So if you were to look at one case that established comprehensive threshold principles that are applicable every day in Aboriginal litigation it would be Delgamuukw. *I was lead counsel on the legal team that tried that case for 14 years of its history. [It] was decided ... 10 years ago this December 11th.*

On the use of oral history evidence:
The courts have to realize that in order to understand the Aboriginal community you have to accept their perspective on themselves. Since Delgamuukw *... trial judges have increasingly been directed by higher courts to look at what the oral histories say. It seems to be a lot easier for judges to accept historians [but] the historians' evidence ... is really the non-Aboriginal history. So there is another history, and it's the history of the people who have recorded their own ways and passed it on in their own ways.*

On the future of Aboriginal rights in British Columbia:
Most of this province is still encumbered with Aboriginal title. Regrettably, the BC Treaty Commission has, by and large, foundered over its 15 years of existence. So if there is to be a negotiated resolution of the land question in BC, then there has to be a revitalized political will that finds its expression in new mandates and recognition of cultural values of Aboriginal people at the treaty table. You can't really say that the legal avenue is going to be the end vehicle by which settlements and claims are fully recognized. It will happen through an interaction of processes.

Rush expresses his hope that students attending UBC Law now will be attracted to working on and developing these cases.

It's an important part of the development of the law, which I think has to happen to give us what the real spirit of people living in this province is all about. I want to see Aboriginal people in this province recognized for the First Peoples that they are, and to have recognized the value of their culture and what they bring to our own culture. I believe that we have much to learn, and much to gain.

Justice S. David Frankel

CLASS OF 1973

He's a natural storyteller. His recollections of law school, of colleagues and of trials take shape as fully formed narratives. He speaks with a hint of laughter in his voice and as though he has all the time in the world for these tales; you'd never guess he had 45 volumes of material on a construction case vying for his attention. He is newly a Justice of Appeal of the Court of Appeal for BC and Judge of the Court of Appeal of Yukon, but once upon a time, just over a decade ago, the Honourable S. David Frankel was lead counsel for the Federal Government on the "fishing cases"—*Van der Peet, Gladstone* and *NTC Smokehouse:*

"Early on," Frankel recalls, "the [Court of Appeal] held a number of pre-appeal conferences, because the logistics of hearing a number of cases with multiple parties and so many interveners was unheard of. At one of the early ones, I'm sitting there at counsel table, we're waiting for the judge to come in. And Tom [Berger] was sitting behind me and he says in a sort of a loud whisper, 'I don't know why Frankel's involved in these cases. He doesn't know anything about Aboriginal rights!' So I turned around and I said, 'Tom, what you don't understand is, you know those tags they put on salmon to track them?' He said, 'Yes.' I said, 'Well, those are actually little wiretap devices and that's why I'm here—because this is really a wiretap case!' That quieted him down for a minute."

From his early teen years, Frankel wanted to practice law. Upon graduating from UBC, he sought work in the civil litigation section of the Department of Justice in Vancouver. There were no openings at the time, so the Director placed him in the prosecution

group, promising to review the situation in six months. By then, that Director had left the office, and Frankel "stayed where I was for 32 years, 121 days."

Just before he joined Justice in 1974, the wiretap provisions of the Criminal Code were enacted. Frankel developed an interest and an expertise in the area, which was virgin territory in the Canadian legal landscape, and stayed with it for over 30 years. In 1982, when the *Charter* came into effect, Frankel once again immersed himself. "It sort of fit with the wiretap work," he says, "because some of the early *Charter* challenges were either to wiretap provisions or wiretap practices."

In March of this year, Frankel was appointed a Judge of the Supreme Court of British Columbia, and a scant 11 weeks later, was made a Justice of the Court of Appeal, filling a vacancy created by the retirement of Madam Justice Mary Southin.

"The job requires a tremendous amount of reading," Frankel explains. "You're basically reviewing records of proceeding to determine whether there was some error in them. The way our system operates now, in the majority of instances the Court of Appeal is the final court, because so few cases are heard by the Supreme Court of Canada. For the vast majority of litigants, this is the last stop."

Frankel is being exposed daily to many areas of law he has not encountered since law school, without the advantage of having spent years on the trial bench. "As a former colleague of mine said, 'The thinnest book on any law library shelf will be the collected judgments of Frankel, J.,'" Frankel laughs.

Frankel's response to a steep learning curve is to read—voraciously. The technique has seen him in good stead through a long and much lauded career, and it served him just as well in the fishing cases. "I was brought in and made part of the team because I had criminal law and appellate expertise," he says. "These were, after all, criminal cases. The Aboriginal part was very much [a] ground-up learning experience for me."

Van der Peet, Gladstone and *NTC Smokehouse,* along with *Nikal* and *Lewis*, went through the Court of Appeal and then to the Supreme Court of Canada "as a package," and were arranged so as to be heard together. "The significance of particularly *Van der Peet*—because as it turned out, it became the lead judgment—was that it gave the Supreme Court of Canada an opportunity to clarify some of the things it had said in *Sparrow*, particularly as relates to the test for determining the existence of an Aboriginal right," Frankel says.

"It was unclear whether the court had intended [certain words] to constitute a test or [whether] it was simply a comment in passing," he continues. "And I'm thinking of the words 'integral to.'" One of the debates in the Supreme Court centred on whether it was necessary for a practice to be integral to First Nations society in order for it to be recognized by the common law as an Aboriginal right.

"I can remember the question that came from the Bench to me from Mr. Justice La Forest, who had been one of the authors of the *Sparrow* judgment," Frankel recalls. "He said to me, 'Mr. Frankel, when we used those words, were we simply commenting on the facts or did we intend them to constitute some form of test?' I looked up at him and said, 'M'Lord, I don't mean to be glib—our position is you were setting out a test—but it's really for *you* to tell us what you meant.'"

With his understanding of courtroom dynamics heightened by recent experiences, Frankel says, "A lot of the give and take in any court—and the Supreme Court of Canada is no different—involves individual judges looking for some assistance." In the end, the court decided that "integral to" was the defining feature of the test for determining the existence of an Aboriginal right.

Frankel is an active speaker and author, a Fellow of the American College of Trial Lawyers, and was an Adjunct Professor with UBC Law, where he taught Advanced Criminal Procedure for 20 years. In 2004, he was the first recipient of the law school's Adjunct Professor Outstanding Service Award. He has been involved in numerous legal education programs in and outside of the Department of Justice. Throughout, his cases have put him at the leading edge of developments in the law, which is where he plans to stay.

"I was given the opportunity to change careers at a time when some people are starting to wind down," Frankel says. "What lies in my future is being exposed to a wide variety of new legal issues and being confronted by new problems to hopefully solve in a principled way."

"The significance of particularly *Van der Peet*—because as it turned out, it became the lead judgment—was that it gave the Supreme Court of Canada an opportunity to clarify some of the things it had said in *Sparrow*, particularly as relates to the test for determining the existence of an Aboriginal right." JUSTICE S. DAVID FRANKEL