

UBCIC Conference

*Protecting Knowledge:
Traditional Resource Rights in the New Millennium*

**APPROACHES TO INTERNATIONAL HUMAN RIGHTS, SELF-DETERMINATION AND
INDIGENOUS CULTURAL SOVEREIGNTY**

Shelley Wright
February, 2000

**[DRAFT ONLY - PLEASE DO NOT DISTRIBUTE, REPRODUCE OR QUOTE IN PRINTED
FORM WITHOUT THE PERMISSION OF THE AUTHOR]**

Introduction

First of all, I wish to thank the Union of British Columbia Indian Chiefs Research Department and the organisers of this conference for inviting me to speak today. I also wish to thank the Musqueam people for welcoming us onto their land and giving us all the place to discuss the important issues surrounding the protection and enhancement of Indigenous culture and knowledge. I would also like to take this opportunity to thank the Kwakwaka'wakw, Coast Salish and Nuu-Chah-nulth people who have always welcomed me very warmly on recent visits to Vancouver Island.

In many ways what we are talking about is the great cultural renaissance of the 21st century - the strengthening and revival of Indigenous and local cultures all over the world which have been oppressed, dispossessed and silenced by centuries of colonialism by Europeans. I myself am of European heritage and am acutely aware of my own place in this long and painful history. Because the centuries of migration and colonial penetration cannot be reversed - we cannot return to the past - I hope that there is a way of negotiating a fair and lasting peace between our peoples. But to do this will require a complete change in our thinking. The renaissance must be as profound as any other historical change called by this name. Full self-determination of Indigenous peoples to own, control, use and share their culture and knowledge is central to this renaissance.

The discourse of human rights, especially in the international field, ought to be about this wider and deeper vision of self-determination, not only on an individual level, but on a cultural or collective level as well. But often this is not what human rights look like and many groups, in particular Indigenous groups, look on the language and practice of human rights with suspicion. Human rights are too often interpreted by their defenders as meaning "individual" rights which may be antithetical to the maintenance of cultural diversity. Indeed a "culture" of individuality is precisely the consequence of the disintegration of cultural ties and helps to further this disintegration. This makes it all the easier for colonising forces - masquerading behind the language of progress, universality, individual rights, "free enterprise", or the growth of consumer cultures - to convince us that to be able to buy, or sell, anything on a supposedly level playing field in the market place is the epitome

of human rights. We know that this isn't true, but often the language and process of human rights, including international human rights, makes it difficult to say why. Thus the protection of cultural knowledge and heritage can be seen by some non-Indigenous people as an attempt to subvert "freedom of expression and information" or free access to and use of "the common cultural heritage of mankind" whatever this might mean.

In the book *Tonto's Revenge: Reflections on American Indian Culture and Policy*¹ Rennard Strickland describes the story of Yellow Bird, or John Rollin Ridge. Professor Strickland is himself a legal historian of Osage and Cherokee heritage who went on to be Dean and Professor of Law at the University of Oregon and is the editor-in-chief of the magisterial reference work by Felix Cohen *Handbook of Federal Indian Law*. Yellow Bird was born and grew up in the old Cherokee Nation in Georgia before the removal of the Cherokee and other Eastern tribes to Oklahoma in the late 1830's. He later moved away from Oklahoma and became the first Native American to be licensed to practice law in California, as well as being a journalist and negotiator for Cherokee rights after the American Civil War. In addition, he was a novelist and poet, becoming the first writer to be named the "poet laureate" of California. He died at the age of 40 a deeply divided and disappointed man. On the one hand he had embraced the "mainstream" path of the white majority, writing in English and practising American law (which he hated). He also remained bitterly divided from many of his own Cherokee people as a result of the deep and long-lasting conflict between those (like his father and grandfather) who had chosen to accept the Treaty of New Echota and move west voluntarily, and those who resisted and were forced on the "Trail of Tears". His own father and grandfather were murdered by members of the opposing Cherokee. He was never able to overcome his desire for revenge and his hatred of those who had chosen a different and perhaps more difficult path. On the other hand, he never abandoned his view of himself as a Cherokee and his desire to create a forum where Indian issues could be widely discussed. He worked hard for a separate "Indian" state in the US where Indigenous cultures from the many nations resettled in Oklahoma could be protected from white predations. He never achieved these goals, but he did foreshadow the 20th century struggle of Indigenous peoples in the US and elsewhere to protect and enhance Indigenous culture while working within the white man's world.²

Professor Strickland himself concludes with two main points in his essay and I would like to use these as my starting point. First of all, in his words:

"This, I believe, is a theme of Yellow Bird's song - we are who we are; to deny ourselves - to forget who we are - is to condemn ourselves to a spiritual, if not actual, death. The exiled Ridge, despite his efforts to remake himself, remained very much the young Yellow Bird of the idyllic Cherokee Georgia woods. If we have lost our sense of self, our cultural heritage - now is not too soon to reassert it." [at p.12].

Secondly, again in Professor Strickland's words:

¹ Strickland, Rennard (New Mexico Press, Albuquerque, 1997).

² See Chapter One: "Yellow Bird's Song: The Dilemma of an Indian Lawyer and Poet", *ibid.*, pp.1-15.

"As students of Indian law, we know there are legal distinctions based upon treaty and statute that set "Indian Rights" apart from "civil rights" [or in Canada "Aboriginal rights" from "human rights", as well as "status Indians" from "non-status Indians"]. Nonetheless, we share much with other groups demanding basic human rights. Phil Lujan, the Kiowa/Taos lawyer, has a saying, 'If we Indians aren't careful we'll unique ourselves out of existence.' Like Yellow Bird, we are caught in the immediacy of our own crisis. We lose sight of the common victimizer and turn on other victims. Until we learn what unites all of us, we will remain dangerously divided." [at p.13].

"Indian rights" or "Aboriginal rights" are human rights. If they cannot be included within the framework of "human rights", then it is the framework that must change. Therefore, I have come to see that the struggle for Aboriginal rights is the struggle for human rights - but a struggle not only for human rights as they are presently defined, too often, as individual rights, but as a struggle to redefine the discourse itself. Yellow Bird, when he first moved to California was struck by the attitude of the people he found there.

"I was a stranger in a strange land . . . looking at the multitude that thronged the streets, and passing each other without a friendly sign, or look of recognition even, I began to think I was in a . . . world, where all were strangers and none cared to know." [quoted at p.15].

The discourse of individual human rights is the discourse of strangers. It is felt and practiced most strongly in a nation-state like the United States which is a country of homeless migrants, shifting restlessly from one end of a continent to another. This vision is also true of countries like Canada and Australia - largely settled at first by Europeans who were themselves impoverished, homeless, dispossessed and decultured (including my own people) and then later becoming the destination of further waves of dispossessed and migratory peoples from Africa, the Pacific, Asia and elsewhere.

I myself am a migrant - from eastern Canada to western Canada to Singapore, then to New Zealand and finally to Australia. My family is also a mixture of different migrant groups - Northern Irish, English, Bavarian, French and Scottish. My mother's Scottish family (we think) comes originally from the eastern highland area north of Edinburgh. Their story is typical of migrants everywhere. At one time they must have been peasants and crofters living off the land, or (later) raising the red highland cattle. They were tribal people following the ancient Celtic religion they shared with their own ancestors in Ireland and elsewhere in western Europe. Later they became serfs, working for the Laird of Stirling as shepherds for the flocks of newly introduced sheep, or as house servants. In the land enclosure movement of the 18th and 19th centuries they were removed from the land altogether and drifted into the slums of Glasgow where they lived in absolute destitution and squalor. After several children died of scarlet fever, my great-grandfather's family emigrated to Ontario to start a new family and a new (and better) life. My Scots forebears brought all their racial and religious prejudices with them, their ignorance and their acquisitiveness. They lived in Toronto and my grandfather eventually moved to Thunder Bay - areas where the Chippewa people had themselves been dispossessed. They had long since lost their Gaelic language, their ancient religion (indeed they lost their religion twice as they were forcibly converted to Catholicism and then Protestantism) and any connection with the land on which they had originally lived.

This story bears many similarities to the stories of Indigenous people living in this country or in Australia. I don't know a lot of my own history for certain – I can only extrapolate from scanty records and the history of Scotland that we know. But in the experience of Aboriginal peoples in Australia (my family's last destination through me) – hunted and killed, then used as servants and "jackeroos" on the cattle and sheep stations of Australia (but still on their own land), then pushed into the fringes of the cities on the eastern seaboard and left on missions or in slums – I see a history not that different from my own people. What is different is that my people were shipped overseas and took over someone else's country. They learned to victimise other victims and forgot that they too once were victims. They became colonisers. This is my inheritance.

By using and transforming the language and practice of human rights we can protect the uniqueness of individual difference within the only source for that difference – the strength and vitality of unique cultures. Human rights can give us, or can be transformed to give, the processes by which these uniqueness can be protected and enhanced and how differences can be negotiated and protected between different cultures and individuals from those cultures. Commonalities across cultures can be respected without being subsumed into the colonialist dogma of "universalism". Human rights present us with both a substantive and a procedural challenge – the substance of self-determination, which must include Aboriginal rights as human rights, and the processes for resolving conflicts and differences peacefully through equality of respect for law, Aboriginal and non-Aboriginal.

Models for Analysing the Legal Protection of Cultural Intellectual Property

The protection of Indigenous knowledge, culture, science and technology is a key issue in the struggle to protect and enhance the survival and development of Indigenous peoples around the world. There are a number of different approaches that can be taken in order to better create the structures, ideas, institutions and tools necessary to further this development, and to assist in the cultural revival of Indigenous peoples. The following is a list of approaches that could be used as possible means of achieving these goals. The list is not meant to be exhaustive or mutually exclusive. It is also very tentative, and much more work needs to be done. Nevertheless, I see these as steps, each one encompassing and including the others. I start with, what I believe, is the most important and work down:

1. The Self-Determination Model

This model focuses on the revival and strengthening of *Indigenous* laws, customs and practices in relation to all aspects of culture and knowledge. This focus emphasises the need to protect and enhance the use of Indigenous languages, the education of children in their own languages and within their own cultural traditions, the expansion of rights to traditional lands including exclusive rights to title to land, the control of natural resource rights, the control of the use of Indigenous cultural material, ideas and knowledge by Indigenous and non-Indigenous users, and the general strengthening of Indigenous societies, economies and cultures. This might be described as the *Self-Determination Model* in which Indigenous law and practice are emphasised. A valuable exposition

to this approach can be found in Alfred, Taiaiake *Peace, Power, Righteousness: An Indigenous Manifesto*.³ See also Monture-Angus, Patricia *Journeying Forward: Dreaming First Nations Independence*.⁴

³ Oxford University Press, 1999.

⁴ Fernwood Publishing, 1999.

2. *The Choice of Law Model*

Where Indigenous legal systems are recognised as sovereign, at least in the field of protection of intellectual and cultural property, it may then be possible for the courts to apply existing rules of Private International Law or Conflict of Laws in recognising Indigenous law in the mainstream court systems. The "Choice of Law" doctrine allows courts of different jurisdictions to apply the laws of a foreign jurisdiction in deciding an issue where this would be most appropriate. Although this is an area which has some possibilities for future development, a full exposition cannot be attempted here. Nevertheless it is an area of development which has not received much attention in this field and might be worth looking at, although it relies on the recognition of Indigenous legal sovereignty (under the *Self-Determination Model*) which has not yet been achieved in either Canada or Australia.

3. *The Human Rights Model*

This model recognises that Indigenous rights to culture and knowledge are in fact human rights that either require separate protection, or that require protection as part of international human rights laws and human rights frameworks more generally. This might be called the *Human Rights Model* and is the basis for the development of Indigenous rights within the international arena. Although this development is not always reflected at the national or domestic level, it can have an impact from the local to the national level through a number of channels, not all of them direct or obvious. This can include the incorporation of international human rights into domestic law (as in the passing of the *Racial Discrimination Act* (Cth) 1975 in Australia incorporating the *UN Convention on the Elimination of All Forms of Racial Discrimination*, 1965 into Australian law) or it can mean the interpretation of existing legislation or common law in the light of international human rights as has been urged by Justice Michael Kirby, now on the Australian High Court.⁵ This model might also help to develop a "human rights culture" that frequently has an influence on what laws are passed, how cases are decided, how people think about law and legal obligations and how society functions more generally.

4. *The Aboriginal Rights Model*

This model seeks to develop national and local systems of law which allow for the recognition of Indigenous legal traditions through which Indigenous culture and knowledge could be protected. It ought to be the link between the *Self-Determination Model* on Indigenous sovereignty and mainstream constitutional or other legal doctrines. It also ought to be the link between international human rights law and national legal protection for Indigenous people. In Canada this is mainly subsumed under interpretations of s.35 of the Constitution and associated case law of which the two most significant recent cases are *Delamukw v. British Columbia* [1997] 3 Supreme Court Reports and *R v. Van der Peet* [1996] 2 Supreme Court Reports. In Australia this is expressed through the development of the concept of native title under the case law of *Mabo and Others v. Queensland*

⁵ See Kirby, M. D. (1993a), 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes' [16 UNSW. L.J. 363].

(No. 2) (1992) 175 CLR 1 F.C 92/104 and subsequent cases and/or under the ***Native Title Act*** (Cth) 1994 and the activities of the Native Title Tribunal. This might be described as the *Aboriginal Rights Model*.

5. ***The Shared Development Model***

Although this model will not be further discussed, it has generated a lot of attention in recent years in developing comparative and international perspectives which focus on either the connection of Indigenous knowledge to the environment (as in bio-diversity) or to trade (as in the development of systems of recognising Indigenous rights under WIPO, UNESCO or the WTO).

6. ***The Cultural Intellectual Property Model***

This model has generated the most attention, particularly in Australia, and has much significant practical and critical value. It focuses on the protection of Indigenous culture and knowledge through non-Indigenous legal mechanisms, in particular intellectual property and cultural heritage protection laws at both the international and domestic level. Hitherto this approach has focused on the development of notions of property law, either through intellectual property, personal property or incidents to real property. This could be called the *Cultural Intellectual Property Model*. In the area of protecting Aboriginal cultural heritage in Australia, it is recognised in a number of different pieces of legislation including the ***Aboriginal and Torres Strait Islander Heritage Protection Act*** (Cth) 1984 as amended. It also occurs at the state level through the recognition of Aboriginal rights over land and in other areas including the protection of Aboriginal knowledge and culture, and in local negotiations over the sharing of land and resources between Aboriginal groups and individual pastoralists (farmers), private leaseholders (especially mining companies) and municipalities. Canada lags significantly behind in protecting Indigenous culture under this model.

These different approaches overlap – or rather they can be seen as a self-reinforcing circle. We can begin on the outside and work inwards with the right of self-determination in international law as the outer circle where Aboriginal rights intersect with other groups and the world more generally. The six steps then circle inwards until we arrive at the development of legal mechanisms to protect the core of self-determination – that is intellectual and cultural property and heritage. Or we can begin with self-determination in the centre as the core value and starting point at the individual and community level and work our way outwards to the protection of cultural and intellectual property at the international level where it impacts on trade and development in our globalised information economy of the 21st century. Both circles overlap.

Much time has been spent investigating the fifth and sixth alternatives. The second approach requires much more thought and legal research before much can be said about it. This must wait for a future article or discussion. I would like to focus on the ways which the first, third and fourth approaches could be interwoven into a broad framework for the protection of Indigenous cultural sovereignty. In particular, I believe a human and Aboriginal rights approach will support and enhance the first alternative, ie. the strengthening and revival of Indigenous ways of protecting knowledge and culture through mechanisms which already have significant recognition in

international and national legal systems. Although I intend to focus on international law, I wish to demonstrate how this can affect the national, regional and local level in ways involving both enforcement of existing international human rights law, and in more flexible ways.

Self-Determination

There can be little doubt that self-determination is the key right and the foundation for the expression of Indigenous rights in international law. But this right has given rise to enormous problems. It is most clearly expressed in ***Common Article 1*** of the ***International Covenant on Economic, Social and Cultural Rights***, 1966 ["ICESCR"] and the ***International Covenant on Civil and Political Rights***, 1966 ["ICCPR"] in which they are worded in identical terms as follows:

Article 1

- 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.**
- 2. All peoples may, for their own needs, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.**
- 3. The States Parties to the Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.**

Most countries in the world, including Canada, Australia, New Zealand and even the United States have ratified either or both of these treaties. None of these four countries appears to have lodged a reservation in relation to Article 1 of either of these Covenants.* It is therefore a matter of international law that all four countries are bound by Article 1. It would seem then that Indigenous "peoples" in these four countries have a right of self-determination under international law that Canada, Australia, New Zealand and the United States (as well as the many other countries which have acceded to or ratified these covenants) must recognise.

But, unfortunately, it is not that simple. Nation-states have been extremely reluctant to acknowledge that Indigenous peoples are indeed "peoples" with group rights recognisable under international law. Indigenous peoples are generally referred to in international instruments and institutional arrangements as "populations". "Peoples" in international law refer to groups that have distinct cultural, linguistic, racial, religious or other affiliations. They are recognised as distinct by others, and perceive themselves as distinct. Generally such groups are also defined by their status as colonised "peoples" to whom the metropolitan power owes obligations under international law, as under the UN trust arrangements in the UN Charter or in documents such as the ***Declaration on the***

* A reservation is a formal statement submitted by a nation-state at the time of ratification that they do not wish to be bound by one or more provisions of a convention. Reservations may be later withdrawn, and other nation-states may lodge objections to reservations on the basis that a reservation goes to the substance and purpose of the convention and is not recognised by the objecting state. Within international human rights, the ***UN Convention on the Elimination of All Forms of Discrimination Against Women, 1979***, or "CEDAW" has the highest number of reservations and objections.

Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly resolution 1514 (XV) of 14 December 1960. Self-determination for these groups normally includes political independence and the right has taken on a distinctly political role for "blue water" colonies. ie. those separated from the colonial power by geographical, usually oceanic, distance. Self-determination leading to independence as a nation-state has been described as "external" self-determination.

Indigenous peoples who live in decolonised or independent countries have had enormous difficulties being recognised as "peoples". Rather they are seen as "populations" of unrelated individuals with (theoretically, if not always in practice) individual human rights, but without the status of "peoples" entitling them to group or collective rights. The ***UN Working Group on Indigenous Populations*** bears this name because of the insistence of member-states of the UN that Indigenous people could not be recognised as peoples. The difficulties of the definition of Indigenous and tribal peoples in ***ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries***, 1989, then becomes significant.

Article 1

- 1. This Convention applies to:**
 - a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;**
 - b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.**

- 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.**

- 3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.**

Although this Convention is useful in providing a definition of Indigenous peoples and tribal peoples (although not one generally accepted), it nevertheless makes it clear that it has no effect on the legal meaning of the word "peoples" elsewhere, and thus undercuts the significance of this term within the convention itself. It is also significant that only 10 countries have so far ratified this Convention, mostly in Latin America. Canada, Australia, the US and New Zealand have refused to become parties.

The *Draft Declaration on the Rights of Indigenous Peoples* puts primary importance on the right of self-determination:

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Under the Draft Declaration this is a key right, but one which is proving contentious to states represented in the *UN Human Rights Commission* Working Group where the Draft is currently under review. The wording of Article 3 would seem to be a modest restatement of Common Article 1, but its application to Indigenous peoples as "peoples" is proving a difficult concept for many members of the international community. And, the Draft Declaration has not yet achieved the status of binding international law.

Indigenous peoples themselves, partly through their participation in the UN Working Group, have attempted to broaden the scope of self-determination to move it beyond a political right focusing on simple independence from colonial domination. Colonialism is seen as an ongoing status for Indigenous peoples and the move away from colonisation as one requiring negotiation over the participation of Indigenous peoples as "peoples" within as well as along side of existing states. This position has been reiterated by Erica-Irene Daes, the Chairperson and Rapporteur of the Working Group, and has generated interest and (at times) support from nation-states such as Australia and Canada. For Indigenous peoples, self-determination may range from independence, to a recognition of their separate and equal status as sovereign peoples falling short of political independence, through to levels of self-government and local control over a range of different social, political, economic and cultural matters. Self-determination can include a recognition of sovereignty which does not lead to independence as a nation-state - just as the province of British Columbia or the state of New South Wales enjoy legal and political sovereignty within their constitutional limits but are contained within the boundaries of the nation-states of Canada and Australia. This type of self-determination has been described as "internal" self-determination.

At root, however, the problems are often economic and cultural rather than primarily political, although solutions must be found in making political choices. In this debate, a broadly defined right of self-determination as a legal concept could be helpful in giving Indigenous peoples a terminology and tool in defining precisely how their own sovereignty and cultural determination could be resolved in relationship to other communities with whom they may have to share space and resources. In addition, this broader definition is being developed by Indigenous peoples themselves, albeit within the framework of international law, incorporating Indigenous perspectives on sovereignty and self-rule.

Erica-Irene Daes has attempted to articulate what self-determination might mean for Indigenous peoples. She has said (in part):

"...the right of self-determination of Indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of 'belated State-building', through which indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms..."⁶.

Self-Determination, Indigenous Culture and Knowledge

The United Nations and other international institutions are beginning to recognise the need for the protection of Indigenous culture and knowledge, but the emphasis appears to be on the use of this knowledge in the market economies of the world.

"One of the challenges in dealing with intellectual and cultural property rights is in balancing two distinct ideas of how they should be handled. One view, subscribed to by many indigenous peoples holds that indigenous peoples themselves must protect their traditions, ideas, innovation and objects, and that only self-protection will guarantee the preservation of their property and adequate compensation for its use. Opposing this perspective is the claim by some States that because many indigenous knowledge bases and cultural objects have universal value, they are part of the world's common heritage. In this latter view, these objects and ideas need 'responsible conservation' and should be accessible to all in society for legitimate scientific and educational purposes."⁷

The value of these products and ideas may be too much for most nation-states to resist, especially in the developing world where economic development, or "modernisation", is so crucial. In large or middle-level industrial economies, such as Australia, Canada and New Zealand, the move towards an information-based global economy is also putting enormous pressure on national governments in relation to the protection of national cultures. The protection of Indigenous or indeed many non-Indigenous minority cultures is often sacrificed, or subsumed into the larger cultural project for nationalist or economic reasons. All three countries exhibit this in an extreme form. Any examination of the economics of tourism, the creative arts, telecommunications, national culture or research and development in science and technology vividly demonstrates how dependent these countries are on Indigenous culture and knowledge.

"What immediately comes to mind when you have to select a gift for someone overseas [while visiting Australia?] What is distinctively Australian besides kangaroos, koalas, frill-necked lizards and Akubra hats? "The Dreamtime", "walkabout", "traditional", "tribal" and "primitive"" boomerangs, bark paintings and totemic designs on coffee

⁶ "Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples" [E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993].

⁷ United Nations, "Indigenous People: Indigenous Peoples and Intellectual and Cultural Property Rights" (November 1992) at p.].

mugs, stationery and linen – of course. Symbols of Aboriginal culture and heritage, randomly selected, superficially treated as objets d'arts and "Australiana", are promoted as expressions of Australia's national identity."⁸

For Canada images of "Indianess" are ubiquitous as part of Canadian national heritage. For an interesting analysis of what this means to Canadian culture more generally see Daniel Francis' *The Imaginary Indian: The Image of the Indian in Canadian Culture*⁹. A trip to Government Street in Victoria or to Gastown in Vancouver provide many dramatic and often depressing examples of the use and misuse of West Coast Aboriginal imagery and art as marketing tools. Pakeha New Zealand's appropriation of Maori culture as a defining part of the culture of Aotearoa/New Zealand is equally ubiquitous. The appropriation of Aboriginal healing and other knowledge in relation to plants and animals is also a serious concern, and the subject of lengthy hearings before New Zealand's Waitangi Tribunal in the "Flora and Fauna Case" [Wai 262]. It has been the subject of serious concern to Aboriginal groups in Canada and Australia as well. The *Van der Peet* decision was, in essence, an argument over the relationship of the salmon to the culture and economy of the Sto:lo people, placed by the authorities and the judicial system in the context of commercial fishing regulations in British Columbia governed by quasi-criminal law, regardless of the appropriateness of this context for this type of discussion.

In Australia, the Smokebush plant in Western Australia has been known to the Indigenous people in the area as an effective healing agent for thousands of years. In 1981 specimens held by the US National Cancer Institute (obtained without Indigenous permission) were found to contain the active property *conocurovone* which can destroy the HIV virus at an early stage. The Western Australian government has the power, under existing legislation, to license the use of any flora or fauna found in Western Australia [under the *Conservation and Land Management Act* 1984 (WA) as amended and the *National Parks and Wildlife Act*]. The private pharmaceutical company, Amrad, has been awarded the rights (including NCI's patents) to exclusively develop the Smokebush plant for therapeutic use worldwide. The NCI, Amrad and the Western Australian government could potentially reap hundreds of millions of dollars in royalties if the plant's healing properties can be successfully developed into a marketable pharmaceutical product. The Indigenous peoples of the west coast of Australia have received no acknowledgement or reward for their ownership or, or knowledge in relation to, the Smokebush plant.¹⁰

In 1995, the Special Rapporteur on Indigenous Cultural Heritage, Mrs. Erica-Irene Daes, tabled a set of Guidelines for the protection of Indigenous culture and knowledge before the Subcommission on Prevention of Discrimination and Protection of Minorities¹¹ These have since been adopted by the UN Human Rights Commission. The Guidelines emphasise that the

⁸ Koorie Cultural Heritage Trust, Koorie (Creative Solutions, Melbourne, 1991) at p. 48.

⁹ Arsenal Pulp Press, Vancouver, 1992.

¹⁰ Janke, Terri *Our Culture: Our Future - Report on Australian Indigenous Cultural and Intellectual Property* (Michael Frankel & Co, 1999).

¹¹ United Nations, Economic and Social Council, Commission on Human Rights, "Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous Peoples" (E/CN.4/Sub.2/1995/26, 21 June 1995).

"...effective protection of the heritage of the indigenous peoples of the world benefits all humanity . . . [but that this protection must be] . . . based broadly on the principle of self-determination, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems . . . as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future. [Annex, *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, paras.1-3].

Although much of the debate has centered around the economic significance of the protection of Indigenous cultural heritage and knowledge, the issues have much wider repercussions both for Indigenous groups themselves, and for the nation-states and smaller political entities (such as the province of British Columbia) in which they live. Developing means of education, protection and enhancement of Indigenous culture and knowledge under existing legal regimes either in the areas of property law, or in the areas of environmental and trade law, are important. But I would suggest that these could be usefully placed within a wider context of self-determination, human rights and Indigenous sovereignty that is political as well as legal. (I do not wish to seem to be disrespectful of the religious and spiritual importance of knowledge and culture, but rather that the struggle for protection and strengthening of Indigenous culture must inevitably be a political process). In this process, based on the concept of self-determination, international law can play an important part in providing a paradigmatic legal framework in which parties to the debate, both Indigenous and non-Indigenous, can engage.

Human Rights

The right of self-determination is recognised in international law as a human right, in particular as expressed in *Common Article 1* as quoted above. But unlike much of the human rights law most people are familiar with, self-determination is not an individual right, rather it is a collective or "peoples'" right which attaches to defined groups. And this also leads to problems within the international human rights framework.

Unlike individual human rights, the right of self-determination cannot be the subject of a complaint or "communication" under the *First Optional Protocol* of the ICCPR. These communications are heard by the *UN Human Rights Committee* that monitors the Covenant generally. Canada, Australia and New Zealand have ratified this Protocol and individuals from these countries can complain to the UN Human Rights Committee about breaches of the individual rights in the ICCPR by these countries. The United States has not ratified this Protocol and therefore individuals cannot complain directly to this international body.

The enforcement and implementation of collective, group or "people's" rights is much less well-developed than the enforcement of individual rights. Decolonisation processes are monitored by various agencies of the United Nations, as can currently be seen in the transformation of East Timor from a province of Indonesia to an independent country. But it is unclear whether a right of self-determination exists for Indigenous peoples (as discussed above) or how it can be implemented. I

would suggest that such a right will inevitably be recognised in international law by incorporating the more flexible model of "internal" as well as "external" self-determination.

Although individual human rights structures can be very problematic for Indigenous peoples, at times undermining the collective cohesion and identity of Indigenous groups, these structures may be valuable in providing a mechanism for protecting particular aspects of Indigenous culture and knowledge. They can force nation-states such as Canada and Australia to address Indigenous issues previously ignored, leading to opportunities for negotiation and change.

Cultural rights to intellectual property, cultural property, heritage and knowledge are themselves international human rights. They are most clearly expressed in the following provision:

Article 15 of the ICESCR

- 1. The States Parties to the present Covenant recognize the right of everyone:**
 - a) To take part in cultural life;**
 - b) To enjoy the benefits of scientific progress and its applications;**
 - c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.**
- 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.**
- 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.**

In addition, both ILO Convention 169 and the Draft Declaration contain extensive provisions relating to cultural protection. Neither the ICESCR, nor the ILO Convention or Draft Declaration have any enforcement mechanisms. They can however have a morally persuasive influence. I would also suggest that they represent the developing nature of international law. The *Economic and Social Rights Committee* monitors compliance with the ICESCR and could require Australia, Canada or New Zealand to redress problems with the protection of Indigenous cultural heritage or knowledge. This has not been hitherto raised as an issue before this Committee, but perhaps it should be.

Individual complaints mechanisms do exist under both the ICCPR and the *Racial Discrimination Convention* ["CERD"]. Provisions in these conventions which may be breaches by a member-state in not properly protecting Indigenous culture or knowledge could include the following:

ICCPR

Article 2

- 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**
- 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.**
- 3. Each State Party to the present Covenant undertakes:**
 - a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**
 - b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;**
 - c) To ensure that the competent authorities shall enforce such remedies when granted.**

Article 18

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.**
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.**
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.**

Article 19

- 1. Everyone shall have the right to hold opinions without interference.**
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of**

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. **The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
 - a) **For respect of the rights or reputations of others;**
 - b) **For the protection of national security or of public order (ordre public), or of public health or morals.**

Article 27

1. **Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.**
2. **Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**

Racial Discrimination Convention (CERD)

Article I

1. **In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.**
2. **This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.**
3. **Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.**
4. **Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.**

Article 2

1. **States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:**

- a) **Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;**
 - b) **Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;**
 - c) **Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;**
 - d) **Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;**
 - e) **Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.**
2. **States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.**

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- d) **Other civil rights, in particular:**
 - vii. **The right to freedom of thought, conscience and religion;**
- e) **Economic, social and cultural rights, in particular:**
 - vi. **The right to equal participation in cultural activities;**

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals

just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Women's Convention (CEDAW)

Although the Optional Protocol under this Convention is not yet in force, it will likely come into force at some time in the future. It is also very likely that Canada, Australia and New Zealand will all become parties. Since the United States has not yet ratified the Women's Convention, it is unlikely that they will wish to accede to the Protocol any time soon.

Some provisions of the Women's Convention might be useful in the protection of culture and knowledge where it is specifically under women's control. There is however a potential problem in that cultures and practices which may be interpreted as prejudicial to women are to be eliminated by states-parties under this Convention:

Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 5

States Parties shall take all appropriate measures:

- a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;**
- b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.**

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

...

- c) **The right to participate in recreational activities, sports and all aspects of cultural life.**

Article 14

1. **States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.**

2. **States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:**
 - a) **To participate in the elaboration and implementation of development planning at all levels;**
 - b) **To have access to adequate health care facilities, including information, counselling and services in family planning;**
 - c) **To benefit directly from social security programmes;**
 - d) **To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;**
 - e) **To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;**
 - f) **To participate in all community activities;**
 - g) **To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;**
 - h) **To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.**

How can international human rights, including the right of self-determination which is so problematic for Indigenous peoples in the international arena, be translated into more effective protection and enhancement of Indigenous culture at the national, regional or local level? One method is to pursue those areas within international law which do present opportunities for Indigenous representation and advocacy. For all the frustrations associated with work in the international arena, I believe they have provided a useful means by which Indigenous voices have been heard. More importantly perhaps, they have allowed different Indigenous groups from around the world to meet and discuss common problems and common strategies. They provide a network of

support, discussion, some financial assistance and sometimes action that can prove useful "back home". Refining and expanding the content of international law can provide at least rhetorical tools that may be effective in overturning blindness and intransigence on the home front.

International areas where Indigenous peoples have been able to put some of their concerns include the *UN Working Group on Indigenous Populations* and its two parent bodies, the *Sub-Commission on the Prevention of Discrimination and the Protection of Minorities* [which has recently been renamed as the *Sub-Commission on the Protection of Human Rights*] and the *UN Human Rights Commission* ["UNHRC"]. The Working Group and the Sub-Commission are bodies of "experts" not representative of governmental views, and have proven much more amenable to Indigenous concerns than has the UNHRC. This is a political body consisting of 53 member-states roughly representative of the different geographical, religious, cultural, political and ethnic divisions in the world (gender and Indigenous representation are not included). The *International Labour Organisation* ["ILO"] also provides some space for Indigenous concerns. Regional organisations such as the *Organisation of American States* ["OAS"] also pay specific attention to Indigenous issues and recently endorsed the *Inter-American Declaration on the Rights of Indigenous Peoples* [approved by the *Inter-American Commission of Human Rights* at the 1278 session held on September 18, 1995 and subsequently adopted by *the General Assembly of the OAS*, 1997].

Aboriginal Rights

In addition, it may be possible to translate the principle of self-determination in international law into a workable *Aboriginal Rights Model* at the constitutional or domestic level. In Canada the concept of Aboriginal rights is contained in Article 35 of the Constitution. Australian law provides no such legal framework for similar concepts of native title or Aboriginal rights in Australian law. In New Zealand the process of recognising Aboriginal rights, in particular in relation to land and taonga or "treasures", has fallen under judicial interpretation of the Waitangi Treaty (1840) and the Waitangi Tribunal. In the United States there does not appear to be any comparable regime of "Aboriginal rights", although there is a body of "Indian law" associated with partial Aboriginal sovereignty under the concept of "dependent nations". Although there are significant political, constitutional and legal differences between these four countries they each share a history of colonisation of Indigenous peoples, the common law, English language and culture (with the exception of Quebec) and a significant failure to adequately protect Indigenous culture and knowledge. I wish to concentrate on Canada and Australia.

As Chief Justice Lamer discussed in *Delgamuukw* (based on his earlier reasoning in *VanderPeet*) the concept of "Aboriginal title" is merely a sub-set of the much larger concept of Aboriginal rights. The difficulty with his reasoning in both cases is that, whereas Aboriginal title crystallises on the assertion of British sovereignty, and continues under subsequent Canadian or provincial sovereignty, Aboriginal rights much attach to cultural activities and practices dating from before European contact. Although neither continuous exercise of these practices, nor attachment to land seems necessary, the determination of what constitutes a protectable cultural activity giving rise to Aboriginal rights must be traceable to some cultural practice of significance which existed at the time of first European contact.

"In order to fulfil the purpose underlying s.35(1) - i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions - the test for identifying the aboriginal rights recognized and affirmed by s.35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with Europeans ..." [*VanderPeet*].

It is interesting that the Chief Justice refers to the landmark Australian decision of *Mabo* in this case. Again, the High Court of Australia, while developing a concept of native title similar to that expressed in *Delgamuukw* recognised by Australian common law (since put into legislative form in the deeply controversial *Native Title Act*, 1994 as amended 1998), tends to see Aboriginal culture, and by extension Aboriginal rights, as tied to a pre-colonial past untainted by European contact. This freezes Aboriginal culture into a basically anthropological or ethnographic model ignoring the often profound impact of European contact and the survival of cultures in a profoundly hostile environment. It places the onus on Aboriginal peoples in both Australia and Canada to justify their entitlement to Aboriginal rights on the basis of a cultural context which may be neither historically verifiable (even with the more sympathetic approach to the use of oral evidence demanded by the Supreme Court in *Delgamuukw*) or in any way accurately reflecting the real living culture actually lived by the peoples themselves. Even in its most sympathetic formulation, as represented by Chief Justices Lamer [SCC] and Brennan [AHC], this makes it virtually impossible for Aboriginal peoples to genuinely pursue a model of Aboriginal rights which also protects their human rights as individuals, or their collective rights as groups or peoples, in particular the right to self-determination. This is so regardless of whether the legal concept of "Aboriginal rights" (or its subset "Aboriginal" or "Native" title) is enshrined in a constitutional framework, legislation (the Native Title Act) or is recognised by the common law. The framework is always European, and the touch-point for discussion is always European contact.

A *Self-Determination Model* would, however, redirect the focus of Aboriginal rights towards the actual lived cultural environment, political reality, economic needs, social framework, spiritual dimension and individual psychology of Aboriginal peoples as peoples. Self-determination in international law, although predicated on a model of decolonisation, does not demand that cultural difference or identity be determined by a pre-colonial past. Ethnic or religious difference can easily incorporate a range of different influences, whether pre-colonial, colonial or (indeed necessarily) anti-colonial. It provides a positive model of group identity and the attachment of basic human rights to a group based on their primary right of self-determination as a people living in the present, not the past. Obviously pre-colonial heritage and traditions will be fundamentally important - but they should not be determinative of the legal and political rights attaching to any particular group. Any *Aboriginal Rights Model* must therefore incorporate both self-determination and human rights as fundamental components.

Madame Justice L'Heureux-Dubé's judgement in *VanderPeet* comes much closer to a *Self-Determination Model* in her vision of Aboriginal rights as she defines them, and is worth quoting at length:

"The practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. See *Delgamuukw v. British Columbia*, supra, at pp. 646-47, per Lambert J.A., dissenting; see also Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow", supra, at p. 505, and Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee", supra, at pp. 258-59.

Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1). This was described by Lambert J.A., dissenting at the Court of Appeal, as the "social" form of description of aboriginal rights (see para. 140), a formulation the Chief Justice rejects. Lambert J.A. distinguished these aboriginal activities from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1) of the Constitution Act, 1982. I agree with this description which, although flexible, provides a defining criterion for the interpretation of the nature and extent of aboriginal rights and, contrary to what my colleague McLachlin J. suggests, does not suffer from vagueness or overbreadth, as defined by this Court (see *R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031).

Further comments regarding this approach are in order. The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

...

The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, tradition or custom has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Here, again, two basic approaches have been advocated in the courts below (see the decisions of the British Columbia Court of Appeal in this case, and in *Delgamuukw v. British*

Columbia, supra), namely the "frozen right" approach and the "dynamic right" approach. An examination of each will show that the latter view is to be preferred.

The "frozen right" approach would recognize practices, traditions and customs -- forming an integral part of a distinctive aboriginal culture -- which have long been in existence at the time of British sovereignty: see Slattery, "Understanding Aboriginal Rights", supra, at pp. 758-59. This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty. Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of "aboriginal time" prior to the arrival of Europeans. Contrary to the Chief Justice, I do not believe that this approach should be adopted, for the following reasons.

First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities: see Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", supra, at p. 22. From the native people's perspective, the coming of the settlers constitutes one of many factors, though a very significant one, involved in their continuing societal change and evolution. Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of aboriginal people as to the significance of European arrival on their rights.

Second, crystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing aboriginal rights: see Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt Sparrow" (1991), 36 McGill L.J. 1382, at pp. 1403-4. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 -- the year in which the Oregon Boundary Treaty, 1846 was concluded -- as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.

As a third point, in terms of proof, the "frozen right" approach imposes a heavy and unfair burden on the natives: the claimant of an aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses, even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about aboriginal culture and society. It forces the

claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in *Sparrow*, supra, which commands a purposive, liberal and favourable construction of aboriginal rights.

Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the Constitution Act, 1982 provides that the "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada" (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee", supra, at pp. 272-74. Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case-by-case application of s. 35(2) of the Constitution Act, 1982 proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

The foundation of Aboriginal rights and an *Aboriginal Rights Model* is therefore cultural distinctiveness, represented by specific cultural practices of significance to a particular group and practiced over a substantial period of time. These cultural practices are themselves protected by international human rights, as discussed above. Justice L'Heureux-Dubé also emphasises the need to incorporate the perspective of Aboriginal people themselves as to the significance of a cultural practice, and disagrees with the Chief Justice that the common law perspectives should be given the same weight. In other words, self-definition becomes the pre-eminent focus of attention, rather than simply placing Aboriginal culture in opposition to European culture. By opposing the two cultures, a divisive and ultimately "majoritarian" perspective (in L'Heureux-Dubé's words) is imposed on the determination of Aboriginal rights. In other words what is needed is a self-determination model in which self-identity is more important than any external criterion.

Within a framework of Aboriginal rights at the constitutional, national or domestic level, which reflects a broad and flexible approach to self-determination in international law, the protection and enhancement of cultural distinctiveness becomes crucial. The protection of Indigenous culture and knowledge can then be seen as (in Canada) a constitutionally protected Aboriginal right or, in Australia, an Aboriginal right which transcends the narrow property law dimensions of native title as it is currently interpreted, but can be framed within a native title context which adopts this wider perspective. In either case, protection of Indigenous culture then becomes fundamental to the right of self-determination.

International human rights, including a right of self-determination, might be incorporated into domestic law by way of legislation, or perhaps by way of the common law. In Canada much of this

has already been enshrined in the Constitution, either under the Charter of Rights, or under s.35. In Australia no such legal discourse of human rights exists within the Constitution, but the High Court has, in recent years, undertaken a major reinterpretation of Australian constitutional and common law in the light of international human rights law. Human rights and a right of self-determination are specifically referred to in the *Mabo* decision and subsequent cases on native title. Nevertheless, native title in Australian law still tends to conform to real property law and has not taken the opportunity to follow a self-determination or human rights approach. This is certainly related to the lack of such a discourse in the constitutional field.

In the area of protection of culture and knowledge Australian law has also tended to focus on a property law model, in this case the protection of cultural and intellectual property. This has had an unfortunate tendency to divide and limit the possibilities for protection, as can be seen in the most recent *Bulun Bulun* case in which Federal Court Justice Von Doussa found it difficult to see how native title, as an aspect of real property law, could incorporate copyright, an aspect of intellectual property law.¹² An approach which emphasises that cultural and intellectual property protection are aspects of self-determination and human rights might provide a different avenue in which Aboriginal rights could flow.

Cultural Renaissance and Self-Determination

In summary, I would like to see much greater awareness of the big picture, of the need for context and history, and the usefulness of cross-cultural sharing of ideas and information. Cultures are not static and cannot remain frozen in a pre-colonial, or colonial, position. Therefore, the current *Aboriginal Rights Model* is inadequate. It needs to incorporate within it a deeper understanding of self-determination, beginning with Aboriginal understandings of their own culture and knowledge. Protection of culture and knowledge can be achieved through a variety of different means, but focusing solely on intellectual property, or current constitutional and native title models, is not enough. But the right of self-determination is itself inadequate and also must be transformed to reflect both the internal and external manifestations of individual and cultural sovereignty. Human rights can provide a discourse and process of discussion where different views of "humanness" can accommodate each other in peaceful and mutually respectful ways, on the basis of equality, not of theft or destruction. Education of both Indigenous and non-Indigenous reformers will be necessary. Human rights can serve as a means of education. But no part of this picture is yet sufficient. Therefore, any overview of human rights must acknowledge that the protection and strengthening of Indigenous cultures must involve the transformation of the tools by which such protection might be achieved. The politics and law of colonialism run so deep that there is no place where a dialogue can occur where they do not penetrate. Even at the local level, whether it be within Indigenous communities, or in the non-Indigenous community, the weight of colonisation makes all approaches and alternatives difficult to reconcile with the core right of self-determination.

In a sense we are arguing over which story is the "right" one. What is sometimes forgotten is that there are many different stories, and they must all be respected. In order to do this, each story must be protected, not stolen or destroyed. And the story-teller must keep his or her right to control how

¹² *Bulun Bulun v. R&T Textiles* (1998) 41 Intellectual Property Reports 513 [Aus].

their story will be told. Copyright law can protect some stories in some forms. The colonial legal system as a whole recognises only one big "story", the History of European settlement and legal development. Therefore, both at the micro-level, in the protection of one story, such as the story of Yellow Bird that I "appropriated" above, or at the macro-level in the weaving together of many such stories, we need rules not only to ensure respect for each story and its teller, but also a way of negotiating how all our stories can mix and interweave to create the whole of our collective history, without "disappearing" some stories for the benefit of others. Self-determination, and the discourse of human rights attempt to ensure that at both a cultural and an individual level everyone has the right to create and tell their own stories and protect them against theft and misuse. In this sense copyright is simply one form of such protection, but one which tends to protect some stories and ignores or fails to protect others. Intellectual and cultural property laws as a whole are like this - because "their" stories are part of European History, this colonial story writ large as well as small. Therefore I would suggest that protection of culture and knowledge cannot be confined to intellectual or cultural property laws, nor even within laws relating to bio-diversity, the environment or trade law more generally. They are basically about human rights, in particular the right to self-determination, but a human rights and self-determination discourse that itself must change to incorporate the full range of "humanness" created out of our many stories.