THE INDIGENOUS LAW JOURNAL
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TORONTO, ONTARIO M5S 2C5
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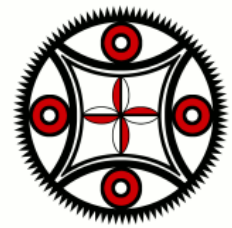

Volume 8, Year 2009

WHOSE "DISTINCTIVE CULTURE"? ABORIGINAL FEMINISM AND *R. V. VAN DER PEET*

By Emily Luther

Aboriginal women have been historically disadvantaged through oppression by both the Canadian state and their own communities. While feminism has often been dismissed as a tool for Aboriginal women, a theoretical and activist movement known as Aboriginal feminism has slowly been gaining ground. Its tenets include drawing inspiration from non-Aboriginal forms of feminism; analyzing colonialism and patriarchy together; evaluating Aboriginal traditions on their merits—that is to say, on whether the way they are currently practiced benefits or harms women; and being willing to ally with the Canadian state and non-Aboriginal feminists in order to promote the interests of Aboriginal women. This paper draws on Aboriginal feminist ideas and applies them to a leading Aboriginal rights case, R. v. Van der Peet, in which an Aboriginal right is defined as a practice or tradition integral to the distinctive culture of the group claiming the right. This analysis demonstrates that the test set out in Van der Peet is inconsistent with Aboriginal feminist doctrine and that it tends to encourage results that Aboriginal feminists warn against. In particular, it tends to elevate to rights only those practices or traditions that benefit Aboriginal men over women; it encourages the rigid idealization of pre-contact practices; and finally, it indirectly reinforces internal violence and oppression. Therefore, an alternative test is needed, through which traditions that enrich women's roles are celebrated and revived, and ones that oppress women are rejected.

FACT, NARRATIVE, AND THE JUDICIAL USES OF HISTORY: DELGAMUUKW AND BEYOND

By Eric H. Reiter

This article examines how judges' use of history serves to construct and reinforce particular views of the past, of the legal order, and of the relationship between the two. Through an analysis of Delgamuukw v. British Columbia and more recent Aboriginal title and rights cases, it traces the process through which judges select facts and turn them into narratives, and then authorize those narratives into new "facts" through the act of judgment. This process of narrative construction is inherently political, and rests on culturally specific assumptions about the nature of time and historical significance. By forcing litigants—particularly Aboriginal litigants—to fit their claims and their history into the predominant narrative, history as wielded by judges represents a powerful force for the creation and preservation of orthodoxy that severely limits the possibilities for dialogue and pluralism in law.

R. V. KAPP: A CASE OF UNFULFILLED POTENTIAL

By Dominique Nouvet

The Supreme Court of Canada's judgment in *R. v. Kapp* was a much anticipated decision for followers of equality and Aboriginal rights jurisprudence alike. The following commentary focuses on the Aboriginal rights implications of *Kapp*.

TIDES OF HISTORY AND JURISPRUDENTIAL GULFS: NATIVE TITLE PROOF AND THE NOONGAR WESTERN AUSTRALIA CLAIM

By Dr Simon Young

Recent native title litigation in Australia, over the important Noongar claim to areas in the south west of the country, highlight some persistent difficulties and troubling trends in Australian native title law. The Federal Court trial and appeal decisions (of 2006 and 2008 respectively) provide telling confirmation that the Australian approach to proof of native title entitlement is a mix of foundational ambiguity, theoretical complexity, moral controversy and practical uncertainty. This article traces the development of the relevant principles in Australian law, up to and including the dissonant Noongar decisions, and advances some potential doctrinal clarifications. It also seeks to underline the risk that prolonged litigation in this field can be an expensive and unhelpful distraction from meaningful progress.