic] Naskapi are now in Great Whale River and received a claim therein that area as Cree people that has no relation to their true place of origin or homeland. The Inuit of Grise Fjord (Ellesmere Island) come from Inoucdjauc (Quebec) and Pond Inlet (Baffin) and were displaced by the Government of Canada.

Evidently you are awarding land claims settlements in other areas based not on original occupation, but to offset the consequences of displacement suffered by Native groups. Sporadic hunting and fishing is the predominant land use and occupancy pattern among all Native groups in Canada. After reading the Inuit

³⁶Office of Native Claims. Notes of Meeting with F.N.I. 18 April 1979. INAC file B8245-116(NS), Vol. 2.

claims, the Dene Claims, the Yukon and James Bay Claims you more than anyone else should know that Native land use is extensive and sporadic as dictated by the seasons and the nature of the animals we hunt for food.

It is ironic that you have accepted a claim in Labrador from Indian people whose grandparents are from St. Augustin, La Romaine, and Seven Islands, Que. It is true that these people roamed from the North Shore to the Ungava Peninsula, hundreds of thousands of square miles. If there ever was a sporadic land use pattern it is in this area where Indian people followed the caribou herds. Further, the Montagnais-Nascapi were in conflict with the Inuit population all along the Labrador North Shore, Que. and Southern Labrador coast and drove them from these areas in the 1700's after Europeans arrived in these areas.

This case and ours has many similarities; ... it seems that you are able to accept that small bands of Indian people roamed hundreds of thousands of square miles of what is now the Quebec North Shore, Labrador, and the Ungava [sic] Peninsula (Que.), however, you reject our seasonal land use pattern in Nfld.

Your denial of our seasonal land use and occupancy patterns must also necessarily be a denial of Inuit and Dene and Cree sporadic land use and occupancy patterns also. If Newfoundland is part of Micmac seasonal land and sea use, and MicMac people as a hunting and fishing group have had no areas that were used other than seasonally, then you are denying that we have a tribal territory anywhere in the Maritimes at all, and that no groups who only used land seasonally and sporadically have a land claim to make.³⁷

This statement turns the government policy of occupancy criterion on its head, and argues for a global definition of occupancy, more in tune with the aboriginal view of "time immemorial" in that it is generalist in nature.

In its critique of Conne River's more comprehensive historical submission in March 1982, the Provincial government historian insisted on characterizing Mi'kmaq occupancy prior to the 1760's as "extremely sporadic, migratory expeditions".³⁸ As the Indian and Inuit Support Group of Newfoundland and Labrador pointed out, this view of occupancy is contrary to any aboriginal thinking. Aboriginal seasonal use may extend to rotational use of land to effect conservation measures. It in no way affects aboriginal title to territory.

³⁷J. Wetzel, F.N.I., to H. Faulkner, Minister of Indian Affairs. Letter, 28 July 1978. INAC File B8245-116(NS), Vol. 1.

³⁸A. Jones, *Critique*, p. 106.

Anger, a member of the Support Group, defines the different concepts as a difference in subsistence patterns:

"A transhuman territorial presence is an integral and definitional aspect of traditional Micmac culture and formed the basis of their concepts of land tenure. European land tenure is based on permanent and full settlement [the historical settlement pattern being the exception in Newfoundland]. The Micmacs were fully using a part of their territory in a way prescribed by their cultural system, prior to European settlement."³⁹

Historical representation as "migratory" peoples are subsumed within the European concept of occupation. Even recent historical commentary characterizes the Mi'kmaq as migrating to Newfoundland from Nova Scotia. This disregards the idea of purposeful movement according to seasonal or conservational rounds within one's district or territory.

Senior federal negotiator Crowe estimated that the Conne River people had proved a case for "seasonal", which he equated with "intermittent", occupancy from about 1650 to 1800. He distinguished it from what he called "permanent occupancy" from 1800 onwards.⁴⁰ This is backtracking from the 1978 position that conceded that "it is possible that sporadic hunting and fishing did take place...from time immemorial".⁴¹

An interim report on land claims by an academic historian asserts that:

³⁹Anger, D., *Potential Eligibility of Native People on the Island of Newfoundland outside of Conne River as Status Indians* (Ottawa, 1984), pp. 2-15/16.

⁴⁰K. Crowe, Summary of Conclusions from Jones Critique & Analysis of "Freedom". 20 May 1982. INAC file B8245-116(NS), Vol. 9.

⁴¹J.H. Faulkner, Minister of Indian & Northern Affairs, to J. Wetzel, Research Co-ordinator, F.N.I. Letter, 6 July 1978. INAC File B8245-116(NS), Vol. 1.

"there is no evidence to provide that Micmacs or Montagnais-Nascapi Indians were any less aboriginal to the island of Newfoundland than were the Beothuks. The main distinction is that their system of land tenure differed from the Beothuks in that they used the island as an extension rather than as the base of their hunting territory. ...if Micmac or Montagnais/Nascapi Indians occupied the island of Newfoundland, peacefully or by conquest, in accordance with their own customary laws, then they enjoy aboriginal rights as recognized under the British Crown."⁴²

A larger definition of time immemorial occupancy is implicit in this argument, one that is consistent with an aboriginal concept of time immemorial.

Federal and Provincial Attitudes: the Policy Barrier

Two other concomittent issues have complicated aboriginal rights claims to Newfoundland: access to registered Indian status as per the *Indian Act*, and access to federal-provincial funding provisions for economic, health, and cultural goals. Documenting attitudes toward the comprehensive claim involves speaking about these linked issues.

At the time Newfoundland entered Confederation in 1949, the position of Indians and "Eskimos" in the Province was not clarified. Even though the *Terms of Union* were silent vis-à-vis responsibility for aboriginal peoples of Newfoundland and Labrador, article 3 states that the *BNA Acts* 1867 to 1946 apply to Newfoundland as if it were one of the originators of Confederation, unless the Terms stated otherwise.⁴³ Recall that the original *BNA Act* gave the federal government jurisdiction for "Indians and lands reserved for Indians."⁴⁴

⁴²R. Pastore and T. Williamson, *The Basis for Indian Claims in Newfoundland*, p. 5. 30 Mar. 1976. INAC File B8245-116(NS)

⁴³*Reports and Documents Relating to the Negotiations for the Union of Newfoundland with Canada*. (Ottawa, 1956, at p. 33) Quoted in Wetzell, *Mi'kmaq Mercenary Myth*, p. 31.

⁴⁴*BNA Act* 1867, sec. 91 (24).

Before Confederation, the Newfoundland government deliberately did not distinguish between Indians and non-Indians.⁴⁵ The Province's position was that these 'non-status' Mi'kmaq had citizenship and the vote and were fully integrated. Newfoundland applied for the ability to administer Indian affairs in Newfoundland/Labrador, but did not request funds for the Mi'kmaq in Newfoundland.⁴⁶

The federal level's preliminary policy decisions belied their later reluctance to treat with the Indians. In 1947, their position was that they would take "sole responsibility" for aboriginal peoples in the newly-confederated area. They contemplated applying the Indian Act and setting up reserved areas in conjunction with the Province.⁴⁷ But the developed policy abstained from providing the full range of services available in other provinces.

However, in 1954 the Secretary of State proposed a Canada-/Newfoundland Government settlement to resolve areas of "uncertain administrative responsibility". This agreement began the joint financial obligations for funding Inuit and Innu in Labrador.

⁴⁵J.G. McGilp, Dir.-Gen. Operations, to P.C. Mackie, ADM, Indian & Eskimo Affairs. Memo, 12 Feb. 1976. NAC RG10, Acc. 1990-91/239, Box 12, f. 121/42-1, pt. 23.

⁴⁶Wetzel, *Mi'kmaq Mercenary Myth*, p. 34.

⁴⁷W. Moss, *Constitutional Responsibility for the Aboriginal Peoples of Newfoundland* (Ottawa, 1988), p. 2. See also E. Tompkins, *Pencilled Out: Newfoundland and Labrador's Native People and Canadian Confederation, 1947-1954* (Ottawa, 1988) for a more detailed pre-Union perspective on the question of jurisdiction and funding.

Because of a prevailing perception that Indian numbers in Newfoundland were very low, they were not mentioned in the agreement.⁴⁸

Both federal and provincial assimilationist attitudes were summarized in a letter from then-Prime Minister Lester Pearson to Newfoundland's Premier Joey Smallwood in 1965:

"I know it is your objective, as well as ours, to see that the Indians and the Eskimos take their place as full participating members of the provincial community and receiving all the benefits of other citizens."⁴⁹

In 1973, people living at Conne River were finally included in an agreement whereby they received funds from the Secretary of State via the Newfoundland Government. Conne River was the only Indian community in Newfoundland to benefit under the joint agreement. The other 7 participants were Innu and Inuit communities in Labrador. The agreement ignored Micmacs living in various locations outside of Conne River. The Province's position, buttressed by federal agreement, was to recognize only those Micmacs who lived in "designated areas" or concentrations.⁵⁰ The back-up for this decision was federal policy, which uses a "recognizable community" criterion for becoming a band.

Despite this progress, the province's position remained clear:

"The province indicated on several occasions that it does not favour registration of the Indian people. Among the reasons given have been the differentiation between residents which the province professes to

⁴⁸Ibid.

⁴⁹L.B. Pearson to J. Smallwood. Letter, 25 May 1965. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 25.

⁵⁰Draft Proposal, Canada/Newfoundland/ Native People Agreement. Dec. 1979. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 26. See p. 111a for a map of Mi'kmaq communities outside Conne River.

find repugnant. It is understood that the province believes that registration could lead to tax exemptions and might foster and further a claim based on aboriginal interests in the land. ...[Re: the aboriginal claim] the Department of Justice has indicated (Cabinet Memo of May 23, 1973-Secret) that only the Beothucks could assert such a claim on the Island [Newfoundland] and Labrador having been excluded from the Royal Proclamation of 1763, may not be subject to such a claim."⁵¹

In 1975, faced with a request for claims research funding by the Native Association of Newfoundland and Labrador, to which Conne River people belonged, the Department of Indian Affairs evaluated the situation. They concluded that:

"...a special policy decision would have to be taken, perhaps at Cabinet level, before the Department could agree to settle a claim from these people and, in view of the possibility that we could not accept such a claim, it might be as well not to generate too many expectations in this respect."⁵²

In late 1976, after a preliminary comprehensive claims submission by Conne River, the National Indian Brotherhood (present-day Assembly of First Nations)] raised the issue of registration as status Indians for the Newfoundland Mi'kmaq. The Minister had to formulate a reply as to eligibility. The situation had potential for embarrassment:

"...it would be difficult to justify denial of their request in view of the historical precedent which has been set in other parts of the country."⁵³

The province publicly aired its attitudes prior to submission of the first version of the aboriginal rights claim; and in 1977 the Chief of the Conne River people, William Joe, expressed their belief in the prejudicial attitude of that government:

⁵¹J.G. McGilp, Dir.-Gen. Operations, to P.C Mackie, ADM, Indian & Eskimo Affairs. Memo, 13 Feb. 1976. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 23. [Emphasis provided].

⁵²C. Jackson, Office of Claims Negotiations, to J. Burns, Policy Planning & Research Branch. Confidential memo, 28 Feb. 1975. INAC, C.H.R.C. - Item #157.

⁵³Ibid.

"We have not even presented our claim and accompanying historical research to your Government, yet you have already prejudged our case by denying our aboriginal rights."⁵⁴

The Conne River Band continued to assert its existence as an (unofficially recognized) band with Chief and Council since "time immemorial", testifying for the House of Commons Standing Committee on Aboriginal Affairs.⁵⁵ But the federal level's strong resistance to legal recognition was backed by the provincial government's extreme reluctance to create an Indian jurisdiction, or what might become competing jurisdiction.⁵⁶

The Province was extremely reluctant to respond positively to aboriginal claims. There is some indication that Newfoundland was waiting for the federal level to respond about regularizing the reserve lands at Conne River to Indian Act capacity. Conne River Chief William Joe regularly questioned the Minister of Indian Affairs about this possibility.⁵⁷ In July 1982, basing his position on a provincial historian's analysis, Newfoundland Premier Peckford publicly denied the validity of the comprehensive claim. In the same statement, he reaffirmed the decision to participate in tripartite negotiations concerning

⁵⁴Letter, Chief William Joe to Hon. Ed Maynard, Minister of Forestry & Agriculture, Newfoundland. 06/06/1977. RG10, Acc. 1988-89/057, Box 28, f. 121/42-1, pt. 24.

⁵⁵*House of Commons No. 37 - Minutes of Proceedings & Evidence of Standing Committee in Indian Affairs & Northern Dev.* - 25 Mar. 1982, p. 17.

⁵⁶Interview with INAC official, 1992.

⁵⁷INAC file B8245-116(NS), Vol. 11 (Secret). In 1983, when pressed for a response to the claim submission by Chief Joe, the Office of Native Claims referred to the pending court case, in which the claim was wrapped up in other issues of individual registration as status Indians and reserve land status for Conne River.

claims in Labrador.⁵⁸ The federal level delayed a public position statement on the claim because of the political implications of Peckford's denial.⁵⁹

Academics have criticized the province's stand, which seems to be based on narrow legalities and archaeological and linguistic evidence, which are outside a politician's domain. They are also outside a judge's expertise. Yet every day, jurisprudence emerges, based on analyses of this type of evidence.

As the Conne River Chief and the Support Group reminded the public, the province's intervention in federal jurisdiction of land claims was intolerable and (at the time) illegal.⁶⁰ The senior federal negotiator for Newfoundland claims felt that the provincial rejection was based primarily on local public opinion, which has largely reflected a negative opinion of Micmac entitlement. The chronically poor economic situation and politics of pleasing a larger constituency coloured the provincial attitude.⁶¹

⁵⁸B. Peckford. Statement on the Question of Native Land Claims. 7 July 1982. INAC File B8245-116(NS), Vol. 9.

⁵⁹M. Lafontaine to Minister, INAC. Memo, 19 June 1984. INAC File B8245-116(NS), Vol. 13.

⁶⁰Telex, 12 July 1982. Conne River to Min. J. Munroe. INAC file B8245-116(NS), Vol. 9.

⁶¹K. Crowe to J.R. Goudie, INAC. Memo, 19 July 1982. Also, Office of Native Claims. Briefing for DM. 6 April 1982. INAC file B8245-116(NS), Vol. 9.

Some Conne River people are convinced that these attitudes related back to the earliest prejudices against Micmacs in Newfoundland, and a persistent popular belief that they had murdered the aboriginal inhabitants, the Beothuks:

"Speaking from my own personal experience as a representative of our Band government in the 1983-87 constitution meetings...Premier Peckford stated [th]at the government of Newfoundland would recognize no Mi'kmaq aboriginal rights on the island of Newfoundland. The leader of this Province and many others in Newfoundland and throughout Canada are still blinded by the prejudices of the colonial era. ...It affects our relationship with the Government of Canada and all other Canadians who believe that our ancestors murdered and wiped out the entire Beothuck nation. Will the Mi'kmaq people of Ta'kam'kuk continue to be denied aboriginal and treaty rights to a homeland on the island of Newfoundland because of these prejudices? Will Newfoundlanders and Canadians continue to believe the racist colonial history that vilifies us?"⁶²

Taking away the rhetoric, it is undeniably true that this "mercenary" complex has worked adversely for the Mi'kmaq claim.

Significantly, the battle to prove occupancy since "time immemorial" has proved so fruitless, that in 1982, an abridged request was registered with the federal negotiators:

"...the Micmac's legal counsel asked that in the event that government could not accept a claim to aboriginal occupancy or title, an alternative "long-term" occupancy be accepted within federal policy as a valid basis for a claim."⁶³

As a Ministerial adviser noted, "Such a decision..would have far reaching consequences." The Minister was advised to be careful not to reject the claim before Cabinet had reviewed the Coolican Task Force Report on Comprehensive Claims Policy; as this might leave an impression with Conne River Mi'kmaq that he was making a decision on claims without the

⁶²Wetzel, *Mi'kmaq Mercenary Myth*, pp.37-8.

⁶³K.J. Crowe, Senior federal negotiator. Chronological briefing notes. 12 August, 1982. INAC, File B8245-116(NS), Vol. 10.

input of the Task Force. It was likely this postponement of the rejection announcement which fed the hopes of Conne River people that the policy was not immutable.⁶⁴

As of 1987, the Newfoundland government reiterated the policy barrier to such claims:

"Before the province agrees to participate in land claims negotiations, claims presentations must be carefully assessed to ensure that they meet the fundamental criteria of aboriginal use and occupancy of the land, from time immemorial, prior to European discovery and the establishment of sovereign jurisdiction."⁶⁵

This policy statement specifically did not mention Newfoundland Indians, only Labrador Innu and Inuit.

Historical Splits in Aboriginal Solidarity: Conne River/F.N.I. Registration as a dividing issue

Conne River people formed the Newfoundland Native Association, later called the Indian Federation of Newfoundland, to advance their economic and legal interests. The larger organization of the Federation of Newfoundland and Labrador Indians looked after the interests of Inuit and Innu in Labrador, as well as the Conne River Micmacs, until its constituency changed. In 1979, the F.N.I. changed its name to *Ktaqamkuk Ilnu* *Saqimawoutie* (hereafter *K.I.S.*) or Newfoundland Indian Government.

⁶⁴B. Rawson to Minister of Indian Affairs. Memo, 22 May 1986. INAC File B8245-116(NS), Vol. 13. This memo indicated that all avenues of approach were closed, emphasis still being on the criterion of "time immemorial" occupation. The Chief at Conne River believed that once a new policy was in place, their aboriginal rights claim would be re-examined re: criteria for acceptance under the new policy. However, the Coolican Task Force review proved disappointing. The March 1993 policy statement, which acknowledges a third category of claim, may change the situation.

⁶⁵Intergovernmental Affairs Secretariat. *Government of Newfoundland & Labrador Policy regarding Aboriginal land Claims*. (Nfld., 1987.), p. 4.

By 1973, aggressive leadership of the Conne River people had lead to federal funding for economic and health-related initiatives. In the second half of 1976, they received \$30,000 for research, of which the federal level paid \$26,000.⁶⁶ The Labrador Innu and Inuit peoples felt this was taking away from their funding arrangements. The Naskapi-Montagnais Innu Association of Labrador objected to adding Conne River people to the terms of the Federal/Provincial Agreement, claiming that the Conne River people were of mixed descent and that the Province had only claimed the total population of Conne River as Indians to get a per capita allocation for Conne River.⁶⁷ As a result of these objections, a decision was made to have a separate Conne River agreement.⁶⁸

The federal level granted most funding for claims research in the 1970's and early 80's. The sporadic nature of the funding received meant that no comprehensive research effort, requiring perhaps a few continuous years, could go towards an aboriginal rights claim.⁶⁹

Funding was related to the issue of registration as status Indians within the meaning of the *Indian Act*. The difference in funding was immediately apparent in a briefing memo,

⁶⁶K. Cook, Dir. Research, to P. Baird, Executive Assistant, INAC. Memo, 18 Feb. 1977. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 23.

⁶⁷P. Mitchell, Executive Director, Naskapi-Montagnais Innu Assoc., to P.E. Trudeau, Prime Minister. Letter, 19 Jan. 1978. NAC RG 10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 25.

⁶⁸Briefing notes, 1980. NAC RG10, Acc. 1990-91/249, Box 13, f. 121/42-1, pt. 27.

⁶⁹Discussion with former researcher for the Conne River Band.

outlining the situation of the Conne River and other "Indian" and Inuit communities party to the Agreement. Under that Agreement, the average government outlay per non-status Indian/Inuit was \$1,067; cost per community was (Inuit) - \$339,000 and (Indian) - \$707,000. In contrast, status Mi'kmaq in the Atlantic Region received on average, \$2,750; with the average band cost at \$1,120,000.⁷⁰ The Department admitted that such gap had "potential resource implications".

In 1975 the Federation of Newfoundland Indians, representing Mi'kmaq living at Conne River and various other locations, started negotiations with the federal government for formal recognition of status. They hoped to have a hand in the development of departmental policy regarding Newfoundland Mi'kmaq and the extension of federal programs.⁷¹

In April 1977 Conne River representatives met with federal and provincial officials. They stated that Conne River was the "only totally Indian community left in Newfoundland"; but that others lived at Glenwood, Badger, Bishops Falls and St. George's Bay. They wanted an *Indian Act* band set up for Conne River and the other people to be placed on a "general list" of registered Indians. It was apparently agreed that only when this was

⁷⁰Briefing Notes (Newfoundland). H. Labelle for J.D. Nicholson, A.D.M. Indian & Inuit Affairs & R. Fournier, A.D.M., Finance and Professional Services. 22 Feb. 1980. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 26.

⁷¹Tony John, President, F.N.I., to Minister of Indian Affairs. Letter, 31 Oct. 1977. NAC RG10, Acc. 1988-89/057, Box 28, f. 121/42-1, pt. 24.

completed would the Indian Act be applied to Newfoundland. At this time, there was ongoing general research into kinship ties with registered Nova Scotia Indians.

In any event, the government's actions differed from the agreed-upon policy. William Joe, Conne River Chief, protested against the practice of splitting Newfoundland Mi'kmaq into registered and non-registered:

"Your letter of October 26 differs from these commitments in that registration would be restricted to Conne River, and that the Indian Act would be applied after our band is officially created. This would be very unfair and discriminatory toward other MicMac families in Newfoundland who have no direct kinship ties with people here in Conne River and who cannot trace their links to registered people in Nova Scotia due to the fact that MicMac people migrated from Nova Scotia to Newfoundland over 400 years ago and before."⁷²

An earlier protest that year by Chief Joe requested that new *Indian Act* bands be created for the Mi'kmaq outside Conne River:

"Any system of registering our people that requires proof that individuals are descended from persons who were members of Indian bands outside of Newfoundland and Labrador is completely unsatisfactory to us. It will split our communities and cause more frustration, not less. We want the federal government to register our people by creating new bands by order-in-council. The present genealogical research is useful both for us and to eliminate double claims to membership. But it must be understood that the general research will not produce sufficient information to guide the federal government in the creation of new bands."⁷³

Chief Joe rightly felt that the government wanted to control the process.

Despite the apparent inconsistencies in the Conne River people's approach to the registration issue, it is clear that the Chief opposed a division of status along the lines of

⁷²Chief William Joe to H. Faulkner, Minister of Indian Affairs. Letter, 1 Nov. 1977. NAC RG10, Acc. 1988-89/057, Box 28, f. 121/42-1, pt. 24.

⁷³Chief William Joe to W. Allmand, Minister of Indian Affairs, 26 April 1977. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 25.

residency in Conne River versus residency in smaller, scattered communities. The inconsistencies may have been due to pressure, either from the Conne River community itself, or from the Department. Perhaps full funding and registered status were too important to be delayed by differences within the Mi'kmaq people in Newfoundland. Some sacrifice in solidarity may have seemed necessary in order to achieve desired goals. In the background, access to the aboriginal rights claims process was doubtless an important underlying factor.

In March 1978 the Conne River people presented an interim report on the basis for an aboriginal claim on insular Newfoundland. This was rejected by the federal level, on the basis that they could not show the fundamental requirement of aboriginal use and occupancy of the southern coast of Newfoundland. A statement of claim in early 1979 was similarly rejected.

At the same time, the F.N.I. asked to have a representative on the registration committee. the Minister reassured Conne River people that an Indian Act band formation at Conne River "would in no way prejudice any...registration for other Indian groups which have no direct kinship ties to the members of the Conne River community."⁷⁴

A 1980 federal policy analysis suggested that the Conne River people were delaying negotiations for a new financial agreement until they attained registered status. Department

⁷⁴Hugh Faulkner, Minister of Indian Affairs, to Chief William Joe. Telex, 3 Jan. 1978. NAC RG10, Acc. 1988-89/057, Box 28, f. 121/42-1, pt. 24.

of Indian Affairs officials felt that once the Conne River people got status, they would refuse to complete the agreement and instead claim a bilateral economic relationship with the federal government, with no provincial input. The fear on the federal level was that the province might well side with the Mi'kmaq in this situation, letting go their responsibilities.

At this time, the federal Reserves and Trusts Branch were in the process of submitting the Conne River recommendation for registration.⁷⁵

The strategy of the Conne River people until recently was to claim aboriginal rights, without reference to treaties:

"[when protesting a federal decision to develop Upper Salmon Rivers] This area is part of our traditional tribal homelands that have been used by our people since time immemorial. At no time in the past have either Colonial, Provincial or Federal Governments made a treaty with us, therefore, our rights have never been extinguished."⁷⁶

In October 1980 they submitted an amended claim entitled Freedom to Live our Own Way in our Own Land. This claim appeared poorly researched; it was rejected, perhaps justly so. My review of this claim shows a paucity of primary sources. Further it made little use of oral history, and those oral sources cited were unreferenced. Nor were many

⁷⁵G. Bloodworth, Tripartite Branch, Corporate Policy Program, to H. Chapter, Dir. Membership and Statutory Requirements. Memo, 16 Apr. 1980. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 26.

⁷⁶Chief William Joe, Ktaqamkuk Micmacs, to B. Peckford, Premier of Newfoundland & Labrador. Letter, 13 Aug. 1979. NAC RG 10, Acc. 1990-91249, Box 12, f. 121/42-1, pt. 25 Temp.

examples cited. The researcher preparing the claim was not well acquainted with the band, which could easily account for the indifferent presentation.⁷⁷

In March 1982, Conne River and the K.I.S. made a fourth claim presentation, which Newfoundland rejected. On 19 July 1982, Chief William Joe and the Conne River Micmacs filed suit against the Queen and the Minister of Indian Affairs in Federal Court. Their Declaration leaned heavily on the criteria established in *Baker Lake*: they were a "distinct" group of "indigenous" Mi'kmaq in an "organized society" who had occupied the area since "time immemorial. Moreover, they had used the resources on a "continuous basis" in accordance with a "traditional" aboriginal way of life. Furthermore, their several family groupings "have existed for centuries", constituting a "homogenous & distinct collectivity". Their assertion of occupation from "time immemorial" was tempered by the assertion of "or at least since the assumption of British sovereignty over Newfoundland."⁷⁸ They referred to themselves as the *Miawpukek* Mi'kmaq people.

They sought reserve status within the meaning of the Indian Act and claimed Indian status as per the Constitution Act 1867, as well as aboriginal status as per the Constitutional Act 1982, sec. 35 and 25, with benefits owed. Their goal was a declaration of exclusive federal fiduciary responsibility towards their land that been set aside for them. The federal level appealed to have the court strike the portion stating that Conne River is an Indian

⁷⁷Interview with anthropology professor from Memorial University of Newfoundland, November 1992.

⁷⁸Federal Court, Trial Division. File No. T-6123-82.

Reserve within the meaning of Sec. 91(24). They succeeded on a technicality and managed to evade a direct ruling on their interest in the Conne River area lands.

In 1986 the Supreme Court ruled that, even though Indian Affairs was a federal jurisdiction, the Newfoundland Provincial Crown owned the lands associated with the claim. Therefore, the Conne River people would have to file their claim in provincial court first.⁷⁹

However, this action led to a Cabinet decision to fund the band and establish Conne River as a reserve within Sec. 91(24) of the Constitution Act 1867. In June of 1984, the Conne River people were finally registered as status Indians within a registered band (Miawpukek Band), thus leaving the rest of the former F.N.I. constituency doubly deprived.⁸⁰ Indians outside Conne River continued on under the F.N.I organization. By 1987, Indian Affairs designated Conne River as an official Indian reserve.

Federation of Newfoundland Indians

In 1979, Tony John, then President of the Newfoundland Indian Government, declared that other Mi'kmaq in Newfoundland wished to be registered under the Indian Act. These comprised Mi'kmaq living at seven areas: Glenwood, Clarkehead, Bishop Falls, Port-

⁷⁹Supreme Court of Canada [S.C.C.] File #17831 (2 Oct. 1986).

⁸⁰Order-in-Council P.C. 1984-2273.

Federation of Newfoundland Indian Communities in Newfoundland

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1. Avalon Peninsula	6. Flat Bay	11. Stephenville/
Stephenville Crossing
2. Bartlett's Harbour	7. Gander Bay	12. Glenwood
3. Benoit's Cove	8. St. Georges	13. Port-au-Port East
4. Corner Brook	9. St. John's	
5. Exploits	10. St. Pierre-
Miquelon	[•] Conne River

Note: Circled locations are bands.

Source: D. Bartels (Memorial University - Anthropology). Unpublished map.

au-Port East, St. Georges, Badger, Flat Bay and Benoit's Cove. The National Indian Brotherhood supported this claim.⁸¹

As discussed above, these Mi'kmaq were excluded as beneficiaries of the federal/provincial/native agreements of the 70's and 80's. Indian Affairs cautioned the F.N.I. in 1981 that their inclusion in any cost-sharing agreement depended on their "potential eligibility" of members as registered or status Indians as per the Indian Act. They indicated a willingness to research the question but were firm on going ahead with Conne River Agreement in the meantime.⁸²

In 1982 then-Minister John Munroe wrote to Calvin White, then President of the Federation, elaborating on this position:

"before the signing ...a response dated May 6, to a telegram from the Conne River Band included an explanation of why the Micmac people residing outside the Conne River community could not be included in the Agreement. After the discussions, my letter to you, dated June 25, further explained that 'under its current terms, the Federal Government reimburses the Province for certain expenditures on a limited range of programs for native people who are resident in "designated" native communities.' I went on to say that 'their [outsiders] ...inclusion in the Agreement... can only be determined through and is contingent upon the potential eligibility of residents for registration as Status Indians.....As we agreed in July, therefore, rather than delay the signing of the Agreement pertaining to the Conne River community, the **eligibility of the residents of the other communities for registration.. will, and could be determined within the life of the present Agreement.**

...I wish to assure you of my commitment to pursue to establish the potential eligibility ...to at least permit their inclusion under a Canada/Newfoundland/Native Peoples Agreement."⁸³

⁸¹Noel V. Starblanket, President, N.I.B., to Jake Epp. Letter, 5 Sept. 1979. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 26.

⁸²J.C. Munroe, Min. of Indian Affairs, to C. White, President, F.N.I. Letter, 29 June 1981. INAC File B8245-116(NS), Vol. 3.

⁸³John Munroe to Calvin White. Letter, 12 Feb. 1982. Quoted in Statement of Claim, para. 18. Emphasis added.

The result was funding of a genealogical research project delivered in January 1984, known as the Anger Report. Anger, an anthropologist, researched the genealogy of Mi'kmaq outside Conne River and found that historical documents, including those generated in Newfoundland, Nova Scotia and the United Kingdom, showed that 750 were of Mi'kmaq ancestry. The project ended due to lack of further funding, leaving the origins of over 1000 people undetermined. Of the seven F.N.I. members named in the suit, six were identified as being of Mi'kmaq descent; work on the seventh was incomplete due to lack of funding. A Departmental Management Committee Paper prepared for the Minister accepted Anger's findings and recommended immediate registration with continued research for the unsurveyed members of the F.N.I. In 1983, a joint working group was created around this issue. Unfortunately, any concrete action was stonewalled by the appearance of yet another new Minister, David Crombie, whose apparent motive was to start anew without reference to the D.M.C. paper of the previous, Liberal government.⁸⁴

To date, the federal level has done nothing significant despite F.N.I.'s repeated efforts towards inclusion within a Canada/Newfoundland/Native People's agreement. The deadline for a negotiated inclusion into such an agreement, 1 April 1986, set by John Munroe and later David Crombie, is long past. In June 1988, the Director-General of Membership, Revenues and Band Governance gave a final negative (and cryptic) response.

⁸⁴Statement of Claim, paras. 19-23 & 26. Federal Court, Trial Division. File No. T-6123-82. See also D. Anger (1984).

In his view, considering F.N.I. members eligible for status "contravenes the principles"⁸⁵ whereby the Conne River people were recognized. Perhaps this is an allusion to the "designated area" criterion so important for band status.

Parallel Splits within a unified front: Newfoundland Micmacs and Others of their Nation in Maritime Canada and Quebec

As well as splitting Newfoundland Mi'kmaq into two camps, the federal policy essentially excluded all Newfoundland Mi'kmaq from rights which might be gained or enjoyed by Nova Scotia Mi'kmaq.⁸⁶ While the claims of these two groups are complicated by unique situational factors, a simple division is apparent. Nova Scotia Mi'kmaq are troubled by internal conflicts and a federal position that their aboriginal rights have been superseded by law, a position which may well change. Newfoundland Mi'kmaq are hampered by having first to gain access to *Indian Act* status before they can assert aboriginal rights claims. Both have problems with intractable provincial governments unfriendly to such assertions. Nevertheless, an underlying difference, in the federal eye, is the "time immemorial" aspect of their respective claims.

Federal and provincial levels do not dispute that Nova Scotia Indians have occupied the area since time immemorial. In 1977 the political organization Union of Nova Scotia

⁸⁵Gregor McIntosh, Director-General, Membership, Revenues, & Band Governance, INAC, quoted in *Ibid*, para 27.

⁸⁶All Micmacs come from a larger-defined group, the Wabanaki peoples, which also included New England Indians. The Wabanaki Confederacy existed by the middle of the 17th century. [U.N.S.I. *Crown Land Rights and Hunting and Fishing Rights of Micmac Indians in the Province of Nova Scotia* (revised 1976), Preamble.]

Indians (U.N.S.I. hereafter) submitted an aboriginal rights claim to much of the lands within Nova Scotia.⁸⁷ The federal level rejected it as a comprehensive claim but recognized it as being too large for a specific one; its present label is indeterminate. In 1985, a breakaway group, the Confederacy of Mainland Mi'kmaq (C.M.M. hereafter), formed, representing the interests of formerly constituted tribal councils, which had been disbanded in 1957/8 by the Indian Affairs Department. In Feb. 1988 the Department started negotiations with U.N.S.I., the Native Council of Nova Scotia and the Grand Council of the Mi'kmaq. A revised claim submission is underway.

The C.M.M. has maintained that Cape Breton, and mainland Nova Scotia (from where its primary membership is drawn), are two different countries.⁸⁸ The Grand Council contends that there is no problem as to who is beneficiary of this claim; they represented the totality of Mi'kmaq Bands prior to 1960 and the Council still exists; whereas the Confederacy of Mainland Mi'kmaq can handle all claims from 1960 to present. The Department of Indian Affairs does not agree with this representation. Based on this divisive issue, Indian Affairs has had trouble dealing with affected claims.⁸⁹

⁸⁷Since the Grand Council has no bureaucracy, U.N.S.I. acts as claims advocate.

⁸⁸Membership in the C.M.M. and U.N.S.I. even overlaps in some reserve communities.

⁸⁹C.M.M.'s membership comes from mainland Nova Scotia. The situation is complicated by the fact that some reserves are factionalized, having membership split between the C.M.M. and U.N.S.I.

Due to the political realities of provincial boundaries, Nova Scotia Mi'kmaq do not appear to have overlapping claims to lands in Newfoundland. Despite federal questioning that such a hunting grounds claim could occur, sources consulted in Nova Scotia deny any such possibility.

Mi'kmaq from the Atlantic Provinces and Quebec united in March 1989 to press claims. The National Council of Mi'kmaq Chiefs, representing all 29 Mi'kmaq bands in Atlantic Canada and Quebec, met and signed a declaration of rights. A resolution was passed regarding meeting with the five affected Premiers of provincial governments to solicit support for land and treaty claims with the federal government. If Ottawa did not act, they were resolved to go the U.N. General Assembly for human and indigenous rights redress. The resolution was signed by chiefs of Nova Scotia, New Brunswick, Prince Edward Island, Gaspé and the Grand Chief of all the Mi'kmaq, Don Marshall Sr., as well as Head Chief of the Mi'kmaq of New Brunswick, Peter Barlow.⁹⁰ It does not appear significant that no one from Newfoundland signed the Declaration. Newfoundland was not excluded from the process; a representative was unable to attend due to internal problems at the time.⁹¹

The 1989 action is a continuation of a 1980 initiative, in which the Grand Council sought redress from the United Nations Human Rights Committee. The Grand Council argues that Canada's continued refusal of land claims and self-determination violates the

⁹⁰CP Press release., 22 March 1989.

⁹¹Interview with S. Henderson, advisor to Grand Council.

Optional Protocol in the International Covenant on Civil and Political Rights. In 1990 the U.N. Human Rights Committee claimed jurisdiction in the matter, which Canada had disputed.⁹²

In former times the Newfoundland Chief sat with the Grand Council. In 1924, a repressive priest forced the Chief out of the Conne River community, closing that office. Chief Noel Jeddore went to live in Eskasoni on Cape Breton Island. This ended the relationship with the Grand Council. Until that time, Newfoundland Mi'kmaq always gathered to celebrate St-Anne's Day in Cape Breton. It is only within the last few decades that Mi'kmaq resurgence has led to a renewed relationship with the Grand Council. In 1984 the F.N.I. chose Wilson Sam from Benoit's Cove as their head. He sat on the Grand Council in the mid-80's. In addition, Conne River went to the first of the Treaty Days celebration in 1985, pursuant to the *Simon* case which declared the 1752 Mi'kmaq treaty valid.⁹³

Both U.N.S.I. and the C.M.M. are supportive of the membership claim of the presently-constituted F.N.I. They have so far supported the aboriginal rights claim of Conne

⁹²The Covenant provides for sovereign ownership of wealth and natural resources, and compensation to the original owners upon appropriation. United Nations, International Covenant on Civil and Political Rights (1966). Also, Grand Captain Alec Denny and Mi'kmaq Nationimou Communication. Document G/SO 21551 CANA (18) R. 19/78. (Geneva: U.N. Human Rights Committee 1980). Cited in A. Tanner & S. Henderson, "Aboriginal Land Claims in the Atlantic Provinces", in K. Coates (ed.) *Aboriginal Land Claims in Canada* (Toronto, 1992): 142-3, 149.

⁹³Interview with D. Anger.

River and the K.I.S.⁹⁴ The Grand Council of the Mi'kmaq issued a statement of support for the F.N.I. members when they became partitioned off from Conne River in 1984.⁹⁵

Policy comparisons: Newfoundland and Labrador "time immemorial"

Claims of the Labrador Innu (Montagnais/Naskapi peoples) and Inuit have remained uncomplicated by conflicting occupation with white inhabitants. There are still large unoccupied areas where Naskapi and Montagnais hunt and fish.

The Innu of Northwest River and Davis Inlet are also unregistered. In the late 70's the government was considering making official bands under the Act but they remain unregistered. In 1977 the Labrador Inuit Association and the Nasakpi-Montagnais Innu of Labrador both submitted claims based on aboriginal rights. In July 1978, the federal level notified Newfoundland of their acceptance of these claims, despite the non-registered status of these people. The claims were deemed compatible with the 1973 policy statement⁹⁶ - this despite the fact that it was well documented in archaeological and other data that this was not the original place of occupation of these groups.

⁹⁴Interview with S. Henderson.

⁹⁵Federation of Newfoundland Indians. *The Caribou*. 31 Mar. 1984, p. 6.

⁹⁶P. Baird for the ADM & Minister. Briefing notes, 6 July 1979. NAC RG10, Acc. 1990-91/249, Box 12, f. 121/42-1, pt. 25.

Furthermore, the federal level has agreed to provide funding for the Labrador Métis Association to forward its comprehensive claim; although it has suggested that the Association discuss beneficiary status with the other two Labrador associations.⁹⁷

One cannot fail to see an inconsistency in comparing the claims policy with this Labrador example. F.N.I. members in Newfoundland find themselves without a strong position for comprehensive claims, despite the fact that many have kinship ties to the Conne River people.

Current Conne River Strategy

It is not possible to accurately foretell what the strategy of Conne River and F.N.I. people will be in the future. Although linked by kinship ties in many cases, Newfoundland Mi'kmaq groups have been forced to respond in differing fashions according to the political pressures of the day. Thus, the unevenness of benefits and status and ensuing hard feelings which have doubtless resulted, need to be healed. Band elections a few years ago in Conne River resulted in a different leadership and perhaps a new evolving strategy involving efforts at unification of the disparate groups of Mi'kmaq on the island.

Conne River people have ongoing plans for action. Several options are open to them. The possibility of pressing a claim based on a treaty relationship with the colonial

⁹⁷T. Siddon, Min. of INAC, to D. Martin, L.M.A. President. Letter, 3 Dec. 1991. Also T. Siddon to K. Lethbridge, L.M.A. President. Letter, 30 Nov. 1992. INAC file B820-2/N1.

government may exist. Research into such a relationship is ongoing. Further litigation is always a possibility, although risky given the record of negotiations to date.

If it were possible to prove to government satisfaction that a treaty relationship existed, what would that do to the comprehensive claim? Perhaps little. A treaty might be construed as a political alliance only, still leaving land within the Mi'kmaq tenure. It might not weaken the case for aboriginal rights.⁹⁸

Claims must always be made in the context of what is legally acceptable. A treaty relationship is a much stronger argument for equality of rights, as so much seems to hinge on the Crown's historical recognition of rights in these legal tangles. Perhaps a political shift has given added possible emphasis to previously-familiar documentation. A claim that Mi'kmaq adhered to treaty, if substantiated, affords some strength in that area; however, it still does not confer 'time immemorial' status as per the Calder case. In choosing differing claim options, the strength of the opposition's case must be a factor. Perhaps the current strategy reflects the extreme difficulty, to date, of proving "time immemorial" occupancy of Newfoundland.

⁹⁸Interview with S. Henderson. Presumably this construction could be put on a treaty if no land cession took place.

Federation of Newfoundland Indians Current Strategy

Since 1986, the F.N.I. leadership has focused on access to registered Indian status for its membership. Faced with the continued exclusion from any federal/provincial/native people's agreement, the F.N.I. in 1988 proposed a framework for community self-government negotiations on a bilateral basis. The idea was that the federal level would recognize Mi'kmaq communities outside Conne River.⁹⁹ The first step was to be registration. However, the same year Indian Affairs officials refused to help any more in the registration process.¹⁰⁰

In 1989, the F.N.I. brought an action in federal court to have them declared as status Indians in "band" communities, both within the meaning of the *Indian Act*. They also seek damages for breach of fiduciary obligation, and inclusion as beneficiaries in a tripartite agreement. They filed a Statement of Claim on behalf of seven local, self-recognized bands and three regional bands. The local bands consist of Flat Bay, Port au Port East, Corner Brook, Benoit's Cove, Bartlett's Harbour, Gander Bay, and Glenwood. The regional bands consist of Bay St. George, Bay of Islands, and Central Regional Bands. The F.N.I. represents itself as a corporate body representing all these bands. F.N.I. members filing are each representing one of the seven area bands.¹⁰¹

⁹⁹Federal sources say that INAC's long-term goal is a one-to-one relationship with all Newfoundland Indians, to avoid being dictated to by Newfoundland. The F.N.I. allegedly also prefers a bilateral agreement.

¹⁰⁰F.N.I. *Micmac Community Self-Government Negotiations*. (Ottawa, 1988).

¹⁰¹*F.N.I. et al v. Her Majesty the Queen et al*. Federal Court, Trial Division, File No. 1989 T-129-89. Initial Statement of Claim dated Jan. 1989; amended Statement on 19 Oct. 1990. For a map showing location of band areas, see

In the submission they state that they are part of the Grand Council of the Mi'kmaq, and are recognized as such by that body. Further, they claim Mi'kmaq ancestry and self-recognition as Mi'kmaq by their respective bands. They say that the failure to extend the Indian Act contradicted the explicit undertakings of the Crown made at preliminary meetings.

They cite the federal/provincial/Native Peoples Agreements reached in 1954 with the Innu and Inuit in Labrador, renewed and expanded in 1973 to include Conne River people, and the 1981 agreement with the Conne River people.¹⁰² They argue that they participated in the negotiations resulting in the 1981 Agreement and were signatory to it but have never derived any benefits from it. They point out the unjust nature of their exclusion from benefits which are "provided as a matter of right to Indians resident elsewhere in Canada". In particular, non-status Inuit and Innu have received these benefits.¹⁰³

Their genealogical argument has a certain logic:

"[all Newfoundland Mi'kmaq] are descended from common ancestors, and ... there are no significant racial, cultural, or ethnographic differences between and among them, except insofar as any two individuals may have a different number of Indians among their ancestors. A 'full-blooded' Micmac who lives in Conne River has precisely the same Indian ancestry, either as to nature or degree, as a 'full-blooded' Micmac who lives elsewhere on the Island."¹⁰⁴

Appendix B.

¹⁰² The latter provided for the expenditure of \$5,050,000 within a five-year period beginning in the 1981-82 fiscal year. The Crown undertook to provide \$3,800,000 (roughly 75%) of this amount.

¹⁰³ *F.N.I. et al v. H.M. the Queen et al.* Statement of Claim, paras. 12-14.

¹⁰⁴ *Ibid*, para. 16.

The Statement effectively documents the historical antecedents of F.N.I. recognition by Indian Affairs. The F.N.I. argues that their rights under Sec. 15(1) of the Charter to "equal protection and equal benefit of the law without discrimination" have been violated.¹⁰⁵

The federal response has been based on defensive technicalities, all stemming from a position of non-recognition of the bands as "bands" [they are only a 'class'] and as status Indians [excluded from the *Indian Act*]. Based on this argument, they are under no fiduciary obligation to the F.N.I. either, since it is merely a corporate body. There, it would appear they are under obligation to no one, which is rather a clever obfuscation of the compelling facts in favour of the Micmacs.

The federal defense belies their own analysis of the situation. In a 1987 discussion paper prepared for Cabinet consideration, INAC officials assumed that "eventual recognition of the status of Newfoundland Micmacs outside Conne River is inevitable and just".¹⁰⁶ Not incidentally, the paper provides an informational base for the F.N.I. case:

[discussing possible funding options for the F.N.I.] the 1982 pre-condition of "potential eligibility for registration"... already imposes an additional requirement over that imposed on Conne River and the Labrador communities. Conne River and Labrador were not required to prove links to historical Indians.
...¹⁰⁷

¹⁰⁵*Charter of Rights and Freedoms*, cited in F.N.I. Statement of Claim, para. 29.

¹⁰⁶D.J. Paul, Actg. Dir., Policy Coordination and Band Government Development, to W. Rudnicki, Dir.-Gen., Program Planning and Policy Coordination. P.M.C. Discussion Paper: *Financial Arrangements for Newfoundland Micmacs outside Conne River*. 26 Feb. 1985. INAC File E1031-R10-1.

¹⁰⁷*Ibid.*, p. 4.

Moreover, the discussion looks ahead, accurately, to F.N.I. arguments:

Since Conne River was not required to present such evidence showing links to historical Micmacs until several years after its inclusion under federal-provincial cost-sharing arrangements, the FNI will argue that it is discriminatory to impose further delays upon its constituency in light of the concession granted to Conne River.¹⁰⁸

The F.N.I. case is in the early stages and will not come to court until sometime in 1994. Concerted effort is underway to gather ethnographic and historical evidence which will convince the court to admit these people's right to declared Indian "status". Opportunity exists for developments to alter the balance of powers. Whatever the outcome, an appeal process may then ensue.

The F.N.I. is up against the latest band and reserve creation policy of the federal level. The policy does not appear to include provision for setting up new bands, unless they are split off from a formerly existing membership and no funding is required. However, legal obligation creates a reason for setting up new bands and reserves.¹⁰⁹

Perhaps the outcome of further genealogical study would enable the F.N.I. to consider joining with Conne River people to press a comprehensive land claim. Undoubtedly, both the federal and provincial levels would view this situation negatively, given their historical resistance to such claims.

¹⁰⁸Ibid., p. 4.

¹⁰⁹INAC Program Directives 20-1, Vol. 1, Chapter 3., sec. 9.2 - 9.6.

In the 1988 proposal for self-government negotiations, the F.N.I. refer to the colonial land grant at Conne River (*Miawpkek*) as being a precursor, if not directly related, to the present reserve lands in that location. They state that similar grants exist for other Micmac bands in western and central Newfoundland; but that, to date, the Deputy Minister of Indian Affairs has refused research funding on that issue, on the basis that the F.N.I. bands are not *Indian Act* bands.¹¹⁰ A successful judgement could alter this catch-22 situation.

The inequity built into a system which allows related tribal members in differing administrative units different status and rights is a problem. The narrow, selective approach to claims policy as seen in this Newfoundland example ignores historical processes, in this case tribal movements. It ignores the fundamental reality of time immemorial occupation for aboriginal peoples. It promotes divisions within groups and is artificial in content.

Chapter V will tell a different story - a story about the problems of comprehension within the justice system - about a lack of willingness and the difficulties of considering an alternative view of history.

¹¹⁰F.N.I. *Micmac Community Self-Government Negotiations*, Annex 3, p. 3.

CHAPTER V
A FAILURE OF UNDERSTANDING:
EVALUATING TRADITIONAL EVIDENCE IN DELGAM'UUKW

In the *Delgam'Uukw* case, a group comprised of the hereditary Tribal Chiefs of two British Columbia peoples, the Gitksan and the Wet'suwet'en, sought a declaration by the B.C. Supreme Court that they had "ownership and jurisdiction", as well as aboriginal rights, to specific chief-owned individual territories, altogether making up the tribal lands or territory. The Chiefs were unsuccessful in their suit; in 1991 the judge denied their ownership and jurisdiction. He allowed that their aboriginal rights did not stem from "time immemorial" occupation but from use over a "long, long time", and were limited to a much smaller area than that claimed. Lastly, Justice McEachern ruled that these rights had been extinguished by the action of colonial ordinances and later, provincial laws.¹ The Gitksan and Wet'suwet'en Chiefs are presently awaiting a B.C. Court of Appeals judgement. This chapter critiques the Reasons for Judgement (8 March 1991) in the *Delgam'uukw* case, concerning the traditional evidence.

This chapter shows that the reasons for negating the evidence stem from a conceptual framework which evaluates truth or validity in certain ways, excluding other possibilities. The judicial attitude conveys the basic orientation lag between current academic approaches and conservative judicial practice. But more than anything, the failure to achieve recognition

¹Justice McEachern. *In the Supreme Court of British Columbia between Delgam'Uukw et al and Her Majesty the Queen in Right of the Prov. of B.C. and the Atty-Gen. of Canada.* (1991) Smithers. No. 0843. [Hereafter, *Reasons*]. [Update: the B.C. Court of Appeals issued a more encouraging decision on June 25/93.]

*Generalized Map of British Columbia
showing Territories claimed by Gitksan and
Wet'suwet'en Peoples (not to scale).*

Source: *In the Supreme Court of British Columbia between Delgam'Uukw et al and H.M. the Queen in Right of the Province of British Columbia and the Attorney-General of Canada. Reasons for Judgment - C.J. McEachern.* Smithers No. 0843 (8 Mar. 1991), p. 6.

is due to the undisclosed gap between our understandings. Concepts of "time immemorial" and "time" are the crux of the problem in this case. This chapter also looks very briefly at possibilities for congruence of disparate knowledge systems, which were discussed in Chapter I.² Lastly, it compares this west coast example with the Mi'kmaq on the east coast, as discussed in Chapter IV.

My commentary uses three main sources: the published Opening Statement of the two main Hereditary Tribal Chiefs, Delgam'Uukw and Gisday Wa, and counsel³; Justice McEachern's published Reasons for Judgement (hereafter Reasons); and a book of trial testimony extracts and commentary compiled by Don Monet, a cartoonist, and Skanu'u (Ardythe Wilson), a Gitksan journalist.⁴

The case has been a direct dialogue between two cultures; nevertheless, this dialogue has failed to achieve consensus on issues of importance to both parties. Both parties were talking across a gap which only widened as the case progressed. Furthermore, political attitudes prevalent in the province were prejudicial to aboriginal claims. An abundance of commentary exists on the case to date, documenting certain racist assumptions which were

²See pp. 15-24.

³Gisday Wa and Delgam Uukw. *The spirit in the Land: the Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987.* (Gabriola, 1989). [Hereafter *Spirit*]

⁴D. Monet and Skanu'u (A. Wilson). *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Gabriola Island, 1992)

at work during the process.⁵ Except for one instance, this chapter will not speak to those issues.

Negating the Validity of Aboriginal History

After the landmark *Sparrow* decision of May 1990, aboriginal groups felt that the court had established some safeguards for rights. The *Sparrow* judge ruled that, pursuant to Section 35(2) of the Constitution, aboriginal rights could only be extinguished if the government's intent to do so was clearly established.⁶ But the ruling meant more:

*In Sparrow, the Court held that the Crown must behave in a manner that respects aboriginal and treaty rights, honours its obligations, and is not adversarial or hostile towards First Nations. The Court acknowledged that Section 35 requires a new way of dealing with aboriginal peoples. ...*⁷

Returning to *Delgam'Uukw*, counsel challenged the Court to conform to the standards of the *Sparrow* case. For perhaps the first time in a Canadian courtroom, a culturally-other system of knowledge was exposed to people who had little or no knowledge of it. Counsel made the challenge clear:

The challenge for this Court in understanding the nature of Gitksan and Wet'suwet'en validation of facts and in accepting Gitksan and Wet'suwet'en history as **real**, is part of the Court's task in treating Gitksan and Wet'suwet'en societies as equals.⁸

⁵See for example, F. Cassidy (ed.). *Aboriginal Title in British Columbia: Delgamuukw v. the Crown*. Lantzville, B.C.: Oolichan Books, 1992; also, *B.C. Studies*, 1993, special volume on Delgam'ukw.

⁶*Sparrow v. the Queen* 49 S.C.J. 1990. (May 31, 1990).

⁷Assembly of First Nations, in *First Nations and the Constitution: Discussion Paper* (Ottawa, 1991), p. 8.

⁸*Spirit*, p. 41. Emphasis added.

The Chiefs took the extraordinary step of offering secret and sacred histories to prove their aboriginal heritage. Their counsel made a special effort to arrange the presentation so that a translation of legal and cultural terms could be effected. There was a standard. Did McEachern follow it? The judgement rebuffed this offering and treated it with scant credibility. Not only that; Federal and Provincial Crown counsel took an adversarial tone with Elders, who are used to being treated with respect because of their responsibility as carriers of tribal tradition and histories.

Thus, Justice McEachern negated aboriginally-constituted and understood history, including their methodology and ways of verifying knowledge. Where does Gitksan-Wet'suwet'en understanding of history come from? From their constitution of it - through its re-creation in songs, oral traditions, and physical memorials such as crests and family poles. All this they tried to make clear to the judge. Their historical understanding reflects and is embedded in the circle of time immemorial, or the Creation. It has reference to the gifts of Creation, along with the peoples' inherent responsibilities towards these gifts. In their testimony, Elders often spoke of these responsibilities, and how they were connected to what we would speak of as re-enactments of the spirit associations between humans and other living beings on the land. These associations form part of their "history".

In opening argument, Gitksan-Wet'suwet'en counsel made it clear that an understanding of history lay at the core of the case. In a linear, progressive view of history,

as opposed to a circular notion associated with tribal views⁹, rights may appear to be frozen in at a certain point in time. Consequently, one can make an argument for abandonment or extinction of those rights. Associated with this is the argument that if aboriginal activities predicated on those rights, change over time, then the rights disappear. "We suggest that this thesis underlies the real defence of the provincial Crown in this case."¹⁰

Truth in Knowledge

In fact, the judge could only examine the traditional evidence in light of his underlying assumptions about what constitutes truth. The basis for his evaluation was western-based epistemology, with its ways of verification based on the scientific method.

The judge's bias towards western-validated systems is obvious. Speaking on the differing kinds of evidence of aboriginal occupation, McEachern shows his true colours. He repeatedly finds that historians, for example, are "reliable", "convincing", and "independent", with "excellent qualifications". Why so? "Generally speaking, I accept just about everything they [historians] put before me because they were largely collectors of archival, historical documents."¹¹

⁹See for example Leroy Littlebear: "It's more or less a cycle. That cycle repeats itself, so that every day is not a new day. Every year is not a new year. The same processes are going to happen today as happened yesterday and the day before." Speaking to the Beaudoin-Dobé Committee, Jan. 1992.

¹⁰Ibid., p. 42.

¹¹Reasons, Op Cit note 1, p. 52.

Setting the framework for arguments in favour of the tribal claim, counsel returned repeatedly to the relationship of traditional knowledge to scientific methodology. This was meant to create a sense of validity. They took a system of accounting foreign to what the courts are used to and referenced it to the dominant system. This proved rather painful, as it laid the system open to attack on those foreign grounds. One problem, expressed at the beginning, was testimony as to validity:

...In the course of his commissioned evidence, Fred Johnson, Chief Lelt, several times insisted that things he was saying were true because they had been witnessed and acknowledged. He used the Gitksan word *nidn't*, which...the translator...rendered in English as 'acknowledged,' 'confirmed,' 'witnessed'. Translation of this term is deeply unfamiliar to Western ideas of truth. For Chief Lelt, historical facts are facts by virtue of *nidn't*. They are confirmed by being acknowledged by a succession of witnesses who, thanks to their specialized training as high Chiefs, can be trusted to police distortions. We can thus begin to see the analogy between Gitksan and Wet'suwet'en *nidn't*-based fact and what, in other cultures in epistemology, is taken to be scientific fact.¹²

In their testimony, Elders offered a full disclosure of their sacred histories. Because the issue of validity is so important to the court, lawyers had the Elders speak about methods of validation of their traditional knowledge.

First of all, their knowledge is wholistic and socially validated. Consider the concept of *ada'awk*. It connotes what we call history (also identity, beginnings) and expresses the wholistic nature of Gitksan traditional knowledge:

Ada'awk in Gitksan language is a powerful word describing what the House stands for, what the chief stands for, what the territory stands for is the *adaawk*. And it's the most important thing in Gitksan is to have an *adaawk*. Without *adaawk* you can't very well say you are chief or you own a territory. It has to come first, the *adaawk*. Names come after, songs come after, crests come after it and the territory that's held, fishing places, all those come into one: that's the *adaawk*. It's not a story, it's *adaawk* to the Gitksan people.

How is it transmitted?

¹²*Spirit*, p. 39-40.

*I think I have tried to illustrate what all goes into adaawk and what it means to the Gitksan people. The adaawk is the most important. Today these adaawk are told. The Gitksan people didn't write anything, it was all oral, from one generation to another. But today these adaawk will go because our young people have educated themselves to write these and we have our language, our own alphabets that they can put on paper, black and white, it will never diminish at all. It will still be there, like it has been before. It goes around like a windmill, it goes around and that's how our adaawk are. It goes from one generation to another and no one changes.*¹³

Another Elder took up the theme of how their history is transmitted:

*In the beginning of time when people become chiefs, what the law they have to follow is that they sleep in the back centre of the long house and what they do is they take a name and they're responsible for the House members and we don't write anything down because there was no writing done in those days. So what happens is as soon as the Chiefs wake up early in the morning, they get up and start telling the history to the people from the beginning of time and then they start telling the adaawk, what adaawk they had in that House and then they tell their other House members what to do and how they should do it. And this was the law of the Gitksan people. It gets passed on from generation to generation. And the hard work of the Chiefs in the ancient times was to pass the adaawk and the history from generation to generation and their hard work reached us. This is why we know our adaawk and our history. ...*¹⁴

Another Elder spoke of how the knowledge is transmitted in stages:

*I would say I would be trained from a young age; these adaawks being told to me in short form, in medium form. Like when I say that, I mean when you're just a young kid, they just give you the general outline of an adaawk, and as you get older more detailed as you get - progressed until the full form of the adaawk is fulfilled and its full length and the yuuhiixamtxw, gan didils, everything that's in it, you have to understand. ... These types of thing, they expand and expand, but with the territorial names, the trails, the cabins, the exterior boundaries. It encloses everything after, it just expands, expands. It's similar like going to university where you hear these lectures daily, hammered into you.*¹⁵

Counsel for the Chiefs argued that a methodology for validation of history existed, and he outlined it. He relied on the feasting system:

The history is sifted through Gitksan minds continuously and each generation must agree to its purity. History is not static. The truth, as witnessed by the community, comes forward in time and includes all

¹³Gyolugyet (Mary McKenzie), Lax Gibuu Clan, Guldo Village. Testifying 13 May 1987. In Monet & Skanu'u, p. 28.

¹⁴Testimony of Xamlaxyeltxw (Solomon Marsden), Ganeda Clan, Kitwancool Village. Days 92-98 of the trial. May 1988. Ibid., p. 92.

¹⁵Testimony of Tenimgyet (Art Mathews), Lax Gibuu Clan, Gitwangak Village. Ibid., p. 78.

events that affect the people. In open forums of discussion, the people, through all ages, have verified the truths of their origins, their territories and their laws.¹⁶

Validation of rights and titles is through public witnessing of assertions of ownership of territory, of crests and of histories. The Chiefs' counsel pointed out that Australian aborigines use similar methods to validate their rights to property.¹⁷

McEachern refused to credit their histories with any validity. In his view, their truth is merely faith. One might ask why he only finds lacking the faith of the other party:

...I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief....¹⁸

In short:

...I am unable to accept adaawk, kungax [Gitksan song trails which are their form of remembering], and oral histories as reliable bases for detailed history, but they could confirm findings based on other admissible evidence.¹⁹

McEachern essentially bought into the idea that Indians have myths, and white people have history. It is this constructed distinction between myth and history which the historian Adler, whom we visited in Chapter I, traced to centuries "Before Christ". Efforts of early

¹⁶Gitksan Wet'suwet'en Bulletin, 29 May 1987. In Monet & Skanu'u, p. 30.

¹⁷Monet & Skanu'u, p. 120.

¹⁸Reasons, p. 49..

¹⁹Ibid., p. 75.

Middle Eastern and later Christian chronographers to construct a universal history, which naturally had culturally-specific origins, led to a disdain for traditions unassociated with a linear time-sequence.

Gitksan journalist Skanu'u exposed an incidental but telling feature of all courts: people must swear on the Christian Bible to speak truthfully. The Bible is used as a measure of truth. Yet the contents of that book come from the "knowledge and experiences" of the people who wrote it. *"Did it become humankind's truth only after it was in its written form?"* she asks.²⁰

The time problem in Tribal History

"Time" concepts posed problems throughout the trial. Differing views led to non-recognition of evidence. McEachern repeated what he felt was the anthropologists' rule-of-thumb that oral traditions are only reliable counting back about 100 years, or three generations.²¹ After that, they are invalidated by the passage of time, permitting uncertainty to contaminate the process. In contrast, the tribal people's acceptance of their ongoing traditions constitutes, to them, the only time-frame they need to express their histories -- until rights had to be validated in an extra-cultural forum. Again, in tribal histories what is measured and where it took place is more important than when it happened.

²⁰In Monet & Skanu'u, p. 105.

²¹Reasons, pp. 58 & 67.

At the trial's beginning, counsel explained mechanisms whereby the people can know and demonstrate the length of occupation. One feature is the names of the hereditary Chiefs:

...But these are not personal names. They are names which the Gitksan and Wet'suwet'en can trace back over the centuries and in themselves they represent the encapsulation of the peoples' history and its projection into the present and future. Indeed, some of the ...names stand among the oldest continuously held titles that exist anywhere in the world.²²

From the judge's observations, Gitksan oral history concerning origins seems to have been much more accessible than Wet'suwet'en origins in the evidence. However, from this he made an unfortunate inference: "their [Wet'suwet'en] history really begins with the observations of the Hudson's Bay traders who came into the territory in the 1820's."²³ There was no acknowledgement that Wet'suwet'en traditions of origins existed but were perhaps difficult to find or somehow problematic. Instead, the judge grafted a western definition onto tribal history.

In his decision, McEachern repeatedly stated that in his view it was impossible to establish specific "time-depth" or dates of beginning of use of individual territories belonging to Chiefs and their Houses. Along with much that he found indefensible, he referred many times to this failing in the oral and affidavit testimony. "Where were the beginning dates?" he seemed to ask continually.

²²*Spirit*, p. 32.

²³*Reasons*, p. 19.

In fact, such "beginning" dates are an absolute requirement for western-based proceedings. They reflect a need for "certainty" which is foreign to indigenous ideas of history. A lawyer-observer present at the trial confirmed that vis-à-vis time, elders rarely gave definite statements. They were more likely to talk about life events -- when their grandmother lived, say -- to fix the frame of reference. They seldom mentioned specific dates.²⁴ This of course got them into difficulties.

Terra Nullius: a Colonial Ghost Returns

The *Delgam'Uukw* decision stated that aboriginal rights to territories were geographically limited to certain small, stated portions which were historically and otherwise validated as territories. Rights did not extend to portions of territories in which rights were only validated by aboriginal oral testimony. Justice McEachern doubted the long-term occupation of extremities of the territories:

The evidence raises serious doubts about the time-depth of particular Indian presence in distant territories, that is away from the villages. It is unlikely that the plaintiffs' ancestors, prior to the fur trade, would occupy territories so far from the villages, particularly in fierce Canadian winters. This theory is well supported by a large number of reputable experts and casts doubts upon the plaintiff's positions that many of the far north and far south territories claimed by many Chiefs were used for as long as they allege.²⁵

His argument sounds logical, but McEachern betrays his underlying attitude throughout the judgement in his descriptions of the territories, which he repeatedly characterized as "waste" or "empty" lands. This is a distinct borrowing of phraseology from

²⁴Interview with [anonymous] lawyer, October 1992.

²⁵Justice McEachern, in Monet & Skanu'u, p. 193.

Individual Gitksan and Wet'suwet'en Chiefs' Territories

Map 3

*Reduced copy of
Overlay Map (Ex. 646-9A)
showing Gitksan
Internal Boundaries.*

Map 4

*Reduced copy of
Overlay Map (Ex. 646-9B)
showing Wet'suwet'en
Internal Boundaries.*

Source: In the Supreme Court of British Columbia between Helgan'Uukw et al and Her Majesty the Queen; in Right of the Province of British Columbia and the Attorney-General of Canada. Reasons for Judgment - C.J. McEachern. Smithers No. 0843 (8 Mar. 1991), pp. 8-9.

the *terra nullius* doctrine of the European colonizers, discussed in Chapter II. Recall that this doctrine referred to lands inhabited by indigenous peoples as "waste" or "deserted" lands. The justification for abrogating aboriginal land rights was that the people were too backward or uncivilized (not even having attained the status of nations) to possess law or custom which would justify their holding of property rights. The lands were empty of a civilized nation. This is a racist notion.

A Gitksan Chief, Gwis Gyen, testified about the nature and strength of their laws:

All the Gitksan people use...a common law between Gitseguk'la, Gitwingax, Gitwancool, Kispiox and Gitanmaax. This is like an ancient tree that has grown the roots right deep into the ground. This is the way our law is. It's sunk...deep into the ground. The strength of our law is passed on from generation to generation, and each generation makes it stronger. ...Each time our people use our law, they make it stronger, and it still goes on today. We never deserted our Grandfather's seat and we never deserted our land, our territories. ...Since the world was created, the Creator separated the different nationalities and gave each one of us a custom to follow, and this is what we did.²⁶

The 1993 Australian decision, *Mabo v. State of Queensland*, states that to disregard the existence of such laws regarding ownership, and instead rely on the European-constructed doctrine of *terra nullius*, would result in inequality before the law.

The strong sense of tribal law as a focal point for tribal identity, which the witnesses in *Delgam'Uukw* tried to convey to the court, is a basis for current recognition of aboriginal rights to territory. The *Mabo* decision rejects long-held racist assumptions, assumptions which institutions still foster today. The Australian Court acknowledged the existence of:

²⁶Testimony of Gwis Gyen (Stanley Williams), Gitanmaax. In Monet and Skanu'u, p. 100.

...a local native system under which the established familiar or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title.²⁷

Similar in some ways to the Gitksan and Wet'suwet'en Chiefs, the Murray Islanders of the Torres Strait, off the Queensland coast, owned specific sections of land under a hereditary system. But the Australian judge found validity in their "native" legal system:

...There is no doubt that if every acre has not its reputed owner (and I am inclined to think every acre has) but every grove or single tree of any value has its proper and legitimate hereditary owner. To disturb these rights, great care would have to be exercised and the natives recompensed for any loss that they might suffer through deprivation.²⁸

A difference here is that the sovereign Government in Australia acknowledged in historical documentation that the Murray Islanders had aboriginal rights in law. No such acknowledgement took place historically for the Gitksan-Wet'suwet'en people. And their laws were not enough history for the British Columbian judge.

Time Immemorial: disparate definitions

A lawyer-observer at the B.C. trial remarked upon what appeared to be basic differences in meaning. She found it strange that the many Elders who gave testimony said that they had been on their lands since "time immemorial", but apparently contradicted

²⁷*Mabo v. the State of Queensland*. [3 June 1992] Australian High Commission. Justices Dans & Gaudron concurring.

²⁸*Mabo v. the State of Queensland*. p. 8 of decision, citing an 1886 report by Actg. Gov. Resident at Thursday Island to the Chief Secretary of Queensland re: the application of Queensland law. Murray Islands were annexed in 1879 to Queensland.

themselves when they also spoke of oral tradition giving out that their people displaced other peoples.²⁹ What was lacking was an understanding of the aboriginal concept of "time immemorial".

Even though the judge conceded occupation of certain areas for a "long, long time", he wouldn't stipulate "time immemorial" occupation in this case. It was, however, sufficient to establish the existence of aboriginal rights, based mainly upon the archaeological, genealogical, and linguistic evidence. He even came up with a date for time immemorial from his own tradition, one that (evidently) "everyone knows":

...time immemorial (the time when the memory of man 'runneth not to the contrary'). 'Time immemorial', as everyone knows, is a legal expression referring to the year 1189 (the beginning of the reign of Richard II), as specified in the *Statute of Westminster, 1275*.³⁰

In contrast, an elder speaks in another way:

*[talking about hunting]...The information that our great, great, great grandparents had handed down from generation to generation. They all resided in the same area and then we today still live in the same territory. We never came from anywhere but where we are today.*³¹

This echoes an early protest in 1916 by tribal member Charles Wesley: "...this country originally belonged to our ancestors - we were placed here originally by God."³²

²⁹Ibid. Gitksan adaawk speak of "extensive migrations", counsel said in the opening statement.

³⁰*Reasons*, p. 82.

³¹Testimony of Txemsim (Alfred Mitchell), Lax Samashu Clan, Ans Payaxw Village. In Monet & Skanu'u, p. 69.

³²Addressing the McKenna-McBride Commission. [19880 1 C.N.L.R., p. B20]

An expression of living in that "time immemorial" is singing as re-creation:

*... when they are singing it and rattle, when they are singing it in a quiet way, while they are singing that song, I can feel it today that you can feel something in your life, it memories back to the past what's happened in the territory. This is why this song, this memorial song. While the chief is sitting there I can still feel it today while I am sitting here, I can hear the brook, I can hear the river run. This is what the song is all about. You can feel the air of the mountain. This is what the memorial song is. To bring you memory back into that territory. This is why the song is sung, the song. And it goes on for many thousands of years ago. And that's why we are still doing it today. I can feel it. That's how they know the law of Indian people, as this goes on for many years and I know this is how they have been handled in the feast, the first one has to be the one that sung the song.*³³

Delgam Uukw, Gitksan Chief, explained how chiefly power is re-created:

*Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit - they all must be shown respect. That is the basis of our law. The chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreation. ... My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed, and the crests displayed ...*³⁴

At one point in the trial, the judge asked an anthropologist to translate the idea of "time immemorial". This led to a rather obtuse interchange:

A. The Wet'suwet'en perceive themselves as having been in situ in the location where they are found now since the very earliest times.

The Court: What do you understand that to mean? What do you understand them to understand that means?

A. I understand them to mean that they have been there for such a very long period of time that this is basically their homeland.

Q. [Plaintiff's counsel] And is there a village to which the Wet'suwet'en people trace their origins?

A. Yes, there is. They call it Dizkle.³⁵

³³Testimony of Taxwok (James Morrison), Lax Gibuu Clan, Kitwancool Village. Ibid, p. 88.

³⁴*Spirit*, p. 7.

³⁵Testimony of Antonia Mills, Anthropologist. March 1989. Ibid., p. 124.

Justice McEachern wasn't persuaded, however. He refuted everything he heard the Elders say about their relationship with their lands from "time immemorial".

The evidence does not disclose the beginnings of the Gitksan and Wet'suwet'en people. Many of them believe God gave this land to them at the beginning of time. While I have every respect for their beliefs, there is no evidence to support such a theory and much good reason to doubt it.³⁶

The Issue of Congruence

Throughout the trial, counsel for the Chiefs attempted to present evidence that would convince the judge of the truth of the traditional proofs offered, in the form of reports and testimony of specialists in different areas of hard and soft science (paleo-botany, geology, archaeology, anthropology) and history. The object was to parallel as closely as possible the traditional material, and create a zone of corroboration, especially for "prehistoric" events.

There were successes. For example, a cultural anthropologist was able to chronologize the ancient history of several clans. Similarly, marrying historical documentation with oral tradition worked well in the "historic" (fur trade) period.³⁷

Nevertheless, let us consider an example that highlights the difficulties in this approach. Counsel used the case of a Gitksan *adaawk* which tells of an enormous grizzly bear who tore apart the forest, uprooting trees, sending the forest down a creek runway into

³⁶*Reasons*, p. 17.

³⁷Susan Marsden, testifying on trial days 232-236 in June 1989. In *Monet and Skanu'u*, p. 139.

a lake; where the water level of the lake was then raised because of the debris. They attempted to relate this story to physical evidence of a specific landslide which experts estimate occurred about 3,500 years ago. The conclusion to be drawn was that the oral history could assume a date and a location known to present-day examiners.

Well and good, McEachern seemed to say, but were the scientists and the Gitksan talking about the same landslide? McEachern thus neatly stepped aside from the question of whether the particular *adaawk* referred to events of 3,500 years ago. He readily accepted the evidence of the "eminent" pollen specialist (a paleobotanist) but did not accept the certainty from the evidence of the geomorphologist that the particular landslide was spoken of; it may have been another landslide. Or was it a landslide at all? Fortunately, he could proceed "without having to decide whether these *adaawk* actually describe a landslide".³⁸

His approach was the same to the whole body of oral testimony: it was all very well, but (fortunately) he had other 'other' (reliable) sources of evidence - history, archaeology, and anthropology. In short, he "did not find it necessary to rely upon it"; instead he chose to look at archaeological, linguistic and genealogical evidence.

So we have it when the two knowledge systems cross-nurture. Sometimes the results are very useful; other times, they fail to meet at all; they go right past each other. Recall that the Mi'kmaq of Newfoundland encountered some of the same problems.

³⁸*Reasons*, p. 66.

Delgam'Uukw and Newfoundland Mi'kmaq: commonalities and differences

Unlike the Conne River claim, which had a very limited oral component, *Delgam'Uukw* was the only Canadian case to use extensive oral evidence. The case took so long that 15 chiefs died during its progression - a case in point about the fragility of oral traditions. Yet, what appeared to be a much stronger marshalling of evidence of social and economic organization ultimately failed to impress, even as had the Newfoundland claim. It seems to matter little what tack is used to advance aboriginal rights - validity will always be questioned. Lawyers will always find it difficult to establish time-frame by traditional methods. Aboriginal groups will still find it problematic to establish time immemorial presence on the land, unless they back their information with western-style evidence.

Although Newfoundland entered into Confederation much later than British Columbia, the former colonies reacted in similar ways. They were both loath to recognize any aboriginal right (with the exception of Governor Douglas and the Vancouver Island treaties of the 1750's). Both colonial (and later provincial) governments held policies of assimilation toward Indians, maintaining that Indian rights were the same as others.³⁹ Nevertheless, there were differences in the federal attitudes after the respective Unions. Canada had always seen some difficulty with not recognizing the Indian title in British Columbia. In B.C., the Imperial Government might be termed almost an advocate, at least in the first fifteen years after the 1871 Union. Yet, presumably because Newfoundland's aboriginal people, the Mi'kmaq, were not occupants since "time immemorial" (the Beothuk supposedly

³⁹With one important difference - B.C. Indians were unable to pre-exempt land until about 40 years ago.

being the original and extinct population), Canada did not remonstrate with Newfoundland in the same way. Newfoundland was much less open to aboriginal land claims than B.C..

Provincial attitudes seem to reflect earlier assimilationist policies. In colonial British Columbia, Gov. Sir Anthony Musgrave said that the Indians status should equal that of "British subjects under the same protection and titled to the same privileges and incurring the same liabilities as the white population." The mirror image of this attitude on the east coast is found in a federal statement of Newfoundland's goals, sixteen years after the Union with Canada. Recall that Prime Minister Pearson said to Premier Smallwood: "I know it is your objective...to see that the Indians and the Eskimos take their place as full participating members of the provincial community and receiving all the benefits of other citizens."⁴⁰

In both provinces, provincial policies reflect third parties, representing the interests of long-time users of natural resources. Both governments staunchly oppose the aspirations of "their" aboriginal groups for the recognition of native rights. Although exploited on a periodic basis by European commercial interests, indigenous peoples in both Newfoundland and British Columbia were subject to settler pressures fairly late in the general process of colonial occupation. They came late to the mantle of British sovereignty in what now constitutes Canada.

⁴⁰L.B. Pearson to J. Smallwood. Letter, 25 May 1965. NAC RG10, Acc. 1990/91, Box 12, f. 121/42-1, pt. 25.

For aboriginal people, access to a land claims resolution process is complicated by the double jurisdictions of provincial and federal levels. As in the specific claims process, provinces usually prefer to deal bilaterally with the federal level as to terms and conditions under which negotiations might take place. At the stage when this process is settled, the aboriginal party may enter tripartite negotiations.

As for the litigation process, aboriginal groups are left dealing with the inherited politico-social orientation of the particular province in which they find themselves. This may mean a very constrained attitude as to what is acceptable in courts as evidence. Where Provincial Crown lands are involved, cases concerning aboriginal rights must first be registered with the Provincial Court.

The federal government has tried to argue as if the Indians themselves don't exist, both in the *Delgam'Uukw* case and in the defense of F.N.I. legal claim. Although the methods of making the argument differ, the end result is the same. In the F.N.I. case, the federal level argues that the bands are not Indian Act bands and the F.N.I. is a corporate body, with which they cannot deal. In effect, they are responsible to nobody. In the *Delgam'Uukw* case, the federal government argued that the entire Gitksan and Wet'suwet'en societies became assimilated between 1891 and 1915. That, in other words, the Gitksan and We'tsuwet'en did not exist as aboriginal peoples.⁴¹

⁴¹Monet & Skanu'u, p. 179.

In *Delgam'Uukw*, the provincial government challenged oral history and occupation of certain territories. Both the federal and provincial governments challenged the exclusive nature and length of that occupation, as in the Newfoundland example. A paucity of physical evidence for particular areas which the Gitksan-Wet'suwet'en and Mi'kmaq claimed factored into a rejection of the claim. In *Delgam'Uukw*, areas which the province contended were not part of the territory, consisted of all parts of individual House territories which were not within maps of settled village sites, established fishing sites, or established agricultural areas. The actual areas the judge decided were associated with aboriginal rights were those described in non-oral evidence. The judge accepted physical (archaeological) evidence, or historical records of fur traders or missionaries who had made reference to these areas. There was no archaeological evidence for the two ancient villages of Temlaxan (Gitksan) and Dizkle (Wet'suwet'en); thus, despite oral traditions which name them as places of origin, the B.C. judge discounted their existence entirely. In Newfoundland, archaeologists are unable to posit the existence of Mi'kmaq cultural remains from a time period approaching that of the presumed Beothuk sites. Both the provincial and federal government analysts have interpreted this paucity of physical evidence as worthy of a rejection of time immemorial occupation.

On the other hand, in other ways the Newfoundland Mi'kmaq are in an entirely different situation. While the public in British Columbia generally acknowledge that many Indian groups in B.C. have existed on those lands prior to British settlement, the legacy of the Mi'kmaq "mercenary myth" is still very real in Newfoundland. Vitriolic letters this

researcher has read bear witness to this ongoing heritage.⁴² "Time immemorial" is much more a barrier to the Mi'kmaq groups than to B.C. groups.

Finally, Newfoundland remains the only province to reject a comprehensive claim, intervening in what has always been a federal jurisdiction.⁴³ British Columbia has not made such a direct move; but up until the last few years, has refused to treat with comprehensive claims, and some indigenous groups view the present B.C. Claims Commission process as inauthentic.

⁴²Some letters assert that Mi'kmaq are the same as any other Newfoundlander, deserve no money, and have a weakness for strong liquor. INAC File B8245-116(NS).

⁴³Indian & Inuit Support Group. *The Newfoundland Government's Rejection of the Micmac Land Claim.* (1982)

CHAPTER VI CONCLUSION

Although in principle, the general population in Canada might be willing to endorse the idea of inherent or "time immemorial" rights, in practice a more conservative nature shows itself in the courtroom and around the negotiating table. This thesis has looked at differing concepts of "time immemorial" and "time". The courts and government policy define "time immemorial" and historical "time" by physical-science and linear referents. Many indigenous people look at "time immemorial" rights with a cultural referent, which includes their spiritual as well as their material history.

Given this indigenous context of cultural origins, perhaps we can rework the problem of aboriginal rights versus aboriginal title - the chicken or the egg. Legal definitions of aboriginal title assume that people must occupy or possess land before rights are attainable. Perhaps the difficulty with occupation - and by extension, aboriginal title - since "time immemorial", is that the latter phrase could be placed elsewhere, where it has a more realistic and enduring attachment. It is rights which exist since time immemorial. You can be displaced, or choose to move, from your original place of occupation, but your rights follow you to the newer place of residence or use. Original inhabitants remain original inhabitants, no matter where they set their camps or villages historically.

That aboriginal peoples were forced into this legal paradigm to prove occupancy since "time immemorial" relates back to the framework of legal assumptions in force at the time of first contact with European nations. Doctrines of discovery and occupancy are based on

terra nullius; as a basis for legal title to lands, this meant that indigenous people had to work within that structure to obtain recognition. The distinction between rights and title might not even exist were it not for the imported conceptual baggage.

Ovide Mercredi, Chief of the Assembly of First Nations, speaking just after the summer of Oka, said that the aboriginal position is a moral one.¹ Perhaps he was hoping to convey the wholistic nature of inherent rights. Over the centuries, European nations have separated the church from the state. Rights have been put into two boxes: legal content, or what the courts define, and spiritual content, or extra-legal. Thus, we now argue about "human" rights, referring to those natural or God-given rights all people possess. But we don't have to have separate boxes. An enhanced cultural polity would enlarge the process to accommodate different definitions, effectively recognizing the comprehensive aspect of rights.

How can the Canadian government accommodate to this idea? Perhaps it can take a cue from the Norwegian government. Like the British colonial government in what is present-day Canada, Norway's government has historically pursued an assimilationist policy towards its indigenous peoples, the Sami (or Samiid). It was only less than a decade ago, in 1984, that government introduced a new rights policy. The Sami Rights Commission established rights guidelines which the Norwegian parliament adopted in May 1987.

¹Ovide Mercredi. Symposium talk, Carleton University (Sept. 1990).

Although it may be too early to say, the guidelines show a tentative accommodation to the indigenous viewpoint of rights, vis-a-vis territorial occupation.

The provisions state that the Sami are:

"...a population group with historical continuity in relation to all or parts of a nation-state, from before the establishment of the territory in relation to all or parts of the state, without necessarily being the original population;..."²

This unstated definition of "time immemorial" is very similar to the Canadian one. Nevertheless, there is leeway for the aboriginal population in that the stipulation of first occupancy is missing. Norway has yet to clarify its position on territorial rights, but this guideline provides a positive note.

The new Norwegian guidelines will undoubtedly influence government policy and in theory filter through to the judicial system. Such an accommodation, if adopted in Canada, might allow Canada's indigenous peoples their unique interpretation of history; their own beginnings and ongoing Creation which breathes spirit into the cycles of their histories.

Both Norway and Finland have made the move to recognize an indigenous Sami Parliament, under their respective European sovereignty. Since 1973 in Finland and 1989 in Norway, these Sami bodies have functioned in an advisory capacity to the larger European

²Translated in O. Steinlien, "The Sami Law: A change of Norwegian Government policy toward the Sami Minority?", *Canadian Journal of Native Studies* IX/1 (1989), p. 11. Emphasis added.

parliaments.³ Naturally, the Sami processes affect aboriginal rights. Nevertheless, they are still working within systems which may or may not endorse their recommendations. They still use the legal language of Europeans to speak about their "time immemorial" rights. Although a positive move, perhaps some things have not changed. The currency of ideas is still based on European concepts.

Heartening signs come from New Zealand, known as a forerunner in the aboriginal rights movement. Since 1975, the indigenous Maori have been instrumental in the development and implementation of a Maori Tribunal. The government set up the tribunal to adjudicate claims relating to the 1840 Treaty of Waitangi between the British Imperial government and Maori chiefs. Since 1988, the Tribunal may make binding recommendations for the return of lands which New Zealand acquired under the State-Owned Enterprises Act of 1986. Although the legislative provision for a Maori majority on the Tribunal was revoked in 1988, a majority presently exists; also, the Chairman and government appointee is the Chief Judge of the Maori Land Court. This latter appointment gives strength to the Tribunal's recommendations, which it sends to the Minister of Maori Affairs and Cabinet.

An important feature of the Tribunal is its ability to conduct hearings after the Maori fashion, in what is known as *marae kawa* (customs). This refers to a culturally-oriented

³L. Sillanpaa, "Self-rule Sami-style works in Nordic nations", *Ottawa Citizen* (2 Feb. 1993), A7.

process in which Maori may give evidence using their own protocol.⁴ Such an adaptation is a significant concession to indigenous interests and understanding.

The Waitangi Tribunal was one of the sources of inspiration for Canada's Indian Claims Commission. The Commission was founded in 1990 to review specific claims in cases where the negotiation process had broken down, the claim had been refused, or compensation was at issue. It is too early to say whether or not the Commission will make a difference; it has yet to pronounce on the two claims accepted so far. However, the Commission has the power to take evidence in situ at reserve communities, where Elders stand a better chance of talking and being actually heard.

I talked earlier about the treatment of Elders by federal Crown counsel in a trial process - *Delgam'Uukw*. Members of the Canadian Anthropology Society, who were observers at that trial, asked the Royal Commission on Aboriginal Peoples to intervene with the Justice Department. The object was to mitigate the adversarial tactics that lawyers use on Elders.⁵ The Commission has promised to take action; at this date, they have not solidified their initiative.⁶ It remains to be seen whether their efforts will have a concrete effect in the courtroom.

⁴Waitangi Tribunal. *A Guide to the Waitangi Tribunal*, Pt. II. (New Zealand, 1992).

⁵CASCA, *Bulletin* Vol. 21:1 (Winter 1993), President's Letter. Also Royal Commission on Aboriginal Peoples, hearings in St John's, Newfoundland. 22 May 1992. Testimony of Dr. Adrian Tanner.

⁶Interview with Royal Commission member, May 1993.

On the international scene, the progression towards accommodation is uneven; in some places of the world such as Brazil, aboriginal rights are being steadily eroded. In others, there are signs of accommodation, perhaps coming out of a recognition that indigenous peoples do see the world differently than the dominant societies which encircle them.

Aboriginal and non-aboriginal people involved in the process of securing justice for indigenous peoples have made it clear, in one way or another, that what is required is cross-cultural communication.⁷ It is my hope that this thesis has achieved this in some small measure. Our minds may be as two, but let our hearts be as one.

⁷See for example, Leroy Littlebear, *Achieving Justice: Today and Tomorrow*. (Whitehorse, Sept. 1991), p. 25-28. Also, Rupert Ross, *Dancing with a Ghost*. Both are involved in criminal justice, but the lesson holds for broader aboriginal rights issues.

APPENDIX "A"

Methodological Issues

Although various indigenous cultures have been the object of intense study in relation to their concepts of time, the methods of analysis have remained strictly anthropological or linguistic-based.¹ Methodological decisions have led to predictable of analysis techniques. The only variable is the theoretical slant which is applied to the data. Reliance on anthropological explanations of concepts of "time" tend to generate a segmentary attitude, which does little to reflect the reality of aboriginal perspectives towards time.²

This researcher could not approach "time immemorial" and "time" concepts from this usual manner of study. That would lead to explanations based on a western paradigm, and would not yield a response from an aboriginal system. How to achieve clarity of vision was an issue. There is an inherent difficulty of working from within one culture, while seeking to explain an alternative tradition.

In recent years, aboriginal researchers of Native Studies have proposed a new, culturally-appropriate methodology, based on their cultural experience of indigenous people.³ The necessity of using a culture-based perspective arose. There are many ways of framing

¹See for example, T. McElwain, "Seneca Iroquois Concepts of Time", *Canadian Journal of Native Studies* 7/2 (1987), 267-277; and J. Lapointe, "La conception du temps chez les Wayana", *Anthropologica* XVIII/1 (1976), 97-104.

²See for example, M. Bloch, "The Past and the Present in the Present", *Man (N.S.)* 12 no. 2 (1977), 278-292; and M.F.C. Bourdillon, "Knowing the world or hiding it: A response to Maurice Bloch", *Man (N.S.)* 13, 591-9.

³See for example, Nick Deleary, "The Medewiwin, An Aboriginal Spiritual Institution", unpublished M.A. thesis, (Carleton University, 1990), 33-54. Also Georges Sioui, *Pour une autohistoire amérindienne* (Québec, 1989).

a methodology, not just one right way. What constitutes a culture-based methodology? Reference back to an aboriginal knowledge system reveals an emphasis on *wholeness* of view, rather than fragmentation; also on *description*. *Experience* is the essential base of an aboriginal system; so the sources will, in large part, speak for themselves in Chapter III. This is a necessary adaptation of a culturally-based perspective, for the non-indigenous researcher. Wholeness as a referent means that, overall, exploring "time immemorial" meant looking at history and time as well, to round out the picture.

Interview approaches:

Rather than talk about aboriginal elders selected for the interview process, it might be more appropriate to talk about connections - scientifically called "opportunistic" - with acknowledged elders of various communities. This was a process of mutual interchange: some elders were clearly markers on my path of understanding; others showed me the kernel of unanimity of response beneath the sometimes seemingly confusing variety of dialogue.

Originally, I planned a resource base of elders from reserve communities surrounding Georgian Bay and on Manitoulin Island. As I was concerned with representation of ideas from the many diverse tribal groupings, I broadened the search to include peoples from different provinces. Eventually, I heard elders with differing heritages: Ojibway and mixed Odawa/Ojibway or Pottawatomi in Ontario, also Chippewa in Ontario; Interior Salish from British Columbia; Cree from Manitoba and Saskatchewan; Tlingit from the Yukon; Lacota/Nacota from Dakota; Mohawk from the Canada/U.S. border area; and Huron from Quebec.

Additional, non-interview material in printed or video form represents the Blackfoot from Alberta, the Haida from British Columbia, and the Micmac from Newfoundland. These speakers are elders or representatives of elders.

Interviews in reserve communities took place in the homes of the Elders. These were from two to six hours duration, and in one instance took place over two days. Interviews which took place in the Kumik, or Elders' lodge, at the Department of Indian and Northern Affairs Canada, involved elders who had travelled from different provinces to give teachings. These often took place over several days and in some cases longer. A base question series appears below.

The potential of these interview materials are unrealized, mainly because of the language barrier. Elders spoke in English or French; comments in their original languages were translated by assistants. The bulk of the material is in English. Therefore, a great deal is missing which might help to further explain the meanings attached to the concepts of "time immemorial" and "time".

Often, in aboriginal teachings, the response to a question may be a story told. In these interviews, in an effort to be understood by another culture, elders also made the unusual move of direct response to questions. This I perceived to be an accommodating move on their part and for this I am grateful. There are instances in the written sources where the same process took place. The goal was cross-cultural communication.

An active appreciation of aboriginal methodology came as a result of the method of recording teachings. Very few of the interviews were taped on the spot. Out of respect to elders, a tape recorder was not considered the best way to obtain information.⁴ Instead, I was particularly advised by elders to listen well, to listen with my heart. I managed to develop listening skills appropriate to long exchanges. Immediately after each period of interviewing, I recorded field notes on tape. This listening approach, along with the idea of not interrupting when an elder is speaking, is consistent with methods of transmission of knowledge in the aboriginal world. Occasionally I took notes during the interviews, but I found it detracted from active listening, unless the material was extremely complex, in which case it helped the later transcription considerably.

The transcribed material was subject to the Elders' approval for use in this thesis. Certain information was to remain out of print. One Elder in particular brought home to me the dangers of possible misinterpretation in the process. Although in general elders were generously willing to share their thoughts, this process was hopefully not abused. Elders are not individually listed in the oral part of the Bibliography, as a few people wanted anonymity and this respects that. All Elders expressed an interest in receiving the finished product.

⁴Linda McDonald, a Yukon aboriginal researcher, did not tape her interview with an elder; she too had to develop listening skills. Coincidentally, the elder in this case was also interviewed by this researcher.

BASIC QUESTIONS - TIME AND ORIGIN

What have people learned through oral traditions or story-tellings:

- * About the beginning of time - Creation (genesis) - when people began. Do you have anything that marks the Creation, any event that marks the beginning of people on the land? Where do people come from?
- * About where people are going: Are there any oral traditions about migration to this particular area?
- * About how time is marked in the present days - are there things that mark the passing of time?
- * What does "time immemorial" mean to you?

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