Making Space for Indigenous Legal Relationships with Plants in Aboriginal Law

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This article explores why Indigenous long-term relationships with plants receive little attention in Canadian law and governance. Even though the use and management of native plants is a foundation of Indigenous cultural and legal practice, these important relationships are generally overlooked in legislation, case law, environmental assessments, and modern treaty negotiations. Using my ethnobotanical research conducted in collaboration with T'Sou-ke First Nation, I examine how plant use and management meets the Supreme Court of Canada's governing tests for Aboriginal and Treaty rights under section 35 of the Constitution Act, 1982. *From this analysis, I critique the limits of the current governing legal tests in considering evidence of Indigenous uses and management of plants, with particular focus on gender bias, inattention to the significance of plants in Indigenous economies, and erroneous assumptions about the significance of agriculture and the continuity of cultural practices in the face of ongoing colonial disruptions.*

Cet article explore pourquoi les relations à long terme entre les peuples autochtones et les plantes reçoivent peu d'attention dans le droit et la gouvernance du Canada. Bien que l'utilisation et la gestion des plantes indigènes constituent un fondement de la pratique culturelle et juridique autochtone, ces relations importantes sont généralement négligées par la législation, la jurisprudence, les évaluations environnementales et les négociations de traités modernes. À l'aide de mes recherches ethnobotaniques menées en collaboration avec la Première Nation TY'Sou-ke, j'examine comment l'utilisation et la gestion des plantes satisfont le test établi par la Cour suprême du Canada sur les droits ancestraux et issus de traités sous l'article 35 de la Loi constitutionnelle de 1982. À partir de cette analyse, je critique les limites des tests juridiques actuels par l'examen des preuves d'utilisation et de gestion des plantes par les autochtones, en considérant particulièrement les préjugés sexistes, l'inattention portée à l'importance des plantes dans les économies autochtones, ainsi que les hypothèses erronées sur l'importance de l'agriculture et la continuité des pratiques culturelles face aux perturbations coloniales continues.

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Contents

I. Introduction

In my role as an ethnobotanist immersed in collaborative community work documenting and interpreting Indigenous peoples' traditional uses of lands, plants, and animals, I am curious why Indigenous long-term relationships with plants receive so little attention in Canadian law and governance.[1] Indigenous relationships with plants are frequently overlooked in legislation, case law, environmental assessments, and modern treaty negotiations. The use and management of native plants is a foundation of Indigenous cultural and legal practice, but it is popularly referred to by settler culture as "gathering," a somewhat incidental activity usually relegated to a distant past and not particularly significant to present day law or governance.[2] This narrow vision of Indigenous plant use and management is like viewing a forest through a pinhole pricked into a piece of construction paper. My ethnobotanical research, done in collaboration with T'Sou-ke First Nation, examines how their enduring relationships with 100 culturally important native plant species provides legal evidence of their Indigenous land and resource rights in Canada.[3]

T'Sou-ke are Straits Salish peoples whose territory lies on southwest Vancouver Island, British Columbia (BC). Past and present practices of T'Sou-ke plant experts involving cultivating, harvesting, processing, storage, trading, and management of plant species, provide compelling evidence of long-

1 I use the term "Indigenous peoples" to refer to those human groups who have lived in a particular territory in interconnected relationships with species and abiotic features for many generations prior to the arrival of colonizing peoples. When I use the term "Indigenous-plant relationships" I am referring to the relationships between Indigenous peoples and native plants. When I refer to "native plants," I am referring to plants that are native to a specific geographical region of present-day Canada. I use the term Aboriginal when I'm referring to Indigenous peoples and their protected rights as they are defined in section 35 of the *Constitution Act, 1982.*

2 Since the middle of the 20th century, ethnobotanical research has contributed to a more accurate understanding of Indigenous women's substantial roles in food, medicine, and technology production, thus supporting a larger theoretical re-evaluation in anthropology around gender roles and the social and economic organization of hunter-gatherers. See, for example, Robert L Kelly, *The Lifeways of Hunter-Gatherers: The Foraging Spectrum*, 2nd ed (New York: Cambridge University Press, 2013); Douglas Deur, *A Domesticated Landscape: Native American Plant Cultivation on the Northwest Coast of North America* (PhD Dissertation, Louisiana State University, 2000) [unpublished]; Helen Norton, *Women and Resources of the Northwest Coast: Documentation from the 18th and Early 19th Centuries* (PhD Dissertation, University of Washington, 1985) [unpublished]; Patricia L Howard, ed, *Women and Plants: Case Studies on Gender Relations in Local Plant Genetic Resource Management* (UK: Zed Books, 2003); Astrida R Blukis Onat, "Resource Cultivation on the Northwest Coast of North America" (2002) 36:2 Journal of Northwest Anthropology 125.

3 To illustrate my argument, I rely on my doctoral research with T'Sou-ke Nation that I am currently developing into a book. This research examined T'Sou-ke's canon of plant knowledge within the customary landscape of their territory: see Pamela Spalding, *Unsettling Landscapes: Applications of Ethnobotanical Research in Defining Aboriginal Rights and Re-affirming Indigenous laws in T'Sou-ke Territory, Vancouver Island and Beyond* (PhD Dissertation, University of Victoria, 2022) [unpublished].

term Straits Salish land use, occupancy, and tenure of this region.[4] Within the T'Sou-ke's canon of plant knowledge, there is a rich array of plant practices, ecosystem management, and associated laws and normative understandings for plant species and habitats native to their territory. Although it is beyond the scope of this article, there may be reasons to think that Indigenous peoples across Canada have similar canons of plant knowledge that are not only legally relevant, but integral to their ongoing relationships with plants and ecosystems.

In this article I explore how Indigenous people's existing Aboriginal and treaty rights can be recognized and affirmed relying on evidence of plant use, cultivation, and stewardship. First, I consider how Indigenous people's relationships with plants in BC, and more generally the conservation of native plants, is acknowledged in Canadian law. Second, based on my research with T'Sou-ke Nation, I consider in a general way how ethnobotanical and ethnoecological research of Indigenous plant practices and customs might meet the normative evidentiary tests for Douglas Treaty rights, Aboriginal rights, and Aboriginal title in Canadian law. Third, as a supplier of research to support both section 35 jurisprudence and the resurgence of Indigenous law, I discuss the challenges that the legal tests pose for interpreting legal rights relating to plants. I indicate the major challenges that arise when the colonial state claims authority over Aboriginal legal rights, and I discuss how this weakness could be strengthened through the inclusion of Indigenous legal orders in considerations of how various kinds of evidence of plant uses and practices can support claims of Aboriginal rights and title.[5]

II. Legally Recognizing Indigenous Peoples' Rights to Plants

Finding legislation related to native plants in BC is a perplexing task. Plants, particularly most native species, have poor legislative protection throughout Canada. Unlike wildlife or fish, which generally have their own legislation at the federal and provincial levels, only some plant species are referred to in wildlife, fisheries, forestry, environmental assessment, or land acts, and then only in

4 The current test for Aboriginal title requires the claimant community to demonstrate proof of occupancy, exclusivity, and continuity: *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC) [*Delgamuukw*].

5 When I refer to legal systems and legal orders, I use Val Napolean's definitions to distinguish these terms, where she states, "I use the term 'legal system' to describe state-centred legal systems in which law is managed by legal professionals in legal institutions that are separated from other social and political institutions. In contrast, I use the term 'legal order' to describe law that is embedded in social, political, economic, and spiritual institutions." Val Napoleon, "Thinking about Indigenous Legal Orders" in *Dialogues on Human Rights and Legal Pluralism* (New York, Springer, 2013) at 229–245.

relation to specific, mostly commercial, uses.[6] Native plants that are threatened with extirpation or extinction are covered under the federal *Species at Risk Act*.[7] None of these acts specifically discuss plants in relation to section 35. Any possible reference to plants must usually be inferred from more general wording around rights to food, social, and ceremonial activities in some parks, infringement on plant gathering in environmental assessment processes, or the potential for the site of a traditional use or heritage tree to be protected by legislation (for instance, BC's *Heritage Conservation Act*). This stands in stark contrast to how fisheries and wildlife are cited in legislation.[8] In this context, the majority of the thousands of native plant species in BC are not protected under either federal or provincial legislation, nor are Indigenous people's relationships with around 400 of these species and these species' ecosystems.[9]

The development of Aboriginal law within Canadian common law has been critical to anchoring and forcing a broader societal engagement with Indigenous rights throughout Canada.[10] For the past forty years, the decisions in this area of law have been a major impetus for government-to-government discussions, negotiations, and agreements between the federal, provincial, and territorial governments and Aboriginal peoples (including First Nations, Inuit, and Métis peoples).[11] Yet, today, while Aboriginal rights are well-understood

6 For example: the *Fisheries Act*, RSC 1985, c F-14 only contemplates plants under its definition of "biofouling" at s 17(3); the *Forest and Range Practices Act*, SBC 2002, c 69 and its accompanying Government Actions Regulation, BC Reg 582/2004 enable listing plant species and plant communities as "Species At Risk" or "Regionally Important Wildlife," although the list is rather limited and out of date. The wording of both documents is clearly oriented around animals rather than plants or communities [Schedules 1-3]; the *Wildlife Act*, RSBC 1996, c 488, ss 6, 7 also allows for plants to theoretically be listed as "endangered" or "threatened" species, but in practice this is not done consistently and the legislation does not indicate how an endangered or threatened species would need to be treated, even if they were listed.

7 *Species at Risk Act*, SC 2002, c 29, s 6.

8 *Heritage Conservation Act,* RSBC, 1996, c 187, s 9. This *Act* protects culturally modified trees that can be shown through archaeological methods to pre-date 1846 as heritage sites (see s 12.1(2)(d)). Further, it protects places and objects as heritage sites or objects (such as buildings and shell middens) but does not have the capacity to recognize and address culturally important species and their habitats. Also, see *Kitkatla Band v British Columbia (Minister of Small Business, Tourism, and Culture)*, 2002 SCC 31.

9 Instead, s 88 of the *Indian Act*, RSC 1985, c I-5 provides that provincial laws of general application apply to Aboriginal people "except if they conflict with: existing treaty rights; existing federal legislation; any provisions in the *Indian Act*; any order, rule regulation or by-law made under the *Indian Act*." See John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 25.

10 Jim Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* (Vancouver: UBC Press, 2018) at 3–29.

11 Heidi Kiiwetinepinesiik Stark, "Introduction: Generating a Critical Resurgence Together" in Heidi Kiiwetinepinesiik Stark, Aimée Craft, and Hōkūlani K Aiku, eds, *Indigenous Resurgence in an Age of Reconciliation* (Toronto: University of Toronto Press, 2023) 3 at 6–7.

conceptually, it remains unclear how Indigenous peoples' relationships with culturally significant plants and any associated "activities, practices and claims fall within this class of constitutionally protected rights."[12] In fact, Aboriginal rights law appears to be preoccupied with hunting and fishing rights, and almost silent when it comes to defining the interplay between Indigenous legal rights and obligations with respect to native plants within Indigenous territories. The pertinent question here is if Straits Salish rights associated with plant use were never legitimately extinguished by the federal Crown before 1982, and since provinces have never possessed the jurisdictional power to extinguish Aboriginal rights or title, then should these rights not be constitutionally recognized and affirmed?[13] If the T'Sou-ke, for example, were to bring forward a claim of Aboriginal rights, how might Indigenous plant use and management meet the legal tests defined through case law? In the following sections, I outline how evidence of Indigenous plant use may persuasively be used in jurisprudence around Treaty rights, Aboriginal rights, and Aboriginal title, and I discuss how the courts would likely struggle with accepting the implications of these arguments.

A. Plant Use as Douglas Treaty Rights

The T'Sou-ke Nation are signatories to a Douglas Treaty, which is one of a series of 14 treaties signed between Sir James Douglas, chief factor of Fort Victoria and governor of the colony, and some of the Indigenous peoples of southern Vancouver Island, between 1850 and 1854.[14] Jurisprudence around the Douglas Treaties could be used to protect T'Sou-ke people's relationships to culturally important plants, though there are obstacles to this recognition, as I will explain. In *White and Bob*,[15] the Supreme Court of Canada ("SCC") recognized that the Douglas Treaties committed Treaty rights to the signato-

12 *R v Van der Peet*, 1996 CanLII 216 (SCC) at para 251 [*Van der Peet*].

13 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 25: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered." As Borrows and Rotman state: "The courts have held there was no widespread extinguishment of Aboriginal rights through military conquest, occupation or legislative enactment. As the Supreme Court has observed, 'European settlement did not terminate the interests of Aboriginal peoples arising from their historical occupation and use of the land. To the contrary, Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty…' (*R. v. Mitchell*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911 (SCC) at para. 8)." John Borrows & Leonard Rotman, eds, *Aboriginal Legal Issues Cases, Materials & Commentary,* 4th ed (Markham: LexisNexis, 2012) at 98.

14 In the words of Chief Gordon Planes: "I have been advised by my Elders that T'Sou-ke signatories to the Douglas Treaty believed the Treaty was about working together with the Crown to jointly manage the resources within our Territory. We therefore take the stance that T'Sou-ke never ceded our Territory to the Crown through the Douglas Treaty."

15 *R.v White and Bob*, 1964 CanLII 452 (BC CA)

ries and their descendants. However, as noted in *R v Morris*, the actual terms of the Douglas Treaties "were reflections of oral agreements reduced to writing by agents of the Crown," [16] with the resulting lack of clarity being the subject of ongoing disputes between the relevant Canadian governments and First Nations. While the written Douglas Treaties refer to enclosed fields, fishing, hunting, and village sites, they are generally viewed by historians and legal scholar Hamar Foster as peace and friendship treaties, not treaties that involved land.[17] These treaties made only an indirect acknowledgement of First Peoples' plant use and management, where the treaties refer enigmatically to "enclosed fields" to be retained by the signing communities. While there were many "cultivated fields" amongst those Douglas Treaty groups within the Straits Salish region, none of these were fenced in the manner of European-style enclosure,[18,] nor were they identified by survey or other means.

As Dorothy Kennedy found in reviewing Sir James Douglas' approach to treaty-making with the Straits Salish:

> In purchasing rights to the other lands, Douglas expected to find clearly demarcated territories associated with particular men (identified as chiefs or owners), with whom he could negotiate. Instead, Douglas encountered a situation he failed to comprehend … [accepting] the situation as he found it, rather than attempting to reconstruct which groups of individuals might have been associated with certain areas in former times, prior to the depopulation and extensive migration that had occurred since contact.[19]

Douglas did state that "the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclu-

16 *R v Morris*, 2006 SCC 59 at para 19

17 See Peter Cook et al, *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021).

18 The camas fields were not fenced because until cattle and other ruminants were introduced to the region, there were no predators of this important root crop. For more on the correlation between ruminants and the need for fenced enclosure elsewhere in North America, see Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge: Cambridge University Press, 2018). From the earliest accounts, the cultivated fields of the Straits Salish, for example, were noticed and commented on, such as by explorers and traders, as a sort of natural agricultural paradise. None of the cultivated root gardens or camas fields nor most village sites noted by Pemberton and others at T'Sou-ke were surveyed or set aside for T'Sou-ke. They are mostly private residential lands today. See John Lutz, "Preparing Eden: Indigenous Land Use and European Settlement on Southern Vancouver Island" in Nancy J Turner, ed, *Plants, People and Places: The Roles of Ethnobotany and Ethnoecology in Indigenous Peoples' Land Right in Canada and Beyond* (Montreal: University of McGill Press, 2020) 107 at 108–127.

19 Dorothy Kennedy, *Threads to the Past: The Construction and Transformation of Kinship in the Coast Salish Social Network* (DPhil, University of Oxford, 2000) at 195.

sive possessory rights in certain districts,"[20] yet he clearly misunderstood that most of these bounded properties were owned by high-born Salish women with whom he did not engage in treaty-making. Anthropologists Dorothy Kennedy and Brian Thom have analyzed how ignorance (wilful or otherwise) of the Coast Salish property system by settlers sabotaged subsequent understandings of Salish political organization and tribal boundaries.[21] Women's inherited property of camas (*Camassia* spp.), bracken (*Pteridium aquilinum*), berry patches, and clam beds were an important component of the Straits Salish governance and economy.[22] While these ownership rights were exclusive and inherited, they did not look and feel like 19th century English property and inheritance law, where a married English woman could not hold property separate from her husband. Thus, Straits Salish property systems were largely ignored by the European newcomers, including James Douglas.

The sparse wording of the Douglas Treaties makes their interpretation challenging in section 35 jurisprudence, particularly with regard to plant practices.[23] The interpretation of the Douglas Treaties in case law focuses largely on the possibility of land transfers and hunting and fishing rights, and relies upon a collection of oral and written accounts associated with the signing of the treaties.[24] The sometimes contradictory accounts between settler and Indigenous authors about the treaties suggest various motivations for initiating discussions arising from settler and Indigenous conflicts over lands and sovereignty. Even though there was a settler assumption of underlying Crown sovereignty, the Douglas Treaties did not involve land transfers, and they indicate that the Straits Salish erected buildings and "improved" their property through a form of agriculture that they agreed to protect.[25] Background accounts also suggest that the treaties were a reaction to loss of camas fields due to settler occupation and to how this loss impacted Straits Salish participation in their regional economy; other accounts suggest that it was the significance of forests

20 Borrows & Rotman, *supra* 13 at 402.

21 See Kennedy, *supra* note 19 at 337–340; Brian Thom, "The Paradox of Boundaries in Coast Salish Territories" (2009) 16:2 Cultural Geographies 179.

22 Wayne P Suttles, *The Economic Life of the Coast Salish of Haro and Rosario Straits* (New York: Garland Publishing, 1974).

23 Peter Cook et al, "Introduction" in Peter Cook et al, eds, *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021) 3 at 6–9.

24 Neil Vallance, "First Nations Accounts of Vancouver Island Treaties" in Peter Cook et al, eds, *To Share Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021) 123.

25 See letter from Joseph W McKay to Dr. James S Helmcken, December 3, 1888, BC Archives (BCA), Joseph William McKay Fonds, PR0560, MS1917, file 27.

to various signatories and the destruction of these forests by settlers that initiated the treaty talks.[26] Ultimately, while the treaties reference "enclosed fields" and background accounts refer to compensation paid for the destruction of the Straits Salish extensive camas fields, they do not provide meaningful insight into continuing access and stewardship throughout their extensive territories of the one hundred or so species of native plants that were culturally significant to T'Sou-ke and other Straits Salish groups. It would appear, then, that access to culturally important plants and stewardship of plant habitats were not explicitly considered in these treaties. Assuming with John Borrows that "any silence in treaty agreements should be construed as leaving intact all original Indigenous entitlements,"[27] it is accordingly appropriate to consider whether T'Sou-ke plant practices meet the test for Aboriginal rights.

B. Characterizing Plant Use as a Claim of Aboriginal Rights

If there are plant practices not covered by Treaty rights, do Indigenous plant use and related practices meet the standard evidentiary tests for determining constitutionally protected rights outside of treaties? *R v Van der Peet* identifies ten factors to consider when determining specific rights, particularly in regard to hunting and fishing. Although criticized by many (including the dissenting judges in the original decision), this has been the base test applied in Aboriginal rights cases for almost three decades, notwithstanding important clarifications in subsequent case law.[28] The majority of this test is designed to define the proposed right under review, while the remaining criteria provide guidance to judges on how to interpret the evidence before them with an open mind. The following paragraphs identify the more compelling features of Straits Salish plant use, as an example, that would be submitted as evidence of plant customs and practices to meet the *Van der Peet* test for Aboriginal rights.[29]

The *Van der Peet* criteria for proving an Aboriginal right include describing the right in terms that highlight precision, centrality, continuity, specificity, integrality, and distinctiveness of the relevant practice, as well as the

26 Vallance, *supra* note 24 at 134–135.

27 Borrows & Rotman, *supra* note 13 at 63.

28 Reynolds, *supra* note 10 at 87–88. See *Lax Kw'alaams Indian Band v Canada*, 2011 SCC 56; *R v Desautel*, 2021 SCC 17.

29 Other plant-related cases mostly focus on issues around timber harvesting, such as establishing commercial rights to harvest timber (*R v Sappier*, 2006 SCC 54), challenging Crown consultation with respect to forestry (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]), protecting CMTs as heritage sites (*Kitkatla v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31), or cutting down trees in parks as treaty rights (*R v Sioui*, 1990 CanLII 103 (SCC)).

practice's connection to the pre-contact period.[30] My research with T'Sou-ke suggests that plant practices can be defined very precisely, such that these practices could persuade a court of the legitimacy of the specific claimed right. Indeed, I found extensive data about T'Sou-ke and other Straits Salish practices, beliefs, and uses associated with plants prior to and after contact with Europeans. Such practices included the right to harvest certain species of plants for food, fibre, or medicines, the harvest of cedar bark for commercial purposes (e.g. basketry or textiles for trade or sale) or ceremonial purposes (e.g. governance through potlatching), and the practice of controlled landscape burning to improve camas production of cultivated fields. This compendium of material reflects T'Sou-ke's canon of plant knowledge and could be used to decisively define a wide spectrum of practices to which rights may attach, from the use and harvest of certain species of plants to practices that support claims of property and Aboriginal title.[31] In this and other respects, plant use and management practices can precisely frame customs (e.g. cedar harvesting customs), practices (e.g. camas horticultural techniques), and traditions (e.g. potlatch foods and textiles, or collection of medicines) that are specific and central to the claimant group within quantifiable terms that are familiar to the courts.

To identify T'Sou-ke central plant practices I compared archival, ethnographic, and ethnoecological research which I then cross-referenced against more recent ethnobotanical and community-based research conducted throughout T'Sou-ke territory and throughout the Pacific Northwest. I also conducted general plant surveys and I used terrestrial ecosystem data to locate culturally important plant species within varied habitats throughout T'Sou-ke territory. Triangulating a variety of sources of information revealed what species were used generally before and after contact, the scale in which these were harvested and used, and the degree to which T'Sou-ke people modified plant communities, ecosystems, and landscapes as a means of cultivating the large quantities of these important resources. While the exact species of plants and the Indigenous practices associated with them would vary across Canada, I contend that an ethnobotanical approach to researching plant practices would be similarly effective in different contexts. The following presents how ethnobotanical methods can be used to provide key evidence of Indigenous people's plant practices that would support a claim of Aboriginal rights.

30 Borrows & Rotman, *supra* note 13 at 123–132.

31 Stuart Rush, "Plants, Habitats, and Litigation for Indigenous Peoples in Canada" in Nancy Turner, ed, *Plants, People and Places: The Roles of Ethnobotany and Ethnoecology in Indigenous Peoples' Land Rights in Canada and Beyond* (Montreal: McGill University Press, 2020) 329 at 343–345.

1. Evidence of cultivation

Ethnobotanists situate human plant management activities on a cultivation continuum where different cultures or sub-cultures manage stages of ecological succession to produce greater or more predictable yields of plants or plant parts.[32] From this vantage point, plant cultivation is sometimes conceptualized as the "human appropriation of the net primary product of photosynthesis," whereby human actions that promote the photosynthetic activity of plants as a means of enhancing plant products for harvest is the basic mechanism of all agriculture.[33] By managing biodiversity, nutrient flows, plant and animal interactions, water, and other inputs, humans through coordinated and systematic social actions have impinged on and shaped natural ecosystems to a greater or lesser degree for millennia all over the globe.[34] This cultivation continuum stretches from what ethnobotanist Michael O'Flaherty calls "ecological agriculture," where diversity and yield are managed through time within the limits of productivity of a local ecosystem, to disturbance or industrial agriculture, which involves a "dramatic redesign of ecological relations to provide for the growth of crop species, and at rates of growth, that could not be found in the local ecology without human addition of external inputs."[35] For example, explaining the T'Sou-ke cultivation practices of camas, bracken, berries, and cedar in this context provides evidence of the centrality, continuity, and specificity of these plant practices.

2. Models of harvesting rates

Models for the scale and intensity of past harvesting amounts for different species can be established by measuring, for example, how long it takes for an average adult harvester to pick a litre of berries from a productive berry patch, or to dig 25 kilograms of root vegetables from an estuarine root garden, and comparing these figures against noted village population figures from ethno-

32 See, for example, M Kat Anderson, *Tending the Wild: Native American Knowledge and the Management of California's Natural Resources* (Berkeley: University of California Press, 2013).

33 Tony Weis, "A Political Ecology Approach to Industrial Food Production" in Mustafa Koç, Jennifer Sumner & Anthony Winson, eds, *Critical Perspectives in Food Studies* (Don Mills: Oxford University Press, 2012) 115 at 119.

34 Nicole L Boivina et al, "Ecological Consequences of Human Niche Construction: Examining Long-term Anthropogenic Shaping of Global Species Distributions" (2016) 113:23 Proceedings of the National Academy of Sciences 6388 at 6388.

35 R Michael O'Flaherty, "Ecological Agriculture: Situating the Garden in the Study of Agriculture" (2000) 22:2 Culture & Agriculture 16 at 21. External inputs into industrial agro-ecosystems beyond the genetically selected seeds or other propagules of the crops themselves, include: chemical fertilizers, pesticides, fossil fuels for equipment, importing of water and labour, and industrial technology.

graphic or historic records.[36] This modelling method was employed by ethnobotanist Nancy Turner in her expert witness report submitted to the court in the *Tl'uqtinus* case to establish the extent of stinging nettle (*Urtica dioica*) and cattail (*Typha latifolia*) harvests for Coast Salish women in the production of reef nets, twine, and large mats and baskets.[37] This presentation of the labour, knowledge, technology, and volumes involved in processing these species grounds these practices as distinctive, specific, and central. Ames and Shepherd applied this method to calculate volumes of western redcedar (*Thuja plicata*) posts and planks required by Indigenous peoples up and down the northwest coast (NWC) in order to orchestrate the complex labour tasks of building and maintaining Big Houses.[38] This quantitative feature of ethnobotanical methodology is particularly compelling at revealing the amount and extent of use of particular plant species to support the centrality and integrality of an associated practice, custom, or tradition. For example, using T'Sou-ke and other Coast Salish data, these harvest models reveal a staggering number of plant varieties such as stinging nettle, cedar, tule (*Schoenoplectus* spp.), cattail, and willow (*Salix* spp.) fibres harvested for the manufacture of a wide array of textiles used in the subsistence, trade, and prestige economies prior to contact.[39]

3. Managing forest succession

Analysis of Indigenous peoples' impacts on plants, ecosystems, and forests helps to develop a qualitative picture of the centrality and integrality of plant practices. Although plants do not preserve well in most archaeological sites, an archaeobotanical analysis of a 10,700 year-old wet site on southern Haida Gwaii revealed how even minute plant remains can help corroborate the time depth of people's relationships with individual species.[40] Similarly, measurement and analysis of the scars of culturally modified trees for several species (but especially for western redcedar) are used as evidence of depth and intensity of occupation by Indigenous groups of particular geographic areas.[41] In work-

36 Douglas Deur & Nancy Turner, eds, *"Keeping it Living": Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Vancouver: UBC Press, 2005).

37 *Cowichan Tribes v Canada (Attorney General)*, 2019 BCSC 1922 at para 4. Nancy J Turner, *Opinion concerning the relationship between the Cowichan and the lands within and around the Cowichan village at Tl'uqtinus before and at 1846 and between 1846 and 1878*. Expert Opinion at 9–12.

38 Kenneth M Ames & Emily E Shepard, "Building Wooden Houses: The Political Economy of Plankhouse Construction on the Southern Northwest Coast of North America" (2019) 53 Journal of Anthropological Archaeology 202 at 209.

39 Spalding, *supra* note 3 at ch 2.

40 Jenny Cohen, "Paleoethnobotany of Kilgii Gwaay: a 10,700 year old Ancestral Haida Archaeological Wet Site" (MA Thesis, University of Victoria, 2014) [unpublished] at 52–80.

41 Species such as western hemlock, western redcedar, yellow cedar, Douglas fir, lodgepole pine, trembling aspen (*Populus tremuloides*), and paper birch (*Betula papyrifera*) are all known to be culturally modified

ing from botanical understandings of plant morphology and ecological succession, one can explain, for example, how T'Sou-ke managed forest succession to increase the size and fruiting of favoured plants through a variety of practices (burning, weeding, tilling, pruning, and coppicing), forged over time and specifically adapted to T'Sou-ke territory.

To better understand pre-colonial customary landscapes, plant communities or patterns of plant use and management practices can, with some caution, serve as physical markers of past use and stewardship practices by humans over time and geographic regions.[42] Two prominent examples of this in Straits Salish territories are the presence of Garry oak savannahs with associated camas prairies in the Coastal Douglas fir Biogeoclimatic Zone, and the presence of dark soils (reflecting a higher nutrient value within the soil of an ecosystem than would normally be found, thereby indicating human input or assistance). In the first example, the extension of Garry oak (*Quercus garryana*) woodlands throughout Straits Salish territories into the Coastal Douglas-fir zone was clearly accomplished by regular, coordinated, and systematic burning to enhance camas production.[43] The remnant Garry oak meadows of southern Vancouver Island and the Gulf and San Juan Islands are indicators of a Salish cultivation complex for the enhancement of camas production and some berry species over thousands of years.[44] In the second example, research all along the central coast of BC of anthropogenic soils reveals that over millennia of repeated occupation at beach village sites, Indigenous peoples developed plant and shellfish harvesting and processing practices that enhanced nutrient-limited ecosystems which rendered the associated forest environment more productive.[45] Methods of reading forests for indicators of past human management as introduced above are one way of identifying the extent, history, and distinctiveness of a practice to which a right may attach.

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trees in this region. Jacob K Earnshaw, "Cultural Forests in Cross Section: Clear-Cuts Reveal 1,100 Years of Bark Harvesting on Vancouver Island, British Columbia" (2019) 84:3 American Antiquity 516.

42 Dana Lepofsky & Natasha Lyons, "The Secret Past Life of Plants: Paleoethnobotany in British Columbia" in Nancy Turner & Dana Lepofksy, eds, *Ethnobotany in British Columbia* (Vancouver: BC Studies, 2013) 39 at 39–40.

43 Brenda Raye Beckwith, *The Queen Root of this Clime: Ethnoecological Investigations of Blue Camas (Camassia Leichtlinii) (Baker) Wats, C Quamash (Pursh) Greene; Liliaceae) and Its Landscapes on Southern Vancouver Island, British Columbia* (PhD, University of Victoria, 2004) at 204–214.

44 Andrea Weiser & Dana Lepofsky, "Ancient Land Use and Management of Ebey's Prairie, Whidbey Island, Washington" (2009) 29:2 Journal of Ethnobiology 184 at 203–204.

45 Kira M Hoffman, Daniel G Gavin & Brian M Starzomski, "Seven Hundred Years of Human-Driven and Climate-Influenced Fire Activity in a British Columbia Coastal Temperate Rainforest" (2016) 3:160608 Royal Society Open Science 1.

4. Cultural keystone species

An analytical device used by Ann Garibaldi and Nancy Turner to distinguish a particularly significant plant species as specific, central, integral, and distinctive is to assess whether it is a cultural keystone species. A cultural keystone species indelibly shapes the cultural identity of a people to the point where the culture would be organized much differently without it.[46] Garibaldi and Turner devised a numeric index of six indicator factors of plant use based on type and intensity of use, multiplicity of uses, linguistic significance of the plant, its role in ontology, persistence of use over time, ability to substitute use with another species, and importance to trade. By assigning an overall quantitative significance rating based on these indicators to all plant species used by a particular group, this index helps rate the influence of key plant species on a cultural group. As such, cultural keystone species analysis can be used to demonstrate the centrality and distinctiveness of the use of certain plants to an Indigenous group. Moreover, identifying the most culturally important species for a particular group provides evidence to support the argument that specific plant practices were not incidental to other more integral cultural practices, customs, or traditions, but were ones "that made the society what it was."[47] As an illustration of this idea, the Haida Nation effectively presented evidence about their long and varied relationship with western redcedar to prove a Haida right to harvest cedar, and also to show that the Crown had failed in its constitutional duty to consult with them when contemplating action that would negatively impact these rights.[48]

5. Linguistic analysis

Linguistic classification structures and names for plants (referred to as folk taxonomies) and plant practices provide a compelling source of evidence as to which species of plants were important to a given group at the time of contact.[49] Of the over 2,300 vascular plant species native to BC, only a few hundred species are culturally significant enough to be named at a generic level in one or more Indigenous languages.[50] The degree of specificity of an Indigenous name associated with a plant species and its plant parts can reflect the cultural signifi-

46 Ann Garibaldi & Nancy Turner, "Cultural Keystone Species: Implications for Ecological Conservation and Restoration" (2004) 9:3 Ecology and Society 1 at 5.

47 *Van der Peet*, *supra* note 12 at para 55.

48 *Haida Nation*, *supra* note 29 at para 79–80. Rush, *supra* note 31.

49 Nancy J Turner, Carla Burton & Jan Van Eijk, "Plants in Language and Classification Among BC First Nations" (2013) 179 BC Studies 135 at 153–155.

50 *Ibid* at 139.

cance of the plant.[51] This linguistic clarity supports the evidentiary requirement that "the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not."[52] Even early settler WC Grant, whose descriptions of the T'Sou-ke were usually dismissive and racist, begrudgingly acknowledged the linguistic precision of their plant knowledge:

> The savages have a name for every flower, for every tree, and for every herb of the field; even the male and female of various plants are frequently distinguished by them by different denominations: to this knowledge of the names they hold an equally general knowledge of the uses to which the plants may be applied, and this knowledge they make use of not only in healing diseases, but in preparing and administering the most subtle poisons.[53]

In folk classification systems, patterns of over- and under-differentiation of terms for plant species can provide further evidence for integrality of plant use. For example, the eight different terms for parts of western redcedar in the SENĆOŦEN language indicate its significance to Straits Salish peoples.[54] Similarly, the elaboration of vocabulary for different uses of plants can help to establish their centrality to a particular group.[55]

C. Establishing Continuity of a Plant Right

Under the *Van der Peet* test, an Indigenous custom or tradition will only give rise to a right if the community can demonstrate "continuity with pre-contract practices, customs [or] traditions."[56] The continuity test has two parts: first, the claimant must show that the practice existed prior to contact with Europeans,[57] and second, that the modern expression of this practice can reasonably be regarded as a continuation of the pre-contact practice.[58] In *Van der Peet*, the test clearly states that an "unbroken chain of continuity" is not required in this analysis, and evidence must be interpret-

51 Nancy J Turner, "'The Importance of a Rose': Evaluating the Cultural Significance of Plants in Thompson and Lillooet Interior Salish" (1988) 90:2 *American Anthropologist* 272 at 277.
52 *Van der Peet*, *supra* note 12 at para 70.
53 Report from W C Grant to James Douglas (October 25 1849) *Report of Vancouvers Island by Capt WC Grant* at 304.
54 Timothy Montler, *SENĆOŦEN: A Dictionary of the Saanich Language* (Seattle: University of Washington Press, 2018) at 882.
55 Turner, Burton & Eijk, *supra* note 49 at 139–147.
56 *Van der Peet*, *supra* note 12 at para 64.
57 *Ibid* at para 62.
58 *Ibid* at para 63.

ed flexibly to allow for lapses in the practice.[59] As with evidence provided for hunting and fishing cases, and based on my own research, I believe that finding sufficient evidence of T'Sou-ke plant practices for food, social, and ceremonial purposes before contact (which in BC is generally declared as 1846)[60] and continuing to this day is a relatively straightforward task. Further, I find that T'Sou-ke plant practices throughout their territories represent much more than a support to their subsistence economy and ceremonial practices.

The T'Sou-ke and other Coast Salish peoples' regular production of impressive surpluses of plant products into specialty foods, medicines, and lightweight textiles serves as evidence that they were active participants in a robust trade economy and a system of regional governance where surpluses were redistributed throughout the Pacific NWC and beyond. Processed and manufactured plant products were stored in large quantities for subsistence during low production periods (e.g. during the winter season and years of low productivity for particular species). These plant products also supported substantial regional trade activity, offsetting food instability as well as bringing in favoured items from outside the T'Sou-ke territory.[61] The convention of formally gifting surpluses of plant products during bumper periods to kin and affines from communities in adjacent territories functioned as a form of social credit that could be reclaimed when needed. These were not incidental pastimes of the T'Sou-ke and other Coast Salish communities, but occupied a tremendous amount of focus, planning, and land use throughout the year by large extended families working in coordinated groups. These practices also signify an extensive degree of regular and, sometimes, exclusive land use by T'Sou-ke to achieve these surpluses.

Attempts to claim historic fishing rights that are on a scale and intensity greater than for food, social, or ceremonial purposes have not met with much

59 *Ibid* at para 168. This aspect of the test has been commented on in subsequent case law, notably *R v Desautel*, *supra* note 28 at para 8.

60 Hamar Foster, "The Imperial Law of Aboriginal Title at the Time of the Douglas Treaties" in Peter Cook et al, eds, *To Share Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021) 92 at 97. 1846 marks when the Oregon Boundary Treaty was signed between the United States and Canada along the 49th parallel, with the territory to the north being controlled by fur traders and eventually the Canadian government, and the south claimed by the United States. In other regions of Canada this date can be as much as 300 years earlier.

61 Wayne Suttles, "Affinal Ties, Subsistence, and Prestige among the Coast Salish" (1960) 62:2 American Anthropologist 296 at 302. This trade in favoured regionally specific species is similar to how in *R v Gladstone*, 1996 CanLII 160 (SCC) at para 27, Barbara Lane described how "some native groups had access to quantities of [herring] spawn beyond their needs and others had access to little or no spawn."

success.[62] These claims tried to prove that older Indigenous trade activities either once were or have evolved into a contemporary commercial right, but were mostly rejected based on the reasoning that "allowance for natural evolution does not justify the award of a quantitatively and qualitatively different right."[63] Like trade in herring roe on kelp, which was discussed effectively by expert witness and anthropologist, Dr. Barbara Lane, in the *Gladstone* decision, trade of lightweight, processed plant products (e.g. camas bulbs, cedar textiles and basketry, wool and nettle blankets, etc.) may provide stronger evidence of a form of commercial activity than trade in fresh fish. I suspect, however, that re-casting Coast Salish plant trading practices into the framework of the commercial practices and values of industrial capitalism and arguing that these plant trading practices continue, qualitatively and quantitatively, as commercial practices, will be met with judicial skepticism due to unavoidable gaps in the evidentiary record of plant use and trade.[64] Since the late 18th century, T'Sou-ke people's ability to harvest and trade in plant products has been diminished by external factors such as introduced diseases, European maritime trading, and foreign settlement and imposition of colonial tenures throughout T'Sou-ke territory. All of these factors made it so that the community's access to culturally important plant species is a fraction what it was in former times. Although I see these trading practices as a form of commerce, I worry the Court's narrow framework for proving a continuing commercial right to plants would require a very liberal interpretation of an archival record that was not designed to track Indigenous economic practices.

D. Plant Use as Evidence in Support of Aboriginal Title

Aboriginal title is a unique expression of Aboriginal rights, in that although it is similar to a private property interest, it is communally held and inalienable except to the Crown, and it can only be extinguished through a clear and plain Crown intention prior to 1982. The legal test for title requires proof not just of basic occupation (as outlined in the previous section) at the time of asserted sovereignty, but of *exclusive* occupation.[65] Exclusive occupation — evidence that would be sufficient to prove Aboriginal title — turns upon the degree and regularity of a group's uses of defined lands, and evidence that the group held

62 See *Van der Peet*, *supra* note 12 and *Lax Kw'alaams Indian Band v Canada*, *supra* note 28. See *Gladstone*, *supra* note 61 for a successful claim of a commercial right.

63 *Lax Kw'alaams*, *supra* note 28 at para 8.

64 While sufficient evidence for finding a commercial right was achieved in *Gladstone*, *supra* note 60 at para 28, the subsequent discussion in *Lax Kw'alaams*, *supra* note 28 at para 51 appears to confine what is accepted as sufficient evidence for proving continuity of commercial practices.

65 *Delgamuukw*, *supra* note 4 at 140.

exclusive control at the time of sovereignty.[66] The identification of these land rights arises from prior and ongoing occupation of an area, social organization representing governance over the area, and a mosaic of regular customary uses. When undertaken carefully and respectfully, plant research can be a powerful way of translating Indigenous plant use and stewardship into cross-cultural frameworks such as "cultivation complexes,"[67] "comparative food systems,"[68] "ecosystem management,"[69] and "customary landscapes"[70] that supply arguments for title rights.

Lawyers for the claimant in the *Tsilhqot'in* trial were the first in BC to effectively incorporate "regular use and management of plant resources" in their arguments to prove sufficient occupation to ground Aboriginal title.[71] For example, the time depth of plant use, and sharing of plant knowledge across groups, can be traced to the linguistic root of plant terms within proto and neighbouring languages. Dr. Nancy Turner testified in the *Tsilhqot'in* trial that it takes generations to acquire traditional ecological knowledge sufficient to allow a group to safely use the plants and plant parts within an ecological zone, and then to name these within the Indigenous language.[72]

In this case, ethnobotanical research, at once, provides clear evidence of Indigenous plant stewardship, tending, and cultivation while challenging the standard of agrarian species domestication of plants and animals as the measure of whether lands and associated resources were "occupied and improved" at the time of initial European settlement. When he considered the meaning of cultivation at the *Tsilhqot'in* trial, Justice Vickers agreed with a growing body of scholarship asserting that while Indigenous peoples in what is now BC did not practice agriculture in the way of Europeans, they did maintain complex

66 *R v Marshall*, 2005 SCC 43 at para 72.

67 Bruce D Smith, "Low-Level Food Production and the Northwest Coast" in Douglas Deur & Nancy J Turner, eds, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Seattle: University of Washington Press, 2010) 37 at 37–66.

68 Harriet V Kuhnlein & Olivier Receveur, "Dietary Change and Traditional Food Systems of Indigenous Peoples" (1996) 16:1 Annual Review of Nutrition 417 at 419–436.

69 Spalding, *supra* note 3 at 74–87.

70 Kenneth R Olwig, "The Landscape of 'Customary' Law versus that of 'Natural' Law" in Kenneth Olwig & Don Mitchell, eds, *Justice, Power and the Political Landscape* (New York: Routledge Press, 2009) 21 at 21.

71 David M Robbins & Michael Bendle, "Tsilhqot'in Nation Aboriginal Title: Ethnoecological and Ethnobotanical Evidence and the Roles and Obligations of the Expert Witness" in Nancy J Turner, ed, *Plants, People and Places: The Roles of Ethnobotany and Ethnoecology in Indigenous Peoples' Land Rights in Canada and Beyond* (Montreal: McGill University Press, 2020) 313 at 325.

72 Nancy J Turner, *Ancient Pathways, Ancestral Knowledge: Ethnobotany and Ecological Wisdom of Indigenous Peoples of Northwestern North America* (Montreal: McGill, 2014) at 117–190.

relationships with lands, plants, and animal species that included sustainable cultivation and harvesting, strict access rules, proscriptions, protocols, and ceremonies.[73] When woven together with all the other evidence in that trial, including the perspective of *Tsilhqot'in* knowledge holders grounded in lived experience and traditional ecological knowledge, title was proved within a core area of *Tsilhqot'in* territory, and usufructuary rights were also proved beyond the core title area.[74]

In my research with the T'Sou-ke Nation, I found archival records that contain many direct and secondary references to plants, plant practices, cultivation, and stewardship within traditionally owned areas. These records contain strong evidence of regular and intensive management practices such as: weeding, digging, pruning, coppicing, selective harvesting, replanting, and burning.[75] There are also references to exclusive ownership through marking off boundaries of camas fields with rock piles and stakes. For the Straits Salish, a picture of cultivation of owned sites emerges in the many references by explorers, botanists, and traders to verdant fields, meadows, and gardens found within what would otherwise have been dense conifer forests throughout southern Vancouver Island. For example, the first European settler in Sooke, Captain WC Grant, observed the following:

> My gardener tells me that with the soil and climate of this island he would not despair of bringing to perfection any plants that can be grown in Europe … At Syusun [T'Sou-ke village] there is a fine plain of 3500 yards [about 3.2 kilometres] in extent by an average breadth of 500 yards [just under 0.5 kilometre] … At Soakes [Saseenos] village a small river discharges itself up which the tide runs to a distance of 2 miles … Between this and the mouth of the river the natives have several little gardens in which they grow considerable quantity of potatoes, carrots and turnips … These are situated on little nooks of flat land framed at the bends of the River, the great majority of which are covered by water in winter.[76]

Here and elsewhere, Grant refers to both what are likely large camas fields (and/or possibly bracken fern) around the Sooke Basin, with deep soil that he describes as a "thick vegetable mould," as well as estuarine root gardens along the river, where T'Sou-ke had incorporated European vegetables into existing root gardens.[77] Botanist Robert Brown noted that as they moved south

73 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 682–683.
74 Robbins & Bendle, *supra* note 70 at 324–325.
75 Spalding, *supra* note 3 at 74–87.
76 Grant, *supra* note 53 at 3.
77 Walter Colquhoun Grant, "Description of Vancouver Island" (1857) 27 Journal of the Royal Geographic Society 268 at 270.

out of Pacheedaht territory the vegetation changes from timbered forest to "slopy park-like openings, stretching down to the water's edge," and "grassy meadows."[78] Grant noted "a series of irregular patches of cleared land extending for a distance of about 2 miles from the Sea Coast" interspersed with bigleaf maples (*Acer macrophyllum*), a marshy swamp, and a terraced area with predominantly Pacific crabapple (*Malus fusca*) trees "giving to the whole the appearance of a straggling Orchard."[79] As colonial surveyors geographically reorganized BC by "flattening space, compartmentalizing it, renaming it, and assimilating these representations into the geometry of the Cartesian grid," they found their bearings by describing landscape features and the vegetation in this strange new world, and many of these descriptions unconsciously reveal landscape management practices of the Indigenous occupants.[80] For example, in a letter to A Barclay about his mapping of "available" lands for settlement around Sooke, JD Pemberton wrote:

> The Vallies & low lands are exceedingly fertile the fern & brambles in them growing occasionally as high as 9 ft … In the neighbourhood of Soke there may be in all 5000 acres [2023 hectares] or nearly 8 square miles [almost 21 square kilometers] improvable woodland from which however a deduction should be made of 400 acres [162 ha] open unwooded land close to Capt[n] Grants House before alluded to … A canoe can be paddled for 2 miles up the river, the banks are pretty & thickly wooded, 30 acres [12 ha] or so cultivated by Indians.[81]

Using the method of reading a forest for clues of anthropogenic management, the woodlands referred to by Pemberton are not a natural climax (coniferous) forest in this region but would have been kept at a meadow or woodland seral stage through landscape burning or other anthropogenic means. With regard to the 400 acres of unwooded areas preempted by Grant, very likely these were camas or even bracken cultivation areas actively tended by T'Sou-ke, as during the early colonization of southern Vancouver Island, where the cleared Garry oak meadows were favoured for pre-emption by settlers.[82] The "30 acres or so cultivated by Indians" alongside the river very likely refer to the estuarine root gardens of native species such as springbank clover (*Trifolium wormskioldii*),

78 Robert Brown, "IV. On the Vegetable Products, used by the North-West American Indians as Food and Medicine, in the Arts, and in Superstitious Rites" (1868) 9 Transactions of the Botanical Society of Edinburgh 378.

79 Grant, *supra* note 77 at 1.

80 Kenneth Brealey, *First (National) Space: (Ab)original (re)mappings of British Columbia* (PhD Disseration, University of British Columbia, 2002) [unpublished] at 10.

81 J Pemberton, "Letter from JD Pemberton to Archibald Barclay December 21, 1852" citation from BCA A-C-15_H86P.

82 Lutz, *supra* note 18 at 123.

riceroot (*Fritillaria* spp.), Pacific silverweed (*Potentilla egedii*), and the more recently introduced potatoes, turnips, and carrots. Combined with vegetation and ecosystem data, these historic observations provide a rich source of information from which to reconstruct customary landscapes as they were at the time of contact, and to understand how these changed over time. Given the rich recollections of plant use and property relations that I have highlighted here, I believe that, like the Tsilhqot'in, T'Sou-ke's plant use would contribute strong evidence of sufficient, exclusive, and continuous occupation over some of their territory for a title case.

III. Problems with Constitutional Law Tests in Considering Evidence of Plant Use

For centuries, T'Sou-ke peoples managed their relationships with plants on a territorial basis, and through their laws arising from their felt and explicit obligations towards plants they governed themselves around access to and use of culturally important plant species.[83] Yet, making the connection between past and present expressions of traditional plant practices as a significant claim of rights within the common law, particularly when those practices were suppressed or abandoned due to lack of access, is tricky. In fact, this is where the momentum of the constitutional law tests become destructive. The overpowering emphasis on precisely articulating Aboriginal rights as specific, central, and distinctive practices that are obviously linked to the pre-1846 past, narrows what is presented about human-plant relationships and, ultimately contradicts the large and liberal view of the evidence required to understand the fullness of these relationships. This forces some ethnobotanical and other Indigenous knowledge out of the evidentiary record. I will highlight the more prominent examples of the problems with using constitutional law tests for native plant use and management here.

A. The Continuity Test

As discussed above, Coast Salish trading practices were on a much larger scale than needed for a local subsistence economy and required unique governance and legal systems of management of people and local resources. The pre-contact scale and intensity of historic Coast Salish plant use for wealth accumulation and regional exchange has definite similarities to commercial trade, but the *sui generis* nature of the Indigenous economy (e.g. kin obligations to plants and place and acknowledgement of plant spirit guardians) was also essential

83 Spalding, *supra* note 3 at 138–143.

to their legal management of plants within their territory. These important relationships to plant species and ecosystems need to be first explained and justified within Straits Salish legal, economic, and ecological terms, rather than through a lens of English common law-derived rules. Colonial settlement and its ties to imperial economies aggressively disrupted the scale of Coast Salish peoples' economic, governing, and legal relationships to plants, particularly women's work and trade with many plants used for food, fibre, and textiles.[84] As such, a serious and fair-minded reflection on the utility of justifying a right based on the current constitutional law test of continuity with respect to the scale and intensity of these hugely important relationships to plants needs to be considered.

B. Gender Bias

Particularly in defining Aboriginal title rights, establishing a robust picture of evidence for women's historic plant practices is essential but not at all straightforward. Throughout the archival and early ethnographic literature Indigenous women's activities are given scant attention until the mid-20th century.[85] In fact, the majority of the detailed ethnographic interviewing around plants and plant management did not occur until 100 years after many regular plant practices had lapsed due to the events and circumstances of colonization.[86] Throughout the 19th century, the biases toward and the overlooking of Strait Salish women's rights to highly productive plant locations and cultivated areas served to further alienate women from their traditional plant activities and from the bounded areas which they owned. Given the comparatively minimal cedar harvesting currently undertaken for ceremonial regalia, proving *continuity* with 18th century cedar practices associated with intensive manufacturing of cedar and other textiles would be challenging.

The specificity and distinctiveness of evidence required to claim an Aboriginal right within this test is an obstacle when attempting to bring archival/ethnographic evidence of the plant practices of women into a legal argument. For example, the perfunctory assignment of women's plant activities by early ethnographer, Franz Boas, as the performance of the duties "of a good housewife" can be read as a dismissal of these practices as not being distinct, central, or integral to an Indigenous claimant.[87] As I have discussed

84 Norton, *supra* note 2 at 203–240.

85 Margaret M Bruchac, "My Sisters Will Not Speak: Boas, Hunt, and the Ethnographic Silencing of First Nations Women" (2014) 57:2 Curator: The Museum Journal 153 at 166–167.

86 Norton, *supra* note 2 at 167–170.

87 Bruchac, *supra* note 85 at 163.

elsewhere, these deep systemic biases about the nature of women's domestic and child care work as being secondary, universal activities, and their plant practices as a relic or a marginal curiosity of Straits Salish culture, are pernicious throughout the archival and ethnographic literature.[88] These claims can only go forward, then, with an innovative approach to framing evidence of Indigenous women's ecosystem, plant morphology, forest ecology, and phenological knowledge, as well as the social rules (such as gender division, labour specialization, and property ownership) and infrastructure required to support plant practices.

C. Static Cultural Interpretations

All human groups have deep cultural connections with plants and plant products, and the traditions associated with these are not static.[89] As discussed above, linguistic analysis demonstrates how plants or plant practices can be adopted into a culture through trade, influence of neighbours, or women marrying into communities from other territories. For Borrows, SCC decisions such as *Van der Peet* and *R v Pamajewon*[90] created a misleading "fiction that … Aboriginal rights could only be recognized and grow if they arose prior to European contact" and that this "form of constitutional originalism is contrary to Canada's living tree jurisprudence."[91] Before and after the 1846 European settlement date, Indigenous peoples modified their plant practices through the trading of European industrial materials for tools, introduction of new species, and cultivation and harvesting of plants for European, rather than Indigenous, trade networks.[92] Further, the colonial activities that are associated with contact change over time, impacting different aspects of Indigenous plant use with various species during different periods. Disproportionate focus on one single date of contact is not only arbitrary and misleading, but also fails to consider how new expressions of contact between Indigenous peoples and the state continue to undermine Indigenous peoples' legal rights today.

88 Nancy J Turner, Pamela Spalding & Doug Deur, "Introduction: Making a Place for Indigenous Botanical Knowledge and Environmental Values in Land Use Planning and Decision-making" in Nancy J Turner, ed, *Plants, People and Places: the Roles of Ethnobotany and Ethnoecology in Indigenous Peoples' Land Rights in Canada and Beyond* (Montreal: McGill/Queen's University Press, 2020) 3 at 8–10.

89 Paul E Minnis, *Ethnobotany: A Reader* (Oklahoma City: University of Oklahoma Press, 2000) at 3.

90 1996 CanLII 161 (SCC).

91 John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*. (Waterloo: Centre for International Governance Innovation, 2019) 29 at 30–31.

92 Norton, *supra* note 2 at 99–112.

For example, how we address the significance of the potato (*Solanum tuberosum*) within deliberations on Aboriginal rights is not at all straightforward. In this regard, recall that WC Grant noted T'Sou-ke's cultivated root gardens containing, amongst other vegetables, potatoes, along the Sooke River. The humble potato, first domesticated by Andean Indigenous peoples some 8,000 years ago and brought to Europe in the mid-16th century, is now almost a cultural keystone species of the world.[93] It was introduced to the Coast Salish through trade with other Indigenous groups and the Hudson's Bay Company, and in some cases before contact with Europeans.[94] Similar to its adoption in Europe, the potato was quickly incorporated into the cultivation practices of Salish peoples in part because the cultivation methods were very similar to those of other native root vegetables, such as wapato (*Sagittaria latifolia*) and camas (*Camassia* spp.). The definition of the Salish word for wapato — *ska,'us* — was expanded to include potato.[95] Can we see potato cultivation as a customary right, then, or if we are defining an Aboriginal right to root cultivation or improvement of lands for property rights, can we use potatoes as one of the examples of this? Was potato cultivation a result of European or of Andean influence? While not unique to Straits Salish, the quick adoption of this plant and its edible tubers, like so many other culturally important species, was facilitated by local marriage laws of exogamy, where women's knowledge and activities spread quickly due to the mobility and political influence of upper-class Salish women, and existing practices and sites of root cultivation.[96] Were the T'Sou-ke's cultivated patches of potatoes noted historically along the river also native root gardens that were overlooked by early explorers? In this instance, where do Straits Salish and European cultural influences begin and end, and why does it matter so much? This quest for precise clarification of customs can result in a frozen reconstruction of plant practices that misses two centuries of cultural change and resilience through the radical shifts in and adoption of new plant practices, territorial alienation, and ecological degradation. In this respect, the SCC's tests for proving Aboriginal rights are significantly deficient in meeting their own standard, that the "law of aboriginal rights is 'neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.'"[97]

93 Rebecca Earle, *Feeding the People: The Politics of the Potato* (Cambridge: Cambridge University Press, 2020) at 3.

94 Wayne Suttles, "The Early Diffusion of the Potato among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talon Books, 1987) 137 at 138–141.

95 *Ibid* at 142–143.

96 *Ibid* at 144.

97 *Van der Peet*, *supra* note 12 at para 42.

D. Translating Indigenous Knowledge: Problems with Evidence

The tests for Aboriginal rights and for Aboriginal title steer evidence towards specific cultural practices with a handful of plant species that were and continue to be used most intensively, such as western redcedar. This approach further valorizes a few cultural keystone species, thereby determining what is significant enough to be legally considered, while overlooking the hundreds of other plant species of importance to Indigenous communities. Furthermore, the stress placed upon presenting the most important practices with the species that are central and distinctive to T'Sou-ke and other Indigenous cultures — species most integral on a sort of taxonomic structure of a culture — does not adequately represent or support the fullness of T'Souke's or any other Indigenous group's relationships with plants and their habitats. Canadian federal and provincial legislation tends to protect the rarest or most endangered plant and animal species and to manage apex predators within ecosystems, but not much else. In the past, the T'Sou-ke would have used many of their 100 culturally important plant species as needed or infrequently, but their significance as a medicine or as an alternate food or technology source would have been nonetheless high and their use could mean the difference between life and death.[98] The many redundancies built into the T'Sou-ke canon of plant knowledge is what has made it so effective for the survival of large populations in a confined territory since a time out of mind.

For the T'Sou-ke, there is increasing interest in re-connecting with their canon of plant knowledge and the species associated with it, although, as in many Indigenous communities, knowledge of native plants is limited to a minority of practicing individuals and is mostly stored in texts. Does this mean that the hundreds of plant species that Indigenous peoples have been restricted access to — both physically and due to the obstruction of the intergenerational transfer of knowledge — are legally swept out of their culture because they do not meet an externally imposed threshold of significant use? As T'Sou-ke peoples work to re-establish their connections to these plant species and places within their territories, it strikes me as unproductive to rely so heavily on the sole opinion of a judge to adjudicate whether "there was no significant dissimilarity between the pre-contact practice and the modern one."[99] On the contrary, the findings of *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"), the Royal Commission on Aboriginal Peoples, and the Truth and Reconciliation Commission call for a much larger acknowledge-

98 Spalding, *supra* note 3 at 228.
99 *R v Desautel*, *supra* note 28 at 357.

ment and accommodation of Indigenous cultural and resource interests.[100] It took millennia for the Indigenous laws associated with the canon of knowledge supporting T'Sou-ke plant relationships to be established. If these relationships have become frayed over the past century due to external factors beyond the control of T'Sou-ke and other Indigenous peoples, then in keeping with the spirit of reconciliation, one would think that more, not less, support should be offered to legally strengthen these human rights to plants. Building on Gordon Christie's conclusion that the power of independent peoples to "build and maintain worlds of meaning about themselves" cannot be taken by another, one may say that so long as these governing relationships with plants are known to one or more Indigenous individuals, they continue to exist.[101]

Ethnobotanical expert witnesses are forced to exclude knowledge that is not cognizable within the Canadian court system. For example, the sentience of plants is recognized in Salish metaphysics, where the vitality or agency of plants must be treated with respect and humility in order for humans to continue receiving gifts from plants via the supernatural.[102] Thus, people's connections with culturally favoured plants are an extension of the set of complex relationships humans engage in with other humans and the more-than-human world connecting Salish individuals to their territories and all life within it. Underlying these beliefs are values and normative rules of behaviour (sources of Indigenous laws) required to encourage certain plant species to behave in ways that benefit humans. This is not necessarily a relationship of domination, though, where humans coerce plant life cycles and behaviour, but rather a relationship of mutual respect that requires persuasion, coaxing, and appropriate behaviour and reciprocity on the part of humans to receive the desired response from plants. Likewise, this collaboration between humans and certain species yields direct benefits for the plant, such as reducing competition for water, soil, and sunlight from other less favoured species, or the dispersal of seeds or other propagules far beyond the footprint of the plant, or widely followed rules of human behaviour that provide ongoing protection and support for the chosen species.[103] In the spirit of relatedness between humans and plants, these rules

100 See generally, Government of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).

101 Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110:2 South Atlantic Quarterly 329 at 342.

102 Keith Thor Carlson, *The Power of Place, the Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto: University of Toronto Press, 2010) at 72. See also Barnett Richling, ed, *The WSÁNEC and their Neighbours: Diamond Jenness on the Coast Salish of Vancouver Island, 1935* (Oakville: Rock Mills Press, 2016) at 85.

103 Robin Wall Kimmerer, "The Covenant of Reciprocity" (2017) in John Hart, ed, *The Wiley Blackwell Companion to Religion and Ecology* (John Wiley & Sons Inc, 2017) 368 at 378–381.

may acknowledge and seek to protect the dignity of a plant, but how can such concepts translate into Canadian state law?

Finally, bringing forward evidence that is "sensitive to the aboriginal perspective itself"[104] from Indigenous and academic expert witnesses in Aboriginal law has had inconsistent success in Aboriginal rights cases. The process of collecting ethnobotanical information involves developing close, long-term bonds between researchers and Indigenous plant experts. These friendships can be viewed by a judge as biased rendering the witness as partial and unable to maintain their scientific objectivity.[105] For example, in the *Delgamuukw* trial, Justice McEachern dismissed evidence from two of the anthropologists as being too closely associated with the plaintiff. He also struggled to understand Indigenous expert witness evidence presented by hereditary chiefs even though the *Van der Peet* test clearly directs judges to be generous when interpreting evidence from Indigenous claimants, as evidence from oral cultures will not conform to the evidentiary standards found in other branches of law.[106] On the other hand, in the *Tsilhqot'in* proceedings, trial judge Justice Vickers was much more open to this form of evidence and accepted a range of Indigenous expert witness knowledge as well as ethnobotanical descriptions about Tsilhqot'in cultivation practices around the Mountain potato (*Claytonia lanceolata*). Interestingly, the recent *Nuchahtlaht* case may indicate that choosing not to bring forward Indigenous expert witnesses and limiting the ethnographic evidence reduces the quality of the case under review, thereby undermining the claim of title.[107]

Perhaps of greatest concern, is that the common message provided by both title and rights cases is that building a reasonable case to support plant use and management within the confines of the reductive language of Canadian constitutional law's *Van der Peet* test places a much heavier burden on the Indigenous claimants to prove their rights to plants and plant management than it does on

104 *Van der Peet*, *supra* note 12 at paras 49.

105 Robbins & Bendle, *supra* note 71 at 326.

106 *Van der Peet*, *supra* note 12 at para 68. Here, the decision directs that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."

107 Kate Gunn & Nico McKay, "Reconciliation and Aboriginal Title: Case Comment on the *Nuchahtlaht v. British Columbia*" (July 27, 2023), online (blog): <https://www.firstpeopleslaw.com/public-education/blog/reconciliation-and-aboriginal-title-case-comment-on-the-nuchatlaht-v-british-columbia> [perma.cc/7MEE-UGRH].

the Crown to prove the same. The burden of proof required of the Indigenous plaintiff by the justice system requires a level of evidentiary data that is unfairly time-consuming and expensive to produce.[108] The heavy reliance on extensive amounts of qualitative and quantitative data to prove or disprove a narrowly defined point of law seems a poor solution for the timely resolution of Aboriginal rights relating to plants. The unreasonably high bar in Canadian constitutional law for detailed evidence that a right maintains continuity and proportionality[109] with a pre-contact practice limits the number of plant species that can be successfully argued as truly making the society what it was.[110]

IV. The Way Forward: Making Space for Indigenous Laws

In Canada, as Reynold's explains, the "law of Aboriginal rights has been described as 'intersocietal law' resulting from both the common law brought by the British Settlers and the Indigenous laws of the Aboriginal peoples." Recall that Indigenous legal orders arising from Indigenous laws are embedded in each Indigenous group's social, political, economic, and spiritual institutions. To date, section 35 jurisprudence relies heavily on judicial lawmaking, where judges appointed by non-Indigenous authorities play the primary role in deciding what is and is not a constitutionally protected Aboriginal or Treaty right. Indigenous people's role in this process does not encourage productive cross-cultural communication between First Nations and the Crown. In this respect, Bryan is critical of the SCC's "abdication of responsibility for political questions by legislative bodies as they attempt to off-load the difficult questions on courts."[111] For Christie, this abdication is such that one could say that "the ongoing objective of the Courts of Canada [is] to finish the colonial project of the state" through the biases of, until recently, mostly White, middle to upper class, middle-aged judges.[112] Indeed, when the sole avenue for confirming rights is held within a legal system built upon colonial assumptions of Crown sovereignty and *Indian Act* political organization, there are reasons to be deeply concerned about colonialism's extension masquerading as reconciliation.

108 Consider: the *Delgamuukw* trial lasted 374 days, compared with five days for *Calder,* and the decision was 394 pages long compared with *Calder*'s 35 pages. This complexity and expense are typical of modern cases and is a major factor inhibiting them. See Reynolds, *supra* note 10 at 99.

109 *Lax Kw'alaams Indian Band v Canada*, 2011 SCC 56 at para 8.

110 *Van der Peet*, *supra* note 12 at para 55.

111 Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13:1 Can J L & Jurisprudence 3 at 30.

112 Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at 265–266.

For example, in *R v Van der Peet*, Lamer CJ cites Brennan J's reasoning from *Mabo v Queensland (No 2)*,[113] in which the latter concluded that:

> … when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[114]

While this citation is incidental to Lamer CJ's decision, its deliberate inclusion in his reasons for judgment reveals the troubling ethical framework within which the *Van der Peet* decision is framed. What exactly is the "tide of history," and who decides when it has washed away any real observance of law or custom? In BC, the tide of history took the form of an enormous wave of settlers in the late 19th century who flooded the province in their search for agricultural land, lumber, fish, gold, and places to establish their cities and towns, and, in so doing, nearly overwhelmed the village sites, legal institutions, and customary landscapes of Indigenous peoples. Obviously, T'Sou-ke and other Straits Salish peoples did not agree to these incursions which, in the instance of plant relationships, forced many to sever their rights and responsibilities — their covenants of reciprocity — with numerous culturally significant species and plant communities that had sustained their people for centuries.[115] While today they may not have access or the same active legal power over their customary landscapes, to suggest that they "abandoned" their laws with respect to plants would be false and misleading.

Canadian constitutional law has brought focus to Treaty rights and Aboriginal rights, and Aboriginal title has also found great place in the jurisprudence. I admire the careful and intelligent reasoning consistently found in Supreme Court judgments, and I believe this effort can be further redirected to expanding the legal space within which Indigenous laws might find expression in Canadian constitutional law.[116] From my perspective, the legal tests currently applied in Canadian law accommodate only a pinhole-sized view of the rich picture of plant use and governance that I have come to understand through

113 [1992] HCA 23.

114 *Van der Peet*, *supra* note 12 at para 63.

115 I discuss Robin Wall Kimmerer's concept of the covenant of reciprocity and its significance to Indigenous laws around plants and ecosystem management in my dissertation.

116 The late Honourable Chief Justice Lance Finch proposed that along with Aboriginal law's "duty to approach questions of interpretation generously, the duty to consult and the duty to accommodate" should be added: "the duty to learn" or "at the very least, to holding ourselves ready to learn." See Lance Finch, *The Duty to Learn: Taking into Account of Indigenous Legal Orders in Practice*, paper delivered at the Indigenous Legal Orders and the Common Law 2012 conference, Continuing Legal Education Society of British Columbia, Vancouver (November 15, 2012) at 2.1.3–2.1.4.

my ethnobotanical research with T'Sou-ke and other Indigenous groups. In fact, the current legal tests appear to discourage Indigenous legal approaches to the stewardship and cultivation of native plants rather than invigorating these important human plant relationships in a manner befitting intersocietal law. The emphasis in the Supreme Court's Aboriginal law jurisprudence, defining cultural practices to *gather* plants rather than supporting the long-term relationships with culturally important species that reflect ecosystem governance (e.g. cultural rules associated with habitat management, harvesting limits, and stewardship values), undermines the recognition and affirmation of Indigenous legal orders throughout Indigenous territories. The greater recognition of Indigenous legal systems and the rights and obligations around (among other areas of life) lands, animal, and plant species is fundamental to reconciling more than one legal system with respect to the same ecosystems and species. It is lamentable that native plants, Indigenous use and stewardship of native plants, and women's roles in all of this have been so overlooked within both state legislation and in Aboriginal rights jurisprudence. On the other hand, this gap creates an opportunity to proceed with innovation as modelled within the recent *R c Montour*[117] decision and in a manner that properly acknowledges Indigenous laws and incorporates broader Indigenous interests in plant species, communities, ecosystems, and customary landscapes.

A current challenge for Canadian law and policy makers is to reconcile the direction provided by section 35 of the *Constitution Act, 1982* with developments in the common law and Indigenous laws so that governance models supporting legal pluralism can be established within the Canadian polity. By acknowledging and understanding racist and sexist biases embedded within Canadian notions of sovereignty, private property, agriculture, and development, we can shift worldviews to accommodate different histories, differing ways of knowing the landscape, the plant species within it, and associated systems of rights to use and manage these resources. If developed in non-discriminatory ways, Aboriginal and Treaty rights could incentivize robust political negotiations around plant species co-management. But, as I have argued, one significant obstacle remains. As the Quebec Superior Court observed in *R c Montour*, the *Van der Peet* test is no longer an appropriate legal measure for Aboriginal rights. It must evolve to more fully respect Indigenous relationships to plant species, thereby meeting the standards set out by *UNDRIP*. I am encouraged that the expanded frame of the test set out in the *Montour* decision has significant potential to better direct and inform future legal arguments as well as political negotiations exploring expanded definitions of rights, owner-

117 2023 QCCS 4154 [*Montour*].

ship, and management of plants. Ideally, the recognition and understanding of Indigenous laws and traditions related to plant use in BC and elsewhere will increasingly influence legal culture so that these issues can be deliberated, within and outside of the Canadian court system, in truly intersocietal ways.