

AN INDIGENOUS
ORAL HISTORY
READER

Bryan P. Schwartz

General Editor & Contributor

With Student Editors

Shira Brand, Janelle Gobin, Tamara Edkins, and Mikal Sokolowski

This page was intentionally left blank.

An Indigenous Oral History Reader

Copyright © 2022 by Bryan P. Schwartz

All rights reserved. Printed in Canada. Material by particular authors here is only included in accordance with Canadian copyright law, and with the permission of the authors/publishers wherever required. The inclusion of material in this volume is only for the purpose of its use by readers of the volume, and does not constitute permission to use or reproduce the material in any other way for any other purpose. The copyright in the material remains with its creators/publishers or their successors, and inclusion in this volume does not constitute waiver of rights, including permission to use the material in any other context.

For more information, contact:

Dr. Bryan P. Schwartz

Robson Hall Faculty of Law

University of Manitoba,

224 Dysart Rd, Winnipeg,

MB R3T 2N2

Phone: (204) 474-6142

Fax: (204) 480-1084

Email: Bryan.Schwartz@umanitoba.ca

First Edition: March, 2022

ABOUT THE GENERAL EDITOR

Dr. Bryan Schwartz is the Asper Professor of International Business and Trade Law at the University of Manitoba and counsel for the Pitblado LLP law firm. His credentials include an LL.B. from Queen's and a Master's and Doctorate in law from Yale Law School.

Bryan has published over three hundred works in all, in many areas of public and private law and cultural studies (<http://bryan-schwartz.com/>). Over the past four decades as a professor, he has written extensively on Indigenous law issues. His academic work in this area has been informed by his broad experience as a lawyer and adjudicator, including arguing a number of cases for the Assembly of First Nations at the Supreme Court of Canada.

Additionally, Bryan was considerably involved as counsel for the Assembly of First Nations in the creation of the legislative framework for the First Nations Specific Claims tribunal (<http://specific-claims.bryan-schwartz.com/>).

Bryan is also the creator of the musical "Consoulation: A Musical Meditation" (<https://consoulation.com/>).

ACKNOWLEDGEMENTS

I am grateful to all the clients, in many Indigenous communities as well as among federal provincial and territorial governments, who have given me the opportunity to learn about Indigenous law, including oral history, in its application to real-world challenges.

My understanding of the tensions and reconciliations in oral and written traditions has been enriched by my study of it in the context of the Jewish tradition. I owe much in this respect to my stints as a summer student at the Jewish Theological Seminary and my involvement in teaching at the Hebrew University of Jerusalem, where I have offered a summer course involving intercultural studies for over ten years.

I am particularly grateful to Joan Jack, of the Berens River First Nation, an expert in both law and cross-cultural learning. Joan has been my partner from the beginning of my creating the Indigenous Oral History course at the law school. Joan's honesty and vitality have been an inspiration, and her insight and wisdom have been a guide.

The 'Oral History, Indigenous Peoples, and the Law' course was supported by a grant from the Indigenous Initiatives Fund at the University of Manitoba. The guest lecturers and students who have learned with me in that course are also due to my expression of sincere thanks.

The assembling of this reader was greater assisted by a number of students over successive years, including Shira Brand, Janelle Gobin, Mikal Sokolowski, Tamara Edkins, and Andrew Weber. All of us involved in producing this work appreciate the generosity of the many authors and publishers who gave us permission to include their work in this anthology.

I would like to thank Stan Somerville for authorizing the use of Daphne Odjig's artwork titled "Grandfather Teaching", a piece from the *Homage to Grandfather* series for our cover artwork. Special thanks also goes out to Laura Balagus for designing the cover.

INTRODUCTION

Several years ago, I created and began teaching a new course titled ‘Oral History, Indigenous Peoples, and the Law’. This volume reflects the readings, conversations and reflections that have guided me.

The purpose of this project is to provide materials or ideas for potential use by others who wish to explore that subject — or oral history generally.

I am grateful to the many students I have had learning in my course and to several others who have helped me prepare this collection for free public access. I also wish to thank all the authors and rights-holders who have given us their permission.

Some Background

Oral history has become a fundamental feature of the mainstream legal system in Canada. The extent to which governments and courts will recognize land ownership and use by Indigenous communities largely depends on a community proving their historical connection. The crucial evidence may be oral traditions in the community. These will be provided by testimony, including by elders, about those traditions, and the evidence may be compared and contrasted with written historical records from the mainstream and archeological evidence. As Indigenous communities increasingly exercise self-governance, however, they are turning to oral history as a source of specific laws, or a source of fundamental values that can guide the further development of specific laws moving forward.

Framework for Exploring the Subject of the Course

- The study should be academic in the best sense. Not abstract, not recondite, not rigid, but striving to learn with an open mind, to

develop your own evolving synthesis, to be ready to reconsider and revise your evolving views, to embrace, not resist, being surprised and edified by further evidence and argument. Different and sometimes competing perspectives on issues should be presented to students for study; the aim is not to inculcate a particular political or legal perspective or understanding about the nature and value of oral history, but encourage students to look at things in many different ways and begin developing their own evolving synthesis and set of further questions;

- Oral law and culture can be organized by timeframe. In current litigation, the mainstream Canadian legal system largely uses oral testimony about recent transactions. Oral history is based on the recollection and reflections of a particular individual in their own lifetime. Oral tradition is handed down from generation to generation.
- In each of these three temporal dimensions, we can ask a similar set of questions:
 - How intrinsically reliable is the initial perception of an event?
 - How much do people perceive what they expect to perceive or what we are hard-wired by evolution to perceive?
 - What is the power and vulnerability of individual memory? How much is memory a “screen capture” and how much a reconstruction?
 - How do the recollection and expectations of a community affect the way people perceive and remember?
 - How much of observation and perception reflects universals

about human being — including our biological hard-wiring — and how much is affected by culture?

- In arriving at overall conclusions, what other forms of evidence can reinforce, modify, or contradict oral sources?
 - What does experience teach us about the relative reliability of different sources; for example, to what extent does archeology, DNA evidence, written records or competing oral traditions tend to confirm or qualify the traditions of a particular community?
- How do comparative methods — looking at the role of orality in different cultures, past and present — help us understand and appreciate oral traditions among Indigenous peoples in North America? One of the best ways to understand your own language is to learn another one; features of your routine way of speaking may turn out to be not as natural or logical or efficient or commonsensical as you might have initially thought. Or you might discover that some features of your language are shared with many or most or maybe all of them.

I identify as a member of a people with traditions that have survived for millennia, even in the face of displacement and destruction. It is a civilization that has blended the oral and the written and preserved the record of both as sacred. It has finally recovered a place in its homeland, where it is blending the ancient and the modern in a dynamic and pluralistic society. My experience with the Indigenous communities in Canada, as an academic and as a practicing lawyer has deepened my understanding of my own experience and traditions. I hope that this volume, and its comparative approach, will be of interest to many people from many backgrounds as they remember and recreate.

CONTENTS

PART 1: INTRODUCTION	3
The Personal Point of View in Orally Communicated History	5
Blood First Nation v Canada.....	19
Tsilhqot'in Nation v British Columbia.....	35
Buffalo v Canada	91
PART 2: MEMORY, EAR- AND EYEWITNESSES	101
Transmission Difficulties: The Use and Abuse of Oral History in Aboriginal Claims	103
Ignace v British Columbia (Attorney General)	129
Our Changeable Memories: Legal and Practical Implications.....	157
Experts on Eyewitness Identification: I Just Don't See it	169
PART 3: ORAL HISTORY AND TRADITION IN CANADIAN LEGAL SYSTEMS	187
Aboriginal Oral History Evidence and Canadian Law	189
Listening for a Change: The Courts and Oral Tradition	203
Kawacatoose First Nation et al v R	261
Reading Beyond the Lines: Oral Understandings and Aboriginal Litigation	291
Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights Litigation in Canada and Australia	321
PART 4: HISTORICAL AND CRITICAL PERSPECTIVES	349
“Lord, Save Us from the <i>Et Cetera</i> of the Notary”: Archival Appraisal, Local Custom, and Colonial Law¹	351
Evidence “Not in a Form Familiar to Common Law Courts”: Assessing Oral Histories in Land Claims Testimony After <i>Delgamuukw v. B.C.</i> .	411
What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation	429

PART 5: ANTHROPOLOGICAL AND OTHER FORMS OF EVIDENCE	471
Indigenous Bodies in Colonial Courts: Anthropological Science and the (Physical) Laws of the Remaining Human	473
Oral Tradition and The Kennewick Man	503
PART 6: BIBLICAL, AFRICAN, AND HOMERIC ORAL HISTORY AND TRADITION	529
“Reading” Homer through Oral Tradition*	531
Biblical and Rabbinic Foundations: Meaning in History, Memory and the Writing of History	573
Whispers and Silences: Explorations in African Oral History	609
The Spelling Eye and the Listening Ear: Oral Poetics and New Testament Writings	629
PART 7: MODERN INQUIRIES AND INITIATIVES	665
Public Inquiries’ Terms of Reference: Lessons from the Past – And for the Future	667
The Missing and Murdered Indigenous Women and Girls Honouring and Awareness Day Act	701
The National Centre for Truth and Reconciliation Act	703
PART 8: HUMAN NATURE IN TRANSLATION	715
Excerpts from the Report of the Aboriginal Justice Inquiry of Manitoba	717
The Sapir-Whorf Hypothesis Today	737
APPENDIX: SAMPLE COURSE SYLLABUS AND LIST OF ADDITIONAL READING MATERIAL	753

Part 1: Introduction

The personal quality [of oral history] rounds out contours in the skeletal outline of written history by clustering stories around crucial points ... it counterbalances the impersonality of written history by revealing the sentiments of the people involved or affected; it provides unique examples of general conditions.

– Barbara Allen, 1979

Author(s): Barbara Allen

Source: *Western Folklore*, Vol. 38 (Apr., 1979), pp. 110-118.

Published by: Western States Folklore Society

Stable URL: <https://www.jstor.org/stable/1498564>

The Personal Point of View in Orally Communicated History

Barbara Allen

The relationship between folklore and history has long been a subject for debate among scholars in a variety of disciplines.¹ While specific folklore genres, such as myth, legend and oral epic, have been used to provide illustrations of the relationship between the two, arguments seem to have focused not so much on folklore *per se* as on the reliability of oral tradition by which folklore is communicated as a means of accurately preserving historical information.

On one side of the question are those who deny the historical validity of any oral tradition. For example, Alfred Nutt dismissed the story of Troy as “destitute of any and every kind of basis, historical, racial, archaeological,

or linguistic,”² twenty years after Heinrich Schliemann had published his archaeological discoveries.³ Robert Lowie, while admitting that North American Indian legends and other traditional narratives had important psychological and social meaning, insisted that no historical value could be attributed to them.⁴ Lord Raglan, in *The Hero*, argued that historic fact could not survive in oral tradition beyond 150 years, i.e., the life span of three generations.⁵

On the other side of the question are those who accept the historical accuracy, or potential for accuracy, of oral tradition. The basis for much nineteenth century folkloristics was the premise that folklore, either as “popular antiquities” or as “survivals,” offered a key for reconstructing the past. In *Folklore as an Historical Science*, for example, George Lawrence Gomme argued that “every single item of folklore, every folk-tale, every tradition, had its origin in some definite fact in the history of man.”⁶ Hector and Nora Chadwick contended, in *The Growth of Literature*, that the heroes of epic poetry and saga were originally historical figures from a postulated Heroic Age whose lives and exploits had been aggrandized by the accretion of legendary material.⁷ Icelandic family sagas and African oral traditional histories⁸ are frequently cited by scholars to support the contention that history and folklore need not be mutually exclusive terms.⁹

The most prevalent contemporary view of the relationship between folklore and history is that the former can serve as a supplementary source of information for the latter. In *Oral Tradition*, for example, Jan Vansina sets forth a detailed methodology for examining critically the oral traditions of nonliterate societies as sources of historical data, especially where written documents are missing or judged to be unreliable.¹⁰ Similarly, most oral history projects are designed primarily “to supplement, not replace, traditional documentary research”¹¹ by interviewing people directly involved in historical events. Folklorists who believe that there is ample

justification for using oral tradition as a resource in historical research¹² cite not only examples from narrative folklore but instances of the vindication of traditional beliefs and practices in scientific discoveries, especially in the area of medicine.¹³ At the same time, both folklorists and historians recognize that folklore often masquerades as history, and warn naive or unwary researchers against the pitfalls of migratory legends and floating motifs.¹⁴

While various folklore forms have been treated as sources of historical data, there is a great deal of information about the past which is communicated and perpetuated outside of standard folklore genres, in the form of personal and collective memories of and reminiscences about the past.

Many scholars have recognized the historical significance of these forms of expression. Oral historians, for example, record personal observations of and reactions to historical events from people directly involved in them; anthropologists regard life histories of individuals as valuable ethnographic documents.¹⁵ Both folklorists and historians have affirmed the importance of the individual point of view and the perspective of the common, ordinary, undistinguished “folk” in historical studies. For example, Philip Jordan speaks of folk traditions as “giving a personalized immediacy, a sense of ‘being there’ and of participation” to historical accounts.¹⁶ Richard Dorson argues that “oral traditions ... offer the chief available records for the beliefs and concerns and memories of large groups of obscured Americans.”¹⁷ In spite of this insistence on the worth of oral historical traditions and personal memories, little effort has been made to incorporate such materials, even when they are collected, into written history.¹⁸ This may be because, within the framework of the historical perspective, it is methodologically unwarranted to make generalizations on the basis of one individual’s experience.

My argument in this paper is that history which is communicated orally, when compared with written history, can be seen as constituting a different kind of historical record from that contained in and compiled from written documents, that it is complementary, rather than supplementary, to written history. The evidence presented to support this argument is drawn from fieldwork with a local historian, Sid Morrison, in northern California. The basis for considering orally communicated information about personalized or localized experiences and events as history is that such accounts, like written historical narratives, are attempts to characterize the past in terms that are meaningful to the present. The difference between written and orally communicated history lies chiefly in the ways in which that characterization is made.

According to traditional standards of western historiography, written history, whether it deals with a larger or smaller segment or aspect of the human past, should be as complete and accurate a record as possible, presented in straightforward, chronologically ordered, narrative form. Cause and effect relationships between events or series of events may be posited or implied. Persons and incidents should be placed in perspective, according to their influence on contemporary events and subsequent historical developments.¹⁹ As far as possible, the historian should be objective and impartial, not allowing personal viewpoints or biases to distort the record, so that the final product is a generalized, impersonal account.²⁰

From my work with Sid, who was recognized in his community as the authority on all matters of local history, it appears that orally communicated history rarely exists as a complete record. Like written history, it is narrative in form, but consists of discrete and disjointed stories which are not necessarily presented chronologically and may not be causally linked.²¹ The material that I obtained in approximately ten hours of tape-recorded interviews with Sid, for example, was rich in narrative, in the form of

personal experiences, anecdotes and reminiscences. These were only roughly sorted into a chronology, corresponding to Sid's life and those of his father and grandfather, and were not told in any particular order (primarily because the interview sessions were topic-oriented).²²

History communicated orally seems to focus on events, periods or persons that have a special significance for a group or an individual, so that several stories may be told about a single event²³ and none about another. Sid told me several stories more than once — stories which I inferred were especially meaningful or enjoyable to him — although he continually urged me not to let him repeat himself.

An occurrence of national importance, such as the election of a president, may not appear in orally communicated history unless it has some relevance for the individual or group; if, for example, the president was a native of the community or an individual attended the inauguration. Sid told a number of stories about a local character named Seth Kinman whose habit of presenting American presidents with handmade elkhorn chairs provided the community with a connection to national events:

There's a pipe on the mantel that President Andrew Johnson gave him. He took this chair back to Andrew Johnson and Andrew Johnson, President Andrew Johnson, was smoking this pipe and he gave it to Kinman and Kinman — I guess he didn't smoke or something because he gave it to Dutch Jack — that was Jack Walsh ... then after Dutch Jack smoked it for a while he gave it to my uncle.

Whenever historical events or conditions with far-reaching consequences are characterized orally, they tend to be described according to their impact on the group or individual. Recollections of recent assassinations in the United States, for example, almost invariably are framed in terms of what the narrator was doing at the time he or she heard the news. Sid, for instance, talked about the introduction of pasteurization into the community, characterizing the local reaction to an event of international significance:

This man who started the creameries that are now the Foremost ... the name of it was the California Central Creamery, and when pasteurizing first became known ... he was very much in favor of it. And they had a big meeting, a big dinner one night, and they were discussing this pasteurizing thing, and some of them it was too new and they were very much against it. And finally one man said, "Well, what's the difference," he says, "the bugs are in it even if they are killed." And he says — he was a Dane — he says, "My Got, mister, I would rather have a graveyard than a menagerie!"

Also likely to be described orally are historical events that have a purely local or individual impact, such as floods, earthquakes or accidents, labor strikes, and political contests, life-changing experiences, and the like. Most of Sid's stories, in fact, were about such local occurrences:

At that time, there was a bad shipwreck right off there. Off this Cape Mendocino, there was a reef out there. At low tide you can see the rock sticking up. And in those early days there was no lightship, no bell buoys, nothing there to warn them off that reef, and the vessels would strike on that This particular one, the Northerner, they headed north up to the beach up there at Centerville, but they didn't quite make it. The boat went down in the breakers aways and my grandfather helped bury twenty-eight people from that wreck in one grave there. It was quite a tragedy.

These are events whose occurrence is of interest chiefly to those directly involved or affected and whose consequences are restricted to their immediate environments.²⁴

Written history is, ideally, objective and unbiased.²⁵ Spoken history, on the other hand, includes the "unsystematized, biased, fragmented bits of personal memories that have no room in academic history books ... [and] reflect individual views of real facts rather than the facts themselves."²⁶ Thus it tends to be more subjective and evaluative. For example, the inclusion of certain incidents and the exclusion of others in orally communicated history indicates the relative values placed on those events; and in the accounts of events themselves, people's attitudes toward them are clearly expressed. Sid's stories about clashes between the white settlers and the local Indians are especially revealing in this regard:

They had an Indian massacre over on the island in the bay there at Eureka. They massacred a bunch of Indians over there. The Indians were all scattered there — what were still alive — and finally, they run onto this one young Indian — 18, 20 years old probably. And he just dropped down on his hands and knees and looked right at them that way. And they told this one man there, said “You haven't killed any Indians today, you shoot this one.” So what could he do? He drew a bead right between the guy's eyes and he touched the trigger, and those old flintlock guns — the flash comes first and then it ignites the powder. And when this young fellow saw that flash, he dropped right down like that, the bullet went over his head and he jumped up and run for the brush and got away from them.

Perhaps the most important distinction to be made between written and orally communicated history is that the former is generalized, while the latter is intensely personal. Many of Sid's stories were based on personal experiences — his own, his father's and grandfather's as well as those of friends and other residents in the area. It is in these kinds of stories that the nature of orally communicated history as primarily and essentially personal is most clearly shown. For example, Sid gave an account of his grandfather's emigration to California:

He took off from Ohio In 1849, I believe, he left and he got here in 1850 He came with a wagon train but he had to give the captain of the train so much for the privilege of traveling with him, besides driving an ox team. So that's the way he got west, walked every doggone step from St. Joe, Missouri, to Weaverville, up here in Trinity County.

After establishing his homestead — the first in the valley in which Sid lives today — Grandfather Morrison was faced with typical frontier dangers:

This is a true story. My grandfather had a huge big hand like so and he was a raw-boned, strong man. Well, he and the dogs had something treed up this little gulch right up there and so he went out there. The tree came right up out of the bottom of the gulch and about even with him he could see this panther against the side of the tree. So he shot him with the shotgun. Well, it broke the panther's back and the panther fell down amongst the dogs, but he could still use his front paws, and he was just knocking the spots off the dogs. So my grandfather took a match and he lit the grass afire along the edge of the bank and was peering down to try to see what was going on down there, and the bank gave way and down there he went. ... And when he hit bottom, his hand closed over this rock about the right size and he took it and conked the panther over the head with it and killed him. That panther cut up some of those dogs pretty badly ... but that happened

right out here a couple of hundred yards from this house.

On one level, Sid's stories about his grandfather are unique and personalized; on another, they are typical and anonymous. While they are part of the Morrison family history, they can also be seen as personalized illustrations of the general conditions of pioneer life, examples of which can be found in other pioneer histories. Mody Boatright, for example, notes the almost obligatory presence of the "why grandfather came to Texas" story in family sagas from that state, and cites encounters with panthers or bears as equally ubiquitous.²⁷

In contrast to impersonal generalized written history, Sid's stories describe historical events and conditions from a personal point of view. The migration to the west in the nineteenth century, for example, is handled in written histories in terms of population expansion and land settlement; Sid's story about his grandfather's trip illustrates how it was accomplished on the individual level. The conflict between Indians and settlers is described in histories as a process of gradual white takeover; in Sid's account, the clash is put on an agonizingly personal level. His story of the wreck of the *Northerner* vividly depicts the dangers of early navigation, dangers which in written history are reflected in maritime statistics. Historical records, in the form of "figures and graphs [,] tell us what people did; folklore tells us what they thought and felt while they were doing it."²⁸

It is this element of the local, the personal, the human, that constitutes the nature of orally communicated history. The personal quality rounds out contours in the skeletal outline of written history by clustering stories around crucial points; it paints in details with eyewitness accounts; it counterbalances the impersonality of written history by revealing the sentiments of the people involved or affected; it provides unique examples of general conditions.

Both written and spoken history are products of the same process of selectively characterizing past events. The sense of incompatibility between them, which has kept historians from incorporating orally communicated

historical information into written histories seems to lie in their respective points of view: the generalized vs. the personal. This difference in perspective stems, however, from another aspect which written and orally communicated history share: the relationship between historian and audience. Both historians engaged in writing national level or “elitist” histories and those involved in communicating local, family or personal history orally, are aware of and influenced by their audiences. This awareness determines the level of generalization used, what kinds of events and experiences will be characterized, and what form their representation will take. Both points of view are historically valid. Written history provides the framework for interpreting the past; orally communicated history documents the human implications of the historical events with which written history deals.

The personal point of view which characterizes spoken history seems to be inherent in folklore as well. In Märchen and traditional ballads, for instance, the characters are anonymous or virtually so, but at the same time, they are recognizably individuals, not simply representatives of a class, and the stories are told from a personal point of view.²⁹ In oral epic poetry, the settings for the stories may be the clash of armies and the working out of national destinies, but the focus is always on the individual hero and his exploits. In nonnarrative folklore as well, the individual is the object of attention. Traditional medical precautions and cures are prescribed on an individual basis. Conventional beliefs deal with impersonal forces, such as the weather or luck, in terms of how they affect individuals. Handcrafted art and technology are not geared for mass production.

The prevalence of the personal point of view as expressed in folklore has not received much attention from folklorists, perhaps because, as Richard Bauman has suggested, the emphasis in folklore studies has been on folklore as the product of a group.³⁰ Yet it seems to me that this humanistic element, which serves as the basis for distinguishing between written history and history which is orally communicated as representing

different perspectives on the past, may be useful in further illuminating the relationship between folklore and history which has intrigued scholars for so long.

University of California
Los Angeles, California

Notes

1. The problem itself dates back at least to Euhemerus, as Richard Dorson points out in "The Debate over the Trustworthiness of Oral Traditional History," *Volksüberlieferung, Festschrift für Kurt Ranke*, ed. F. Harkort, et al. (Göttingen, 1968), 19-35. See also Francis A. deCaro, "Folklore as an 'Historical Science': the Anglo- American Viewpoint" (Ph.D. diss., Indiana University, 1972).
2. Alfred Nutt, "History, Tradition, and Historic Myth," *Folk-Lore* 12 (1901): 337.
3. Heinrich Schliemann, *Ilios, the City and the Country of the Trojans* (London, 1880).
4. Robert Lowie, "Oral Tradition and History," *Journal of American Folklore* 30 (1917): 169.
5. Lord Raglan, *The Hero: A Study in Tradition, Myth, and Drama* (London, 1934), 14.
6. George Lawrence Gomme, *Folklore as an Historical Science* (London, 1908), 8.
7. Hector M. Chadwick and Nora K. Chadwick, *The Growth of Literature*, 3 vols. (Cambridge, 1932-36), 3:727-749.
8. As studied by Knut Liestøl, *The Origin of the Icelandic Family Sagas*

(Oslo, 1930) and E. Meyerowitz, *Akan Traditions of Origins* (London, 1952), among others.

9. Throughout this paper, the terms folklore and history are used to refer to the subject matters with which folklorists and historians are concerned respectively. The terms folkloristics and historical studies are used to designate the disciplines associated with the subject matters.

10. Jan Vansina, *Oral Tradition: A Study in Historical Methodology* (London, 1965).

11. Paige Mulhollan, "Oral History: Impressions and Problems by a Contemporary Practitioner," *Oral History Association Newsletter* 5 (July 1971): 3.

12. Cf. William Lynwood Montell, "The Oral Historian as Folklorist," *Selections from the 5th and 6th National Colloquia on Oral History* (New York, 1972), 50-53.

13. Paul Brewster, "The Myth of Modernity," *Tennessee Folklore Society Bulletin* 35, no. 2 (1969): 37-40.

14. Merle Wells, "History and Folklore: A Suggestion for Cooperation," *Journal of the West* 4, no. 1 (1965): 95-96; Montell, 52.

15. L. Langness, *The Life History in Anthropological Science* (New York, 1965).

16. Unpublished paper cited by Robert Seager II in "American Folklore and History: Observations on Potential Integration," *Midwest Folklore* 1 (1951): 214.

17. Richard Dorson, "Oral Tradition and Written History: The Case for the United States," *Journal of the Folklore Institute* 1 (1964): 233-234.

18. Theodore Blegen's *Grass Roots History* (Minneapolis, 1947) is a

notable attempt to write history based on these kinds of sources.

19. Louis Gottschalk, "The Historian and the Historical Document," in *The Use of Personal Documents in History, Anthropology and Sociology*, Social Science Research Council Bulletin 53 (New York, 1945), passim, especially 48-62.

20. George Kitson Clark, "The Critical Historian," in *Dimensions in History* (Chicago, 1971), 7-21.

21. See, for example, William Lynwood Montell's oral history study of a black community, *The Saga of Coe Ridge* (Knoxville, 1970).

22. The "relative dating" phenomenon (i.e., locating events in time according to their proximity to events in one's personal life) is frequently noted as a feature of "folk" history.

23. See, for example, Yvonne Lockwood, "Death of a Priest: The Folk History of a Local Event as Told in Personal Experience Narratives," *Journal of the Folklore Institute* 16 (1977), 97-114. Richard Dorson, in "The Oral Historian and the Folklorist," in *Selections from the 5th and 6th National Colloquia on Oral History*, 40-49, points out that there may be conflicting versions about a single event within a community.

24. See William Ivey, "The 1913 Disaster: 'Michigan Local Legend,'" *Folklore Forum* 3, no. 4 (1970) 4: 100-114.

25. This ideal of "objectivity" is being increasingly challenged by historians as an illusion, since any historical account is necessarily biased in some respect.

26. Linda Degh, "Narratives from Early Indiana," *Indiana Folklore* 3 (1970): 229.

27. Mody Boatright, "The Family Saga as a Forum of Folklore," in *The*

Family Saga and Other Phases of American Folklore (Urbana, Illinois, 1958), 1-19. Linda Dégh in the paper cited above states that encounters with wild animals are also common in Indiana pioneer stories.

28. William A. Wilson, "Folklore and History: Fact amid the Legends," *Utah Historical Quarterly* 41 (1973):45.

29. In a paper presented to the Southern California Academy of Sciences in May 1977, Robert A. Georges described an informant who identified with the hero of the tale he was telling to the point of bursting into tears when the hero considers suicide and, toward the end of the narrative, calling the hero by his own (i.e., the narrator's) name.

30. Richard Bauman, "Differential Identity and the Social Base of Folklore," in *Toward New Perspectives in Folklore* (Austin, Texas, 1972), 31-41.

Source: *Blood First Nation v Canada*, 2015 FC 1159

Reasons delivered by: Hon. Mr. Justice Zinn

Published by: CanLII

Stable URL: <http://canlii.ca/t/gm8ch>

Blood First Nation v Canada

2015 FC 1159

ORDER AND REASONS

[1] The Plaintiffs [the Blood Tribe] and the Defendant [Canada] each brought complementary motions regarding procedural aspects of the trial of this action. The motions were heard together; this Order and Reasons deal with both.

[2] In this action, the Blood Tribe claims that the land provided to it by Canada is less than that agreed upon under the provisions of Treaty 7.

[3] The Blood Tribe, pursuant to a Direction issued by the case management judge dated September 12, 2014, seeks an Order confirming

that this action will be heard in three phases. Both parties and the Court are agreeable to this manner of proceeding.

[4] In Phase I, the Court will receive evidence of the oral traditions of the Blood Tribe and the oral history evidence of Elders of the Blood Tribe. It is agreed that this evidence will be heard at the Blood Tribe Reserve located near Standoff, Alberta. A site visit has been undertaken by the trial judge with the parties and their counsel to confirm that adequate facilities are available to hear and record this evidence. The agreement to have the Elder testimony heard earlier than the remainder of the trial evidence was made because the Elders proposed to be called as witnesses are aging and some might not be available or able to testify later. The parties and the Court agreed that this manner of proceeding was preferable to the taking of Commission evidence. It was further agreed that, given the lengthy gap between the receipt of the Elders' testimony and the receipt of the rest of the evidence, the Court would entertain submissions on the admissibility of the Elders' evidence immediately following their testimony. A ruling on admissibility may be delayed until the conclusion of Phase II if the trial judge is of the view that the interests of justice are better served by such a delay.

[5] In Phase II, to be held not more than two years later, unless otherwise ordered by the trial judge, the Court will receive the evidence of Canada and any rebuttal evidence of the Blood Tribe. Following Phase II, the Court will render judgment on the claim, save and except for issues related to remedy if the Blood Tribe is successful. Phase III, if necessary, will deal with remedy.

[6] The Blood Tribe also seeks an order that, notwithstanding the commencement and completion of Phase I of the trial, the parties shall be entitled, subject to any direction of the case management or trial judge, to:

- a. Conduct further discovery of officers and employees of the party opposite in accordance with the *Federal Courts Rules* prior to the commencement of Phase II of the trial;
- b. Serve Notices of Intention to elicit expert evidence prior to Phase II of the trial; and
- c. Serve such Notices as permitted under the *Evidence Act* (Canada or Alberta) up to but not after 7 days prior to the opening of Phase II of the trial.

[7] Canada does not oppose such an Order and the Court is satisfied that the interests of justice are best served by issuing it.

[8] The Blood Tribe also sought an Order that Phase I might include a site visit to the places at or near the Blood Tribe Reserve that the Blood Tribe expects to be the subject of the Elder evidence. This was not opposed by Canada. The Court is agreeable to such a site visit provided that it will not yield evidence forming the basis of any inferences to be drawn by the trial judge but will be restricted to providing the trial judge and counsel with a better understanding of the evidence to be given by the Elders. If such a site visit is to occur, the Blood Tribe is to inform the Court and Canada at least 6 weeks prior to the commencement of Phase I; otherwise, no site visit will be undertaken. Any site visit is to be arranged by the Blood Tribe, at its expense, and shall include all counsel, their advisors, the trial judge, and court staff, and it shall take place on the first day of Phase I.

[9] Canada, in its cross-motion, sought an Order of the Court setting out a protocol for the hearing of the Phase I evidence. Both parties provided a proposed protocol for this part of the trial. The issue of contention between the parties that was argued at length was Canada's request that the Blood Tribe provide "will say" statements for the Elder evidence, prior to

the start of Phase I of the trial.

[10] Canada's proposed protocol with respect to the will say statements is as follows:

1. WILL SAY STATEMENTS:

a. By a deadline to be set by the case management Justice, the Plaintiffs shall provide to the Defendant a will say statement for each Elder to be called as a witness.

b. The will say statements shall contain sufficient details to allow for challenges based on relevancy and otherwise, and for effective preparation of cross-examination. The content of the will says shall include, but not be limited to, a detailed, specific and comprehensive description of:

- i. The language that will be used by each Elder;
- ii. How the Elder's oral history is preserved, who is entitled to relate the oral history and how this entitlement is assessed, the community practice with respect to safeguarding the integrity of its oral history (to the extent that this information is not provided in another expert report/statement);
- iii. The personal, family, community and professional background of the Elder sufficient to fully ascertain the witness' status as an Elder in the community and the witnesses [*sic*] authority to recount the oral history (to the extent that this information is not provided in another expert report/statement);
- iv. Any other background of the Elder relevant to the testimony that he or she will provide;
- v. How and when the Elder came to know the evidence;

vi. Who relayed the evidence to the Elder, the relationship of the Elder to that person, that person's general reputation, and whether that person witnessed the event or was told of it; and

vii. What the witness will say.

c. The will say statements will not form part of the evidence at trial but the Defendant will be able to use the will say statements in evidence as a prior statement of the Elder witness.

[11] The Blood Tribe opposed providing will say statements for the Elders. They submit that the "evidence about the tradition of the Blood Tribe, their culture and connection to the use of their lands, will assist the Court to understand what lands the Blood Tribe leaders understood as part of their home territory." The general nature of that evidence from the Elders was outlined by counsel at the hearing in the following terms:

So the Court will hear evidence of the Blood Tribe tradition of treaty making and peace making. The Court will hear evidence of how they protected their territory and, in particular, the concept of exclusive right to their territory and sharing their territory with others. The Court will hear evidence about decision-making within the Blood Tribe. The Court will hear evidence about the events surrounding the entering of Treaty 7 by the Blood Tribe and the other First Nations, including evidence regarding what took place from the Blood Tribe perspective, the language barrier and the problem with interpreters. The Court will hear evidence of what Chief Red Crow meant following the Treaty 7 negotiations when he said he was returning to his home. You'll hear evidence about the surveying of the reserve and about the location of survey markers. The Court will hear evidence about the movement of Blood Tribe members around the time of the treaty and other evidence relative — relevant to payless and the population of the Blood Tribe. The Court will hear evidence of what lands were traditionally used by the Blood Tribe as their home or their wintering grounds. The Court will hear evidence of what these lands meant to the members of the Blood Tribe and how they used these lands. The Court will hear evidence of relevant subsequent events when, example, the Mormons come to occupy a portion of the territory near Cardston. And evidence of the removal of Blood Tribe members from lands that — between

Waterton and the Valley Rivers.

So those, I give by way of examples of the kinds of evidence that you will hear.

[12] The Blood Tribe firstly submits that requiring will say statements “creates an entirely new process that is not part of a civil trial conducted in accordance with the law of evidence and the rules of court.” The Blood Tribe acknowledges that this Court and others have required that expert and “professional” witnesses such as police officers provide will say statements, but they point out that the Elders are not called as experts nor are they experienced witnesses. Moreover, they point out that they are men and women in their 70s and 80s. Counsel asks, “Why would you hand a whole bunch of arrows to the other side to skewer some Elders” when such is not required in other civil cases.

[13] Counsel is incorrect in suggesting that this action is like other civil cases – it is not. First, in other civil actions the evidence of the Elders would not be admitted or, if admitted, would be given little weight, as it is hearsay. In this action, as in other aboriginal litigation, the evidence is *prima facie* admissible because the Blood Tribe does not have a tradition of written history; it has an oral tradition. Second, unlike the usual civil action, there has been no examination for discovery of the plaintiffs’ representative(s) and thus Canada has had no opportunity to ask questions to learn what evidence the Blood Tribe proposes to offer through its Elders to support the claim. Third, I reject the suggestion that these witnesses are at risk of being “skewered” because they are elderly and Canada may be able to raise questions as to their credibility if their evidence differs from their will say statements. Canada has agreed that its cross-examination will be respectful. If the evidence given on direct examination differs in some material manner from that provided in a witness’ will say statement, then that difference may have to be addressed by the witness, or by counsel in

submissions. There is nothing unusual or contrary to the norm in that respect.

[14] The Blood Tribe also submits that “the very nature of the evidence does not lend itself to a will say statement.” I am not persuaded. The Federal Court’s Aboriginal Litigation Practice Guidelines, developed after extensive consultation with all stakeholders, specifically envisages that there is to be disclosure prior to an Elder testifying. Specifically, it provides as follows in this regard:

The party calling an Elder to testify should provide information about the Elder and the basis of his or her knowledge about the subject matter of the testimony. Given the differing dynamics and logistical issues that may be associated with having an Elder testify, this disclosure need not necessarily coincide with document disclosure as long as it is timely.

The disclosure should also provide information about the Aboriginal community’s practices or protocols for requesting Elder testimony. Elders often refrain from describing themselves as elders and the party calling an Elder may have a community member to introduce the Elder and confirm his or her status as an Elder.

The disclosure should also summarize the proposed evidence, keeping in mind both that Aboriginal respect for Elders may involve not directing an Elder’s words and that an Elder unfamiliar with court proceedings may respond on unexpected topics.

Where issues arise between parties over the adequacy of the disclosure, the parties should seek assistance through case management or trial management for a direction or ruling on the disclosure to be provided and its timing.

[emphasis added]

[15] Lastly, the Blood Tribe submits that the Court has no jurisdiction to order that a party provide will say statements. I agree with Canada that this Court has jurisdiction to make the Order requested, and indeed, it has done so previously in aboriginal matters. Justice Russell in *Sawbridge Band v Canada*, [2007] FC 657 at para 38 explains that will say statements “were

designed as a procedural tool to ensure fairness, efficiency, preparedness, and to prevent ambush at trial.” While not specifically provided for in the *Federal Courts Rules*, a judge has authority to order a party to produce will say statements by virtue of all or any of Rules 3, 53, 265, 270, and 385 which generally provide that a judge may make any order respecting the conduct of the action that assists in the just and timely disposition of it. In my view, if there are no will say statements provided for the Elders’ evidence, on the facts as outlined above, the action will not proceed in a just and expeditious manner because the Crown will be ambushed and not be in a position to effectively test the Elders’ evidence in the manner provided for in the Aboriginal Litigation Practice Guidelines and generally accepted Canadian trial procedure.

[16] For these reasons, I am prepared to order that the Blood Tribe prepare and deliver will say statements to Canada respecting the Elders’ testimony.

[17] I also think it advisable that the Court set out a detailed protocol respecting the conduct of this trial, and particularly Phase I. The parties were provided with a draft of the Court’s proposed protocol for Phase I and provided many comments that have been incorporated in the Order.

ORDER

THIS COURT ORDERS that:

1. This trial will be held in three phases as follows:

Phase 1 — Evidence of Blood Tribe Elders and related expert and lay evidence of the Blood Tribe [Phase I Evidence];

Phase 2 — Any further evidence of the Blood Tribe and the evidence of Canada including Canada’s expert evidence, and the Blood Tribe’s rebuttal evidence [Phase II Evidence];

Phase 3 — Evidence regarding remedy [Phase III Evidence].

2. Phase I of the trial will take place before this Court at the Blood Tribe's Multipurpose Building, in the City of Standoff, Alberta, on Monday, May 2, 2016, at 9:30 in the forenoon for a duration not exceeding twenty (20) days to receive the Phase I Evidence. The courtroom shall be configured as shown on the diagram attached as Appendix A. Counsel and Court officials shall not wear formal court attire but shall be dressed in business casual. The trial judge shall be robed. Security staff shall wear clothing that properly identifies them. Counsel shall remain seated when examining or cross-examining an Elder. They shall stand only when addressing the Court.
3. The Blood Tribe may conduct a traditional ceremony at the Phase I trial venue immediately prior to the opening of Phase I by the Court.
4. The trial will continue before this Court at 635 – 8th Avenue South West, 3rd floor, in the City of Calgary, Alberta, following the completion of Phase I, on Monday, May 30, 2016, at 9:30 in the forenoon (or earlier at the direction of the trial judge), for a duration of three (3) days to hear the parties' submissions as to admissibility of the Phase I Evidence. It is recognized that further evidence relevant to some of those arguments may be presented in Phase II of this trial, necessitating further argument on admissibility at that time.
5. Subject to any further Order of the trial judge, Phase II of the trial will commence before this Court at 635 – 8th Avenue South West, 3rd floor, in the City of Calgary, Alberta, on Monday, May 7, 2018, at 9:30 in the forenoon, for a duration of twenty (20) days.

6. Subject to paragraph 11, each party shall disclose to the other all documents, records, maps, drawings, photographs and the like that are intended to be referenced during Phase I [Phase I Documents] as soon as they are identified. Within thirty (30) days prior to trial, the parties shall prepare a Joint Book of Documents for use at Phase I containing the Phase I Documents. The admissibility of any document at Phase I that has not been identified and produced in accordance with this provision shall be at the discretion of the trial judge.
7. The Blood Tribe shall present evidence at Phase I as to how its oral history is preserved, who is entitled to relate the oral history, how this entitlement is assessed, and the community practice with respect to safeguarding the integrity of its oral history. To the extent that such evidence is not contained in an expert report previously provided to Canada or ascertained through examination for discovery prior to Phase I, the Blood Tribe shall provide Canada with a will say statement of the witness or witnesses (containing the detail recited below) called to provide this evidence.
8. No motion to exclude from the hearing an Elder who will be called as a witness at Phase I shall be made or entertained until after the evidence respecting the oral history traditions of the Blood Tribe has been concluded.
9. Before the Elders testify, they shall be introduced by Annabel Crop Eared Wolf, or another witness agreed upon by the parties, who shall present biographical and genealogical evidence concerning each Elder who will be called to testify. This witness shall also testify as to the basis on which Elders are recognized by the Blood Tribe. If there has been no previous examination for discovery

conducted regarding this evidence then the Blood Tribe shall provide Canada with a will say statement for this witness at least ninety (90) days prior to trial. This witness will be subject to cross-examination by Canada.

10. All examinations of Elders, including direct examination and cross-examination, will be conducted respectfully and will be subject to the *Federal Courts Act*, RSC 1985, c F-7, the *Federal Courts Rules*, and any other legislation applicable to trial procedure in the Federal Court.
11. The Blood Tribe shall provide Canada with a will say statement for each Elder it proposes to call at Phase I. The Blood Tribe has identified and made known to Canada four (4) such Elders. Within sixty (60) days of the date of this Order, or such greater period as the parties may agree or the Court order, the Blood Tribe shall provide Canada with a will say statement for each of these four Elders. A will say statement for each of the remaining four Elders the Blood Tribe proposes to call shall be delivered to Canada no later than December 31, 2015. Canada shall have ninety (90) days after the delivery of an Elder's will say statement to identify and disclose to the Blood Tribe the document(s) it wishes to put to that Elder.
12. The will say statement shall contain sufficient detail to allow for challenges to the proposed evidence by Canada on the basis of relevancy, and for effective preparation of cross-examination. The content of each Elder's will say statement shall include a detailed description of:
 - a. The language that will be used by the Elder;

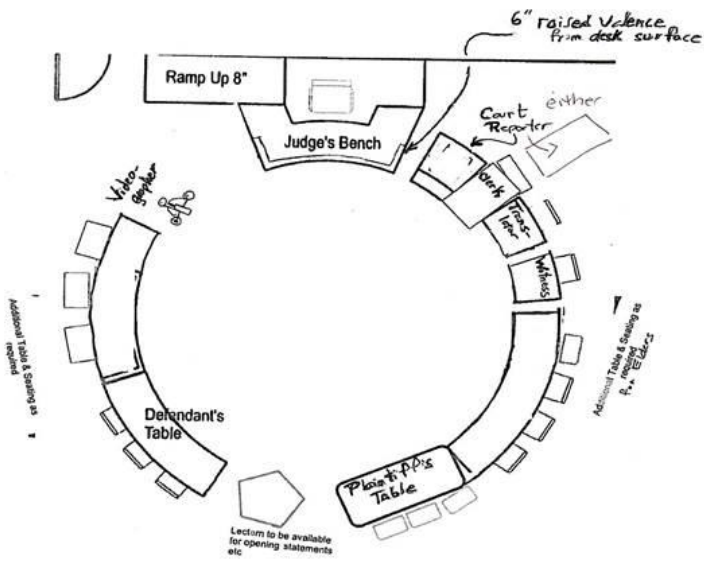
- b. The personal, family, community and professional background of the Elder sufficient to fully ascertain the witness' status as an Elder in the community and his or her authority to recount the oral history;
 - c. Any background of the Elder relevant to the testimony that he or she will provide;
 - d. How and when the Elder came to know the evidence;
 - e. Who relayed the evidence to the Elder, the relationship of the Elder to that person, that person's general reputation, and whether that person witnessed the event in question or was told of it; and
 - f. What the Elder will say.
13. The will say statements will not form part of the evidence at trial but Canada will be able to use a will say statement as a prior statement of an Elder witness should the oral evidence offered at trial be materially different than or inconsistent with that set out in the will say statement.
14. An interpreter and word speller to interpret Blackfoot into English and English into Blackfoot as required, shall be agreed upon by the parties. If the parties cannot agree on an interpreter or word speller at least ninety (90) days prior to the commencement of Phase I, then one will be appointed by the Court (following receipt of submissions from the parties). The interpreter and word speller shall be impartial and independent to the satisfaction of the parties and the Court and need not be the same person. Should interpretation be required, then the Court shall provide equipment for simultaneous interpretation.

15. Canada shall not interrupt an Elder while he or she is speaking, except if an immediate objection is required related to privilege or if there are serious interpretation issues.
16. Any delay or deferral of an objection by Canada will be without prejudice to its right to raise the objection later in Phase I.
17. Canada may object to a question posed by counsel before the Elder begins his or her testimony in answer, if in its opinion the objection is so serious that it must be raised immediately. Any failure by Canada to raise an objection to a question during the testimony of an Elder does not prejudice the right of Canada to later object to the question (and response) during the latter part of Phase I, which is to commence on May 30, 2016.
18. Canada may raise an objection, which in its submission should not wait until Monday May 30, 2016, after the conclusion of the testimony given by one Elder and before the testimony of the next Elder or during breaks in an Elder's testimony.
19. Canada and the Blood Tribe may present argument related to the admissibility of the Elder evidence taken in Phase I, beginning on Monday, May 30, 2016 at 9:30 in the forenoon for a duration of three (3) days.
20. A ruling on admissibility will be delayed until the conclusion of Phase II if the trial judge is of the view that the interests of justice are best served by such a delay.
21. No decisions as to the weight to be given to any part of the evidence heard in Phase I shall be given until the conclusion of Phase II of the trial.
22. A Court Reporter shall be present at all times during Phase I and

shall prepare a certified transcript of the Phase I proceedings. Court reporting shall be completed with real-time technology.

23. Phase I shall be recorded by video and audio by a person or persons agreed to by the parties or, failing agreement, appointed by the Court. They shall be made in accordance with the Federal Court Media Guidelines, and the video shall give a direct frontal close-up of the witness' face. The recordings are the property of the Court and a certified true copy of the video and audio recording of the Phase I proceedings shall be marked as a trial exhibit.
24. Notwithstanding the commencement and completion of Phase I of the trial, the parties shall be entitled, subject to any direction of the case management or trial judge, to:
 - a. Conduct further discovery of officers and employees of the party opposite in accordance with the *Federal Courts Rules* prior to the commencement of Phase II of the trial;
 - b. Serve Notices of Intention to elicit expert evidence prior to Phase II of the trial; and
 - c. Serve such Notices as permitted under the *Evidence Act* (Canada or Alberta) up to but not after 7 days prior to the opening of Phase II of the trial.
25. Other than issues arising from this Order, which shall be dealt with by the trial judge, the case management judge will continue to manage this action under the *Federal Courts Rules* and will decide all pre-trial matters, unless in his view, the matter would best be directed to the trial judge.
26. Each party shall bear its own costs of these motions.

Appendix "A"
Diagram of Courtroom Configuration



Source: *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 (CanLII)

Reasons delivered by: Rt. Hon. McLachlin C.J (as she then was)

Published by: CanLII

Stable URL: <http://canlii.ca/t/g7mt9>

Tsilhqot'in Nation v British Columbia

2014 SCC 44

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land

and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the Constitution Act, 1982. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the Forest Act applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional

constraints of s. 35 of the Constitution Act, 1982 and the division of powers in the Constitution Act, 1867, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the Forest Act on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain “Crown land” for the purposes of the Forest Act at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of “Crown timber” and the Forest Act no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the Forest Act, is ousted by the s. 35 framework or by the limits on provincial power under the Constitution Act, 1867. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group’s ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the

idea that Aboriginal rights are at the core of the federal power over “Indians” under s. 91(24) of the Constitution Act, 1867. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the Forest Act, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the Constitution Act, 1982 and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province’s land use planning and forestry authorizations under the Forest Act were inconsistent with its duties owed to the Tsilhqot’in people.

The judgment of the Court was delivered by

The Chief Justice —

I. Introduction

[1] What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

[2] These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.
- In this case, Aboriginal title is established over the area designated by the trial judge.
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining

the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.

- In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

II. The Historic Backdrop

[3] For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

[4] Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

[5] The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging

without the consent of the Xení Gwet'in. Talks between the Ministry of Forests and the Xení Gwet'in ensued, but reached an impasse over the Xení Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

[6] The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about 3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

[7] In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

[10] In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties — mainly in British Columbia — resuming a policy that had been abandoned in the 1920s: P. W. Hogg, "The Constitutional Basis of Aboriginal Rights", in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 3.

[11] Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* "recognized and affirmed" existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

[12] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held

that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the “pre-existing legal right” of Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as “an independent legal interest” (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

[13] In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a “compelling and substantial” purpose and account for the “priority” of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (pp. 1113-19).

[14] The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown’s relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

[15] The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, “[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures” (para. 117). Negatively, the “protected uses must not be irreconcilable with the nature of the group’s attachment to that land” (*ibid.*) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[16] The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a “necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part” (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the “different” (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

[17] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown’s duty to consult and accommodate the asserted Aboriginal interest “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right

or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (para. 39). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida*. The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown’s fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

[19] The Province, to its credit, no longer contends that the claim should be barred because of defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

[20] I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

[21] First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

[22] Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an “all or nothing” proposition (at para. 117):

The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

[23] Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have

envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. *The Test for Aboriginal Title*

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on “occupation” prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, per Lamer C.J., at para. 143:

In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[27] The trial judge in this case held that “occupation” was established for the purpose of proving title by showing regular and exclusive use of sites

or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

[30] Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

[31] Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1, the court stated as follows, at para 89:

The expression "possession, occupation, use and enjoyment . . . to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the

exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

[33] The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

[34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”: B. Slattery, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

[36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

[37] Sufficiency of occupation is a context-specific inquiry. “[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group’s purposes are dependent on the manner of life of the people and the nature of the

land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[39] In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135-38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

What, then, did one have to do to acquire a title by occupancy? . . . [I]t appears . . . that . . . a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts “being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider”. There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone. . . .

Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one’s own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.

[Emphasis added.]

[40] Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner. . . . Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, . . . it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

[42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is “sufficient” use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

[43] The Province argues that this Court in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there “appears to have rejected the territorial approach of the Court of Appeal” (“Aboriginal Title and the Supreme Court: What’s Happening?” (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). In fact, this Court in *Marshall*; *Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be “proof of sufficiently regular and exclusive use” of the land in question, a requirement established in *Delgamuukw*.

[44] The Court in *Marshall*; *Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While “[n]ot every nomadic passage or use will ground title to land”, the Court confirmed that *Delgamuukw* contemplates that “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a “question of fact, depending on all the circumstances, in

particular the nature of the land and the manner in which it is commonly used” (*ibid.*).

2. Continuity of Occupation

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

[47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had “the intention and capacity to retain exclusive control” over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature

of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[49] As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) “sufficient

occupation” of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. Was Aboriginal Title Established in This Case?

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

[52] Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

[53] I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

[54] I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

[55] The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

[56] Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

[57] This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5 to 7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this finding.

[58] Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over

it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

[59] The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

- The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141-142).
- The trial judge relied on a map the validity of which the Province disputes (para. 143).
- The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).
- The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).
- A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).

[60] Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with

precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

[61] The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

[62] This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

[63] The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By

examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

[64] The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the mandate of a trial judge, who should pronounce only on pleaded matters.

[65] In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

[66] I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes” (para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. *The Legal Characterization of Aboriginal Title*

[69] The starting point in characterizing the legal nature of Aboriginal title is Dickson J.’s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[70] The content of the Crown’s underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act*,

1867; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives “the right to exclusive use and occupation of the land . . . for a variety of purposes”, not confined to traditional or “distinctive” uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.

[71] What remains, then, of the Crown’s radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*.

[72] The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”.

B. *The Incidents of Aboriginal Title*

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.

[74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

[75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. *Justification of Infringement*

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract

a mere duty of notice, while a stronger claim may attract more stringent duties” (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

... the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d’être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial

objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.]

[84] If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown’s fiduciary duty towards Aboriginal people.

[85] The Crown’s fiduciary duty in the context of justification merits further discussion. The Crown’s underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown’s fiduciary or trust obligation to the group. This impacts the justification process in two ways.

[86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

[87] Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida's* insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and

substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. *Remedies and Transition*

[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation

correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

[93] Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right

to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

VII. Breach of the Duty to Consult

[95] The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

[96] The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

[97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. *Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?*

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that

Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. *Does the Forest Act on its Face Apply to Aboriginal Title Land?*

[107] Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question at this point — is always a matter of statutory interpretation.

[108] The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

[109] Under the *Forest Act*, the Crown can only issue timber licences with respect to “Crown timber”. “Crown timber” is defined as timber that is on “Crown land”, and “Crown land” is defined as “land, whether or not it is covered by water, or an interest in land, vested in the Crown” (s. 1). The Crown is not empowered to issue timber licences on “private land”, which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is “Crown land”; (2) Aboriginal title land is “private land”; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

[110] If Aboriginal title land is “vested in the Crown”, then it falls within the definition of “Crown land” and the timber on it is “Crown timber”.

[111] What does it mean for a person or entity to be “vested” with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black’s Law Dictionary* (9th ed. 2009), *sub verbo* “vested”.

[112] Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown’s underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

[113] The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land’s use: *Haida*. At this stage, the

Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

[114] It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain “Crown land” under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words “vested in the Crown” to cover at least lands to which Aboriginal title had not yet been confirmed.

[115] I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*. To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.

[116] Applied to this case, this means that as a matter of statutory construction, the lands in question were “Crown land” under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of “Crown timber” and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. Is the Forest Act Ousted by the Constitution?

[117] The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the *Constitution Act, 1982*

[118] Section 35 of the *Constitution Act, 1982* represents “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights” (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

[119] Section 35(1) states that existing Aboriginal rights are hereby “recognized and affirmed”. In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown’s fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. “[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights” (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s. 35(1).

[120] Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

[122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would

be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[127] Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge’s findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot’in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge’s reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot’in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

[128] The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in “pith and substance” a

provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

[129] “Indians, and Lands reserved for the Indians” falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over “Indians”. Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

[130] First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament’s power over “Indians”, the latter would trump the former. No such inconsistency is alleged in this case.

[131] Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the

other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions. First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power? (*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536).

[132] The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over “Indians”. He placed considerable reliance on *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over “Indians”. It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

[133] The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

[134] The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[135] The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to “Indians” under s. 91(24) is somewhat mixed. While no case has held that Aboriginal rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta*. However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* — this latter proposition being inconsistent with the reasoning accepted by the trial judge.

[136] In *R. v. Marshall*, [1999] 3 S.C.R. 533, this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

... the federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives
 [para. 24]

[137] More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

[138] Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes

with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered. Does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework? Is provincial interference with Aboriginal rights treated differently than treaty rights? And, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

[139] As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

[140] What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases

such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

[142] The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

[143] An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

[144] The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by

carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

[145] Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

[146] First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: How far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

[147] Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

[148] Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes

more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over “Indians” and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province’s power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[149] This Court has recently stressed the limits of interjurisdictional immunity. “[C]onstitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism’” and as such “a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of “limited application” and should be applied “with restraint” (paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

[150] *Morris*, on which the trial judge relied, was decided prior to this Court’s articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *Canadian Owners and Pilots Association*, and so is of limited precedential value on this subject as a result (see *Marine*

Services, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports

this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

Source: *Buffalo v Canada*, 2005 FC 1622 at 26-36

Reasons delivered by: Hon. Teitelbaum, J.

Published by: CanLII

Stable URL: <https://canlii.ca/t/1m3zz>

Buffalo v Canada

2005 FC 1622

ii. Oral History

[38] In cases involving treaty interpretation, the aboriginal perspective and understanding must be considered. Oral histories, oral traditions, and other extrinsic evidence may provide some illumination; however, they also raise important evidentiary issues.

[39] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paragraph 68, Lamer C.J. stated that, in aboriginal claims, courts must approach the rules of evidence bearing in mind the evidentiary difficulties inherent in such cases:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, 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.

[40] Chief Justice Lamer revisited the comments he made in *Van der Peet* the following year in the landmark decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. In that case, the Court held that a misapprehension of the evidentiary value of oral history evidence amounted to an error in law warranting appellate intervention. Chief Justice Lamer noted, at paragraph 81, that the justification for the approach he set forth in *Van der Peet* could be found in the nature of aboriginal rights, which are aimed at the reconciliation of the prior occupation of North America by aboriginal societies with the assertion of crown sovereignty over Canadian territory.

[41] The Supreme Court recognized the challenges created by the use of oral histories as proof of historical facts. Nevertheless, the rules of evidence must be adapted to accommodate this type of evidence and place it on an equal footing with other, more familiar, types of historical evidence (see: *Delgamuukw* at paragraph 87). The accommodation of such evidence must be done in a manner that does not strain the Canadian legal and constitutional structure (see: *Delgamuukw* at paragraph 82).

[42] In *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911, Chief Justice McLachlin revisited the issue of oral history evidence. The Chief Justice set out the criteria for the admission of such evidence, at paragraphs 27 to 34, as follows:

(1) Evidentiary Concerns — Proving Aboriginal Rights

¶27 Aboriginal right claims give rise to unique and inherent

evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet*, supra, the majority of this Court stated 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” (para. 68).

¶28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, supra; *Delgamuukw*, supra, at para. 82).

(a) Admissibility of Evidence in Aboriginal Right Claims

¶29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, supra, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, supra).

¶30 The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not “cast in stone, nor are they enacted in a vacuum” (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable;

unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

¶31 In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

¶32 Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned: see R. L. Barsh and J. Y. Henderson, “The Supreme Court’s Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand” (1997), 42 McGill L.J. 993, at p. 1000, and J. Woodward, *Native Law* (loose-leaf), at p. 137. Also see Sparrow, *supra*, at p. 1103; *Delgamuukw*, *supra*, at paras. 82-87, and J. Borrows, “The Trickster: Integral to a Distinctive Culture” (1997), 8 Constitutional Forum 27.

¶33 The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people’s history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness’s ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

¶34 In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric

traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey “historical” truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

[43] The Chief Justice commented on the interpretation and weighing of evidence in aboriginal right claims at paragraphs 36 to 39:

(b) The Interpretation of Evidence in Aboriginal Right Claims

¶36 The second facet of the *Van der Peet* approach to evidence, and the more contentious issue in the present case, relates to the interpretation and weighing of evidence in support of aboriginal claims once it has cleared the threshold for admission. For the most part, the rules of evidence are concerned with issues of admissibility and the means by which facts may be proved. As J. Sopinka and S. N. Lederman observe, “[t]he value to be given to such facts does not...lend itself as readily to precise rules. Accordingly, there are no absolute principles which govern the assessment of evidence by the trial judge” (*The Law of Evidence in Civil Cases* (1974), at p. 524). This Court has not attempted to set out “precises rules” or “absolute principles” governing the interpretation or weighing of evidence in aboriginal claims. This reticence is appropriate, as this process is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard. Moreover, weighing evidence is an exercise inherently specific to the case at hand.

¶37 Nonetheless, the present case requires us to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or

deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is “given due weight by the courts” (para. 84).

¶38 Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the “general principles of common sense” (Sopinka and Lederman, *supra*, at p. 524). As Lamer C.J. emphasized in *Delgamuukw*, *supra*, at para. 82:

[A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure” [*Van der Peet* at para. 49]. Both the principles laid down in *Van der Peet* — first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit — must be understood against his background.

¶39 There is a boundary that must be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, “[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse” (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing “due weight” on the aboriginal perspective, or ensuring its supporting evidence an “equal footing” with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued “simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case” (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to

carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.

[44] Trial judges face an enormous challenge in hearing, understanding, analysing, and according due weight to oral history evidence.

[45] During the course of the trial, Samson presented a great deal of evidence through Cree elders and other Cree witnesses. These witnesses provided evidence on the making of Treaty 6, the Cree perspective, as well as Cree culture and territory. Samson also tendered expert evidence on oral history. Dr. Winona Wheeler testified on the academic and cultural framework within which oral histories and oral traditions are to be understood, although she did not apply this to any of the oral traditions presented to the Court. The Crown tendered Dr. Alexander von Gernet; among other things, he analysed the contents of some of the oral traditions presented at Court. I will comment further and in greater detail when I address the witnesses and evidence. I note only at this point that it was a near daunting challenge to appropriately weigh this evidence to conclude what happened at, and indeed before, European contact and the course of subsequent events.

iii. Aboriginal Rights

[46] In the case at bar, Samson claims that it has an aboriginal right to manage its resources — its oil and gas — and the money they generate. Further, Samson appears to claim a general right of self-government. In its Amended Statement of Claim (No. 4), Samson pleaded:

7. Pursuant to Treaty No. 6, Plaintiff the Samson Indian Nation retained its rights as a nation, encompassing, *inter alia*, its right to self determination, including the right to determine its own membership, which rights are recognized and affirmed and constitutionally protected by Section 35 of the *Constitution Act, 1982*.

7A. Samson Cree Nation existed as a Nation in 1876 and 1877 and

was recognized as such by the Crown in Treaty No. 6 and the 1877 Adhesion to Treaty No. 6 made by Kiskaquin (or Bobtail) on behalf of the Samson Cree Nation and continues to exist as a Nation.

7B. The Samson Cree Nation possessed and continues to possess aboriginal or inherent rights and powers in respect of governance, citizenship, taxation, trade and management of its resources and revenues. These inherent rights and powers were affirmed by Treaty No. 6, the *Royal Proclamation, 1763*, treaties with the Hudson's Bay Company and various constitutional instruments.

...

63. Moreover, sections 61 to 68 of the *Indian Act* violate, contravene and are incompatible with the *Constitution Act, 1982*, particularly sections 15, 25 and 35 thereof and it is expedient that sections 61 to 68 of the Indian Act be declared to be illegal, unconstitutional, null and void in respect to Plaintiffs and the moneys entrusted to Defendant Her Majesty for Plaintiffs or alternatively constitutionally inapplicable to Plaintiffs and their moneys or subject to the treaty and aboriginal rights of Plaintiffs.

[47] While the assertions of the aboriginal rights claimed also relate to matters addressed in Phase Two, Money Management, of this trial, the historical and factual background were dealt with, for the most part, in Phase One. Thus, it is appropriate to address, albeit briefly, the jurisprudence on aboriginal rights at this early stage.

[48] In *Mitchell*, the Chief Justice commented on the criteria for establishing an aboriginal right and its characterization at paragraphs 12 to 15:

¶[12 In the seminal cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw*, *supra*, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior

to contact. The practice, custom or tradition must have been “integral to the distinctive culture” of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples’ identity. It must be a “defining feature” of the aboriginal society, such that the culture would be “fundamentally altered” without it. It must be a feature of “central significance” to the peoples’ culture, one that “truly made the society what it was” (Van der Peet, *supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society’s cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

¶13 Once an aboriginal right is established, the issue is whether the act which gave rise to the case at bar is an expression of that right. Aboriginal rights are not frozen in their pre-contact form: ancestral rights may find modern expression. The question is whether the impugned act represents the modern exercise of an ancestral practice, custom or tradition.

B. What is the Aboriginal Right Claimed?

¶14 Before we can address the question of whether an aboriginal right had been established, we must first characterize the right claimed. The event giving rise to litigation merely represents an alleged exercise of an underlying right; it does not, in itself, tell us the scope of the right claimed. Therefore it is necessary to determine the nature of the claimed right. At this initial stage of characterization, the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support.

¶15 In *Van der Peet*, *supra*, at para. 53, the majority of this Court provided three factors that should guide a court’s characterization of a claimed aboriginal right: (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right. (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation; and (3) the ancestral traditions and practices relied upon to establish the right. The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly

broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society: see *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

[49] Thus, the aboriginal right being claimed must first be defined or characterized. The right cannot be painted in broad or general terms. In *Van der Peet*, at paragraph 69, Chief Justice Lamer held,

Courts considering a claim to the existence of an aboriginal right must focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the traditions, customs and practices of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

[50] The following points, I note, can be taken from the Supreme Court's pronouncements on the law as it relates to aboriginal rights. First, a claimant must prove that a modern practice, tradition, or custom has a reasonable degree of continuity with a practice, tradition, or custom that existed before contact. Second, the practice, tradition, or custom must have been "integral to the distinctive culture" of the aboriginal group; it distinguished or characterized their culture, and lay at the core of their identity. Third, aboriginal rights are not frozen in their pre-contact form, but rather may be exercised in modern ways, as long as the modern expression is connected to the ancestral practice, tradition, or custom.

Part 2: Memory, Ear- and Eyewitnesses

*Memories are precious. They give us identity. They create a
shared past that bonds us with family and friends.*

– Elizabeth Loftus, 2003

Author(s): Joan Lovisek

Published by: Archives of the Papers of the Algonquian Conference, Vol. 33 (2002), H.C. Wolfart, ed.

Stable URL:

<https://ojs.library.carleton.ca/index.php/ALGQP/article/view/1125>

Transmission Difficulties: The Use and Abuse of Oral History in Aboriginal Claims

Joan Lovisek

Oral history used as evidence to support aboriginal claims became the subject of extensive media and academic coverage after the Delgamuukw decision was delivered in March 1991 (Asch 1992; Cruikshank 1992; Culhane 1992, 1998; Fisher 1992; Miller 1992; Ridington 1992; Roness and McNeil 2000; Simpson 1998; Storrow and Bryant 1992).¹ At issue was the trial judge's refusal to give weight to oral history and his rejection of much of the anthropological expert witness evidence. The case proceeded to the Supreme Court of Canada in 1997, and this court widened the admissibility

of oral evidence (Delgamuukw v. British Columbia 1998). Its decision was subsequently hailed as an indication that oral history had been vindicated in the courts, which in turn has encouraged many aboriginal communities to collect and record oral histories. The press reflected the public reaction to the decision by stating that the Delgamuukw decision had “set a new and easier standard for Natives to secure title” (Simpson 1998).

But is this a valid interpretation of how the Supreme Court views oral history? In making its decision, how did the Supreme Court recognize the use of oral history as evidence to support aboriginal rights or title?

THE DELGAMUUKW DECISION

The Supreme Court of Canada in the Delgamuukw decision of 1997 classified oral history as it had been presented at trial into three types: (1) territorial affidavits which relied on the declarations of deceased persons about the use or ownership of specific tracts of land. (2) the *adaawk* of the Gitksan (or Gitksan, a Tsimshian people), which is a distinctive collection of sacred oral traditions about their ancestors, histories and territories, and the *kungax* of the Wet’suwet’en (an Athapaskan people), which is a spiritual song performance which ties the Wet’suwet’en to specific tracts, or rather, trails of land. Both the *kungax* and *adaawk* were validated by community feasts. (3) the personal recollections of the aboriginal claimants. It is the second type, the *adaawk* and the *kungax*, which was the subject of much of the Court’s attention. The Court understood these oral histories to be of a special kind:

The most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the Gitksan and Wet’suwet’en people tell and re-tell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions (Delgamuukw v. British Columbia 1998:24).

What does the Supreme Court define as oral history?

Chief Justice Lamer, who wrote the majority decision, appears to have based his understanding of oral history on two sources which were submitted in the *Wet'suwet'en* Factum of Appeal: (1) the 1996 *Report of the Royal Commission on Aboriginal Peoples* (Canada 1996), and (2) a 1992 article in the *Alberta Law Review* by Clay McLeod. Quoting extensively from the *Report of the Royal Commission on Aboriginal Peoples*, the Court appears to have understood oral history as a “social construction” which integrated oral accounts of the past in a non-factual, subjective narrative:

Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human centred in the same way as in the western scientific tradition, for it does not assume that human beings are anything more than one — and not necessarily the most important — element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time...

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are ‘facts enmeshed in the stories of a lifetime’. They are also likely to be rooted in particular locations, making reference to particular families and communities, this contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people (Delgamuukw v. British Columbia 1998: 48-49).

The Court then selectively quoted from McLeod’s article, which also portrayed oral history as social and non-factual. However, McLeod (1992:1287) suggested ways by which some rules of evidence could be used to effectively allow aboriginal people to present their oral histories to courts, and have them accepted as being “necessary and trustworthy.”

Starting with the premise that elders are accorded the highest respect in

First Nations cultures and that elders maintain oral histories, McLeod (1992:1288) asserted that oral histories are an authoritative representation of First Nations culture. After briefly describing how literacy has been used as a tool of oppression for placing oral history subject to the hearsay rule, McLeod stated that even when oral historical evidence has been accepted, Canadian courts have found some other rule to devalue it, particularly by using the concept of evidentiary weight.

Although McLeod (1992:1282) argued for the value of expert evidence based on opinion by experts obtained from oral histories, he did not go as far as to suggest that elders should be validated as experts. In search of analogues in the law, McLeod examined the hearsay rule and found in *R. v. Khan* (1990) that the statement of a young child to her mother made out of court was hearsay but that it was accepted by the court as evidence as the child's statements were considered "necessary and trustworthy." He then discussed the ancient document rule which provides that old documents, because of their age, are regarded as trustworthy. Putting the two together, McLeod (1992:1287) argued that elders' evidence should be admissible because it is trustworthy like a child's out-of-court statement to her mother and because elders (and their information) are like old documents.

In general, evidence law distinguishes between that which is heard and that which is seen — eyewitness vs. ear-witness evidence. One of the justifications for the exclusion of hearsay is that the memory of what is heard is thought to be less reliable than the memory of what is seen and that it is difficult to assess the truthfulness of the original utterer, who is not under oath, and cannot be cross-examined (Phillips 1993:254). The incongruity of evidence law from the perspective of oral history is that court proceedings are conducted primarily in oral form.

Cultural integrity test

The Supreme Court interpreted oral history by referring to the phrase “practices, customs and traditions” which had been used in conjunction with the application of a test which was first articulated and successfully applied from anthropological evidence presented in the Sparrow case. In *R. v. Sparrow*, the Musqueam First Nation asserted an aboriginal right to fish for salmon for food and ceremonial purposes. The anthropologist Wayne Suttles established the special position occupied by the salmon fishery in Musqueam society, not only as food but also in the system of beliefs and ceremonies of the Salish people (which included the Musqueam). In addition, Suttles presented archaeological and ethnohistorical material and linguistic evidence which demonstrated that the respect and practices shown toward salmon by the Musqueam resulted in its conservation. The Court was persuaded by this evidence and decided “that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day” (*R. v. Sparrow* 1990).

The “integral to distinctive culture” principle accepted in *R. v. Sparrow* (1990) was enlarged in scope to that of a legal test in the *R. v. Van der Peet* decision. In *Van der Peet* the Sto’lo asserted an aboriginal right to sell salmon. The Supreme Court held that:

to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. A number of factors must be considered in applying the “integral to a distinctive culture” test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable [*sic*] to the Canadian legal and constitutional structure...

to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question — one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society

(e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. The concept of continuity is the means by which a “frozen rights” approach to s. 35(1) will be avoided. It does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after interruption (*R. v. Van der Peet* 1996:178).

It was on the basis of this test that the Supreme Court held that the factual findings made by the trial judge in *Delgamuukw* could not stand, “because the trial judge’s treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*.” (The Supreme Court also noted that the *Van der Peet* decision had been made after the 1991 *Delgamuukw* trial decision).

And herein lies what the Supreme Court meant by oral history. The Court understood that oral history of the type described in the report of the Aboriginal Commission which cannot be corroborated by historical evidence, is of a type which fits into the category of “practices, customs and traditions”, and as such, is subject to the cultural integrity test. This did not mean that all types of oral history would be subject to the test. All oral histories were subject to historical verification and in particular this applied to oral histories described above in (1) declarations of diseased persons, and (3) personal recollections. But oral histories of a special kind, that is (2) *kungax* and *adaawk*, because of their distinctive cultural quality, could not be subject to historical verification, and would be subject to the cultural integrity test:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents (Delgamuukw v. British Columbia 1998:49-51).

To merit constitutional protection, which is the principal concern of the Court in aboriginal claims issues, the practice, custom or tradition which has been proven to the Court's satisfaction to be integral to the aboriginal community as an organized society must also be shown to have continuity with the aboriginal practices, customs or traditions. The Court further defined aboriginal rights by stating that aboriginal rights existed prior to contact, and aboriginal title existed pre-sovereignty (Delgamuukw v. British Columbia 1998:65-66).

Although the Supreme Court acknowledged that oral history may have several forms, the Court put weight on the *adaawk* and *kungax*, because they are "repeated, performed and authenticated at important feasts" and because these appear to fit the definition of attributes subject to the cultural integrity test (Delgamuukw v. British Columbia 1998:51). This conclusion contrasts with the factual findings made by the trial judge, who had found that the *adaawk* was seldom recited at feasts, and that some chiefs never told the *adaawk*. In addition the trial judge had found that the verifying group to the *adaawk* was too small to express the reputation² of the community, that the *adaawk* lacked detail about specific lands and may have related to areas outside the territory and to people outside the territory. The trial judge also stated that the archaeological evidence did not support the location of the ancestral villages identified in the *kungax* and *adaawk* (Delgamuukw v. British Columbia 1998:53).

The inconsistencies identified by the trial judge were based on the assumption that the cultural evidence required support from the historical evidence before it could be given weight. The Supreme Court, however,

held the view that the *adaawk* (and *kungax*) by their very existence were cultural forms through which the two groups could establish a pre-sovereignty land relationship and that the content of these forms was not subject to historical (or archaeological) scrutiny.

When the Supreme Court found that oral histories should be correctly assessed and given independent weight, it would appear to mean that oral histories should be assessed by corroboration and verification with other historical evidence, but that oral histories of a special kind, those which are more like “practices, customs and traditions,” should be subjected to the cultural integrity test. It would appear that what the Court meant by oral histories of a special kind are ORAL TRADITIONS, as these would fit the definition of elements subject to the test. Therefore, this special form of oral history or oral tradition, could establish an aboriginal connection to the land in the absence of any other historical evidence. Unfortunately, the Court did not distinguish between oral history and oral tradition and used them interchangeably.

The cultural integrity test as applied in *Sparrow* and *Van der Peet* is not without an historical dimension. To prove cultural integrity among the Musqueam, Suttles relied upon ethnohistorical and archaeological evidence in conjunction with other cultural forms of evidence. This would seem to imply that the vehicle for transmitting the oral tradition (feast, dance, song, etc.), rather than the substance, needed to be historically and culturally grounded.

Joel Fortune (1993) provided insight on this issue in his paper published before the Supreme Court decision. He noted that oral traditions were introduced at the trial in *Delgamuukw* to establish the very existence of a people, to demonstrate that the Gitksan and Wet’suwet’en had a culture, and the “character and quality of that culture.” Fortune also stated that:

the ‘truthfulness’ of stories handed down through generations is not the

issue; rather, the issue is simply whether that tradition continues to exist. The story functions solely as evidence that a tradition is being followed; the testimony of knowledgeable contemporaries is useful to establish the credibility of the spokesperson; that he or she did not simply fabricate the stories (1993:98).

But if this is a true understanding of cultural integrity, then the trial judge's finding that the *adaawk* was seldom recited at feasts, that some chiefs never told the *adaawk*, and that the verifying group to the *adaawk* was too small to express the reputation of the community, differs from the Supreme Court's understanding that the *adaawk* (and *kungax*) are subject to the test as they are "repeated, performed and authenticated at important feasts" (Delgamuukw v. British Columbia 1998:51).

The Supreme Court effectively excised "history" from the term "oral history" and substituted "culture," through the word "tradition" as in oral tradition, so as to make this conception fit the "practices, customs or traditions" articulated in the cultural integrity test. This is possible because the Court accepted a definition of oral history as a social construct "tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth." The cultural integrity test was newly created by the Court and readily available for legal application. Therefore, when the Supreme Court decided that oral histories should be correctly assessed and given independent weight, while at the same time stating that oral history "should be weighed, like all evidence, against the weight of countervailing evidence [i.e., historical evidence] and not against an absolute standard," it would appear to be weighing the vehicle in which the oral history is being transmitted rather than the substance of the oral history.

ORAL HISTORY IN THE COURTS BEFORE AND AFTER DELGAMUUKW

Prior to the Supreme Court decision, Canadian courts dealt with oral history

and its absence by applying various interpretations. Although much is made of the issue that oral history has been subject to exclusion by the hearsay rule (McLeod 1992), exclusion of oral history for this reason has rarely been the case, but this rule does serve as an evidentiary hurdle.³ The following cases involve Ojibwa, Mi'kmaq and Cree oral history which has been introduced into various courts before and after the 1997 *Delgamuukw* decision.

In the 1984 case, *Ontario v. The Bear Island Foundation*, the Temagami Band claimed that they were not parties to the 1850 Robinson Treaty and that they had unextinguished aboriginal title to certain tracts of land in Northern Ontario. The Supreme Court of Ontario penalized the aboriginal claimants for introducing oral history in a form that was not acceptable to the Court. Justice Steele described "Indian oral history" as admissible in aboriginal land claims "where history was never recorded in writing." However, he also stated that "the court should always be given the best evidence." He went so far as to say that the Court had an obligation to weigh the evidence and "if such best evidence is not introduced, to consider making an adverse finding against the person who has failed to produce it." The Court also recognized that oral evidence, like other evidence, was not always accurate and may be contradicted by factual [i.e., written] records: "This shows that while oral evidence must be weighed like other evidence, consideration must be given to the faultiness of human memory" (*Attorney General for Ontario v. Bear Island Foundation et al.*, 1984).

The Ontario Court reprimanded the Temagami Band for *not* bringing forward oral history:

In a matter of this importance I expected all of the older people in the Temagami band who were able to give useful evidence would have been called. Throughout the trial I had an uncomfortable feeling that the defendants, in presenting their case, did not want the evidence of the

Indians themselves to be given, except through the mouth of Chief Potts (Attorney General for Ontario v. Bear Island Foundation et al., 1984:28).

Justice Steele apparently understood that oral history was something “handed down between father to son” which could then be presented as evidence by “old people.” The acknowledged old people who knew the most about the oral history of the Temagami Band were in Steele’s view “inexplicably not called to give any such evidence” (Attorney General for Ontario v. Bear Island Foundation et al., 1984:29). In particular Steele faulted the method by which Chief Potts acquired his oral tradition, which apparently occurred after the Chief had read Frank Speck’s 1915 study, *Family hunting territories and social life of various Algonkian bands of the Ottawa Valley*. This then led the Chief to ask questions of the old people of the Temagami Band. According to Steele, “this was obviously not oral tradition in the normal sense.” Steele expected oral history to be provided by elders (‘old people’) and transmitted to a younger generation. For this reason Steele doubted the credibility of the oral history introduced by the Chief because he was not an elder, had mixed blood ancestry and could not speak Ojibwa which, in Steele’s view, indicated that the Chief could not communicate with the elders. This understanding of oral history negatively influenced not only the oral history evidence submitted by the Chief, but the weight that the Court gave to evidence presented by the non-Indian expert witnesses on the basis of the failure to present “the best evidence” (Attorney General for Ontario v. Bear Island Foundation et al., 1984:35).

Over a decade later, in 1995, the Federal Court of Canada decided the *Sawridge* case. The Sawridge First Nation, located near Slave Lake in northern Alberta, claimed that Bill 31 (which was intended to allow thousands of treaty-status women who had married non-treaty men, or people who had previously lost their status for a variety of other reasons, to regain treaty status) had infringed their right to control band membership.

The First Nation claimed that the control of band membership was an aboriginal and treaty right and that this right involved the practice of a marital custom which permitted Indian husbands to bring non-Indian wives onto the reserve, but denied Indian wives to bring non-Indian husbands onto the reserve (*Sawridge Band v. Canada* 1995).

The Federal Court found that “oral history” was being used to perpetuate patriarchal customs and undermine gender equality, a condition considered “repugnant” to natural justice and equity. According to Judge Muldoon, the ancient oral history of Indian peoples and their tradition of handing down to each generation the stories of their cultures and histories provided information that, when compared with the historical and anthropological evidence presented by the defense, was “so unreliable” that it amounted to “skewed propaganda, without objective verity.” Muldoon described the oral history evidence as “ancestor advocacy or ancestor worship,” which was “one of the most counter-productive, racist, hateful and backward-looking of all human characteristics, or religion, or what passes for thought.” Muldoon recommended that oral history should be written down “at the earliest possible time in order to avoid some of the embellishments, which render oral history so unreliable” (*Sawridge Band v. Canada* 1995:195, 196).

Muldoon took issue with (and offence at) the Band’s assertion that “women follow men,” that is, that traditionally women moved into the tribal community of their husbands and that women who married men outside the community were not permitted to live in their natal communities or bring their husbands. The Court dismissed the case, finding that the Constitution exacted provisions for the equality of rights between males and females, “no matter what rights and responsibilities may have pertained in earlier times.” The Court had difficulty with the idea that a marital right in which women lost the right to live in their communities upon marriage could ever be

recognized as an aboriginal right since such a right would affirm a “terrible inequality” (*Sawridge Band v. Canada* 1995:142, 191).

After the Supreme Court’s *Delgamuukw* decision, oral evidence was submitted in the *Lac La Ronge Indian Band v. Canada*, a treaty land entitlement claim in which the Lac La Ronge Indian Band of Saskatchewan, as parties to Treaty 6, claimed unfulfilled treaty land entitlement. Oral history was presented, weighed and excluded, as the Saskatchewan Court of the Queen’s Bench decided that the persons giving the evidence were political activists. The Court would have recognized elders, “who hold a unique position in Indian culture and society,” and found that oral history” should have been put forward by the elders themselves and not filtered through a third party” (*Lac La Ronge Indian Band v. Canada* 2000:293). In addition the Court found that the language the witnesses used in their testimony relied on modern land claim terminology, particularly the use of the words “current population formula.” This use was difficult for the Court to accept as oral history since the phrase was of recent origin.

Although the Saskatchewan Court did attempt to interpret *Delgamuukw* principles by stating that it would apply the phrase “practices, customs and traditions” to oral history, it ultimately decided that the witnesses had “interpreted what the ancestor said and then passed on the interpretation.” Although admitted, little weight was given to the oral history (*Lac La Ronge Indian Band v. Canada* 2000:265, 266, 293).

Oral history was introduced by a Mi’kmaq hereditary leader, Chief Augustine, who was also acknowledged and validated by the Nova Scotia Provincial Court as a Native history researcher and Acting Curator of Eastern Maritime Ethnology at the Canadian Museum of Civilization (*R. v. Marshall* 2001:268). In the 2001 *Marshall* timber case, the Mi’kmaq were charged with cutting and removing timber on Crown land in Nova Scotia without authorization. The Mi’kmaq claimed they were exempt through

unextinguished aboriginal title and treaty rights of 1760-1761.

On the basis of Chief Augustine's education and profession, it was unclear to the Court how much of his oral history evidence was derived from his ancestors and how much was obtained through written sources. The only oral history provided by the Chief was a creation story and a story called the *Getoasaloet*, which he stated he had received from his grandmother and had repeated at meetings of the Grand Council. Chief Augustine also introduced as evidence a replica of a wampum belt to substantiate the Mi'kmaq association with Christianity, which he claimed dated to the early 17th century (R. v. Marshall 2001:269-270).

The actual wampum belt was found in the Vatican archives and dated 200 years later than stated by the Chief and was determined to have no association with the Mi'kmaq. Although the lawyers for the Mi'kmaq withdrew the wampum belt evidence, this error was held against the Mi'kmaq as the Court decided that the error "amounted to an acknowledgement that Chief Augustine was wrong about the belt. I said I would consider that error in weighing Chief Augustine's other evidence." The Court also took issue with the fact that oral history was being introduced by a single witness, that no evidence was presented from other "tradition bearers," and that there was no historical evidence to support the aboriginal (or treaty) existence of a Grand Council (R. v. Marshall 2001:269). The Court's findings on the recent origin of the Grand Council subsequently reduced the weight attached to the oral history value of the creation story.

Despite the findings of the various courts, these cases suggest that the courts consider oral history as a compulsory form of evidence for aboriginal claimants. Oral history must be introduced as evidence if it is the best evidence. If oral history is introduced and fails to pass historical tests, little weight will be given to it, and failed oral history evidence may bring into question the veracity of the other evidence adduced from the oral history.

The courts require that oral evidence be given by elders and preferably by more than a single witness. The courts will reject such practices, customs or traditions which are considered unconstitutional or repugnant to natural justice. The courts will derogate oral evidence introduced by persons other than elders, including the evidence of expert witnesses. The courts require that oral evidence not be influenced by written sources and that the use of modern language may suggest a contemporary origin. It is evident from the cases that the courts are defining oral history by what it is not.

PRACTICES, CUSTOM AND TRADITION

As the courts do not distinguish between oral history and oral tradition, they hold a common view that they are the same and that they consist of “formalized historical accounts being passed down from generation to generation by specialists [elders] whose duty it is to recite and transmit them accurately” (Finnegan 1970:197). The forms of oral history introduced in the above cases did not fit the special kind cited in the Delgamuukw decision that would warrant independent consideration by means of the cultural integrity test, although the Court in Lac La Ronge did interpret the word “traditions” to be oral traditions as in the cultural integrity test, and in the Mi’kmaq case the creation story was not challenged but the antiquity of the Grand Council as the vehicle of its transmission was challenged, which contributed to less weight being given to the story supporting the Mi’kmaq claim.

As previously noted, the basis of the cultural integrity test is the phrase, “practices, customs and traditions.” But what anthropological meaning do these terms have? The term “practice” has no special anthropological definition or understanding so that a dictionary definition of “habitual or customary action or act” will suffice. Its effect after Delgamuukw (Delgamuukw v. British Columbia 1998:65-67) is that the practice, whether

feasting, hunting, fishing, gathering, etc., should be demonstrated to have its origin pre-contact (aboriginal rights) or pre sovereignty (aboriginal title).

Anthropological discourse has generally abandoned the term “custom” and replaced it with the term “tradition” but this latter term contains mixed messages, particularly if tradition is examined cross-culturally. Shanklin (1981) analyzed the meaning and uses of “tradition” in its anthropological usage and determined that tradition is used as both a passive analytic construct in theoretical anthropology and as an active indigenous force as recorded in the ethnographic literature.

If used actively, tradition is subject to change, considered a creative process and subject to invention. If used passively, tradition is considered a storage repository. Shanklin (1981:71, 77, 79) concluded that even in its passive storage form, tradition stores selected traits which are not necessarily old or even indigenous. In its active use, tradition is used to obtain goals, rationalize behavior and set legal precedents, which can vary according to political context.

That cultural traditions and, by association, oral traditions consist of an element of invention has been demonstrated by Allan Hanson (1989). He described how Maori “traditional culture” was increasingly recognized to be more an invention constructed for contemporary purposes than a stable heritage transmitted from the past. Hanson also noted that anthropologists often participated in this creative process of tradition. Hanson’s intention was not to strip away the invented portions of the tradition, but to examine how these portions acquired authenticity for the culture, including why parts of traditions are rejected or supplemented.

The definition, understanding, and limitations of the use of the word “tradition” and its transmission have important consequences for litigation. It is apparent that the courts would seem to apply oral history as a form of oral tradition in its passive storage capacity.

ORAL HISTORY: TOWARD A WORKING MODEL

The interests of the courts are straightforward: to establish whether an aboriginal right exists and whether it deserves protection. As the cases cited illustrate, it is crucial that the oral history evidence be presented in a form that is recognizable to the courts. According to Von Gernet's (1996) survey of the oral history literature, most scholars distinguish between oral history and oral traditions, but not all do. With the objective of clarifying the definition of oral history for aboriginal claims purposes, the following working model is proposed.

Oral evidence can be separated into three discrete types: oral tradition; oral history; and elder testimony. One of the characteristics distinguishing among the types is the degree of transmission. For practitioners who use oral history in aboriginal claims, greater clarification is in order if they are to be responsive to the literature and the demands of the courts. Since oral history accounts are ultimately weighed, the types of oral evidence need to be defined and distinguished.

Oral tradition

Oral tradition is a type of oral source in which a message considered important to a group, but not witnessed first-hand by the narrator or performer, is transmitted over generations (LaGrand 1997:75). No living members of the community experienced these events or saw the original people (or animals) referred to in the deeds (Henige 1974:106). The message is often transmitted through a formal, structured, even ritualized, process involving sacred objects, site-specific myths and totemic entities (see Vansina 1985:198). Oral tradition can link sacred areas with language, and illuminate the cultural principles of land relationships (Sutton 1996).

The transmission of tradition is facilitated by good communication between peoples, frequent social gatherings, and regular reference to the

presence of large audiences (Finnegan 1970:197; LaGrand 1997:82). Among peoples speaking Algonquian languages, oral tradition may appear in creation stories and societies like the Midewiwin, pipe ceremonials, dances, songs, political organizations and other societies. Narrators and performers try to stay as close as possible to the original message, often through the use of mnemonic aids (totems, sacred language, wampum belts, scrolls, drums, places, pictographs, etc.). The recounting of the oral tradition emphasizes the continuity of the group over the individual. This is significant in litigation as the courts have determined that aboriginal rights descend communally (Delgamuukw v. British Columbia 1998:25).

The principal value of oral tradition in aboriginal claims is to demonstrate the communal collective aspect of rights, establish a spiritual relationship to land, and establish a sense of continuity between the past and present.

Oral history

Oral history is a type of oral source in which an individual expresses firsthand experiences in narrative form. It is a subjective account, which is similar to a spoken autobiography but often treated as a narrative. There is no formal process of transmission from generation to generation. Through oral histories people attempt to make sense of the meaning of events (Cruikshank 1992). Oral history is a transactional event based on collaboration between narrator and interviewer and concerned with “how people perceive their roles in the context of historical time” (LaGrand 1997:76). The influence of the listener, collaborator, or interviewer is always present. As oral history is elicited information, it is subject to the influence of contemporary social and political situations.

The recording of oral histories is influenced by the relationship of the interviewer and narrator, the questions asked, and the circumstances leading

to the acquisition of the oral history (in this case land claim or litigation). Depending upon how the information is obtained, there can be problems with bias and leading questions.

The principal value of oral history for aboriginal claims is to establish the meaning of past events through links between past and present. It can also assist in community healing, especially if it is part of a compensation claim.

Elder testimony

Elder testimony is oral testimonial evidence which provides collective common knowledge about the past obtained through individual recollections of the past as experienced by eyewitnesses. Elders are persons who can be both historical witnesses and “tradition bearers” as validated by the community. Elder testimony is recalled through informal transmission which does not crystallize into a recitation (Finnegan 1970). The information derived from elder testimony is closer to primary historical (and anthropological) evidence than oral tradition or oral history (LaGrand 1997:77). Its source is experiential and behavioral in form as it is acquired through culturally defined repetition of activities (“practices”) such as capturing, processing, gathering, distributing, consuming and celebrating. It is through these practices that appropriate cultural information and structural values of the group, including kinship, are transmitted. In its collective form the transmission of elder testimony is sometimes called traditional knowledge, is vaguely synonymous with ethnography, spans generations and is not limited to the exchange of information between closely related peoples. It involves the transfer of appropriate information (and behavior) to succeeding generations to ensure that core principles of the culture group are reproduced over time.

The information obtained from elder testimony assumes that memory

resides not only in “explicit knowledge but also in patterned ways of thinking and reacting, for the most part unselfconsciously” (Rogers and Rogers 1982: 168, 169). The principal value of elder testimony is to establish the primary link between people, principles, knowledge, land and the past and thereby integrate cultural context into the information cited in oral traditions and oral histories. Elder testimony should be recognizable to the court as it corresponds to Wigmore’s (1904:820) category of evidence called Testimonial Recollection (and used in *Delgamuukw* as “personal recollections”), which is evidence based upon observation (knowledge) and communication (narration).

Based upon the proposed working model, “oral history” as currently being used by the courts is a misnomer misapplied. As the courts seem focused on a particular understanding of oral history, it is important to clarify what oral history is and is not. An initial measure may be to recognize elders as experts.

ELDERS AS EXPERTS

Although expert evidence from academic and professional anthropologists has been the principal means of introducing oral evidence, the courts appear willing to hear from the real experts on aboriginal culture, elders. However, the courts appear to have a romantic view⁴ of who elders are, other than they are “old people” and confuse oral tradition with oral history.

It is a reality for many aboriginal communities⁵ that “Indian” pasts are either unknown, have been rejected, or have been invented for various reasons. This can be attributed to the effects of the Indian Act, discrimination, and Indian removal policies, including the residential school system, and to the fact that not all groups are interested in transmitting oral history. In some communities, a resurgence in oral history occurred about 1970, when Native history and traditions had “regained respectability”

(Rogers and Rogers 1982:160). In addition, amendments to the Indian Act, which had since 1927 prohibited Indian bands from paying lawyers, and the creation of a newly established land claims process by the federal government in the 1970s have contributed to an interest in oral history.

As part of the resurgence, “professional elders” have emerged, who may vary in age and politics but are recognized as community representatives. In many communities professional elders hold paid political positions and dispense services from prayers and spiritual advice to dispute resolution. As aboriginal claims have become a principal agenda of community level politics, the role of elders has responded to these changes.

As a result of these changes, oral history and elder testimony as defined in the working model may be the principal forms of oral evidence available. Oral histories, as described in the working model, are inherently more subject to change because of influences in the contemporary social and political situation, and these changes require scrutiny if this form of oral evidence is to be used in litigation. The value of oral history to the community and its value as evidence are often confused by anthropologists because of differing evidentiary standards and purposes (Kew 1993).

One of the sources often quoted by the courts to assist in their decision-making is Wigmore’s *Treatise on the system of evidence at trials at common law*. Wigmore (1904:669) described different kinds of expert capacity, including an expertise which is obtained through the “ordinary fortunes in life—the kind of skill in the ordinary use of the senses which is developed necessarily, in the course of the daily doings, for every mature member of society.” Wigmore also identified a second type of expert which is the type commonly known to the court as persons who have some “special and peculiar experience,” which included “systematic training or scientific experience, directed deliberately at the acquisition of fitness and involves the study of a body of knowledge.” According to Wigmore (1904:669) there

is no “legal significance” in the distinction between the two types of expert as “each shades into the other imperceptively.”

If the courts expect elders or “old people” to give evidence, and if the courts view elders as tradition or culture bearers and historical witnesses, it would seem, based upon Wigmore’s definitions, that the courts would also have the scope to validate elders as experts.

EXPECTATIONS POST-DELGAMUUKW

If the Supreme Court’s decision in *Delgamuukw* created an expectation that the use of oral history as evidence will be facilitated by the courts or that oral history stands separate from historical and other evidentiary standards, then this view requires reconsideration. Whether oral history as evidence will facilitate the proof of aboriginal rights by any aboriginal community that seeks recourse to the courts will depend on the quality and type of oral history, its relationship to other evidence (see Von Gernet 2000), the issue which requires arbitration, and how the oral evidence has been obtained, transmitted and presented.

Although the Supreme Court stated that the trial judge had “expected too much” of oral history (*Delgamuukw v. British Columbia* 1997:54), at this point, the only certain expectation is that the Courts expect something called “oral history” to be introduced in aboriginal litigation. The full implications of the *Delgamuukw* decision for oral history will remain unclear until further decisions come from the courts.

Notes

1. An earlier version of this paper, entitled ‘*Delgamuukw*: The future of oral history in land claims,’ was presented to the Canadian Anthropological Society Conference, Toronto, 1998.

2. Reputation can involve community acknowledgement of public or general rights (Roness and McNeil 2000: 68).
3. Note that in the Khan case the court took the following position on hearsay: The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions (R. v. Khan 1990).
4. Richard Wagamese (1998) is one of the few Ojibwa writers who have stated that romanticized Native traditions are harmful to Native identity.
5. As a professional anthropologist who has been involved in aboriginal land claims issues for over 20 years, the writer has interviewed elders about aboriginal claims in various Algonquian communities in Ontario, Saskatchewan and Alberta.

References

- Asch, Michael. 1992. Errors in Delgamuukw: An anthropological perspective. *Aboriginal title in British Columbia: Delgamuukw v. The Queen*, ed. by Frank Cassidy, pp. 221-243. Lantzville, British Columbia: Oolichan Books and Institute for Research on Public Policy.
- Attorney General for Ontario v. Bear Island Foundation. 1984. Reasons for Judgment in the Supreme Court of Ontario between The Attorney General for the Province of Ontario (Plaintiff) and the Bear Island Foundation and Gary Potts, William Twain and Maurice McKenzie

- Jr. ... (Defendants).
[\[http://www.landclaimsdocs.com/court/html/agontvfran.htm\]](http://www.landclaimsdocs.com/court/html/agontvfran.htm)
- Canada. 1996. *Report of the Royal Commission on Aboriginal Peoples*. Ottawa.
- Cruikshank, Julie. 1992. Invention of anthropology in British Columbia's Supreme Court: Oral tradition as evidence in 'Delgamuukw v. B.C.' *B.C. Studies* 95:25-42.
- Culhane, Dara. 1992. Adding insult to injury: Her Majesty's loyal anthropologist. *B.C. Studies* 95:66-92.
- . 1998. *The pleasure of the Crown: Anthropology, law and first nations*. Burnaby, B.C.: Talonbooks.
- Delgamuukw v. British Columbia. 1998. *Canadian Native Law Reporter* 1:14-97.
- Finnegan, Ruth. 1970. A note on oral tradition and historical evidence. *History and Theory* 9:195-201.
- Fisher, Robin. 1992. Judging history: Reflections on the Reasons for Judgment in 'Delgamuukw v. B.C.' *B.C. Studies* 95:43-54.
- Fortune, Joel, R. 1993. Construing Delgamuukw: Legal arguments, historical argumentation, and the philosophy of history. *University of Toronto Faculty of Law Review* 51:80-117.
- Hanson, Allan. 1989. The making of the Maori: Culture invention and its logic. *American Anthropologist* 91:890-902.
- Henige, David. 1982. *Oral historiography*. London: Longman.
- Kew, Michael. 1993. Anthropology and First Nations in British Columbia. *B.C. Studies* 100:78-105.
- Lac La Ronge Indian Band v. Canada, 2000. *Canadian Native Law Reporter* 1:245-397.
- LaGrand, James B. 1997. Whose voices count? Oral sources and twentieth-century American history. *American Indian Culture and*

Research Journal 21:73-105.

- McLeod, Clay. 1992. The oral histories of Canada's northern people, Anglo-Canadian evidence law, and Canada's fiduciary duty to First Nations: Breaking down the barriers of the past. *Alberta Law Review* 30:1276-1290
- Miller, Bruce G. 1992. Introduction: Anthropology and history in the courts. *B.C. Studies* 95:3-6.
- Philips, Susan U. 1993. Evidentiary standards for American trials: Just the facts. *Responsibility and evidence*, ed. by Jane H. Hill and Judith T. Irvine, pp. 248-259. Cambridge: Cambridge University Press.
- R. v. Khan, 1990.
[http://www.lexum.umontreal.ca/cscscc/en/pub/1990/vol2/html/1990scr2_0531.html]
- R. v. Marshall. 2001. *Canadian Native Law Reporter* 2:256-290.
- R. v. Sparrow. 1990. *Canadian Native Law Reporter* 3:160-188.
- R. v. Van der Peet. 1996. *Canadian Native Law Reporter* 4:177-286.
- Ridington, Robin. 1992. Fieldwork in courtroom 53: A witness to Delgamuukw v. B.C. *B.C. Studies* 95:12-24.
- Rogers, Edward S., and Mary Black Rogers. 1982. Who were the Cranes? Groups and group identity names in Northern Ontario. *Approaches to Algonquian archaeology: Proceedings of the Thirteenth Annual Conference*, ed. by Margaret G. Hanna and Brian Kooyman, pp. 147-188. Archaeology Association of the University of Calgary.
- Roness, Lori Ann, and Kent McNeil. 2000. Legalizing oral history: Proving aboriginal claims in Canadian courts. *Journal of the West* 39 (3):66-74.
- Sawridge Band v. Canada, 1995. *Canadian Native Law Reporter* 4:121 - 230.
- Shanklin, Eugenia. 1981. Two meanings and uses of tradition. *Journal of*

Anthropological Research 37(1):71-89.

Simpson, Jeffrey. 1998. Oral evidence finds a protector in the Supreme Court. *Globe and Mail* (18 February).

Speck, Frank, G. 1915. *Family hunting territories and social life of various Algonkian bands of the Ottawa Valley*. Memoirs of the Canadian Geological Survey, 70. Ottawa.

Storrow, Marvin R.V., and Michael J. Bryant. 1992. Litigating aboriginal rights cases. *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. by Frank Cassidy, pp. 178-192. Lantzville, British Columbia: Oolichan Books and Institute for Research on Public Policy.

Sutton, Peter. 1996. The robustness of aboriginal land tenure systems: Underlying and proximate customary titles. *Oceania* 67(1):7-29.

Vansina, Jan. 1985. *Oral tradition as history*. Madison: University of Wisconsin Press.

Von Gernet, Alexander. 1996. Oral narratives and aboriginal pasts: An interdisciplinary review of the literature on oral traditions and oral histories. Indian and Northern Affairs Research & Analysis Directorate. Ottawa.

———. 2000. What my elders taught me: Oral traditions as evidence in aboriginal litigation. *Beyond the Nass Valley: National implications of the Supreme Court's Delgamuukw decision*, ed. by Owen Lippert, pp. 103-129. Vancouver: Fraser Institute.

Wagamese, Richard, 1998. Reconstructing aboriginal history, *Anishinabek News*, pp. 13-16. Nipissing: Union of Ontario Indians.
[http://www.firstnationsdrum.com/history/fall98_hist2.htm.]

Wigmore, John Henry. 1904. *A treatise on the system of evidence at trials at common law*. Boston: Little, Brown.

Source: *Ignace v British Columbia (Attorney General)*, 2019 BCSC 10
Reasons delivered by: Hon. Mr. Justice Abrioux
Published by: CanLII
Stable URL: <<https://canlii.ca/t/hwvkk>>

Ignace v British Columbia (Attorney General)

2019 BCSC 10

I: INTRODUCTION

[1] In its amended notice of civil claim, the plaintiffs, Stk’emlupsemc te Secwepemc Nation (“SSN”), seek, amongst other relief, declarations that they hold Aboriginal rights and title “to all or part of the Stk’emlupseme te Secwepemc Territory which is part of Secwepemc Traditional Territory in the Kamloops region of British Columbia”.

[2] The territory in question, which is comprised of approximately 1.25 million hectares of land near the confluence of the North and South Thompson Rivers at Kamloops and Savona, British Columbia, also includes

the Ajax Mine project, which is owned by one of the defendants, KGHM Ajax Mining Inc. (“KGHM”). Together with KGHM, the Province of British Columbia (the “Province”) and the Attorney General of Canada (“Canada”) are the defendants in this matter (collectively referred to as the “Defendants”).

[3] The claim for this action was filed in September 2015. No trial date has been set nor has the number of days of trial been determined. In November 2017, the parties requested the appointment of a judicial management and trial judge. This request was not acceded to by the Chief Justice “given the present number of vacancies on the court” at that time.

[4] This application is brought within the early stages of this Aboriginal land title claim and raises issues regarding the balance to be sought between procedures for taking evidence under the British Columbia *Supreme Court Civil Rules* [Rules], specifically depositions, and the need to accommodate non-traditional methods of giving evidence in the Indigenous context, including the role of interpreters/word spellers and certain Elders testifying as part of a panel. I am advised by counsel that the issue of panel or “collective” evidence has yet to be considered by a Canadian court, although it is somewhat addressed in the Federal Court of Canada *Rules of Court*. Furthermore, this issue has been considered in Australia, albeit not within the context of depositions or the giving of evidence at a trial.

[5] On this application, SSN seeks:

- (a) an order in the form of a proposed deposition protocol (the “Deposition Protocol”) or alternatively, directions on the process for taking depositions in this proceeding;
- (b) directions addressing the process in which deposition evidence is taken, particularly for two central disputed issues:

- whether certain SSN Elders may be deposed with the assistance of a “word speller” and/or interpreter to translate from Secwepemctsin (Secwepemc dialect) to English, and the limitations on what the word speller’s role is; and
- whether certain SSN Elders may be deposed as a panel in accordance with their traditional customs and practices and what evidence individual members of the panel may give.

[6] Both prior to and during the hearing of this application, the parties refined their positions and agreed on certain matters, but the court’s intervention is still required with respect to:

- (a) whether a blanket Deposition Protocol is appropriate at this stage of the proceedings;
- (b) the role of the interpreter/word speller, which is raised by the deposition of Elder Christine Simon; and
- (c) whether the evidence of Elder Delores Jules can be taken as part of a panel including Elder Loretta Seymour and their daughters, with all four of the women’s testimony constituting the “collective” evidence.

[7] For the reasons that follow, I have concluded that:

- (a) while the parties have agreed to certain elements of a Deposition Protocol, unless the terms are also agreed to by the parties, it is premature for the court to order additional terms to constitute the “blanket protocol”, as these terms could apply to witnesses who have not yet been identified;

(b) the interpreter/word speller's Affirmation or Oath shall be in the form of instructions proposed by the Province in the draft referred to below;

(c) Ms. Jules' deposition evidence may be given as part of a panel and constitute collective evidence in the form of the order proposed by Canada in the draft below. The admissibility of this evidence shall be determined by the trial judge.

II: BACKGROUND

[8] The factual background to the application is not significantly in dispute. What follows is largely excerpted from SSN's written argument.

[9] SSN intends to rely on oral history evidence at trial, citing *William et al. v. British Columbia et al.*, 2004 BCSC 148 [*William*] as authority. In particular, SSN submits that its Stsq'ey' (Indigenous law), which reflect Secwepemc spirituality and SSN's connection to its Territory, support its claim to Aboriginal title. *William* cites *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 and *Mitchell v. M.N.R.*, 2001 SCC 33 for the proposition that the admissibility of oral history and traditions will be determined by the trial judge on a case-by-case basis.

[10] As pleaded by SSN:

(a) The Stsq'ey' comprise the experiences of Secwepemc ancestors on the land.

(b) The Stsq'ey' are written in physical markings on the land and told in Secwepemc stories.

(c) These Stsq'ey' are integral to SSN's claim to Aboriginal title.

[11] In *William* at para. 21, Justice Vickers outlines three categories of

oral history evidence. The first, “creation stories”, involves spiritual stories or legends which explain certain landmarks or the nature of particular animals and their relationship with the communities. The second involves stories that require the relating of genealogy. The final category involves witnesses telling stories of past practices, events, customs or traditions. For all three categories of oral history evidence, Vickers J. states that hearsay evidence may be necessary to tender evidence where the original witnesses are no longer alive, or, with respect to the second category, if the descendant of a person or the tracing of family lines is relevant to an issue before the court.

[12] SSN anticipates that the deposition evidence of its Elders will fall within similar categories as those articulated in *William*. SSN submits that its members can credibly and reliably give necessary and relevant oral history evidence in this proceeding. SSN intends to tender this evidence by way of deposition, as many Elders are in poor health and cannot be reasonably expected to travel to attend a future trial. It is also uncertain whether the Elders will live long enough to attend a trial.

[13] On May 31, 2018, SSN proposed to adduce the Stsq’ey’ and other relevant oral history evidence of the first round of Elders: Christine Simon, Delores Jules, Cecilia Peters, and Martha Simpson. These Elders will require an interpreter or “word speller” for their testimony, as many of whom only speak Secwepemctsin (the language of the Secwepemc). As noted by counsel for SSN, there are no certified translators for the Secwepemc language in British Columbia and many words in Secwepemctsin cannot be directly translated into English. The role of a “word speller” is to provide an English translation and to help the English speaker understand the meaning of the Elder’s story. As such, SSN seeks to have an interpreter/word speller attend the depositions as a translator.

[14] Further, SSN's customs for truth telling and the intergenerational transmission of oral history and knowledge dictate that oral histories are told in groups, rather than by individuals. Accordingly, SSN has proposed to adduce the Stsq'ey' and other relevant oral history evidence of Elder Loretta Seymour, Ms. Seymour's daughter Colleen Seymour, Elder Delores Jules, and Councillor Jeanette Jules – Delores Jules' daughter. Allowing these four women to provide deposition oral history evidence in a panel format would accord with SSN's customs and accommodate the Elders' needs during a deposition.

[15] Counsel have unsuccessfully attempted to reach an agreement on the procedure for admitting and using the oral history deposition evidence from the Elders which included a revised protocol.

III: THE DEPOSITION PROTOCOL

A: The Legal Framework

[16] Rules 7-8(1)-(3) in the *Rules* provide when depositions may take place:

Examination of person

(1) By consent of the parties of record or by order of the court, a person may be examined on oath before or during trial in order that the record of the examination may be available to be tendered as evidence at the trial.

Examination of person

(2) An examination under subrule (1) may be conducted before an official reporter or any other person as the court may direct.

Grounds for order

(3) In determining whether to exercise its discretion to order an examination under subrule (1), the court must take into account:

- (a) the convenience of the person sought to be examined;
- (b) the possibility that the person may be unavailable to testify

at the trial by reason of death, infirmity, sickness or absence;

(c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;

(d) the possibility and desirability of having the person testify at trial by video conferencing or other electronic means, and

(e) the expense of bringing the person to the trial.

[17] Rules 12-5(40)-(45) provide for the use of deposition evidence at trial:

Use of deposition evidence

(40) A transcript or video recording of a deposition under Rule 7-8 may be given in evidence at the trial by any party and, even though the deposition of a witness has or may be given in evidence, the witness may be called to testify orally at the trial.

Use of videotape or film

(41) If a video recording of a deposition is given in evidence under subrule (40) of this rule, a transcript of the deposition may also be given.

Certified transcript

(42) If a transcript of a deposition is certified as an accurate transcription by the person taking the deposition, the transcript may be tendered in evidence without proof of the signature of that person.

Video recording of deposition evidence

(43) A video recording of a deposition may be tendered in evidence without proof of its accuracy or completeness, but the court may order an investigation to verify the accuracy or completeness of the video recording.

Video recording of evidence becomes exhibit

(44) A video recording of a deposition tendered in evidence becomes an exhibit at the trial.

Deposition to be given in full

(45) If a transcript or video recording of a deposition is given in evidence,

(a) subrule (56) applies, and

(b) the deposition must be presented in full, unless otherwise agreed by the parties or ordered by the court.

[18] Generally, the party applying for deposition evidence bears the burden of departing from the normal rule that evidence be given *viva voce*: *Williams v. Fraser* (1925), 35 B.C.R. 481 (C.A.) at p. 483; *Byer v. Mills*, 2011 BCSC 158.

B: The Parties' Positions

[19] SSN argues that the *Rules*, including Rules 7-8 and 12-5, do not provide guidance on the points of disagreement between the parties with respect to the Deposition Protocol. However, the *Rules* do not preclude the court from providing necessary directions.

[20] SSN submits that the establishment of a blanket protocol for all deponents would not unduly prejudice the Defendants who will still be able to review any of the deponents proposed by SSN and object to an individual deponents in accordance with the Deposition Protocol. According to SSN, not having a procedure or protocol in place risks that the proceeding will become unduly complicated and prolonged by preliminary objections and interlocutory applications for each deponent. Further, there is a risk that after the depositions are taken from the Elders, the Defendants could raise objections that would prejudice the SSN from relying on the deposition evidence at trial. Accordingly, it is important to acquire directions prior to the parties embarking on a process that could involve multiple depositions.

[21] The Province and KGHM have never opposed the use of depositions for Elders who are of advanced age and/or in ill health, or those who may otherwise be unavailable for trial. However, they submit that SSN's proposed protocol would apply to witnesses that have yet to be identified, and point to the fact that SSN has only provided the names and justification for two witnesses. They say that a protocol already exists, being the *Rules*, and point to the fact that the relevant sub-rules refer to the deposition of "the person" to be examined, and not "persons" or a "panel of

persons”.

[22] Canada does not oppose SSN’s proposed Deposition Protocol, but sees no reason why both a Deposition Protocol and individual consent orders for each deponent are necessary. It argues that either consent orders should be agreed to for each witness, or that there should be a blanket protocol with individual consent orders only as needed.

C: Discussion

[23] I will not repeat the terms of the Deposition Protocol that the parties agree to, which covers what I would deem as non-controversial or “boilerplate” matters, such as:

- the timing of production of documents and will-say statements;
- where depositions are to be held and that they are to be videotaped; and
- that witnesses who are deposed may nonetheless give evidence at the trial.

[24] The parties disagree on whether there should be a form of consent order that will establish a practice for the depositions and/or the need for individual consent orders, failing which an application would have to be made.

[25] First of all, I agree with SSN that I have the discretion to order terms where the parties are unable to agree on the manner in which a deposition is to occur. However, given the early stages of the proceedings, I conclude that it is premature to place the Defendants in the position where they must apply to modify the Deposition Protocol. The burden is on SSN to satisfy this Court that an exception to the normal rule that witnesses should testify in person should apply.

[26] As the depositions and examinations for discovery occur in greater numbers, I suspect that counsel, who are all very experienced in this type of litigation, will likely be able to resolve issues that may arise with a given witness. However, as the onus is on SSN, the Defendants should not have to satisfy this Court as to the terms of a particular disposition, particularly when the identity of the witness is unknown.

[27] Accordingly, I order that absent a consent order relating to a specific witness, the parties must bring an application with respect to that witness. However, I will grant leave to SSN to renew an application for a blanket Deposition Protocol once there is a “sample size” of at least five witnesses who have been deposed. By that time, this Court will be in a better position to assess, taking into account consent orders or otherwise, whether a blanket Deposition Protocol would then be in the best interests of and promote efficiency in the trial management process. In addition, the orders I propose to make with respect to word spellers/interpreters and the panel/collective evidence will also have been specifically applied. This Court will then be in a better position to consider whether those orders, to the extent the parties disagree, should be included in a blanket Deposition Protocol.

IV: DEPOSITION EVIDENCE WITH A WORD SPELLER AND/OR INTERPRETER

A: Background

[28] Word spellers and interpreters have, by consent, been used in prior Aboriginal rights and title cases, such as the *Haida* proceedings.

[29] Mr. Darcy Deneault is the proposed interpreter/word speller for the deposition of Elder Christine Simon. Initially, it was SSN’s position that Mr.

Deneault's role would be limited to translating from Secwepemctsin to English.

[30] I note that the parties appear, at times, to use the term “translator” and “interpreter” interchangeably. In this portion of these reasons I shall refer to “interpreter/word speller”.

[31] On October 3, 2018, Mr. Deneault swore an affidavit in which he sets out his background and involvement with Skeetchestn Indian Band and the Secwepemctsin language. The affidavit also includes the following statements:

- I am a word speller, sun dancer, keeper of the pipe, eagle whistle carrier, and I conduct sweat lodge ceremonies and smudging;
- I have learned my family's and community's oral history from Elders, other relative and members of the Secwépemc community. Oral history in my Secwépemc community was passed to me by various Elders who spoke to me about it and took me out on the Territory to show me the stories;
- there are some oral histories that belong to family groups and other stories that belong to the Secwépemc community as a whole;
- the meaning of Secwépemc stories about the past is almost never self-evident. More than merely giving “facts” of “events” the stories operate on multiple levels. The stories' moral and social messages require careful explanation, and the messages may vary with context, with the storyteller and with the audience. Importantly, the meaning required knowledge of the Secwépemc language and the ways that past Secwépemc people communicated knowledge;
- a word speller generally has two roles with respect to the telling of oral histories which are traditionally told in Secwépemctsin. The first is to provide an English translation of the Elder's story while it is being told to an English speaker and to help the English speaker understand the meaning of the Elders' story;

- as a word speller it is my job to not only decipher the language, but also to assist the listener in understating the story from the Elder's perspective. In carrying out this duty, *I may ask questions to invite Elders to clarify words* and to explain meanings, contexts, and connections within the language.”

[emphasis added.]

[32] The issue therefore arises regarding whether Mr. Deneault should be permitted to ask questions and/or the degree to which he should be permitted to assist the deponent tell her story.

B: The Legal Framework

[33] Rule 7-8 does not provide guidance on the use of an interpreter/word speller where deponents speak languages for which there are no certified translators.

[34] According to SSN, the Federal Court Practice Guidelines for Aboriginal Law Proceedings [*Guidelines*] suggest that a translator who is not certified as a legal interpreter may be appointed in circumstances where there are no certified interpreters for the language of the Indigenous group in question. SSN submits that *Guidelines* further explain that (at p. 34):

The Aboriginal perspective derives much from the Aboriginal language. Interpretation that is both accurate and effective is essential. The party calling the Elder to testify should address the need for interpretation and propose the manner in which the interpretation is to be carried out.

- simultaneous interpretation is likely the most efficient method of entering lengthy Elder testimony in the native tongue. Sequential interpretation may suffice where the Elder narratives are not long.
- elders may be willing to testify in English or French even if their command of the language is limited. An interpreter should be available to assist if they need to better express themselves in their own language. In such cases, it is best to first interpret the questions put to the Elder, so they have a clear

understanding of the question they are asked to answer. Where Elders choose to testify principally in English or French, they may still use individual terms in their native tongue for specific places or ideas. A glossary of Aboriginal terms should be provided to the court reporter.

- under the rules, the party calling a witness provides for the interpreter. Parties may have their own interpreters to assist counsel whose interpretations are not part of the record. In some cases, the Court may wish to appoint interpreters with apportionment of interpretation costs. The Court may require an orientation for interpreters touching on the approach to interpretation (word for word or sense of), duty to interpret accurately, court procedure, and legal language.

C: The Parties' Positions

[35] The issue therefore arises regarding whether Mr. Deneault should be permitted to ask questions and/or the degree to which he should be permitted to assist the deponent tell her story.

[36] The Defendants are not opposed to the use of interpreters/word spellers at the depositions, but the dispute relates to the role that the word spellers/interpreters should be permitted to play in their interactions with the deponents. Particularly, the parties disagree on the parameters of the words "permitted to assist".

[37] KGHM, supported by the Province, seeks an order limiting the role of interpreters/word spellers to translating words verbatim. This position is based on Mr. Deneault's affidavit where he deposed that his role will go well beyond that of an interpreter as contemplated in the *Rules*, particularly R. 7-8(3). Mr. Deneault indicated that he intends to give evidence "to explain meanings, contexts, and connections within the language" and also may elicit further explanation from the witness when required. According to Mr. Deneault's affidavit, he will provide "careful explanation".

[38] KGHM supports the Province's suggested wording which it submits is required "to preserve the impartiality of the process" in its form of order that the translation be done "without embellishment, omission, explanation, or expression of opinion". It also opposes giving additional witnesses, beyond the deponent, licence to clarify, elaborate, or discuss the meaning of certain stories at a deposition. According to KGHM, the *Guidelines*, as cited by SSN, contemplate evidence that is presented at trial, not by deposition.

[39] Canada does not object to interpreters/word spellers being present at depositions, but submits that these individuals should not be permitted to provide their own interpretations of the meaning of an oral history, as this would constitute giving evidence when the interpreter/word speller is not a witness. Canada highlights concerns regarding lengthy side conversations between the word speller and an Elder which the trial judge will not be able to understand. Further, Canada does not object to an interpreter/word speller seeking clarification or asking additional questions of the deponent, so long as they ask permission and if the parties consent.

[40] SSN's response to Canada's proposal, as outlined by Chief Ron Ignace's affidavit, is that it can be difficult to apply Western systems of translation to the translation of Indigenous knowledge, as the evidence giving process is foreign and unfamiliar to Elders. The key concern ought to be ensuring that the Elder understands what is being asked and that his or her response is accurately recorded. SSN points to Chief Ignace's observations that during the review for the Ajax Mine project, the Elders often required assistance in understanding the questions asked, including providing context, or explaining meanings and connections within the language.

[41] SSN further notes that the efficiencies to be derived from

excluding the exchanges between the interpreter/word speller and the deponent will not prejudice any of the parties, as all of the interactions will be recorded. The evidence should be considered without superimposing peremptory challenges or further constraints in anticipation of hypothetical objections. If objections arise, the Defendants can bring them to the court for proper determination.

D: Discussion

[42] In considering this issue, I have taken into account the authorities referred to below, and the court's role in balancing the unique nature of Aboriginal rights and title claims with the traditional rules of evidence.

[43] It is important to distinguish between the interpreter/word speller's role as such and if he/she were a witness in their own right, which is a distinct possibility, if not a certainty, in this proceeding. The terms of the order should make it clear that, when performing the interpreter/word speller role, evidence should not be given to supplement that of the deponent.

[44] I agree with the Province's proposed wording being that the deposition order for Ms. Simon should provide that the interpreter/word speller "faithfully and accurately reproduce the speaker's message in the closest natural equivalent of the listener's language, primarily in terms of meaning and secondarily in terms of style, without embellishment, omission, explanation, or expression of opinion".

[45] However, I also agree with Canada's position that the interpreter/word speller should be permitted to ask additional questions of the Elder for clarifications of the meanings of a given answer. I also agree with Canada that the word speller or interpreter should ask permission to seek clarification, and only do so if the parties consent.

[46] This approach properly addresses some of the concerns expressed

by Chief Justice McLachlin regarding Western systems of translation being applied to the evidence giving process in the Indigenous context. I note that the practice before regulatory bodies is of little assistance since depositions are not conducted in the presence of the trier of fact and the rules of evidence are often more relaxed than they would be in a trial.

[47] The ability of the interpreter/word speller to ask the deponent questions to clarify her or his answer should not prejudice the Defendants because the entire exchange will be both videotaped and transcribed. To the extent the Defendants take objection to certain interactions between the interpreter/word speller and the witness, these objections should be made with an application then being brought either prior to or at the trial when the evidence is sought to be admitted.

V: PANEL EVIDENCE

A: The Legal Framework

[48] It is helpful in these reasons to set out certain of the often cited comments of Chief Justice McLachlin in *Mitchell* regarding the basic principles of the law of evidence as it applies to Aboriginal claims; that is because they provide the necessary context in which this particular question should be considered.

[27] Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet*, *supra*, the majority of this Court stated 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" (para. 68).

[28] This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet, supra*; *Delgamuukw, supra*, at para. 82).

[49] At paras. 29-34, the Court commented on the admissibility of evidence and the use of oral history evidence in aboriginal rights claims:

[29] Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet, supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw, supra*).

[30] The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487).

Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

[31] In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

[32] Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining

features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned: see R. L. Barsh and J. Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997), 42 McGill L.J. 993, at p. 1000, and J. Woodward, *Native Law* (loose-leaf), at p. 137. Also see *Sparrow, supra*, at p. 1103; *Delgamuukw, supra*, at paras. 82-87, and J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997), 8 *Constitutional Forum* 27.

[33] The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability.

However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

[34] In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

See also: *William et al. v. British Columbia*, 2004 BCSC 148 at paras. 10-25.

[50] The *Guidelines* provide that a panel format for oral history testimony may be appropriate in certain circumstances (at p. 36):

An Elder may wish to testify in the presence of other Elders or in the presence of the community in accordance with their custom for truth telling. Elders may also prefer to testify as a panel or have someone accompany them while they testify.

Elders may also wish to testify in a traditional manner for which oral histories are transmitted or in a specific forum or setting such as on the land or in a circle setting.

[Emphasis added.]

[51] The Federal Court further provides that (*Guidelines* at p. 30):

Reconciliation requires the courts to find ways of making its rules of procedure

relevant to the Aboriginal perspective without losing sight of the principles of fairness, truth-seeking and justice. This can be accomplished by adopting an approach rooted in respect and dignity. One way to show respect and enable Aboriginal witnesses to be heard is to have regard for Aboriginal ceremony and protocols.

[52] According to SSN, the Australian *Federal Court Rules* 2011 (Cth), 2011/134, specifically Rule 34.125, allow for evidence of Indigenous witnesses to be given as a group or in consultation with others:

Rule 34.125: a party may apply to the Court for an Order that the Court receive into evidence statements from a group of witnesses, or a statement from a witness after that witness has consulted with other persons.

[53] *Risk v. Quall*, [2001] FCA 5, a decision of the Federal Court of Australia, involved an application for pre-trial directions regarding the manner in which certain evidence would be adduced during the course of an Aboriginal title claim. Having first identified that the evidence in group “cannot be taken as a matter of course” (at p. 2) and that its availability “is dependent upon it first being established that it is in the interests of justice to do so”, the court concluded (at para. 8):

I can foresee, in particular, the likelihood that during site evidence the applicants might be able to explain and justify why group evidence should be received or why a particular witness might have a need to consult with others before answering certain questions. However the recognition of these possibilities cannot be translated into pre-trial orders of the blanket nature that are presently sought by the applicants. I decline therefore, at this stage, to make orders that are sought in pars 4 and 5 of the notice of motion.

[Emphasis added]

[54] In *Harrington-Smith v. Western Australia*,¹²¹ FCR 82 (2002), the Australian Federal Court noted some of the practical difficulties and considerations with group evidence:

- the interests of justice require that “the Court be able to understand the extent of each witness’ own knowledge and recollection in the usual way, without the contamination of consultation” (at para. 23);
- the law in Australia, based on the country’s *Evidence Act*, is that the

evidence cannot belong to the “panel”, even in the case of a “group of witnesses”. The statement of each member of the group who is to testify as a witness, that is, under oath or on affirmation, is identified and attributed to that witness, even though he or she has been permitted first to consult with another member or other members of the group (at para. 26);

- the “Court might permit” counsel for the party to ask questions of any panel member they choose and “the cross-examiner should be allowed to question each witness to conclusion in the usual way, or, apparently, to do as the examiner-in-chief has done, at the cross-examiner’s option” (at para. 27); and
- furthermore, “where the Court allows consultation, the person consulted is not, by reason of having been consulted, a witness and is therefore not required to be sworn” (at para. 27).

[Emphasis added.]

B: The Parties’ Positions

[55] Due to the novel nature of this issue, I intend to set out the parties’ positions in some detail, as they have assisted me in identifying many of the practical considerations and factors which I should take into account in formulating my reasons.

[56] SSN seeks the following order:

The Plaintiffs may depose witnesses in groups as a panel and tender their evidence collectively. Nothing in these terms precludes a panel member from testifying at trial.

[57] SSN’s submits that the taking of group evidence “will right a historical wrong” and that requiring evidence to be individual in nature is contrary to the historical manner in which Indigenous peoples give their history and pass it on to their descendants. The fact that the witnesses are providing concurrent evidence should not, in the absence of an exclusionary rule, prevent Elders from giving testimony in this manner. Accordingly, allowing SSN to present Ms. Delores Jules as part of a panel with Loretta

Seymour, Jeanette Jules and Colleen Seymour to provide oral history deposition evidence would achieve a proper balance between the unique evidentiary concerns in Aboriginal claims and the rules of evidence and procedure.

[58] While conceding that there is no rule that addresses this issue and no guideline similar to that in the *Guidelines* or the Australian Federal Court Rules, SSN argues that this Court, exercising its inherent jurisdiction and using the *Guidelines* as, just that, a guide, should permit this form of evidence since it would not be contravening any existing statutory provision.

[59] By exercising its inherent jurisdiction to set a protocol for the admission and use of deposition evidence, this Court will facilitate the just, speedy, and inexpensive determination of the issues in this case, consistent with the objective of the *Rules*. The alternative would be to prejudice SSN's ability to give Elder testimony in accordance with traditional customs and practices.

[60] SSN points to the fact that panel evidence also takes place at various tribunals and boards for the giving of evidence, such as the National Energy Board.

[61] KGHM's position, supported by the Province, is that the *Rules* do not provide for panel evidence and that "flexibility should be found within the existing Rules of Court and not apart from them". KGHM notes that SSN's examples of administrative tribunals are not applicable in this case, given that there is no evidence (or suggestion) that administrative tribunals follow such practice in advance of a hearing and in the absence of the oversight provided by the hearing panel/trial judge.

[62] Furthermore, KGHM notes that the *Guidelines* clearly contemplate the evidence being given at trial in the presence of the trier of fact, and it

points to the following references (*Guidelines* at p. 36):

- an Elder testifying “in the presence of other Elders or in the presence of the community in accordance with their custom for truth telling”; and
- that Elders may prefer to “have someone accompany them while they testify”.

[63] KGHM’s position is that the *Guidelines* emphasize someone being present to accompany the Elder, but do not account for the accompanying person also giving evidence and providing explanations as to the meaning of the Elder’s testimony, as proposed by SSN.

[64] Canada, while emphasizing that panel evidence is a significant departure from one of the foundational aspects of the law of evidence, submits that “if this exceptional request is to be granted, it should be carefully considered on a witness by witness basis, and appropriate limitations must be set out”. Canada specifically opposes SSN’s broad order, arguing that SSN should not be given “free reign” to tender evidence in groups whenever it chooses.

[65] Canada notes that evidence given by the Elders should be approached with sensitivity. Based on Ms. Jules’ affidavit, Canada agrees that limited specific evidence could be heard from the panel in relation to a specific deponent. It does not agree to a blanket order allowing the SSN to call group evidence for any witness it chooses, without appropriate evidence to support the need for it. It notes the affidavit evidence of Chief Ignace, which is to the effect that group evidence is part of both oral traditions and oral histories, but emphasizes that he does not say that the testimony must be provided that way. Accordingly, there is no need to justify SSN’s proposed departure from conventional practice.

[66] Canada argues that if panel evidence is to be permitted, appropriate restrictions must be placed on the type of evidence to be provided and the procedure to be followed, and raises the following points:

- if any panel member can answer any question, it will be difficult for the parties, and ultimately the trial judge, to follow the evidence and make factual determinations;
- in determining the reliability of the evidence, the trial judge may find one panel member to be more knowledgeable than another. Having multiple witnesses makes it difficult to separate the evidence that comes from a knowledgeable witness as opposed to a less knowledgeable one. The trial judge will have to parse out, line by line, which statements to give more or less weight to. Given that Aboriginal title claims produce an enormous volume of evidence, this would make the trial judge's task extremely difficult;
- the purpose of deposition evidence in the circumstances of this proceeding is to take evidence of elderly witnesses or those who may be ill in advance of trial. Without restrictions, there is a danger that a younger person, who may not meet the requirements of R. 7-8, could take over and become the primary witness on the panel, which defeats the purpose of deposition evidence.

[67] According to Canada, what SSN seeks is far too broad and not justified within the context of the evidentiary record on this application. Canada proposes that:

- (a) Ms. Jules may provide deposition evidence in a traditional manner as a panel accompanied by Loretta Seymour, Jeannette Jules and Colleen Seymour (the "Panel");

- (b) all members of the Panel shall swear an oath to tell the truth, and if applicable, swear to provide translation and word spelling to the best of their abilities;
- (c) deposition evidence from Loretta Seymour, Jeanette Jules and Colleen Seymour should be limited to assisting in telling oral traditions (*stspetekwill*, or stories set in ancient times) in accordance with their communities' traditions, and providing translation and word spelling as needed;
- (d) in respect to the evidence provided on telling oral traditions (*stspetekwill*, or stories set in ancient times), the parties may cross-examine a particular member of the panel, and the question shall be answered only by the person or persons to whom the question is directed;
- (e) in respect to any evidence Delores Jules may give in relation to additional matters relevant to the claim being advanced, the parties will direct their questions only to Delores Jules and only Delores Jules may answer those questions;
- (f) nothing in these terms precludes Loretta Seymour, Jeannette Jules or Colleen Seymour from testifying at trial; and
- (g) nothing in these terms limit the parties' right to object at trial under R. 12- 5(56).

[68] In response, SSN submits that these suggested restrictions are unnecessary because any objections will be noted on the record and submissions should be made in that regard at the trial.

C: Discussion

[69] I start by noting that the court must balance the relevant and appropriate rules of evidence and procedure which have developed over many years while also recognizing the unique traditional manner that Indigenous peoples give their evidence, as highlighted by the Supreme Court of Canada in *Mitchell*.

[70] I have concluded that it is a natural and logical development from what was stated in *William* and *Mitchell* to permit, when justified by the circumstances, panel evidence in Aboriginal rights and title proceedings. Specifically, there is no principled reason, in my view, why the same flexibility pertaining to the giving of evidence should not also apply to questions of procedure, in particular on this application, depositions and R. 7-8. I reach this conclusion despite there being no specific provision in the *Rules* which provides for group or panel evidence. However, there is no rule of evidence or procedure or statutory provision which specifically excludes this form of evidence.

[71] As stated by R. 1-3, the objective of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits. KGHM, while opposing the proposed panel evidence, submits that “flexibility should be found within the existing Rules of Court and not apart from them”, but it does not provide any practical suggestions as to how this “flexibility” could be achieved in Ms. Jules’ circumstances.

[72] In my view, the fact this application concerns deposition evidence, as opposed to evidence led at trial, is a cogent example as to why a blanket deposition protocol as sought by SSN is inappropriate in this case. This issue reinforces the need for the question to be considered on a witness-by-witness basis in light of the evidentiary record before the court at the time the application for deposition evidence is sought. The trial judge is in a very

different position if she/he is faced with panel evidence being given before her/him and when it is sought to be adduced by deposition by means of transcripts and videotapes.

[73] During a trial, the trial judge has the ability to make rulings as the evidence unfolds after hearing from counsel if there is objection. This is required to prevent the “contamination” referred to in *Harrington-Smith*. On the other hand, following a deposition, the deponent may be deceased or in such ill health, that attendance at trial is impossible. In that situation, the trial judge has no ability to give rulings as the evidence is being given, and is essentially restricted, after hearing submissions, from admitting all or part of the evidence or redacting portions of the deposition record which is sought to be adduced into evidence. This difference accentuates the need for the order permitting the deposition evidence to be as specific as possible with the goal of minimizing “contamination”.

[74] What may occur in certain regulatory hearings is, at best, of limited assistance, as there does not appear to be any acknowledged practice. Furthermore, as noted by KGHM, to the extent that panel evidence has been permitted, it has occurred at the hearing itself, as opposed to beforehand.

[75] What SSN proposes is essentially what the Australian Federal Court declined to order in the two cases I have referred to, *Harrington-Smith* and *Risk v. Quall*, being an open ended process.

[76] In my view, the process should only permit evidence which can clearly be attributable to an individual witness while being given in a group format. Since this is the first order of such a nature to be made, a cautious approach must be taken to limit the order in its application. What actually transpires at the deposition may warrant a broadening of what is necessary and appropriate in future applications or, for that matter, result in a more restrictive approach.

[77] Within this context, I consider Canada's approach to be a reasonable balancing of Indigenous customs with conventional trial practice, evidence and procedure. After all, the plaintiff in Aboriginal title and rights cases is the collective, with the form of proceeding often being a representative action brought pursuant to R. 20-3 of the *Rules*. In the circumstances of this application, the deposition "collective" evidence is being obtained in order to be led at trial on behalf of the collective.

[78] From a practical perspective, if a party adverse in interest objects, then an application could be made prior to trial, since the deposition could be continued, if required, depending on the ruling provided while the deponent were still able to give the evidence. However, I emphasize that the trial judge will have the final decision making authority while exercising her/his gatekeeper function regarding what portion of the deposition evidence will form part of the evidentiary record at the trial.

[79] Accordingly, I order that Elder Delores Jules may provide deposition evidence as a panel in the presence of and accompanied by Loretta Seymour, Jeannette Jules and Colleen Seymour. This evidence will be taken in accordance with Canada's proposal which is referred to above at para. 67.

VI: CONCLUSIONS

[80] In conclusion, I make the following orders:

- a) I decline to order blanket Deposition Protocol that will apply to future witnesses in these proceedings. Instead, I order that absent a consent order relating to a specific witness, the parties must bring an application with respect to that witness. I grant SSN leave to renew an application for a blanket protocol once

there is a sample size of at least five witnesses who have been deposed;

- b) Interpreters/word spellers are permitted to be present at depositions, with their role being to faithfully and accurately reproduce the witnesses' message in the closest natural equivalent of the listener's language without embellishment, omission, explanation, or expression of opinion. The interpreter/word speller should be permitted to seek permission to ask the Elder additional questions for clarifications of the meaning of a given answer, and do so if the parties consent;
- c) Elder Dolores Jules may provide deposition evidence in a traditional manner as a panel accompanied by Loretta Seymour, Jeannette Jules and Colleen Seymour. The manner in which this evidence is given will be in accordance with Canada's proposal set out in paragraph 67 above. The admissibility of this evidence shall be determined by the trial judge.

[81] The parties should include in the order those terms of a deposition protocol upon which they agree. They also have liberty to apply to make further submissions, if required, regarding the wording of the order(s) arising from these reasons.

VII: COSTS:

[82] In light of the novel aspects of the issues on this application, costs shall be in the cause.

Author(s): Elizabeth Loftus

Source: *Nature Reviews Neuroscience* 4 (2003), pp. 231-234.

Published by: *Nature*

Stable URL: www.nature.com/nrn/

Our Changeable Memories: Legal and Practical Implications

Elizabeth Loftus

The malleability of memory is becoming increasingly clear. Many influences can cause memories to change or even be created anew, including our imaginations and the leading questions or different recollections of others. The knowledge that we cannot rely on our memories, however compelling they might be, leads to questions about the validity of criminal convictions that are based largely on the testimony of victims or witnesses. Our scientific understanding of memory should be used to help the legal system to navigate this minefield.

Memories are precious. They give us identity. They create a shared past that bonds us with family and friends. They seem fixed, like concrete, so that if you ‘stepped’ on them they would still be there as they always were.

But memories are not fixed. Everyday experience tells us that they can be lost, but they can also be drastically changed or even created. Inaccurate

memories can sometimes be as compelling and ‘real’ as an accurate memory. In this article, I discuss the ways in which memories can be reshaped and their implications for the legal system. If we cannot believe our own memories, how can we know whether the memories of a victim or a witness are accurate?

Remaking memories

We are all familiar with temporary memory problems. “I can’t remember the right word,” says a colleague at a cocktail party. “Is it senility?” I reply: “Can you remember the word later?” And the usual answer will be yes, proving that the information was not lost, but only temporarily unavailable. Retrieval problems are common.

However, there are also problems with storing something new. This usually occurs simply because the person concerned is not paying attention. But some people are unable to store new information even if they are paying attention and have the opportunity to repeat the new information over and over again — several hours later, it is gone. Such people, including patients with Alzheimer’s disease, might not even complain about ‘losing their memory’ because they do not realize that anything is missing¹.

More insidiously, memories can become scrambled, sometimes in the process of attempting to retrieve something. You might relate a story to a friend but unwittingly include some mistaken details. Later, as you attempt to recall the episode, you might come across your memory of the scrambled recall attempt instead of your original memory. Memory is malleable. It is not, as is commonly thought, like a museum piece sitting in a display case. “Memory is,” as the Uruguayan novelist Eduardo Galeano once said, “born every day, springing from the past, and set against it.”²

Usually the scrambled memory does not matter very much. But if you are an eyewitness to a crime, your scrambled recall could send someone to

prison. And, rather than feeling hesitant, you might feel perfectly sure of the truth of your memory. The history of the United States justice system, like those of other countries, is littered with wrongful convictions made on the basis of mistaken memories³. Huff recently estimated⁴ that about 7,500 people arrested for serious crimes were wrongly convicted in the United States in 1999. He further noted that the rate is thought to be much lower in Great Britain, Canada, Australia, New Zealand and many other nations, especially those that have established procedures for reviewing cases involving the potential of wrongful conviction.

Ronald Cotton, a North Carolina prisoner who was convicted in 1986 of raping a 22-year-old college student, Jennifer Thompson, puts a human face on these cases. Thompson stood up on the stand, put her hand on the Bible and swore to tell the truth. On the basis of her testimony, Cotton was sentenced to prison for life. Eventually, DNA testing — which began 11 years after Thompson had first identified Cotton — proved his innocence. Another man, Bobby Poole, pleaded guilty to the crime³.

Faulty memory is not just about picking the wrong person. Memory problems were also evident during the sniper attacks that killed ten people in the Washington DC area in 2002 (see for example, ^{REF.5}). Witnesses reported seeing a white truck or van fleeing several of the crime scenes. It seems that a white vehicle might have been near one of the first shootings and media repetition of this information contaminated the memories of witnesses to later attacks, making them more likely to remember white trucks. When caught, the sniper suspects were driving a blue car. Were we observing unwitting memory contamination on a nationwide scale?

Witnesses can be wrong for several reasons. A key reason is that they pick up information from other sources; they combine bits of memory from different experiences. A growing body of research shows that memory more closely resembles a synthesis of experiences than a replay of a videotape⁶.

Three decades ago, a method of studying memory distortions was introduced. People watched a simulated crime or accident. Later they were given erroneous information about the details of the event, such as the false detail that a man had curly rather than straight hair. Many of these people later claimed that they had seen a curly-haired person⁷. Studies such as this showed how leading questions or other forms of misinformation could contaminate the memories of witnesses about events that they had recently experienced⁸.

In the past decade, the challenges have become greater. Newer studies showed that you could do more than change a detail here and there in someone's memory. You could actually make people believe that a childhood experience had occurred when in fact it never happened. Examples include being lost in a shopping mall for an extended period of time, being rescued by a lifeguard, or surviving a vicious animal attack⁹⁻¹². How is this possible? In our studies, we enlist family members to help us to persuade their relatives that the events occurred. This method has led about a quarter of our subjects to believe that they were lost in a shopping mall for an extended period of time, and were ultimately rescued by an elderly person and reunited with their families. In other studies, we engaged people in guided imagination exercises. We asked people to imagine for a minute that as a child they had tripped and broken a window with their hand. Later, many of them became confident that the event had occurred. In other studies, we encouraged people to read stories and testimonials about witnessing demonic possession, and even these raised confidence that this rather implausible event had happened.

One recurring issue for memory distortion research is the question of whether the events being reported after such a manipulation might have actually happened. Perhaps the subject did break a window but had forgotten about it — the imagination exercise might have triggered a true memory

rather than planting a false one. To prove that false memories can be insinuated into memory by these suggestive techniques, researchers have tried to plant memories that would be highly implausible or impossible. For example, one set of studies asked people to evaluate advertising copy. They were shown a fake print advertisement that described a visit to Disneyland and how they met and shook hands with Bugs Bunny. Later, 16% of these subjects said that they remembered meeting and shaking hands with Bugs Bunny¹³. In follow-up research carried out by Grinley in my laboratory, several presentations of fake advertisements involving Bugs Bunny at Disneyland resulted in 25-35% of subjects claiming to have met Bugs Bunny¹⁴. Moreover, when these subjects were subsequently asked to report precisely what they remembered about their encounter with Bugs Bunny, 62% remembered shaking his hand and 46% remembered hugging him. A few people remembered touching his ears or tail. One person remembered that he was holding a carrot. The scenes described in the advertisement never occurred, because Bugs Bunny is a Warner Bros. cartoon character and would not be featured at a Disney property.

Other ‘impossible’ memories have been recently planted in British students¹⁵. The false event was “having a nurse remove a skin sample from my little finger.” This medical procedure was not one that was carried out in the United Kingdom, according to extensive investigation of health policy records. After guided imagination, many subjects came to remember the non-existent procedure occurring in their childhood. Some embellished their reported memory with significant detail such as, “There was a nurse and the place smelled horrible.”

One of the cleverest and most powerful techniques for planting highly implausible false memories involves the use of fake photographs¹⁶. Subjects were shown a falsified photograph that was made up of a real photograph of the subject and a relative pasted into a prototype photograph of a hot-air

balloon (FIG.1) [to view figures mentioned please refer to the original publication]. Family members confirmed that the event had never occurred. Subjects were shown the fake photograph and asked to tell “everything you can remember without leaving anything out, no matter how trivial it may seem.” There were two further interviews, and by the end of the series 50% of the subjects had recalled, partially or clearly, the fictitious hot-air balloon ride. Some embellished their reports with sensory details of a hot-air balloon ride during childhood that had never occurred. For example, one subject said “I’m still pretty certain it occurred when I was in sixth grade at, um, the local school there... I’m pretty certain that mum is down on the ground taking a photo.”¹⁶

These studies, and many more like them, show that people can develop beliefs and memories for events that definitely did not happen to them. They can do this when fed strong suggestions — such as “your family told us about this event” or “look at this photograph of you from childhood”. They can even do this when induced to imagine the experiences. Large changes in autobiography can be achieved quickly. Attempts to distinguish the false memories from true ones have occasionally shown statistical differences, such as differences in confidence, vividness or amount of detail¹⁷, or differences in lateralized brain potentials^{18,19}. For example, in the hot-air balloon study¹⁶ the real memories were expressed with much more confidence than the fake ones. In most studies, any differences between true and false memories are observed only when comparing large groups of true and false memories, and these differences are typically too small to be useful for classifying a single autobiographical memory report as true or false. Psychological science has not yet developed a reliable way to classify memories as true or false. Moreover, it should be kept in mind that many false memories have been expressed with great confidence.

Implications for Society

While researchers continue to investigate false memories, it is evident that there are already lessons to be learned. The fact that the memories of victims and witnesses can be false or inaccurate even though they believe them to be true has important implications for the legal system and for those who counsel or treat victims of crimes.

Some psychotherapists use techniques that are suggestive (along the lines of, “you don’t remember sexual abuse, but you have the symptoms, so let’s just imagine who might have done it”). These can lead patients to false beliefs and memories, causing great damage to the patients themselves and to those who are accused. In one Illinois case, psychiatrist Bennett Braun was accused by his patient, Patricia Burgus, of using drugs and hypnosis to convince her that she possessed 300 personalities, ate meat loaf made of human flesh and was a high priestess in a satanic cult²⁰. By some estimates, thousands of people have been harmed in similar ways by well-meaning providers who apply a ‘cure’ that ends up being worse than the disease²¹. Law enforcement interrogations that are suggestive can lead witnesses to mistaken memories, even ones that are detailed and expressed with confidence. Hundreds of people have been harmed by witnesses who made a mistake that could have been avoided^{22,23}. Of course, even before the police arrive on the scene, witnesses talk to one another and cross contamination can occur. I personally witnessed this when I entered a shop in Cambridge, Massachusetts, moments after a robbery had occurred and before the police arrived. In the immediate aftermath, customers and employees shared their recollections, providing fuel for influencing the thoughts of one another. This is why, during the Washington DC area sniper attacks in 2002, law enforcement officials advised members of the public who might witness the ‘next attack’ to write down what they saw immediately, even using their hand if they did not have paper. Good advice,

but I would suggest having paper handy because the best course of action is to write down everything that can be remembered before witnesses are interrogated or talk to one another. This activity strengthens the memory and protects it to some extent from later contamination²⁴.

It is often argued that a few false accusations are just the cost of doing business. But this cost includes the potential for the actual perpetrator to commit more crimes, and for the taxpayer to have to pay sizable sums of money in compensation when wrongful convictions are exposed (which probably happens in only a fraction of cases). Although the defendants in most wrongful prosecution cases are government officials or organizations, in one recent case the witness with mistaken memory was successfully sued²⁵. Donna Parmeter, a former prison guard, was charged with kidnapping, robbery and torture. She had been identified by the victim, Peter Kretzu, who was tied up, blindfolded and tortured by two masked robbers. Although the attackers wore ski masks, Kretzu claimed that he recognized Donna (from her voice and eyes) and her husband Joseph (from his breathing, laugh, body shape and 'chicken soup' body odour). Kretzu was 100% certain. Donna was eventually exonerated when investigators substantiated her alibi. But she had spent a month in jail, and she later sued, eventually winning a US\$100,000 civil judgement against Kretzu. In the past, mistaken witnesses simply went their own ways, although there are a few known instances in which they have made profound apologies to those whom they had falsely accused. Will we now see more cases in which mistaken witnesses end up paying financially for their mistakes?

Although much of the research has focused on wrongful convictions, there is another side to the criminal justice coin. Memory distortions can also contribute to failures to convict a guilty person, not because an innocent person is convicted in their place, but because accurate witness testimony can be undermined. If witnesses misremember some detail, or they are told

that their stories conflict with other evidence, they might discount their testimony and be less persuasive than perhaps they should be, or the jury might consider their entire testimony to be unreliable.

Scientific research into memory has the potential to minimize these kinds of problem. Information from psychological scientists (and perhaps neuroscientists) could help to keep the people in power from making decisions on the basis of myths or misconceptions about memory. Scientific knowledge could be shared with relevant individuals in many ways: through workshops for mental health professionals, training for police, seminars for lawyers and judges, judicial instructions or expert testimony for jurors. In one example, Jacob Beard of West Virginia was wrongly convicted of murdering two women and spent many years in prison. He managed to win a second trial. Expert testimony on suggestion and false memory was presented in that second trial, and helped to secure his acquittal. Beard later filed a civil lawsuit, and eventually received a settlement of nearly US\$2 million in his case against state and county police²⁶.

This list of potential venues for education about the nature of memory represents just one proposal for a possible programme for action. Some legislative remedies might also be called for, especially in the most serious cases that can result in a sentence of death. Recently, the Innocence Protection Act was introduced in the United States Congress. It has two useful elements: access to DNA testing for convicted people and improvement in the quality of lawyers who try death penalty cases. Better lawyers might be better acquainted with the problems of memory and how to educate judges and jurors about these problems. Congress will be considering this legislation again in 2003 (^{REF.27}).

The American Judicature Society proposed the creation of an ‘innocence commission’ that would study why the legal system has failed in known cases of wrongful conviction. After all, look what the National

Transportation Safety Board does when a plane crashes. Few expenses are spared as every aspect of the crash is examined. Not long ago, I proposed an analogous ‘National Memory Safety Board’ that might concentrate specifically on memory problems that have led to injustice²⁸. If the travesties of the past few decades were thoroughly examined side-by-side with scientific knowledge on memory, we would all benefit. It would be too late for the family of Steve Titus, who died of a heart attack at the age of 35 after being falsely convicted of rape. It would be too late for the many death row prisoners who have recently been exonerated by DNA evidence. It would be too late for the scores of innocent defendants who have had to face civil litigation over false claims of satanic ritual abuse and other dubious charges. But it might be in time to keep us from searching for that next white van that does not exist because someone inadvertently planted a false memory.

To reiterate the main points: memory is more prone to error than many people realize. Our memory system can be infused with compelling illusory memories of important events. These grand memory errors have contributed to injustices that could have been avoided or minimized. As a start, I suggest that we all remember an important truth about the mind — paraphrasing Galeano: memory is born anew every day.

References

1. Duke, L. M., Seltzer, B., Seltzer, J. E. & Vasterling, J. J. Cognitive components of deficit awareness in Alzheimer’s disease. *Neuropsychology* 16, 359-369 (2002).
2. Galeano, E. H. translated by Belfrage, C. (with Schafer, M.) in *The Book of Embraces* 124-125 (Norton & Co., New York, 1991).
3. Connors, E., Lundregan, T., Miller, N. & McEwan, T. *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (National Institute of

- Justice, Alexandria, Virginia, 1996).
4. Huff, C. R. What can we learn from other nations about the problem of wrongful conviction? *Judicature* 86, 91-97 (2002).
 5. Kennedy, H. Beltway sniper notches no. 8. Kills man gassing car in Va., dodges dragnet. *NY Daily News* [online], (cited 12 October 2002), http://www.nydailynews.com/news/crime_file/story/26305p-24892c.html (2002).
 6. Schacter, D. L. *Searching for Memory* (Basic Books, New York, 1996).
 7. Loftus, E. F. & Greene, E. Warning: even memory for faces may be contagious. *Law Hum. Behav.* 4, 323-334 (1980).
 8. Loftus, E. F. & Hoffman, H. G. Misinformation and memory: the creation of memory. *J. Exp. Psychol. Gen.* 118, 100-104 (1989).
 9. Heaps, C. M. & Nash, M. Comparing recollective experience in true and false autobiographical memories. *J. Exp. Psychol. Learn. Mem. Cogn.* 27, 920-930 (2001).
 10. Loftus, E. F. & Pickrell, J. E. The formation of false memories. *Psychiatr. Ann.* 25, 720-725 (1995).
 11. Loftus, E. F. Creating false memories. *Sci. Am.* 277, 70-75 (1997).
 12. Porter, S., Birt, A., Yuille, J. C. & Lehman, D. R. Negotiating false memories: interviewer and rememberer characteristics relate to memory distortion. *Psychol. Sci.* 11, 507-510 (2000).
 13. Braun, K. A., Ellis, R. E. & Loftus, E. F. Make my memory: how advertising can change our memories of the past. *Psychol. Mark.* 19, 1-23 (2002).
 14. Grinley, M. J. *Effects of Advertising on Semantic and Episodic Memory*. Thesis, Univ. Washington (2002).
 15. Mazzoni, G. & Memon, A. Imagination can create false autobiographical memories. *Psychol. Sci.* (in the press).
 16. Wade, K. A., Garry, M., Read, J. D. & Lindsay, S. A picture is worth a

- thousand lies. *Psychon. Bull. Rev.* 9, 597-603 (2002).
17. Porter, S., Yuille, J. C. & Lehman, D. R. The nature of real, implanted, and fabricated memories for emotional childhood events. *Law Hum. Behav.* 23, 517-537 (1999).
 18. Fabiani, M., Stadler, M. A. & Wessels, P. M. True but not false memories produce a sensory signature in human lateralized brain potentials. *J. Cogn. Neurosci.* 12, 941-949 (2000).
 19. Gonsalves, B. & Paller, K. A. Neural events that underlie remembering something that never happened. *Nature Neurosci.* 3, 1316-1320 (2000).
 20. Bloomberg, D. Bennett Braun case update: trials set for May, July. *Skeptical Inquirer* 23, 12-13 (1999).
 21. Pendergrast, M. *Victims of Memory* 2nd edn (Upper Access, Hinesburg, Vermont, 1996).
 22. Huff, C. R., Rattner, A. & Sagarin, E. *Convicted but Innocent: Wrongful Conviction and Public Policy* (Sage Publications, Thousand Oaks, California, 1996).
 23. Radelet, M. L. Wrongful convictions of the innocent. *Judicature* 86, 67-68 (2002).
 24. Loftus, E. F. *Eyewitness Testimony* (Harvard Univ. Press, Cambridge, Massachusetts, 1996).
 25. Pemberton, P. S. Woman falsely accused wins \$100,000 judgment. *San Luis Obispo Tribune* B1 (7 December, 2002).
 26. Richards, Z. Rainbow case is settled. *Charleston Daily Mail* A1 (4 January 2003).
 27. Loge, P. The Innocence Protection Act. *Judicature* 86, 121 (2002).
 28. Loftus, E. F. Memory faults and fixes. *Issues Sci. Technol.* 18, 41-50 (2002).

Author(s): Lee Stuesser

Source: *Manitoba Law Journal* (2006) Vol. 31 No. 3, pp. 543-554.

Published by: Manitoba Law Journal

Stable URL: <http://www.canlii.org/t/2cc6>

Experts on Eyewitness Identification: I Just Don't See it

*Lee Stuesser**

I accept the inherent frailties of eyewitness identification and, at the same time, the persuasive impact of such testimony.¹ I accept that mistaken eyewitness identifications have contributed to wrongful convictions. I also accept that there exists an established legitimate body of studies on memory and the process of eyewitness identification; in other words, this is not junk science. What I do not accept is the need for such expert evidence. In my view, admitting this type of expert evidence, with its associated costs, is not necessary

* Lee Stuesser, Professor, Faculty of Law, University of Manitoba.

to ensure a fair trial. Simply put, we ought to leave the educating of the jury on eyewitness identification to the trial process and not to the experts. To be sure there may be exceptional cases where expert evidence may well assist, but they would be the rare exception.

The starting point for the admissibility of any evidence is relevancy, and this paper begins by examining the relevancy of expert testimony on eyewitness identification. Relevancy — minimum probative value — however is not enough; expert evidence must be worth hearing. A “cost-benefit” analysis is mandated, and I will weigh the probative value of such expert evidence against its potential prejudicial impact. Finally, expert evidence must be necessary. It is my position that expert evidence on eyewitness identification is not necessary and that the traditional trial safeguards of cross-examination, counsel submissions and jury instructions adequately inform juries as to the problems with eyewitness identification. What I do propose is that the expert studies on memory and eyewitness identification be used to improve our identification gathering practices — outside of the courtroom.

I. WHAT DO THE EXPERTS HAVE TO OFFER?

A fundamental prerequisite to the admissibility of any evidence is that it must be relevant. With respect to expert testimony on eyewitness identification the evidence is being introduced essentially to assist the jury in properly weighing the testimony of eyewitnesses. In the words of one expert:

Well, the understanding of jurors, and how they perceive is what psychologists spend their lives doing. We hope to be able to assist the judge or the jury on the various levels and factors of what would lead to a good or a poor identification. It is not my job to decide whether or not that is the answer. All I can do is assist the trier in understanding, “Here are the reasons why it could be a good identification or a poor one.”²

Note that the expert evidence is not going directly to a fact in issue, rather it is merely an interpretative aid to assist the triers of fact in assessing the accuracy of the eyewitness evidence.

*R. v. Sheppard*³ provides a useful starting point in terms of the typical information provided by such experts. In this case the accused was charged with trafficking in cocaine. The only issue was identity. A police officer, working undercover, had some dealings with a black man and purchased cocaine from him on two occasions. Two months later, the officer picked the accused's photograph out of a photo pack prepared by another officer. The accused sought to call a psychologist, who was an expert in the field of eyewitness identification. A full day *voir dire* was held to determine whether the expert would be allowed to testify. The expert's testimony in issue would include the following:

1. There are three phases of memory: the encoding phase, the storage phase and the retrieval phase.
2. Generally speaking, performance as it relates to memory deteriorates as the retention interval (the period of time that elapses between the time observation occurs and the time that the memory is tested) lengthens, but that the rate at which memory deteriorates slows down with the passage of time.
3. People are better able to identify people of their own race.
4. "Unconscious cuing" may occur where the person running the lineup knows that the suspect is in the lineup and unconsciously gives a cue to the person making the identification.
5. Confidence is not a good predictor of accuracy.
6. "Unconscious transfer" may occur. This is where confusion as between two different people arises when seen in different circumstances.
7. "Encoding activity", that is, a process that makes it more likely that memory will be accurate, assists in the identification process. Notes taken by a witness are one form of encoding activity.

8. Changes in appearance of the subject will lower the performance of the viewer.

9. The probability of an accurate identification goes up with the increase in the number of opportunities the witness has to view the subject.

10. “Expectation” is another variable. If a viewer of a photo pack is not told that the suspect may or may not be included in the photos, the chance of someone depicted in the photos being picked by the viewer is higher.

Other factors include “detail salience”, which is the fact that eyewitnesses tend to focus on unusual characteristics of people they observe.⁴ Experts may also testify as to the desirability of sequential photo lineups, where the witness is shown photos one at a time, as opposed to a simultaneous showing, where the witness is asked to pick from the group of photos shown all at once. The research shows that with simultaneous lineups, witnesses make “relative judgments” whereby the person who most closely resembles the perpetrator is selected; this increases the number of false-positive identifications.⁵

I suggest that much of what is provided by the experts is intuitive. We know it. All the expert is doing is confirming what reasonable people understand. The expert is not testifying to matters that are outside the normal experience of the trier of fact, but merely reminding the jury of the normal experience.⁶ Look at the evidence offered in *Sheppard* above. I suggest that there really is nothing there that reasonable people did not already know. They may not know the jargon, but they understand the concepts. The relevancy of the expert evidence increases where the expert informs as to matters that may be little known or counter-intuitive. For example, it is not well-known that accuracy increases when a witness is shown a photo array sequentially — one at a time — rather than being shown a group of photographs simultaneously.

In sum, the expert can identify, label and explain various influences on eyewitness identification to the trier of fact, the relevance being that with this information the trier of fact will be in a better position to accurately assess the eyewitness testimony and give it the proper weight. It is an educative aid. The amount of educating will necessarily vary with the facts and issues in each case. Let us accept this relevancy.

II. WHAT ARE THE COSTS

R. v. Mohan is the leading case on the admissibility of expert evidence in Canada; in that decision, Justice Sopinka spoke of a “cost-benefit” analysis. In other words, it is not enough that the expert evidence is simply relevant. The court must go on to weigh the benefits of the evidence against its potential costs. Justice Sopinka explained:

Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.⁷

There are certain “fixed costs” to the receiving of any expert evidence. There is court time. There is expense. There is increased preparation time for both defence and Crown counsel. In addition, Justice Sopinka identified further special concerns:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.⁸

This is a valid concern especially for experts on eyewitness identification, because there will be a natural tendency for the jury to jump from the general to the specific, reasoning as follows:

- A. The expert has told us that in general there are a number of factors that make eyewitness identification unreliable;
- B. Some of those factors are present in this case;
- C. Therefore, the eyewitness testimony presented is not reliable.

For example, in *Sheppard* the trial judge asked the expert if the conclusion to be drawn from his evidence is that eyewitness identification evidence is manifestly unreliable. The expert replied, “Yes.”⁹ Case closed.

There may well be a tendency, to use an Alberta analogy, “to slaughter the whole herd as the only workable precaution.”¹⁰ Our experience is that notwithstanding the frailties of eyewitness testimony it is indispensable to our trial process and is often a reliable and accurate source. It is tempting to say, “What is the harm in admitting such evidence?” I accept that with respect to the defence calling evidence the cost-benefit analysis will be undertaken less rigorously than for prosecution evidence. Nevertheless, there is the countervailing prejudicial cost to the trial process, and in many situations where the expert is only offering general reminders about the common frailties of eyewitness identification — one must wonder whether the benefit is worth the cost.

It is said that a proper jury instruction will offset the concern that the jury will be unduly influenced by the eyewitness expert. Is this not ironic? We trust the judge to put the expert testimony in its proper context, but we do not at the same time have faith that the judge will properly instruct and educate the jury on eyewitness testimony. This leads us to the issue of necessity.

III. IS THE EXPERT EVIDENCE NECESSARY?

The call for experts runs counter to the prevailing judicial mood, which is

to look more critically at the use and misuse of experts. The expert's power to mislead really sparked the call for judges to become the "gatekeepers of science". In the United States, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*,¹¹ and, in Canada, the Supreme Court's decision in *Mohan*, lead the way towards increased scrutiny of expert testimony.

The expert testimony on eyewitness identification and memory may be interesting, but I am not certain that it is necessary. In the Sophonow Inquiry Commissioner Cory recommended that judges favourably consider and readily admit properly qualified expert evidence pertaining to eyewitness identification. In his opinion, "The testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial."¹² With respect, this threshold of admissibility is too low. The admissibility of expert testimony requires that it be necessary. "Mere relevance" or "helpfulness" is not enough.¹³

The "necessity" requirement is intended both to prevent superfluous or redundant expert evidence being presented, and to ensure that the kinds of problems expert evidence can present for courts and triers of fact are not created needlessly. In *R. v. D. (D.)*, the Supreme Court of Canada adopted the following position:

[The *Mohan* test] exists in appreciation of the distracting and time consuming thing that expert testimony can become. It reflects the realization that simple humility and the desire to do what is right can tempt triers of fact to defer to what the expert says. It even addresses the fact that with expert testimony, lawyers may be hard-pressed to perform effectively their function of probing and testing and challenging evidence because its subject matter will often pull them beyond their competence, let alone their expertise. This leaves the trier of fact without sufficient information to assess its reliability adequately, increasing the risk that the expert opinion will simply be attorned to.¹⁴

The Court then went on to describe the necessity test:

When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are apt to come to a wrong

conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert be helpful before we will be prepared to run these risks. That sets too low a standard. It must be necessary.¹⁵

The Ontario Court of Appeal, in *R. v. McIntosh*, refused to allow an expert to testify on the frailties of eyewitness identification.¹⁶ The basic tenor of this decision is found in Justice Finlayson's view that "courts are overly eager to abdicate their fact-finding responsibilities to 'experts' in the field of the behavioural sciences."¹⁷ More recently, this same view was reiterated in a *Report on the Prevention of Miscarriages of Justice* prepared by a working group of the federal, provincial and territorial ministers of justice. The Report concluded that such expert evidence "is redundant and usurps the function and role of the trier of fact. This is not information that is outside the regular knowledge of the jury and has the potential to distort the fact-finding process."¹⁸

In *Sheppard* the expert evidence also was not admitted. Ultimately, Associate Chief Justice Oliphant excluded the expert testimony because the doctor "did not provide me with information that was outside either my experience or knowledge as a trial judge." He alluded to the judicial education programs on eyewitness identification that he had received. Accordingly, he then went on to qualify his ruling by saying, "I want to make it clear that in my mind, at least, the issue as to the admissibility of this type of evidence remains open where the trial of the accused is before a judge and jury."¹⁹ With respect, I suggest that reasonable jurors also know of these things.

This is not to say that expert testimony on the frailties of eyewitness identification should never be allowed. Admissibility is to be determined on a case-by-case basis. For example, in *R. v. Sophonow (No. 2)* the Court of Appeal may well have allowed an expert on identification to testify as to

“unconscious transference” where in that case a number of witnesses spoke with the same police artist in preparing a composite drawing of the murderer.²⁰

The fact that a trial judge can caution a jury about many of the frailties of eyewitness identification further speaks to why expert testimony on the point is unnecessary. Our judges are to provide detailed jury instructions on the weighing and dangers of eyewitness identification. In many instances a jury instruction is to be preferred. Justice Major observed in *R. v. D. (D.)*:

*A jury instruction, in preference to expert opinion, where practicable, has advantages. It saves time and expense. But of greater importance, it is given by an impartial judicial officer, and any risk of superfluous or prejudicial content is eliminated.*²¹

There is a difference between assisting jurors with information that is beyond their normal experience, or counter-intuitive to their experience, for which they *need* assistance and merely reminding jurors of matters within their normal experience. “Reminding” is helpful, but not necessary. Judges can remind just as well as experts. The danger is that the “gate” is then left too open for expert testimony.²²

IV. ARE OUR TRIAL SAFEGUARDS ENOUGH?

Fundamentally I believe that our existing trial safeguards are sufficient to caution jurors about eyewitness identification. Call me naive, but I believe that effective cross-examination, strong submissions and thorough jury instructions are the best means to prevent wrongful convictions.

I concede that studies in the United States say otherwise. For example, the Innocence Project in the United States, after reviewing 62 cases of wrongful conviction, found that mistaken eyewitnesses were a factor in 52, or 84 percent, of these convictions.²³ It seems apparent that the traditional trial safeguards are not good enough in the United States, and the attitude of

the American courts to such evidence has gone from outright hostility to growing but reluctant acceptance.²⁴ In many jurisdictions, the matter is left to the discretion of the trial judge only to be overturned if an abuse of discretion is found.²⁵ Implicit in this approach is that trial judges may exclude such evidence in their discretion and that seems to be what happens in most cases.²⁶ I am not convinced, however, that the American trial experience is shared in Canada and that we need to follow the American example.

I do not believe that mistaken eyewitness identifications are as prevalent a cause of wrongful convictions in Canada as they are in the United States. When we look to the high profile Canadian cases of wrongful conviction, problems of faulty science, police tunnel vision and prosecutorial non-disclosure seem to be the more pervasive causes.²⁷ I do not for a moment suggest that Canadians are better able to see than their American counterparts, but I do suggest that there are important systemic differences between our trial processes, which raise questions as to the applicability of American studies.

First, the Innocent Project also found that of the 62 cases examined, in 17 or 27 percent the wrongfully convicted had “subpar or outright incompetent” counsel.²⁸ The authors of *Actual Innocence* devote an entire chapter to “Sleeping Lawyers”. Good lawyering makes a difference. Good lawyers are able to cross-examine effectively on any of the frailties of eyewitness identification. They then raise these frailties in their submissions and see that proper jury instructions are given. Bad lawyers cannot or do not do these things. When one looks to our high profile wrongful conviction cases, such as Milgaard, Sophonow and Morin, one sees that these accused were represented by some of the best defence counsel in their respective provinces. Bad lawyering, therefore, is not as significant a factor in Canada.

The message here is clear, a justice system, in order to avoid

miscarriages of justice, must ensure that all of its citizens have access to a strong defence bar. This costs money. It is not politically attractive, but it is the right thing to do. As Canadians, let us not be smug. We too have seen cutbacks to legal aid.

A second major difference between Canadian and American jury trials involves instructions to the jury. American judges instruct juries on the law. They make little reference to the facts. As a result the typical jury instruction on eyewitness identification speaks of general concerns that may be applicable on the evidence. Canadian judges instruct the jury on the applicable law and go further to apply the law to the evidence. The judges carefully review the evidence of the eyewitnesses. A perfect example of such a charge to the jury is found in *R. v. McIntosh*. The charge in that case was extremely detailed and the concerns about eyewitness identification were applied to the specific circumstances as found in that case.²⁹ In my view these specific instructions are much clearer and stronger for the jury. In the *Model Jury Instructions in Criminal Matters* prepared by the Canadian Judicial Council, a judge proceeds as follows:

1. Identification is an important issue in this case. The case against [Name of Accused] depends entirely, or to a large extent, on eyewitness testimony.
2. You must be very careful about relying on eyewitness testimony to find NOA guilty of any criminal offence. There have been cases where persons have been wrongfully convicted because eyewitnesses made mistakes. It is quite possible for an honest witness to make a mistake in identification. Even a number of witnesses can be honestly mistaken about identification.
3. You may wish to consider several factors that relate specifically to the eyewitness and his/her identification of NOA as the person who committed the offence charged:

[List of various factors.]

Review relevant evidence about circumstances.

Review description provided by witness.

*Review relevant evidence about circumstances of identification.*³⁰

This is a far more detailed and “evidence specific” examination than an American judge would ever undertake.³¹

My point is a simple one, we have stronger safeguards in our trial process than the United States, and so we need to be cautious before we accept that expert testimony is needed because traditional trial safeguards are inadequate.

V. WHAT TO DO WITH THE EXPERT INFORMATION ON EYEWITNESS IDENTIFICATION?

As I mentioned at the outset, there is much valuable psychological research on memory and the process of eyewitness identification. We would be remiss if we do not use and apply this information. For example, Professor Gary Wells has clarified that there exist “estimator variables” and “system variables” at work in determining the accuracy of eyewitness identifications.³² Estimator variables apply to the circumstances surrounding the initial observation. These factors include the eyewitness’s eyesight, opportunity to observe, and lighting. These things the legal system cannot control. On the other hand, system variables can be controlled. They apply to the identification process in which the identification is elicited from the witness, for example, police interviews with the witness and the creation and presentation of a lineup. Professor Wells and other psychologists provide useful studies to help the legal system fashion “best practices” for eliciting eyewitness identifications by the police.

In 1999 the United States Department of Justice prepared a guide on eyewitness identification.³³ It includes recommendations on the conduct of eyewitness interviews and lineups.³⁴ Similarly, our ministers of justice, in

their *Report on Prevention of Miscarriages of Justice*, also make a number of useful recommendations on “best practices” that should be adopted by police investigators.

The problem that I see with these “exhortations” is that they do not have any teeth behind them. They are difficult for cross-examiners to use in any meaningful way in court. For example, the Canadian report notes that of ten police agencies contacted, four used sequential photo spreads, four are studying the practice, and presumably the other two continue to use simultaneous viewing. Where is the real commitment to “best practices”? The United States Guide actually contains the following caution:

This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

Opinions or points of view expressed in this document represent a consensus of the authors and do not necessarily reflect the official position of the U.S. Department of Justice.

Great! What good is it?

In the United Kingdom the government has legislated Codes of Practice under the *Police and Criminal Evidence Act 1984 (PACE)*. The Codes include detailed Annex protocols outlining the accepted practices for obtaining various types of evidence. Annex A deals with video identification and Annex E deals with showing photographs.³⁵ Under section 67(11) of *PACE* the Codes are admissible in evidence. In other words, wayward police officers who fail to follow correct procedures will be confronted with the legislation for all to see. More significantly, under section 78(1) of *PACE* a judge has the discretion to exclude such evidence in the interests of fairness. The British legislation goes a long way to ensure that the police follow correct procedures.

Our federal government could well introduce a “Code of Practice” in the Criminal Code. This would help to ensure a fairer identification process

across the country. Such a Code could and should incorporate the useful psychological studies on how eyewitness identifications are inappropriately influenced. This is where the “science” on eyewitness identification has a place and not in the courtrooms of the land.

Notes

1. See *e.g.* *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.).
2. *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 at 391 (Ont. C.A.), leave to appeal to S.C.C. refused, 121 C.C.C. (3d) vi [*McIntosh*] (quoting from the expert's testimony).
3. *R. v. Sheppard* (2002), 164 C.C.C. (3d) 141 (Man. Q.B.) [*Sheppard*].
4. See *United States v. Smithers*, 212 F.3d 306 at 310 (6th Cir. 2000) [*Smithers*].
5. See *e.g.* Roderick Lindsay and Gary Wells, “Improving eyewitness identification from line-ups: Simultaneous versus sequential lineup presentation” (1985) 70 *J. Applied Psychology* 556; Avraham Levi and Roderick Lindsay, “Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations” (2001) 7 *Psych. Pub. Pol. and L.* 776.
6. See *McIntosh*, *supra* note 2.
7. *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 411 (S.C.C.).
8. *Ibid.*
9. *Sheppard*, *supra* note 3 at para. 26.
10. *R. v. Zurowski* (2003), 44 M.V.R. (4th) 39 (Aka C.A.), McClung J.A., rev'd (2004), 10 M.V.R. (5th) 1 (S.C.C.).
11. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993).

12. *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) (Commissioner: The Honourable Peter deCarteret Cory), Eyewitness Identification Recommendations, online: Manitoba Justice <<http://www.gov.mb.ca/justice/sophonow>>.
13. *R. v. D.(D.)* (2000), 148 C.C.C. (3d) 41 at para. 46 (S.C.C.) [*D.(D.)*].
14. *Ibid.* at para. 57.
15. *Ibid.*
16. *McIntosh*, *supra* note 2.
17. *Ibid.* at para. 14.
18. FTP Heads of Prosecutions Committee, *Report of the Working Group on the Prevention of Miscarriages of Justice* (2005), Eyewitness Identification and Testimony, online: Justice Canada <<http://canada.justice.gc.ca/en/dept/pub/hop>>.
19. *Sheppard*, *supra* note 3 at para. 48.
20. *R. v. Sophonow (No. 2)* (1986), 25 C.C.C. (3d) 415 (Man. C.A.).
21. *D.(D.)*, *supra* note 13 at para. 67.
22. See the observations of Professor Mark Brodin, “Behavioral Science Evidence In The Age Of *Daubert*: Reflections Of A Skeptic” (2005) 73 U. CM. L. Rev. 867.
23. Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence* (Random House, 2000) at 246.
24. For a review of the admissibility of expert testimony on eyewitness identification see *e.g.* Michael Barnett, “Casenote: The Admissibility Determination of Expert Testimony on Eyewitness Identification: *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000)” (2000) 70 U. Cin. L. Rev. 751; Scott Woller, “Note: Rethinking the Role of Expert Testimony

Regarding The Reliability of Eyewitness Identifications in New York” (2003/2004) 48 N.Y.L. Sch. L. Rev. 323.

25. For a further discussion of discretion and abuse of discretion see *Smithers*, *supra* note 4.

26. See *People v. Lee*, 96 N.Y.2d 157 (2001), and a note written by Heather Sonnenberg, “The Admissibility of Expert Identification Testimony In New York Courts According to *People v. Lee*” (2002) 12 Temp. Pol. & Civ. Rts. L. Rev. 231.

27. Bruce MacFarlane in his detailed paper on wrongful convictions also noted that mistaken eyewitness identifications does not appear to be as major a cause in Australia. See Bruce MacFarlane, “Convicting the Innocent” in this issue of the Man. L.J. at 415.

28. See Dwyer, Neufeld & Scheck, *supra* note 23 at 187.

29. The jury instruction can be found at the Ontario Criminal Lawyers Association database CLAN in quicklaw. See Vol. 18, no. 3, June 1997 for commentary on the *McIntosh* case, the evidence presented at the trial, the judge's ruling, instruction to the jury, excerpts from the defence and Crown factums and the decision of the Ontario Court of Appeal.

30. Canadian Judicial Council, *Model Jury Instructions in Criminal Matters*, see section 11.24 “Eyewitness Identification Evidence”, online: CJC <<http://www.cjc-ccm.gc.ca>>. See also Gerry Ferguson and John Bouck, *Canadian Criminal Jury Instructions (CRIMJI)*, section 4.55.

31. For an example of an American jury instruction see Judge Ito’s Jury Instruction in the O.J. Simpson case. Online: ‘Lectric Law Library <<http://www.lectlaw.com>>.

32. See e.g. Gary Wells, “Applied Eyewitness Testimony Research: System Variables and Estimator Variables” (1978) 36 J. Personality and Social Psychology 1546.

33. United States Department of Justice, “Eyewitness Evidence: A Guide for Law Enforcement”, online: NCJRS <<http://www.ncjrs.org/pdffiles1/nij/178240.pdf>>. This guide was prepared through the National Institute of Justice and involved a multidisciplinary group of experts from the United States and Canada.
34. For a critique of the recommendations, see Avraham Levi and Rod C.L. Lindsay, “Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations” (2001) 7 Psych. Pub. Pol. and L. 776.
35. An excellent summary of this legislation is found in Christopher Allen, *Practical Guide to Evidence*, 3rd ed. (London: Cavendish, 2004) at 192-98.

Part 3: Oral History and Tradition in Canadian Legal Systems

Clearly, it would be very difficult for even the most attentive lawyer to remember everything important said in a court of law. Instead, the hunter was alluding to a difference between the way First Nations and Canadian people practice history.

– Joan Lovisek, 2002

Author(s): Adam Daniel Etinson

Source: *The Central European journal of Canadian studies* (2008), Vol. 6, Issue 1, at pp. 97-104.

Published by: The Central European Association for Canadian Studies

Stable URL: <http://hdl.handle.net/11222.digilib/116071>

Aboriginal Oral History Evidence and Canadian Law

Adam D. Etinson

Abstract

The establishment of distant historical facts and the articulation of aboriginal understandings of such facts are both vital to the legal cases of First Nations that confront the Canadian government with specific land claims as well as rights claims. This has made the appearance of oral history testimony a practical necessity for aboriginal claimants. Not only does oral history contain the aboriginal understanding of the past, it also refers to distant historical events for which little or no documentary evidence exists. Such testimony, however, has brought to the fore deep anxieties on the part of the Canadian judiciary regarding the rules of evidence and the value of oral accounts of history.

The Canadian judiciary has made significant efforts to be fair and open towards oral history testimony, taking into consideration the unique difficulties of proving aboriginal rights and title cases, most notably in the 1997 Supreme Court decision, *Delgamuukw*. However, despite such efforts, the need to stretch oral histories to the

limits of their reliability, the prevalence of suspicion and distrust between Native and non-Native parties, and the textual 'bias' of the Western styles of doing history have led to the undermining of oral history evidence in court. What emerges from this survey of the history of the legal reception of aboriginal oral history testimony in Canada is a sharper sense of the psychological and cultural damage that can result when folk tradition becomes an instrument of economic, legal and political interests.

I think that to be in this kind of work and not to have an optimistic personality would probably take one into the depths of despair. At the same time, you have to balance optimism with reality. People occasionally ask me, "How can you come back so energetically week after week and have a lot of positive things to say?" On the other hand, I'm also the messenger of not always pleasant stories — about technology, about corporations getting bigger and militarism getting worse. People ask, "How can you stay so cheerful?" and I say, "Well, although things are getting worse, we are getting clearer about their getting worse. And I think it's this clarity that will help us change direction." It's not going to be changed by pure brute force, and I don't believe it's going to be changed by moral coercion. It's going to happen by working on new ways to solve problems, and on new institutions to solve those problems with. (John Mohawk, 1997, Sec: Question Period)

In his first experience in court, one Cree hunter from James Bay, Québec, remarked "the white man writes down what he thinks is important, the Indians remember what is important" (Richardson, 41). The observation was telling. This Cree hunter was one of many whom, in 1973, had left home and come south to Montréal to try and save their traditional hunting territory from massive disruption by hydroelectric development. In what was their first visit to a big city, one of the most baffling sights for these men was the courtroom and especially its lawyers, scrambling to write down every last word of what the aboriginals said.

The hunter's statement was not a criticism of the strength of Canadian people's memory. Clearly, it would be very difficult for even the most attentive lawyer to remember everything important said in a court of law. Instead, the hunter was alluding to a difference between the way First Nations and Canadian people practice history. Western history has become a university discipline, a matter of scholarly debate grounded in careful

analysis (and analysis of analysis) of written, documentary evidence. Canadian First Nations history, like that of many indigenous societies all over the world, on the other hand, is traditionally oral. Oral history is passed on from generation to generation through stories and songs, through the telling and retelling of ancient tales.

Indigenous peoples of Canada — as well as many in the United States, Australia and New Zealand — have maintained and developed their oral traditions. One clear testament to that vitality is the recent courtroom phenomena of oral history testimony. Despite roughly five hundred years of European contact and cultural domination, the widespread development of written forms of aboriginal languages, and systematic efforts by modern anthropologists to document aboriginal histories, oral history has survived and is now being introduced into the courtroom as important case evidence.

Why is this happening? In Canada at least, there are two main reasons. Firstly, oral histories contain the aboriginal understanding of important historical events, and First Nations look to oral history in order to articulate and give evidence for that understanding. When the incentive to expand westward grew strong for 19th century Canada, the newly sovereign federal government wanted to avoid the bloody confrontations with Native Peoples that characterized the westward expansion of the United States. The government therefore opted to negotiate treaties which, for many Native groups, represented the only hopeful way out of a troublesome situation. In exchange for immense tracts of land, Native Peoples were confined to relatively small reserves, where they were offered protections such as tax exemptions, schools, annuities, farming equipment, ammunition, relief in times of famine, and hunting and fishing rights. As government negotiators were in a position to use the vulnerability (and illiteracy) of First Nations to their advantage, however, they sometimes failed to put down in writing all that they verbally promised at the time of signing. Oral history is often the

only remaining source of information about what was actually promised during treaty negotiations and so, with increasing frequency, First Nations are approaching the courts in search of justice with oral history evidence in hand.

The second major reason for the advent of oral history evidence in Canada is that Canadian law has, perhaps inadvertently, made aboriginal rights and land title cases difficult to decide without it. The most recent precedent for the proof of aboriginal rights was set forth in the Supreme Court ruling on *R. v. Van der Peet* in 1996, and is summarized by Stuart Rush as follows:

[The group must prove the existence of:] (i) A modern practice, tradition or custom (for example fishing salmon for trade) (ii) Continuity of the practice, tradition or custom from a pre-contact practice, tradition or custom to the present; (iii) The practice, tradition or custom must have been integral, core or central to the people's culture (iv) The people's society must have been distinctive. (Rush, Sect. II A, my emphasis)

To legally prove a community's right to continue a traditional aboriginal practice (such as hunting, trapping, or logging) involves, among other things, demonstrating that such activities were integral to the community's 'distinct culture' at the time of first contact (that is to say, in the 16th century!). Since there are few existing documents that specify in detail the practices of aboriginals five hundred years ago, aboriginal oral history is often the only viable and relevant evidential candidate. The test for the proof of aboriginal land title, in its most recently articulated form, was set forward by Chief Justice Lamer in the 1997 Supreme Court ruling in *Delgamuukw v. British Columbia* and is the following:

The land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive. (*Delgamuukw*: The Supreme Court of Canada Decision on Aboriginal Title, Para. 143)¹

To prove the validity of aboriginal title to contested land, the court must agree that the group in question was socially organized and significantly attached to that land prior to Canadian sovereignty (1867). Here again, relevant and sufficiently specific historical documentation is generally scarce even for that date, and oral history is therefore often key evidence.

The fact that it is oral histories that harbour so much important evidence regarding aboriginal history puts aboriginal peoples in a very peculiar position when they are expected to speak about their past in a court of law. To present evidence in a Canadian or American court means that western standards of evidence must be met, and since those standards are designed for written and documentary evidence, aboriginal histories are at a unique disadvantage. As Antonia Mills points out, “Westerners, including anthropologists, usually do not accept Native accounts as valid history because they are based on different premises than are Western canons of evidence” (Mills 1994, Pg. 73). The tendency for Westerners is to interpret aboriginal histories as allegory rather than historical fact.

In the first case made famous for its treatment of oral history evidence, *R. v. Delgamuukw*, it was the question of land title that was at issue. There, Chief Justice McEachern heard sixty-six oral history testimonies called *adaawk* and *kungax*. Normally performed at community gatherings or feasts called *potlatches*, the *adaawk* and *kungax* — mythological songs and stories about ancestors, ownerships, and trails between territories — were meant to establish that the Gitksan and Wet’suwet’en peoples of British Columbia were in fact socially organized and the exclusive occupants of the relevant land at the time of Canadian sovereignty. This evidence was the most important in the case.

In C. J. McEachern’s final ruling of 1991, he refused to accept oral history testimony as direct evidence of fact. He argued that, along with being at times inconsistent about important matters, it was too deeply embedded

in ‘belief’ and blurred the distinction between ‘mythology’ and ‘real’ matters (McEachern, 46). In his eyes, oral history ought, with rare exception, to be understood as hearsay evidence. In Canadian law, hearsay evidence is only admissible to prove the fact of something having been said by a third party who can no longer be called upon for cross-examination; it cannot be direct evidence as to the truth of a matter. Since oral history is often passed on by remembering and relating what someone’s great-grandfather or grandmother (for example) said, it falls by default into this lower category of evidence.

McEachern’s decision has been derided by anthropologists and other analysts ever since its proclamation. Among his critics are scholars such as Clay McLeod and Bruce G. Miller who argue that “the law of evidence has been used to oppress First Nations” (McLeod, 1280) and that “[McEachern’s] judgment is part of the ‘dominant discourse’ which, relying on the ‘common sense’ of the layman, is by definition ethnocentric, oversimplified, and logically flawed” (Miller, 65). Robin Ridington argues that McEachern is not an “unintelligent man; He is merely the prisoner of his own culture’s colonial ideology” (Ridington, 217). All of these points have their merit. But Ridington speaks more to the heart of the matter. We are all ‘prisoners’ of our own culture in some sense. And to its credit, the Canadian judiciary has, over the last decade, made efforts to take stock of this and to correct for it.

In 1997 the Supreme Court of Canada violently overturned McEachern’s decision. It specified firstly that a court should approach the rules of evidence flexibly, with a consciousness of the special nature of aboriginal rights and title claims: especially the peculiar difficulty of proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. Secondly, the Supreme Court insisted that judges should, in considering the weight of oral

history evidence, resist “facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions” (Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title, Para. 34). Without a doubt, these are admirably progressive views to be established in a Supreme Court. But what has this meant for the admission of oral history evidence in practice? Has the Supreme Court placed aboriginal oral history on the same evidential footing as European-style documentary history? Is it obliged to do so?

The mandate of flexibility and cultural sensitivity given to judges with regards to oral history has only made their jobs more difficult and vastly complex. After all, perhaps nowhere are the procedural, rigid, and skeptical dimensions of western culture more emphasized than in the courtroom. Western courts are supposed to be sanctuaries of common sense and rigorous rationality, where claims and their supporting evidence are tirelessly probed until established beyond reasonable doubt. What then, is an everyday judge supposed to make of folkloric testimonies that tell of human-animal body transfers or how the universe originated from a tiny blood clot when deciding on the status of specific aboriginal rights and land claims? Such evidence can present the judiciary with questions as complex and philosophical as that of the historical reality of Biblical narratives. McEachern’s judgment should not be seen as that of an evil law enforcer, but as the natural outcome of a clash of cultures.

The Canadian judiciary has managed to simplify its job somewhat, providing itself with two criteria for the acceptance of oral history evidence. In a 2001 decision, *Mitchell v. MNR*, the court ruled that admissible oral history evidence must be both useful (this, presumably, would exclude purely supernatural content) and reliable. On the face of it, this appears to be a reasonable strategy. After all, documentary evidence should also be useful and reliable if accepted in court. But do the standards of reliability

and usefulness work too strongly against oral history evidence? Is the bar set too high? These questions are still in the process of being answered; the battle to rescue aboriginal oral history from the hearsay rule must be fought anew in every case.

In 2002, *Benoit v. Canada*, the Cree and Dene people approached the Federal Court claiming that the Canadian government had, for one hundred years, failed to uphold a promise of tax exemption made to them and other Native signatories of Treaty 8. Although the text of Treaty 8 itself makes no mention of any tax exemption, the Aboriginal parties argued that it was verbally promised to them by negotiators in 1899, and should therefore be upheld by law. To back up their claim, the Cree and Dene appealed to both documentary and oral history evidence. While the Federal judge agreed that a promise of tax exemption was indeed part of the Aboriginal understanding of the treaty — and that, in order to uphold the honour of the Crown, the exemption should be respected as a treaty right — his decision was quickly overruled in the Court of Appeal. There it was argued that oral history evidence had been given undue weight, that in fact it failed to meet a ‘community standard’ test of reliability that should have been more rigorously applied. Whereas in *Delgamuukw* the oral history evidence was offered by individuals specially designated by the community and passed on in rituals where its veracity could be publicly scrutinized, here oral history was passed on from one random individual to another in an informal manner. Without such checks and balances in place, the court deemed the oral history evidence equal to hearsay, and the case was ruled in favour of the Crown.

In a more recent Supreme Court case, *Bernard and Marshall* (2005), oral history was used to prove that commercial logging, or something like it, was an essential aspect of Mi’kmaq society in 1760. While the court emphasized admissibility, flexibility and sensitivity to the aboriginal

perspective in these matters, the oral history evidence heard in the case was deemed unreliable and inconsistent. This is partly a result of the historical distances involved; the farther back one wants to go with oral traditions the more strained they become. Paradoxically, the legal structure that makes oral history evidence useful — and sometimes necessary — also makes it unreliable. The emerging picture is that, for one reason or another, oral history evidence tends to be discredited in court, and is generally unable to satisfy the conditions of usefulness and reliability.

The tendency of judges to devalue oral history evidence is not only a result of a clash of cultures. There are some very sensible and grounded reasons for being suspicious of oral history evidence. Stuart Rush put the point well in his research on the status of such evidence:

The courts are reluctant to use oral history [because] oral history is considered by many judges to be self-serving. Those judges consider it to be hearsay given by a party with an interest in the outcome of the litigation...The implications of treating it like other evidence are enormous. Thus, it is the type of evidence that courts are not accustomed to accepting without a somewhat greater degree of confidence in the evidence. (Rush, 2003, sect. IX)

Alexander Von Gernet, who has served as an expert witness in many cases and whose testimony in Benoit helped to devalue oral history evidence and swing the case in favour of the government, reports to the Canadian Department of Indian Affairs:

Many oral traditions do not remain consistent over time and are either inadvertently or deliberately changed to meet new needs. Aside from the fallibility of human memory and inter-individual transmission, the factor that most contributes to the changing expression of any given oral tradition is the social and political context of the 'present' in which it is narrated. (Von Gernet, 1996, 5.3.6.)

The central difficulty with oral history evidence is that it is a living form of evidence that takes on what we would think of as the role of dead evidence. Oral history is not like a document dating to the 17th century.

Constantly changing, oral traditions survive by being told and retold, often in different ways. And unless the courts are working with transcripts of oral history interviews conducted beforehand (which, in fact, is often the case), a people's history can be made or re-made by the words of an elder in court. The central anxiety that creeps up on all of us then, is, "What if they are making this up?"

In an interview broadcasted on McGill University's student radio (CKUT) in October of 2004, a man who had spent 14 years in various US prisons very lucidly explained that the hardest thing about doing time in prison was not the threat of physical violence or isolation but the special kind of abuse that comes with denying inmates trust, authority, or say in any matter whatsoever: what he called the loss of the ability to be right. If a guard decided that an inmate had spat gum, he explained, then that inmate had indeed spat gum, period. Stripped of the power to be believed or to demand that his beliefs be respected — an authority, however minimal, that we take for granted in everyday life — the man struggled to remind himself that he was more than a ghost: he struggled to maintain a sense of dignity and integrity, or even a sense of who he was.

The peculiar, fascinating, and unfortunate thing about introducing oral history evidence into the courtroom is not that it might not be believed, but the looming threat that, like the beliefs of this prison inmate, it cannot be believed. Whether it is for good reasons or bad reasons, the suspicion that courts routinely throw at oral history evidence damages aboriginal people's sense of who they are, of their worth as a people. Canadian aboriginals are surrounded by a dominant culture that cannot fully recognize, even when willing, the value of oral history as they themselves would recognize it. And the practice of placing their ancient traditions and customs on the examination stand, only for them to be probed and scrutinized by non-Native judges, is certainly humiliating. In a personal confession regarding

the Delgamuukw case mentioned above, an old Native woman remarked to aboriginal rights lawyer Paul Williams: “We told that judge things we don’t even tell our own grandchildren. We made ourselves naked in front of him. And he did not believe us.”²

After more than thirty years of legal battles, on 17 July 2007, the Cree people of James Bay finally came to an agreement with the federal government. The deal, which includes Cree rights for self-governance, is praised by both sides as a model for future aboriginal-state negotiations. Still, this agreement arrives amidst a growing backlog of almost 900 unsettled land claims and a National Day of Action, this past 29 June 2007, when First Nations from all across Canada publicly demonstrated for their causes, grievances and frustrations. Much more work remains to be done. One can only hope that aboriginal oral history is given due weight in the future settlement of these claims. The deeper and more long-term hope, however, is that oral history will be returned to its rightful place in aboriginal societies and taken off the examination stand. To this end, the negotiating table, where legal procedures can be left behind and a much more nuanced and fluid notion of history adopted, may be a more useful and reliable ally than the courtroom.

Notes

1. Before the ruling of C.J. Lamer, the criteria for proof of title was set forward in the Baker Lake decision of 1980, and included the extra clause that the plaintiffs prove the pre-sovereignty existence of an ‘organized society’, which means a society with “an organized system of landholding and a system of social rules and customs distinct to the band” (Baker Lake v. Min. of Indian Affairs and Northern Development (Can.) (1979), 107 D.L.R. (3d) 513 at 542 (Fed. T.D.)).

2. This turned out to be a crucial criterion in the Delgamuukw case: the existence of an “organized society” pre-sovereignty was one of the crucial requirements that Chief Justice McEachern concluded was not provable by the oral and non-oral history evidence submitted in the trial. The requirements for proof of aboriginal title are clearly set out on page 225-226 of his Reasons For Judgment, and reiterate the criteria set forth in the Baker Lake case.

Works cited

- McEachern, Allan (1991). *Delgamuukw v. A.G.: Reasons for Judgement*; *Delgamuukw et al. v. The Queen in right of British Columbia et al.* No. 0843 Smithers Registry Dominion Law Reports, 1991
- McLeod, Clay (1992). “The Oral Histories of Canada’s Northern People, Anglo Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down The Barriers of The Past”, 30 *Alberta Law Review*. Pgs. 1276 – 1290.
- Mohawk, J. (1997). “How the Conquest of Indigenous Peoples Parallels the Conquest of Nature”. Copyright 1999 by the E. F. Schumacher Society and John Mohawk. Online at: http://www.archive.org/details/conquest_mohawk
- Miller, Bruce G. (1992). “Introduction” in *BC Studies*/Special Issue No.95, Autumn 1992.
- , (1992). “Common Sense and Plain Language” in *BC Studies*/Special Issue No.95, Autumn 1992. (55-65)
- Mills, Antonia (1994). *Eagle Down is our Law: Witsuwit’en Law, Feasts, and Land Claims*. UBC Press.
- Richardson, Boyce (1979). *Strangers Devour the Land*. Toronto, Macmillan of Canada.
- Ridington, Robin (1992). “Fieldwork in Courtroom 53: A Witness to

Delgamuukw” in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. Edited by Frank Cassidy. Oolichan Books and The Institute for Research on Public Policy 1992

Rush, Stuart (2003). Use of oral history evidence in aboriginal rights litigation. The Continuing Legal Education Society of British Columbia, at www.cle.bc.ca

Von Gernet, Alexander (1996). *Oral Narratives and Aboriginal Pasts*. Indian and Northern Affairs Canada. Internet Edition. http://www.ainc-inac.gc.ca/pr/pub/orl/index_e.html

Cases cited

Benoit v. Canada (2003) Source:

<http://recueil.cmf.gc.ca/en/2003/2003fca236/2003fca236.html>

R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220, 2005 SCC 43

Delgamuukw et al v. The Queen et al, 40 D.L.R (4th) 685

Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title. (1998) Commentary by Stan Persky, Foreword by Don Ryan. Greystone Books.

Mitchell v. M.N.R., [2001] 1 S.C.R. 911.

Author(s): John Borrows

Source: *Osgoode Hall Law Journal* (2001), Vol. 39, No. 1, at 1.

Published by: Osgoode Hall Law Journal

Stable URL: <http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss1/1>

Listening for a Change: The Courts and Oral Tradition

*John Borrows**

Aboriginal oral history is a valuable source of information about a people's past. It can constitute important evidence as proof of prior events, and, or it can shed light on meanings groups give to their past. Despite its value, however, oral tradition presents particular challenges of admissibility and interpretation because of its unique source and transmission. This article outlines and discusses these challenges and suggests various approaches to better understand the insights contained within aboriginal history.

* Associate Professor, Faculty of Law, University of Toronto; Visiting Professor and Acting Executive Director, Indian Legal Program, Arizona State University. The author would like to thank Frank Cassidy, Dena Davis, Patrick Macklem, Patricia Monture-Angus, Maria Moratello, Kent McNeil, Jeffrie Murphy, and helpful anonymous reviewers for comments on earlier versions of this article.

1. INTRODUCTION

My Aunt Irene lived in a blue clapboard bungalow on the top of an escarpment that overlooked the reservation. From her front window you could see down Sydney Bay Bluff Road, across the “prairie,” to the peninsula that gave Cape Croker its name. Framing “the Cape” were the vast cerulean waters of Georgian Bay. From this perch you could watch the people of Neyaashingaming come and go. Aunt Irene was familiar with all that she could take in. She could tell you the family history of each resident who passed by her window, and she knew the stories that made sacred the place where each one lived. When I was a young boy we would sometimes visit her and she would relate a thing or two about this world. I would always enjoy the soda she served me but was frankly a little scared by her and did not know what to do while her stories went on and on. She was kind and loving, but for a boy who spent more time off the reserve than on, I did not know what to make of the strange world she unfolded to me.

When I was older I began to appreciate a little more the knowledge Aunt Irene carried. I can remember visiting her house with Grandpa Josh (her brother), my mother, and my sister and listening to her reminiscences. I would see her on and off through the years, but she was never really a big part of my life. Then one day when I was in graduate school, I went to ask her about the history of the reserve. I was with my mother and Aunt Norma. We spent a couple of hours there and, in her unforgettable way, she told us the history of our family as it related to Cape Croker. She knew details about my great-great-great-grandfather and grandmother, and everyone down through their line until my generation. I was amazed. She was a living history book. I finally caught a glimpse of the world that had made me feel so uneasy as a boy. I realized that the discomfort I once felt was due more to my disorienting unfamiliarity with the people she talked about than to any

unusual behaviour on her part. In fact, from her stories I came to take great comfort in the knowledge that I fit into this world she described and was related to it in more ways than I even knew.

Aunt Irene's narrative became the backbone of the Master's thesis I was working on at the time, a genealogical legal history of the Cape Croker Indian Reserve.¹ The framework she provided helped me make sense of the fragmentary archival material that I had been sorting through prior to that visit. It was as if she had presented the picture of the puzzle I was building, an account I still held in scattered pieces. Her wonderful narrative helped me to shape the papered remnants of our history into something approaching a recognizable representation. I later triangulated her stories with those of my great-uncle Fred, John Nadgiwon, "Chick" (Walter Johnson), Aunt Norma, and my mother, and with the archival materials I had been working with, to fill in the details of the work.

The experience I had with Aunt Irene gave me a great respect for oral history. I realized that it could be enormously helpful in assembling a portrait of the past. It can provide evidence of prior circumstances that may not be available in written documents or other formally recorded instruments. For example, Aunt Irene told me information about my great-great-grandfather's treaty-making activities that were not available in the written record. Peter Kecedonce Jones, my great-great-grandfather, had signed two treaties in 1854² and 1857³ that promised many material goods and services in return for non-native people settling on our territory. In fact, Peter's signature was the first one on the 1857 treaty. These treaties covered over five hundred thousand acres of prime land in southwestern Ontario, extending east from Goderich on Lake Huron to Arthur in central southwestern Ontario, and then north to Owen Sound on Lake Huron. I found that the archives contained valuable information about Peter's decision to enter into these agreements. Written sources told of promises

secured for sharing the land: they included increasing capital payments through trust fund deposits and payments,⁴ the provision of education, the building of infrastructure (such as roads, public buildings, and docks), large reserves,⁵ housing,⁶ and for the provision of hunting, fishing, and timber rights.⁷ In fact, the people of Cape Crocker were told “that from the sale of the land [they] would soon have a large income, would all be able to ride in carriages, roll in wealth and fare sumptuously every day.”⁸ Yet, despite this detail, I discovered that the written record was incomplete. It was only through Aunt Irene’s oral accounts that a fuller picture emerged as to why such agreements were made. She told me that, despite its monetary implications, Peter and his people signed the treaty first and foremost as an exercise of self-respect and self-determination. Many people in the band wanted to remove themselves from the destructive influences of alcohol, which was becoming a problem in their community in Owen Sound.⁹ This insight deepened my understanding of why my ancestors would agree, as part of their treaty negotiations, to their removal from their productive farms and hunting grounds. It helped me to appreciate the great value of oral tradition in compiling a more complete representation of the past.

II. THE CHALLENGES OF ORAL HISTORY

While I saw the value of oral tradition, I also recognized that it could present some unique challenges to making sense of what went before. Oral history presents both risk and insight because it simultaneously intermingles the events that took place in the past *and* the meaning that people ascribe to those events.¹⁰ As the Royal Commission on Aboriginal Peoples noted, “oral history is enmeshed with the stories of a lifetime.”¹¹ The blending of incident and interpretation presents special problems of verification for oral history, problems which are sometimes different from those contained in a documentary reconstruction of the past.¹² For example, many of my Aunt

Irene's stories about my great-great-grandfather contained references to supernatural events. These references potentially would undermine the credibility of oral history if they were included in certain academic histories or repeated in court. I was aware that a portion of my scholarly or legal audience would have reacted negatively to the appearance of "little people," "bear-walkers," or "underwater lions" in my history. I imagined that some would call into question the more conventional aspects of the narrative because they were intermingled with these more unorthodox elements.

From my study of Anishinabek (Ojibway) documentary history, I was familiar with the literature that cast doubt on the reliability of oral traditions in drawing inferences and conclusions about the past. Nicolas Perrot, a primary and leading source for Anishinabek history, wrote about Aboriginal oral traditions in the most disparaging of terms. For example, he observed that: "Among them there is no knowledge of letters or of the art of writing; and all their history of ancient times proves to be only confused and fabulous notions, which are so simple, so gross, and so ridiculous that they only deserve to be brought to light in order to show the ignorance and rudeness of these peoples."¹³ I knew that such opinions would be hard to shake. Many early writers of Anishinabek history shared Perrot's critical views about oral tradition, although such judgement was not uniform.¹⁴ Despite some dissent, an unreflective treatment of oral tradition still infused the prevailing culture of inquiry. I knew that "the weight of history" was against me in questioning these views.¹⁵

I also knew that these prejudices could find expression in the more recent literature too. Robert Lowie, an influential American anthropologist, wrote that he could "not attach to oral traditions any historical value whatsoever under any conditions whatsoever."¹⁶ Lowie had such a low view of oral tradition that he concluded that, if the "primitive notions tally with ours, so much the better for them, not for ours."¹⁷ In the same vein, the noted

English historian Hugh Trevor-Roper also observed that it was inappropriate to write history based on oral traditions. He counseled his fellow historians that “we should not amuse ourselves with the unrewarding gyrations of barbarous tribes in picturesque but irrelevant corners of the globe; tribes whose chief function in history, in my opinion, is to show to the present an image of the past from which, by history, it has escaped.”¹⁸ Such views led Trevor-Roper to conclude that only people with written history should be studied and that “the rest is darkness...and darkness is not the subject of history.”¹⁹ This assessment was not a promising message for my study of Anishinabek legal history. I was mindful of these and similar examples when I thought about the prejudices Anishinabek history might encounter if it was told with all its supernatural elements.

Yet I had to ask myself: What explains the pervasive bias against oral tradition? From my own experience I knew it had great value. It seemed to me that some people regarded the passage of oral traditions as the game of “telephone” many of us played as children. You may remember how this game was played. After recess, when the teacher wanted to quiet us down from our boisterous outdoor activities, we would be asked to sit quietly in a circle to try an experiment. The teacher would then help our six-or seven-year-old bodies settle into a somewhat orderly formation, and whisper a message in a child’s ear. The child who received the message would have to pass it along to the next person, and so on, through twenty or so children, until the message within the circle reached its beginning point. You might also remember the outcome of this game: Messages like “See me run and stand” might turn out to be “Steamy buns and jam.”

Despite the truths this game might reveal about our short-term listening skills as young children, it is questionable whether this common analogy was appropriate for considering the accuracy of tribal societies’ oral traditions. There are three potential problems. First, for many communities

the transmission of oral tradition is not conveyed in such a singular, detached, and decontextualized way. As such, the game of telephone oversimplifies the process of transmission in Aboriginal tradition. Oral history in numerous Aboriginal groups is conveyed through interwoven layers of culture that entwine to sustain national memories over the lifetime of many generations. The transmission of oral tradition in these societies is bound up with the configuration of language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology, and the physical world. These factors assist people in knitting historic memories more tightly in their minds. There are many types of traditions that are a product of this process: memorized speech, historical gossip, personal reminiscences, formalized group accounts, representations of origins and genesis, genealogies, epics, tales, proverbs, and sayings.²⁰ In their aggregation, each of these cultural strands wound together and were reinforced by specific practices. These practices include such complex customs as pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing, and the use and importance of place and geographic space to help ensure that certain traditions are accredited within the community. Oral tradition does not stand alone but is given meaning through the context of the larger cultural experiences that surround it.

The second problem in analogizing the game of telephone to Aboriginal oral history is that it often assumes that intentional change in the transmission of messages is unrecognizable and unstoppable. This concern also has an answer. Recall the game of telephone once again: "See me run and stand" could turn out to be "There are seven bears in the tent." Such deliberate changes might be made during the game to liven up the activity, to see how entertaining it would sound to have the message changed completely when it reached the end of the circle. Children might do this in

an attempt to draw attention to themselves as being funny, creative, or playfully mischievous when it is later discovered who made the changes. In doing this, they may hope that others will respond to them in more flattering ways. They change the message so that they can become more popular and have greater opportunities with their friends. The same might be said to happen in the transmission of oral tradition. People who tell stories might make changes to oral messages, perhaps not so much to receive the benefit of greater entertainment, but to obtain more material benefits that they hope will accrue to them because of the changes. In the case of traditions that are brought forward by Aboriginal peoples to establish their rights, there is no denying the point that there are many incentives to recount them in a way that favours the establishment of their case. Aboriginal people are subject to the same flaws and frailties as other people in similar circumstances.

In response to this concern, it should be noted that there are usually certain people in any given group who preserve accounts of tradition in a way that sustains a more multilayered view of the community's past. While some might try to mislead, others in the group will have the same propensity for honesty and integrity that is found in all populations. They will be sensitive to the numerous interpretations and meanings of past events and will recount oral histories in a way that reflects this fact. Some are even formally commissioned to bear this responsibility and will be true to the charge to relate the complexities of these histories as they know them. Such people, formally and informally chosen, will help to ensure that the competing motivations found within their history are appropriately reproduced. Their presence will help to ensure that many different accounts of the same event are preserved in a recognizable form. Their efforts protect the understanding of past events from outright intentional change.

The third potential problem some see with oral tradition is, as Professor Alexander von Gernet wrote, “overwhelming evidence that many oral

traditions do not remain consistent over time.”²¹ Professor von Gernet cited three reasons for the lack of consistency in oral traditions. First, he observed that memory is unreliable and is subject to permutation and change. Second, the fact that oral tradition is based on recycled memories enhances their potential for error and omissions over numerous repetitions. Third, oral traditions are adversely influenced by the context in which they are compiled. He suggested that since oral traditions are spoken under the influence of present concerns and values, their reliability for providing a true explanation of past events is contaminated.²² Professor von Gernet’s observations deserve attention. It is true that oral traditions can change over time and that they can be influenced by present concerns and events.

Since I simultaneously agree and disagree with Professor von Gernet’s observations, I want to examine them. He gives a negative spin to the variability of oral tradition that is not always warranted. He employs words such as “unreliable,” “error,” and “contaminate,” which are not appropriate in certain circumstances. First, it is important to note that oral traditions can remain quite consistent through generations of time and thus be reliable for providing a good explanation of past events. In such cases, von Gernet’s observations may not take sufficient account of the checks and balances in language, people, and culture that help to sustain such memories. On the other hand, von Gernet is correct in observing that there is a substantial body of literature that demonstrates the permeability and fluidity of oral tradition through time. I want to suggest that this observation does not lessen the value of oral tradition; rather, it provides us with a different value by which it should be measured. As such, there are many instances in which oral tradition does not warrant von Gernet’s negative labels. Sometimes there is something quite different going on in the transmission of oral history than the mere recording of past events, and this difference can lead to the accounts changing over time through the adoption of more contemporary

elements. This possibility does not mean that oral history is of no value, it means that sometimes (though not always) it has value for different purposes.

To return to our analogy: sometimes it is as if the game of telephone is no longer about passing a message unchanged around the circle but about giving meaning to the message which is consistent with its original formulation. In these circumstances, the game draws its strength from its participatory element, creating a message that is faithful to the original while drawing on the skills and understanding of people in the group to make the message meaningful. That is to say, with certain oral histories, a different game may be being played than the verbatim transmission of information. In some oral history simply passing the message around the circle without trying to make it part of each person may not be the object of the exercise. If we were children involved in such a game, we would have to be careful that we did not judge the people playing the game by the wrong rules. Similarly, lawyers, judges, and historians observing and participating in the transmission of oral history should be cautious in judging the differing and sometimes shifting purposes of oral tradition. This counsel may be even more fitting when we recognize that sometimes the game we think we are playing can even shift back and forth in mid-stream.

III. THE “FACTS” ABOUT ORAL HISTORY

The multifaceted elements of oral tradition can, however, make working with it difficult. Those of us who may be attentive to its substance and methodology are left with the task of trying to explain its usefulness for historical and legal inquiry. As I have implied, while the recognition of oral history's differences does not undermine factual validity, these differences do suggest that special considerations will be relevant to determining such validity and usefulness. Despite this challenge, the existence of explicitly

subjective elements in oral history can, at times, present greater opportunities for understanding historical events than the recitation of bare facts. It can reveal the intellectual, social, spiritual, and emotional cognition of the event for the group in question. As a leading philosopher of oral history has expressed: “[t]he importance of oral testimony may not lie in its adherence to fact, but rather in its departure from it, as imagination, symbolism, and desire emerge.”²³ So called “wrong” statements can still be psychologically true and reveal more about the people and events under study than the mere fact being chronicled. A group’s understanding of their own past is as much a part of history as are more verifiable facts. “What informants believe, is indeed a historical fact (that is, the fact that they believe it), as much as what really happened.”²⁴

For example, the Lemba of southern Africa have oral traditions that are regarded by some as evidence of their historical migrations. If their stories are true, then they contribute significantly to historical understandings of dispersion and settlement patterns of people in their region. However, even if the events described did not happen, their oral traditions can also be important because they simultaneously provide a great deal of insight into the Lemba’s self-understanding of their own identity and judgement of their history. For two thousand five hundred years, the Bantu speaking Lemba of southern Africa say they have kept alive an oral tradition about their Jewish ancestry and exodus from Judea to Africa led by a man named Buba.²⁵ They say that after travelling to the southern Arabian Peninsula, they eventually settled in a place called Senna, an ancient city in present day Yemen. After many generations in Senna, for reasons not clear from their traditions, the Lemba migrated again. They journeyed across the Red Sea into eastern Africa, headed south and eventually resettled in their present location in modern day South Africa. They say that: “we came from the north, from a place called Senna. We left Senna, we crossed Pusela, we came to Africa

and there we rebuilt Senna.”²⁶ The Lemba refuse to eat pig-like animals, practice male circumcision, have twelve tribes, or clans, and maintain numerous practices that are found among many Jewish people. Not surprisingly, there were many people who doubted the veracity of the Lemba’s claims.²⁷ There is no record of Buba in written Jewish history, and there is “no shortage of those who questionably claim to be the sons of Abraham.”²⁸

However, despite understandable cynicism, recent DNA analysis suggests that Lemba oral traditions may be correct. A team of geneticists has found that many Lemba men carry a set of DNA sequences that are distinctive of the Jewish cohanim priests believed to be the descendants of Aaron.²⁹ These researchers discovered this link by examining material from the Lemba’s Y chromosome samples, which are not shuffled every generation and therefore do not obscure the lines of individual descent from father to son.³⁰ The genetic signature is also common among Ashkenazi and Sephardic priests, but is rare or absent in non-Jewish populations.³¹ What is interesting about Lemba genetic patterns is that the cohen-associated gene signature is present at the same high rates as found in the Ashkenazi and Sephardic priests, among men who belong to the senior of their twelve groups known as the Buba clan. This discovery has led to a re-examination of the Lemba’s oral traditions regarding their Jewish ancestry and historic migration to South Africa.

The oral history of the Lemba is, therefore, an important addition to understanding their society on two different levels. On the one hand, the tradition may be important evidence of a significant historical migration that seems to be subject to scientific verification. This conjunction of oral history and external data demonstrates that there may be instances where oral history and other methodologies converge and can be used to verify one another.³² On the other hand, the Lemba’s account is also important because

it reveals much about the Lemba's interpretation of their historical past, which would be the case even if other studies eventually reveal that their migration and/or Jewish ancestry is not historically "true." The fact that they explain their historical experience and contemporary identity by reference to their former residence in the middle-east and their adherence to principles of Judaism, indicates a strong association with its social and spiritual values. The symbolism, imagination, interpretation, and desire that can be inferred from Lemba oral traditions provides an historical insight into their culture that may be as significant, if not more so, than verification that their journey actually occurred.

IV. SORTING THROUGH THE PAST

This short description of the Lemba's oral history demonstrates that making use of oral history can be complicated. With the Lemba it seems that the past event may have actually occurred, and that the meaning they attach to this event can also tell us a lot about their identity. What do we do, however, in cases where we cannot decide if the event described as having taken place in the past actually happened? What consequences should follow from our interpretation if it did not? How do we understand oral tradition when it may sometimes authenticate actual events and simultaneously provide an interpretation of those events, and at other times provide an insight into the societies' past collective beliefs, even if the event described did not really occur. Untangling this thicket is the challenge historians and courts have been wrestling with as they have attempted to work with oral tradition.

One approach to this problem is to downplay, disregard, or deny the utility of oral traditions as providing useful insights into the past. The courts and early scholars took this traditional approach. While this approach might make historical reconstruction easier, it does not make it better. Valuable

insights would be lost on those occasions when oral history does describe a real past event, or reveal a group's psychological understanding of its past. Another answer to the challenges supplied by oral tradition is to treat it as a completely different intellectual exercise from conventional historical work.³³ This approach was the official view of the members of the Royal Commission on Aboriginal Peoples as they broadly contrasted Aboriginal and non-Aboriginal approaches to history in their final report.³⁴ The tendency to dichotomize oral and documentary history and treat the purposes of both enterprises as completely different does have certain attractions. There is no question that different emphases are broadly present in Aboriginal versus non-Aboriginal historical traditions. The Royal Commission labeled these different emphases as documentation, progress, objectivity, and scientific, on the one hand, and oral, educative, cultural, socializing, and subjective, on the other. However, I would caution against over-generalizing the differences between oral and documentary history. They can be, but are not always, completely different enterprises. A careful historian, advocate, or judge who works with these materials must appreciate this fact. Sweeping generalizations about oral and written histories must be closely scrutinized, and case-by-case analysis must be supplemented with an awareness of the complex relationship in these approaches.³⁵ The similarities between oral and written history are legion. A significant portion of the documentary record started its life as oral history.³⁶ This means that each format can encounter similar challenges in verification and authentication, though this may occur in different ways.³⁷ Each format may also be subject to substantial revision, permutation, and change.³⁸ Just as there are different written versions of how and why Canadian confederation occurred,³⁹ so there are different oral accounts of how the Ojibway came to live on their traditional territories in southern Ontario.⁴⁰ The diversity of interpretation about these events is not

necessarily a result of the way in which they were transmitted, but instead reflects the fact that there are different interpreters of history who have different interests in its reproduction.⁴¹ If called upon to recount an important event from our personal or family history, each of us might try to demonstrate a different aspect of the same event to sustain our deliberate or unexamined values and beliefs. We may also write with present values in mind, and pass on both the biases and insights of our generation.⁴² We are all socialized and acculturated in different ways. These various patterns of individual and cultural choice shape how we view the world.⁴³ Some people will regard certain influences in historical development as primary moving forces, while others will take their cues from very different factors. All historical observation and interpretation, oral and written, is coloured by differential life experience and training.⁴⁴ While these challenges may be less apparent to those people who are used to thinking about written history as more trustworthy than oral literacy, it is important to remember that any view of the past is influenced by the social and cultural position of those people who engage in its transmission.⁴⁵

Given the pervasiveness of western culture in understanding oral tradition, in the end it may be that people are generally more suspect about its veracity because it does not accord with prevalent historical and legal methodologies. When criticizing the use of oral history this fact should provoke a moment of sober second thought. Giving oral tradition its due might require examining and partially overturning the values that lie hidden behind the most pervasive methods of “factual” interpretation. We should be open to the idea that different cultures may draw their implications about what happened in the past from different sources. Oral history or genetic makeup, as illustrated by the Lemba example, could be two such sources. People have also used pictoglyphs, wampum belts, masks, totem poles, button blankets, culturally modified environments, birch bark scrolls, burial

disturbances, songs, ceremonies, and stories, to name but a few, to remember and interpret what happened in the past. Why might we think writing is always a more reliable basis upon which to take clues about the past than these other forms of communication?⁴⁶ Is it because there is a value system and unexamined bias built into the very process of western historical and legal interpretation that is often not apparent to those of us who use it as if it were second nature? Can we be, in some ways, like the fish that did not ever know about the existence of water, until the first time it was pulled out into the air?

In examining history one must develop some good general questions to discern oral tradition's different guises while still being attentive to its specific context. These inquiries should help one to know when to consider tradition as proof of past events, when to treat it as evidence combined with interpretation, and when to regard tradition as "false" concerning a past occurrence, but "true" because of what it reveals about the speakers' relationship to their history.⁴⁷

When I was working with the oral traditions of Cape Croker I remember wrestling with similar questions. To judge oral tradition as proof of past events, I looked for a certain degree of consistency within the accounts and stories I received. I talked to people from different families on the reserve (Jones, Johnston, Nadjiwon, Akiwenzie). I spoke to people of different generations (elders, older cousins) and of different but closely associated communities (Saugeen, Wasauksing, Walpole, Manitoulin). I also compared these oral accounts with written materials that dealt with the same events. This was a way of scrutinizing both the oral and written sources: to show where one or the other may have gaps, errors, or other deficiencies as proof of past events. In such comparisons it is not always the case that oral sources are corrected by written sources. At times, oral tradition may prompt significant revisions to the written record that have

falsely misconstrued a past occurrence. In order to test the traditions I received for this kind of proof, I searched family histories, scholarly works, graduate theses, missionary journals, Indian agency correspondence, surveyors notes, band council minutes, newspaper articles, individuals' private papers, "explorers" travel maps and books, and government census material.⁴⁸

Yet, this testing of tradition was not only for the purpose of verifying the existence of certain past events. As illustrated in the example of my great-great grandfather's treaty making exercise, of even greater importance for the history I was compiling was the historical meaning that our people applied to the treaty-making event. The "facts" of my community's legal, psychological, emotional, and spiritual relationship to the events that had taken place was what interested me. Testing the "truth" of this historical evidence required further tools. I needed to be familiar with the hopes, fears, aspirations, and self-perceived limits people held. I needed to know their priorities, relationships, landscape, physical needs, and desires. My ancestry, family relationship, friendships, personal viewpoints, and student status were also helpful in this regard. I would have been even better equipped to understand their interpretation of history had I known more of the Ojibway language, and spent even more time in the community as a youth.

Another tool helpful for understanding my community's oral histories was an ability to give something valuable back to those who were speaking to me. The dialogical nature of oral history reveals the researcher as a participant in the creation of historical meaning, despite attempts to "tread lightly" and not interfere with the informant's memory. As hard as I tried, it was impossible for me to hide behind a façade of objectivity when I interacted with others in the interviews and thereby became involuntarily complicit in the structure of their narratives.⁴⁹ In many respects, an

interviewer implicitly defines the roles of the parties and establishes the basis of narrative by opening the conversation. My seemingly neutral requests would shape the agenda and form of the interview, and thereby influence its chronology, themes, subject matter, and style.⁵⁰ Fortunately, these agendas were constantly subject to renegotiation throughout the interview as the informant and I unconsciously tussled with one another over the significance, hypothesis, analysis, and assumptions that structured our interaction.⁵¹ Nevertheless, the fiction of non-interference in such interactions was hard to sustain when the very process of inquiry shaped the understanding of oral history.⁵² Therefore, my active and often not too hidden role in the construction of the narrative made another tool very valuable for understanding oral history. The ability to give something significant in return throughout the interview could establish a better understanding of the events under study. If I could draw on my knowledge to ask more specific questions, challenge responses, listen patiently to so-called tangents, better answer questions that were put to me, and thereby further draw on the interviewee's memory, this could play an important role in understanding the informant's history. Furthermore, any limited ability I later marshaled to communicate this history also became an important tool that gave something back to the people who spoke to me. I felt that if I could provide an opportunity for people to organize their knowledge more articulately, amplify their voices by bringing them to a wider audience, and extend their narrative's life by prolonging access to it, this activity could be a valuable tool that helped in understanding oral history.⁵³

The questions and qualities that make oral history more intellectually accessible are available to researchers, lawyers, and decisionmakers who want to understand its particular truths. They assist in discerning the different "facts" that oral history might record. They can help in sorting through the past and making sense of oral history's sometimes shifting

purposes. External testing and documentary triangulation shed light on the “factual” occurrence of past events. Internal cross-referencing reveals the “factual” truth of the community’s perception of the past through the researcher’s relationship to the peoples’ knowledge under study. Keeping these tools in mind might help those researchers interested in using oral history to understand actual past events, peoples’ interpretations of the past (even when the events on which they based their historical understanding did not occur), and the distinctions that may sometimes need to be made between them.

V. ORAL HISTORY IN THE COURTS

Similar to my experiences with Aunt Irene, and to other challenges discussed in this article, the difficulties present in understanding oral tradition have been encountered in the context of courtroom practice and jurisprudential principle.⁵⁴ Through the years, Aboriginal oral history has led judges to label Indigenous peoples as, among other things, “ignorant,”⁵⁵ “primitive,”⁵⁶ “untutored,”⁵⁷ “savage,”⁵⁸ “crude...simple, uniformed and inferior people,”⁵⁹ who led lives that were “nasty, brutish and short.”⁶⁰ Yet despite these biases, in recent years the oral traditions of Canada’s First Nations have played an increasingly “crucial role in the litigation of Aboriginal rights.”⁶¹ In numerous cases oral histories have been brought before the courts in an attempt to prove long-standing relationships between Indigenous peoples and their environments.⁶² Aboriginal litigants have presented this evidence in the hope that courts would attach legal significance to these ancient relationships and thereby provide protection for them in their traditional territories. In some cases there has been scholarly and legal recognition of the connection between oral tradition, scientific study, and the actual occurrence of past events. In others there have been some difficulties in discerning the complexities of oral history that has led

to questions concerning its admissibility and weight as proof of past events.⁶³ One of the challenges the courts face in dealing with oral history is that they have not traditionally given much credence to the other truths that may be present in oral history.⁶⁴

This traditional approach may be changing in light of the groundbreaking case of *Delgamuukw v. British Columbia*,⁶⁵ in which the Supreme Court of Canada partially acknowledged the problems associated with the interpretation of oral history. The Court wrote that a “special approach” was required in receiving and interpreting evidence from Aboriginal claimants where such evidence “does not conform precisely with the evidentiary standards” that would be applied in private law cases.⁶⁶ The differential treatment of Aboriginal evidence was justified by the *sui generis* categorization of Aboriginal rights, which recognizes their unique source and nature.⁶⁷ The Court reasoned that “although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples.”⁶⁸ To apply this principle, the Court instructed judges to adapt the laws of evidence so that Aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight.⁶⁹ This approach allows a judicial decisionmaker to give oral histories “independent weight” and place them “on an equal footing with the types of historical evidence that courts are familiar with.”⁷⁰ The Court noted that these modifications to the rules of evidence were necessary to the litigation of Aboriginal rights if to do otherwise would “impose an impossible burden of proof on Aboriginal peoples, and render nugatory any rights they have” because “most Aboriginal societies did not keep written records.”⁷¹

The attempted reconciliation of “the perspective of Aboriginal people” with “the perspective of the common law” found in these new evidentiary

standards is an important development in the Court's articulation of principles to bridge the differences between Aboriginal and non-Aboriginal cultures.⁷² While the Court's new approach to oral history might have solved the old problems of not giving credence to these histories, in the process the Court may have created new challenges. It is not yet clear how the courts will sort through and discern the shifting purposes of oral history explored in this article. Distinguishing between the various purposes and uses of oral history is not an easy task. The Court is now peering over this new horizon by allowing oral histories to be received on the same footing as conventional histories. How they will deal with the challenge of placing Aboriginal oral tradition on the same footing with the types of evidence the courts are familiar with is an important question. Will they be equipped or mindful of the difficulties presented by the interpretation of oral history?

There are elements of *Delgamuukw* that raise questions about the Court's knowledge of what it has embarked upon, which deserve outlining here. In particular, after encouraging the accommodation of unique evidence from Aboriginal peoples, the Court wrote that this reconciliation must not be done in a manner that "strains the Canadian legal and constitutional structure."⁷³ This caveat, while intended to be reassuring, represents a substantial challenge for the reception of oral history in a manner that is sensitive to its different purposes. It may one day represent the fulcrum on which the courts once again elevate non-Aboriginal values and modes of historical interpretation, despite their intent to do otherwise. This new problem may present itself because the Court's new test for Aboriginal oral history will probably strain (though not break) Canada's legal and constitutional structure.⁷⁴ Any failure to recognize this difficulty misapprehends the nature and purposes of Aboriginal oral history.

The mere presentation of Aboriginal oral evidence often questions the very core of the Canadian legal and constitutional structure.⁷⁵ In many parts

of the country certain oral traditions are most relevant to Aboriginal peoples because they keep alive the memory of their unconscionable mistreatment at the hands of the British and Canadian legal systems. Their evidence records the “fact” that the unjust extension of the common law and constitutional regimes often occurred through dishonesty and deception, and that the loss of Aboriginal land and jurisdiction happened against their will and without their consent.⁷⁶ These traditions include memories⁷⁷ of the government’s deception,⁷⁸ lies,⁷⁹ theft,⁸⁰ broken promises,⁸¹ unequal and inhumane treatment,⁸² suppression of language,⁸³ repression of religious freedoms,⁸⁴ restraint of trade and economic sanctions,⁸⁵ denial of legal rights,⁸⁶ suppression of political rights,⁸⁷ forced physical relocation,⁸⁸ and plunder and despoliation of traditional territories.⁸⁹ As such, oral tradition is controversial because it potentially undermines the law’s claim to legitimacy throughout the country due to the illegality and/or unconstitutionality of past actions.

However, oral tradition may also be contentious on other grounds. Besides challenging the law’s underlying legitimacy, it can simultaneously assert an alternative structure of legitimate normative order. The Court may not have contemplated this aspect of oral tradition when commenting on it in *Delgamuukw*.⁹⁰ In many places Aboriginal law continues to exist as an important source of legal authority,⁹¹ even if it has been weakened in some cases through the unjust imposition of alien structures.⁹² A number of Aboriginal groups assert that their law remains paramount in their lives, and that colonial legal structures have not extinguished their legal structures.⁹³ While they acknowledge that their law may be encumbered by Canadian law they contend that Indigenous law stems from an independent source of authority and does not depend upon executive, legislative, or judicial recognition to have force over their people.⁹⁴ To the extent that oral tradition encompasses these views, it presents a strong vision of legal pluralism that

the Supreme Court has not yet fully embraced.⁹⁵

For example, much of the evidence recited in the *Delgamuukw* case not only provided information that supported the Gitksan's and Wet'suwet'en's historic use and occupation of their territories, but also contained a competing jurisprudential narrative that potentially strained Canada's claim to legal exclusivity in the area.⁹⁶ The Court did not strongly acknowledge the binary nature of this testimony, which comprised both a "subjective and evaluative" aspect and a "scientific and objective aspect."⁹⁷ Some of the most striking evidence of this type was the recitation at trial of Gitksan *adaawk* and Wet'suwet'en *kungax*. The *adaawk* and *kungax* are unwritten collections of important history, legends, laws, rituals, and traditions of Gitksan or Wet'suwet'en House organizations. They speak of these peoples' proprietary rights and responsibilities in the disputed territories *and* they tell of Indigenous legal regimes that govern relationships in their homelands. The *adaawk* and *kungax* are something to be evaluated and something to evaluate by. However, the courts in this case only saw the *adaawk* and *kungax* as something to be judged (and then only barely), and did not view them as legal standards that would assist in making a judgement. The courts could or would not see or accept the "fact" that Gitksan and Wet'suwet'en oral tradition challenges Canada's monopoly on law in their territories, since such recognition might presumably strain the Canadian legal and constitutional structure. This reluctance illustrates one large difficulty with the Supreme Court's notion that Aboriginal evidence must accede to Canadian legal and constitutional standards because Aboriginal traditions will often necessarily strain Canada's legal system — they can be part of another culture's evaluative system of law. To deny such testimony when it potentially strains Canada's legal and constitutional structure will ensure that Aboriginal oral history is subordinated to other historical and legal methodologies. Accordingly, Aboriginal peoples will also be subordinated

in the process.

Unless the Court is willing to change its entire approach to the reception, interpretation, and use of evidence, it may not be able to implement effectively its call to accommodate Aboriginal oral history on an equal footing to other forms of evidence. Aside from the fact that this evidence might sometimes be properly regarded as law, there are still other problems. For example, the Court's modified test for Aboriginal evidence must still be received and evaluated by people within a structure and institution that often has a very different ideological and cultural orientation from most Aboriginal peoples' traditions. This requirement creates problems for the courts in evaluating what is factual across cultures, and raises a host of issues around oral history's sometimes shifting purposes. The leading historiographer of oral tradition, Jan Vansina, has observed that "all messages are a part of a culture."⁹⁸ In his seminal work, Vansina wrote that messages "are expressed in the language of a culture and conceived, as well as understood, in the substantive terms of a culture."⁹⁹ He concluded that since culture shapes all messages, culture must be taken into account when interpreting these messages. This is a challenging proposition, since what constitutes a fact is largely contingent on the language and culture out of which that information arises.¹⁰⁰ The people who decide the "fact" are inexorably defined from within the matrix of relationships they share with others.¹⁰¹

There are enormous risks for non-apprehension and misinterpretation when Aboriginal peoples submit their "facts" to the judiciary for interpretation.¹⁰² This problem is especially poignant in litigation as factual determinations are presented in an adversarial environment,¹⁰³ and interpretations made by judges with a different language, cultural orientation, and experiential background than aboriginal people.¹⁰⁴ The potential for misunderstanding exists because each culture has somewhat

different perceptions of space, time, historical truth, and causality.¹⁰⁵ The cultural specificity of what constitutes a fact in one culture may make it difficult for a person from a different culture to accept the same information as a fact.¹⁰⁶ Since variations between groups help to encode “facts” with different meanings within each culture,¹⁰⁷ collective perceptions of these notions must be viewed through the lens of the culture that recorded them to be properly understood.

Therefore, judges who evaluate the meaning, relevance, and weight of the Aboriginal evidence must appreciate the potential cultural differences in the implicit meanings behind the explicit messages if they are going to draw appropriate inferences and conclusions from this data.¹⁰⁸ They should attempt to comprehend the unspoken symbolic aspects of these messages to evaluate their veracity and value. Mastering both these facets of interpretation is a tremendously difficult and complex task. Many judges simply may not be equipped to perform this role without further training, even in cases where the best of intentions and will is present. Each culture has its own shared imagery that conveys meaning and emotional impact, as found in metaphors, stock phrases, stereotypes, and other clichés.¹⁰⁹ It is important to understand the particular imagery of a culture as contained in these forms in order to appreciate “the context of meaning” behind oral evidence.¹¹⁰ Without this deeper knowledge, Canadian judges will have an especially difficult time understanding and acknowledging the meanings Aboriginal people give to the facts they present.¹¹¹ This evaluation will be especially fraught with danger if the interpreter does not recognize the cultural foundation of knowledge, and acknowledge personal bias.¹¹² If such recognition does not occur, there will be great difficulties for Aboriginal peoples in Canadian courts receiving and evaluating their evidence “because judges, like all other humans, operate from their own perspectives.”¹¹³

The difficulty of interpretation speaks to the need, when hearing this

so-called evidence, to have the assistance of Aboriginal elders, judges, *amicus curiae*, or skilled counsel knowledgeable in the traditions, laws, and cultures of Canadian and Indigenous legal systems.¹¹⁴ Unless this happens, Aboriginal oral history runs the risk of being “undervalued”¹¹⁵ because the “Aboriginal perspective on their practices, customs and traditions and on their relationship with the land” may not be given “due weight.”¹¹⁶ Aboriginal peoples need to continue, as they have done for millennia, to be involved in the creation, control, and change of their own worlds through the power of language, stories, and songs. It is vital that they participate in the interpretation of their traditions, if they are going to bring them before the courts. This engagement is important because the court’s words “do not merely represent meaning, but possess the power to change reality itself” as judicial consideration of Aboriginal history will shape aboriginal peoples’ legal, economic, political, and socio-cultural relationships.¹¹⁷ Unless Aboriginal peoples more strongly participate in the future interpretation of these narratives in the Canadian judicial system, the process and purpose of Aboriginal oral history may not be appropriately accommodated, despite the best efforts of the judiciary. This loss might occur for Indigenous peoples because the language and culture of law will not really be their own,¹¹⁸ as the legal interpretation of their traditions and history is centralized and administered by non-Aboriginal people.¹¹⁹ Aboriginal peoples need to participate more fully in the administration of this system — and at times be in positions of control — to overcome this danger. The Court’s instruction to adapt the laws of evidence to incorporate Aboriginal factual perspectives may not be realized unless this occurs.

A final problem that Aboriginal people may encounter in reconciling their evidence with Canadian constitutional and legal structures concerns the treatment of Aboriginal elders at the hands of some lawyers and judges. Unless substantial reform occurs, this may also create individual challenges

for those people presenting their traditions, and may raise problems for the community. Aboriginal elders frequently have to endure questioning and procedures that are inconsistent with their status in their communities. The wisdom they have attained and the struggles they have endured in acquiring this knowledge demand that they be shown the highest honour and deepest respect. While there is no doubt that presenting evidence in an adversarial setting is a harrowing experience for most people,¹²⁰ this can be especially troubling for elders from certain groups where such treatment would be tantamount to discrediting their reputation and standing in the community. No one likes to be aggressively cross-examined, but the results are not the same for every person who experiences this procedure. Elders who are put in this position on the witness stand, and from within their worldview, subjected themselves to the highest form of ridicule and humiliation that they could suffer.

While this treatment places a tremendous strain on the individual enduring this experience, it also represents a major challenge to the culture more generally. To directly challenge or question elders about what they know about the world, and how they know it, strains the legal and constitutional structure of many Aboriginal communities. To treat elders in this way can be a substantial breach of one of the central protocols within many Aboriginal nations, somewhat akin to asking judges to comment on their decision after it is written. To subject elders to intensive questioning can come across as ignorance and contempt for the knowledge they have preserved, and a disrespect and disdain for the structures of the culture that they represent. Yet such behavior is currently mandated by the Canadian legal system, and reveals the problems Aboriginal elders encounter in placing their traditions before the courts in the same way, and on the same footing, with the types of evidence with which courts. Creating alternatives for assessing the veracity and weight to be assigned to this testimony that

respect the place of elders in Aboriginal communities, would improve interpretations of Aboriginal oral history in the courts. Greater innovation through Aboriginal participation could represent one such step.

VI. CONCLUSION

In *Delgamuukw*, the Supreme Court's accommodation of Aboriginal oral tradition was meant to counteract previous shortcomings in the Canadian legal system's treatment of this form of evidence.¹²¹ The Court spoke of those occasions in which it would intercede if deficiencies in the reception of this history were apparent in any trial. It wrote that in "cases involving Aboriginal rights, appellate intervention is...warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating Aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it."¹²² In deciding to review the treatment of Aboriginal oral tradition on new grounds the Supreme Court may have created a larger task than it realized. As this article has tried to identify, the interpretation of oral history presents numerous interpretive difficulties that go beyond those identified in Canadian law. Much still remains to be done to address the issues of structural bias, cultural incognizance, cultural control, and the breach of Aboriginal law that Indigenous peoples encounter in bringing their traditions before the courts. Aboriginal oral tradition may find itself on less than an equal footing in Canadian law until these deeper issues are addressed.

Until more far-reaching changes occur, therefore, oral history's complex character may continue to cause great confusion and lead to its disrepute for judges who fail to appreciate its simultaneous strengths and weaknesses. They may find its shifting purposes hard to grasp. It can sometimes be a very important source of evidence concerning actual events that occurred in the past. At other times, however, oral history could mislead

judges about the factual happenstance of prior events if they fail to discern its more “evaluative” elements. At such times, while its factual contribution may lie in its revelation of the meaning that people attach to their history, because of this history’s interpretive difficulties these insights may be lost. It is important to be alert for oral history’s transsubstantiative qualities. While not perfect, it can sometimes provide persuasive evidence of past events; it may also mingle this evidence with an insightful interpretation of those very same events. Canadian law may not yet be ready to live with the implications of this “fact.”

If there is any hope for a more nuanced response to the presentation and reception of oral history, aside from key structural changes and/or a deeper knowledge of Aboriginal legal traditions and culture on the part of the judiciary, it may come from the observation that Canadians are somewhat familiar with the need to treat written histories with different lenses depending on their particular contexts.¹²³ Most readers of documentary evidence do not interpret written history in a homogeneous and undifferentiated manner. For example, people are generally used to reading the Illiad,¹²⁴ Bible,¹²⁵ Ramayana,¹²⁶ Norse Sagas,¹²⁷ and Mayan Codexes,¹²⁸ and other great texts of history, as containing a mixture of literal and psychological facts. In analyzing these written documents from an historical perspective, people have long known that not every fact can be treated in the same manner. These texts have been described as poly-functional: containing a plurality of factual insights and conveying a multiplicity of truths from different methodological perspectives.¹²⁹ The acquaintance with the cultural contexts of these books allow readers to almost unconsciously sift through these books’ various factual elements. It is easier to analyze their different “truths” with a knowledge of the customs and values of the societies (or their successors) from which these books draw their meanings. This familiarity enables readers to evaluate those

instances in which the literal occurrence of a past event is of importance for understanding the text, and when it is a psychological fact that the authors are attempting to convey.

If judges examine oral history with their own complex experiences of written history in mind, they may be better able to appreciate the variegated nature of fact found in Aboriginal oral traditions. Such awareness may give them a greater appreciation of how Aboriginal traditions operate in their particular contexts, since judicial fluency with the above-mentioned texts may be closer to their own culture than to that of Aboriginal traditions. While this analogical process will not likely give judges specific answers to the meaning of historical facts in Aboriginal oral histories that are before them, this process might help them exercise greater patience and insight when faced with such an inquiry. The tolerance generated by this second sober thought, combined with their critical self-reflection about how they understand different facts in the texts they are familiar with, might help judges analyze the process of how they came to know the various “truths” to which they subconsciously subscribe. Many important insights may be revealed in this process of internalized judicial review, where decision makers reconsider their own reasoning process about “facts.” This practice could in turn lead to better questions about the nature of fact in legal inquiries related to Aboriginal oral traditions. As a majority of the Supreme Court observed, “Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality.”¹³⁰

It should come as no surprise, however, that this form of inquiry is not easy. Analyzing a factual record in its various contexts and articulating how one knows that something is a “fact” is not a simple task.¹³¹ The cultural and temporal separation from certain facts, caused by different cultural contexts

and the constraints of time in a formal court setting, are likely to invoke a measure of humility in even the most seasoned judge. Nevertheless, “[j]udicial inquiry into context” is necessary because it “provides the requisite background for the interpretation and the application of the law.”¹³² Common law judges cannot turn away from their duty to provide public reasons about how and what they determined were factual conclusions in any given case involving oral history. They do not have the luxury that other people might have in deferring judgment until there is a “stable academic consensus” on the question.¹³³ Judges must evaluate how they came to regard a particular point of knowledge as a “fact,” and articulate their findings for others’ evaluation and response.

This measured, nuanced, and contextual approach to Aboriginal oral history is likely required in order to correctly follow the Supreme Court’s instructions to place oral history “on an equal footing with the types of historical evidence that courts are familiar with.”¹³⁴ Along with other relevant factors, it takes “into account the perspective of the Aboriginal peoples themselves” in adapting the laws of evidence so that their intellectual “practices, customs and traditions...are given due weight.”¹³⁵ Such an inquiry is consistent with what the Court envisioned as a “special approach” needed to place “equal weight” on Aboriginal oral tradition because it subjects all determinations of fact on this question to an appropriate contextual analysis. As judges become more aware of why certain types of evidence are familiar to them (and therefore more likely to be accepted), this process of self-reflection may lead them to a better weighting, evaluation, and acceptance of factual evidence with which they are unfamiliar. Indeed, such a process “is a pre-condition to impartiality.”¹³⁶ The conscious comparison of different factual perspective at issue in a trial, including the judges’ critical examination of their own perspective,¹³⁷ is crucial to the fair disposition of cases involving Aboriginal oral history.¹³⁸

It is also, to quote Nedelsky, “the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely that we are to be locked into one perspective...It is th[is] capacity for ‘enlargement of mind’ that makes autonomous, impartial judgement possible.”¹³⁹

Aunt Irene’s old blue bungalow now sits empty atop the escarpment. She died a few years ago but her memories live on. Her house holds meaning for me in my reflections about oral history’s variegated nature. The weeds have gathered, paint has cracked, and her windows have dulled. But much about the place still remains vibrant. I know more about past events on the reserve as a result of our conversations. I also know more about what these past events meant to the people who experienced them. When I drive down the road in front of her house I remember these stories, and think of their significance for the people of Cape Croker today. Neyaashingaming struggles in many ways because of its past. Colonialism is not an easy thing to live with. Yet, Neyaashingaming is also stronger because of these experiences. The same history that produced adversity can also become a deep reservoir holding ideas for change and renewal. I hope this potential for change can be harnessed. The appropriate use of oral history’s multifaceted purposes may one day help activate this power.

Notes

1. J. Borrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government” (1992) 30 Osgoode Hall L. J. 291 [hereinafter *Genealogy of Law*]. Cape Croker is also known as the Chippewas of the Nawash Reservation. The people are Anishinabek, sometimes also called Ojibway.
2. For the text of Treaty 72, see Canada, *Indian Treaties and Surrenders* (Toronto; Coles Publishing Company, 1971) at 195-96.

3. For text, see *ibid.* at 213.

4. NA (Canada), RG 10, vol. 541,101 at 105, letter from T.G. Anderson, Superintendent of Indian Affairs, to the Chiefs of the Central Superintendency (2 August 1854): We want a written paper from the Government saying that the principal coming for the Reserve will be funded for ourselves and the future generation and that we and they shall receive the interest of it every year.

5. *Ibid* at 104: We see the quantity of land reserved for ourselves as marked in the map is not large enough therefore we beg our Great Father to increase the quantity to the pencil lines which we have drawn on the map embracing the Fishing Islands and Cape Croker with the tract from the Owen Sounds to the Head of Colpoy's Bay. These are the three reserves marked in pencil we want to keep for ourselves and Children on the main land, The Island we say nothing about as they belong to us and we wish to keep them

6. NA (Canada), RG 10, vol. 117, 169150 at 169151-55, Report on Negotiation Proceedings Regarding surrender of the Saugeen Tract (Treaty No. 72) (3 November 1854). Governor General Oliphant outlined the promises in the treaty: I explained the advantage which would accrue to them from so large an augmentation of finances as must result from the sale of their lands, by which they would be enabled to erect schools extend their farms and purchase many comforts of which they were now deprived ... I finally promised that those Chiefs who were prepared to meet the government in this measure so productive of benefit to their bands would be rewarded by Your Excellency with medals.

7. A band petition to Queen Victoria in 1860 indicates what they were promised during treaty. NA (Canada), RG 10, vol. 266, 163303 at 163303-09, petition of Cape Croker to Queen Victoria (17 April 1860): However, we made up our minds to surrender on the following conditions 1st — that

we would have the privilege of purchasing land — 2nd that our yearly annuities would continue to increase every year. 3rd — that comfortable houses would be built every year until every family would be supplied with one, 4th — and that a church also be erected... If we could only have this privilege of all that we should call our own — have the sole management of our lands, our fisheries, our hunting, our timbers, our monies, we would be satisfied...

8. Enemikeese (C. Van Dusen), *The Indian Chief: An Account of the Labours, Losses, Sufferings and Oppressions of Ke-zig-ko-e-ne-ne* (David Sawyer), *A Chief of the Indians in Canada West* (Toronto: Coles, 1974) at 51.

9. Ten years after my visit with Aunt Irene I found a document that contained the same information she had orally related to me. The letter was written after 1985 (no specific date given) in her own handwriting and addressed to Peter Schmalz, a teacher who had done research among the Anishinabek of southern Ontario. Her account reads: My People came here from what is now Brooke close to Owen Sound. The reason for moving from that well-established village was the coming of the pioneer farmers and the fur traders. Many of these pioneers were squatters on Indian land. They also brought with them the 'Demon Drink' as my grandfather called intoxicants. The idea of these white people was to get the Indians to become drunkards who would do anything for a bottle of 'firewater,' from giving away his furs to giving up his children or his land. Chief Peter Kegeponce Jones believed that strong drink would ruin his Indian People and was concerned in his own mind that their only salvation was to move away from such temptation to a place that was very hard to reach. The only way to get to Cape Croker was by boat or over meandering trails through the bush.

10. A. Portelli, *The Death of Luigi Trastulli: Form and Meaning in Oral*

History (Albany State University of New York Press, 1991) at 50 [hereinafter *Death of Luigi*].

11. Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 33 [hereinafter *Looking Forward*]. I have used the terms “oral history” and “oral tradition” interchangeably in this article. Some have argued that each term should be treated separately, with oral history representing the product of communication, and oral tradition signifying the process of communication. I have not separated the two because, as this article will reveal, I believe that the product and process of communication are inseparably intertwined.

12. Although, the problems of verification for written and oral sources are not always as different as some might assume, see P. Thompson, *The Voice of the Past: Oral History*, 3d ed. (New York: Oxford University Press, 2000) at 118-125.

13. E. Blair, ed., *The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes as Described by Nicolas Perrot, French Commandant in the Northwest; Bacqueville de la Potherie, French Royal Commissioner to Canada; Morrell Marston, American Army Officer; and Thomas Forsyth, United States Agent at Fort Armstrong*, vol. 1, trans. E. Blair (Lincoln: University of Nebraska Press, 1996) at 31.

14. See B.G. Trigger, *Natives and Newcomers: Canada's Heroic Age Reconsidered* (Montreal: McGill Queen's University Press, 1985) at 3-49. Perhaps, not surprisingly, the writings of early Anishinabek authors treated oral history in a more favourable light, see W.W. Warren & E.D. Neill, *History of the Ojibway Nation* (Minneapolis: Ross & Haines, 1970); G. Copway or Kah-ge-ga-gah-bowh, *The Traditional History and Characteristic Sketches of the Ojibway Nation* (Toronto: Coles, 1972); P.

Jones, *Life and Journals of Kah-ke-wa-quo-na-by* (Rev. Peter Jones), *Wesleyan Missionary* (Toronto: Anson Green, 1860).

15. For discussions on the use of “weight of history” arguments against Aboriginal peoples, see J. Singer, “Well Settled? The Increasing Weight of History in American Indian Land Claims” (1994) 28 Ga. L. Rev. 481.

16. R.H. Lowie, “Oral Tradition and History” (1915) 17 Am. Anthropologist 597 at 598. One of Lowie’s main objections to oral tradition was that the actions and events remembered within societies with these traditions did not often deal with significant items. For example, he was critical of the Assiniboine Indians’ failure to remember the introduction of the horse among them after the arrival of Europeans. In response to his criticism it may be observed that all history is selective in what it records as being significant. As Atkinson has stated, “Selection is inevitable, and with the recognition of this comes the possibility of new doubts about its objectivity.” R.F. Atkinson, *Knowledge and Explanation in History: An Introduction to the Philosophy of History* (London: McMillan Press, 1978) at 69. It is possible that at first the Assiniboine did not view the coming of the Europeans and the horse as very significant and thus did not select this event as worth recording in their traditions.

17. R. H. Lowie, “Oral Tradition and History” (1917) 30 J. of Am. Folklore 161 at 163.

18. H. Trevor-Roper, *The Rise of Christian Europe* (New York: Harcourt, Brace & World, 1965) at 9.

19. *Ibid.*

20. This list is taken from J. Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at 13-27.

21. A. von Gernet, *Oral Narratives and Aboriginal Pasts: An*

Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories (Ottawa: Indian and Northern Affairs 1996) at 20, online: Indian and Northern Affairs Canada <https://www.aicn-inac.gc.ca/pr/pub/orl/index_e.html> (date accessed: 24 September 2001).

22. In a similar vein, Professor Tom Flanagan has also questioned uses of oral history, quoting that “the contradictions in what constitutes history — oral and written — cannot be resolved.” He states that Aboriginal oral traditions can contradict Western conceptions of rationality. facts that can be established by overwhelming documentary evidence, and that they can contradict one another. However, in addressing Professor Flanagan on these points, it is apparent that written history can also violate its own rationality, contradict facts established by overwhelming documentary evidence, and pit different accounts against each other. For a fuller examination of these points, see T. Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen’s University Press, 2000) c. 4.

23. *Death of Luigi*, *supra* note 10 at 51.

24. *Ibid.* at 50.

25. T. Parfitt, *Journey to the Vanished City: The Search for the Lost Tribe of Israel* (New York: Vintage Books, 2000).

26. N. Wade, “DNA Backs a Tribe’s Tradition of Early Descent From Jews” *The New York Times* (9 May 1999) 1.

27. See G. Buijs, “Black Jews in the Northern Province: A Study of Ethnic Diversity in South Africa” (1998) 21 *Ethnic and Racial Stud.* 661.

28. D. Christy, “A Load of Old Ballistics” *The [London] Guardian* (16 March 1999) 19.

29. Wade, *supra* note 26. The team of geneticists were Dr. Karl Skorecki, Technion Israel Institute of Technology; Dr. Michael Hammer, University

of Arizona; Neil Bradman, Chair of Centre for Genetic Anthropology at University College London; David B. Goldstein, population geneticist, Oxford University, England.

30. There has been an exclusion of outside males among the Lemba which would limit the Y chromosome additions to the community and may explain why the cohen modal haplotype is so pervasive within this group, *ibid*.

31. *Ibid*. Dr. Goldstein has found that 45 percent of Ashkenazi priests and 56 percent of Sephardic priests have the cohen gene signature, while in Jewish populations in general, the frequency is 3-5 percent.

32. There have been some attempts to establish the authenticity of Aboriginal traditions through genetic corroboration. However, the inferences that can be drawn from these studies are inconclusive: see J.H. Greenburg, C.G. Turner, & S.L. Zegura, "The Settlement of the Americas: A Comparison of the Linguistic, Dental and Genetic Evidence" (1986) 27 *Current Anthropology* 477; T.G. Schurr *et al*, "Amerindian Mitochondrial DNA Have Rare Asian Mutations and High Frequencies, Suggesting They Derived from Four Primary Maternal Lineages" (1990) 46 *Am.J. of Human Genetics* 613; M. Wolpoff in E. Trinkaus, ed., *The Emergence of Modern Humans: Biocultural Adaptations in the Later Pleistocene* (Cambridge: Cambridge University Press, 1959); M. Brown, *The Search for Eve* (New York: Harper & Row, 1990), see especially at 315. For an interesting overview of this field, see J. Diamond, *Germs, Guns and Steel: The Fates of Human Societies* (New York W.W. Norton, 1997).

33. *Looking Forward*, *supra* note 11.

34. *Ibid*. at 32-33: The non-Aboriginal historical tradition in Canada is rooted in western scientific methodology and emphasizes scholarly documentation and written records. It seeks objectivity and assumes that

persons recording or interpreting events attempt to escape the limitations of their own philosophies, cultures and outlooks. In the non-Aboriginal tradition, at least until recently, the purpose of historical study has often been the analysis of particular events in an effort to establish what 'really' happened as a matter of objective historical truth or, more modestly, to marshal facts in support of a particular interpretation of past events.

...Moreover, underlying the western humanist intellectual tradition in the writing of history is the focus on human beings as the centrepiece of history, including the notion of human progress...This historical tradition is also secular and distinguishes what is scientific from what is religious or spiritual, on the assumption that these are two different and separable aspects of the human experience. The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution... It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to classify or characterize the event exactly or for all time. In the Aboriginal tradition the purpose of oral accounts is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate claims of a particular family to authority or prestige. Those who hear oral accounts draw their own conclusions from what they have heard, and they do so in the particular context (time, place, and situation) of the telling. Thus, the meaning to be drawn from an oral account depends on who is telling it, the circumstances in which the account is told and the interpretation the listener gives to what has been heard. Oral accounts of the past include a good deal of subjective experience.

35. Recently, there has been an explosion of materials that treat oral history in a sophisticated manner, demonstrating caution against over-

generalization and illustrating careful case-by-case analysis. See D.L. Fixico, ed., *Rethinking American Indian History*, (Albuquerque: University of New Mexico Press, 1997); D. McNab & D. Standen, *Gin Das Winan: Documenting Aboriginal History Ontario* (Toronto: Champlain Society, 1996) [hereinafter *Gin Das Winan*]; B. Stonechild & B. Waiser, *Loyal Till Death: Indians and the North-West Rebellion* (Calgary: Fifth House, 1997); D. Hanna & M. Henry. *Our Tellings: Interior Salish Stories on the Nlha'kpmx People* (Vancouver: University of British Columbia Press, 1996); H. Foster & A. Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers" (1993) 27 U.B.C.L. Rev. 213; E. Tonkin, *Narrating Our Pasts: The Social Construction of Oral History* (Cambridge: Cambridge University Press, 1992); R. Sharpless & D. Stricklin, eds., *The Past Meets the Present: Essays on Oral History* (Lanham, MD: University Press of America, 1985) [hereinafter *Past Meets Present*]; D. Cohen, *The Ramapo Mountain People* (New Brunswick, NJ: Rutgers University Press, 1974); D. Cohen, *Folk Legacies Revisited* (New Brunswick NJ: Rutgers University Press, 1995); *Death of Luigi*, *supra* note 10; A. Portelli, *The Battle of Valle Giulia: Oral History and the Art of Dialogue* (Madison: University of Wisconsin Press, 1997) [hereinafter *Valle Giulia*]; A. Salmond, *Between Worlds: Early Exchanges Between Maori and Europeans 1773-1815* (Honolulu: University of Hawaii Press, 1997); A. Salmond, *Two Worlds: First Meetings Between Maori and Europeans 1642-1772* (Honolulu: University of Hawaii Press, 1991); J. Binney, *Redemptive Songs: A Life of the Nineteenth Century, Maori Leader T Kooti Andarangi* (Honolulu: University of Hawaii Press, 1997); M. Kwàioloa & B. Burt, *Living Tradition: A Changing Life in the Solomon Islands* (London: British Museum Press, 1997); R. Keesing, *Custom and Confrontation: The Kwato Struggle for Cultural Autonomy* (Chicago: University of Chicago Press, 1992); K. Basso, *Western Apache*

Raiding and Warfare (Tucson: University of Arizona Press, 1971).

36. Written history is often based, in the first instance, on oral history. For example, Herodotus and Thucydides, the fathers of western history, certainly relied on such sources to create their work. The writers of the Old and New Testaments and the Muslim hadiths also built their writings on spoken traditions. What we know about medieval western Europe, through Bede, Gregory of Tours, Paulus Diaconus, Isidore of Seville, and Widukind, draws most strongly on oral tradition; while the ancient history of Africa has been largely written over the last fifty years by engaging in oral research. For further development of these points, see D. Henige, *Oral Historiography* (New York: Longman, 1982) at 7-20.

37. Vansina, *supra* note 20 at 186-201.

38. The constructionist nature of historical knowledge means that one cannot study the written histories of any period or culture without discovering numerous contradictions, permutations, and changes. See J.W. Meiland, *Skepticism and Historical Knowledge* (New York: Random House, 1965) and L.J. Goldstein, *Historical Knowing* (Austin: University of Texas Press, 1976). One merely has to become familiar with any history to discover the changes and permutations present in these accounts of the past. There is a somewhat contrary line of thought in the philosophy of history, represented by the idealists, who suggest that the past can be known with fewer contradictions. R.G. Collingwood perhaps represents this school of thought's best advocate. He wrote, "the history of thought, and therefore all history, is the re-enactment of past thought in the historian's own mind," see R.G. Collingwood, *The Idea of History* (Oxford: Oxford University Press, 1948) at 215. The implication of Collingwood's line of reasoning is that historical accounts would be more reliable if every historian similarly accessed the context and thoughts behind past events. Michael J. Oakeshott,

another leading philosopher of history, shares a similar view, see *On History and Other Essays* (Oxford: Blackwell, 1983), but neither scholar would suggest that history is not rife with contradictions, even if it is because historians fail to properly access the appropriate thoughts behind past events.

39. A glance through M. Brook Taylor, ed., *Canadian History: A Reader's Guide: Beginnings to Confederation*, vol. 1 (Toronto: University of Toronto Press, 1994) indicates the range of opinion on this matter.

40. I know of three different accounts of how the Ojibway came to occupy their territories in southern Ontario. One involves their creation near this area, another talks about their migration from the Atlantic ocean, and yet another involves their migration from the Lake Superior area. These various versions have been described in S. Dewdney, *The Sacred Scrolls of the Southern Ojibway* (Toronto: University of Toronto Press, 1975); B. Johnson, *Ojibway Heritage* (Toronto: McClelland and Stewart, 1976) 13-17; G. Copway, *supra* note 14 at 20; E. Benton Benai, *The Mishomis Book: The Voice of the Ojibway* (Hayward, WI: Indian Country Communications, 1988).

41. Collingwood makes this point throughout his book in his discussion of various historians, *supra* note 38.

42. B. Croce wrote that all history is modern history: The practical requirements which underlie every historical judgement give to all history the character of "contemporary history" because, however remote in time events there recounted may seem to be, the history in reality refers to both present needs and present situations, wherein those events vibrate." B. Croce, *History as the Story of Liberty*, trans. S. Sprigge (Lanham, MD: University Press of America, 1990) at 19. EH. Carr also makes this point in his book, *What is History*, 2d ed. (Toronto: Penguin Books, 1990) at 16-20.

43. C. Taylor wrote: "Each one of us has...an understanding from our home culture, and it is woven very deeply into our lives: we don't mainly use it to make people intelligible in theoretical contexts but to understand and deliberate about our own motives and actions, and those of the people we deal with every day. Indeed, much of our understanding is quite inarticulate; it is in this sense a form of preunderstanding. It shapes our judgements without our being aware of it." *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) at 143-149.

44. R. Gordon & W. Nelson, "An Exchange on Critical Legal Studies" (1933) 6 *L and Hist. Rev.* 139, see especially at 150. Historical studies of all kinds have this problem because what is regarded as important about the past depends upon the historian's selectivity. E.H. Carr put it this way: "It used to be said that facts speak for themselves. This is, of course, untrue. The facts speak only when the historian calls on them: it is he who decides to which facts to give the floor, and in what order and context." Carr, *supra* note 42 at 11.

45. E.H. Carr observed: "The historian, then, is an individual human being. Like other individuals, he is a social phenomenon, both the product and the conscious or unconscious spokesman of the society to which he belongs; it is in this capacity that he approaches the historical past," *supra* note 42 at 35.

46. Memory may have certain advantages over writing: "The mind is still the most sophisticated recording and preserving device that humans have found. Its storage capabilities have not been fully tested. It is portable, does not need much temperature and humidity control, and is capable of complex storage, retrieval, and correlation tasks. Knowledge stored in the mind can be transmitted or transferred to other minds, and that knowledge invests those other minds with abilities to use and understand the information. Most

important, a matter that is kept in mind is also kept *in mind*. Matters on paper are more easily stored and forgotten.” P. Williams, “Oral Traditions on Trial” in *Gin Das Winan*, *supra* note 35 at 30-31.

47. *Death of Luigi*, *supra* note 10 at 50.

48. *Genealogy of Law*, *supra* note 1.

49. “Remembering in an interview is a mutual process, which requires understanding on both sides,” Thompson, *supra* note 12 at 157.

50. *Valle Giulia*, *supra* note 35 at 11-12.

51. *Past Meets Present*, *supra* note 35 at 12.

52. E. Tonkin, *supra* note 35 at 1-4.

53. *Ibid.* at 67-69.

54. One backhanded example of the bias against Aboriginal peoples and their capacity to properly give evidence is found in an early *British Columbia Evidence Act* that was only repealed in 1963. This Act permitted a judge to receive evidence from an Aboriginal person only as a matter of discretion, as it was implicitly assumed that otherwise such a person’s testimony would be suspect and unreliable. The Act read “...it shall be lawful for any Court...in the discretion of such Court...to receive evidence of any Aboriginal, Native, or Native of the half-blood, of the Continent of North America, or the Islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God, and of any fixed and clear belief in religion or in a future state of rewards and punishments, without administering the usual form of oath to any such Aboriginal Native or Native of the half-blood...” S.B.C. 188, c.41, s.11, as rep. by S.B.C. 1963, c. 16, s. 2. While this statute was presumably considered to be a liberal and generous provision in favour of Aboriginal people, in that it permitted the reception of their evidence, it is anything but liberal when one realizes that

it was premised on a racist view of Aboriginal spirituality and cultural development. Aboriginal peoples have often confronted such views concerning their intellectual disposition and capacity when dealing with common law values and principles. For further general commentary on oral evidence in trial, see D. Opekokew, “A Review of Ethnocentric Bias Facing Indian Witnesses” in R. Gosse, J. Y. Henderson & R. Carter, eds., *Continuing Poundmaker and Riel’s Quest* (Saskatoon: Purich Publishing, 1994) 192.

55. *Beecher v. Wetherby*, 95 U.S. 517 440, 441 (1887).

56. *Calder v. A.G.B.C* (1990), 13 D.L.R. (3d) 64 at 64 (B.C.C.A.). Chief Justice Davey was upbraided for this comment by Justice Hall of the Supreme Court of Canada who wrote, “in so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards Europeans applied to the Indians of North America two or more centuries before,” *ibid.* [1973] S.C.R. 313 at 347.

57. *R. v. Syliboy* (1929), 1 D.L.R. 307 at 315 (N.S.Co.Ct.). In reference to this label, Chief Justice Dickson observed that “such language is no longer acceptable in Canadian law and, indeed, is inconsistent with a growing sensitivity to native rights in Canada,” *R. v. Simon*, [1985] 2 S.C.R. 337 at 399.

58. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543; *Ex Parte Crow Dog*, 109 U.S. 556.

59. *United States v. Sandoval*, 34 S.Ct. 1 (U.S.S.C.).

60. *Delgamuukw v. A.G.B.C.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) at 268.

61. *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw* (S.C.C.)].

62. Some notable cases considering Aboriginal oral evidence are *Milirrumpum*

v. Nabalco Pty. Ltd. (1971), 17 F.L.R. 141 (S.C.N. Terr.); *Re Paulette and Registrar of Titles* (No.2) (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.); *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), 102 D.L.R. (3d) 513 (F.C.T.D.); *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.); *R. v. Simon*, [1985] 2 S.C.R. 387; *Attorney General for Ontario v. Bear Island Foundation*, (1984) 49 O.R. (2d) 353; *Mabo v. Queensland* (1992), 107 A.L.R. 1 (H.C. Aust); *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*]; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw* (S.C.C.), *ibid.*, *Mitchell v. MNR* [2001] S.C.R. 33.

63. For a good discussion of the challenges presented to courts on the admissibility and weight of Aboriginal evidence, see B. Gover & M. Locke Macaulay, “Snow Houses Leave No Ruins: Unique Evidence Issues in Aboriginal and Treaty Rights Cases” (1996) 60 Sask. L. Rev. 47.

64. There are some exceptions to the courts mistreatment of Aboriginal history. Oral testimony, necessarily hearsay in character, will be accepted from an Indian witness as *prima facie* proof that lands are Indian lands, and that they have never been ceded to the Crown. *R. v. Strong* (1850) 1 Or. 392 (U.C.Ch.) at 404-06.

65. *Delgamuukw* (S.C.C.), *supra* note 61.

66. *Delgamuukw* (S.C.C.), *ibid.* at 1065, per Justice Lamer, quoting *Van der Peet*, *supra* note 62 at 559. It should also be noted that the Supreme Court of Canada, in other circumstances, has also affirmed the importance of not mechanically applying the so-called exception to hearsay evidence when circumstantial probability warrants its admission: see *R. v. Khan*. [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915. The Supreme Court has also extolled the virtues of oral history more generally, and even written that this history contains “unwritten norms” that “stretch back through the ages” and “inform and sustain” Canada’s highest legal document, the Canadian

Constitution, see the *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at 239-40, 247, 249.

67. *Delgamuukw* (S.C.C.), *ibid.* at 1066, per Justice Lamer. For commentary on the *sui generis* nature of Aboriginal rights, see J. Borrows & L.I. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 Alta. L Rev. 9.

68. *Delgamuukw* (S.C.C.), *ibid.*

69. *Ibid.* at 1067, per Justice Lamer. In this regard the Chief Justice also wrote that “courts must not undervalue the evidence presented by aboriginal claimants...simply because that evidence does not conform precisely with the evidentiary standards” in private law cases, *ibid.* at 1085.

70. *Ibid.* at 1069. It should be noted that the Court’s adaptation of evidentiary standards finds parallels elsewhere in the jurisprudence. In the mid-18th century, the courts drastically changed the rules of evidence to receive commercial and merchant customs and evidence for virtually the first time. The *Delgamuukw* case has been criticized by many in the business community for the new “uncertain” evidentiary standards it creates. It is interesting and somewhat ironic to note that the foundation of law protecting commercial transactions was as revolutionary in its time as the *Delgamuukw* case may appear today.

M.H. Ogilvie, *Historical Introduction to Legal Studies* (Carswell: Toronto, 1982) at 345 noted the radical evidentiary changes required to receive commercial customs into the common law as follows: “Lord Mansfield can rightly be claimed to be the greatest chief justice in the common law and his influence on numerous branches of law is still felt today. He also incorporated the law merchant into the common law by ignoring the traditional procedural rules of the King’s Bench so as to allow for the expert

evidence on mercantile practice heard by specially selected juries of commercial men from the City. Moreover, he did not feel compelled to equate the law merchant with feudal property or to reinterpret it in that light, rather he accepted the evidence and adopted it into the body of the common law, transforming it into common or judge-made law at the same time.” Mansfield’s groundbreaking treatment of evidence in commercial law sounds like Lamer’s treatment of Aboriginal evidence in *Delgamuukw*.

71. *Ibid.*, quoting from *R. v. Simon*, [1985] 2 S.C.R. 387 at 408.

72. *Delgamuukw* (S.C.C.), *supra* note 61 at 1066.

73. *Ibid.*

74. For my comments on the durability of Canada’s legal structure in the face of injustice to Aboriginal peoples, see J. Borrows, “*Sovereignty’s Alchemy: A Comment on Delgamuukw v. The Queen*” (1999) 37 Osgoode Hall L.J. 537.

75. *Ibid.*

76. There are many accounts of the mistreatment endured by Aboriginal peoples at the hands of colonial governments. A good overview is found in *Looking Forward*, *supra* note 11 at 245-590.

77. The footnotes that follow in this sentence record Aboriginal historical experiences that can also be verified through written sources.

78. Aboriginal peoples remember that civil servants charged with protecting their rights, often deceived them in very costly ways. For an example, see the facts of *Guerin v. R.*, [1984] 2 S.C.R. 335. For an excellent study about deception in Canadian Aboriginal relations, see S.M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

79. H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 27-50.

80. Many Aboriginal people remember the theft of their mask, totem poles, button blankets, carvings, medicine bundles, land, and their ancestor's bones. For a non-Aboriginal account that cites many Aboriginal sources, see generally, R. Wright, *Stolen Continents: The New World Through Indian Eyes* (Toronto: Penguin, 1993).

81. See P. Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 Osgoode Hall L.J. 457. Almost every major Indian treaty also has unfulfilled promises, see Canada, *Report of the Royal Commission on Aboriginal People: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services, 1996), see especially c. 2. Specific examples of the court's permitting the Crown to break its promises are found in *A.G. of Canada v. A.G. of Ontario (sub nom. Re Indian Claims)* [1897] A.C. 199 at 213, *R. v. Sikyea*, [1964] S.C.R. 642.

82. Aboriginal people who fought in the wars received disturbingly unequal treatment when they returned home, see F. Gaffen, *Forgotten Soldiers* (Penticton, B C: Theytus Books, 1985). Aboriginal peoples have also been treated unequally and inhumanely in Canada's criminal law system, see Royal Commission on Aboriginal People, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996). The Supreme Court of Canada has commented on the current "crisis" this treatment has spawned in *R. v. Gladue*, [1999] 1 S.C.R. 688.

83. D.A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis vs Cultural Replacement* (Waterloo: Wilfrid Laurier University Press, 1988) at 40, 78; G. Manuel & M. Posluns, *The Fourth World: An Indian Reality* (Don. Mills, Ont.: Collier-Macmillan, 1974) at 67.

For personal anecdotes that keep alive the effect of this treatment, see C. Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1988) at 53-87.

84. See K. Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

85. For a history of restraint on trade encountered on the prairies, see S. Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990). For a history of the sanctions Aboriginal peoples suffered in the west coast fishing trade, see D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).

86. In 1927 the federal government made it illegal to raise money to pursue land claims without government approval, see *Indian Act*, R.S.C. 1927, c. 98, s. 149; for commentary see P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) at 111-113.

87. The federal government attempted to forcibly replace the Haudenosaunee Confederacy Council at Six Nations with an elected band council, and the courts later upheld this action, see *Logan v. Styres* (1959) 20 D.L.R. (2d) 416 (Ont. H.C.). The federal government similarly suppressed west coast political structures by outlawing the potlatch. For a description and commentary, see D. Cole & I. Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).

88. Whole communities suffered resettlement. For example, see *The High Arctic Relocation: A Report on the 1953-1955 Relocation* (Ottawa: Supply

and Services, 1994). For information about further relocations, see *Looking Forward*, *supra* note 11 at 411-543. Individuals were also forcibly relocated through residential schools and provincial child welfare regimes, see A.C. Hamilton & C.M. Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry in Manitoba*, vol. 1 (Winnipeg: Queen's Printer, 1991) at 509-520.

89. I. Spry, "The Tragedy of the Loss of the Commons in Western Canada" in A.L. Getty & A.S. Lussier, eds., *As Long as the Sun Shines and the Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) at 203; J. Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991).

90. *Delgamuukw* (S.C.C.), *supra* note 61.

91. The continued existence of Aboriginal law as an important source of authority is illustrated in *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.); *R. v. Nan-c-quis-a-La* (1889), 1 Terr. L.R. 211 (N.W.T. Sup.Ct.); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re: Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Kitchoolik v. Tucktoo* (1972), 23 D.L.R. (3d) 203 (N.W.T.C.A.), (sub nom. *Re Deborah*); *Michell v. Dennis*, [1984] 2 C.N.L.R. 91 (B.C.S.C.); *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.); *Vielle v. Vielle* (1992), 93 D.L.R. (4th) 318 (Alta. Prov. Ct.); *Van der Peet*, *supra* note 62; *Delgamuukw* (S.C.C.), *supra* note 61.

92. For a discussion of how the imposition of non-Aboriginal structures have weakened but not destroyed Aboriginal authority, see *Genealogy of Law*, *supra* note 1.

93. For a sample of this opinion, see Grand Chief M. Mitchell, "An Unbroken Assertion of Sovereignty" in B. Richardson, ed., *Drumbeat:*

Anger and Renewal in Indian Country (Toronto: Summerhill Press, 1989) at 105-136; F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, BC.; Oolichan Books, 1991) at 33-62; O. Mercredi & M.E. Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking Books, 1993) at 13-36.

94. In this they have some support from the Supreme Court of Canada, who termed Indigenous laws “pre-existing,” having their source prior to the assertion of British Sovereignty, *Delgamuukw* (S.C.C.), *supra* note 61 at 1082-92, quoted from *Van der Peet*, *supra* note 62 at 538.

95. However, the Court has accepted a weaker version of Indigenous legal pluralism, see *Van der Peet*, *supra* note 62 at 538, 545-46.547; *Delgamuukw* (S.C.C.), *supra* note 61 at 1082, 1092, 1099-1100, 1105-1106. For further commentary, see J. Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L.J. 629 [hereinafter “With or Without You”].

96. A. Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver, University of British Columbia Press, 1994).

97. For example, a Gitksan tradition of a supernatural event of a giant bear coming down a mountain corroborates geological evidence of a land slide in the same valley which is the subject of the story. See *Delgamuukw v. A.G.B.C.*, *supra* note 60, per Justice McEachern.

98. Vansina, *supra* note 20 at 124.

99. *Ibid.* See also J. Cruikshank, “Oral Tradition and Oral History: Reviewing Some Issues” (1994) 75 Can. Hist. Rev. 403.

100. L. Wittgenstein, *Philosophical Investigations*, 3rd ed, trans. G.E.M. Anscombe (New York: Macmillan, 1958) at 60f. He wrote that meaning and understanding of a fact is “knowing how to go on,” If you do not have an understanding of “how to go on” in a culture that is different from your own,

you do not know the facts of that culture.

101. M. Heidegger, *Being and Time*, trans. J. Macquarrie and E. Robinson (New York: Harper & Row, 1962) at 157.

102. R. Rorty, "On Ethnocentrism: A Reply to Clifford Geertz" (1986) 25 Mich Q. Rev. 115, AA An-Na'im, "Problems of Universal Cultural Legitimacy for Human Right" in A.A An-Na'im & F Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington: Brookings Institution, 1990) 331.

103. For the special challenges of presenting history in an adversarial courtroom environment, see D. J. Bourgeois, "The Role of the Historian in the Litigation Process" (1986) 67 Can. Hist Rev 195; G.M. Dickinson & R.D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation" (1987) 68 Can. Hist. Rev. 576; Vansina, *supra* note 20 at 102-103.

104 R. Devlin, "Judging and Diversity: Justice or Just Us?" (1996) 20:3 Prov. Ct Judges J, 4.

105. For example, in spatial terms, early Christians visualized the Garden of Eden as being in Mesopotamia and thus attempted to explain all human migration as somehow stemming from this point. In contrast, many Ojibway people trace their origin to Michilimackinac Island in the Great Lakes and reference their migrations from this place. Temporally speaking, Christianity, Islam, and Judaism have tended to view time as being linear, progressing, and "marching on." Other cultures, such as the Maya, Ainu, or Cree, have thought of time as being cyclical and repetitive. Causality or change can also differ between groups. See Vansina, *supra* note 20 at 125-133.

106. Vansina has written that "[h]istorical truth is also a notion that is culture

specific,” *ibid.* at 129.

107. C. Taylor, “Understanding and Ethnocentricity,” in *Philosophy and the Human Science: Philosophical Papers*, vol. 2 (Cambridge: Cambridge University Press, 1985) at 119-121. Vansina states that since “culture can be defined as what is common in the minds of a given group of people;... [p]eople in a community share many ideas, values and images..which are collective to them and differ from others,” Vansina, *ibid.* at 124.

108. A leading ethnohistorian wrote: “Historical records can be interpreted only when the cultural values of both the observer and the observed are understood by the historian. In the study of modern Western history, the experience of everyday life may suffice to supply such knowledge. Yet this implicit approach does not provide an adequate basis for understanding the behavior of people in earlier times or in cultures radically different from our own.” Trigger, *supra* note 14 at 168.

109. Vansina, *supra* note 20 at 124.

110. *Ibid.* at 137.

111. L. Mandell, “Native Culture on Trial” in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 358; J. Ryan & B. Ominayak, “The Cultural Effects of Judicial Bias” *ibid.* at 346; R. Ridington, “Cultures in Conflict: The Problem of Discourse” in W.H. New, ed., *Native Writers and Canadian Writing: Canadian Literature Special Issue* (Vancouver: University of British Columbia Press, 1990) 273.

112. Anthropologist Robin Ridington observed these problems in the factual underpinnings of the trial judge’s decision in *Delgamuukw*. See R. Ridington, “Fieldwork in Courtroom 53: A Witness to Delgamuukw” in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Montreal: Institute for Public Policy, 1992) 206 at 211-12. For

further commentary on the historical and cultural assumptions of Chief Justice McEachern's decision in *Delgamuukw*, See: J. Fortune, "Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History" (1993) 51 U.T. Fac. L Rev. 80; M. Asch & C. Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Legislation: An Analysis of Delgamuukw" (1994) 10 Queen's L.J. 503; G. Sherrott, "The Court's Treatment of the Evidence in Delgamuukw v. B.C." (1992) 56 Sask. L Rev, 441.

113. *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at 504 [hereinafter *S.(R.D.)*], per Justices L'Heureux-Dubé and McLachlin. Justices L'Heureux-Dubé and Justice McLachlin similarly wrote that "judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their various perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench," *ibid.* at 505.

114. "With or Without You," *supra* note 95.

115. *Delgamuukw* (S.C.C.), *supra* note 61 at 1065, quoted from *Van der Peet*, *supra* note 62 at 559.

116. *Delgamuukw*, *ibid.* at 1067, per Justice Lamer.

117. P. Petrone, *Native Literature in Canada: From the Oral Tradition to the Present* (Toronto: Oxford University Press, 1990) at 9-10.

118. One lawyer has commented on this process as follows: "What counts as fact? What can sustain us? With more and more sophisticated technologies we have destroyed the stories. In court cases, we word search transcripts to reassemble the evidence; it doesn't resemble anything that was said, by anyone. We cut the words, even our written words, away from the

environment, and hold them up as pieces of meaning, hacked up pieces of meaning. As lawyers we don't have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are civilized, well-heeled, comfortable carriers of no. We thrive on it. Other races die." L. Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 11-12.

119. There are only sixteen Aboriginal judges in Canada, none of whom sit on an appellate court. For an article which explains the importance of Aboriginal control over traditional knowledge and culture, see G. Christie, "Aboriginal Rights, Aboriginal Culture and Protection" (1998) 36 Osgoode Hall L.J. 447.

120. For one historian's description of his "ordeal" in court, see A. J. Ray, "Creating the Image of the Savage in Defence of the Crown" (1990) 6 Native Stud. Rev. 13.

121. The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Van der Peet*. These errors are particularly worrisome..." *Delgamuukw* (S.C.C.), *supra* note 61 at 1079.

122. *Delgamuukw*, *ibid.* at 1065, per Justice Lamer. The challenges of receiving Aboriginal evidence were described as follows: "Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only as a repository of historical knowledge for a culture but also as an expression of the "values and mores...of [that] culture" *ibid.* at 1068. For further discussion, see C. McLeod, "The Oral Histories of Canada's Northern People, Anglo Canadian Evidence Law and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276 at 1279.

123. The author would like to thank an anonymous reviewer for bringing this point to his attention.

124. D. Page, *History and the Homneric Illiad* (Berkeley): University of California Press. 1972).

125. I. Finkelstein & N.A. Silberman, *The Bible Unearthed: Archaeology's New Vision of Ancient Israel and The Origin of Its Sacred Texts* (Toronto: Free Press, 2001), see especially 14-24. The author's observations concerning memory and history in the Bible are summarized in their statement concerning the Exodus: "The saga of Israel's exodus from Egypt is neither historical truth nor literary fiction. It is a powerful expression of memory and hope born in a world in the midst of change," *ibid.* at 70-71. See also H. Shanks & D.P. Cole, eds., *Early Israel* (Washington: Biblical Archaeology Society, 1990).

126. J. Keay, *India: A History* (London: HarperCollins, 2000) at 44-47.

127. See E. Whalgren, "Fact and Fancy in the Vinland Sagas" in E. Plums, ed., *Old Norse Literature and Mythology*, (Austin: University of Texas Press, 1969) at 19-20. A recent compilation of the sagas with a good introduction by Jane Miley, is R. Kellogg, *The Sagas of the Icelanders*, (New York: Penguin Books, 2001).

128. D. Drew, *The Lost Chronicles of the Mava Kings* (London: Weidenfeld & Nicolson, 1999) at 290-335.

129. For a discussion of the "poly-functionality" of the Icelandic sagas, see M.E. Kalinke, *The Book of Reykjaholar: The Last of the Great Medieval Legendaries* (Toronto: University of Toronto Press, 1996) at 8-9.

130. *S.(R.D.)*, *supra* note 113 at 507, per Justices L'Heureux-Dubé and McLachlin.

131. For recent neurological research that probes the question of how we

come to consciousness and knowledge, see A.R. Damasio, *The Feeling of What Happens: Body and Emotion and the Making of Consciousness* (New York: Harcourt, 1999); A.R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Putnam, 1994). For an exploration of Damasio's finding in a legal context, see J. Nedelsky "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91.

132. *S.(R.D.)*, *supra* note 113 at 507, per Justices L'Heureux-Dubé and McLachlin.

133. *R. v. Marshall*, [1999] 3 S.C.R. 456 at 488.

134. *Delgamuukw* (S.C.C.), *supra* note 62 at 1069.

135. *Ibid.* at 1067.

136. *S.(R.D.)*, *supra* note 113 at 507.

137. *Ibid.* at 506, per Justices L'Heureux-Dubé and McLachlin, 533-534, per Justice Cory.

138. *Delgamuukw* (S.C.C.), *supra* note 61 at 1066, per Justice Lamer.

139. *S.(R.D.)*, *supra* note 113 at 107, per Justices L'Heureux-Dubé and McLachlin for the majority, citing Professor Jennifer Nedelsky.

Source: *Kawacatoose First Nation et al v R*, 2016 SCTC 1

Reasons delivered by: Hon. W.L Whalen

Published by: CanLII

Stable URL: <https://canlii.ca/t/h3z5x>

Kawacatoose First Nation et al v R

2016 SCTC 1

1. INTRODUCTION

[1] One of the eleven Claimants in this case, Standing Buffalo Dakota First Nation (“Standing Buffalo”), brings an Application, together with the required Application for Leave, to allow the admission of two sets of documents at the hearing of the validity phase of the Claim. The first set of documents (the “Correspondence”) comprises five letters between the Respondent Crown and the Applicant. The Respondent Crown objects to their admission on the basis of relevance and settlement privilege. The second set of documents (the “Elder Transcripts”) comprises three excerpts of transcripts of Elder testimony given before the National Energy Board in 2007, including one map. The Respondent Crown and several of the Applicant’s fellow Claimants (Kawacatoose First Nation et al and

Peepeekisis First Nation) object to the admission of the Elder Transcripts on the basis of relevance. The Respondent Crown further submits that the Elder Transcripts constitute evidence given in a prior proceeding, and as such, fails to meet the established legal test for admissibility. Standing Buffalo submits that all of the documents are relevant and satisfy all other criteria of admissibility.

[2] The Tribunal adjudicates this dispute pursuant to sub-section 13(1)(b) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], and Rule 30 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*], which provide respectively as follows:

Under the *SCTA*:

13. (1) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record and may

...

(b) receive and accept any evidence, including oral history, and other information, whether on oath or by affidavit or otherwise, that it sees fit, whether or not that evidence or information is or would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence;

Under the *Rules*:

30. Except for an application referred to in the Act, subrule 60(2) or Part 11, leave of the Tribunal is required before an application can be made to the Tribunal.

[3] By virtue of the fact of this hearing, it is obvious that the leave required under Rule 30 is granted.

II. BACKGROUND

A. The Claims

[4] The Claims concern the surrender and disposition of Last Mountain Indian Reserve 80A (“IR 80A”) in the Qu’Appelle Valley, Saskatchewan.

[5] IR 80A was comprised of 1,408 acres on the south side of Last Mountain Lake, northwest of present-day Regina. It was officially set aside as a reserve by order-in-council in 1889, and was described only generally as a “[f]ishing [s]tation for the use of the Touchwood Hills and Qu’Appelle Valley Indians”. Precisely which First Nations come within the descriptor “Touchwood Hills and Qu’Appelle Valley Indians” and which ones had an interest in IR 80A was not stated and is therefore not clear. This is a threshold issue to be resolved in these Claims.

[6] By at least the 1910s, IR 80A had become increasingly sought after and used by the non-Aboriginal population of the area, and in 1918 the federal government accepted a surrender of the land. The legality of the surrender has been challenged on several fronts, including for: non-compliance with the *Indian Act*, RSC 1906, c 81, s 49 [*Indian Act*]; the Crown’s failure to meet its fiduciary obligations (for a variety of reasons); and, for those Claimants who are party to Treaty 4, for non-compliance with the terms of the Treaty. Several of the Claimants submit that the surrender was illegal because consent was not obtained by all those interested in the Reserve, and various facts asserted in their respective Declarations of Claim pertain to which First Nations had an interest in IR 80A and which did not.

[7] Following acceptance of the surrender, the Crown put the lands to a number of uses. Over time it sold lots and leased parcels for various purposes, including for grazing, a country club, and local government use. The Claimants submit that the leases breached the terms of the surrender,

which required the Crown to sell the land. They also allege a number of other breaches of Crown fiduciary duty following the surrender of IR 80A, including allowing the construction of a road over the reserve without authorization or compensation, permitting trespass by squatters and campers, failing to prevent the removal of gravel and water, and by accepting inadequate lease terms for the lands. In whole, the Claims are grounded in sub-sections 14(1)(b), (c), (d), and (e) of the *SCTA*.

[8] The Applicant, Standing Buffalo, for its part, alleges that it was improperly excluded from the surrender and its proceeds, thus rendering the surrender illegal under the *Indian Act*, and also constituting a breach of what it refers to as its “ally-ship” relationship with the Crown. The documents it seeks to admit are allegedly evidence of the ally-ship relationship, which Standing Buffalo describes in its Declaration of Claim as a “special relationship” that “creates heightened obligations on the Crown in comparison to the Crown’s obligations to Aboriginal people in general, based on the fact that the specific obligations of the Crown in relation to a particular Aboriginal people arise out of the specific nature of their relationship” (Standing Buffalo’s Declaration of Claim, at para 18).

[9] The Crown denies all allegations of liability, asserting that it has met its lawful obligations with respect to the surrender and disposition of IR 80A.

[10] On the consent of the Parties, the Tribunal directed on May 11, 2015 that the Claims be heard in two separate phases, one focussed on their validity; and, the second, if validity is established, on the amount of compensation owed, if any. The validity phase will be divided into sub-phases, including a preliminary standing sub-phase to determine those interested in IR 80A and thus entitled to proceed to the hearing on validity. Once the standing sub-phase has been concluded, the validity phase will

proceed to resolve whether the Claims are valid.

B. Other Proceedings

[11] The Claims were originally filed with the Minister of Indian Affairs in 2008 as specific claims in the government negotiation process by seven of the original Claimants, but not including Standing Buffalo. The Minister decided to negotiate the claims in part, and invited Standing Buffalo to participate. The Respondent Crown states that the invitation to Standing Buffalo was extended on a “without prejudice” basis (Respondent’s Response to Standing Buffalo’s Declaration of Claim, at para 5). By contrast, Standing Buffalo states that Canada’s invitation to participate in the negotiations was based on Canada’s alleged acknowledgment that Standing Buffalo had an interest in IR 80A (Standing Buffalo’s Declaration of Claim, at para 8). In any event, Standing Buffalo did not submit a specific claim to the Minister, and the original Claimants filed a Declaration of Claim with the Tribunal on June 20, 2013 (Respondent’s Response to Standing Buffalo’s Declaration of Claim, at para 6). Therefore, negotiations with the Minister did not proceed.

[12] Prior to the specific claim, Standing Buffalo had filed a comprehensive claim against the Crown in the Federal Court in 2011 (the “Federal Court Action”). This Federal Court Action had the potential to overlap with the Claims presently before the Tribunal, and section 15(3) of the SCTA prohibits parallel proceedings from being filed with the Tribunal. Canada and Standing Buffalo eventually reached agreement on an amendment in the Federal Court Action, thereby eliminating parallel claims on any of the matters before the Tribunal in the present proceeding. As a result, the Respondent Crown did not object to Standing Buffalo filing a claim with the Tribunal on October 17, 2014. Correspondence between Crown counsel and Standing Buffalo’s counsel regarding Standing

Buffalo's joining the present Claims constitute part of the documents under consideration in this Application.

III. DOCUMENTS TENDERED FOR ADMISSION

[13] The Applicant seeks the admission of two sets of documents:

- a) The Correspondence, comprised of five letters between counsel for the Applicant and counsel for the Respondent Crown discussing the Applicant's participation in the present proceeding and the amendment of the Applicant's Federal Court Action to enable such participation; and
- b) The Elder Transcripts taken from the National Energy Board hearings on April 12, June 14, and August 21, 2007 in respect of proposed resource development projects not related to the dispute in the present case.

[14] The Respondent Crown objects to the admission of both sets of documents. The Claimants Kawacatoose First Nation et al and Peepeekisis First Nation object to the admission of the Elder Transcripts on the basis of relevance, but take no position on the Correspondence. The Claimants Little Black Bear First Nation and Star Blanket First Nation take no position with respect to any of the documents.

A. The Correspondence

[15] The first of the five letters in question is dated June 19, 2014, and is addressed to the Respondent's counsel, Lauri Miller, from Mervin C. Phillips, counsel for Standing Buffalo. The letter, dated July 23, 2014 is Ms. Miller's response. In the letter, dated July 31, 2014, Mr. Phillips replies to Ms. Miller, who responds by the letter dated August 1, 2014. In the final letter, dated July 15, 2015, Mr. Phillips reconfirms production of the documents he wants to put in evidence and recaps his position on other matters earlier corresponded. The Applicant did not formally request admission of this fifth letter in its written submissions, but offered it as an

exhibit and discussed it at oral argument. That letter having been introduced, the Crown took objection on the basis of settlement privilege.

[16] As originally presented in the Application for admission into evidence, the Respondent raised an objection based on settlement privilege. However, during oral submissions on the Application, counsel resolved that objection by agreeing to redaction of parts of the letters. As a result, the settlement privilege issue was resolved. Copies of the letters in their consensually redacted form appear in the Appendix to these Reasons as Exhibits “A”, “B”, “C”, “D” and “E”. The letters are not complicated or long, and do not require detailed summary. It is easiest to read them directly for their content.

1. Positions of the Parties

[17] The Applicant argues that the Correspondence, and in particular Ms. Miller’s letter of July 23, 2014, constitutes an agreement between Standing Buffalo and the Respondent Crown as to the proper forum of adjudication, and as such, is directly relevant to the present proceeding because it is “a direct admission by the Respondent Crown that it believes that Standing Buffalo has an interest in the within claim and is a party that has standing in these proceedings” (Applicant’s Written Submissions, at para 15). The Applicant argues that the admission contained in the Correspondence has a direct bearing on the standing sub-phase of these proceedings and is therefore relevant. It further submits that the Correspondence illustrates the Crown’s conduct towards the Applicant, which is relevant to determining whether the Crown has acted in accordance with its honourable obligations in the positions it has taken before the Tribunal. In the Applicant’s view, the Correspondence shows “a complete agreement as to forum and standing and the Crown cannot deny there is standing for Standing Buffalo and should be estopped from” doing so (Applicant’s Reply Written Submissions, at para

7).

[18] In oral argument, Standing Buffalo explained more fully its understanding of its special ally-ship relationship with the Crown as a feature that continues to infuse all of its interactions with the Crown, including present-day negotiations. It seeks to use the Correspondence to show the Crown's agreement and cooperation in switching from the Federal Court to the Tribunal as evidence of the ongoing "ally-ship" and the Crown's practice of looking out for Standing Buffalo, rather than simply as proof of the Crown's acknowledgment of Standing Buffalo's interest in IR 80A. It argues that to not admit documents probative of the ally-ship relationship at this early stage would be to determine that ally-ship is not relevant before the issues in these Claims are determined and the Applicant has been able to present its arguments grounding its ally-ship claims.

[19] The Respondent Crown argues that the Correspondence does not meet the basic test of relevance. "The sole purpose of the documents was to discuss the abeyance of the Applicant's Federal Court action before becoming a party to the Claim" and has no bearing on standing (Respondent Crown's Written Submissions, at para 15). The Correspondence is not probative of an ally-ship relationship, which the Respondent denies exists. The Crown says it did not encourage Standing Buffalo to choose one forum over the other in pursuit of its claims against the government, and the Correspondence is not relevant to an ally-ship relationship in any way. Further, the Respondent Crown argues that the ally-ship relationship itself is not relevant in these Claims. While the Parties have not agreed to an Agreed Statement of Issues, it is nonetheless clear that a major issue is the intention of the Crown vis-à-vis IR 80A and what use the various Claimants made of the IR 80A lands. According to the Respondent Crown, ally-ship is not relevant to these issues, and its existence does not make any fact in issue

more or less likely.

[20] The Respondent Crown also seeks to block the admission of the Correspondence on the basis of settlement privilege, based on the references to and discussion of the February 2012 letter from the Department of Indian and Northern Affairs regarding the Applicant's participation in the specific claims process. That letter was expressly marked "without prejudice", and the first letter in the Correspondence states that that letter was written in pursuit of settlement of the claim. The Respondent submits that the Applicant should not be able to "bypass settlement privilege over this communication by introducing it through the subject documents" (Respondent Crown's Written Submissions, at para 27).

[21] At oral argument, the Respondent stated that its purpose in asserting privilege was to protect privileged communications regarding specific claims negotiations, and that it had no insidious motive that would undermine the honour of the Crown. It agreed that redaction of the references to the February 2012 letter would be an acceptable solution to address its privilege concerns, and it proposed the redactions it deemed necessary. The Applicant agreed, thus resolving the settlement privilege issue. A copy of the Correspondence in its agreed redacted form appears as an Appendix to these Reasons. The Respondent's relevance-based objections to the Correspondence remain.

B. The Elder Transcripts

[22] The Elder Transcripts contain the testimony of Clifford Tawiyaka and Dennis Thorne before the National Energy Board in hearings that took place in 2007 on three separate proposed projects related to oil and gas. The witnesses are referred to as "Elders" in the transcripts.

[23] Exhibit G to the Affidavit of Chief Rodger Redman submitted by

the Applicant contains the testimony of both Elders in a hearing concerning the construction of the TransCanada Keystone Pipeline held on June 14, 2007. Exhibit H is a short portion of a hearing concerning the “Alida to Cromer Capacity Expansion Project” by Enbridge Pipelines on April 12, 2007, and only covers testimony from Elder Tawiyaka. Exhibit I contains the testimony of both Elders on August 21, 2007 in respect of proposed changes to the Enbridge Southern Lights Project.

[24] Each hearing was presided over by a National Energy Board panel of three, and attended by representatives of the applicant companies, First Nations representatives, and personnel from the National Energy Board. The latter two hearings, captured in Exhibits H and I, were also attended by other resource companies and an industry association. The Saskatchewan government was represented at the hearing transcribed in Exhibit H, and a union in the hearing transcribed in Exhibit I. The federal government did not appear at any of the hearings, a fact that was noted by Elder Thorne in his testimony. Nor did any of the other Claimants in the present proceeding appear before the panel.

[25] It is not clear from the Elder Transcripts exactly what happened in terms of an oath or affirmation of the witnesses. In the first transcript, the National Energy Board accepted that the Elders had been sworn or affirmed in a manner acceptable to the Board, which was by a pipe ceremony (Exhibit G, at paras 9725-27). The other transcript excerpts are silent in this regard. They are also silent as to the origins of the Elders’ knowledge, their status in their community, and the methods by which knowledge was retained and passed down to them through generations in their community.

[26] In Exhibit G, the National Energy Board Chairman described the purpose of the hearing as being “to hear from the Elders on the specific impacts the Keystone Project may have on the Standing Buffalo Dakota

First Nations” (at para 9717). Mr. Phillips noted that “the First Nation’s perspective on impacts has to consider the indigenous world view” (at para 9720), and the Elders’ testimony focussed largely on elaborating that world-view. It does not do justice to this world-view to distil it into a few summary lines, but I will attempt to provide an overview while referring to the testimony directly for much of its substance.

[27] Elder Tawiyaka (spelled Tawiyala in the transcripts) testified about the Dakota creation story, describing how the Dakota came into being, and how, from there, the laws binding the Dakota flowed. Key concepts in that law are harmony, having responsibility for and living sustainably with the rest of the earth, and viewing its lands and the earth as sacred. In this way, all activities that affect the Dakota’s land also have an impact on the people. A map, which appears to be identical to or at least broadly similar to Exhibit J of the Redman Affidavit, was introduced by another witness and shows the Dakota’s purported traditional territory, which stretches from southern Alberta, Saskatchewan and Manitoba down to the middle of the United States, as far as Arkansas and Oklahoma. According to the Elder, the proposed resource development work in this area contaminates and pollutes, violates the Dakota principles of living and the sacredness of the earth, and is something that will ultimately impact all people. “We’re desecrating everything...[and] we’re going downhill real fast” (Exhibit I, at para 4278, 4282).

[28] Elder Tawiyaka also described the Dakota relationship with the government as one that should be built on mutual respect and equality. He asserted that the Dakota did not sign a treaty relinquishing its rights, was still a sovereign nation, and that the Crown had a duty to consult with it. He stated, however, that the reality has been very different. He touched upon some of the tragedies of colonial oppression, and described the Dakota’s

current status as “the lowest on the ladder” (Exhibit H, at para 2297) amongst First Nations because it did not sign a treaty. The Dakota were either sidelined in negotiations or left out, and were forced to accept what treaty First Nations had negotiated; “we more or less...have our hands out all the time and nobody listens...” (Exhibit G, at para 9768). Nonetheless, he thought that the Dakota’s relationships with other First Nations were friendly.

[29] Elder Thorne outlined all of the many events and battles in which his people had participated in support of the British and their Canadian successors. He described Standing Buffalo and its people as constant allies. He also contrasted the “linear, compartmentalized and specifically... narrow” (Exhibit G, at para 9814) world-view of non-indigenous Canada with his holistic and relativistic view that “everything is connected; everything affects each other...” (Exhibit G, at para 9815), and described some of the spiritual practices, legal principles and organizational structures of his people. He criticized the non-indigenous world-view for its greed and the narrow approach it took to understanding the impact of resource extraction, describing it as unsustainable and harmful to all. He warned of the prophecy of an imminent “cleansing” of the earth, which has happened four times in its history, and explained the responsibility he felt to explain the consequences that arise from an approach of “industry at any cost” and the dangers of ignoring Crown obligations to consult with indigenous people (see Exhibit I, at paras 4416, 4422, 4423).

[30] He delved into the history of the Dakota’s relations with the colonial Crown, saying that “[w]e have a great history and relationship with the Crown” (Exhibit I, at para 4364), emphasizing the British need for assistance in the wars of the 1700s and early 1800s, their re-affirmation of the two-row wampum that they “would walk parallel, two systems of

government” (Exhibit G, at para 9835), and their mutual understanding that they were allies. Once responsibility devolved to the colonies, things changed. He recounted the shameful history of oppression at the hands of the Canadian government in some detail, and the Crown’s current neglect of the Dakota. He expressed his belief that the government should be present and should always consult with the Dakota, because “we didn’t give up anything” (Exhibit I, at para 4401) and because the Dakota world-view had much to offer.

[31] Elder Thorne presented his understating of “ally-ship” as follows: “[w]e are a nation of people, just as much as the law of nations in the international law. We are not less than. We are not inferior. We are equal in nationhood” (Exhibit G, at para 9875). He emphasized that the Dakota had not been conquered, and also his desire for dialogue between the two nations and a reconciliation of world-views. He made it clear that he did not believe the Crown was currently living up to its obligations with respect to the Dakota, either its historical obligations or those espoused by the Supreme Court of Canada. He spoke of the differences between the Dakota and other First Nations, with different ways of thinking and understanding their relationship with the Crown, and of the need to be dealt with separately. He also expressed his “sense of territory” (Exhibit G, at para 9860) as vast and transcending current political borders, overlapping with Cree and Blackfoot lands, and requiring further research.

[32] All parties present were offered the opportunity for cross-examination, which was only taken up by board staff and members of the panel in the first two hearings. However, only the beginnings of the cross-examination are included in the excerpts provided by the Applicant.

1. Positions of the Parties

[33] The Applicant seeks to have the Elder Transcripts admitted as an exception to the hearsay rule as evidence of “oral history and traditions” – and not, as became clear in its oral submissions, as prior testimony. The testimony was characterized as important information to the community, which living elders should be able to refer to and use as a documentary record and evidence of the long-standing and pervasive nature of Standing Buffalo’s beliefs and disputes with the Crown. For these reasons, the Applicant believes the relevant legal test is that of usefulness, necessity and reliability as laid out in *Tsilhqot’in Nation v British Columbia*, 2004 BCSC 148, 24 BCLR (4th) 296 [*Tsilhqot’in*].

[34] Standing Buffalo submits that the testimony is necessary because Elders Tawiyaka and Thorne are now deceased, though it noted in oral argument that it will also have live witnesses to provide oral history testimony on the Dakota world-view. It submitted that the testimony should be deemed reliable because it was taken in a tribunal setting with opportunity for cross-examination. Furthermore, an assessment of reliability can affect how much weight the ultimate adjudicator accords the evidence, and thus can be addressed after the Elder Transcripts are admitted.

[35] Standing Buffalo further submits that the Elder Transcripts are relevant because they contain testimony regarding the ally-ship relationship, which is the basis for the Applicant’s entitlement to reserve land and its interest in IR 80A. In its Reply, it also argues that the Elder Transcripts are useful in the sense that they provide the Dakota “perspective on the right being claimed”, pursuant to *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*] (Applicant’s Reply Written Submissions, at para 13d), although there was no elaboration or discussion of what “right” Standing Buffalo was referring to. It also claims that the testimony on the following

topics helps to explain the historical relationship between Standing Buffalo and the Crown: the use of traditional lands, including the lakes in the Qu'Appelle Valley, the non-Treaty relationship, the Seven Council Fires and the misconception of Standing Buffalo as American Sioux.

[36] The Respondent Crown, Kawacatoose First Nation et al and Peepeekisis First Nation submit that the Elder Transcripts are simply not relevant to the present proceedings. They point out that there is no reference to IR 80A in the testimony and no link between the testimony and Standing Buffalo's specific interest in this dispute. The map and discussions of the Applicant's traditional territory was very broad and not at all focussed on the land at issue in these Claims. As the Peepeekisis First Nation states, "the fact that the specific reserve is found within its traditional territory is not, by itself, evidence of an interest in that specific reserve" (Peepeekisis First Nation Response, at para 33).

[37] In the Respondent Crown's view, the allegation of ally-ship does not make the testimony more relevant to Standing Buffalo's entitlement to the specific reserve at issue. As discussed above, the Respondent submits that ally-ship neither existed nor is relevant to these Claims. Kawacatoose First Nation et al submits that it "fail[s] to understand that there is a legal principle of 'allyship' that gives rise to a duty to consult" or any other Crown duty (Kawacatoose Written Submissions, at para 20 and at oral argument). Both Kawacatoose First Nation et al and Peepeekisis First Nation also point out that, to the extent the Applicant relies on Aboriginal rights or title to justify admission, the Tribunal does not have the jurisdiction to consider those issues per sub-section 15(1)(f) of the SCTA.

[38] The Respondent Crown further argues that the Elder Transcripts constitute prior testimony offered for its truth and thus must satisfy the test for an exception to hearsay based on prior testimony. The Elder Transcripts

fail to do this. The Parties were not substantially the same. The federal Crown was not present at the hearings and did not have the opportunity to cross-examine the witnesses. Further, the material issues discussed in the hearings were completely different than those in the Claims, and any cross-examination would have been on the issue of the pipeline projects being discussed, not IR 80A. Further, the Respondent submits that the testimony is not necessary, as live witnesses will be offered to testify on the same subjects, and is not reliable.

IV. THE LAW

[39] The Parties were not in dispute with respect to the legal principles and tests to be applied regarding settlement privilege and relevance. Because they resolved the settlement privilege question by the redactions evident in the Appendix, it is not necessary to review the law of settlement privilege. The Parties disagreed on the nature of the exception to the hearsay rule that applies to the Elder Transcripts, and how it applies.

A. Relevance

[40] The Parties do not disagree on the basic rule for the admissibility of evidence. Evidence must be relevant to a material fact in issue. Relevance and materiality are the fundamental requirements. This proposition is well summarized in *R v Truscott*, [2006] OJ No 4171 (CA) at para 22, 213 CCC (3d) 183:

Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely:...Evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings.

[41] Moreover, as I observed in *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2015

SCTC 2, at para 20 “the threshold is not a great one”. As held by the Supreme Court of Canada in *R v Arp*, [1998] SCJ No 82 at para 38, [1998] 3 SCR 339, there must only be a tendency of relevance and materiality:

To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to “increase or diminish the probability of the existence of a fact in issue”...As a consequence, there is no minimum probative value required for evidence to be relevant.

[42] The judge assessing relevancy also has a common law residual discretion to exclude the proposed evidence where, in his or her view, its probative value is slight, or undue prejudice might result to the objecting party or to the trial process itself: *R v Hawkins*, [1996] 3 SCR 1043 at 1089, 141 DLR (4th) 193.

[43] Evidence that is otherwise relevant may also be excluded because of the application of an exclusionary rule, such as privilege or hearsay. Settlement privilege was a possible area of exclusion with respect to the Correspondence that the Applicant sought to admit. However, that question having been resolved, the only issue remaining is the relevance of the Correspondence.

[44] Relevance is also a question with respect to the Elder Transcripts. However, considerations relating to hearsay also come into play here.

B. Exceptions to Hearsay

[45] Strictly speaking, prior testimony in transcript form offered into evidence for its truth – as the Elder Transcripts are – is hearsay. Hearsay evidence is generally inadmissible. However, it may be admitted if it can be shown to be both necessary and reliable (*R. v Khan*, [1990] 2 SCR 531 [*Khan*]; *R v Starr*, [2000] 2 SCR 144 [*Starr*]). Necessity may arise where a witness is no longer alive or is otherwise unavailable.

[46] The Parties disagree on the characterization of the Elder Transcripts, and thus also the legal test applicable to their admissibility.

[47] As stated earlier, the Applicant argues that the Elder Transcripts are evidence of oral history and traditions, and thus meet the hearsay exception as laid out in *Tsilhqot'in*. *Tsilhqot'in* involved a claim for Aboriginal rights and title. Vickers J. had heard or received the oral evidence of the Chief and two Elders, the affidavit evidence of eight other Tsilhqot'in persons and one non-aboriginal person, plus the "will-say" of an anthropologist who the Plaintiff planned to call as an expert. The Chief and Elders had provided their oral history evidence, including in respect of history, genealogy, traditions and practices. The federal Crown objected that this evidence was hearsay because it had been handed down orally by then-deceased Elders and had not been physically recorded. It submitted that there should be a formal process to receive such evidence. The Crown proposed a process similar to that applied to expert evidence, including a *voir dire* or other preliminary hearing, where the proposed witness's qualifications and appropriateness would be considered.

[48] In a carefully considered decision, Justice Vickers reviewed the Supreme Court of Canada decisions where the Court recognized that aboriginal history was kept by long-standing cultural practice through the passing down of oral accounts from one generation to the next. He acknowledged the Court's conclusion that courts must not deny aboriginal peoples access to their history and perspective by imposing an impossible burden of proof. Oral history evidence was admissible through the exercise of flexibility in the application of the usual rules of evidence. It must also be demonstrably useful in the sense of tending to prove a fact relevant to the issues in question. It must also be reasonably necessary and reliable.

[49] In *Mitchell*, McLachlin C.J.C. (writing for the majority of the Court)

provided the following guidance:

32 Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned. [at para 32]

[50] The Chief Justice also stated at paras 27 and 28:

27 Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.), at p. 408). Thus in *Van der Peet*, *supra*, the majority of this Court stated 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” (para. 68).

28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, *supra*; *Delgamuukw*, *supra*, at para. 82).

[51] The traditional rules of evidence were not to be altered, ignored or applied with any less care. Rather it was necessary, on a case-by-case basis, to adapt the rules of evidence to accommodate the admissibility of hearsay evidence relating to aboriginal oral histories. In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 87, 153 DLR (4th) 193, Lamer C.J. wrote for the majority:

87 Notwithstanding the challenges created by the use of oral histories as

proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, supra, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies “did not keep written records”, the failure to do so would “impose an impossible burden of proof” on aboriginal peoples, and “render nugatory” any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis...

[52] Chief Justice McLachlin also recognized the continued applicability of the traditional rules of evidence, but confirmed that they must be adapted and applied with sensitivity and flexibility. She stated the following:

29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post- contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, supra, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, supra).

30 The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not “cast in stone, nor are they enacted in a vacuum” (*R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.), at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

...

39 There is a boundary that must not be crossed between a sensitive

application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, “[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse” (*Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing “due weight” on the aboriginal perspective, or ensuring its supporting evidence an “equal footing” with more familiar forms of evidence, means precisely what these phrases suggest: *equal* and *due* treatment. While the evidence presented by aboriginal claimants should not be undervalued “simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case” (*Van der Peet*, supra, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated. [emphasis in original; *Mitchell*, at paras 29, 30, and 39]

[53] Recognizing the Supreme Court of Canada’s approval of the acceptance of aboriginal oral history evidence, the balance of Vickers J.’s decision in *Tsilhqot’in* considered how to adapt the traditional hearsay rules in the particular circumstances of his case. He recognized (at para 16) that no court had set a formal procedure to determine the admissibility of oral history evidence, and he also refused to do so, preferring to treat it in the same way that hearsay evidence would be dealt with in any other case. The threshold test was whether the oral history evidence was useful in the sense of tending to prove a fact relevant to the issues in the case. That test having been satisfied, the hearsay must then pass the twofold test of necessity and reliability before being admitted (*Tsilhqot’in*, at para 17; see also *Khan and Starr*).

[54] Necessity depends largely on whether there is a witness who can testify directly on the particular event or circumstances in question. If all direct witnesses are unavailable by virtue of 2016 SCTC 1 (CanLII) 21 death, illness, distance or infirmity, necessity will generally have been made

out.

[55] Vickers J. also outlined (at para 19) some of the information that the court “would want to know” in order to determine the reliability of oral history evidence:

- 1) some personal information concerning the witnesses circumstances and ability to recount what others have told him or her;
- 2) who it was that told the witness about the event or story;
- 3) the relationship of the witness to the person from whom he or she learned of the event or story;
- 4) the general reputation of the person from whom the witness learned of the event or story;
- 5) whether that person witnessed the event or was simply told of it; and,
- 6) any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact.

[56] The oral history evidence will be admitted if the court finds it both necessary and reliable. The court must then weigh the evidence in the usual manner, and as usual, it has the discretion to accept the proposed evidence in whole, in part or not at all (*Tsilhqot'in*, at para 20).

[57] Vickers J. then proceeded to direct counsel to provide him with information that he considered essential to the case before him, in particular: how customs and traditions were preserved and safeguarded in the plaintiff's culture; who was entitled to relate information about them; who the witness was and why he was chosen to testify. The court also mandated a preliminary examination of each witnesses' personal ability to recount hearsay evidence, their sources, and any other information relevant to their reliability (at paras 24, 28).

[58] The Respondent does not dispute the criteria laid out in *Tsilhqot'in*, but argues that the Elder Transcripts do not meet them. It submits that the Elder Transcripts are properly characterized as prior testimony offered for

its truth. David M Paciocco and Lee Stuesser (“Paciocco and Stuesser”) succinctly summarized the applicable legal principles at 138-39 of *The Law of Evidence*, 6th ed (Toronto, Irwin Law Inc, 2011):

At common law, evidence given in a prior proceeding by a witness is admissible for its truth in a later proceeding provided:

- *the witness is unavailable;*
- *the parties, or those claiming under them, are substantially the same;*
- *the material issues to which the evidence is relevant are substantially the same; and*
- *the person against whom the evidence is to be used had an opportunity to cross-examine the witness at the earlier proceeding. [emphasis in original]*

[59] The Respondent submits that the Elder Transcripts do not meet at least three of the four requirements for admission, namely that: the parties in the transcribed proceeding and the proceeding to which admission is sought (or those claiming under them) are substantially the same; the material issues to which the evidence is relevant are substantially the same in both proceedings; and the person against whom the evidence is to be used had an opportunity to cross-examine the witness at the earlier proceeding.

V. LEGAL ANALYSIS AND CONCLUSION

A. The Correspondence

[60] The question of settlement privilege was resolved in the course of the hearing, so that question does not need to be dealt with further.

[61] The Correspondence focuses on the Applicant’s desire to participate in the proceeding before the Tribunal in respect of its claimed interest in IR 80A and the Crown’s opposition or agreement to that participation. I regard the Correspondence as nothing more than ordinary communication between

counsel in respect of litigation procedure. There is no evidence to suggest otherwise.

[62] The Applicant already had a claim before the Federal Court bearing on the same matter. Indeed, that claim was apparently underway before the proposed negotiations with the federal government involving other First Nations and to which the Applicant was also invited to participate in February 2012. As the letter of June 19, 2014 demonstrates, the Applicant was willing to participate in the proposed negotiations provided it did not compromise the Federal Court Action. For whatever reason, the negotiations did not proceed and the Federal Court Action continued.

[63] Then in 2013, the Claimants Kawacatoose First Nation et al filed their Declaration of Claim with the Tribunal, thereby spurring the other letters in question. In the letter dated July 23, 2014, the Respondent Crown denied making a request that Standing Buffalo be added as a Party to the present Claims, pointing out that the Tribunal had notified the Applicant pursuant to section 22 of the *SCTA*, advising that a decision on the Claims might significantly affect Standing Buffalo's legal interests. The notice was issued on August 19, 2014. Paragraph 5 of the notice recites that Standing Buffalo, through its counsel, requested that the notice be issued. The Respondent did not initiate its issuance.

[64] In fact, counsel for Standing Buffalo appeared at this proceeding's first Case Management Conference on December 9, 2013 in Regina, Saskatchewan. At that point in time, Standing Buffalo was not a Party, had not made an application to intervene and had not requested issuance of the section 22 notice. As apparent from paragraph 5 of the Endorsement dated December 19, 2013, Standing Buffalo's counsel asserted that his client had a strong interest in the Claims and the lands that were the subject of the Claims, but indicated that the Band was involved in Federal Court Action

and by the Rules of the Federal Court and the *SCTA*, it could not participate as a Claimant in both proceedings. Thus Standing Buffalo's counsel reported that his client was attempting to extricate its claim for IR 80A from the Federal Court Action and that it "may seek status as an interven[or] or party in this proceeding".

[65] There is no evidence that the Respondent invited Standing Buffalo to participate as a party or otherwise in the current proceedings. The final four letters dealt mainly with the sufficiency of the proposed amendment to remove any claim for an interest in IR 80A from the Federal Court Action. The Respondent Crown wanted to be sure that there was no possibility that IR 80A was a component of the Federal Court Action.

[66] Ultimately, the Respondent accepted an amendment to the Federal Court Action and did not oppose Standing Buffalo's participation as a Party to the Tribunal proceeding. The fact of the Respondent's non-opposition to Standing Buffalo's participation as a Party did not amount to an invitation to participate, or to an acceptance that Standing Buffalo had an interest in IR 80A, or to standing in the context of the validity phase of this proceeding. In its Response to Standing Buffalo's Declaration of Claim, the Respondent denied the validity of the First Nation's allegations and claims.

[67] Standing Buffalo's claim in the Federal Court preceded the commencement of proceedings by the other Claimants with the Tribunal. Standing Buffalo could have continued with the Federal Court Action had it wanted to. That was entirely its prerogative, without influence by the Crown. However, from a practical point of view, it made great sense that Standing Buffalo join the Tribunal proceedings because of the competing claims by the other First Nations. A decision by the Federal Court would not have dealt with the claims of the other First Nations, just as the Tribunal's ultimate decision would not have dealt with Standing Buffalo's claimed

interest in IR 80A. There was great potential for conflicting decisions and resulting confusion. For the same reason, the Respondent would obviously prefer to deal with the claims comprehensively, provided the issue was removed from the Federal Court.

[68] None of the letters and related circumstances offer the slightest evidence of the Respondent admitting that Standing Buffalo had standing as one of the aboriginal groups having an interest in IR 80A, or that if it did have standing, its claim was valid. Indeed, that is the contest. The Correspondence focused principally on Standing Buffalo's satisfactory extrication of its claim in respect of IR 80A from consideration by the Federal Court. I can find nothing in the Correspondence that renders the existence of a material fact in issue more or less likely. Nor is there anything in the Correspondence that tends to increase or diminish the probability of the existence of a fact in issue. The Correspondence focuses on procedural matters. I can find nothing of relevance in the Correspondence bearing on the substance of the Claims. For the same reasons the Correspondence did not evidence an agreement by the Respondent that Standing Buffalo had any particular standing or interest in the subject Reserve.

[69] Finally, the fact that the Respondent did not ultimately oppose Standing Buffalo's joining the Tribunal process has nothing to do with Standing Buffalo's claim of "ally-ship". There is no evidence that the Respondent's concession of the First Nation's participation before the Tribunal had anything to do with "ally-ship", and no evidentiary foundation was established to associate the Correspondence with that position. There was no reference to it in the Correspondence, either directly or indirectly. Nor was any other acceptable evidence offered to support that proposition. I conclude that the Respondent's concession was made for practical reasons of seeking comprehensive resolution in an efficient and economical process

that would avoid possible conflicting decisions. Standing Buffalo's Claim was made upon its own initiative. The question was not that it would be made, but rather where it would proceed. The communications in the letters in question were focused on forum, not the substance of the Claims.

[70] In reaching this conclusion, I am in no way pre-judging or making any finding in respect of Standing Buffalo's allegations of "ally-ship" or its bearing on the Claims.

[71] For these reasons, I conclude that the Correspondence is not relevant in any way to the substance of the Claims and is therefore not admissible.

B. The Elder Transcripts

[72] We are dealing with transcripts of testimony given before another tribunal. For purposes of this Application, I am willing to accept that the testimony was given solemnly by some means, although it was not clearly apparent from the transcripts offered. I will also assume that the facts and circumstances to which the witnesses testified were offered for their truth, otherwise there would be no need for a solemn oath. I do not question the sincerity of the witnesses. Otherwise, why would they have taken the time to testify? All this being so, the prior testimony was given at a prior proceeding and is therefore subject to the principles summarized by Paciocco and Stuesser (see paragraph 58 above) as informed by the general principles of necessity and reliability (see *Starr*).

[73] The witnesses are not before the Tribunal. This is a fundamental distinguishing feature from the circumstances in the *Tsilhqot'in* case. In *Tsilhqot'in* the witnesses were present and had testified, or they were affiants or an expert who could have been called upon for oral testimony and cross-examination. That is not possible in the present Claims, which is

another reason why the prior testimony principles apply.

[74] The witnesses in the proposed National Energy Board transcripts are not available now because they are deceased; and because of this, an important aspect of the necessity requirement is satisfied, although not completely. The Applicant has indicated that it will be calling oral history evidence from living Elders and presenting an expert anthropologist. It has not been established that these Elders will not be able to testify about the world perspective and alleged ally-ship relationship for which the Applicant proposes to rely on the Elder Transcripts. For that reason, I am not fully satisfied that necessity has been established.

[75] Quite apart from the necessity requirement, however, the material issues under consideration are not substantially the same as between the present Claims and the National Energy Board hearings. Although a formal statement of the purpose of the Elders' testimony before the National Energy Board was not provided, it would appear (and I accept) that they were there to testify to "the specific impacts" of the proposed pipeline projects on the Standing Buffalo Dakota First Nation (Exhibit G, at para 9717). That is very different than the question of the Applicant's (and other First Nations') interest in and entitlement to IR 80A. The requirement that the material issues to which the proposed evidence is relevant be substantially the same is not met. The necessity of this alignment is surely obvious.

[76] Nor are the Parties (or those claiming under them) before the National Energy Board and the Tribunal the same. Neither the Respondent Crown nor the other Claimants before the Tribunal were present or appeared before the National Energy Board. Their interest in the matters presented in testimony of the Elders before the National Energy Board is unknown and they did not have an opportunity to make them known through the presentation of testimony of their own. From that perspective, the testimony

is one-sided.

[77] More importantly, while there appears to have been some cross-examination (although the transcripts presented were incomplete), the Respondent Crown and other Claimants in the present proceeding did not have any opportunity to cross-examine the witnesses. The testimony is therefore not only one-sided but is also untested vis-à-vis the interests of the Respondent and other Claimants. From the materials filed on this Application and the oral submissions, it is clear that some of the other Parties question the validity and/or relevance of the Applicant's ally-ship submissions.

[78] Prior testimony offered for its truth by one or more witnesses is hearsay evidence. It must pass the test for prior testimony before being assessed as an exception to the hearsay rule. The Elder Transcripts have not done so.

[79] *Tsilhqot'in* described the Supreme Court of Canada's creation of the exception to the hearsay rule in cases where aboriginal oral history is offered by a First Nation as evidence in support of a claim or other matter of interest. The rationale for the recognition of oral history was summarized in the passages discussed in paragraphs 48 through 51 above. Even conceding that the testimony offered by the Elders to the National Energy Board was "oral history" in the sense that it reflected this First Nation's history, perspective and cultural practices passed down from generation to generation by oral means, it would be impossible to assess its reliability by posing the questions for information that Vickers J. suggested that the court "would want to know", namely:

- 1) some personal information concerning the witnesses circumstances and ability to recount what others have told him or her;
- 2) who it was that told the witness about the event or story;

- 3) the relationship of the witness to the person from whom he or she learned of the event or story
- 4) the general reputation of the person from whom the witness learned of the event or story;
- 5) whether that person witnessed the event or was simply told of it; and,
- 6) any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact. [*Tsilhqot'in*, at para 19]

[80] These questions are addressed one way or another in Tribunal proceedings where oral history is presented, either in the Will-Say statements of the proposed witnesses or by introduction at the hearing prior to the witnesses' giving their testimony. These matters are also often addressed in oral history protocols that are typically entered into by parties in anticipation of oral history evidence being given. That is not possible here.

[81] The Tribunal is unable to ask the witnesses any of these questions. It must simply assume reliability. This would ignore the traditional rules of evidence that the Supreme Court of Canada has held must still be applied although with flexibility and sensitive adaptativeness.

[82] For these reasons the proposed transcripts of testimony before the National Energy Board are not relevant or otherwise admissible in the present proceedings. Again, this should not be taken as a decision or pronouncement on the question of ally-ship.

VI. ORDER

[83] In summary, leave is granted to Standing Buffalo to bring this Application but for the reasons given, the Application is denied.

Author(s): Aimée Craft

Source: (2013) Canadian Institute for the Administration of Justice Conference
– How Do We Know What We Think We Know: Facts in the Legal System

Stable URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433234

Reading Beyond the Lines: Oral Understandings and Aboriginal Litigation

Aimée Craft

I. Introduction

Aboriginal peoples in Canada have constitutionally protected Treaty and Aboriginal rights which are “recognized and affirmed” in Section 35 of the *Constitution Act, 1982*.¹ This simple constitutional statement is the foundation for a legacy of rich legal reasoning on the nature of Aboriginal and Treaty rights, and the evidentiary struggles that accompany the litigation of those rights.

Historical evidence is generally necessary to prove Treaty and Aboriginal

rights. In large part, this is due to the historical framing of rights by the courts through legal tests that are rooted in prior occupation of lands, past cultural practices, and the interpretation of historical treaties. Aboriginal rights are held to the standard of being “integral to the distinctive culture of the Aboriginal group”² prior to contact (and in the case of the Métis, prior to effective control).³ The litigation of Aboriginal title requires proof of exclusive use and occupancy that dates back prior to British Sovereignty.⁴ Treaty rights are generally litigated in a context of competing historical understandings of the treaties, requiring extrinsic evidence as to the meaning of the original Treaty terms themselves.⁵

While historical evidence may be necessary to prove these rights, there is very little written historical evidence from an Aboriginal perspective. Professor Borrows argues that oral history can be controversial in nature in that it can “question the very core of the Canadian legal and constitutional structure.”⁶ This poses a challenge: how to balance the principles of evidence with the reception of oral history and Elder evidence?⁷ While recent efforts have paved the way for the admissibility of oral history and Elder evidence,⁸ we still have much ground to cover in terms of the purposes for which this evidence is considered, and the weight that it is given in judicial decision making. Below I suggest that although the Supreme Court of Canada (“SCC”) has provided clear direction to give oral history and historical evidence equal weight, courts continue to struggle with how to receive, treat, and decide based on this *sui generis* type of evidence. The heart of this paper is a description of a multi-year, multi-party effort aimed at developing Guidelines for Elder Testimony and Oral history. This process unfolded in the context of the Federal Court Aboriginal Law Bar Liaison Committee.

I end by suggesting that we have much more work to do. While we have not yet really wet our feet in the waters of oral history and Elder evidence, I anticipate that we are about to dive into the deep waters of indigenous legal traditions. Their presence in Canadian courts will surely enhance the common law, while giving many of us the opportunity to challenge our legal assumptions of what is in fact, *law*.

II. Aboriginal Law Needs Aboriginal Evidence

Aboriginal rights and Treaty rights are unique in their nature, or “*sui generis*”. The SCC has written that they are rooted in the “reconciliation of the prior occupation of North America by distinctive Aboriginal societies with the assertion of Crown sovereignty over Canadian territory.”⁹ They attempt to achieve that reconciliation by “their bridging of Aboriginal and non-Aboriginal cultures.”¹⁰ Accordingly, “a court must take into account the perspective of the Aboriginal people claiming the right [...] while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each.”¹¹

A special approach is required. As mandated in *Delgamuukw*, the Aboriginal perspective and the common law perspective must be considered in equal measure. Equal weight must be given to equal perspectives. This is what is required if we are to achieve Aboriginal law’s objective of reconciling “Aboriginal peoples and non-Aboriginal peoples and their respective claims, interest and ambitions.”¹²

More concretely, the SCC recognized that the histories of Aboriginal nations are largely, if not entirely, oral, and that the laws of evidence need to be modified in order for weight to be given to this perspective. We must: “adapt the laws of evidence so that the Aboriginal perspective on their practices,

customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of Aboriginal societies, which for many Aboriginal nations, are the only record of their past.”¹³

The Aboriginal perspective is oral, not written; it is contextual and holistic rather than fact based; and it is also linked to culture.¹⁴ For example, Anishinaabe understandings are generally not written¹⁵ but rather recorded through oral transmission.¹⁶ Historically, understandings, stories, and laws were physically recorded in birch bark scrolls, wampum belts, pictographs and petroforms. Some of these forms of “writing on the land” continue today.

From an Aboriginal perspective, “cultural identity is a subjective matter and not easily discerned”.¹⁷ In *Delgamuukw*, the SCC cited what they considered to be a “useful and informative” passage from the Royal Commission on Aboriginal Peoples (1996):

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolutions [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one — and not necessarily the most important — element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly.

In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige

[...]

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are “facts enmeshed in the stories of a lifetime”. They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.¹⁸

The rules of evidence must be adapted to accommodate Aboriginal oral histories and the Aboriginal perspective.

In determining whether an Aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive Aboriginal culture, 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 originate 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.*¹⁹ [Emphasis in original.]

Courts and decision makers have expressed difficulty and discomfort with the treatment of oral history and Elder evidence and evidentiary legal standards; struggling at the interface with issues of necessity and reliability.

Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only “as a repository of historical knowledge for culture” but also as an expression of “the values and mores of [that] culture...”

[...]

Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that “[c]laims to Aboriginal title are woven with history, legend, politics and moral obligations.” *The difficulty with these features of oral histories is that they tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth.* Another feature of oral histories which creates difficulty is that they largely consist of out- of-court statements, passed on through an unbroken chain across the generations of a particular

Aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.²⁰

Although oral history evidence is a valid exception to the general rule for exclusion of hearsay evidence, courts have been reticent to accept this evidence in the absence of other forms of corroborating evidence. For example, in *Montana Band v Canada*, a 2006 decision of the Federal Court, the trial judge stated:

Certain aspects of this evidence are corroborative of other evidence adduced at the trial. However, neither the oral history evidence nor the evidence it tends to corroborate are particularly useful in relation to the resolution of the technical issues before the Court. As well, none of this evidence contradicted any of the relevant documentary or expert opinion evidence. For this reason, it is not necessary to engage in an analysis of the weight that ought to be given to this evidence. Having said this, given that the Cree perspective for the most part is absent in the historical record, the oral history evidence provided the Court with an additional context within which to consider the evidence.²¹

Where historical, scientific or expert evidence contradicts oral history, the former have often been the preferred evidence. In many cases, oral history has either been deemed to be unreliable and set aside or given little evidentiary weight.²² While corroboration may be an appropriate measure in the adversarial process more generally, the Aboriginal perspective should not necessarily be subject to strict standards requiring corroborating documentary or expert opinion evidence. As stated by Chief Justice McLachlin in her opinion for the majority in *Mitchell*: “The flexible adaptation of traditional rules of evidence to the challenge of doing justice in Aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not ‘cast in stone, nor are they enacted in a vacuum’.”²³ This is particularly important given the challenges that have been identified, such as lack of written historical evidence from the Aboriginal perspective.

There are examples of cases in which evidence of oral history has been accepted and relied upon in judicial reasoning. In the *Sappier* case, Mr. Sewell was qualified as an expert “regarding oral traditions and customs which have been passed down through the generations and more particularly in the field of describing practices and customs relating to the use of and gathering of wood by Aboriginals in the geographical area encompassed by the terms of the charge.”²⁴ In *Mitchell v Canada*, Grand Chief Mitchell’s testimony “confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence to be credible and relied on it.”²⁵

While the evidence was accepted in both of these cases, the adaptation of the rules of evidence was to no extent evident. In *Sappier*, the evidence was tendered as “expert evidence” which requires experts to be qualified to provide opinions based on their particular area of knowledge or expertise.²⁶ In *Mitchell*, the evidence was credible and reliable, at least in part because it was “confirmed by archaeological and historical evidence...”²⁷ Where oral historians have been educated in history, anthropology, archaeology, or ethnography, their evidence may be subject to these questions: Is the evidence considered as biased, tainted or contaminated? Should the Elder or oral historian be held to the same standards as experts?²⁸ Can academic or professional experts be called to question the evidence or the qualifications of the Elder?

Although admissibility and weight must be determined on a case-by-case basis, issues have arisen systematically, including advance disclosure, cross-examination, the qualification of witnesses and the use of experts to

challenge oral history and Elder evidence. In an adversarial context, these may be perfectly appropriate means of testing the evidence. Nonetheless, this approach can foster an atmosphere of distrust and frustration with the legal process, particularly for the Aboriginal parties involved. Bruce Miller suggests that

[t]he Department of Justice effort at responding to the Canadian Supreme Court's evolving position on oral narratives has been less than helpful, and perhaps less than honourable on some occasions. The emphasis remains on the strategic defence of the Crown's perceived prerogative to control resources and land, and on the tactical use of academic devices intended to discredit and dislodge the use of oral narratives in civil litigation. These legal tactics have contributed to making litigation long, expensive, and contentious, developments that are not in the best interests of Canada or Aboriginal peoples.²⁹

This distrust and frustration are further amplified in the context of aboriginal litigation, for cultural reasons and because of the particular nature of oral history and Elder evidence. For example, from an indigenous perspective, questioning an Elder is a sign of disrespect. Elders are generally the community knowledge keepers and leaders in terms of their community decision-making processes. Questioning them or treating them in a way that is perceived as disrespectful is damaging to the group and the culture. Yet, questions may arise as to who may properly be considered as part of the "category" of "Elders".

As part of the process of developing the Guidelines, Elders assisted in identifying the issues that have arisen when they have been called to testify. They also suggested some solutions that would accommodate both the requirements of the legal process and the Aboriginal perspective. "Elders have frequently said their experience in court has not been favourable. The formalities of the court and the adversarial aspect of litigation do not accord with Aboriginal approaches to sharing knowledge and stories."³⁰

Interrupting and questioning the truth or reliability of Elder evidence has been devastating to Elders personally and to their reputation in the community. Elder Fran Guerin expressed that respect and acknowledgement of difference is at the center of the issue:

How do you reconcile this with the adversarial system? How do you treat Elders with respect in the adversarial system? In part by allowing as much time as is needed for parties to deliver information — it is ceremony and a great degree of caution is taken to ensure no one is offended. It is the opposite of the court system. It's the two cultures clashing. The principle of respect is integral.³¹

While some Elders are familiar with courtrooms, public speaking, or having their thoughts and views challenged, others will have very little familiarity with the adversarial process. Elder testimonies must be accommodated to foster truth seeking and to encourage the Aboriginal perspective. Sakej Henderson explains that the Elders have a constitutional voice:

Elders provide a new, distinct, Constitutional voice that has not been heard, one that the courts describe as *sui generis* [...] when Elders come to court, they carry Constitutional supremacy and Aboriginal rights with them, the power to explain Aboriginal traditions, which no one else can do [...] they have a Constitutional voice that in a federal system is considered superior to other rules [...] the Federal Court rules must be consistent with Aboriginal rights.³²

Oral history and Elder evidence is essential to understanding the Aboriginal perspective. An international comparative review of the treatment of oral history evidence by courts, prepared under the direction of Professor James Hopkins, Associate Professor, Rogers College of Law, University of Arizona found that “[M]oving forward, it is clear from the comparative analysis that Canada’s system must respectfully tender oral history evidence and recognize the dignity of Elders whose customary knowledge places them in a unique position within the community.”³³

In the *Tsilhqot'in* Aboriginal title case, Vickers J. of the British Columbia

Supreme Court addressed considerations for oral history.³⁴ In a procedural ruling in advance of the trial, Justice Vickers indicated that counsel should address the following issues on behalf of the claimant clients:

- 1) How their oral history, stories, legends, customs and traditions are preserved;
- 2) Who is entitled to relate such things and whether there is hierarchy in that regard;
- 3) The community practice with respect to safeguarding the integrity of its oral history, stories, legends and traditions; and
- 4) Who will be called at trial to relate such evidence, and the reasons they are being called to testify.³⁵

Justice Vickers was clear that this “is not a formula or template to be applied in every case where hearsay evidence of oral history, genealogy, practices, events, customs and traditions are a critical part of the evidence at trial. It is a procedure that will, in my view, be helpful in this case, and might have eliminated some objections if it had been undertaken at an earlier stage.”³⁶

Nonetheless, it provides a reasonable basis from which to consider and adapt according to the particularities of each legal matter and each Aboriginal community.

III. Federal Court Guidelines: Elder Testimony and Oral History

In 2005, the *Federal Court — Aboriginal Law Bar Liaison Committee* was created, with representatives of the Federal Court, the Indigenous Bar Association, the Department of Justice (Canada), and the Canadian Bar Association (Aboriginal Law Section). The purpose of the Committee was to “provide a forum for dialogue, review litigation

practice and rules, and make recommendations for improvement.”³⁷ Issues relevant to Aboriginal litigation were discussed by the Liaison Committee including the suitability of the adversarial process, pre-trial disclosure of oral history evidence, adaptation of the judicial process to the cross-cultural context, and delay and cost, amongst many others. The ultimate objective was to build in enough flexibility to allow for “the just, most expeditious and least expensive determination of every proceeding on its merits.”³⁸

The first four years of dialogue resulted in an Aboriginal Litigation Practice Guideline (November, 2009), which focused primarily on case management and trial management. The Guidelines contain best practices for litigation, specific to the Aboriginal law context. While the committee members did not agree on all proposals that were put forward, we did ultimately compromise on wording and suggestions for best practices, drawn primarily from the experience and suggestions of legal counsel, to improve the practice of Aboriginal litigation. Guiding principles were set out, encouraging the flexible interpretation of the rules of procedure to give equal weight to the Aboriginal perspective and the academic historical perspective requiring the respectful treatment of Elders, and an approach that is fair and responsive to the practices of the Aboriginal group and the Elder who is testifying. “The overarching theme permeating these guidelines is that the Aboriginal perspective provided by Elders can assist the Court by providing context for the matter before the Court.”³⁹

The committee continued to actively work on recommendations for the Practice Guidelines on Elder Testimony and oral history until the publication of a second edition in October, 2012. Throughout the

process, academics, judges, Elders, lawyers and collaborators were called upon to provide guidance to the committee.⁴⁰ A two-day symposium was held in Ottawa, where Elders from across Canada and various indigenous nation groups shared their perspectives on oral history and Elder evidence in the courts. The Elders shared their views and past experiences, relating their concerns about speaking in foreign environments such as courtrooms, and in places that they have felt disrespected in the past. In the Fall of 2010, at the invitation of the Elders to come to “our house”, members of the Court attended a two-day session in a traditional lodge at the Sagkeeng First Nation.

The Guidelines on Elder Evidence and Oral History

When Elders agree to testify, consideration should be given to the Guidelines. Issues about the evidence may be considered in a case management or trial management conference to “settle on a flexible appropriate procedure of hearing the Elder’s testimony.”⁴¹ Where appropriate, the case management or trial management judge may make rulings to this effect.

The Guidelines appropriately note that the admissibility of an Elder’s testimony depends on the circumstances of the case and that it will be for the trial judge to decide on a case-by-case basis. Since the Elder testimony is aimed at informing the court on the Aboriginal perspective, Elders evidence “will usually be admissible where an Elder is a person recognized by his or her community as having that status.”⁴² This principle helps address some of the difficulties identified above, such as subjecting Elders to the requirements of legal tests to determine “expertise” and issues related to the qualification of Elders. There are internal mechanisms in the Aboriginal communities that allow for the

identification of the Elder(s), and that can provide the Aboriginal perspective of the particular aboriginal group or indigenous nation group. Often Elders will not call themselves “Elders” by virtue of customary of cultural practice. Therefore, an introduction of the Elder to the court by a member of the community may be appropriate.

In advance of trial, information should be disclosed about the Elder and the basis of his or her knowledge. This need not be at the same time as document disclosure. Issues about the adequacy of disclosure can be raised in case management or trial management for directions or rulings on the disclosure and its timing. In addition to a summary of the proposed evidence, the disclosure should include information about the practices and protocols for requesting evidence from the Elder, such as offering tobacco, making gifts, and explaining the purpose for which the request is being made.

Where Elder evidence is being called, legal counsel should prepare the Elders, explaining what will be expected from them. They should have the opportunity to reflect on the form and substance of their contribution, including any protocols that may apply. In some cases, the court may play a role in this preparation. Judges can express “respect and appreciation to the Elder for coming to share their knowledge with the Court.”⁴³ This is where the court can take a leadership role in explaining the legal process and addressing any concerns that the witness may have, either in advance or throughout the proceeding.

Where evidence is either supported by demonstration, or directly demonstrative, it can be considered as part of the Elder’s evidence (*i.e.* songs, dances, culturally significant object or activities on the land) and

in these cases, special arrangements may be made. The Guidelines also address the treatment of confidential or sensitive material. Due to past experiences and abuses, many are concerned with the protection of the intellectual property of Aboriginal groups' information.

In some cases, it may be appropriate to commission evidence or out-of-court examination of Elders in advance of trial, for example in situations where Elders may no longer be available at the time of trial. This is particularly important given the long duration of litigation and delays, as well as the age and physical health of Elders. There is a list of considerations for evidence gathering in the Guidelines, including language and translation considerations, procedures for recording, appropriate cross-examination, and the location and length of sessions.

Special proceedings for the hearing of Elder evidence may be considered at any stage of the trial. However, it may be beneficial to hear the Aboriginal perspective at an early stage in order to allow the parties to consider their positions, and the potential for resolving the dispute out of court (including through mediation or negotiation). These special hearings serve the purpose of preserving Elder evidence in case the trial is delayed or prolonged. The procedure for the special hearing should be determined in advance, and may take the form or be guided by some of the considerations in the *Williams* case, and adapted to the particular Aboriginal community involved.

Procedural matters, such as the location of the court hearing, the use of Aboriginal languages and interpretation, and Aboriginal protocols should be canvassed early in the case management or trial management process. Special accommodations to courtroom procedures for the

hearing of evidence can have a significant impact on what evidence is brought forward about the Aboriginal perspective. Given the largely oral tradition of Aboriginal people, discussions, remembrances and the telling of stories is often not limited to one person speaking. Notably, the ability for Elders to testify in each other's presence or in the presence of the community, including as part of a panel, accord with many of the customary practices related to truth telling. In some cases, the Elders should be accompanied by someone while they testify, either a relative, or an Elder with whom they collaborate. Although there are protocols about not interrupting while someone speaks, an Elder may defer to others who have knowledge of a particular fact or an event, which can corroborate or enhance what is said by a particular witness. Other persons may be asked by the Elder to share a bit of information that supports the primary story. In addition, some stories are best told at a particular time of day or night, which may be accommodated.⁴⁴

A key recommendation in the Guidelines is that discussions about Elder evidence, including admissibility and weight of the Elder evidence should be held in advance of the Elder testimony, and not when the Elder is on the witness stand. Unless there are immediate issues such as objections because of privilege, "challenges to admissibility may be deferred on a without prejudice basis to completion of the Elder's testimony while questions of the weight may be left for later argument."⁴⁵

The Guidelines provide that special procedures may be adopted for Elder testimony, including:

- Decorum and respect to be afforded an Elder in keeping with

Aboriginal sensibilities for respecting Elders;

- Whether examining counsel will need to direct the Elders attention to testimony the party wishes to elicit;
- How objections may be raised without disrupting the flow of an Elder's testimony;
- Procedures for challenging the admissibility and weight of an Elder's testimony; and,
- Being mindful of the Elder's age and physical health and the need for health breaks in the Elder's testimony so as not to tax the Elder's limitations in prolonged questioning.⁴⁶

One of the key contentious issues for counsel and the Elders was how to conduct cross-examination in the context of Elder evidence. The Elders were particularly concerned with real or perceived disrespect that characterized cross-examination. The following considerations and principles have been built into the Guidelines, and serve as a benchmark for appropriate cross-examination in this context:

- All witnesses are entitled to respect. Questions put to Elders should be courteous in keeping with the respect afforded the Elder by his or her community.
- Counsel should take into account the cultural approach of the Elders in making best efforts to ensure that the Elder understands the questions asked.
- The Court should intervene where questions stray from the bounds of examination or cross-examination, or where the Elder may have difficulty understanding the questions.
- The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination should be explored in appropriate cases. This exploration should be done

on consent of the parties or on direction of the Case Management Judge.⁴⁷

There are processes that may assist in attenuating the difficulties surrounding the cross-examination of Elders. In particular, alternative and respectful modes of asking questions of Elders may include:

- Counsel for the other party may make a list of questions that will be put to the Elder by Counsel for the Aboriginal person/group;
- Questions may be altered from leading questions to more open questions on cross-examination;
- Counsel for both sides may make a joint list of questions. Where questions are not agreed to by both parties, they may be asked separately by each party.

While the general rules for re-direct should apply, the court might consider granting leave for the discussion of certain subjects between counsel and a witness where it is necessary, and when it might assist in advancing the trial process.

The Guidelines contain a whole section on direct examination and cross-examination that includes suggestions for procedures that “should be chosen to achieve the best environment to receive that testimony.”⁴⁸

These may include:

- The use of Aboriginal languages:
 - Address the need for interpretation;
 - Choose the mode of interpretation (simultaneous or sequential interpretation);
 - Even where Elders choose to testify in English or in

French, interpreters may be required to assist with the interpretation of certain words or concepts;

- Counsel should be encouraged to prepare glossaries of Aboriginal terms, including places and ideas;
- Consideration should be given to the choice of the interpreters, given regional dialects;
- The appointment and cost of the interpreters may be shared between the parties;
- The approach to interpretation, court procedure and legal language should be discussed with the interpreters in advance (in particular if they have not been trained as court room interpreters).
- Observance of cultural and spiritual protocols:
 - Parties and the court should be made aware of the protocols (*i.e.* offering of tobacco);
 - Consideration should be given to whether or not the protocols should be conducted on the record or in advance of the hearing (given that some ceremonies are not allowed to be recorded);
 - Some Elders may choose to take an oath in accordance with their Aboriginal practice (*i.e.* with an eagle feather).
- The choice of a suitable venue (including in the community or on the land):
 - Aboriginal community venues should be canvassed in light of the effect on the ability of Elders to testify, and other considerations such as public access, travel, accommodation, court equipment and records.
- The format or mode of the testimony:

- There are formats in which oral histories are transmitted, including types of forums such as circle settings, on the land, or in ceremony.
- The viewing of certain sites:
 - Certain evidence should be given on site to accommodate cultural or spiritual protocols, and in some cases, for ease of demonstration.
- The admission of demonstrative evidence:
 - Demonstrative evidence such as songs, dances or ceremonies may be part of the Elder's evidence.

The Guidelines acknowledge that the Federal Court Rules for expert evidence are typically not suitable for Elder testimony and oral history. Their evidence and knowledge “comes directly from their own culture’s traditions and teachings, and needs to be acknowledged accordingly.”⁴⁹ The expert rules continue to apply to the topic of oral history by academic experts. In a hybrid situation where an Elder is sharing both from traditional learning and academic education, the expert witness rules should be “adapted as necessary to meet the requirements of receiving the Elders’ testimony and oral history evidence.”⁵⁰

While this procedural openness and flexibility is a positive step forward, it remains a procedural accommodation that may not address the entirety or the complexity of differing worldviews, cultural practices and legal traditions. Elder Stephen Augustine suggests that “there should be a system in place where someone experienced in [indigenous] law decides on the issues. Like a tri-jural system. Is there a progression towards the tri-jural system — what is the vision? The flexibility of the court rules is more of a procedural accommodation to the Aboriginal

perspective...”⁵¹

IV. Indigenous Legal Traditions: Law and Fact

Indigenous laws have a place carved into the fabric of Canadian law. In the *Mitchell v MNR* decision, McLachlin C.J. recognized that “English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment.”⁵² Chief Justice Lutfy (as he then was) of the Federal Court, acknowledged during the course of the Liaison Committee’s work on the Guidelines, that Canada is tri-juridical in nature. John Borrows explains that Indigenous legal systems pre-date British or Canadian Law and continue to co-exist with (or exist alongside) Canadian law.⁵³ While Borrows states that Canada has three legal traditions, Common Law, Civil Law, and Indigenous Law, he acknowledges that this is not a universally held view:

There is a debate about what constitutes ‘law’ and whether Indigenous peoples in Canada practiced law prior to European arrival. Some contemporary commentators have said that Indigenous peoples in North America were pre-legal. Those who take this view believe that societies only possess laws if they are declared by some recognized power that is capable of enforcing such a proclamation. They may argue that Indigenous tradition is only customary, and therefore not clothed with legality.⁵⁴

Indigenous legal traditions have survived multiple attempts at suppression by the Canadian state.⁵⁵ “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”⁵⁶ I have argued that Treaty interpretation and implementation should not be rooted only in Canadian common law, but should recognize and consider the indigenous legal principles that were central to the negotiations and formation of the agreements.⁵⁷ Borrows suggests that “[w]e do not have to abandon law to overcome past injustices... we only have to relinquish those *interpretations of law* that are discriminatory.”⁵⁸

If Canadian courts are going to consider the laws of indigenous people, the process by which those laws are considered and given effect poses a unique challenge. Indigenous laws are generally not articulated in written textual form, or founded by the same structural and theoretical principles. The value systems or worldviews on which they are based have been, and continue to be, in conflict with Canadian normative values. In addition, each indigenous nation is unique, and the laws of each nation will be particular to that group (although admittedly, similarities will arise). Borrows expresses this caution: “When working with Indigenous legal traditions one must take care not to oversimplify their character. Indigenous legal traditions can be just as varied and diverse as Canada’s other traditions, though they are often expressed in their own unique ways.”⁵⁹

Absent the creation of indigenous courts, Canadian courts may be called upon to consider indigenous legal traditions.⁶⁰ How will decision makers interpret and apply various indigenous legal traditions in a Canadian legal context? Val Napoleon and Hadley Friedland suggest that indigenous law can be accessed through indigenous stories and that the use of a case brief model can draw out indigenous legal principles and processes of legal reasoning.⁶¹ Other scholars are working on foundational indigenous legal and political theory.⁶² The University of Victoria Faculty of Law is contemplating a joint JD/JID (indigenous laws) program and has established a Canada Research Chair in Indigenous Laws and Legal Systems.

When indigenous legal traditions are introduced into Canadian courts, questions and disagreements may arise. I anticipate that creative approaches will need to be developed to address some of the following considerations:

- In which circumstances will it be appropriate to rely on indigenous legal traditions?
- How will legal authorities be considered in the absence of written precedents or authoritative texts?
- Will judges and lawyers be able to rely on precedents when many indigenous laws and legal principles are in an oral or demonstrative form?
- How will issues of conflicts of laws be resolved between indigenous laws and Canadian law, or amongst different indigenous legal traditions themselves?
- Will indigenous laws be led as evidence or will they be argued in oral and written legal submissions? Or a hybrid of both?
- Will the decision makers have the necessary cultural competence to determine the meaning or interpret what is not in a textual or oral form?

Jeremy Webber suggests that in considering attempting to describe the law of a particular context, we

should not state the law as though it were singular. Instead, it should aim to capture a *legal culture*, portraying the range of contending arguments; the normative resources on which those arguments can build; the relationship between those arguments on the one hand, and practices, interests, patterns of historical experience and individuals' identifications on the other; the extant mechanisms for resolving social disagreement; and, from an assessment of all of these factors, the relative chances of success of various normative assertions.⁶³

Indigenous legal traditions were and are a part of Canada's legal culture. Justice Lamer stated succinctly, "[l]et us face it, we are all here to stay."⁶⁴ Indigenous legal traditions and laws are here to stay. It is now our task to make space.

V. Conclusion

As identified in the Guidelines, oral history and Elder evidence must be treated with cultural sensitivity, while meeting the requirements of fairness and truth finding. Respect must be at the centre of any approach. In order to be responsive to the ultimate goal of reconciliation, we must aim not only at balancing competing interests, but seek to engage indigenous nations and individuals in the legal system in a way that is considerate of culture, language and protocols. As a start and at a minimum, we should embrace the following principles:

- Diversity must be recognized in all dealings with indigenous people, nations and groups;
- Inquiries and accommodation which consider difference should be encouraged; and
- Knowledge and familiarity with the process is essential. Courts should take a leadership role in communicating with Elders about their role in the proceedings and ensuring that appropriate respect and consideration is given to each Elder in providing evidence to the court.

The principles and the suggestions in the Guidelines are not meant to be prescriptive; rather, they are meant to serve as a starting point for engaging respectfully with oral history and Elder evidence in Aboriginal litigation. The best measure of success will be how the suggestions in the Guidelines make their way into the courts, or even better yet, if by engaging with them, issues are resolved without having to resort to litigation.

Notes

1. *The Constitution Act, 1982*, being Schedule B to *the Canada Act 1982* (UK), 1982, c 11, s 35.
2. *R v Van der Peet*, [1996] 2 SCR 507 at para 45 [*Van der Peet*]; *R v Sparrow*, [1990] 1 SCR 1075 at 1990 [*Sparrow*].
3. *R v Powley*, [2003] 2 SCR 207 at paras. 37-38 [*Powley*].
4. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].
5. *R v Sioui*, [1990] 1 SCR 1025 [*Sioui*]; *R v White and Bob*, (1964) 50 DLR (2d) 613 (BCCA); *R v Taylor and Williams*, [1981] 3 CNLR 114 (Ont CA); *R v Simon*, [1985] 2 SCR 387; *R v Horseman*, [1990] 1 SCR 901; *R v Badger*, [1996] 1 SCR 771; *R v Sundown*, [1999] 1 SCR 393; *R v Marshall*, [1999] 3 S.C.R. 456 [*Marshall*]; *R v Marshall*, [1999] 3 SCR 53; *R v Marshall and Bernard*, [2005] 2 SCR 220; *R v Morris*, [2006] 2 SCR 915.
6. John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39 Osgoode Hall LJ 1 at para 31.
7. I will not, in this paper, comment on the appropriateness of calling Oral history and Elder evidence in Aboriginal litigation. Some consider that it becomes decontextualized and “fractured into slices by both direct and cross examination”: Val Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?” (2005) 20 CJSLS 123.
8. I refer to both ‘oral history’ and ‘Elders evidence’. Oral history is generally considered to be a history that is shared through generations, whereas Elders evidence may be in the nature of oral history, it is also direct knowledge about the practices and customs, ways of being, and facts directly related to the subject of the litigation.
9. *Delgamuukw*, *supra* note 4 at para. 81.

10. *Van der Peet*, *supra* note 2 at para. 42.
11. *Ibid* at paras. 49-50. See also *Marshall*, *supra* note 5; *R v Bernard* 2005 SCC 33.
12. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.
13. *Delgamuukw*, *supra* note 4 at para. 84.
14. Bruce Granville Miller, “Oral History on Trial: Recognizing Aboriginal Narratives in the Courts” (Vancouver: UBC Press, 2011) at 172 [*Miller*].
15. Note that exceptions exist and are becoming more common.
16. See Basil Johnston, *Ojibway heritage* (Toronto: McClelland & Stewart, 1976); Eddie Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Minneapolis: University of Minnesota Press, 1988).
17. *Mitchell v MNR*, [2001] 1 SCR 911 at para. 32 [*Mitchell*]. In *R v Sappier*; *R v Gray* 2006 SCR 54 [*Sappier*], Bastarache J, writing on behalf of the Court, expressed that “[w]hat is meant by ‘culture’ is really an inquiry into the pre-contact way of life of particular aboriginal community, including their means of survival, their socialization methods, their legal systems [...]” at para. 45.
18. Ontario, Canada Communication Group, *Looking Forward, Looking Back*, vol. 1 at 38 <<http://caid.ca/RRCAP1.3.pdf>>.
19. *Van der Peet*, *supra* note 2 at para 68.
20. *Delagmuukw*, *supra* note 4 at para. 86, emphasis added.
21. *Montana Band v Canada*, [2006] FC 261 at para 313.
22. See generally *Miller*, *supra* note 14.
23. *Mitchell*, *supra* note 17 at para 30. [Internal citation omitted]

24. *Sappier*, *supra* note 17 at para 29.
25. *Mitchell*, *supra* note 17 at para 25.
26. *Sappier*, *supra* note 17.
27. *Mitchell*, *supra* note 17 at para 35.
28. Bruce Miller suggests that oral historians may be considered experts: *Miller*, *supra* note 14 at 169-73.
29. *Ibid* at 164.
30. Federal Court - Aboriginal Law Bar Liaison Committee, “Aboriginal Litigation Practice Guidelines” (2009), at 15 < <http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf> > [Guidelines].
31. Elders Gathering, Tsartlip First Nation (November 13, 2011) [*Gathering*]. [on file with author]
32. James Sakej Youngblood Henderson, “Symposium on Oral History” (Paper delivered in Ottawa, 7 April 2009), [unpublished, on file with author].
33. James Hopkins & David Nahwegahbow, “Draft Protocol/ Practice Direction on the Oral Testimony of Aboriginal Elders” (Federal Court-Indigenous Bar-Aboriginal Law Bar-Liaison Committee, Yellowknife, 20 February 2008) [unpublished].
34. *Williams v British Columbia et al*, [2004] 2 CNLR 380 [*Williams*]. The trial decision granting the declaration of Aboriginal title was reversed in *Tsilhqot’in v British Columbia* 2006 BCCA 2. That decision, however, was in turn reversed in 2014 SCC 44.
35. *Ibid* at para 24.

36. *Ibid* at para 23.

37. *Guidelines, supra* note 30 at 2.

38. *Ibid* at 3.

39. *Ibid* at 12.

40. Minutes of the meetings are available on the Federal Court website <http://cas-ncr-nter03.cas.satj.gc.ca/portal/page/portal/fc_cf_en/Liaison_Committees>.

41. *Guidelines, supra* note 30 at 12.

42. *Ibid* at 12.

43. *Guidelines, supra* note 30 at 15.

44. In the Tsilhqot'in trial, a special sitting was scheduled at night to accommodate a story that is only told after dark: *Williams*, *supra* note 34.

45. *Guidelines, supra* note 30 at 14.

46. *Ibid* at 16.

47. *Ibid* at 16.

48. *Ibid* at 14.

49. *Ibid* at 17.

50. *Ibid*.

51. *Gathering, supra* note 31.

52. *Mitchell, supra* note 17 at para. 9.

53. *Ibid* at 16.

54. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 12 [*Indigenous Constitution*].

55. John Borrows, *Drawing Out Law* (Toronto: University of Toronto Press,

2010) at 68.

56. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at para. 25.

57. Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013).

58. *Supra* note 54 at 20.

59. *Ibid* at 30.

60. For example, the *Canadian Human Rights Act* requires that the Act be “interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws...”: *An Act to Amend the Canadian Human Rights Act*, SC 2008, c 30, s 12.

61. Val Napoleon and Hadley Friedland, “An Inside Job: Developing Scholarship From An Internal Perspective of Indigenous Legal Traditions” (Paper delivered at the Exploratory Workshop Thinking about and Practicing Indigenous Legal Traditions, 2011) [unpublished, on file with the author].

62. See e.g. the work of Gordon Christie, Darlene Johnston, Heidi Stark, Sarah Morales, Johnny Mack, Andrée Boiselle, Kerry Sloan, and Aaron Mills.

63. Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 *Osgoode Hall LJ* 167 at 192.

64. *Delgamuukw*, *supra* note 4 at para 186.

References

LEGISLATION

An Act to Amend the Canadian Human Rights Act, SC 2008, c 30, s 12.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

JURISPRUDENCE

Delgamuukw v British Columbia, [1997] 3 SCR 1010.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511.

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] SCJ no 71.

Mitchell v MNR, [2001] 1 SCR 911.

Montana Band v Canada, [2006] FC 261.

R v Badger, [1996] 1 SCR 771.

R v Horseman, [1990] 1 SCR 901.

R v Marshall; R v Bernard, [2005] 2 SCR 220.

R v Marshall, [1999] 3 S.C.R. 456.

R v Marshall, [1999] 3 SCR 53.

R v Morris, [2006] 2 SCR 915.

R v Powley, [2003] 2 SCR 207.

R. v Sparrow, [1990] 1 SCR 1075.

R v Sappier, [2006] 2 SCR 686.

R v Simon, [1985] 2 SCR 387.

R v Sioui, [1990] 1 SCR 1025.

R v Sundown, [1999] 1 SCR 393.

R v Taylor and Williams, [1981] 3 CNLR 114 (Ont CA).

R v Van der Peet, [1996] 2 SCR 507.

R v White and Bob, (1964) 50 DLR (2d) 613 (BCCA).

Tsilhqot'in Nation v British Columbia, [2007] BCSC 1700.

Williams v British Columbia, [2004] 2 CNLR 380.

William v British Columbia, 2013 SCC 34986.

SECONDARY SOURCES: MONOGRAPHS

Benton-Banai, Eddie. *The Mishomis Book: The Voice of the Ojibway* (Minneapolis: University of Minnesota Press, 1988).

Borrows, John. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

Borrows, John. *Drawing Out Law* (Toronto: University of Toronto Press, 2010).

Craft, Aimée. *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013).

Johnston, Basil. *Ojibway heritage* (Toronto: McClelland & Stewart, 1976).

SECONDARY SOURCES: ARTICLES

Borrows, John. "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgood Hall LJ 1.

Miller, Bruce Granville. *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011).

Napoleon, Val and Friedland, Hadley. "An Inside Job: Developing Scholarship From An Internal Perspective of Indigenous Legal Traditions" (Paper delivered at the Exploratory Workshop Thinking about and Practicing Indigenous Legal Traditions", 2011). [unpublished].

Napoleon, Val. "Delgamuukw: A Legal Straightjacket for Oral Histories?" (2005) 20 CJLS 123.

OTHER MATERIALS

Elders Gathering, Tsartlip First Nation, (November 13, 2011).

Author(s): Arthur J. Ray

Published by: *The International Indigenous Policy Journal*, Vol. 6, Issue 2, Article 5.

Stable URL: <https://ir.lib.uwo.ca/iipj/vol6/iss2/5>

Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights Litigation in Canada and Australia

Arthur J. Ray

Abstract

Traditional knowledge and oral traditions history are crucial lines of evidence in Aboriginal claims litigation and alternative forms of resolution, most notably claims commissions. This article explores the ways in which these lines of evidence pose numerous challenges in terms of how and where they can be presented, who is qualified to present it, questions about whether this evidence can stand on its own, and the problems of developing appropriate measures to protect it from inappropriate use by outsiders while not unduly restricting access by the traditional owners.

Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights Litigation in Canada and Australia

Aboriginal rights litigation raises various questions concerning historical and traditional knowledge. The reasons are that Aboriginal title claims are based on plaintiffs' ancestors' traditional use and occupation of specific tracts of land before and after European contact. Treaty rights litigation raises similar issues, but the relevant timeframe is determined by the date when the treaty at issue was signed. In Canada, the Métis, who are of mixed European-Aboriginal descent, base their rights claims on traditional cultural practices at the time when effective sovereignty (control) was established by the British Crown, or the Canadian government. All of these instances call for information that Indigenous claimants possess as oral history and oral tradition. Use of these types of information raises several questions. How do Western courts, commissions, and tribunals deal with this sort of evidence? What protocols have they developed to accommodate traditional modes of presentation? How do they assess traditional knowledge (TK) against other lines of evidence that are introduced in claims disputes? How do they deal with issues of proprietorship? My discussion of these issues, with a focus on Australia and Canada, is intended for non-legal specialists who are not familiar with the extent to which Western courts have addressed issues that TK evidence poses.

Lines of Evidence and Knowledge

Normally courts only accept evidence from eyewitnesses because of the "hearsay rule." This rule precludes judges from receiving evidence from individuals who have obtained it "second hand." The problem in Aboriginal and treaty rights litigation is that the historical questions that inevitably arise

call for the gathering of evidence from a time period that lies beyond the direct experiences of living people (i.e., the current generation). This fact has forced the courts to relax the hearsay rule so that they can deal with “ancient times.” In legal circles, the latter is defined as the period beyond thirty years ago. In Aboriginal and treaty rights litigation, there are two broad categories of evidence about ancient times: one is oral evidence, which is obtained mostly from Elders or those who have been designated in their societies as keepers of traditional knowledge and stories; the other category of historical information consists of an array of evidence about the past that is obtained from documentary sources or is data generated by physical and social scientists, particularly anthropologists, archaeologists, linguists, and paleontologists. Sometimes these diverse sources of evidence clash, forcing the courts to make decisions about the relative weights they should assign to the various lines of evidence when adjudicating claims.

The Challenges of Oral History and Oral Traditions

Oral evidence presented by Elders often poses the biggest challenge to the courts given that judges normally do not deal with this type of evidence, nor are they familiar with the Aboriginal protocols that are associated with it. Elders provide two types of information — oral history and oral traditions. In his classic work on this topic, *Oral Tradition As History*, Jan Vansina (1985) differentiated these two types of knowledge noting that oral histories are “reminiscences, hearsay, or eyewitness accounts about events and situations which are contemporary, that is, which occurred during the lifetime of the informants, but oral traditions are no longer contemporary. They have passed from mouth to mouth, for a period beyond the lifetime of the informants” (pp. 12-13). In other words, oral traditions reach beyond the current generation. He noted that they could be transmitted in statements, as

songs, and as chants. Some oral traditions are about the past, others may not be. In the Federal Court of Canada, Winona Wheeler, an expert on Plains Cree oral history who appeared on behalf of the petitioner Victor Buffalo, used the term “oral traditions history” to refer to oral traditions that deal with unwritten accounts of past events, which occurred beyond the current generation (Figure 1) (*Buffalo v. Canada*, 2005). In his extended essay on the use of oral history evidence in litigation, *Oral History on Trial*, Bruce Miller (2011) noted that the boundaries between oral history and oral tradition cannot be sharply drawn. There are many reasons for this. Of particular importance is the fact that there is such diversity in these narratives in terms of the ways that they are structured, the purposes they serve, who can relate them, and the circumstances in which they are retold (Miller, 2011).

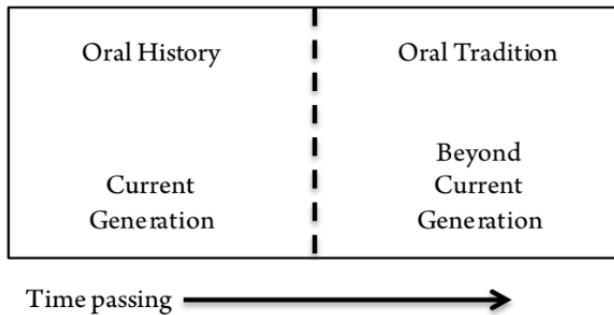


Figure 1. Relationship between oral history and oral tradition.

Keith Carlson, who has done extensive research on the Stó:lō of the Fraser Valley of British Columbia, has shown that these people had two types of oral histories. The first were personal stories, which are called *sqwelqwel* or “true news” about people. Typically, these were narratives about oneself or about someone that the individual knew personally. The broader “official histories,” which are referred to as *sxwoxwiyam*, relate myth-age

transformer stories, flood stories, and origin stories (Carlson, 2010). Wheeler noted in her testimony in *Buffalo v. Canada* (2005) that the Plains Cree also have many different types of stories. One category is the family story, or family story bundle, which contain accounts of significant past events. Some of these become officially sanctioned versions that only designated family members have the authority to recount. The sanctioning process depends on the community and the cultural context. Often it is an informal process that involves reaching a general agreement in the community. In most Indigenous societies, certain individuals are designated as the carriers of official stories and they are carefully trained for that purpose. For example, among the Plains Cree of the Treaty 6 area of Alberta, Canada, communities have Treaty 6 stories that are protected by ceremony and protocols. Treaty 6 story-keepers have apprentices and the process of teaching them takes years. Very few in the community are considered official keepers or historians of Treaty 6.

Communities have various methods for verifying the accuracy of the telling of these histories. Often they accomplish this by having the keepers of the stories relate them in appropriate public settings where knowledgeable Elders can make corrections and provide commentaries. Sometimes mnemonic devices are used as memory prompts. The winter counts of the Plains tribes of North America are probably one of the best-known examples. In these counts, key events from a series of years are represented pictorially. The landscape is also an important memory prompt. Many stories are tied to place and can only be told in their entirety at the appropriate location. In contrast to “official histories,” those of a more personal nature are not normally subject to the same scrutiny by other members of the local native community.

Oral tradition evidence differs from that of oral history, although the boundary is not sharp, in that it primarily is concerned with transmitting information about cultural practices from one generation to another. As with oral histories, the mode of transmission can be by apprenticing and through storytelling, chanting, singing, and/or performances. Of relevance to Aboriginal claims, oral traditions are a key source of Indigenous information about economic, cultural, and spiritual land use practices. In many Aboriginal societies, some traditional knowledge is not shared universally. Rather, specialized knowledge can only be shared among those of the same gender, or among members of a particular social group.

These aspects of oral traditions can pose significant challenges for claims adjudication procedures and for the Aboriginal witnesses who are involved. For example, problems of gender-specific knowledge arose in land claims in northern Australia in the 1970s and 1980s. In 1976, Australia passed the *Aboriginal Land Rights (Northern Territory) Act* (1976), which established a Land Claim Commission to adjudicate the land claims of Aborigines in the Northern Territory. In these societies, local patrilineages had strong ties to the land through a series of sacred sites and dreaming tracks. Adult men and women are carriers of sacred and special knowledge, which they were barred by tradition from sharing with members of the opposite sex. From the outset, the first Northern Territory Land Claim Commissioner, Justice John Toohey (1982), understood that this cultural reality would have major implications for receiving evidence in claims hearings:

The question of material of a secret and sacred nature should be seen in perspective. For the most part claimants, men and women, are content to present the evidence in support of their claims without seeking to impose any restrictions upon it. Where they do feel obliged to take this course they should be permitted to do so so long as it does not unduly prejudice others participating in the inquiry. There are competing interests to be weighed. I do not think claimants should feel obliged to speak of matters they regard

as secret. On the other hand it would be unreal to deny the impact that witnessing aspects of ritual and ceremonial life has in establishing traditional ownership and traditional attachment to land. (p. 88)

In other words, Toohey weighed the concerns of Aborigines as dictated by their cultural traditions against the general “rules of natural justice as they have developed in regard to administrative enquiries, which dictate that those participating in an inquiry ought to be given the opportunity to dispute testimony and make comments about it” (Toohey, 1982, p. 88).

In the end, Justice Toohey decided to accept some evidence on the basis that only a limited number or class of people would have access to it. As it happened, this did not prove to be a major problem because the greatest part of the sensitive evidence concerned men’s knowledge and most of the legal counselors were male. In the key exception that Justice Toohey dealt with regarding secret women’s ceremonies, the claimant women were willing to let the commissioner, female counsel, and female anthropologists read the reports about the ceremonies in question (Toohey, 1982). The issue of the gendered nature of TK came to the fore in land claims in Australia beyond the Northern Territory beginning in the early 1990s. Most notably, perhaps, was the Hindmarsh Island claim that was put forward in 1994 by a group of Ngarrindjeri female Elders from Goolwa, South Australia. They opposed the building of a new bridge in the Murray River delta area on the basis that it would interfere with traditional religious practices, in particular “secret women’s business” that took place on the island. Their claim, which became the subject of the Hindmarsh Island Royal Commission (1996) and civil litigation, was remarkable not only because it focused on questions about women’s links to the land, but the secret nature of the practices served to raise questions among proponents of the project and another group of Ngarrindjeri women about whether the traditions asserted were fabrications

(Gelder & Jacobs, 1997).

In Canada, problems also have arisen concerning telling oral histories and relating oral traditions in the public forum of the courtroom. *Delgamuukw v. British Columbia* (1997) was the landmark title suit of the Gitksan-Wet'suet'en of north-central British Columbia. At trial in the Supreme Court of British Columbia (1987-1991), the Gitksan-Wet'suet'en presented evidence that showed that they had divided their traditional homelands into house territories. Houses were the residences of local lineages (an extended kinship group). Thus, the "house" simultaneously refers to a dwelling and a landowning kinship group. A hereditary chief served as the custodian and manager of a house territory. Each house kept a "box" of traditional knowledge about its history, rights, and customs. This knowledge is known the *Kungax* amongst the Gitksan and the *Ada'ox* amongst the Wet'suet'en. Elders only "opened their boxes" in the appropriate setting of a longhouse. Typically, they did not share their knowledge with outsiders. For the Gitksan and Wet'suet'en, this practice meant that they had to make the painful decision to share their *Kungax* and *Ada'ox* with outsiders in the alien setting of the courtroom in order to take their claim to court. It also meant their traditional stories and knowledge would be subject to evaluation procedures that would be foreign and painful to them. In particular, the adversarial approach for the testing of evidence that is practiced in Western courts meant that the hereditary Elders would be subjected to harsh cross-examination. This procedure does not afford the Elders the respect that they are accustomed to receiving in their own societies. In many Aboriginal societies, Elders are not interrupted, questioned, or "directed." In court and commission hearings, this often meant that Elders' testimony did not seem to be directly relevant to the questions they were asked. As anthropologist Nancy Lurie observed many years ago with respect to United States Indian

Claims Commission (1946-1978) hearings, the tendency of Elders to “wander off point” was one of the reasons commissioners preferred to deal with anthropologists as surrogates for Indian witnesses. Anthropologists were accustomed to providing direct responses to questions.

Protocols for Presentation

Introducing oral histories and traditions in litigation proceedings has raised additional problems for courts, commissions, tribunals, and Indigenous witnesses. During the trial of *Delgamuukw*, Chief Justice of the Supreme Court of British Columbia, Alan McEachern, made a brief visit to the plaintiffs’ territories and he opened the trial in May 1987 in a nearby courthouse in Smithers, British Columbia. Soon, he found the location inconvenient and he relocated the proceedings to Courtroom 53 of the British Columbia Supreme Court at the concrete and glass Law Courts Building in Vancouver. This location was a three-hour flight from the rural, largely forested lands of the Elders’ traditional territories. The distance and high cost of flying meant that very few members of their community were ever present to lend moral support and bear witness to their Elders’ testimony and cross-examination. For these reasons, appearing in Courtroom 53 proved to be an extremely stressful, even debilitating experience, for many of the more elderly witnesses.

Since *Delgamuukw v. Regina* (McEachern, 1991), Canadian courts have taken steps to address this problem. These steps were taken in *Buffalo v. Canada* (2005), which was a lawsuit that the Samson Cree First Nation of Alberta, Canada filed in the Federal Court of Canada against the federal government for alleged breach of fiduciary responsibilities toward them arising from Treaty 6 (1876). In this instance, Federal Court Justice Max

Teitelbaum temporarily relocated the hearings from the courtroom in Calgary, Alberta to the Samson Cree reserve for the presentation of the Elder's testimony. This venue provided a more comfortable and familiar environment for the Elders to present their testimony. Nonetheless, they were subject to normal court proceedings for the testing of evidence. When the trial resumed back in Calgary, Justice Teitelbaum sought to further accommodate the Cree by allowing them to offer an opening prayer and place a sweetgrass bundle in the courtroom.

In taking these small steps, Justice Teitelbaum unknowingly was following a precedent set over two decades earlier by Land Claims Commissioner Justice Toohey (1979) in the Northern Territory of Australia. As commissioner, Toohey, who was also a member of the Supreme Court of the Northern Territory, was expected to rigorously test the evidence that he received in public hearings. Accordingly, he applied many standard litigation procedures. Quickly, however, Toohey also decided to hold his hearings both in the formal settings of the courtrooms in Darwin and other towns in the Northern Territory, in the communities of the plaintiffs, and sometimes at sacred sites and other special places. He met at the latter places because some stories and certain ceremonies could only be told or performed at appropriate locations.

Toohey relaxed proceedings in other ways. He allowed groups of Aborigines to provide testimonials via videotapes so that more witnesses could be heard in a reasonable length of time. However, this approach precluded lawyers from cross-examining the witnesses who appeared using this format (Toohey, 1979). Also, during the public meetings that he held in the Aborigines' communities, Toohey allowed those present to prompt and correct each other and thereby reach consensus on important points.

Normally, in court proceedings such practices would be regarded as leading a witness and would not be tolerated. It was in these ways that Toohey had relaxed the rules of evidence considerably to accommodate Aborigines' traditional ways of transmitting and verifying traditional knowledge. He believed he was able to get closer to the "truth" by doing so.

To date, Canadian courts have not been willing to accommodate traditional Western practices of testing evidence to this extent, but they are making efforts toward that end. For example, the Federal Court–Aboriginal Law Bar Liaison Committee (2009) developed practice guidelines that were intended to make the Federal Court more "user friendly" for Aboriginal litigants. The guideline, adopted by the court, addressed a wide range of issues. It recommended that portions of trials ought to be held in Aboriginal communities and that the courts accommodate appropriate traditional ceremonies (Federal Court–Aboriginal Law Bar Liaison Committee, 2009). The same committee has drafted a discussion paper dealing with most aspects of Elder testimony.

An additional problem the courts face when dealing with oral history and traditional knowledge relates to the manner of presentation. Sometimes the tellers are supposed to deliver their stories in chants, songs or other performances wearing appropriate regalia. Some of the *Kungax* and *Ada'ox* of the Gitksan and Wet'suet'en, for example, are supposed to be presented as chants. When Elders attempted to do so in *Delgamuukw v. Regina*, British Columbia Supreme Court Chief Justice Alan McEachern objected, saying that chanting violated the decorum of the court. As I discussed in *Telling It To the Judge*, a similar issue arose several years later during a Métis fishing rights trial in Saskatchewan in 2007 (Ray, 2012). In this instance, the centrality of fiddle music to Métis culture was an issue at trial. Accordingly,

the lawyers for the defendants called expert Métis fiddler Oliver Boulette to testify. When he proposed to play some key Métis songs on his fiddle, the lawyer for the Crown objected strenuously. He stressed that “this is a court of law, we’re here to deal with legal issues, it’s not a concert” (Ray, 2012, p. 116). The judge overruled the Crown’s objection. In October 2012, the Federal Court-Aboriginal Law Bar Liaison Committee (2012) issued revised Aboriginal Litigation Practice Guidelines that addressed most of these issues.¹ The committee emphasized that:

Reconciliation requires the courts to find ways of making its rules of procedure relevant to the Aboriginal perspective without losing sight of the principles of fairness, truth-seeking and justice. This can be accomplished by adopting an approach rooted in respect and dignity. One way to show respect and enable Aboriginal witnesses to be heard is to have regard for Aboriginal ceremony and protocols. (p. 11)

In making this observation, the Liaison Committee noted that Aboriginal ceremonies may be part of the process of presenting oral history and evidence.

Evidentiary Boundaries are Blurred

Before discussing the ways courts assess oral evidence about Aboriginal history and traditions, and other lines of evidence, it is important to note that the boundaries between them are not as distinct as the courts often seem to imagine. For instance, oral histories and eyewitness evidence can be included within an archival document. The reason is that the latter sources often include information that Native people provided to European traders and explorers. A notable example is the narrative of 18th century trader and explorer David Thompson. In 1797, he provided an account of the earlier separation of the Siouan-speaking Assiniboiné from their Yankton relatives in the northern area of present-day Minnesota. Thompson had obtained his

historical account of this important incident from a Native Elder (cited in Glover, 1962). In other words, Thompson's written narrative contains this and other snippets of oral tradition histories as well as eyewitness accounts of his travels and interactions with various Aboriginal groups.

As the Hudson's Bay Company expanded its trading empire across the continent, beginning in 1670, most of the information it obtained about areas that lay beyond the range of its posts and the travels of its servants was obtained by post managers interviewing their Native customers. One of the most important examples is found in the Hudson's Bay Company records for Fort Kilmaurs (Old Fort Babine), which had been established on the northern shores of Babine Lake, British Columbia on the edge of Gitksan-Wet'suet'en territory. In his district report for 1822 to 1823, Brown described the social structure of the Wet'suet'en in accurate detail even though he had not yet visited their territory. There is little doubt that he would have obtained this information from a local Native informant, who likely was from the Wet'suet'en's principal village that lay over the mountains to the west in the Bulkley Valley. The information in Brown's reports provided independent corroboration of the oral testimony of the Elders in *Delgamuukw v. Regina* (Ray, 2012).²

After the company established a post in an area, its officers and servants did not remain resident "outsiders." Rather, usually they married into the local population "à la façon du pays." They did so partly because these "country marriages" served to cement trading relationships with First Nations according to Aboriginal customs. They also had the effect of making insider-outsider distinctions of dubious merit. For example, Hudson Bay Company Chief Factor James Isham wrote one of the first "amateur" ethnographies about First Nations of the Canadian central Subarctic. He was

in charge of York Factory during the early 18th century when it served as the company's chief gateway to the interior of present-day central Canada. In his *Observations on Hudson Bay* (from 1743-1749), Isham (1743/1949) provided a wealth of information on all aspects of Cree life and culture. In his capacity as a Hudson's Bay Company officer, he had the viewpoint of a European outsider; as the spouse of a Cree woman and the father of her children, he also had an "insider's" perspective (see Figure 2).

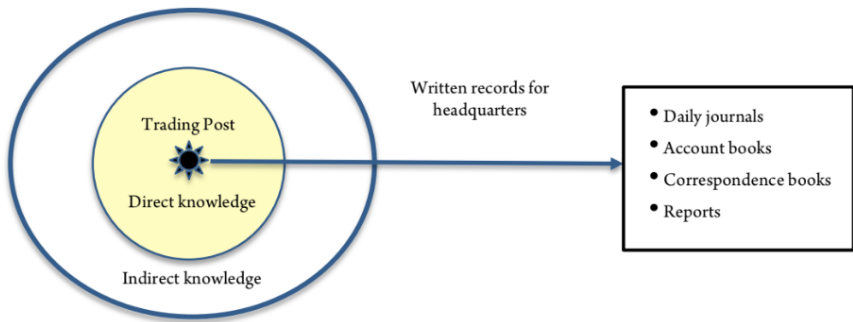


Figure 2. Nature of Hudson's Bay Company data collection and transmission during expansion.

Archaeological data provides yet another example of how the boundaries between the different lines of evidence can be blurred. Physical artifacts are given meaning in terms of current anthropological theoretical models and through methodologies used for interpretation. Ethnographic analogy and the so-called "direct historical approach," are two key ways archaeologists give meaning to excavated artifacts. The former involves ascribing behavior to an assemblage of artifacts based on the similarity of the latter to an assemblage associated with historical cultures elsewhere. Our knowledge of the latter usually is based partly, if not largely, on ethnography, which entails making field observations and conducting oral interviews with

Indigenous people. The “direct historical approach,” on the other hand, involves reading the archaeological record of a particular place backward in time from the documented historical period to the pre-contact (pre-recorded history) era. In other words, it entails using documentary records.

Weighing the Evidence and Ways of Knowing

Once oral histories and traditional knowledge are entered as evidence, claims commissioners and trial judges face the difficult task of deciding how much weight they should give this information when reaching their decisions. In the land claims cases of the Northern Territory of Australia during the late 1970s and 1980s, TK was the primary evidence and often there was no contrary data of significance that the commissioner had to consider against it. The problem of competing evidence subsequently did arise elsewhere in Australia, however, after Murray Islanders and Aborigines took their land claims to court. These problems escalated after the landmark Murray Islanders’ title claim, *Mabo v. Queensland (No 2)* (1992), when the High Court of Australia recognized Aboriginal title for the first time, but also ruled that the state could extinguish it without paying compensation. This decision led the federal government to pass the *Native Land Title Act* (1993), which created the Native Title Tribunal to adjudicate claims nationally. In 1998, Parliament amended the Act and added a clause that detailed how the federal courts were supposed to weigh Aboriginal evidence. The clause stipulated: “In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings” (Government of Australia, 1998, 82.2) This amendment was the federal government’s specific response to the land title case of the *Wik Peoples v. Queensland* (1996). In this litigation, the High

Court determined that pastoral leases on Crown land, which take up almost half of the country, do not extinguish Native title. Of particular relevance here, the amendment of 1998 reflected federal politicians' fear that the courts' efforts to accommodate Aborigines' perspectives were becoming prejudicial to the interests of other Australians. So, the revised legislation specified that evidence pertaining to Aborigines use and occupation of land had to be considered in relation to information about the historical land use of other local stakeholders. This development serves to highlight the reality that courts face real constraints when attempting to accommodate Aboriginal traditions without provoking a strong political backlash from the dominant settler society.

The first land claims ruling of the High Court of Australia following the revisions to the *Native Title Act* was that of the Yorta Yorta people who live along the Goulburn and Murray rivers in the northeastern area of the state of Victoria. The trial of this claim had taken place in the Federal Court on the eve of the passage of the revised Act, but the trial judge allowed interested parties to make post-trial submissions that addressed the changes. At trial, the petitioners had the burden of proving that at least some of their named ancestors had occupied the claimed territory prior to 1788 and that one or more members of the claimant group were descended from such ancestors. The petitioners placed heavy reliance on oral and anthropological testimony. They and the respondents also introduced extensive documentary evidence. The trial judge found considerable problems with all of these lines of evidence (*Yorta Yorta Aboriginal Community v. Victoria & Ors*, 1998). Regarding oral history, he concluded that some of the Aboriginal witnesses were not reliable. Complicating matters, opposing anthropological experts put forward conflicting interpretations of the ethnographic information that was contained in oral and written sources. The trial judge concluded that he

lacked the expertise to resolve their differences. Regarding some of the key historical documents pertaining to the early nineteenth century, the trial judge noted that these records did not directly address the key issues before his court. Consequently, he thought that the testimony of experts who had relied on these records was speculative. In the end, the trial judge put more weight on the documentary records and dismissed the claim. In upholding his decision, the High Court concluded that the Aboriginal claimants' ties to the land had been broken by "the tides of history" (*Yorta Yorta Aboriginal Community v. Victoria*, 2002).

In Canada, the problem of weighing Aboriginal oral history and TK evidence against other kinds of knowledge came to the public's attention in the late 1990s. The issue arose in an important Aboriginal fishing case in British Columbia remembered as *Regina v. Van der Peet* (1996). This involved the Stó:lō of the Fraser River who contended that they held an Aboriginal right to operate a commercial salmon fishery. At trial, the presiding judge had to consider an array of cultural and historical evidence. He downplayed the oral evidence. On appeal, the Supreme Court of Canada warned:

A court should approach the rules of evidence, and interpret the evidence that exists, conscious 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 and customs 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 applied in other contexts. (*Regina v. Van der Peet*, 1996, The Aboriginal right section, para. 9)

It was the *Delgamuukw* trial that captured the public's attention about this issue. In this trial, the plaintiffs and the Crown confronted Justice McEachern with a massive amount of archaeological, cartographic, ethnographic, geological, genealogical, geographical, historical, and

historical geographical evidence in addition to the many months of testimony that he received from the Elders. In the end, Justice McEachern gave little weight to the latter's testimony, which led him to reject their claim. His decision was appealed to the Supreme Court of Canada. The latter court faulted him for not giving the traditional oral evidence proper weight and ordered a new trial. Regarding oral evidence, the Supreme Court stated:

The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title.

Continuing to fault Justice McEachern, the Supreme Court added:

The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership." Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different. (*Delgamuukw v. British Columbia*, 1997, The ability of the court to interfere with the trial judge's factual findings section, para. 1)

Rather than settle the issue of oral evidence, *Delgamuukw* merely intensified the battles in the Canadian courts about this line of evidence. The results have been mixed as two relatively recent examples serve to illustrate. One was the massive trial of Chief Victor Buffalo, which dealt with the treaty rights claim of the Samson Cree of Alberta, Canada (*Buffalo v. Canada*, 2005). After the Elders had testified in this trial, the plaintiffs and the Crown called experts to give their opinions about the nature of traditional oral evidence including its strengths and weaknesses. Winona Wheeler appeared for the plaintiffs and she emphasized the positive aspects of this line of evidence. Archaeologist Alexander von Gernet testified on behalf of the Crown. He asserted that, notwithstanding the Supreme Court's *Delgamuukw* ruling, oral evidence cannot stand alone. According to von Gernet, it must be

corroborated with other lines of evidence and by using approaches to evidence commonly applied in the social sciences.

In the end, Justice Teitelbaum discounted the many months of oral testimony by the Elders and put forward a long rationale for doing so in the reasons for his judgment. He began with a review of the Supreme Court's Van der Peet and Delgamuukw decisions and the subsequent Supreme Court ruling in *Mitchell v. M.N.R.* (2001), as they related to this topic. Teitelbaum observed:

The SCC's [Supreme Court of Canada] decision in Delgamuukw, supra, does not mandate blanket admissibility of oral history or oral tradition evidence; nor does it establish the amount of weight that should be placed upon such evidence by a trial judge. The decision merely speaks of "due weight." This does not amount to equal weight, an interpretation which the plaintiffs seem to suggest.

He continued:

In *Mitchell*, supra, McLachlin C.J. held that "due weight" meant that oral tradition evidence is entitled to "equal and due treatment." It should neither be undervalued, nor artificially constrained to carry more weight than it could reasonably support. (*Buffalo v. Canada*, 2005, para. 451)

Justice Teitelbaum then turned his attention to the main points of Wheeler's testimony about nature of Cree "oral history traditions." He noted that she had faulted historians for treating oral history as though it was like any other documentary source, which entailed sifting the stories for facts while stripping them of any of their mythical aspects and disregarding their original intent and cultural context. Justice Teitelbaum recalled Wheeler saying that Cree histories "distorted time," when viewed from a Western perspective because the Cree conception of time was constructed in terms of "spirals in an unbroken chain, linking past, present, and future together." He noted that Wheeler had added that to understand how Cree viewed time it was necessary to have

an intimate knowledge of the local land and environment because they determined time by linking it to season and climate (*Buffalo v. Canada*, 2005, para. 306).

On the crucial issue of verification, Justice Teitelbaum recorded that:

She believed that verification must occur within the context of the oral tradition histories; one must be aware of the internal checks and balances within the cultural context. Foremost, however is the storyteller's reputation. Elders are held in high esteem and are expected to be truthful. Elders may assist each other in ensuring that a proper rendition of a story is given. Repercussions result also from any break in protocol. (*Buffalo v. Canada*, 2005, para. 301)

In light of her testimony, Justice Teitelbaum asked Wheeler how the court should evaluate Cree oral evidence. She replied:

Somebody trained in oral histories research can provide you with the interpretation, the full contextual reading you require to see the transcript beyond a literal reading...The transcript is a representation of the original full story, and to get a full understanding of the meaning, we have to go back there. And that's what the local experts, I guess, who are not considered experts by the Court — they are the key. They are the ones that I go to for assistance to help me understand transcripts and oral histories that have been taped. So the local experts are in the best position to do that, because they can provide the context I need to be able to read that document more completely and more fully. (*Buffalo v. Canada*, 2005, para. 311)

Von Gernet, who testified after Wheeler, put forward the view that oral histories were merely “oral documents.” Based on this outlook, he provided the judge with a much simpler approach that did not require the court to take into account cultural differences nor turn to Aboriginal experts for help when analyzing and interpreting this source. Justice Teitelbaum wrote:

With regard to his methodology, Dr. Von Gernet testified that other versions of an oral tradition by the same informant allow for testing of internal consistency and range of variability. These versions can also be compared with traditions told by other storytellers about the same historical events. The final step involves looking for independent evidence

and assessing it against the oral tradition. He testified that he would also look for evidence of feedback — subtle influences from the written record — as well as conflation. (*Buffalo v. Canada*, 2005, para. 314)

In the end, Justice Teitelbaum thought that Wheeler's recommended approach of going back to the Elders for guidance was impractical for a court. He explained that Wheeler's approach might well be suitable for scholars, but:

It is simply not feasible, nor is it realistic, for a trial judge. The Court cannot embark upon independent fact-finding investigations into evidence tendered at trial. The Court must rely upon the parties for the evidence and any assistance from experts. And while Dr. Wheeler offered some interesting insights into the nature of oral traditions and oral histories, she did not present the Court with any analysis of the oral traditions tendered at trial. (*Buffalo v. Canada*, 2005, para. 453)

From 2002 to 2007, another massive trial took place in the Supreme Court of British Columbia. This involved the land title suit of *Tsilhqot'in Nation v. British Columbia* (2007). It unfolded in 339 trial days that were spread over seven years in Victoria and Tsilhqot'in territory. As in *Delgamuukw* and *Victor Buffalo*, the trial judge had to confront massive amounts of diverse cultural and historical evidence. Once again, a central issue concerned the weight the court should give to oral tradition. Yet again, Von Gernet appeared for the Crown. He presented two briefs. The first was his general assessment of oral history as a line of evidence. The second report specifically evaluated *Tsilhqot'in* oral history. Based on his reading of the first brief, Justice Vickers concluded that Von Gernet held that oral history evidence could never stand on its own. Justice Vickers flatly rejected this presumption. In his reasons for judgment the Justice Vickers wrote:

I was left with the impression that Von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he

would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. (*Tsilhqot'in Nation v. British Columbia*, 2007, para 154)

Justice Vickers pointed out that Von Gernet's methodology flew in the face of the jurisprudence that had developed in Canada since *Delgamuukw*:

This approach is not legally sound. Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Von Gernet, it would fall into legal error on the strength of the current jurisprudence. (*Tsilhqot'in Nation v. British Columbia*, 2007, para. 154)

Justice Vickers thought that Von Gernet's basic attitude toward oral history undermined the credibility of his assessment of *Tsilhqot'in* oral histories of events relevant to their claims. In this way, Justice Vickers judgment reflected changes that had taken place in Canadian jurisprudence about oral history evidence since Teitelbaum's ruling.

Issues of the Proprietorship of TK

Given the importance of TK (broadly defined) in litigation and its centrality to the maintenance of Aboriginal cultures, it is inevitable that proprietorship issues arose from the outset. This can best be illustrated by returning to the work of the Northern Territory Land Commission. As noted, in Aborigines' societies, classes of people (adult men and women) held exclusive rights to certain stories, ritual secrets, and practices, artifacts, and regalia. Out of respect for this customary practice, from the outset, Toohey restricted access to this type of material. In 1985, one of his successors, Justice J. Maurice, placed restrictions on exhibits and sections of the transcripts regarding the

Waramungu peoples' land claim (Neate, 1989).

In 1987, the federal government amended the Land Rights Act (Northern Territory) to give the Commissioner the specific authority to prohibit or limit the access to and/or publication of material provided to the commission under the Act. These revisions also empowered him or her to bar specific persons or classes of persons from being in the vicinity of the place where information is to be given in the course of a traditional land claim hearing (Neate, 1989). The amendments to the Act gave the Land Commissioner the right to make a number of other restrictions on submitted materials based on the form of presentation and the conditions under which it had been tendered. These are summarized in Table 1 [to see table 1 please refer to the original article].

Although these measures were intended for the benefit of the Aborigines who took part in land claims hearings, subsequently it has created problems for them and for the Federal Court that has to administer the land claims records, including the restricted reports. According to Australian anthropologist Nicolas Peterson, who was a participant in some of the early hearings, lawyers for land claimants played the politics of knowledge hard and, in the end, most of them argued for restricting all of the documentation, including the claim books. Today, only the transcripts are readily available. The irony is that originally the Northern and Central Land Councils, which represented claimants, sold copies of these books to people. The books had nothing restricted in them and do not include sensitive genealogies, which were presented in separate bound books. After a few years of selling the claims books, the councils stopped doing so and eventually these documents also became restricted. The irony in this, according to Peterson, is that Aboriginal

people now want access to these claims books as they are a repository of a good deal of their cultural history that is otherwise unknown or not available to them. Gaining access is not an easy process, however, and will prove to be a drawn out effort (Nicolas Peterson, personal communication, July 21, 2012). In Canada, the superior courts can seal sensitive material in a file, making it inaccessible to the public. Also, the Federal Court can bar the use of traditional knowledge by those who are not members of the aboriginal group who provided it.

Conclusion

Traditional knowledge and oral traditions history are crucial lines of evidence in Aboriginal claims litigation and alternative forms of resolution, most notably claims commissions. These lines of evidence pose numerous challenges in terms of how and where they can be presented, regarding who is qualified to present it, concerning the question of whether this evidence can stand on its own, and developing appropriate measures to protect it from inappropriate use by outsiders while not unduly restricting access by the traditional owners. Given that the Land Claims Commission of the Northern Territory of Australia, Australian courts, and Canadian courts have struggled with these issues since the 1970s due to the complexity of the issues, which are compounded by the cultural diversity of Aboriginal peoples, makes it unlikely that final resolutions will be reached. Rather, ongoing dialogues involving commissions and courts and Aboriginal people will be required and case-by-case solutions needed.

Notes

1. In September 2011, the Federal Court-Aboriginal Law Bar Liaison Committee issued a discussion paper entitled: Elder Testimony and Oral History, which addressed most of these issues (see Federal Court-Aboriginal Law Bar Liaison Committee, 2012).
2. I edited and reproduced these reports in *Telling It To the Judge: Taking Native History To Court* (Ray, 2012, see pp. 161 – 202).

References

- Aboriginal Land Rights Act* (Northern Territory) 1976 No. 191.
- Buffalo v. Canada*, 2005 FC 1622. Retrieved from <http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/46344/index.do>
- Carlson, K. (2010). *The power of place and the problem of time: Aboriginal identity and historical consciousness in the cauldron of colonialism*. Toronto: University of Toronto Press.
- Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
- Federal Court-Aboriginal Law Bar Liaison Committee. (2009, November 5). *Aboriginal litigation practice guidelines*. Retrieved from: <http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/PracticeGL-Phase1-05-11-09eng.pdf>
- Federal Court-Aboriginal Law Bar Liaison Committee. (2012, October 16). *Aboriginal litigation practice guidelines*. Retrieved from: <http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf>
- Gelder, K., & Jacobs, J. M. (1997). Promiscuous sacred sites: Reflections on secrecy and scepticism in the Hindmarsh Island affair. *Australian Humanities Review*, 6. Retrieved from

- <http://www.australianhumanitiesreview.org/archive/Issue-June-1997/gelder.html>
- Glover, R. (Ed.). (1962). *David Thompson's narrative 1784-1812*. Toronto: Champlain Society.
- Government of Australia. (1998). *Native Title Amendment Act 1998* (No. 97). Retrieved from:
<http://www.comlaw.gov.au/Details/C2004A00354/Html/Text>
- Hindmarsh Island Royal Commission. (1996). *Transcripts of proceedings*. Retrieved from
<https://digital.library.adelaide.edu.au/dspace/handle/2440/5127>
- Isham, J. (1949). In E. E. Rich (Ed.), *James Isham's observations on Hudson's Bay, 1743 and notes and observations on a book entitled: A voyage to Hudson's Bay in the Dobbs Galley 1749*. London: The Champlain Society for the Hudson's Bay Record Society. (Original work published in 1743).
- Mabo v. Queensland. (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
- McEachern, A. (Chief Justice) (1991). *Delgammukw v. Regina: Reasons for judgment*. Vancouver: Supreme Court of British Columbia.
- Miller, B. (2011). *Oral history on trial*. Vancouver: University of British Columbia Press.
- Mitchell v. M.N.R.*, [2001] S.C.R. 911.
- Native Title Act 1993 No. 110, 1993.
- Neate, G. (1989). *Aboriginal land rights law in the Northern Territory*. Chippendale: Alternative Publishing Company.
- Ray, A. J. (2012). *Telling it to the judge: Taking Native history to court*. Montreal: McGill-Queens University Press.
- Regina v. Van der Peet*, [1996] 2 S.C.R. 507.
- Toohey, J. (1979). *Borrooloola Land Claim: Report by the Aboriginal Land*

- Commissioner*. Canberra: Australian Government Publishing Service.
- Toohy, J. (1982). *Daly River (Malak Malak) Land Claim: Report by the Aboriginal Land Commissioner*. Canberra: Australian Government Publishing Service.
- Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700. Retrieved from <http://www.courts.gov.bc.ca/jdb-txt/sc/07/17/2007bcsc1700.pdf>
- Vansina, J. (1985). *Oral tradition as history*. Madison: The University of Wisconsin Press.
- Wik Peoples v. Queensland [1996] 187 CLR 1.
- Yorta Yorta Aboriginal Community v. Victoria & Ors* [1998] FCA 1606 (18 December 1998).
- Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356 (12 December 2002).

Part 4: Historical and Critical Perspectives

In the history of Western law and public archives, we find moments when the disciplines have combined to record and represent local custom. ... These periods highlight a local community's identity and culture and offer a view of the enfolding ideological parameters and assimilating processes used to represent local values.

– Raymond O. Frogner, 2015

Author(s): Raymond O. Frogner

Source: *Archivaria*, The Journal of the Association of Canadian Archivists, (2015) Vol. 79, pp. 121-158

Published by: Association of Canadian Archivists (Canada)

Stable URL: <https://archivaria.ca/index.php/archivaria/article/view/13529>

“Lord, Save Us from the *Et Cetera* of the Notary”: Archival Appraisal, Local Custom, and Colonial Law¹

Raymond O. Frogner

ABSTRACT

This article considers the timeless legal and archival challenge to appraise, preserve, and reference unwritten, local custom. In the history of Western law and public archives, we find moments when the disciplines have combined to record and

¹ This article was written under the direction of Professor Val Napoleon for the graduate studies program at the Faculty of Law, University of Alberta. It was presented at the Progressive Librarians' Guild Conference (Edmonton chapter) in 2011 and at the Association of Canadian Archivists conference in Whitehorse in 2012. In 2013, it was delivered by invitation at the international workshop Archives Futures: Manuscripts, Materiality, Methods (Bibliothèque et Archives Nationales du Québec) and at the Aboriginal Studies/Medieval Studies symposium First Nation/Last Nation (University of Ottawa). Several colleagues have offered comments, including Sarah Shea, Mary McIntosh, Linda Nobrega, and Christine Gergich. I am particularly grateful to Dr. Napoleon for her knowledge and wisdom and to Heather MacNeil for her encouragement, scholarship, and editorial talents. The quote in the title is a reference to “Dieu nous garde d’un et cetera de notaire,” in *Locutions latines et adages du droit français contemporain*, vol. 1, ed. Henri Roland and Laurent Boyer (Lyon, France: L’Hermès, 978), 216, quoted in Donald R. Kelley, “Lord Deliver Us from Justice,” *Yale Journal of Law and the Humanities* 5 (1993): 160.

represent local custom. In these periods, methods were refined to capture and embed diverse local customs in the enfolding legal and political values of a dominant order. These periods highlight a local community's identity and culture and offer a view of the enfolding ideological parameters and assimilating processes used to represent local values. I consider two examples of this legal and archival rendition of local culture: the codification of unwritten, local customary law in the French *code civil* and the Supreme Court of Canada's tentative recognition of the probative value of traditional, unwritten Aboriginal custom. The comparison demonstrates that professional models of records appraisal have not adapted well to contemporary records-creating environments of dynamic, collaborative media and the distributed governance and interrelated cultural authorities of our socially diverse constitution. Contemporary archival appraisal continues to privilege textual evidence and frame appraisal decisions within structured, hierarchical juridical models of governance and authority. These modernist interpretive appraisal elements attenuate the archival representation of multiple constituencies of Canadian society. Both legal and archival disciplines require an interpretive model to represent non-textual evidence of the contingent, the particular, the local, and the inductive within the interpretive framework of local social sanction.

Nor should the curious legendary lore and tribal history of the natives be neglected. It would be well, indeed, the myths, legends, and historical narrations which have been handed down from generation to generation, by word of mouth, or by hieroglyphic, petroglyphic, or pictorial inscriptions, were preserved in definite form.²

This article considers “the human measure” — the timeless legal and archival challenge to appraise, preserve, and reference unwritten, local custom.³ At various periods in the histories of Western law and public archives, we find moments when the disciplines have combined to record and represent local custom. These periods are revealing because they not only highlight a local community's identity and culture, but they also offer a view of the instruments used to represent these values and the means to apply them strategically. These are times when methods were refined to capture, co-opt and embed the plurality of local customs into the greater legal and political parameters of a dominant order. This article compares two moments when the encompassing cultural and juridical parameters of a dominant order encountered, subsumed, and represented the cultures and traditions of local community. The two examples are the codification of late-medieval unwritten, local customary laws of northern France and the “post-

colonial” period of Canadian Aboriginal jurisprudence.⁴ After examining both developments, I will speculate on how recent Canadian court trials concerning Aboriginal rights and title misrepresented archival principles in the judicial appraisal of evidence of Aboriginal society. I will conclude with comments on the archival disposition of traditional Aboriginal evidence in the case *Delgamuukw v. British Columbia*.⁵

Appraisal in Public Archives of Colonial Societies

There is a well-documented debate in the Western archival discipline about how contemporary public archival institutions appraise records and even if they should do so at all.⁶ Several writers have expressed concern that the holdings of our public archives do not represent an inclusive and accurate depiction of the society they are mandated to represent. For Terry Eastwood, appraisal of archival records in a democratic society should be directed toward an enlightened cultural and historical understanding of belonging within local and national communities:

Citizens of a democracy have interests in the question of appraisal of archives. They have an interest in knowing how they have governed themselves and come to their current condition, and a companion interest in obtaining a sense of the condition of their community in the wider society from which they gain a sense of recognition. Archivists are the democratic delegates to perform the act of appraisal of archives to serve these interests.⁷

Eastwood identifies, in our struggles to formulate public appraisal policy, the often unacknowledged but vital democratic role of public archives. Contemporary political philosophy is facing similar challenges of public representation, recognition, and dialogue: “popular sovereignty in culturally diverse societies appears to require that the people reach agreement on a constitution by means of an intercultural dialogue in which their culturally distinct ways of speaking and acting are mutually recognized.”⁸ However

records are appraised for archival preservation, as legislatively mandated spaces of public dialogue and representation, the role of public archives in our modern constitution is crucial.

Supporters of traditional archival theory maintain that appraisal occurs naturally because archival material embodies fundamental, utilitarian values.⁹ These properties are identified in certain records over time as citizens create, use, and reference required documents within the protocols of a society's juridical system; in short, purposeful use attributes archival value.¹⁰ Through controlled preservation and access, archivists maintain the trustworthiness of such valued records to serve as proof of rights, governance, and, ultimately, collective social identity.¹¹

Critics claim that modern archives overindulge this juridical-administrative interpretation of archival value. They express concern for "a socio-cultural justification for archives grounded in wider public policy and public use."¹² Most would agree with the Roman law principles of probative juridical accountability, elements of trustworthy documents, and the public faith in archives as servants to society.¹³ Instead, the critique focuses on the deleterious framework of nineteenth-century modernism through which these principles are applied, notably historical and legal positivism. Historical positivism identifies historical knowledge as a scientific endeavour attained through the detailed accumulation of objective facts.¹⁴ For archival practice, this meant careful decomposing of records in order for their intrinsic and extrinsic data to serve scientific observation.¹⁵ Judicial positivism, first understood as "command of the sovereign," developed into a normative system of state-designed rules for the guidance of society.¹⁶ For archives, this privileged administrative records documenting the legislative will of the state. While both disciplines have expanded beyond these modernist principles, they continue to influence archival method and appraisal profoundly. Records appraisal remains based on administrative

theories of value and a focus on the records as direct, linear embodiment of facts in textual media.

There are significant consequences, both social and archival, of the judicial/administrative interpretation of archival value. Public archives' appraisal practices have not adapted well to our contemporary records-creating environment of dynamic, collaborative media and the distributed governance and interrelated cultural authorities of our socially diverse constitution. Archival appraisal continues to privilege the textual records medium and recognizes diverse cultural identities through an enfolding and restrictive juridical sovereignty. These modernist interpretive appraisal elements attenuate the archival representation of the multiple constituencies of contemporary Canadian society. Addressing the consequences of contemporary appraisal challenges requires an interpretive model to represent non-textual evidence of the contingent, the particular, the local, and the inductive within the interpretive framework of local social sanction.

This article looks at the appraisal of unwritten Aboriginal tradition to consider this contemporary appraisal challenge. Important characteristics of unwritten Aboriginal culture and tradition pose broader challenges for public archives to acquire and safeguard a meaningful representation of the social constituencies of our constitutional democracy. These characteristics include the meaning of custody, instantaneous reproduction and distribution, the fixity and stability of form and content, collaborative authorship, reinterpretation of authenticity, and the distributed authority and responsibility of traditional Aboriginal governance.¹⁷ Traditional, modernist concepts of trustworthy records, built on enfolding, statist conceptions of uniform sovereignty and textual paradigms of evidence, cohere poorly with the unwritten and communal cultural testimony – the songs, ceremonies, artwork – of Aboriginal traditions.¹⁸

Our current representation of Aboriginal communities in our public

archives begins with an appreciation of the colonial-era discourse of First Nations in our public institutions. Recently, several studies in the humanities have highlighted the history of public representation of social constituencies in our colonial governance; some have touched on the social role of archives in shaping our historic collective conscience.¹⁹ Christopher Bracken's book *The Potlatch Papers: A Colonial Case History* is an example of this approach. Bracken uses the state's records documenting the prohibition of the Aboriginal ceremony known as the potlatch to consider the representation of indigenous society through the lens of colonial law.²⁰ He also notes the indigenous resistance to both the cultural prohibition and its implications for indigenous identity: "One of the defining qualities of that discourse, particularly after 1914, [is] the attempt by the First Nations of coastal British Columbia to seize control of the techniques of representation in order to substitute their own accounts of who they are for the stories that European Canada tells itself about them."²¹ The potlatch records provide Bracken with insights into both the colonial settler and European *mentalités*.²² But he never directly investigates one of the most vital "techniques of representation": the social role of public archives. He chooses instead to consider what he terms the "postal record" of governance that "began in the mail," without examining the archival agency, the processes of archival appraisal, selection, and access, that made these records available for public study.²³

Bracken focuses on colonial and continental European social values, but his wholesale use of archival sources in the British Columbia Archives touches on an important point. Our public archival memory is overflowing with the settler communities' documentation of the indigenous colonial experience: Indian agency reports,²⁴ missionary records,²⁵ trap-line records,²⁶ land reserve commissions,²⁷ and anthropological studies,²⁸ to name a few genres. This predicament directs us to consider the history of

appraisal practices in public archives of colonial societies in two ways. First, as settler society developed ever more enfolding and interventionist laws and regulations to surveil, control, and direct indigenous lives, the unprecedented form (i.e. case files) and volume of the documentation became the prototypical archival record of modernity's social condition.²⁹ The encompassing meta-narrative of the *Indian Act*, the residential schools program, and the reserve system presented colonial archives with unlimited, detailed documentation of the colonial indigenous program. This colonial administrative documentation of the indigenous experience of settler society was a kind of "writing out" or erasing of the cultures and traditions of First Nations communities. This documentary by-product of the assimilation of indigenous society was acquired and preserved on a wholesale scale, and made available for archival reference. Appraisal, when considered, was neither thoroughly documented nor applied. The high-volume acquisition of these administrative records represents one of the first archival responses to the social condition of modernity. But like most positivist claims to objectivity, colonial archives did not simply acquire all documentation of the colonial experience. Colonial Aboriginal policy assumed native society was vanishing. Academics offered the concept of "salvage" anthropology to describe the need to study indigenous societies before their anticipated cultural disappearance.³⁰ Evidence of indigenous resistance to settler jurisdiction or the self-expression of local indigenous communities was correspondingly undervalued. This explains why the BC Archives holds volumes of records documenting how the government created the reserve system in British Columbia, including interviews with First Nations representatives "consulted" on the construction of reserves, but there is no accession record explaining how the institution acquired the fourteen Douglas Treaties (1850–54), the only treaties that formally recognized indigenous title and were signed by First Nations communities in BC's

colonial era.³¹ E.O.S. Scholefield was painfully aware of this situation when he assumed responsibility for the government archives program in 1910.³² In a period when the province was trying to negotiate “better terms” for its constitutional relationship with Ottawa, many questions were raised concerning the constitutional status of Aboriginal title and the process of colonial settlement.³³ In the shadow of these negotiations, Scholefield attempted, without much success, to locate colonial records of “agreements made with the Indians of British Columbia and Vancouver Island with regard to taking over their lands previous to Confederation.”³⁴ As he explained in a letter to the Secretary of State:

I am particularly anxious to obtain for the Library of the Legislative Assembly of British Columbia copies of all documents and papers, if any such exist, relating to the agreements made with the Indians of British Columbia and Vancouver Island with regard to taking over their lands previous to Confederation.... For some time past I have been making an examination of such documents dealing with Indian lands as may be found in the archives of British Columbia, but this examination has only brought me face to face with the fact that we have but few important papers relating to the treaties and agreements made with various authorities in early days.³⁵

As federal–provincial manoeuvres over Aboriginal title in British Columbia grew increasingly intense, Scholefield was concerned with finding evidence of colonial title for “Indian lands.”³⁶ But even in this narrow juridical/administrative sense, he was a lone voice in his concern for archival records of the colonial Aboriginal experience. In the more general process of “writing out” indigenous culture, settler society was preserving the foundational evidence of its own existence. The modernist archival appraisal of colonial society, like all appraisal, carried its own agenda.

Second, the colonial legal and academic encounter with indigenous societies created a body of jurisprudence, history, and anthropology that continues to play a role in our archival depictions of indigenous culture and identity and even influences our more general contemporary archival

understanding of the meaning of diverse cultures in society. Influential cultural theoreticians such as Claude Lévi-Strauss, Jacques Derrida, and Marcel Mauss debated the significance of indigenous ceremonies and protocols like the potlatch. The potlatch became a trope for the anthropological meaning of the legal and social concept of reciprocal obligation in societies organized along capitalist, social democratic, and socialist ideologies.³⁷ Indigenous social and cultural practices were so effectively pervasive in mid-century European cultural theory that even an influential contemporary study of archival appraisal cites the work of a principal modernist spokesperson, Franz Boas, the premier nineteenth-century anthropologist of the Kwakwaka-wakw peoples of the West Coast of British Columbia, to frame our common understanding of cultures in society.³⁸ Bracken's work unintentionally reveals an ironic archival idea: while colonial archives are replete with the "writing out" of First Nations' culture and identity — the documentation of settler society's efforts to at best absorb or at worst eliminate indigenous societies — the social values represented in this documentation have influenced archival practices in unexpected and influential ways.³⁹

To address this irony, critics of the traditional approach to archival appraisal direct us away from appraising the records to the functions and environments where the records were created. They advise us to highlight

the generic attributes, interconnections, and points of special intersection of conflict between creators of records (structures, agencies, people), sociopolitical trends and patterns (functions, activities, programs), and the ... citizens upon whom both function and structure impinge, and who in turn influence both function and structure, directly or indirectly, explicitly or implicitly.⁴⁰

Viewed this way, archivists must more fully confront the multiple influences and social consequences of the colonial project and its archival manifestations. If a single juridical system frames the juridical act, and

thereby records creation, then each act of appraisal is an expression of juridical sovereignty. Identifying a juridical system predisposes us to recognize a particular kind of order, arrangement, and value of records. It determines the classification of records, particularly the basic division into public and private spheres. In the archival appraisal of colonial records, the indulgence of a dominant world view or juridical system has been assumed a priori when in fact the distinction is unclear.⁴¹

Located on the fringe of the colonial empire, pre-contact First Nations of British Columbia existed within their own social and political systems. Social ceremony was witnessed, notarized, and preserved for future reference within unique cultural and legal protocols such as the potlatch. As settler society increasingly asserted juridical sovereignty, and its colonial project to convert common earth into property, much of the indigenous-related recordkeeping of the colonial era concerned the surveillance, control, and eradication of these indigenous social and political systems. This is the principal form of indigenous records in colonial-era archives. The early years of public archives in British Columbia operated to establish the settler fact: the first schoolhouse, the first municipality, the first jail. We have moved beyond the point where our public archives are settler archives. The archival memorialization of First Nations in the current era must be done in view of the settler archives' reality. But it must begin with an approach to appraisal that more fully recognizes the political, cultural, and juridical systems of the communities creating enduring histories across indigenous societies, as well as the settler political and legal systems that engulfed them.

L'enquête par turbe

Canadian First Nations communities do not offer the first example of an indigenous, local customary law and culture enveloped and represented in

an encompassing sovereign legal regime. This need to capture and articulate for alternative, state-directed purposes the indigenous local custom has been a legal and archival concern since imperial antiquity. At various periods in Western legal history, methods were secured and refined to document unwritten local practice. Such is the case in sixteenth-century northern France. In this period, French scholars and jurists formulated a critical scholarly framework to prove customary law. Specifically, the French Enlightenment innovations on textual criticism (philology), legal history (humanism), and governance (statism) structured their critical analysis of customary law as evidence. More broadly, these French innovations built on the Roman concept of law being “written reason,” *la raison écrite*.⁴² Taken together, these developments would become the legal rationalization of custom as reason. They inscribed in our legal and scholarly traditions the concept of written evidence as the unassailable probative format for law and scholarly research. In these efforts, a door was effectively closed to the recognition of unwritten local culture; it became something less intellectual, less valued, less formal and influential in our archival and legal professions.

In the efforts of French jurists to develop legal interpretations to prove local customary law and incorporate it into the national codification known as the *code civil*, there are parallels with how contemporary Canadian Aboriginal jurisprudence has characterized *sui generis* Aboriginal customary law as evidence of Aboriginal rights and title. Within these contemporary developments of written legal practice, the French medieval legal process known as *l'enquête par turbe* is an early Western example of how a nationalist jurisprudence adapted probative models to capture and incorporate unwritten local customary law within a political program. With the codification completed, “customary law became an object of study” and, more importantly, assimilation.⁴³ The archival copies were subsequently referenced for their probative character; the original oral sources lost their

legal authority and were no longer referenced with normative legal weight. This example of the probative adaptation of French jurists brings insight to the philosophical and juridical impasse of appraising and preserving Aboriginal tradition in a manner that can be referenced in support of constitutional rights and title.⁴⁴

In medieval Western Europe there existed two forms of law: law imposed by feudal authority and law founded on popular consent. In the absence of counterbalancing legislation, local customary law was virtually unique and unlimited.⁴⁵ Recent French studies argue that the collapse of local jurisdictions, increased regional trade, and the nationalist expanse of statist authority precipitated a growing practical need to recognize and accommodate the prevailing regional customary law, particularly in northern France.⁴⁶ The late-medieval transcribers of customary law, known as *coutumiers*, were often lawyers. Their work began before the twelfth century, but the earliest extant written summaries of regional custom are from this period.⁴⁷ *Coutumiers* were not preoccupied with theories of customary law but remained convinced of the legal weight of local custom and the need to record valued tradition for informed legal decisions. The late-medieval scholar Philippe de Beaumanoir, in his thirteenth-century work *Coutume de Beauvaisis*, summarized the predominant legal perspective on the need to capture in text the unwritten customary law of late-medieval French communities: "It is my opinion, and others as well, that for all the customs which are currently used, are good and profitable, to be written down and registered, so that they be maintained without change, for memories are fallible and peoples' lives are short, and what is not written is completely forgotten."⁴⁸ Beaumanoir advocated the capture of unwritten custom for posterity and later in the text despaired of the ever-changing, chaotic variety of regional custom. The same despair is found in the early work of Sir Edward Coke, as he tried to formulate a documented English

common law approach to custom: “Should I go about with a catalogue of several customs, I should with Sysiphus ... undertake an endless piece of work.”⁴⁹ In Beaumanoir’s view, law deemed “good” today should be captured and unchanged, i.e. “good” for all time. Renaissance legal history had not yet fully emerged to add a more sophisticated historical perspective. Thus, at the same time as Beaumanoir supported preserving customary law for future use, he also advocated researching the origins and influences of particular customs to resolve current disputes. This meant, contrary to his advice to maintain laws “without change,” Beaumanoir also tried to recognize an evolving, contextual sense of precedent. Placing laws in their local context, he tried incorporating Roman and canon law’s influence in an effort to untangle the ambiguous ambience of evolving local custom.⁵⁰ Conspicuously absent in Beaumanoir’s work is the requirement to combine and edit law for the assimilating authority of a national agenda. Nevertheless, Beaumanoir summarized the early legal requirement to capture and henceforth organize (i.e. rationalize) local custom for legal purpose.⁵¹

In addition to the general work of the *coutumiers*, offices of national authority – ecclesiastical, royal, and commercial – increasingly challenged local jurisdictions. Judges were left to prove custom in private dispute. As custom remained the “law of the land,” it was incumbent on judges to resolve disputes through appropriate customary law. They recognized that customary law was characterized by three qualities: generality, antiquity, and consistency. Generality meant that the custom must be observed by a large portion of the population in a region. As for antiquity, there was considerable dispute. Trained in classical Roman jurisprudence, some *coutumiers* argued for the Roman law’s prescription of ten years, but the most common argument referred to a canon law characterization of forty years. With regard to consistency, the custom must be irrefutable, i.e. the

certitude unqualified. In this manner, another distinction was made between two subcategories of consistency: private custom and customs “*notoires*,” the latter indicating those laws commonly known and incontestable. Finally, on this narrow legal terrain of determining contested private custom, the legal process *enquête par turbe* was applied.⁵²

The origins of the *enquête* are not exclusively found in the expansion of royal legal authority into the regions of customary law in northern France. There are examples of this process in medieval Carolingian law.⁵³ L. Waelkens argues that its origins remain “bathed in mystery and myth.”⁵⁴ This is in part because modern interpretations are as wrought with political agenda as the original process.⁵⁵ But as centrist government authority expanded into regional law, the work of codification and the rationalization of custom became unavoidable. In the *enquête*, it was generally believed custom was, in the words of a fourteenth-century French lawyer, “proved by a meeting of ten men worthy of faith.” Across northern Europe, medieval customary law acknowledged that only the first-hand testimony of community representation could supply the rational proof of custom.⁵⁶ The *Ordonnance de la Chandeleur*, dated 1270, expanded on this concept. It was the first text sent from the French royal court to incorporate the word “*turba*.”⁵⁷ The royal bill contains several notable features. First, it describes a written procedure, a radical development for the time. Second, it does not mention unanimity in the consulted collective testimony.

Several wise men, in good repute, are to be called. Once they are called, the custom is to be proposed to them by the mouth of one of their number. The custom having been proposed, they are to declare and honestly transmit what they know and believe and have seen to be the practice with regard to the custom in question. Upon the swearing of an oath, they are to stand off to the side, deliberate, and communicate their deliberations, saying among which persons they have seen the custom practiced, who performed it in what case and in what place, if it has been the subject of judgment and what the circumstances were, and all of this is to be reduced to writing and sent to the court under the seals of the inquisitors, and they are also to be separately interrogated on what they have said.⁵⁸

This *Ordonnance de Saint Louis* captures the opinion and strategy of the royal court. Incorporating important local representation embeds community leadership in the process. The royal court was conceding its weakness by allowing local representatives the freedom to “stand off” and independently “deliberate.” Nevertheless, the *turbe* represented “the people’s will,” for the French court exploited the popular contemporary maxim *decem faciunt populum* – “ten makes the people.” In effect, French royal authorities could argue that they were recording and representing – and ultimately assimilating – contemporary, local legal jurisdiction.

But in spite of the public drama and ritual, the effort to encapsulate unwritten local customary law was as elusive in late-medieval France as has been in contemporary Aboriginal Canada. James Whitman makes this association clearly, if unintentionally, even using language commonly found in Aboriginal jurisprudence:

Customary dispute resolution took place in local gatherings, presided over by elders and leaders who sought to foster local consensus. By contrast, governmental courts were presided over by jurists without local ties, ignorant of local practices. Such men could not adjudicate in the way local leaders did, by assembling the populace and engineering consensus through suasion and authority. Lacking local ties, these jurists inevitably had to rely more on awe and less on authority than did local elders and leaders. And without the entire community before them, they could not supervise consensus formation. They could only do what learned lawyers are trained to do: apply some defined rule to the particular parties before them.⁵⁹

In the *enquête par turbe*, Renaissance French jurists offer us an important example of Western law trying to apply textual parameters of legal reason around distributed local cultures built on complex interrelationships of land, verbal testimony, and unwritten culture and heritage. As the great social historian E.P. Thompson writes, “At the interface between law and agrarian practice we find custom. Custom itself is the interface, since it may be considered both as praxis and as law.”⁶⁰ What in fact was accomplished in

many of the *enquêtes* was conflict resolution. With an emphasis on reconciliation, “local gatherings for law-making involved not agreeing upon ‘the rule’ but agreeing upon a peaceful solution.”⁶¹ As living custom, there was room for considerable flexibility and adaptation in the process of authentication. Finally, Whitman notes, royal courts often overrode customary rulings, and there could never be enough recorded *enquêtes* for the manifold conflicts in private law. These legal vacuums were often filled with Roman and canon law, the primary reference for classically trained *coutumiers*, or completed through the royal court’s intervention.⁶²

But if the assembled documents concerning the *enquête* are incomplete, one sees the birth, from the thirteenth and fourteenth centuries, of tendencies that are in opposition to the preceding centuries. We find a growing collection of documents claiming to represent the artificial and politically charged entity known increasingly in emerging European states: the “common custom of the realm.”⁶³ Through this statist, French court innovation, local authority has been appropriated. From here, jurists began to consult the written codes instead of customary sources. Caveats accepting unwritten custom emerged; courts recognized royal and urban legislation over testimonial custom, and “courts typically insisted that customs would only be respected if they were ‘reasonable.’”⁶⁴ This notion to appraise and selectively acquire and preserve for future reference essentially killed the evolution of customary law and created a repertoire of written resources to be shaped, preserved, and referenced for assimilating royal policy.

As the idea of documenting customary law gradually gained acceptance across regional France over the thirteenth and fourteenth centuries, expanding state apparatus began to provide legislation for the editing of recorded customary law. The most often cited and influential example of this is the *Ordonnance de Montil-lès-Tours* of 1454. Unprecedented for its comprehensive national scope, article 125 of this long

bill established a procedure for “the official editing of custom.”⁶⁵ Part of Charles VII’s legislation to provide justice across the land, the three long paragraphs of article 125 offered to “simplify the various styles, usages and customs which are different according to the diversity of our Kingdom.” It proposed that “if the customs, usages and styles were written up, the trials would be briefer, the parties required to pay less, and the judgments would be clearer.”⁶⁶ As well as clarifying custom and expediting cost and procedure, written, redacted custom held a quality heretofore unacknowledged: “writing put to an end the variations and evolutions capable of affecting normative customary law.”⁶⁷ Customary law became an officially legislated, rationalized document open to the same archival control and exegesis that philologists applied to the *Justinian Code*.

The *Ordonnance de Montil-lès-Tours* did not immediately produce codification; the process continued for over a century. And this progression was not without resistance. “The 16th and 17th centuries were throughout western Europe a time of collision between the authority of kings and local ... privileges, liberties and constitutions.”⁶⁸ In response to statist authority, local feudal custom became located in a sacred, immemorial past; it became a bulwark against encroaching royal constitutionalism. The response to the usurping laws of human will was a romanticized custom without a definitive single provenance. “Since there was an increasing tendency to claim sovereignty in the full sense for the king, it was natural that those who sought to defend threatened privileges or liberties should emphasize in return that their rights were rooted in a law which no king could invade.”⁶⁹ A common expression of the period summarized the perspective of regional French communities experiencing the enfolding program of juridical constitutionalism, and the loss of their cultural authority: “Lord, save us from the *et cetera* of the notary.”⁷⁰ By the end of the seventeenth century, such adages were the remaining resistance to the cultural assimilation of

national, western European constitutions. Citing expense, ineffectiveness, unresolved “diversity of opinion,” danger due to “intrigue,” and local manipulation of the process, the state-sponsored *enquête par turbe* was officially abolished by the *Ordonnance de 1667* in the *parlement de Flandre*.⁷¹

The idea of a national common customary law expressing the will of the people was the ideological concept required to encode unwritten, regional custom in text. As national constitutional movements expanded across sixteenth-century Europe, such expansion incorporated culturally diverse societies into a single “common customary law.” However, along with an interpretive concept, juridical authority required a process. Classical Roman legislative procedure, taught in western European law schools, regulated the process.⁷² “Roman law ... laid stress upon the concepts of will, command and the legislator, and tended therefore to encourage the already existing idea that each institution had originated at a particular time in the will of a particular individual who had established it in substantially its present form.”⁷³ By this procedural model, customs could be reduced to the point of a juridical fact, an expression of will intended to have legal consequences within a comprehensive constitutionalism.

This notion of a juridical act highlights two critical threads in the codification of French custom, one procedural and the other philosophical. On a procedural level, French jurists modelled their process to incorporate customary law into Roman legislative process. It was summarized by a pithy comment of jurist Charles Dumoulin, the best-known advocate of national codification and editor of the *Coutumes de Paris*: “Our customary laws are so different and so confused that it is very difficult to extract from them a general and certain answer. Accordingly, the law must be married with the practice, usage with reason.” Reason in law was expressed in legislation. Dumoulin argued forcefully for legislation to encode customary law. His

introduction to the redacted codes of Paris expresses his confidence in legislated reason:

The text of these customs ... [has] been rendered the most accurate possible. They are useful to reference the original custom, and should be deposited in registers, either in the Parliament of Paris, or in courts and administrative offices of the kingdom. They can even be conserved in specialized libraries and cabinets ... they can be referred to in innumerable [circumstances] to reconstruct the verbal process.⁷⁴

Proof of custom became legislated proof of a juridical act secured in “specialized libraries and cabinets” (i.e. public archives). This concept was defined in the contemporary study of diplomatics and became the classical archival definition:

In a society governed in all its aspects by law (be it natural, customary, common or statutory), any fact represented in an archival document is related or referable to law, and is defined as being either juridically relevant or juridically irrelevant... a juridical fact is an event, whether intentionally or unintentionally produced, whose results are taken into consideration by the juridical system in which it takes place.⁷⁵

A juridically relevant act was accorded weight by approval in the community where it occurred. State sovereignty shifted the parameters of judicial sanction. This is when the legal bond between the modern concept of custom, the “unwritten law,” and justice began, i.e. when custom became a matter of legal convention and judicial determination.⁷⁶ The procedural accomplishment was to create juridical fact by an artificial, legislated consultation of a romanticized concept of “the people.”

The second critical thread of French codification is philosophical: humanism’s development of legal history. Best represented by jurists Francois Baudouin and Jean Bodin’s work, humanist legal history brought important heuristic principles to reading and understanding history.⁷⁷ While their focus was public records, they influenced historiography through the idea of a universal history. From the study of Roman law, they proposed the concept of law within an evolving cultural context:

A sense of the particularity, mutability, relativity and contingency of events – came about through the conjunction of humanist learning and jurisprudence on the theory of law. Renaissance legal thought discovered growth, change and decay in the lives of states and civil societies, from which it concluded that it is necessary to understand history of human achievements.... As generations of commentators on the inherited Roman law struggled with the contrast between the ideal form of that law and the variety of legal practices and customs in Europe, so they became conscious of the different histories of states and peoples. Jurisprudence laid the basis for comparative history [i.e. universal] and suggested that the development of states is related to circumstances.⁷⁸

In addition to this sophisticated view of historical evolution, Bodin and Baudouin supplied models to critique the sources of history. French jurist Jean Bodin outlined his approach: “Such is the multiplicity and disorder of human activities, such the abundant supply of histories, that unless the actions and affairs of men are confined to certain definite types, historical works obviously cannot be understood.”⁷⁹ Bodin was known for developing standards to assess the reliability of sources, whereas Baudouin formulated methods for analyzing the authenticity of sources.⁸⁰ In tandem, the two scholars set standards for the utility and understanding of primary and secondary sources. The newer and more recent a narration of the past, the more mendacious it usually becomes.

For as wine grows weaker the more it is diluted, and at last becomes devoid of taste, as a rumour, the long it progresses, recedes even further from the truth and constantly increases in its falsity, so a history, which has been tossed about in many repetitions, and besprinkled with the words of many versions, will often be at last contaminated, and thus degenerate to fable.⁸¹

While a principal criterion of Baudouin’s approach is the source’s proximity in time and space to the reported event, he does not distinguish “between original narrative relations, in which events are consciously interpreted, and documentary records or ‘remains,’ in which transactions are more likely to be noted unreflectively, and hence often more reliably.”⁸² It is not difficult to see how Baudouin’s influence mitigates the probative value of

generational oral histories from a variety of distributed sources critiqued in contemporary Canadian Aboriginal jurisprudence.

The French Renaissance efforts to codify local indigenous custom are useful case studies for Aboriginal jurisprudence for three reasons. First, the late-medieval legal process to acquire unwritten custom, the *enquête par turbe*, demonstrates strategies and rationalizations similar to the contemporary methods of Aboriginal jurisprudence; second, contemporaneous to codification, French Renaissance jurists conceptualized and legislated principles of documentary authenticity and reliability. These concepts continue to structure the legal criticism restricting the probative weight of customary Aboriginal evidence in Canadian courts. Finally, the methods to assert state juridical authority in Renaissance France are echoed in the first-contact manoeuvres to create a sovereign colonial juridical landscape of power and authority in nineteenth-century Canada, where First Nations were forced to articulate their rights and title. The French codifications of customary law were early examples of state civil law documents written and set aside for reference in an archival fashion, accessioned and preserved as trustworthy evidence of local custom. In this unappreciated relationship between legal and archival value, this challenge to appraise and preserve for future reference, customary law continues to defy modern archives in their relationship with First Nations' cultural heritage. The fundamental archival endeavour, the memorialization of enduring societal values, remains to be thoroughly considered in the context of local, indigenous custom.

Canadian Aboriginal Jurisprudence

Colonial public archives accessioned small volumes of evidence of Aboriginal societies. In this same period, colonial jurisprudence established settler sovereignty through the creation of physical and legal spaces within

which colonial settlement could operate.⁸³ Evidence of local indigenous cultures and traditions, when recorded, was filtered through the interpretive legal parameters of this colonial legal process. Our archival landscapes of memory reflect our landscapes of colonial settlement.

Colonial settler states in the nineteenth century required clear uniform jurisdictions – legal spaces with well-defined, documented rights:

The modernist positivization of common law was influential in this coalescence of state authority. Legal positivism highlighted precisely documented instruments such as statutes, charters, and land surveys – modernist devices designed to detail in precise legal terms the nature of colonial sovereignty. Local custom and tradition, when acknowledged, was strictly codified and legislated within the parameters of “bounded, internally uniform” nation states.⁸⁴

When confronted with indigenous local custom, colonial law was not prepared to recognize its legal value within Canadian common law. Following the European Romantic movement’s celebration of folklore and custom, modernism’s nineteenth-century positivization of law and the social sciences returned custom to a legislated fact, where Renaissance French *coutumiers* and Roman legislative procedure had placed it.

In the nineteenth century the idea of custom, though for a time central to the new sciences of society, especially anthropology and sociology, [became] marginal in modern legal traditions. Jacobins, Bonapartists, Utilitarians, and Austinians all looked to legislation as the true science of law and society and even in the historical and sociological schools of law, “custom” was a matter of legal convention or judicial determination.⁸⁵

Under the influence of the nineteenth-century legal positivism of John Austin, custom had fallen altogether beyond probative legal significance.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. Before it is adopted by the courts and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general disapprobation

falling on those who transgress it.⁸⁶

Like the French *coutumiers*, colonial Canadian jurisprudence reduced Aboriginal cultural identity to a legal *et cetera*, placed in archival preservation for future state reference.

In 1973, the BC Supreme Court's decision in *Calder et al. v. Attorney-General of British Columbia* rejected this notion of state-determined proof of Aboriginal rights and sent jurists in search of pre-contact, self-defined evidence of Aboriginal custom.⁸⁷ For this reason, this case is often considered to be the introduction to a post-modern period in Aboriginal jurisprudence. *Calder* established the notion that the probative legal roots of Aboriginal rights and title are located in the customs and indigenous legal practices of local community, not enshrined in statutes, imperial legal texts, or colonial judicial decisions. As Justice Emmett M. Hall wrote in the *Calder* decision, "What emerges from the evidence is that the Nishgas [contemporary spelling] in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law."⁸⁸

Calder began an imperative for legal scholarship and the judiciary to interpret the meaning of evidence of local indigenous culture. It inspired section 35(1) of the Canadian *Constitution Act*, which enshrined the rights and title of First Nations. If our search for an inclusive and socially relevant perspective for archival appraisal is grounded in public policy, then section 35 is a cornerstone.⁸⁹

This is also the point where legal appraisal of evidence of unwritten Aboriginal tradition differs from archival appraisal. Unlike archival practice, constitutional imperative drives the legal discipline to examine the significance of Aboriginal evidence.⁹⁰ The constitution acknowledges Aboriginal rights and title but it does not provide a definition of what they are or how they are proved. This has been left to judicial decisions. Since

1982, a raft of legal cases and academic work have studied the implications of using local indigenous cultural evidence for proof of rights and title. One of the most significant developments in Canadian common law concerning Aboriginal evidence is the Supreme Court's conceptualization of evidence of Aboriginal rights and title as "*sui generis*." It has become accepted in Canadian common law that decisions concerning the probative value of unwritten evidence of Aboriginal tradition and culture must be done in recognition of the evidence's uniqueness.⁹¹ *Sui generis* means "of its own kind or class"; it suggests difference.⁹² The characterization poses countless interpretive questions, but for all its vagueness it moves the interpretation in a proper direction by recognizing unique Aboriginal legal jurisdictions. Aboriginal societies organized through discrete legal traditions that predated colonial contact; these traditions are proven through the customary protocols and social sanction of local indigenous culture. Such perspective acknowledges that there is a universe of traditional indigenous legal orders interacting through their own gravitational pull, rather than Aboriginal traditions simply orbiting the sun of common law proclamations and regulations.⁹³ But in spite of the legal overtures to recognizing oral histories and traditions for proof of legal rights, there is still a sense, in Chief Justice Beverley McLachlin's words, that "the rights protected under Section 35 [may] be rendered illusory by imposing an impossible burden of proof."⁹⁴

It was not until seventeen years after the Constitution Act acknowledged Aboriginal rights that former Chief Justice Antonio Lamer formally identified the indispensable legal value of oral history as a unique form of Aboriginal evidence.

In practical terms, this [recognition of indigenous rights] requires the courts to come to terms with the oral histories of Aboriginal societies, which, for many Aboriginal nations, are the only record of their past. Given that the Aboriginal rights recognized and affirmed by s. 35 (1) are defined by pre-contact practices or, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of

Aboriginal rights.⁹⁵

Legal proof of Aboriginal rights occurs within the Canadian common law system. Canadian common law rules of evidence are fashioned to support the integrity of Canadian court decisions. To this end, it evolved a strict separation of issues concerning law, characterized as the admissibility of evidence, and questions of fact, characterized as weight of evidence.⁹⁶ Since the 1997 *Delgamuukw* decision advised that “independent weight” should be accorded oral histories in proof of Aboriginal rights and title, there has been a protracted legal debate over how to recognize Aboriginal oral histories in court. Aboriginal oral testimony is admitted under an exception to the hearsay rule in common law rules of evidence.⁹⁷ For admission, courts have considered the reliability and authenticity of non-textual testimony. Although a long list of cases on Aboriginal jurisprudence have addressed the issues of authenticity and reliability of Aboriginal oral testimony, none of the reasons for decision directly reference the considerable archival literature on these questions.⁹⁸ Further, to date no court has established an admissibility threshold for Aboriginal oral testimony. The *Van der Peet* decision expressed the two basic tenets underlining the admissibility of oral history: first, “trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims”; and second, “Aboriginal evidence must not be undervalued just because it does not strictly conform to the rules of evidence.”⁹⁹ Recent Supreme Court decisions have begun to limit the 1997 *Delgamuukw* recommendation to use indigenous oral testimony with weight. Having recognized in *Calder* that Aboriginal rights existed in Canadian common law, more than thirty years later the court is still debating the means to admit with legal weight oral testimony as legal evidence of Aboriginal culture and identity.

In 2001, the decision of the Supreme Court of Canada in *Mitchell v. M.N.R.* repeated the ground-breaking *Delgamuukw* verdict. The ruling

stated that “oral histories should be admitted as evidence where they are useful, reasonably reliable, and not subject to exclusion for undue prejudice.”¹⁰⁰ In *Mitchell*, the Supreme Court added a caution by elaborating on the concept of reliability: “The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness’s ability to know and testify to orally transmit Aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.”¹⁰¹ *Mitchell* elaborated a test for the elements of proof of Aboriginal rights, which built on *Van der Peet*:

The test to establish an Aboriginal right focuses on the integral, defining features of the relevant Aboriginal society before the Crown’s assertion of sovereignty. A claimant must prove that a modern practice, custom or tradition has a reasonable degree of continuity with a practice, tradition or custom that was in existence prior to contact with the Europeans. The practice, tradition or custom must have been integral to the distinctive culture of the Aboriginal people in the sense that it distinguished or characterized their traditional culture and lay at the core of the Aboriginal people’s identity.¹⁰²

Ruling in *R. v. Williams*, Judge Vickers reiterated *Mitchell*’s caution and brought the issue into the landscape of national sovereignty. He noted that Aboriginal oral testimony should not be treated differently from other forms of hearsay evidence, but it must be done in light of the goal of “the promise of reconciliation embodied in section 35 (1).” Vickers sketched out some preliminary determining factors a court would consider for admissibility:

1. How their oral history, stories, legends, customs, and traditions are preserved;
2. Who is entitled to relate such things and whether there is a hierarchy in that regard;
3. The community practice with respect to safeguarding the integrity of its oral history, stories, legends, and traditions.
4. Who will be called at trial to relate such evidence, and the reason they are being called to testify.¹⁰³

As Vickers added, “where there were no witnesses alive and the evidence was relevant, the test for necessity had been met.”¹⁰⁴ To an archivist, these points read very much like a search to determine a record’s authenticity, proof that “a record is what it claims to be.”¹⁰⁵ It focuses on use and access over time: “The authenticity of a record, or rather the recognition that it has not been subject to manipulation, forgery, or substitution, entails guarantees of the maintenance of records across time and space (that is, their preservation and transmission) in terms of the provenance and integrity of records previously created.”¹⁰⁶ Writers in the archival discipline have begun to question whether a strict interpretation of authenticity is limiting the variety of influences that shape a record’s meaning.¹⁰⁷ But without further expanding on the social construction of the concept of authenticity, Vickers turns to the concept of reliability, adding that defendants hold a right to interrogate the reliability of the oral history before it is admitted as evidence. Suggested questions include:

1. Is the particular evidence consistent with all of the evidence in the case when viewed in context?
2. Are there independent points of corroboration of the particular facts?
3. How, when, where, and why did the fact arise?
4. Can a reasonably logical inference be drawn from direct or indirect facts?
5. Is the witness or document relied upon (such as an expert or opinion report) disinterested and uncontradicted?¹⁰⁸

But the reliability of records is something entirely different in archival studies: “A reliable record is one that is capable of standing for the facts to which it attests. Reliability thus refers to the truth-value of the record as a statement of facts and it is assessed in relation to the proximity of the observer and recorder to the facts recorded.”¹⁰⁹ Unlike authenticity, archival reliability focuses on the creation of the record in question. Broadly

speaking, the question of legal admissibility seems to be similar to the archival question of authenticity, whereas legal weight approximates archival reliability. Even a passing comment on the social construction of these principles in an evidence-related discipline such as archival studies would add focus and context to legal decisions. Finally, based on the Supreme Court decisions in *Mitchell* and *Williams*, Stuart Rush, council for the plaintiff in the *Delgamuukw* case, suggests the following factors will inevitably be considered to prove legal weight:

- the age of the storyteller;
- the traditional knowledge of the persons who raised the storyteller;
- whether the storyteller has lived and experienced a traditional life;
- whether the storyteller speaks the indigenous language;
- the reputation of the storyteller in the community;
- the existence of a practice of repeating and correcting oral histories;
- the attributes of a witness to recount the oral history;
- the sources of the oral history and the general reputation of the source.¹¹⁰

These criteria clearly carry an obvious archival flavour. But it should be noted the archival perspective is premised on the need to safeguard over time the vital qualities of records holding enduring value. They might be helpful considerations for court, but they should be understood in the context of a court's need for an immediate legal decision. Canadian Aboriginal jurisprudence is searching for paradigms to understand the authenticity and reliability of oral history. These concepts do not seem to be explicitly defined in significant decisions of Aboriginal jurisprudence.¹¹¹ Archival studies might add focus to this commentary; however, when the work of archival studies has been referenced in court, expert witnesses for the Crown have misapplied archival concepts and limited the legal weight

of Aboriginal oral testimony.

The codification of Renaissance French customary law reminds us this has all been tried before. What has changed is the constitutional status of Native peoples and the essential requirement for Canadian juridical authority to reconcile the reality of Native rights and the evidence of their probative cultural practices. As a field of legal study, the Supreme Court decisions on indigenous rights and title, known collectively as Aboriginal jurisprudence, read as a kind of *bricolage*. From local history, anthropology, and archaeology to folklore, Native studies, and law – ideas on evidence and representation are filtered through a variety of disciplines in an attempt to create meaningful references to local indigenous cultures and identities. Many have argued that this jurisprudence is well intentioned, but the courtroom is the wrong public venue to reconcile Aboriginal rights within our constitution. Within this antagonistic forum, the Crown has turned to positivist models of evidence and sovereignty from colonial history to limit indigenous claims to distinct rights and title. Rather than adopting a collaborative, deep knowledge of the originating communities, the Crown has consistently relied on a single anthropologist, Alexander von Gernet, to pronounce on the reliability of Aboriginal history for a variety of cases involving distinct Native communities from coast to coast – an approach one anthropologist dubbed “drive-by anthropology.”¹¹² More troubling from an archival perspective, von Gernet has cited archival literature out of context to limit the weight of Aboriginal oral testimonies in court. He has referenced a UNESCO Records and Archives Management Program (RAMP) study, “Archives, Oral History, and Oral Tradition,” to argue there is an arbitrary process of selection involved in the preservation of oral histories and traditions that takes them out of context and therefore limits their reliability. However, like all RAMP studies, this one was intended for archival work, “for archivists, curators, historical administrators and other

information specialists, and the guidelines with which it concludes are based upon the experience of sound professional programmes.”¹¹³

It is the archival mission to safeguard records in a transparent manner, in their full context over time, in order for researchers to consult trustworthy evidence; if the archivist is to apply taxonomies of value in the selection process, s/he does so in an accountable manner. Von Gernet misconstrues the archival mission when he cites Moss and Mazikana as a source to argue that oral histories and traditions are “selected” for preservation and therefore subjective and less reliable.¹¹⁴ Although von Gernet cites the RAMP work extensively for his court reports on oral history and tradition, infallibly using it to argue that oral histories are less valuable historical sources, he avoids citing the caveat of archival appraisal that Moss and Mazikana make clear, an obvious caveat given that the authors titled the section “archival appraisal”:

The archivist must, however, appraise each oral history or oral tradition record on the merits of its contents as well as on provenance, *just as must be done with other kinds of records*. Standard application of archival judgment as to the intrinsic value of the material and to primary and secondary values, administrative and historical values, evidential and informational values, and enduring or permanent values of an item for future use all must be addressed for oral history and oral tradition materials just as for traditional written records.¹¹⁵

While courts have struggled with an understanding of how to interpret with weight the unwritten evidence of indigenous custom and tradition, legal theory has advanced. And like recent archival theory, the developments have focused on the more general contextual provenance of natural, normative interrelationships of local community publicly observed and sanctioned over time. The inquiry into the legal status of an individual, discrete custom is not an empirical matter; rather, it is a collaborative, normative, public process within a larger context. As Gerald Postema states, “Because custom that is likely to be eligible for legal status is a public rule, the deliberation in which it is embedded is never a private matter, but rather

involves deliberation as a common, public practice.”¹¹⁶ Recorded interviews of representatives of local communities for trial reveal valuable insights into local culture and tradition. But we must not fall into the model of the *enquête par turbe*. As Postema warns, there is no canonical beginning to customary law.¹¹⁷ Common usage sanctioned over time, commonly and publicly endorsed, does not carry a notarized documentation.

Contemporary legal theory cautions us about the futility of searching for static individual customary traditions timelessly “integral” and comprehensively defining for modern Aboriginal societies.¹¹⁸ Similarly, international archival standards are beginning to focus on the broader, evolving, and interrelated functions and processes that provide contextual provenance to individual records.¹¹⁹ Recent archival description models recommend a distinction between the information produced in activities and the carriers and genres that perpetuate that information. Once identified, the web of contextual relationships – creators, participants, locales, containers – can be established.¹²⁰ As archivists know, evidence is not a fact but a relationship matrix. And, one might add, nineteenth-century positivist models of evidentiary proof will produce nineteenth-century models of Aboriginal jurisprudence.¹²¹

Aboriginal jurisprudence encapsulates the historic moral agency of the Crown’s sovereign relationship with First Nations. Important Supreme Court decisions in Aboriginal jurisprudence describe the “nobility”¹²² and “honour”¹²³ at the core of the Crown’s relationship with First Nations communities. If we are to apply a democratic appraisal model to preserve an inclusive and meaningful profile of the plurality of constituents shaping our historic and constitutional identity, the body of evidence accumulated for decisions of Aboriginal jurisprudence merits public archival preservation and access. This is not to suggest that public archives must acquire all trial records concerning cases of indigenous rights and title. But decisions of judicial consequence should be appraised for preservation. Significantly, one should include the archival responsibility to make the

records publicly available. The British Columbia central agency responsible for records management has correctly appraised the records of such cases and recommended their full retention “because of their significant historical, evidential and informational value.”¹²⁴ The records identified for preservation include “factums, transcripts and appeal books.” This is an appropriate and respectful treatment of records documenting the Crown’s evolving recognition of Aboriginal rights.

But for most of these significant cases of Aboriginal jurisprudence, such as the *Delgamuukw v. British Columbia* decision, the BC Archives currently holds only the published *Reasons for Judgment* of the Supreme Court of British Columbia.¹²⁵ Like many of these cases, the *Delgamuukw* trial produced an enormous volume of records. The majority remain in the Attorney General’s court registry, in semi-active off-site storage, until final archival disposition. The *Delgamuukw* trial records include 579 boxes sent off-site by the Aboriginal Research Centre in 2001. They contain 369 volumes of original trial transcripts and hundreds of boxes of exhibits, including video recordings.¹²⁶

Although the records are properly appraised for their enduring value, the fundamental archival element – to describe and make them accessible – is not being served. Non-government repositories are beginning to acquire some of these exhibits and other relevant records of some of the most significant trials in the history of Canadian Aboriginal jurisprudence. *Delgamuukw* is one example of this trend. On 22 April 2014, the BC Attorney General’s office announced a consent order stating that “by agreement of all parties the original exhibits from the *Delgamuukw* trial, including the audio and video materials, will be housed and preserved in Rare Books and Special Collections of the UBC Library.”¹²⁷ The terms of the transfer noted:

A. The collection is not to be divided;

B. The collection is to be maintained in the Rare Books and Special Collections within the library, in a secure environment which complies

with the Library's preservation standards for rare book storage and access, and shall provide on-site access to all Parties upon request;

C. [A series of access protocols recognizing the sacred value of some of the recorded testimony].¹²⁸

Richard Overstall, research coordinator for the plaintiffs in *Delgamuukw*, recalled that for the video-recorded testimony of the Gitksan and Wet'suwet'en chiefs created for trial, "at least five copies were made of each tape, one for the court, one for the plaintiffs' lawyers, one each for the BC and Federal legal teams, and one for the plaintiffs' libraries." Suggesting a First Nations' need for archival sources, and a possible reason to liaise with UBC Special Collections, Overstall added, "I understand that the Wet'suwet'en library copies were subsequently destroyed in a building fire."¹²⁹ The consent order refers to "original exhibits," suggesting the original public records of the court are being sent to UBC, but this is perhaps imprecise. Nevertheless, the document does not mention the Royal BC Museum or the Public Archives of British Columbia. This agreement is made possible because rule 40 of the BC Supreme Court Rules (civil) states that the court registry "may return an exhibit to the party who tendered it [for trial]." The Supreme Court rules are explicit in upholding the rights of the holders of exhibits at trial. But the transfer still raises questions over the documentation of the relationship between the Crown and First Nations communities who argue their case for rights and title. There is a risk that the documentation and exhibits used in government court decisions are being subjectively stored across libraries and archival repositories in Canada. Removing the histories still further from their original sources endangers the records trustworthiness. As McRanor has noted, "A serious problem arises if tapes and transcripts of oral accounts are never situated within, or are removed from, [their] context and made into collections that purport to be aggregations of oral records. Quite simply, they are not what they purport

to be, and they are, therefore, inauthentic.”¹³⁰

Such distribution also questions the democratic role of the public archives, particularly if one considers the 1982 *Constitution Act*’s recommendation of reconciliation with First Nations communities. Like the records of the Truth and Reconciliation Commission, publicly preserving for access in an interrelated manner the exhibits, testimony, and decisions of the considerable archival material produced through Aboriginal jurisprudence fits the basic appraisal goal of preserving significant public records of governance and social identity. Preserved in the provincial public archival repository, records of Aboriginal jurisprudence are given context by other records of the Ministry of the Attorney General and by other records of First Nations communities interacting with offices of the state, as well as by the general body of records documenting European settlement.¹³¹

Writing of the settler polity’s relationship with New Zealand Aboriginal communities, P.G. McHugh nicely summarizes the legal and social responsibility as it relates to public archives and the record of the settler/colonial juridical program: “The Crown, ... was ... personified through its bureaucratic processes, particularly with regard to those guiding and attending its performance of its lawful obligations and duties. Ethical integrity required bureaucratic rigour and propriety as well as consistency and independence.”¹³²

In the words of the provincial Freedom of Information Commissioner, a fuller recognition of the government’s democratic responsibilities to British Columbians to maintain its record keeping system is reaching a critical stage.¹³³ The consent order is one example of significant records of government dispersed or potentially lost, and made available through a variety of institutional policies and practices, rather than acquired, preserved, and made cohesively available in the public archives of the province. The cost, as the Information and Privacy Commissioner for British

Columbia has recently noted, is the potential loss of “records of key actions and decisions of government.”¹³⁴ Should there be any doubt as to the contemporary public value and historic weight of court records used in Aboriginal jurisprudence, one need only witness the timely and appropriate recognition that Premier Christy Clark offered to the representatives of the Tsilhqot’in First Nation following the court’s *Tsilhqot’in Nation v. British Columbia* decision in June 2014.¹³⁵

After all that has been considered, I return to the troubling original question: how does one insert an ongoing indigeneity into archival practice and preserve a living document such as a customary oral testimony? If public archives are ever to produce a meaningful and representative depiction of contemporary social values, there must be a participatory appraisal, selection, and acquisition process in which the role of description is not the privileged domain of those who study its specialized semantics – a self-defined process to express the contingent, the particular, the local, and the inductive within the interpretive framework of local social sanction. And this sanction must be ongoing in the appraisal and conservation of remembrance. As West German archivist Hans Booms famously observes, “Only the society from which the material originated and for whose sake it is to be preserved can provide archivists with the necessary tools to assess the conceptions by which they bring the past into the present.”¹³⁶ Public archives will never acquire and preserve a meaningful and inclusive archives of records to embody the values and identities of society without fuller participation from the communities participating in our representative constitutional democracy. This is where the *enquête par turbe* collapsed. This explains why recognition of regional identity played an important role in the French Revolution. Since the revolution, “public” records of social identity have been caught in a state-purposed definition of the “people.” As a legislated public institution, archives have seen archival principles

entangled in the politics of enfolding power and sovereignty. Ultimately, the best-case scenario is for First Nations communities to control their own representational evidence within their own social and administrative protocols; with cultures and traditions preserved, recognized, and appropriately represented, the related communities can participate more fully in relationships of governance at the constitutional table.

Can we save the records of Aboriginal identity from “an *et cetera* of the notary”? Records documenting Aboriginal identity have lived on the threshold of our colonial houses of memory for generations. In 1982, they found permanent lodging within the Canadian constitution, and Canadian common law has since debated their legal tenancy, their evidential value, in numerous decisions. Their archival residency has not been equally considered in public archives appraisal policies, and their admission into public archives and subsequent preservation and access remain in the shadows of settler society. The first step in reformulating the appraisal of records documenting the relationship of the settler polity and the colonial project with First Nations is a recognition that our contemporary juridical environment has evolved beyond the binary public/private nineteenth-century constitutional landscape of John Austin and A.V. Dicey.¹³⁷ Firstly, and at all times, First Nations communities should have the option to control the discourse of their representation of themselves. One might argue this was done with the *Delgamuukw* exhibits; however, they now seem twice removed from their original context. Secondly, if public archival appraisal practice is truly a retrospective endeavour, the role of the public archives at the turn of the twentieth century — to serve as a documentary foundation for the establishment of settler society — must be acknowledged.¹³⁸ A responsible public archives must not interpret historic truth but remain forcefully accountable for its transparent and unhindered interpretation: “A non-corrupt legal system is not the outcome of a complacent so much as

vigilant past”;¹³⁹ such vigilance is the role and responsibility of the public archives. Finally, Canadian political philosophers for years have acknowledged relationships of governance, authority, and public representation. These archival concerns can only be addressed through “seeing the diverse cultural and national identities of citizens as overlapping, interacting and negotiated over time.”¹⁴⁰ In the records they acquire, public archives are a source of dialogue for public recognition of the plurality of constituents in our constitutional democracy. To appraise records in this sense requires recognition of the complexity of players and discourse, as well as the conflicting cultural authorities and references, that combine to create a record. In James Tully’s words, “The study of the practices of governance, whether narrow or broad, must proceed from two perspectives: from the side of the forms of government that are put into practice and from the side of the practices of freedom of the governed.”¹⁴¹ There are multiple experiences and histories of the same past beyond the distinction of public and private; not all fit comfortably into the Whiggish reading of colonial history as a relentless progression of settler society.

The term “First Nations” has been adopted into our political discourse without our fully recognizing its implications for the functions of governance or the archival role to document such political entities in public archives. The purpose of the title “First Nations” is in part to address our colonial legacy and to represent Aboriginal societies more fully across Canada within our constitution, and, one would hope, our public archives. In this light, Chief Justice McLachlin, in her 2014 *Tsilhqot’in Nation v. British Columbia* decision, has moved Aboriginal jurisprudence another step away from the legal positivism of juridical sovereignty and the historical positivism of socially decontextualized evidentiary criticism. Her decision more fully accepts the legal weight of Aboriginal oral history, and offers greater recognition to Aboriginal legal title. McLachlin’s decision

reminds us that we aspire to a socially relevant, inclusive, and representative public archives that recognizes and invites the participation of the social constituencies of our multicultural society.

Although section 35 of the Canadian constitution enshrines the recognition of Aboriginal identity within the framework of the constitution, there must also be a corresponding policy to promote the remembrance of “existing rights.” We are what we choose to remember, but we are also what we choose to forget. Our public archives are filled with detailed documentation “writing out” the memory of Aboriginal communities from colonial society. Hidden in the grammar, formalities, and *et ceteras* of this text is the indigenous voice — very faint, very human. As Philosopher Charles Taylor writes, a public policy of remembrance is a social necessity. Democratic recognition and remembrance of minority cultural communities shapes our collective identity: “a ... group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.... Due recognition is not just a courtesy we owe people. It is a vital human need.”¹⁴² This need must be served in our public institutions of law and memory.

Raymond Frogner holds a Master of Arts degree in history (University of Victoria, 1991) and a Master of Archival Studies degree (University of British Columbia, 1999). He has worked as a digital archivist for the computer animation firm Mainframe Entertainment (now Rainmaker Entertainment, Inc.); as a government records archivist at the Provincial Archives of Alberta; and as a general archivist for the Municipality of Esquimalt, British Columbia. For ten years, he was the associate archivist at the University of Alberta, where he was responsible for private records. He is currently the private records archivist at the Royal BC Museum (Archives). In 2010, his article in *Archivaria* 70, “Innocent Legal Fictions:

Archival Convention and the North Saanich Treaty of 1852,” won the W. Kaye Lamb Prize and the Alan D. Ridge Award of Merit. His archival interests include First Nations records and digital records.

Notes

2. E.O.S. Scholefield, “Report of Provincial Archivist,” *Sessional Papers, British Columbia* (Victoria: Richard Wolfenden, I.S.O., V.D., Printer to the King’s Most Excellent Majesty, 1911), N10. Although R.E. Gosnell is often cited as the first public archivist of British Columbia, it was Scholefield who was the first to hold the position as a full-time, permanent position in the provincial government.

3. Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1990), 1—13.

4. There is a considerable body of literature discussing the Canadian post-colonial period of Aboriginal jurisprudence. Although the first significant indigenous campaign for Native rights and title in British Columbia through a formal legal argument goes back to the *Cowichan Petition* of 1909, the *Calder* decision (*Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1) is thought to have forcefully introduced Aboriginal jurisprudence to the legal landscape. See, for example, Hamar Foster, Heather Raven, and Jeremy Weber, *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2008); Russel Lawrence Barsh and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand,” *McGill Law Journal/Revue de droit de McGill* 42, no. 2 (August 1997): 993–1109; Sidney Haring, *White Man’s Law: Native People in Nineteenth-Century*

Canadian Jurisprudence (Toronto: Osgoode Society for Canadian Legal History, 1998); John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," *Osgoode Hall Law Journal* 37, no. 3 (November 1998): 537–94; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); and B. Slaterry, "Understanding Aboriginal Rights," *Canadian Bar Review* 66 (1987): 727–83.

5. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

6. For prominent contributions to this debate, see Luciana Duranti, "The Concept of Appraisal and Archival Theory," *American Archivist* 57 (Spring 1994): 328–45; Terry Cook, "What is Past is Prologue: A History of Archival Ideas since 1898, and the Future Paradigm Shift," *Archivaria* 43 (Spring 1997): 17–63; F. Gerald Ham, "The Archival Edge," *American Archivist* 38 (January 1975): 5–13; Frank Boles, *Selecting and Appraising Archives and Manuscripts* (Chicago: Society of American Archivists, 2005); T.R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: University of Chicago Press, 1956); Trevor Livelton, *Archival Theory, Records, and the Public* (Lanham, MD, and London: Society of American Archivists and Scarecrow Press, 1996); Hans Booms, "Society and the Formation of a Documentary Heritage: Issues in the Appraisal of Archival Science," *Archivaria* 24 (Summer 1987): 104; Terry Cook, "Mind over Matter: Towards a New Theory of Archival Appraisal," in *The Archival Imagination: Essays in Honour of Hugh A. Taylor*, ed. Barbara L. Craig (Ottawa: Association of Canadian Archivists, 1992), 38–70; Phillip C. Brooks, "The Selection of Records for Preservation," *American Archivist* 3, no. 4 (October 1940): 211–34; and Verne Harris, "Contesting Remembering and Forgetting: The Archive of South Africa's Truth and Reconciliation Commission," in *Archives and Justice: A South African Perspective*, ed. Verne Harris, (Chicago: Society of American Archivists,

2007).

7. Terry Eastwood, "Reflections on the Goal of Archival Appraisal in Democratic Societies," *Archivaria* 54 (Fall 2002): 67.

8. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 29.

9. Terry Eastwood, "What Is Archival Theory and Why Is It Important?" *Archivaria* 37 (Spring 1994): 122–30; Luciana Duranti, "The Concept of Appraisal and Archival Theory," *American Archivist* 57, no. 2 (Spring 1994): 328–44; Livelton, *Archival Theory, Records, and the Public*.

10. For the traditional archival understanding of a juridical system and its interplay with records, see Luciana Duranti, "Diplomatics: New Uses for an Old Science," *Archivaria* 28 (Summer 1989): 16.

11. For an insightful look at the role of public institutions in the formation of identity in modern democracies, see James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom*, vol. 1 (Cambridge: Cambridge University Press, 2008).

12. Cook, "What Is Past Is Prologue," 43–44.

13. Duranti, "The Concept of Appraisal and Archival Theory," 330–32.

14. Heather MacNeil, *Trusting Records: Legal, Historical, and Diplomatic Perspectives* (Dordrecht: Kluwer Academic Publishers, 2000), 32–56. On historical positivism, empiricism, and historical materialism in historiography, see Bryan Palmer, *Descent into Discourse: The Reification of Language and Writing of Social History* (Philadelphia: Temple University Press, 1990).

15. See, for example, A. de Broüard, *Manuel de diplomatie française et pontificale* (Paris: Éditions Auguste Picard, 1929); C.V. Langlois and C. Seignobos, *Introduction to the Study of History*, trans. G.G. Berry (London:

Duckworth & Co., 1898); A. Giry, *Manuel diplomatique* (New York: B. Franklin, 1894).

16. For the classic nineteenth-century example of legal positivism, see John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832). For the conceptual taproots of sovereignty and the written paradigm of authenticity, see Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992); and Jean Bodin, *Method for the Easy Comprehension of History*, trans. Beatrice Reynolds (New York: Octagon Books, 1966). See also MacNeil, *Trusting Records*, 14–17; and Julian H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (New York: Columbia University Press, 1966).

17. This list of characteristics of traditional Aboriginal evidence possesses qualities and characteristics similar to electronic records. Similar to discrete electronic records, individual items of Aboriginal tradition are best understood within the systems in which they were created and used. See Heather MacNeil, “Proving Grounds for Trust II: The Findings of the Authenticity Task Force of InterPARES,” *Archivaria* 54 (Fall 2002): 24—58. The archival perspective on electronic evidence is based on the *Canada Evidence Act* (R.S.C., 1985, c. C-5), 31.2 (1): “The best evidence rule in respect of an electronic document is satisfied (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored.”

18. Raymond O. Frogner, “Innocent Legal Fictions: Archival Convention and the North Saanich Treaty of 1852,” *Archivaria* 70 (Fall 2010): 89.

19. The latter theme has become particularly popular in the humanities since the publication of Jacques Derrida’s *Archive Fever: A Freudian Impression*

(Chicago: University of Chicago Press, 1996).

20. The potlatch is a First Nations ceremonial activity involving ritualistic gift giving. It forms an important component of the culture, law, and economic practices of BC coastal and interior First Nations groups, such as the Heiltsuk, Haida, Nuxalk, Tlingit, Makah, Tsimshian, Nuuchahnulth, Kwakwaka'wakw, and Coast Salish. The federal government passed legislation in 1885 to prohibit what it understood inconsistently to be the ceremonial potlatch as practised in BC First Nations' communities. The restriction remained until 1951. For an overview of the potlatch prohibition, see Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990). The federal government documentation of the potlatch law is captured in the federal government fonds; see Library and Archives Canada, RG 10.

21. Christopher Bracken, *The Potlatch Papers: A Colonial Case History* (Chicago: University of Chicago Press, 1997), 15.

22. For a contrary review of Bracken's work, see Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: University of British Columbia Press, 2002).

23. Ibid., 1–20.

24. BC Archives, MS-1267, "Kuper Island Indian Industrial School."

25. BC Archives, MS-1513, "Oblates of Mary Immaculate. St. Paul's Province."

26. BC Archives, GR-0934, "Central Registry files of the Department of Indian Affairs on matters pertaining to British Columbia"; BC Archives, GR-1085, "British Columbia. Fish and Wildlife Branch."

27. BC Archives, "Joint Indian Land Reserve," GR-0494, Indian Reserve

Commission records, 1876–1878, British Columbia; BC Archives, Provincial Secretary, GR-1995, Royal Commission on Indian Affairs for the Province of British Columbia (1913–1916), originals, 1876–1878; “Confidential Report of the Royal Commission on Indian Affairs for the Province of British Columbia,” NW 970.5 B862c O/S.

28. BC Archives, Boas, Franz, MS-0517; Franz Boas, *Indian Legends of the North Pacific Coast of America*, ed. Dorothy Kennedy and Randy Bouchard (Vancouver: Talonbooks, 2002).

29. It could be argued the administrative colonial records of the surveillance and control of First Nations communities became some of the first sets of archival records of the modernist condition. There are many studies commenting on the explosion of records and their new characteristics and genres in the modern era. See, for example, Richard Dancy, “Case Files: Theory, History, Practice” (PhD diss., University of British Columbia, 1998), 2–5; and Cook, “Mind Over Matter.”

30. See, for example, Scholefield, “Report of Provincial Archivist,” N10.

31. Raymond Frogner, “‘...[T]he Land Itself with These Small Exceptions...’: Some Archival Thoughts on the Vancouver Island Treaties,” *Friends of the BC Archives Presentation*, 21 April 2013, accessed 28 January 2015, <http://bit.ly/1nv8yce>.

32. *British Columbia Gazette*, 14932, 29 December 1910: “appointed Provincial Archivist effective 31 July 1910.” I am grateful to Frederike Verspoor for this reference. See also Royal BC Museum, E.O.S. Scholefield Fonds, MS-491.

33. Hamar Foster, “Roadblocks and Legal History, Part 1: Do Forgotten Cases Make Good Law?” *Advocate* 54 (May 1996): 356. See also Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers, and the First

Campaign for Aboriginal Title in British Columbia, 1908–1928,” in *Let Right Be Done*, 61–84.

34. Library and Archives Canada, Dept. of the Secretary of State of Canada Fonds, R174-0-6-E, Secretary of State Correspondence, General Correspondence series, R174-26-2-E, file no. 302, vol. 112, “[E.O.S.] Scholefield to the Secretary of State, Department of State, Ottawa,” 8 February 1904.

35. Ibid.

36. The McKenna-McBride commission was designed to be the final decision on Aboriginal title in BC, but this was not the case.

37. Jacques Derrida, *Given Time: 1. Counterfeit Money*, trans. Peggy Kamuf (Chicago: University of Chicago Press, 1992); Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies*, trans. Ian Cunnison (London: Cohen and West, 1966).

38. Franz Boas, *Race, Language and Culture* (New York: MacMillan, 1910), and Kwakiutl Ethnography, ed. Helen Codere (Chicago: University of Chicago Press, 1966), both cited in Duranti, “The Concept of Appraisal and Archival Theory,” 342–53.

39. For an example of a contemporary archivist in another post-colonial jurisdiction struggling with modernist archival appraisal values and the work of Jacques Derrida, see Harris, “Contesting Remembering and Forgetting.”

40. Cook, “Mind Over Matter,” 40.

41. See, for example, Luciana Duranti, “Diplomatics: New Uses for an Old Science (Parts I–VI),” *Archivaria* 28–33 (Summer 1989 to Winter 1991–92); and de Broüard, *Manuel de diplomatique française et pontificale*, 39–55. For a challenge to this, see Jacques LeGoff, *History and Memory*, trans.

Steven Rendall and Elizabeth Calman (New York: Columbia University Press, 1992).

42. Kelley, *The Human Measure*.

43. John Gilissen, *La coutume* (Belgium: Brepols Turnhout, 1982), 106.

44. I have presupposed Aboriginal participation in the Canadian constitution. Should Aboriginal groups select sovereignty, another paper would be needed to address the archival implications.

45. Pierre-Clément Timbal, "Coutume et jurisprudence en France au moyen âge," in *La coutume: Recueils de la Société Jean Bodin pour l'histoire comparative des institutions* 52 (Bruxelles: De Boeck Université, 1989), 227.

46. René Filhol, *La preuve: Moyen âge et temps modernes: Recueils de la Société Jean Bodin pour l'histoire comparative des institutions* 17 (Bruxelles: Éditions de la Librairie Encyclopédique, 1965), 358–61. There was a division in medieval France between the *pays de coutume* (regions following customary law) and the *pays de droit écrit* (regions following written law). My paper is concerned only with the *pays de coutume*, located in regions of northern France. The *pays de droit écrit* drew northern limits in the district surrounding Bordeaux, and passed along the northern border of Périgord and Limousin, then north of Lyons, ending on the east in the region of Geneva. Roman law continued in this area serving the purpose of local customary law. Having reference to private law, codifications were not common.

47. See, for example, Philippe de Beaumanoir, *Coutumes de Beauvaisis: Livre de justice et de plet* (Paris: Alphonse Picard et Fils, 1899); and Jacques d'Ableiges and Édouard Laboulaye, *Le grand coutumier de France* (Paris: A. Durand et Pedone Lauriel, 1868).

48. Translated by the author from Beaumanoir, *Coutumes de Beauvaisis*, 4. See also Dominique Gaurier, “La rédaction des normes juridiques, source de la métamorphose du droit? Quelques repères historiques pour une réflexion contemporaine,” *Revue générale de droit* 31, no. 1 (2001): 12.

49. Sir Edward Coke, *The Complete Copy-holder, Being Learned Discourse of the Antiquity and Nature of Manors and Copy-holds...* (London: John Streater et al., 1641), cited in E.P. Thompson, “Custom, Law, and Common Right,” in *Customs in Common*, ed. E.P. Thompson (London: Penguin, 1993), 137. For similar struggles in an English context, see M.T. Clanchy, *From Memory to Written Record: 1066–1307* (West Sussex, UK: Wiley-Blackwell, 2013).

50. Gaurier, “La rédaction des normes juridiques,” 10–15.

51. As part of the royal sanction, Tessier tells us that at this time royal seals were adopted to complete the official recognition of oral transcriptions; see Georges Tessier, *La diplomatie* (Paris: Presses Universitaires de France, 1966), 122.

52. Pierre-Clément Timbal, “Coutume et jurisprudence en France au moyen âge,” in *La coutume: Recueils de la Société Jean Bodin pour l’histoire comparative des institutions* 52 (Bruxelles: De Boeck Université, 1989), 227–30. See also Jean-Francois Poudret, “Rapport de synthèse: Connaissance et preuve de la coutume en Europe occidentale au moyen âge et à l’époque moderne,” in *La coutume* 52, 511–13. According to Gerald Postema, such division of meaning is a classic normative legal approach to customary law; see Gerald Postema, “Custom, Normative Practice, and the Law,” *Duke Law Journal* 62, no. 3 (2012): 712.

53. John Gilissen, “La coutume: Essai de synthèse générale,” in *La coutume: Recueils de la Société Jean Bodin pour l’histoire comparative des*

institutions 54 (Bruxelles: De Boeck Université, 1989), 460–61.

54. L. Waelkens, “L’origine de l’enquête par turbe,” *Tijdschrift voor Rechtsgeschiedenis/Legal History Review* 53 (1985): 337.

55. *Ibid.*, 338.

56. Gilissen, “La coutume,” 461.

57. *Turba* is the Latin origin of the term “crowd.” The ordinance is commonly known as *l’Ordonnance de Saint Louis* in reference to the contemporary king, Louis IX.

58. James Q. Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?” *Faculty Scholarship Series*, Paper 657 (1991): 1334. For a copy of the text in Latin, see Ministère d’État - Archives de l’Empire, *Inventaires et documents publiés par ordre de l’empereur: Actes du Parlement de Paris*, 1e série (de l’an 1254 à l’an 1328), tome 1 (1254-1299), ed. E. Boutaric (Paris: Henri Plon, 1863), 242, para. 2547B. For further commentary on the *Acte*, see Gilissen, *La coutume*, 66.

59. Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 1332–33.

60. Thompson, “Custom, Law, and Common Right,” 97.

61. Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 1337.

62. Henri Lévy-Bruhl, “Le droit commun en France selon les coutumiers,” *Revue historique de droit française et étranger* 38, ser. 4 (1960): 412—3.

63. The phrase has been credited to Charles Dumoulin.

64. Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 1339.

65. Gaurier, “La rédaction des normes juridiques,” 16.

66. Translated by the author. For the complete text of article 125, see Gaurier, “La rédaction des normes juridiques,” 17–18.

67. Ibid., 19.

68. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1987), 16.

69. Ibid.

70. See “Dieu nous garde d’un et cœtera de notaire,” in *Locutions latines et adages du droit français contemporain*, 216, cited in Kelley, “Lord Deliver Us from Justice,” 160.

71. M. Merlin, *Répertoire universel et raisonné de jurisprudence*, 5e édit. Tome Sixième (Bruxelles: H. Tarlier, Libraire-éditeur, 1826).

72. Luciana Duranti, “The Odyssey of Records Managers,” in *Canadian Archival Studies and the Rediscovery of Provenance*, ed. Tom Nesmith (Metuchen, NJ, and London: Society of American Archivists and Association of Canadian Archivists, 1993), 29–60.

73. Pocock, *The Ancient Constitution and the Feudal Law*, 18–19.

74. Translated by the author from Charles A. Bourdot de Richebourg, ed., *Nouveau coutumier général, ou corps des coutumes générales et particulières de France, et des provinces connues sous le nom des Gaules* ... Tome I (Paris: Michel Brunet, 1824), 1.

75. Duranti, “Diplomatics, Part 1,” 16.

76. Kelley, “Lord Deliver Us from Justice,” 176–78. See also Francois Hotman, *Francogallia*, Latin text Ralph E. Giesey, trans. J.H.M. Salmon (Cambridge: Cambridge University Press, 1972), 59–61.

77. See Baudouin’s principal work, *De institutione historiae universae et*

ejus cum jurisprudentia conjunctione prolegomenon libri II (Paris, 1561). See also MacNeil, *Trusting Records*.

78. Roger Smith, *The Fontana History of the Human Sciences* (London: Fontana Press, 1997), 80. Franz Boas humanized this contextual idea of culture in his studies of the Kwakwaka'wakw; see *Boas, Race, Language and Culture and Kwakiutl Ethnography*.

79. Bodin, *Method for the Easy Comprehension of History*, 28. See also chap. 3–5.

80. These are generally recognized as the origins of the modern definitions of reliability and authenticity in archival convention. In traditional archival practice, a reliable record is true to the facts it attests to. This value is encapsulated in its form and procedures of creation. As Luciana Duranti states, “A record is regarded as reliable when its form is complete, that is, when it possesses all the elements that are required by the socio-juridical system in which the record is created for it to be able to generate consequences recognized by the system itself. A record is authentic when it is the document that it claims to be”; see Duranti, “Reliability and Authenticity: The Concepts and Their Implications,” *Archivaria* 39 (Spring 1995): 6–7. For the idea that the archival quality of authenticity is a social construction, thereby opening the possibility to attenuate its traditional interpretive archival model, see Heather Marie MacNeil and Bonnie Mak, “Constructions of Authenticity,” *Library Trends* 56, no. 1 (Summer 2007): 26–52; Chris Duncan, “Authenticity or Bust,” *Archivaria* 68 (Fall 2009): 97–118; and Bonnie Mak, “On the Uses of Authenticity,” *Archivaria* 73 (Spring 2012): 1–17. Both of these concepts of reliability and authenticity are applied rather loosely in Canadian court decisions on Aboriginal rights and title. See, for example, *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44 and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001

SCC 33.

81. Franklin, *Jean Bodin and the Sixteenth-Century Revolution*, 133. See also MacNeil, *Trusting Records*, 1–31.

82. Franklin, *Jean Bodin and the Sixteenth-Century Revolution*, cited in MacNeil, *Trusting Records*, 15.

83. For the idea of the collective social process of memory and its relationship to communal space, see David A. Rossiter, “Lessons in Possession: Colonial Resource Geographies in Practice on Vancouver Island, 1859–1865,” *Journal of Historical Geography* 33 (2007): 770–90; Harris, *Making Native Space*; Cole Harris, “How Did Colonialism Dispossession? Comments from an Edge of Empire,” *Annals of the Association of American Geographers* 94, no. 1 (2004): 165–82; Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: University of British Columbia Press, 1997); Borrows, “Sovereignty’s Alchemy”; Kenneth Brealey, “Travels from Point Ellice: Peter O’Reilly and the Indian Reserve System in British Columbia,” *BC Studies*, no. 115/116 (Autumn/Winter 1997/98): 181–236.

84. Frogner, “Innocent Legal Fictions,” 47.

85. Kelley, “Lord Deliver Us from Justice,” 168.

86. John Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (originally publ. 1832; repr. New York: Noonday Press, 1954), 31.

87. *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] W.W.R. 1.

88. *Ibid.*

89. Section 35 (1) is intended to recognize Aboriginal peoples as citizens with unique rights within the constitutional fold. The section reads, “The

existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, sect. 35 (1).

90. To date, the archival literature on the appraisal of records of First Nations societies has been significant but sparse. See Shauna McRanor, “Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations: Implications for Archival Practice,” *Archivaria* 43 (Spring 1997): 64–88; Mary Ann Pylypchuk, “The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources,” *Archivaria* 32 (Summer 1991): 51–77; Mary Ann Pylypchuk, “A Documentary Approach to Aboriginal Archives,” *Archivaria* 33 (Winter 1991–92): 117–24.

91. *Guerin v. The Queen*, [1984] 2 S.C.R. 335. See, for example, John Borrows and L.I. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?” *Alberta Law Review* 36, no. 1 (1997): 12. See also *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (SCC), at para. 49.

92. Bryan A. Garner, ed., *Black’s Law Dictionary: Standard Ninth Edition* (St. Paul, MN: West Group, 2009), 672.

93. The argument of the Crown in the path-breaking *Calder* case referenced colonial legislation and proclamations regarding land registration and legal title as evidence that Aboriginal rights and legal regimes were extinguished in the colonial era. See the Royal BC Museum draft document “Archival Records for Aboriginal Rights and Title Cases,” Royal BC Museum, accessed 30 December 2014, <http://bit.ly/1hvULBF>.

94. *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 27.

95. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 84. For a critical look at *Delgamuukw*, see Val Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?” *Canadian Journal of Law and Society*

20, no. 2 (2005): 123–55.

96. MacNeil, *Trusting Records*, 32.

97. McCormick defines hearsay evidence as “testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.” See Charles T. McCormick, *Handbook of the Law of Evidence*, 2nd ed., ed. Edward W. Cleary (St. Paul, MN: West Publishing, 1972), 584, cited in MacNeil, *Trusting Records*, 37.

98. In his article “What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation,” in *Beyond the Nass Valley* (Vancouver: Fraser Institute, 2000), serial expert witness for the Crown in Aboriginal trials, Alexander von Gernet, makes passing reference to McRanor, “Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations.” For archival studies of authenticity and reliability, see MacNeil and Mak, “Constructions of Authenticity”; Duranti, “Reliability and Authenticity,” 7–8; Heather MacNeil, “Trusting Records in a Postmodern World,” *Archivaria* 51 (Spring 2001): 36–47; Armando Petrucci, *Writers and Readers in Medieval Italy: Studies in the History of Written Culture*, ed. and trans. Charles M. Radding (New Haven, CT: Yale University Press, 1995), esp. chap. 10, “The Illusion of Authentic History: Documentary Evidence,” 236–50; Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Chicago: Society of American Archivists), accessed 7 April 2014, <http://www.archivists.org/glossary/>; Duncan, “Authenticity or Bust,” 97–118.

99. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 68. The *R. v. Van der Peet* decision attempted to decide from “first principles” and jettison the ethnocentric stare decisis of colonial judicial work. See Barsh and

Henderson, “The Supreme Court’s Van der Peet Trilogy,” 993–1109.

100. *Mitchell v. M.N.R.*, 2001 SCC 33, at para. 12.

101. *Mitchell v. M.N.R.*, at para. 33. For commentary on the restrictive caution Mitchell placed on recognizing oral histories in court, see Napoleon, “Delgamuukw: A Legal Straightjacket for Oral Histories?” 102. *Ibid.*, 3.

103. *R. v. Williams*, [2003] 2 S.C.R. 134, 2003 SCC 41. See also Stuart Rush, *Aboriginal Practice Points: Oral History* (Vancouver: Continuing Legal Education Society of British Columbia, April 2008), 11.

104. *Ibid.*

105. MacNeil, *Trusting Records*, xi.

106. Maria Guercio, “Principles, Methods, and Instruments for the Creation, Preservation, and Use of Archival Records in the Digital Environment,” *American Archivist* 64, no. 2 (Fall/Winter 2001): 238–69. See also Duranti, “Reliability and Authenticity,” 5–10.

107. Duncan, “Authenticity or Bust”; Mak, “On the Uses of Authenticity”; MacNeil and Mak, “Constructions of Authenticity.”

108. Rush, *Aboriginal Practice Points*, 11–12.

109. MacNeil, *Trusting Records*, xi.

110. Rush, *Aboriginal Practice Points*, 15. See also Stephanie P. Lysyk, “Evidentiary Issues – Oral Tradition Evidence,” *Aboriginal Practice Points* (Vancouver: Continuing Legal Education Society of British Columbia, October 2006); Peter W. Hutchins and Tanya Whiteside, “Mixed Messages, Double Standards, Eurocentrism and High Hurdles: Evidentiary Challenges in Aboriginal Litigation, Aboriginal Law: Litigation Issues” (Vancouver: Continuing Legal Education Society of British Columbia, October 2004).

111. The author has searched in several significant decisions to determine

how these concepts were defined in court: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (SCC); *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *R. v. Williams*, [2003], 2 S.C.R. 134, 2003 SCC 41; and *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

112. Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talonbooks, 1998). Also limiting the local context of his testimony, von Gernet has relied heavily on Jan Vansina for his understanding of oral history and oral tradition. Vansina's sources for his study were African communities; see Jan Vansina, *Oral Tradition as History* (Madison, WI: University of Wisconsin Press, 1984). See also Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: University of British Columbia Press, 2011).

113. William W. Moss and Peter C. Mazikana, *Archives, Oral History, and Oral Tradition: A RAMP Study* (Paris: UNESCO, 1986), i.

114. Alexander von Gernet, *Sawridge Band v. The Queen*, Edmonton, T-66-86A, Alberta, Federal Court; and *Tsuu T'ina First Nation v. The Queen*, Edmonton, T-66-86, Alberta, Federal Court (evidence, Dr. von Gernet's expert report); cited in Miller, *Oral History On Trial*, 132–133.

115. *Ibid.*, 48 (emphasis added).

116. Postema, "Custom, Normative Practice, and Law," 719.

117 *Ibid.*, 713. See also Lon Fuller, "Human Interaction and the Law," *American Journal of Jurisprudence* 14 (1969): 1–36.

118 Barsh and Henderson, "The Supreme Court's Van der Peet Trilogy."

119. International Council of Archives, *ISDF: International Standard for Describing Functions* (Paris: International Council of Archives, 2011),

accessed 28 January 2015, <http://www.ica.org/10208/standards/isdf-international-standard-for-describing-functions.html>. For a similar perspective concerning electronic records, see note 17.

120. Richard Dancy, “RAD: Past, Present, and Future,” *Archivaria* 74 (Fall 2012): 7–41.

121. In 1970, the BC Court of Appeal judgment of Justice Herbert William Davey referenced *In re Southern Rhodesia*, (1919) A.C. 210 (P.C.) [Southern Rhodesia] to argue that “the native culture of the Indians of the mainland of British Columbia” were “a very primitive people with few of the institutions of civilized society” and therefore were not sufficiently organized to claim any rights recognized by the Crown at the time of settlement. *Calder et al. v. British Columbia (Attorney General)* (1970), 74 W.W.R. 481, at para. 483 (BCCA), cited in Michael Asch, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence,” in *Let Right Be Done*, 102.

122. *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385.

123. *R. v. Marshall*, [1999] 3 S.C.R. 456.

124. Civil Court Services Operational Civil Case Files – Court of Appeal, Court Services Operational Records Classification System (ORCS), schedule 100152.

125. BC Archives, NW 346.71104 B862: In the Supreme Court of British Columbia, between Delgamuukw, also known as Ken Muldoe, suing on his own behalf and on behalf of all the members of the House of *Delgamuukw* and others, plaintiffs, and Her Majesty the Queen in right of the Province of British Columbia and the Attorney General of Canada, defendants; reasons for judgment of the honourable Chief Justice Allan McEachern; dates of trial, 374 days between May 11, 1987 and June 30, 1990.

126. Correspondence with Sarah Shea, archivist, Government Records Service, 6 November 2014. Mary McIntosh and Linda Nobrega from the Government Records Service and Christine Gergich, Supervisor and Appellate Court Records Officer, Superior Courts Judiciary, Court Services, British Columbia, also provided important comments.

127. Supreme Court of British Columbia, Smithers Registry, “Consent Order,” BC Appeal No. CA013770, file no. 0843/84, “Correspondence with Stuart Rush, Counsel for the Plaintiffs re: *R. v. Delgamuukw*,” 7 April 2014. The parties identified include counsel for the plaintiffs at trial (Delgamuukw, ... members of the House of Delgamuukw and others), counsel for British Columbia, counsel for the Attorney General of Canada, and counsel for the University of British Columbia.

128. Ibid., 1–2.

129. Correspondence with Richard Overstall, counsel for the plaintiffs, 21 June 2014. See also Antonia Mills, *Hang On to These Words: Johnny David’s Delgamuukw Testimony* (Toronto: University of Toronto Press, 2005).

130. McRanor, “Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations,” 76–77.

131. The Archives of the Royal BC Museum is attempting to address this with a project to identify and reference related records used in significant decisions of Aboriginal jurisprudence. See the draft document “Archival Records for Aboriginal Rights and Title Cases,” Royal BC Museum, <http://bit.ly/1hvULBF>.

132. P.G. McHugh, “Sir John Salmond and the Moral Agency of the State,” *Victoria University Wellington Law Review* 38 (2007): 746.

133. Elizabeth Denham, “Special Report: A Failure to Archive –

Recommendations to Modernize Government Records Management,” Office of the Information and Privacy Commissioner for British Columbia, July 2014, accessed 26 January 2015, <https://www.oipc.bc.ca/report/special-reports/>.

134. *Ibid.*, 3.

135. *Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44. See also Dirk Meissner, “B.C. Apologizes for Hanging Six Tsilhqot’in Chiefs 150 Years Ago,” *Province*, 23 October 2014, <http://www.theprovince.com/apologizes+hanging+Tsilhqot+chiefs+years/10319151/story.html>.

136. Booms, “Society and the Formation of a Documentary Heritage,” 37.

137. See, for example, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., publ. 1915; repr. Indianapolis: Liberty Classics, 1982).

138. *R.E. Gosnell v. Minister of Lands and Atty Genl for Dominion* (1912), Victoria 03283 (BC SC). See also Foster, “Roadblocks and Legal History, Part 1,” 356.

139. McHugh, *Aboriginal Societies and the Common Law*, 150.

140. Tully, *Public Philosophy in a New Key*, 22.

141. *Ibid.*

142. Charles Taylor, Multiculturalism and “The Politics of Recognition: An Essay,” ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1992), 25–26. See also James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom, Volume 1*, Democracy and Civic Freedom (Cambridge: Cambridge University Press, 2008); Terry Eastwood, “Reflections on the Goal of Archival Appraisal in Democratic Societies,”

Archivaria 54 (Fall 2002), 59–71.

Author(s): Andie Diane Palmer

Source: *Alberta Law Review* (2000), Vol. 38, No 4, pp. 1040 - 1050

Published by: The Alberta Law Review Society

Stable URL: <https://doi.org/10.29173/alr1422>

Evidence “Not in a Form Familiar to Common Law Courts”: Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*

*Andie Diane Palmer**

*The Supreme Court of Canada’s recent decision in Delgamuukw v. B.C.
permits a reconsideration of the place of oral traditions in aboriginal land*

* Assistant Professor, Department of Anthropology, University of Alberta. I am most grateful for the comments and helpful suggestions of an anonymous reviewer for the *Alberta Law Review*, and Claire Klassen, LL.B. Franca Boag and fellow members of my writer's group, Julie Rak, Aara Suksi, Cecily Devereaux, and Heather Young Leslie also receive thanks for their encouragement and for patient readings of earlier drafts. Aaron Palmer, LL.B., and Carl Urion were extremely helpful in their discussions of an earlier version, presented at the Canadian Anthropological Society meetings at the University of Toronto in 1998. Any errors are, of course, my own.

claims cases. Court advises that oral histories be given “independent weight,” and that at trial McEachern C.J. had not “assessed the oral histories correctly.” However, the Supreme Court of Canada’s view of how to weigh oral history in testimony is troublesome, in that then-Chief Justice Lamer informs us that such key features of oral histories as “moral obligations” are “tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth.” This article considers how courts will be able to evaluate oral histories in the future, if such key features of testimony are to be discarded.

I. INTRODUCTION

The Supreme Court of Canada decision in *Delgamuukw v. B. C.*¹ has been touted as holding promise for the future consideration of oral histories as evidence in Aboriginal land claim cases. The purpose of this article is to make it evident that no advancement has yet been made in the Supreme Court of Canada’s instructions for the interpretation of oral histories offered as testimony by Aboriginal Peoples. I argue that we have been instructed that oral history be given weight as part of land claims testimony, but have yet to produce the scale that could properly do so. I will examine Lamer C.J.C.’s (as he then was) instructions for the weighing of oral histories, and will also consider MacEachern C.J.’s attempts to give consideration to oral histories. The latter will be done in order to demonstrate how even the application of the principles laid out in *R. v. Van der Peet*² could not have assisted McEachern C.J. in his interpretation.

I will argue that Lamer C.J.C.’s instructions in the *Van der Peet* decision do not provide sufficient direction to account for the ways in which either the content or the anthropological interpretation of oral histories contribute to his decision in the *Delgamuukw* case. I will discuss some reasons that expectations for a different assessment of oral histories than McEachern C.J. offered might not be forthcoming in a new trial. What Lamer C.J.C. proposed (that oral histories be given weight) is an *ideal*. What

he in fact delivered, with the application of the principles laid out in the *Van der Peet* decision, is a temporary remedy resulting from the lack of shared understanding between the appellants and the judiciary of the direct referents and social meanings of the presented oral histories. Lamer C.J.C.'s separation of oral histories from the "moral obligations"³ these entail is indicative of this lack of understanding. This article, informed by Clay McLeod's discussion of judicial notice,⁴ proposes a partial remedy for this dilemma. I will conclude by considering an alternative judicial framework to that currently used by Canadian courts.

II. PROBLEMS WITH THE APPLICATION OF THE *VAN DER PEET* PRINCIPLES TO THE *DELGAMUUKW* CASE

A. WHAT'S IN A NAME?: DIFFERENT CULTURAL INTERPRETATIONS OF "DELGAMUUKW"

Contextualization of oral histories, and reasoned explications of associated social meanings, are essential to the interpretation of oral histories presented by Aboriginal witnesses. Shared terminology does not necessarily correspond to shared meanings of terms across cultures. In order to explain some of the fundamental differences in terminology which may have a bearing on the interpretation of law, I begin with an example from the decision of the *Delgamuukw* case: the social meanings and uses of the name "Delgamuukw" as used by the members of two different cultures present during that case.

This example is concerned with the extension of the Euro-Canadian legal custom of using a name to stand for a citation of a case (e.g., *Guerin*, for *Guerin v. The Queen*⁵) to include the use of Northwest Coast First

Nations' chiefly names for this purpose. My discomfort with this practice is engendered by my long consideration of the use of such names by speakers of the Coast Salish language, Lushootseed. According to my fieldwork experience as a linguistic anthropologist, a Lushootseed chiefly name should be spoken when formally calling on someone to respond to a request. This includes asking them to speak or to bear witness at a longhouse event or other public gathering. When referring to someone in passing in conversation, the uses of kin terms and other circumlocutions may be more properly employed.

The use of "Delgamuukw" as a reference to a whole court case, rather than to a particular wearer of a name and/or to once and future wearers of that name, is potentially unmindful of its normal use as a chiefly name, and of its place of use in another legal system. Chiefly names, as used on the Northwest Coast, are the property of clans and other kin groups, and are formally transferred between members of one lineage in the presence of invited witnesses from other lineages. Witnesses signal their acknowledgement of the rightful ownership of a chiefly name through their attendance at a ceremonial feast to mark that transfer, and through their acceptance of thanks in the form of food and other gifts distributed at the ceremony. To use a chiefly name in the address of an individual in ceremony, then, is to acknowledge that the addressee is the rightful bearer of that chiefly name, and of the property (including land, crests, and stories) that is transferred with it. In four publications (including three publications over which Gitksan and Wet'suwet'en organizations hold copyright), "Delgamuukw" is referred to by Gitksan and Wet'suwet'en writers as: "[T]he Gitksan and Wet'suwet'en Sovereignty Case,"⁶ as "this case," and as "the claim."⁷ When the chiefly name is used in reference to the *Delgamuukw* case, it is only used by these writers in larger phrases as "the

Delgamuukw case” and “the *Delgamuukw* court case.”⁸ I will follow the example of these writers, who have an understanding of the appropriate uses of such names in their feast systems.

It should become apparent, then, that even in the apparently minor details of language use, the shortening of a case name according to the custom of one group (in this instance, Canadian lawyers and judges) reflects an unmindfulness of another system of law. The Chiefly name of the head of a House group, when appropriately used (properly uttered), connotes an acceptance on the part of the speaker that the person so addressed is the rightful head of a recognized, organized social group. This group is corporate, and extends through an oral history that is marked by song, stories, and witness, and is acknowledged through the remembrance and mindful pronouncement of that same name by others.

An assumption that can generally be made by interlocutors ostensibly speaking in the same language, is that there is an at least partially shared understanding of the social meaning of a term negotiated between speaker and addressee. As, in the example given above:

- the utterance of a name, “*Delgamuukw*”;
- the idea, held by the speaker, of what that name refers to (in the terminology of linguistics, what the *direct referent* of the term is);
- the hearer’s understanding of what the *direct referent* of the term is;
- and, between speaker and addressee, a negotiation of the social meaning, and social consequences, of the utterance of that name “*Delgamuukw*,” in a particular context.

The lack of a shared understanding on the part of litigants of the social meaning of terms, and even of the nature of their direct referents, underpins the fundamental problem of interpretation that judges are faced with every day. Each case in the areas of Treaty Rights and Aboriginal Rights requires an investigation of understandings (or assumptions of understandings) between individuals of different cultural and linguistic backgrounds,⁹ extrapolated across the sands of time. Judges, I find, are well aware of the difficulties they face, and strive to educate themselves. Some of the very finest professional interpreters of cultural, temporal, and linguistic difference are regularly brought before them, as expert witnesses, to assist them in their task of interpretation.

To divorce the chiefly name from its appropriate use is not unlike what Chief Justice Lamer proposes in the *Delgamuukw* case. Lamer C.J.C. informs us that such key features of oral histories as “moral obligations” are “tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth.”¹⁰ Here, the separation of the chiefly name from its appropriate context provides a term of reference, a “fact,” that is not coupled with an acknowledgement of the moral obligation with which it is usually encumbered. The allowance for, and the acknowledgement of, other systems of law in which oral histories play a central role, is a theme to which I shall return several times in this paper.

B. HOW ORAL HISTORIES ARE TO BE WEIGHTED

Even where the Court seems to demonstrate some understanding of the Gitksan and Wet’suwet’en uses of oral history, it is the occupancy of the land (and its associated built structures), and not the perspectives of the people, that is most heavily weighted. For example, in his summary statement, Lamer C.J.C. explains that oral histories include the performance

of Gitksan *adaawk* and Wet'suwet'en *kungax*, as follows:

In addition, the Gitksan houses have an “adaawk” which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a “kungax” which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants...

*The most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the Gitksan and Wet'suwet'en people tell and re-tell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands.*¹¹

I understand, from the emphasized segment above, that it is the feast hall (a building) and not the stories told therein, that contributed the most to his understanding of the connection and claims of the Gitksan and Wet'suwet'en Houses to their lands.

The majority of the Supreme Court of Canada, albeit using the passive voice and not directly naming McEachern C.J., advises in its summary that the court is justified in intervening in such a case: “[A]ppellate intervention is... warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it.”¹²

How does the Supreme Court of Canada suggest “evidentiary difficulties” be approached and interpreted? The Court found that “[t]he trial judge gave no independent weight to these special oral histories.”¹³ An examination of the facts as stated in the body of the judgment reveals that

At the British Columbia Supreme Court, McEachern C.J. heard 374 days of evidence and argument. Some of that evidence was not in a form which is familiar to common law courts, including oral histories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archeology, anthropology, and geography.¹⁴

In *Van der Peet*, also written by Lamer C.J.C., he argues that “[t]he 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.”¹⁵ Citing *Van der Peet*, Lamer, C.J.C. asserts that to reconcile the differences in perspectives presented by common law and law as claimed through oral history: “[t]rue reconciliation will, equally, place weight on each.”¹⁶

There we have instructions from the Supreme Court of Canada. But how can such different things be equally weighted? Lamer C.J.C. states that courts must

...adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.¹⁷

Lamer C.J.C. wishes to “come to terms” with the oral histories, but undermines his own point, in part, with the following:

...given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62) “conclusive evidence from pre-contact times about the practices, customs and traditions of their community”.¹⁸

This is not in any way a “coming to terms” with oral history. One of the fundamental features of oral histories, as recognized in the feast hall, is that it is acknowledged by the participants as providing an authoritative record of past events. I would also argue that it would be exceedingly difficult to produce what could be deemed to be “conclusive evidence” about their “practices, customs and traditions” if courts do *not* seriously consider oral testimony. In feast halls, shared understandings of territorial boundaries are negotiated, and the reasons for association of Houses with particular territories are restated. I think that Lamer C.J.C. does not recognize the ways in which such oral records are relied upon, and so he

resorts to a lesser standard of proof than oral histories can provide. Therefore, the following “proof” is on its own troublesome, and seems to undermine any consideration of the potential reliability of oral histories presented in the feast halls to witnesses:

Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title.¹⁹

Lamer C.J.C. is not providing guidance as to how to give oral history testimonial weight. Although in the *Van der Peet* decision he asserts that “[c]ourts must take into account the perspectives of the aboriginal peoples themselves,”²⁰ he creates instead a condition in his decision in the *Delgamuukw* case which states that it is unnecessary to give evidence that derives from oral history. His emphasis is on adapting the rules of evidence by accepting a different kind of evidence. Rather than considering the substance of the presented oral history — that is, the oral documents that are told from “the perspectives of the aboriginal people themselves” — he has “pre-sovereignty occupation” stand as a proxy. Lamer C.J.C.’s instructions to follow the principles laid down in the *Van der Peet* decision simply do not allow for an interpretation beyond that which can be afforded to a text in which the social meanings and direct referents of *all* terms are evident to the judge, or, at least, can be made evident through *written* (Euro-Canadian) records of the times in question.

C. ON HEARSAY: MCEACHERN C.J.’S ATTEMPT TO ADMIT ORAL HISTORY AS TESTIMONY

Three weeks into his hearing of the *Delgamuukw* case, McEachern C.J. ruled on the admissibility of oral history in that case. According to a

recognized exception that declarations by deceased persons can be given in evidence by witnesses as proof of public or general rights, McEachern C.J. ruled oral history admissible, as an exception to the hearsay rule.²¹ Therefore, when witnesses recount their ancestors' declarations, this provides an account that is admissible as proof of general rights. The Supreme Court of Canada concurred with McEachern C.J.'s ruling.

All looked promising for the serious consideration of oral history, but McEachern C.J. also said at that time that he would determine the admissibility of some of the evidence later: "[N]ot all of the [oral history] evidence would be admissible, but questionable evidence would be received subject to a later determination of admissibility."²² He gave as a partial reason that both Mr. Jackson, for the plaintiffs, and Mr. Goldie, for the Crown, thought that "extensive anthropological and other testimony, which he had not yet heard, would help him with this interpretation."²³ McEachern C.J. then heard the anthropological evidence, which included a contextualization of the oral history narratives.

Lamer C.J.C. discussed McEachern C.J.'s interpretation of the anthropologists' testimony in his judgment:

One objection that I would like to mention specifically, albeit in passing, is the trial judge's refusal to accept the testimony of two anthropologists who were brought in as expert witnesses by the appellants. This aspect of the trial judge's reasons was hotly contested by the appellants in their written submissions. However, I need only reiterate what I have stated above, that findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.²⁴

This could mean that if oral histories are not placed in context for the trial judge by people other than the expert witnesses, they may be disregarded, as the judge may find that he does not have the tools to evaluate them.

D. THE ROLE OF ANTHROPOLOGISTS: THE PLACE OF JUDICIAL NOTICE²⁵

Trial judges are still able to dismiss oral histories on the ground that they have not been made intelligible to participants in a Euro-Canadian judicial system. In taking judicial notice, judges are able to consider that “the matter need only be common knowledge in the particular community in which the judge is sitting.”²⁶ The holding of sessions on Indian reserves can shift the available store of “common knowledge,” but that common knowledge might not at first be recognizable to a judge newly visiting a community. He or she might be occupied with extra work in hours that would otherwise allow acquaintance, through socialization, with what locally, “everyone knows.”²⁷ To expand the judicial notice of the judges who make decisions in the Canadian courts, we must begin to expand their exposure to alternative perspectives on the world earlier in their lives.

If we are to expect oral histories of Aboriginal Peoples to be given more consideration in Canadian courts, we must develop our educational system in such a way that it becomes unreasonable for a trial judge to be unaware of the workings of such orally-based legal traditions. We must encourage public schools to make use of textbooks and other curricular materials that foster an understanding of alternative legal histories on their own terms. These textbooks include, most notably, Olive Dickason’s eminently readable history text, *Canada’s First Nations*,²⁸ and the Yukon social studies textbook, *Reading Voices: Oral and Written Interpretations of the Yukon’s Past*, written by Julie Cruikshank.²⁹ Both of these texts make the perspectives of non-Euro-Canadians accessible to high school students, and are based on ethno-historical and anthropological research of highly-regarded scholars. In order to give potential future members of the Canadian

judiciary time to consider and develop their opinions on such matters, we must ensure that, at the very least, everyone develops an early awareness of the controversies within our legal system. To foster such an awareness, we must also rectify the recent excisions of the mention of Aboriginal Peoples and their systems of governance and social organizations from some newer editions of high school textbooks now in circulation in Canada. This avoidance of controversy in print through social erasure has been cogently documented by Elizabeth Furniss.³⁰ Anthropologists, including this author, must also be able to publish in places that judges and their clerks are likely to look. The work of a few anthropologists could make further significant contributions to the reading lists of sitting judges, and their clerks. We must, as Ridington has advised, attend to the “conflicting models of discourse,”³¹ and explicitly identify those instances in which such conflicts might preclude an understanding, on the part of judges, of the unfamiliar social meanings clothed in terminology that seems, at first glance, to reflect a common understanding of terms in use.

III. CONTRASTING NOTIONS OF TITLE AND SOVEREIGNTY: DIFFERENT WORLDVIEWS

In their opening address to the Supreme Court of British Columbia, the Gitksan and Wet’suwet’en hereditary Chiefs Gisday Wa and Delgam Uukw³² asked that their *title* be recognized (this was not qualified as aboriginal title), and that sovereignty *of* the land be recognized (not the sovereignty *over* the land of any party, whether Crown, Gitksan, or Wet’suwet’en).³³ This is in keeping with the hereditary chiefs’ discussion in *The Spirit in the Land*, in which they assert their rights of “ownership and jurisdiction.”³⁴ The Supreme Court of Canada failed to address the request. Instead, it addressed the issue of “occupancy and possession.”³⁵ This is not

merely a limitation due to legal language, but also of the associated legal view, which is that the Crown holds underlying title. A consideration of what sovereignty *of* land might mean to Gisday Wa and Delgam Uukw and members of their Houses needs to be unbound from the context of a decision made within the Canadian court system, which, of course, is where matters are to be decided that are considered to be *under that court's jurisdiction*. Judgments by the Supreme Court of Canada are made entirely within the context of an assumption that the Crown has the underlying title to all land, rather than in the context of an assumption of a nation-to-nation relationship, where different systems of law (and different understandings of what constitutes a person or spirit) might be treated as commensurate. The Supreme Court of Canada has not made use of an examination of relationships between the concerned parties, the Crown and the *Wilip* (or Houses), at the time in history where common law and aboriginal law converged. Nor has the Court found it necessary to consider whether an assertion of sovereignty by the Crown, at that shared point in history, meant anything at all under another system of law. As such, an explanation that, for Delgamuukw and the members of his House, “the ownership of territory is a marriage of the Chief and the land,”³⁶ has not been accommodated by the Canadian courts.

IV. THE LARGER ISSUE

I am concerned that by attending to the minute details of this discussion I will lose sight of the larger issues, and by engaging in arguments framed within the system, I am complicit with it. At first, I did not think that this would be the case, but the larger issue, that of facilitating two cultures' communication, has been framed within the context of a colonialist court

throughout most of this paper. However, as Medig'm Gyamk [Neil Sterrit] points out in the title of his essay, "It doesn't matter what the judge said,"³⁷ the court case "was only one of the ways we [the Gitksan and Wet'suwet'en] sought to achieve justice within our territories."³⁸ And truth, as he defines it, is in the following:

The elders... went in and they said how they felt, what they knew about the land, what they wanted in the future, and where they came from in the past. It was that truth, ultimately, that will be important... [B]ecause it is all written. It is all there.³⁹

Even though the Canadian judicial system makes use of a set of laws, set out in a language that is not entirely shared by Medig'm Gyamk, his wearing of that chiefly name, and the understanding of the laws by which he can claim it on the part of those who utter it in its appropriate context, is indicative of the enduring relevance of a body of law beyond the control of the Canadian courts. Perhaps, in the study of law in Canada, we should become increasingly mindful of accounts situated within legal frameworks which have origins independent of the common law tradition developed under the influence of a lineage of British sovereigns that has extended into Canadian courts.

Notes

1. [1997] 3 S.C.R. 1010 [hereinafter the *Delgamuukw* case].
2. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].
3. *Supra* note 1 at para. 86.
4. C. McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276.
5. *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
6. D. Monet & Skanu'u (A. Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Philadelphia: New Society Publishers, 1992).
7. Gisday Wa & Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia* (Gabriola, B.C.: Reflections, 1989).
8. Gisday Wa, "Foreword" in A. Mills, ed., *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver, University of British Columbia Press, 1994); Mas Gak, "Foreword" in A. Mills, ed., *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver, University of British Columbia Press, 1994); Medig'm Gyamk in F. Cassidy, ed., *Aboriginal Title in B.C.: Delgamuukw v. the Queen* (Lantzville, B.C.: Oolichan Books, 1992).
9. The discussion in this ruling has implications for the growing body of anthropological theory and research on "responsibility and evidence in oral discourse," which examines the linguistic means by which a speaker can make a claim, and indicate the source of authority for that claim. See, for example, J. Hill & J. Irvine, *Responsibility and Evidence in Oral Discourse*. (Cambridge: Cambridge University Press, 1993).
10. The *Delgamuukw* case, *supra* note 1 at para. 86.

11. *Ibid*, at paras. 13-14 [emphasis added].
12. *Ibid*, at para. 80.
13. *Ibid*, at para. 98.
14. *Ibid*, at para 5.
15. *Van der Peet*, *supra* note 2 at para. 68, as cited in the *Delgamuukw* case, *supra* note 1 at para. 80 [emphasis removed].
16. The *Delgamuukw* case, *supra* note 1 at para. 81, citing *Van der Peet*, *supra* note 2 at para. 50.
17. The *Delgamuukw* case, *ibid* at para 84.
18. *Ibid*, at para. 83.
19. *Ibid*, at para. 152.
20. *Van der Peet*, *supra* note 2 at para. 48 [emphasis added].
21. *Uukw v. R.*, [1987] 6 W.W.R. 156.
22. *Ibid*, at 156.
23. *Ibid* at 163.
24. The *Delgamuukw* case, *supra* note 1 at para. 91.
25. Judicial notice is the term used to describe the practice of the courts using their knowledge about the world to make decisions without requiring the parties of the action to prove the things known by the court. “Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party”: J. Sopinka, S.N. Lederman & A.W. Bryant. *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 1055, sec.

19.13 [hereinafter *The Law of Evidence in Canada*]. McLeod, *supra* note 4, has a discussion of judicial notice which demonstrated to me the importance of considering the place of judicial notice in the development of new interpretations of law.

26. *The Law of Evidence in Canada*, *ibid.* at 1055, sec. 19.14, quoting then-Chief Justice Duff.

27. *Ibid.*

28. *Canada's First Nations: A History of Founding Peoples*. (Toronto: McClelland and Stewart, 1991).

29. *Dän Dhá Ts'edenintth'é / Reading voices: Oral and Written Interpretations of the Yukon's Past* (Vancouver: Douglas and McIntyre, 1991).

30. *The Burden of History: Colonialism and the Frontier Myth in a Rural Canadian Community* (Vancouver: University of British Columbia Press, 1999).

31. R. Ridington, "Cultures in Conflict: The Problem of Discourse" in *Little Bit Know Something: Stories in a Language of Anthropology* (Iowa City: University of Iowa Press, 1990) at 189. See also "Fieldwork in Courtroom 53: A Witness to *Delgamuukw v. B.C.*" 95(2) *B.C. Studies Special Issue* 12. We can find some guidance in the detailed critiques of McEachern C.J.'s reasons put forward by a number of scholars in anthropology, history, the law, and in the Gitksan and Wet'suwet'en communities. In particular, I refer to: *B.C. Studies Special Issue* 95(2), B. Miller, ed.; the session, *Anthropologists On Stage and Back Stage: Expert Witnessing in First Nation Litigation*. This was presented at the 22nd Annual Meeting of the Canadian Anthropological Society (CASCAS), Learned Societies Conference, Université du Québec à Montréal, May 1995. Papers by Dara Culhane, Antonia Mills, Robert Paine, Bruce Miller, John Cove, James McDonald and Tom Weegar, Andie Palmer, Adrian Tanner, and Joan Ryan,

and organized by Bruce Miller, with discussion by Randy Kandel and John Borrows.

32. Each of these names can be spelled several ways. The Nass-Gitksan language is now written, but, as with English, the standardization of orthographic representation, the spelling of names, and the education of publishers as to what constitute word boundaries (as opposed to morpheme boundaries), takes some number of years to work out.

33. Gisday Wa & Delgam Uukw, *supra* note 7. It should be noted, however, that notions of the Crown's fiduciary responsibility are brought up in their argument at page 1.

34. *Ibid.* at 11.

35. The *Delgamuukw* case, *supra* note 1, per La Forest J. and L'Heureux-Dubé J. at para. 188, Lamer C.J.C. on occupancy at paras. 144-47. I found Hamar Foster's discussion of what he views as McEachern C.J.'s confusion between rights and title very helpful in the formulation of this point (see H. Foster, "It goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in *Delgamuukw v. The Queen*" (May 1991) 49 *Advocate* 341).

36. Gisday Wa & Delgam Uukw, *supra* note 7 at 7. The notion of land as a non-human person, as one imbued with a spirit, that is, as one with whom a hereditary chief would enter into a relationship based on respect, and with an expectation of mutual responsibility, provides a basis for what is deemed to be proper behaviour under Gitksan law.

37. "It Doesn't Matter What the Judge Said" in F. Cassidy, ed., *Aboriginal title in British Columbia: Delgamuukw v. The Queen*, Proceedings of a conference held September 10-11, 1991 (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1992) at 303.

38. *Ibid.*, at 305.

39. *Ibid.*

Author(s): Alexander von Gernet

Source: *Beyond the Nass Valley* (2000), 103-129

Published by: Oxford University Press

Stable URL: www.fraserinstitute.org

What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation

Alexander von Gernet

Introduction

This paper is an effort to share with others some of the wisdom of my elders.¹ When I say “elders” I do not mean my parents, grandparents or other relatives. Nor am I referring to any of my First Nations friends such as the late Chief Jacob Thomas. Rather, I am talking about my academic mentors who used both oral communication and numerous learned treatises to instruct me in the skills of my profession. Among other things, they showed me how archaeological data, written documents, and oral traditions are used in methodological conjunction to illuminate the past. After summarizing what I was taught about oral traditions,² I will offer a few observations on

the *Delgamuukw* case.

I would like to begin by reviewing some modern perspectives on reconstructing the past in the present. At the risk of obscuring the full range of opinions, I will simplify matters and focus on two rival epistemologies located at the extreme ends of a continuum.

Historical Objectivism

At one end of the spectrum of approaches is an interpretative position known as historical objectivism or positivist history. This position has a commitment to the reality of the past, a belief that there is a single solution or one “true” history, and a tendency to eliminate other possibilities. Its sprawling set of assumptions includes the notion that historical facts are embedded in documents and need only be extracted; hence, there is a focus on the collection and critical analysis of documentary materials to ascertain their origins, date and trustworthiness. There is a sharp separation between fact and fiction. Facts are independent of interpretation. The historian should have an attitude of neutral objectivity and disinterest and should never be an advocate or propagandist. The result is an authoritative, chronologized text about what “actually happened” in the past.³

The Postmodernist Critique

Historical objectivism, in various incarnations, has been the dominant paradigm in Western historiography. But in recent decades it has been challenged as problematic by an intellectual movement loosely organized under the rubric “postmodernism.” This alternative position is, in many respects, a type of historical relativism in which interpretation changes in relation to changing circumstances. It is also a type of idealism in which humans are said to adjust not to a world as it really is, but to a world as they imagine it to be. Instead of a single, “true” history, there is pluralism, with

multiple locations of historical knowledge. A value-free, empirical, objective history is an impossible ideal: historians can never free themselves from their own biases and all pasts are culturally mediated and socially constructed. Historical works written by “expert” historians; anthropologists and members of other academic guilds are socially constituted as authority and have no privileged claims on universal truth. They are closer to ethnocentric ideology than to scientific objectivity. There is no past to be *reconstructed* — only many, equally “true” or equally fictitious pasts to be *constructed*. There are no objective means of distinguishing between truth and falsehood since reality is what each individual believes it to be. As such, postmodernism is primarily a critique of many basic tenets of objectivism and positivism rather than a viable alternative.⁴

The Role of Oral Traditions

Oral traditions have an important role in the contested terrain between historical objectivism and postmodernism. While they have often focused on written documents, historical objectivists have not totally ignored oral sources and have incorporated them into their reconstructions of the past after first subjecting them to varying degrees of scrutiny. In a recent study, I reviewed numerous examples of Aboriginal oral traditions which contained useful facts about remote periods in history, as well as many instances in which scholars employed this evidence in standard historical reconstructions.⁵

Critics of the objectivist approach believe that oral traditions should not be mined for facts to be used as evidence in positivist histories, but should stand on their own as valid alternatives to such histories and regarded as worthy of study in their own right. Postmodernists raise questions about who is empowered or authorized to tell the story about the past, who controls the authentication process, and whose voices are included and whose are

excluded or marginalized. Indeed, the term “voice” is prominent in the fashionable language of postmodernist discourse. It is with the “return of voice” that marginalized or minority groups, including Aboriginal peoples, can reclaim the past from “expert” academics, construct their own pasts, assert social power and claim rights. It is argued that oral traditions, in particular, can challenge biased, hegemonic history based on written records; democratize elitist historical disciplines; and give balance to an historical record.⁶

Reputable scholars draw from both ends of the continuum and try to situate their work in a comfortable middle ground. Unfortunately, excessive fidelity to the postmodernist end of the spectrum as well as a number of peculiar misconceptions have fostered untenable generalizations in the academic community, in First Nations political rhetoric and in Aboriginal litigation. I will briefly explore only a few of those generalizations.

Bias

It is frequently suggested that history, as told by outsiders, is inherently biased, politically motivated, and amounts to an assertion of dominance and power over those whose past is being told. The voices of First Nations people are believed to be essential because only they can confront the distorting cultural biases that allegedly inform “expert” views of Aboriginal history. These biases are said to include, for example, the notion that Aboriginal societies were static and without history until after contact with “progressive” European cultures.⁷ However, non-Aboriginal archaeologists first corrected this bias by demonstrating that the cultures of First Nations people underwent constant change prior to European contact, challenging the racist attitudes of nineteenth-century evolutionism and outdated ideas of progress.⁸ Significantly, the bias was confronted internally, in the absence of trendy postcolonial theory and without recourse to oral traditions or an

overt challenge from First Nations people.⁹ Clearly, it is not necessary to be an Aboriginal person to identify and overcome distorting biases.

Many also assume that the written record produced by Europeans is inherently biased because it was not produced by Aboriginal people but by strangers who had little understanding of the people they were writing about. How, then, does one explain the fact that written accounts by missionaries, fur traders, soldiers, explorers and other newcomers are commonly used to support Aboriginal claims? Good examples are the records of Hudson's Bay Co. trader William Brown and Peter Ogden which were relied upon by the Gitksan and Wet'suwet'en plaintiffs in the *Delgamuukw* trial to challenge the idea that an Aboriginal land-tenure system developed in response to the European fur trade.¹⁰

The postmodernists are correct in their observation that Western historical disciplines can become tools for use in the subordination and domination of non-Western peoples. Yet it must be conceded that these same disciplines also become the tools of resistance. Many First Nations people have overcome their long-felt mistrust of Western approaches and have used modern science in research, exhibition and education¹¹ to challenge other versions of their history,¹² to support Aboriginal rights,¹³ or to oppose development on their lands.¹⁴ As one Blackfoot Elder said, archaeology "had done more for the betterment of native peoples than all of the missionary and government agents had ever done."¹⁵ Archaeology is a source of information that is independent of written accounts and can help to ensure that history is not only written by the winners.¹⁶ Critics who charge that Western anthropologists and archaeologists are inherently biased because of their non-Aboriginality, or who argue that their research and findings harm First Nations interests,¹⁷ must also be prepared to explain why it is that archaeological data often provides compelling support for Aboriginal claims.¹⁸

Those First Nations activists who claim that unflattering academic views of their history are the result of Western prejudices are just as likely to accept positive contributions emerging from the research of non-Aboriginal scholars.¹⁹ In many respects, historical objectivism, including the scholarly apparatus that goes with it, has become the dominant posture of modern Aboriginal intellectuals involved in the public representation of their history.²⁰ Others have been influenced by postmodernist literature and are employing this relatively new Western approach to dismantle colonial thought.²¹ Curiously, Aboriginal intellectuals who see the use of oral traditions by Western historians as a form of cultural appropriation have themselves appropriated the discourse of Western postmodernism to make the argument.²² Many First Nations writers have voluntarily incorporated Western scholarship into their own 'voice,' partly because modern anthropology, history and other disciplines frequently challenge rather than perpetuate the myths used to assert dominance and power over Aboriginal people.²³

Aboriginal people are humans like everyone else and their voices can be just as self-serving and biased as the writings of non-Aboriginal people. This makes it particularly important that all assertions about the past, whether written or oral, are subjected to scrutiny and are not accepted at face value for any reason, including political expediency or cultural sensitivity. Unlike heritage, which often makes the past an exclusive possession created to protect group interests, history is an open inquiry into any and every past; it is comprehensive, collaborative and open to all.²⁴ Members of any given culture are not inherently better qualified to give an accurate representation of themselves and their history. No scientific or moral arguments can be advanced for restricting the study of the past to members of the group being investigated, or for giving any group exclusive proprietary rights to its history. On the contrary, the history of any people is greatly enriched

because individuals from outside the group study it.²⁵ Charges of cultural appropriation²⁶ are often misguided and based on an outdated view of scholarly practice. In my view, James Henderson, a prominent Aboriginal legal scholar, is simply wrong when he alleges that efforts to understand Aboriginal pasts using a foreign world view “is the essence of cognitive imperialism and academic colonization.”²⁷

There are many reasons why the perspective of the people whose past is being explored must be given serious consideration, but the absence of bias and assurances of accuracy are certainly not among them. Postmodernists agree that voices coming from the inside are not necessarily free from bias. Indeed, most argue that since *all* voices are inherently biased, *all* stories about the past are equally valid alternatives. Despite many attractions, this position also has profound limitations. When taken to its obvious radical conclusion, postmodernism leads to a conundrum. It is a socially constructed Western ideology that cannot present itself as a better alternative to its older competitor without creating a privileged position for itself, thereby undermining its own ideals. It must also dilute its own relativism or be charged with tolerating morally repugnant or socially noxious historical theories. Furthermore, in its extreme form, it offers only a debilitating nihilism that denies the existence of a basis for knowledge and precludes any consensus on what happened in the past. The notion that there is no past to be reconstructed and that all stories are equally true is contrary to common human experience and is rejected by most Aboriginal as well as non-Aboriginal people. More importantly, it is an entirely impractical epistemology when dealing with situations in which decisions about what happened *must* be made.

The Orality-Literacy Continuum

A second problem that deserves attention is the common tendency to

dichotomize orality and literacy. While the terms ‘oral’ and ‘orality’ have often been contrasted with ‘written’ and ‘literacy,’²⁸ these seemingly obvious distinctions are rather slippery in practice.²⁹ Aboriginal cultures have often been characterized as ‘oral.’³⁰ Since it is no longer possible to generalize validly about oral or literate individuals, it would be a mistake to divide entire cultures along these lines. There is now a widespread academic consensus that orality and literacy should not be regarded as a dichotomy. Even literacy may not represent a pole, now that the world has entered an era of ‘post-literate’ communication. Simply put, orality and literacy are no longer among the reasons for distinguishing between Aboriginal and non-Aboriginal peoples.³¹

It is often forgotten that alphabetic systems are not the only form of writing in Aboriginal North America.³² Prior to European contact, there were systems of writing without words which constituted a nonalphabetic form of literacy. Since there is nothing inherent in orality that fosters accurate transmission of information, and since the memories of Aboriginal people are no different from those of other humans, it comes as no surprise that First Nations people had *aides-mémoire* such as notched or marked sticks, dendroglyphs, wampum and pictography. The fact that these exist is in and of itself evidence that the people who invented them understood the limitations of memory. They not only illustrate how oral traditions frequently depend on mnemonic cues, but serve to undermine generalizations about how “Canada’s First Nations had no written history.”³³

For millennia, Aboriginal people had writing *without* words. Over the course of the last few centuries, many have also written *with* words. This makes for a situation that is far more complex than advocates of a simple orality-literacy dichotomy would have us believe. In some cases, missionaries adapted European languages to indigenous sound systems. In

other instances, native speakers modified European writing for their own use. Still others devised and perfected entirely new systems, including syllabaries, ideographic script such as hieroglyphic writing and countless orthographies.³⁴

Then there is English — a language that (either through a voluntary strategy of adaptation or, more often, involuntary participation in that catastrophic experiment known as the residential school) has become the lingua franca and the basis of literacy for the majority of First Nations people in Canada.³⁵ For some peoples, such as the Inuit of the Arctic, English literacy has been a recent development.³⁶ In other parts of Canada, however, Aboriginal peoples have been speaking and writing in English for more than three centuries.³⁷ The degree to which written sources have been incorporated into oral documents has often been underestimated. Scholars working in many different countries have noted this phenomenon, known as “feedback.” The feedback effect is common in oral traditions related in all but the most remote areas of the world.³⁸ Throughout the twentieth century, First Nations people have increasingly consulted the corpus of written research in the public domain,³⁹ while at the same time drawing on their rich inventory of non-recorded oral traditions.

Aboriginal Traditions and

Non-Aboriginal Traditions

A third popular but untenable generalization posits a stark distinction between Aboriginal and non-Aboriginal historical traditions. Anthropologists discovered long ago that temporal orientation is, to a certain extent, a cultural construction. The past is not always remembered lineally, sequentially, chronometrically or calendrically. For this reason, history may involve compression or telescoping of time, or may even be conceived of in cyclical terms.⁴⁰ Unfortunately, these insights have led to extreme forms of

cultural relativism, in which differences are frequently accepted without question. Maurice Bloch recognized this as part of a “recurrent professional malpractice of anthropologists to exaggerate the exotic character of other cultures.”⁴¹ Extreme relativism is an exaggeration because if every culture conceived of things in entirely unique ways, no culture but our own would be comprehensible to us. In other words, if members of other cultures really did have entirely different concepts of time and history, we simply could not do what we obviously do, that is communicate with them.⁴² Just as ethnocentrism assumes that everyone thinks alike, so too extreme relativism takes it for granted that all cultures are completely different. Frequently, neither position is founded on solid cross-cultural research.

Having examined numerous studies and researched this issue at some length, I have come to the conclusion that the contrast between the two “traditions” or “perspectives” is fraught with oversimplification, generalization, and reductionism. First Nations cultures are rich in their diversity. While it is appropriate to recognize and celebrate differences between these cultures and more recent immigrants, facile dichotomies between linear and cyclic, between an interest in the past and a timeless present, or between a caricatured non-Aboriginal historical tradition and a monolithic Aboriginal historical tradition are overstated and contrary to evidence.⁴³ In the case of Aboriginal claims, such dichotomies can lead to the type of divisive “us” and “them” mentality that limits intercultural communication and ultimately works against consensus-building.

The Delgamuukw Trial Judgement

Oral traditions figured prominently in the *Delgamuukw* trial.⁴⁴ Some judges in earlier years may have been guilty of a mechanical application of the rules of evidence which rendered entire classes of materials inadmissible even before they could be weighed against other evidence. This was not the case

here, for many of the oral documents tendered by the Gitksan and Wet'suwet'en, either through *viva voce* testimony or in the form of written affidavits, were admitted as evidence. It was only after careful deliberation that Chief Justice McEachern ultimately gave them little weight. I recently had occasion to study the trial decision and am preparing a detailed analysis; for now, I will confine my remarks to a few observations on the published reaction to the decision.

There is a widespread consensus that in his Reasons for Judgement, Justice McEachern volunteered several unnecessary remarks in a language reminiscent of nineteenth-century evolutionism. His notion that the Aboriginal plaintiffs were a "primitive" people prior to contact with Europeans and his use of Western technologies as a yardstick to measure progress⁴⁵ was offensive, not only to the First Nations plaintiffs, but to the many non-Aboriginal academics who have struggled hard to overturn such ethnocentrism. For these reasons, his judgement has been justifiably criticized.⁴⁶ It has also been charged that Justice McEachern's treatment of ancient documents is not in accord with mainstream historical scholarship.⁴⁷ Since the Chief Justice appears to have adopted the long-abandoned view that such documents largely speak for themselves,⁴⁸ this criticism also has validity. Complaints about his treatment of oral traditions, on the other hand, have in my view generally been unfair and off the mark.

Justice McEachern has been chastised for ignoring context in his use of written documents and for failing to subject these sources to further corroboration before giving them probative value.⁴⁹ However, in a classic example of damned if he does and damned if he doesn't, some of his detractors have accused him of "ethnocentric biases," and an "ethnocentric vanity verging on racism"⁵⁰ for applying these same, commonly accepted principles of research to oral documents. There have been complaints that the Judge's narrative "is about the unchallengeable authority of the now

familiar ‘Western scientific tradition’”⁵¹ and that his dismissal of Aboriginal oral traditions is based on a “naive positivism.”⁵² Julie Cruikshank criticizes Justice McEachern for being overly concerned about the “reliability” of oral traditions and for seeing the value of oral traditions exclusively in terms of their contribution to a positivistic reconstruction of “what really happened.” She advances the thesis that “the court’s decision to present and evaluate oral tradition as positivistic, literal evidence for ‘history’ is both ethnocentric and reductionist, undermining the complex nature of such testimony because it fails to address it on its own terms.” She asserts that “there is in anthropology an extensive body of literature which guides scholarly analysis of oral tradition; in that literature, concerns about ‘literal truth’ of oral traditions were superseded almost a century ago.”⁵³

Critics like Cruikshank ignore two important facts. First, the Aboriginal plaintiffs *themselves* tendered oral traditions as truthful statements about what really happened and it was they who went to great lengths to establish the historicity and trustworthiness of these traditions by pointing to internal training, testing and validation procedures and by calling on independent, scientific corroboration. It seems clear that many Gitksan believe that their oral traditions come from the past, are about a remote past, and can be used as evidence to construct history in a positivistic sense.⁵⁴ More specifically, both lay and expert witnesses relied upon the traditions to prove the connection between precontact and present societies, ancient land use and territorial boundaries.⁵⁵ Whatever their usual role within the community, once oral traditions are offered as insights into a past that is contested or otherwise under investigation and are marshaled in support of an argument in a dispute with outsiders, they are either transformed into or specifically generated as *evidence* and can no longer be addressed solely on their own terms.

Secondly, Cruikshank’s assertion that anthropologists no longer have

an interest in the historicity of oral traditions and no longer seek to extract facts about what “actually” happened in the past represents a rather narrow slice of the range of approaches having currency in the second half of the twentieth century.⁵⁶ Cruikshank’s antipositivism has by no means superseded other approaches. True, some historians and anthropologists, including myself, have gone beyond what “really happened” and developed an interest in what people believe might have happened. They acknowledge the legitimacy of self-representation and write accounts outlining how a group of people conceive of their histories on their own terms and construct their own historical consciousness within their own frameworks of analysis. Nevertheless, since some oral traditions are demonstrably containers of facts about the past, scholars continue to combine them with other evidence in standard positivist histories.⁵⁷

A careful reading of his *Reasons for Judgement* suggests that Justice McEachern’s critical approach to oral traditions was not stimulated entirely by his personal predilections or the ideology of his profession, but was also inspired by mainstream academic opinion. For instance, he cited a lengthy excerpt from Bruce Trigger’s *Time and Traditions*, in which one of the most influential Canadian anthropologists of this century noted that oral traditions are as much about the present as the past, that they are reworked from generation to generation, that they require careful evaluation, and that when used uncritically they can be a source of much confusion.⁵⁸ Since this scholar was among the many ‘learned authors’ who reminded the judge to be cautious,⁵⁹ it is unfair to intimate that Justice McEachern’s critical approach was not in accord with modern anthropological thinking. Or, as other critics claim, that his approach was generated “exclusively within the framework of western jurisprudence,” arose from a “Canadian legal ideology,” and conveyed an “orientation lag between current academic approaches and conservative judicial practice.”⁶⁰ By admitting oral

documents into evidence, recognizing that they are not *prima facie* proof of the truth of the facts stated in them, taking note of the context in which they were generated, evaluating them for internal consistency, comparing them with other available evidence, and carefully weighing them, the judge did precisely what his critics suggest he should have done with written documents.⁶¹

Delgamuukw in the Supreme Court of Canada

Chief Justice Antonio Lamer of the Supreme Court of Canada noted that the *Delgamuukw* appeal raised “an important practical problem relevant to the proof of aboriginal title which is endemic to aboriginal rights litigation generally — the treatment of the oral histories of Canada’s aboriginal peoples by the courts.”⁶² The Court’s response to Justice McEachern’s decision will undoubtedly influence the way in which lower courts approach Aboriginal oral traditions for many years to come. Although I have studied the decision in considerable detail, I again offer only a few preliminary remarks.

Since the trier of fact is in direct contact with the mass of evidence, the Supreme Court has been reluctant to interfere with the findings of fact made by a trial judge.⁶³ Indeed, the Court refused to question Justice McEachern’s decision to reject the testimony of two anthropologists who served as expert witnesses on behalf of the Aboriginal plaintiffs.⁶⁴ However, when it came to the same trial judge’s decision to assign little weight to the oral traditions, the Court waived the principle of noninterference and offered a lengthy critique. The Chief Justice argued that such appellate intervention was warranted because the trial judge did not have the benefit of the principles laid down in the *R. v. Van der Peet* case, which instructed courts to appreciate the unique evidentiary difficulties inherent in adjudicating

Aboriginal claims and to adopt a special approach that does not undervalue the evidence presented by First Nations people. Since Aboriginal rights are defined by reference to pre-contact practices (or, in the case of title, pre-sovereignty occupation), the Court reasoned that written documents are usually unavailable and oral documents are often “the only record of their past.” Hence, the “Aboriginal perspective” must be accorded “due weight” by the courts. The oral evidence given by Aboriginal people must be accommodated and “placed on an equal footing with the types of historical evidence that the courts are familiar with, which largely consists of historical documents.”⁶⁵

The Supreme Court agreed with the trial judge that the *adaawk* and *kungax* oral traditions of the Gitksan and Wet’suwet’en people were admissible out of necessity as exceptions to the hearsay rule, but disagreed with his decision not to give them independent weight. The Chief Justice feared that since the deficiencies identified by the trial judge are inherent in all oral traditions (an assumption that is, incidentally, demonstrably false), such traditions would be consistently “undervalued” in Canadian courts.⁶⁶ Furthermore, the trial judge apparently erred when he discounted the “recollections of aboriginal life” on the grounds that they did not demonstrate land use beyond 100 years ago; here, Justice McEachern had “expected too much.”⁶⁷ Finally, the trial judge erred in his treatment of oral documents adduced in the form of territorial affidavits. He should not have rejected them on the grounds that their contents were not known in the general community, that the subject matter was disputed, and that they had been generated in the context of land claims discussions.⁶⁸ Since conclusions on issues of fact might have been very different had the trial judge assessed the oral traditions “correctly,” the Supreme Court suggested that his factual findings cannot stand and that a new trial was warranted.⁶⁹

The *Delgamuukw* decision is in keeping with a recent trend that has

effectively lowered the standard of proof in Aboriginal and treaty rights cases.⁷⁰ In my view, the decision is problematic because, while lowering the standard is well intentioned, the rationale for doing so is based on misconceptions that can be traced back to the earlier *Van der Peet* decision.

In *Van Der Peet*, Chief Justice Lamer held that since producing “conclusive” evidence about Aboriginal practices, customs and traditions prior to contact with Europeans is a “next-to impossible task,” the evidence relied upon may relate to Aboriginal practices “post-contact,” provided these have their “origins pre-contact” or “can be rooted in the pre-contact societies.”⁷¹ This is apparently intended to overcome “the evidentiary difficulties in proving a right which originates in times where there were no written records.”⁷² Such reasoning will appear puzzling to anyone familiar with modern approaches to reconstructing the past.

First, even if it were possible to obtain conclusive evidence about the past, the conclusiveness of such evidence would have nothing to do with whether it relates to pre- or post-contact times. Suggesting that pre-contact evidence is more difficult to obtain than post-contact evidence is indulging in a baseless generality, since there is nothing inherent in the latter evidence that lessens the difficulties. For reasons I need not detail here, the written records generated during the period after European contact and the oral traditions collected in recent times are not necessarily more conclusive than archaeological evidence that serves as the basis of much of our knowledge about pre-contact life. In fact, in many cases, a good argument can be made that the archaeological record (which, after all, was generated by Aboriginal people living at the time), must be preferred over later written and oral records, which can only be projected into the past through inferential argument.⁷³

It is of course true that the pre-contact record does not contain all the perishable components of land use and practices, which might form the basis

of title and rights. As Justice Mahoney said in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, “snow houses leave no ruins.”⁷⁴ Yet reconstructing pre-contact Aboriginal land use and associated practices such as hunting and fishing is not at all a “next-to-impossible task,” particularly with the emergence of archaeozoology, archaeobotany and other specialized fields which have provided valuable insights into subsistence activities. In some instances, extensive knowledge is now available about all the different animal and plant species hunted, fished or collected by a particular Aboriginal group, the time of year during which they inhabited a particular campsite, the amounts of edible meat they obtained, how they butchered and cooked their food and how they disposed of their garbage.⁷⁵ In many cases, we are also able to outline, with a reasonable degree of certainty, socio-political systems and even ideology, symbolism and religion.⁷⁶ If disputing parties invested as much money in state-of-the-art archaeological fieldwork as they now do on lawyers, they might be surprised at the result.

Secondly, if it is indeed “next-to-impossible” to produce evidence from pre-contact times, how is anyone to overcome the hurdle of demonstrating that the post-contact practices, customs and traditions have their “origins pre-contact” or “can be rooted in the pre-contact societies”? There is no practical way of untying this Gordian knot, although it can be cut by adopting the type of inferential argument known as analogical reasoning. This involves carefully projecting a post-contact known (the source-side of the analogy) back into a pre-contact unknown (the subject side of the analogy). When done properly, this sophisticated method has successful applications.⁷⁷ In the hands of the untrained, however, it is prone to misuse and can easily turn into circular reasoning.⁷⁸ A skilled ethnohistorian can project written records and oral traditions into the past, but to ‘root’ a practice in pre-contact times requires at least some independent evidence of

the type only archaeology can provide.

The Supreme Court's rationale is at least partly based on a well-known necessity argument that, together with the circumstantial probability of reliability argument, constituted the original common law justification for admitting oral traditions as exceptions to the hearsay rule. The necessity justification seems straightforward enough since there is no dependable way of consulting a witness once he is dead. Resorting to other types of evidence is essential; otherwise a claimant would never be able to prove anything. That this *necessarily* means recourse to oral traditions is, however, an unwarranted assumption. In my experience as an expert witness in numerous Aboriginal litigations from Newfoundland to British Columbia, I have always incorporated oral traditions as part of my evidence whenever they were available. Yet, I have never encountered a case in which oral traditions were absolutely necessary because they were "the only record of their past." On the contrary, in most parts of the country the material date (either European contact or assertion of sovereignty) is beyond the temporal scope of many oral traditions and it usually becomes necessary to tender other evidence.

The Supreme Court's instruction that oral traditions be "placed on an equal footing" with historical documents⁷⁹ has already become a source of much confusion and speculation. Does the Court mean that oral traditions be placed on an equal footing because they may contain at least some features of historicity which are *not*, in the Court's words, "tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth"?⁸⁰ Does equal footing mean that oral traditions should be subjected to the same rigorous tests routinely conducted by historians on written materials? Or does the Court have in mind something closer to the postmodernist end of the spectrum — perhaps an approach that gives "due weight" to any Aboriginal voice merely because of its Aboriginality and

irrespective of whether it is tangential to the task or fails standard tests? Of course, the latter approach risks an imbalance in which oral traditions will be consistently and systematically *overvalued* in the courts below because who will dare question an elder? The rejection of McEachern's critical analysis will almost certainly be regarded by some not merely as an effort to level the field or lower the standard, but as an outright abandonment of the rigorous scrutiny that is essential to any fact-finding process. When taken to its logical conclusion this would seem unworkable in conflict resolution and, as others have noted,⁸¹ it would open the way for a radical reinvention of the law itself.⁸²

It is unfortunate that the Supreme Court in *Delgamuukw* has perpetuated the untenable orality/literacy and Aboriginal/non-Aboriginal dichotomies, since the net effect has been to isolate oral traditions as an exotic species of evidence. I hasten to add that I do not place the blame on the learned justices but, rather, on the absence at trial of expert witnesses qualified to assess the tendered oral documents, form opinions on their strengths and weaknesses, and demonstrate how these commonly-used sources are best used in methodological conjunction with other evidence.

Conclusions

My elders taught me that a respect for people's beliefs should not preclude scientific inquiry.⁸³ Furthermore, I learned that reducing all human ideas to a common level conflicts with the fact that our modern scientific understanding, despite all its shortcomings and possibilities for misuse, remains qualitatively different from other belief systems and more closely approximates what is external to the individual.⁸⁴ That this understanding emerged from the Western intellectual tradition should not disqualify it as a suitable framework for studying Aboriginal pasts. It has given rise to methods that remain the most comprehensive, inclusive and flexible

available.⁸⁵ Although it is incapable of arriving at absolute truth, it is a way to knowledge that can be both dependable and reliable.⁸⁶ When used as a tool of oppression, a Western approach can do much harm to First Nations people, but when used responsibly and fairly it can serve members of all cultures well. This is particularly true when the rigour of positivism incorporates some of the more important and useful messages of the postmodernist critique.

The relativistic orientation of postmodernism (much like the anthropological cultural relativism from which it is partly derived) leads to a fuller appreciation of First Nations and the ethical and moral principles underlying the actions, beliefs and practices of their members.⁸⁷ That complete objectivity is unobtainable is also an important lesson, although it must never become an excuse for abandoning the positivist ideal.

Courts simply do not have the ivory-tower luxury of pronouncing that all stories about the past are socially constituted and equally true. Aboriginal litigations are invariably fact-finding exercises and usually involve making decisions about what actually happened in history. However, while judges may have brilliant legal minds, they often lack the specialized training that is required to reconstruct Aboriginal pasts. Fortunately, there are competent expert witnesses who do have the requisite skills, have spent their lives working with the same types of evidence, and are able to assist courts in their difficult tasks. Since judgements issued by courts impact the lives of many Canadians, it is absolutely essential that decisions be informed by the best research available today.

As a participant in numerous litigations across the country, I have adopted an approach that I believe is most useful in resolving the complex historical issues before the courts. In accord with mainstream scholarship,⁸⁸ this approach tries to achieve a rapprochement between various scholarly disciplines and to effect a balance between historical objectivist and

postmodernist, or between positivist and relativist positions. It recognizes the legitimacy of self-representation and acknowledges that what people believe about their own past must be respected and receive serious historical consideration. At the same time, it assumes that there was a real past independent of what people presently believe it to be, and that valuable information about that past may be derived from various sources including oral histories and traditions. It accepts that both non-Aboriginal and Aboriginal scholars can be biased, that various pasts can be invented or used for political reasons, and that a completely value-free history is an impossible ideal. Nevertheless, it postulates that the past constrains the way in which modern interpreters can manipulate it for various purposes. While the actual past is beyond retrieval, this must remain the aim. The reconstruction that results may not have a privileged claim on universal 'truth,' but it will have the advantage of being rigorous. The approach rejects the fashionable notion that because Aboriginal oral histories and traditions are not Western, they cannot be assessed using Western methods and should be allowed to escape the type of scrutiny given to other forms of evidence.⁸⁹ Ultimately, the perspective is in accord with Bruce Trigger's belief that public wrongs cannot be atoned by abandoning scientific standards in the historical study of relations between Aboriginal and non-Aboriginal people.⁹⁰

Notes

1. This paper is based in part on research conducted while preparing several studies commissioned by the Department of Indian and Northern Affairs (see von Gernet 1996, 1998), as well as on the author's forthcoming book on the use of oral histories and traditions in reconstructing Aboriginal pasts. All references contained in the footnotes are listed alphabetically in the references cited section.

2. I follow the common scholarly practice of distinguishing between oral history and oral tradition. Although the literature is not always consistent, oral histories are most often defined as recollections of individuals who were eyewitnesses or had personal experience with events occurring within their lifetime. Oral traditions, on the other hand, are oral narratives about past events transmitted by word of mouth over at least a generation.

3. Carr 1961: 5-7; Fogelson 1989: 135; Hedican 1995: 25-29; Kellner 1975: 291; Krech 1991: 351-352; Lowenthal 1996: 106-111; Miller 1992b: 56; Novick 1988: 1-2; Tough 1990: 6.

4. Cohen 1994: 4, 241; Cruikshank 1994a: 162-163; Culhane 1992: 70; Fienup-Riordan 1988; Fogelson 1989: 135, 138; Grace 1998; Hill 1988: 3; Krech 1991: 352; Novick 1988: 3, 16-17, 523; Tough 1990: 6-7; Trigger 1995: 319-321; 1998: 5-6, 15.

5. Von Gernet 1996.

6. Cohen 1994: 79; Cruikshank 1988: 198; 1992a: 33; 1992b: 8; 1994a: 147-148; 1994b: 403, 417; Culhane 1992: 68; Finnegan 1992: 48; Fisher 1992: 46-47; Fortune 1993; Kew 1994: 83, 92; McDonald et al. 1991: 75; Moss and Mazikana 1986: 19, 73; Perdue 1980: xix; Quintana 1992: 86; Reimer 1981: 30-31; 1984: 2; Seligman 1989: 176-177; Thompson 1988: 5-6; Treaty 7 Elders 1996: 327-329; Trigger 1998: 15; cf. O'Farrell 1979: 5.

7. Fortune 1993: 92; Gisday Wa and Delgamuukw 1988: 37; Henderson 1997: 21-23.
8. Pryce 1992: 38; Trigger 1980; 1989; 1995: 324; 1998: 22-23.
9. Trigger 1998: 22-23.
10. Gisday Wa and Delgamuukw 1988: 39-40; Ray 1990: 15-19; 1991.
11. Anawak 1989: 48-49; Bielawski 1989: 231-232; Cruikshank 1992b: 9.
12. McDonald et al. 1991: 77.
13. Sioui 1992: 82-89.
14. Wickwire 1991: 53-54, 69.
15. quoted in Fox 1989: 31.
16. Gathercole 1990: 1; Rubertone 1989: 32, 37-43.
17. e.g., Callison 1995: 168; Deloria 1995.
18. Devine 1991: 16.
19. Trigger 1982: 7.
20. Ciborski 1990: 244; von Gernet 1995: 123.
21. e.g., Henderson 1995: 207; 1997: 23.
22. e.g., Callison 1995.
23. At the same time, this Western scholarship is also engaged in debunking tenacious myths entertained by some Aboriginal people. These include the idea that Indians did not practice scalping until after Europeans taught them how, as well as the notion that the United States Constitution was closely patterned on the League of the Iroquois (Axtell 1988: 252; Tooker 1988).
24. Lowenthal 1996: 119-120, 128-129; Washburn 1987: 95-96.
25. Trigger 1982: 8.

26. Callison 1995.

27. Henderson 1997: 23. This is not to say that the reconstructions of outsiders are always more accurate. In fact, some local histories told by First Nations people have been shown to be more accurate than those offered by their non-Aboriginal neighbours (Meighan 1960: 60).

28. e.g., Ong 1982.

29. Finnegan 1992: 5-6, 50.

30. See, for example, Gisday Wa and Delgamuukw (1988: 33). They are also commonly regarded as 'preliterate' (e.g., Gover and Macaulay 1996: 60), although this term is fraught with an implicit technological determinism and evolutionary connotation (Chamberlin 1997: 8; McRanor 1997: 81-82).

31. Battiste 1984: 37-39; Edwards and Sienkewicz 1990: 6, 215; Finnegan 1992: 141; Goody 1987: xii-xiv; Heath 1984: 54; Pomedli 1992: 335-336; Pylypchuk 1991: 55-56; Sherzer and Woodbury 1987: 9-10; Tannen 1982a: 3; 1982b; Urion 1991: 6-7.

32. Battiste 1984: 28-31; Daly 1993: 223; Vastokas 1996: 57; Walker 1981.

33. McLeod 1992: 1279.

34. Battiste 1984; Walker 1981.

35. Miller 1996.

36. Petrone 1988: xi-xiii; see also Moses and Goldie 1998.

37. Petrone 1983: vii, 169.

38. Cohen 1994: 230; Henige 1974: 96-103; 1982: 81-83; Sturtevant 1966: 31-32; Vansina 1985: 31, 156-157; von Gernet 1995: 120-123.

39. Spurling 1988: 74; Sturtevant 1966: 31-32; Trigger 1985: 167; von Gernet 1994b: 12-13.

40. Allen and Montell 1981: 25-26; Fontana 1969: 370; Fortune 1993: 90; Hallowell 1937: 652, 665-666; Henderson 1995: 223-224; Henige 1974: 2, 14; McClellan 1970: 116, 118; Mills 1994: 30; Morantz 1984: 174; Ratelle 1992: 4; Stone 1993: 3, 63-72; Sypher et al. 1994: 54; Vansina 1985: 173.
41. Bloch 1977: 285.
42. Bloch 1977: 283; Hedican 1995: 28.
43. Layton 1989: 4; Williams and Mununggurr 1989: 73.
44. The disputing parties and the judge subsumed under the rubric 'oral histories' a number of different oral documents which, according to the definitions given supra, are more properly characterized as oral traditions, since they depend on the intergenerational transmission of successive memories.
45. McEachern 1991: 208, 221, 222.
46. Asch 1992; Asch and Bell 1994; Burns 1992; Cassidy 1992; Cruikshank 1992a; 1994b: 411-413; Culhane 1992; Daly and Mills 1993; Fisher 1992; Fortune 1993; Foster 1992; Frideres 1998: 67; George 1992; Gover and Macaulay 1996; Jeffrey 1992; McLeod 1992: 1282-1283; Miller 1992a; 1992b; Mills 1994: 3-33, 177-187; 1995; Monet and Skanu'u 1992; Pylypchuk 1991: 72-73; Ray 1990; 1991; Ridington 1992a; 1992b; Schwartz 1992; Slattery 1992; Sterritt 1992; Stone 1993: 122-143; Storrow and Bryant 1992; Tennant 1992; Wetzel 1995: 85-86; Wilson 1992; Wilson-Kenni 1992.
47. Fisher 1992; Fortune 1993; Miller 1992a: 6; 1992b.
48. McEachern 1991: 251.
49. Asch and Bell 1994: 514-515, 537; Culhane 1992: 78; Fisher 1992: 44, 46-47; Fortune 1993: 101-102.

50. McLeod 1992: 1283-1284.

51. Fortune 1993: 114.

52. Miller 1992b: 55-56, 62.

53. Cruikshank 1992a: 26, 37, 38.

54. Anonymous 1992; Asch and Bell 1994: 542; Cassidy 1992: 6-7; Culhane 1992: 68; Fortune 1993: 95; Gisday Wa and Delgamuukw 1988: 26-27, 34-36; Jeffrey 1992: 58; Joseph 1994: ix; McEachern 1991: 243, 258-259, 263-270, 272; McLeod 1992: 1288; McRanor 1997: 69; Mills 1994: 17-18, 74; Monet and Skanu'u 1992: 3, 30, 32, 36, 38, 92, 110, 139; Ray 1990: 14; Stone 1993: 127-129; 137-138.

55. McEachern 1991: 243-245, 252, 258.

56. Brown 1991; Harris 1968; Krech 1991; Layton 1989; Trigger 1989; Vansina 1985.

57. For a brief review see von Gernet 1996.

58. McEachern 1991: 246.

59. McEachern 1991: 259.

60. Asch and Bell 1994: 505; Cruikshank 1992a: 40; Stone 1993: 122.

61. Culhane 1992: 78; Fisher 1992: 44, 46; Fortune 1993: 102. Critics who, because of strong commitments to a postmodernist relativism, decry the tendency of Canadian courts to apply Western principles of rigorous scholarship to Aboriginal oral documents, offer little in the way of alternatives. Joel Fortune, for example, conveniently resorts to the well-worn excuse that this is "beyond the scope" of his commentary (Fortune 1993: 107).

62. Lamer et al. 1997: 1027.

63. Lamer et al. 1997: 1064-1065, 1070.

64. Lamer et al. 1997: 1071.

65. Lamer et al. 1997: 1065-1077.

66. Lamer et al. 1997: 1072-1074.

67. Lamer et al. 1997: 1075-1076.

68. Lamer et al. 1997: 1076-1078.

69. Lamer et al. 1997: 1079.

70. Gover and Macaulay 1996: 56-59.

71. Lamer et al. 1996: 205.

72. Lamer et al. 1996: 207.

73. Unlike oral documents, which because they are generated in the present can raise suspicions about their pastness, the antiquity of the archaeological record is generally indisputable.

74. Gover and Macaulay 1996: 48, 58.

75. e.g., von Gernet 1992b.

76. von Gernet 1992a; 1993. Aboriginal religious beliefs can also be reconstructed with a tolerable degree of certainty from written records produced by Europeans shortly after first contact (e.g., von Gernet 1994a).

77. e.g., von Gernet 1993.

78. It is, for example, inappropriate to argue that a post-contact practice has an origin pre-contact and at the same time infer the pre-contact practice solely from post-contact evidence.

79. Lamer et al. 1997: 1069.

80. Lamer et al. 1997: 1068-1069.

81. Fortune 1993: 95-96.

82. It does not appear that the Supreme Court is ready for such a reinvention; as the Chief Justice says, the accommodation that accords due weight to the perspective of Aboriginal peoples, must be done in a manner which “does not strain” the Canadian legal structure (Lamer et al. 1997: 1066).

83. Fontana 1969: 366-370; Sturtevant 1966: 22-23; Trigger 1982: 6; Washburn 1987; Wiget 1982: 181-182.

84. Trigger 1995: 323.

85. Axtell 1997: 23.

86. Feder 1990: 12.

87. Hedican 1995: 26.

88. Krech 1991: 352.

89. Wilson 1997.

90. Trigger 1982: 8.

References

Allen, Barbara, and William L. Montell (1981). *From Memory to History: Using Oral Sources in Local Historical Research*. American Association for State and Local History, Nashville, Tennessee.

Anawak, Jack (1989). Inuit Perceptions of the Past. In *Who Needs the Past? Indigenous Values and Archaeology*, edited by R. Layton, pp. 45-50. Unwin Hyman, London.

Anonymous (1992). Science Supports Ancient Legends. *National Geographic* 181(3): Geographica.

Asch, Michael (1992). Errors in *Delgamuukw*: An Anthropological Perspective. In *Aboriginal Title in British Columbia: Delgamuukw v.*

- The Queen*, edited by F. Cassidy, pp. 221-243. Oolichan and Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Asch, Michael, and Catherine Bell (1994). Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*. *Queen's Law Journal* 19: 503-550.
- Axtell, James (1988). *After Columbus: Essays in the Ethnohistory of Colonial North America*. Oxford University Press, Oxford.
- Axtell, James (1997). The Ethnohistory of Native America. In *Rethinking American Indian History*, edited by Donald L. Fixico, pp. 11-27. University of New Mexico Press, Albuquerque.
- Battiste, Marie Ann (1984). *An Historical Investigation of the Social and Cultural Consequences of Micmac Literacy*. Unpublished Ed.D. Dissertation, School of Education, Stanford University.
- Bielawski, Ellen (1989). Dual Perceptions of the Past: Archaeology and Inuit Culture. In *Conflict in the Archaeology of Living Traditions*, edited by Robert Layton, pp. 228-236. Unwin Hyman, London.
- Bloch, Maurice (1977). The Past and the Present in the Present. *Man* 12(2): 278-292.
- Brown, Donald E. (1991). *Human Universals*. McGraw-Hill, New York.
- Burns, Peter T. (1992). Delgamuukw: A Summary of the Judgement. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 21-34. Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Callison, Cynthia (1995). Appropriation of Aboriginal Oral Traditions. *University of British Columbia Law Review Special Issue*: 165-181.
- Carr, Edward H. (1961). *What is History?* Vintage, New York.
- Cassidy, Frank (editor) (1992). Rethinking British Columbia: The Challenge of *Delgamuukw*. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 5-17.

- Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Chamberlin, J. Edward (1997). Culture and Anarchy in Indian Country. In *Aboriginal and Treaty Rights in Canada: Essays in Law, Equality, and Respect for Difference*, edited by Michael Asch, pp. 3-37. UBC Press, Vancouver.
- Ciborski, Sara (1990). *Culture and Power: The Emergence and Politics of Akwesasne Mohawk Traditionalism*. Ph.D. Dissertation, Department of Anthropology, University at Albany, State University of New York, Albany, New York.
- Cohen, David W. (1994). *The Combing of History*. Cambridge University Press, Cambridge.
- Cruikshank, Julie (1988). Myth and Tradition as Narrative Framework: Oral Histories from Northern Canada. *International Journal of Oral History* 9(3): 198-214.
- (1992a). Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.* *BC Studies* 95: 25-42.
- (1992b). Oral Tradition and Material Culture. *Anthropology Today* 8(3): 5-9.
- (1994a). Claiming Legitimacy: Prophecy Narratives From Northern Aboriginal Women. *American Indian Quarterly* 18(2): 147-167.
- (1994b). Oral Tradition and Oral History: Reviewing Some Issues. *The Canadian Historical Review* 75(3): 403-418.
- Culhane, Dara (1992). Adding Insult to Injury: Her Majesty's Loyal Anthropologist. *BC Studies* 95: 66-92.
- Daly, Richard (1993). Writing on the Landscape: Protoliteracy and Psychic Travel in Oral Cultures. In *They Write Their Dream on the Rock Forever: Rock Writings of the Stein River Valley of British Columbia*,

- by Annie York, Richard Daly and Chris Arnett, pp. 223-260. Talonbooks, Vancouver.
- Daly, Richard, and Antonia Mills (1993). Ethics and Objectivity: AAA Principles of Responsibility Discredit Testimony. *Anthropology Newsletter* 34(8): 1,6.
- Deloria, Vine, Jr. (1995). *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*. Scribner, New York.
- Devine, Heather (1991). The Role of Archaeology in Teaching the Native Past: Ideology or Pedagogy? *Canadian Journal of Native Education* 18(1): 11-22.
- Edwards, Viv, and Thomas J. Sienkewicz (1990). *Oral Cultures Past and Present*. Basil Blackwell, Cambridge, Massachusetts.
- Feder, Kenneth L. (1990). *Frauds, Myths, and Mysteries: Science and Pseudoscience in Archaeology*. Mayfield, Mountainview, California.
- Fienup-Riordan, Ann (1988). Robert Redford, Apanuugpak, and the Invention of Tradition. *American Ethnologist* 15: 442-455.
- Finnegan, Ruth (1992). *Oral Traditions and the Verbal Arts: A Guide to Research Practices*. Routledge, London.
- Fisher, Robin (1992). Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.* *BC Studies* 95: 43-54.
- Fogelson, Raymond D. (1989). The Ethnohistory of Events and Nonevents. *Ethnohistory* 36: 133-147.
- Fontana, Bernard L. (1969). American Indian Oral History: An Anthropologist's Note. *History and Theory* 8: 366-370.
- Fortune, Joel L. (1993). Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History. *University of Toronto Faculty of Law Review* 51(1): 80-117.
- Foster, Hamar (1992). It Goes Without Saying: The Doctrine of Extinguishment by Implication in *Delgamuukw*. In *Aboriginal Title in*

- British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 133-160. Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Fox, W.A. (1989). Native Archaeology in Ontario: A Status Report. *Arch Notes* 89(6): 30-31.
- Frideres, James S. (1998). *Aboriginal Peoples in Canada: Contemporary Conflicts*. 5th Edition. Prentice Hall Allyn and Bacon, Scarborough, Ontario.
- Gathercole, Peter (1990). Introduction. In *The Politics of the Past*, edited by Peter Gathercole and David Lowenthal, pp. 1-4. Unwin Hyman, London.
- George, Herb (Satsan) (1992). The Fire Within Us. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 53-57. Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Gisday Wa and Delgam uukw (1988). The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia. [1988] 1 *Canadian Native Law Reporter* at pp. 17-72.
- Goody, Jack (1987). *The Interface Between the Written and the Oral*. Cambridge University Press, Cambridge.
- Gover, Brian J., and Mary L. Macaulay (1996). "Snow Houses Leave No Ruins": Unique Evidence Issues in Aboriginal and Treaty Rights Cases. *Saskatchewan Law Review* 60: 48-89.
- Grace, Damian (1998). A Strange Outbreak of Rocks in the Head. *The Sydney Morning Herald*, January 21, p. 13.
- Hallowell, A. Irving (1937). Temporal Orientation in Western Civilization and in a Pre-Literate Society. *American Anthropologist* 39: 647-670.
- Harris, Marvin (1968). *The Rise of Anthropological Theory*. Thomas Y.

- Crowell, New York.
- Heath, Shirley B. (1984). Oral and Literate Traditions. *International Social Science Journal* 36(1): 41-57.
- Hedican, Edward J. (1995). *Applied Anthropology in Canada: Understanding Aboriginal Issues*. University of Toronto Press, Toronto.
- Henderson, James (Sákéj) Youngblood (1995). Míkmaw Tenure in Atlantic Canada. *Dalhousie Law Journal* 18: 196-294.
- (1997). *The Míkmaw Concordat*. Fernwood, Halifax.
- Henige, David (1974). *The Chronology of Oral Tradition: Quest for a Chimera*. Clarendon Press, Oxford.
- (1982). *Oral Historiography*. Longman, London.
- Hill, Jonathan D. (1988). Myth and History. In *Rethinking History and Myth: Indigenous South American Perspectives on the Past*, edited by Jonathan D. Hill, pp. 1-17. University of Illinois Press, Urbana.
- Jeffrey, Alice (Miluulak) (1992). Remove Not the Landmark. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 58-61. Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Kellner, Hans D. (1975). Time Out: The Discontinuity of Historical Consciousness. *History and Theory* 14(3): 275-296.
- Kew, Michael (1994). Anthropology and First Nations in British Columbia. *BC Studies* 100: 78-105.
- Krech, Shepard III (1991). The State of Ethnohistory. *Annual Review of Anthropology* 20: 345-375.
- Lamer, C.J. et al. (Supreme Court of Canada) (1996). Dorothy Marie Van der Peet (Appellant) v. Her Majesty the Queen (Respondent) and the Attorney General of Quebec et al. (Interveniers). [1996] 4 *Canadian Native Law Reporter* at pp. 117-286.

- (1997). *Delgamuukw v. British Columbia*. [1997] 3 S.C.R. at pp. 1010-1141.
- Layton, Robert (1989). Introduction: Who Needs the Past? In *Who Needs the Past? Indigenous Values and Archaeology*, edited by R. Layton, pp. 1-20. Unwin Hyman, London.
- Lowenthal, David (1996). *Possessed by the Past: The Heritage Crusade and the Spoils of History*. Free Press, New York.
- McClellan, Catharine (1970). Indian Stories About the First Whites in Northwestern America. In *Ethnohistory in Southwestern Alaska and the Southern Yukon*, edited by Margaret Lantis, pp. 103-133. University Press of Kentucky, Lexington, Kentucky.
- McDonald, J. Douglas, Larry J. Zimmerman, A.L. McDonald, William Tall Bull, and Ted Rising Sun (1991). The Northern Cheyenne Outbreak of 1879: Using Oral History and Archaeology as Tools of Resistance. In: *The Archaeology of Inequality*, edited by Randall H. McGuire and Robert Paynter, ed., pp. 64-78. Blackwell, Cambridge, Massachusetts.
- McEachern, C.J.B.C. (British Columbia Supreme Court) (1991). *Delgamuukw et al. v. The Queen in right of British Columbia et al.* 79 D.L.R. [Dominion Law Reports] (4th): 185-640.
- McLeod, Clay (1992). The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past. *Alberta Law Review* 30(4): 1276-1290.
- McRanor, Shauna (1997). Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations: Implications for Archival Practice. *Archivaria* 43: 64-88.
- Meighan, Clement W. (1960). More on Folk Traditions. *Journal of American Folklore* 73: 59-60.
- Miller, Bruce G. (1992a). Introduction [to Theme Issue on Anthropology

- and History in the Courts]. *BC Studies* 95: 3-6.
- (1992b). Common Sense and Plain Language. *BC Studies* 95: 55-65.
- Miller, J.R. (1996). *Shingwauk's Vision: A History of Native Residential Schools*. University of Toronto Press, Toronto.
- Mills, Antonia (1994). *Eagle Down is our Law: Witsuwit'en Law, Feasts, and Land Claims*. University of British Columbia Press, Vancouver.
- (1995). Cultural Contrast: The British Columbia Court's Evaluation of the Gitksan-Wet'suwet'en and Their Own Sense of Self-Worth as Revealed in Cases of Reported Reincarnation. *BC Studies* 104: 149-172.
- Monet, Don, and Skanu'u (Ardythe Wilson) (1992). *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case*. New Society, Philadelphia, PA and Gabriola Island, B.C.
- Morantz, Toby (1984). Oral and Recorded History in James Bay. In *Papers of the Fifteenth Algonquian Conference*, edited by William Cowan, pp. 171-191. Carleton University, Ottawa.
- Moses, Daniel David, and Terry Goldie (editors) (1998). *An Anthology of Canadian Native Literature in English*. 2nd Edition. Oxford University Press, Toronto.
- Moss, William W., and Peter C. Mazikana (1986). *Archives, Oral History and Oral Tradition: A RAMP Study*. United Nations Educational Scientific and Cultural Organization, Paris.
- Novick, Peter (1988). *That Noble Dream: The "Objectivity Question" and the American Historical Profession*. Cambridge University Press, Cambridge.
- O'Farrell, Patrick (1979). Oral History: Facts and Fiction. *Quadrant* 148: 4-8.
- Ong, Walter J. (1982). *Orality and Literacy: The Technologizing of the Word*. Methuen, London.

- Perdue, Theda (1980). *Nations Remembered: An Oral History of the Five Civilized Tribes, 1865-1907*. Greenwood Press, Westport, Connecticut.
- Petrone, Penny (editor) (1983). *First People, First Voices*. University of Toronto Press, Toronto.
- Petrone, Penny (editor) (1988). *Northern Voices: Inuit Writing in English*. University of Toronto Press, Toronto.
- Pomedli, Michael M. (1992). Orality in Early Greek and Cree Traditions. In *Papers of the Twenty-Third Algonquian Conference*, edited by William Cowan, pp. 334-343.
- Pryce, Paula (1992). The Manipulation of Culture and History: A Critique of Two Expert Witnesses. *Native Studies Review* 8(1): 35-46.
- Pylypchuk, Mary Anne (1991). The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources. *Archivaria* 32: 51-77.
- Quintana, Antonio G. (1992). The Archivist and Oral Sources. In *Documents that Move and Speak: Audiovisual Archives in the New Information Age*, pp. 84-89. K.G. Saur, München.
- Ratelle, Maurice (1992). *Le "Two Row Wampum" ou Les voies parallèles*. Québec, Ministère de l'Énergie et des ressources, Direction des Affaires Autochtones. Québec City.
- Ray, Arthur J. (1990). Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court. *Native Studies Review* 6(2): 13-29.
- (1991). Fur Trade History and the Gitksan-Wet'suwet'en Comprehensive Claim: Men of Property and the Exercise of Title. In *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, edited by Kerry Abel and Jean Friesen, pp. 301-315. University of Manitoba Press, Winnipeg.
- Reimer, Derek (1981). Oral History and Archives: The Case in Favor.

- Canadian Oral History Association Journal* 5: 30-33.
- Reimer, Derek (editor) (1984). *Voices: A Guide to Oral History*. Provincial Archives of British Columbia, Victoria, B.C.
- Ridington, Robin (1992a). Fieldwork in Courtroom 53: A Witness to *Delgamuukw v. B.C.* *BC Studies* 95: 12-24.
- (1992b). Fieldwork in Courtroom 53: A Witness to *Delgamuukw*. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by F. Cassidy, pp.206-220. Oolichan and Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Rubertone, Patricia E. (1989). Archaeology, Colonialism and 17th-century Native America: Towards an Alternative Interpretation. In *Conflict in the Archaeology of Living Traditions*, edited by Robert Layton, pp. 32-44. Unwin Hyman, London.
- Schwartz, Bryan (1992). "The General Sense of Things:" *Delgamuuk[w]* and the Courts. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 161-177. Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Seligman, Haim (1989). Is Oral History a Valid Research Instrument? *International Journal of Oral History* 10(3): 175-182.
- Sherzer, Joel and Anthony C. Woodbury (1987). Introduction In: *Native American Discourse: Poetics and Rhetoric*, edited by Joel Sherzer and Anthony C. Woodbury, pp. 1-16. Cambridge University Press, Cambridge.
- Sioui, Georges E. (1992). *For an Amerindian Autohistory*. McGill-Queen's University Press, Montreal and Kingston.
- Slattery, Brian (1992). The Legal Basis of Aboriginal Title. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 113-132. Oolichan Books and The Institute for Research

- on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Spurling, B. (1988). Archaeology and the Policy Sciences. *Canadian Journal of Archaeology* 12: 65-85.
- Sterritt, Neil (Medig'm Gyamk) (1992). It Doesn't Matter What the Judge Said. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by F. Cassidy, pp.303-307. Oolichan and Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Stone, Helen (1993). *Living in Time Immemorial: Concepts of "Time" and "Time Immemorial."* Unpublished M.A. thesis, Canadian Studies, Carleton University, Ottawa.
- Storrow, Marvin R.V. and Michael J. Bryant (1992). Litigating Aboriginal Rights Cases. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by F. Cassidy, pp.178-192. Oolichan and Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Sturtevant, William C. (1966). Anthropology, History, and Ethnohistory. *Ethnohistory* 13: 1-51.
- Sypher, Howard E., Mary L. Hummert, and Sheryl L. Williams (1994). Social Psychological Aspects of the Oral History Interview. In *Interactive Oral History Interviewing*, edited by Eva M. McMahan and Kim L. Rogers, pp. 47-61. Lawrence Erlbaum Associates, Hillsdale, New Jersey.
- Tannen, Deborah (1982a). The Oral/Literate Continuum in Discourse. In *Spoken and Written Language: Exploring Orality and Literacy*, edited by Deborah Tannen, pp. 1-16. Ablex, Norwood, New Jersey.
- (1982b). The Myth of Orality and Literacy. In *Linguistics and Literacy*, edited by William Frawley, pp. 37-50. Plenum Press, New York.
- Tennant, Paul (1992). The Place of Delgamuukw In British Columbia History and Politics — and vice versa. In *Aboriginal Title in British*

- Columbia: Delgamuukw v. The Queen*, edited by Frank Cassidy, pp. 73-91. Oolichan Books and The Institute for Research on Public Policy, Lantzville, B.C. and Montreal, P.Q.
- Thompson, Paul (1988). *The Voice of the Past: Oral History*. 2nd edition. Oxford University Press, Oxford.
- Tooker, Elisabeth (1988). The United States Constitution and the Iroquois League. *Ethnohistory* 35(4): 305-336.
- Tough, Frank (1990). Introduction: Advocacy Research and Native Studies. *Native Studies Review* 6(2): 1-12.
- Treaty 7 Elders and Tribal Council (1996). *The True Spirit and Original Intent of Treaty 7*. McGill-Queen's University Press, Montreal and Kingston.
- Trigger, Bruce G. (1980). Archaeology and the Image of the American Indian. *American Antiquity* 45(4): 662-676.
- (1982). Ethnohistory: Problems and Prospects. *Ethnohistory* 29(1): 1-19.
- (1985). *Natives and Newcomers: Canada's "Heroic Age" Reconsidered*. McGill-Queen's University Press, Kingston and Montreal.
- (1989). *A History of Archaeological Thought*. Cambridge University Press, Cambridge.
- (1995). Archaeology and the Integrated Circus. *Critique of Anthropology* 15(4): 319-335.
- (1998). Archaeology and Epistemology: Dialoguing across the Darwinian Chasm. *American Journal of Archaeology* 102(1): 1-34.
- Urion, Carl (1991). Changing Academic Discourse About Native Education: Using Two Pairs of Eyes. *Canadian Journal of Native Education* 18(1): 1-22.
- Vansina, Jan (1985). *Oral Tradition as History*. University of Wisconsin

Press, Madison, Wisconsin.

- Vastokas, Joan M. (1996). History Without Writing: Pictorial Narratives in Native North America. In *Gin Das Winan: Documenting Aboriginal History in Ontario*, edited by Dale Standen and David McNab, pp. 48-64. Champlain Society Occasional Papers 2. Champlain Society, Toronto.
- von Gernet, Alexander (1992a). New Directions in the Construction of Prehistoric Amerindian Belief Systems. In *Ancient Images, Ancient Thought: The Archaeology of Ideology*, edited by S. Goldsmith, S. Garvie, D. Selin, & J. Smith, pp. 133-140. Archaeological Association, University of Calgary, Calgary, Alberta.
- (1992b). Archaeological Investigations at Highland Lake: 1991 Field Season. In *Annual Archaeological Report*, Ontario 3 (1992): 74-79.
- (1993). The Construction of Prehistoric Ideation: Exploring the Universality-Idiosyncrasy Continuum. *Cambridge Archaeological Journal* 3(1): 67-81.
- (1994a). Saving the Souls: Reincarnation Beliefs of the Seventeenth Century Huron. In *Amerindian Rebirth: Reincarnation Belief among the North American Indians and Inuit*, edited by Antonia Mills and Richard Slobodin, pp. 38-54. University of Toronto Press, Toronto.
- (1994b). Archaeology as Discourse: An Editorial Essay. *Ontario Archaeology* 57: 3-22.
- (1995). The Date of Time Immemorial: Politics and Iroquoian Origins. In *Origins of the People of the Longhouse*, edited by A. Beckerman and G. Warrick, pp. 119-128. Ontario Archaeological Society, North York, Ontario.
- (1996). *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories*. 2 vols. Research and Analysis Directorate, Indian and Northern Affairs

- Canada, Ottawa.
- (1998). *Handbook for Creating a Record of Aboriginal Oral Histories and Traditions*. Research and Analysis Directorate, Indian and Northern Affairs Canada, Ottawa.
- Walker, Willard (1981). Native American Writing Systems. In *Language in the USA*, edited by Charles A. Ferguson and Shirley B. Heath, pp. 145-174. Cambridge University Press, Cambridge.
- Washburn, Wilcomb E. (1987). Distinguishing History from Moral Philosophy and Public Advocacy. In *The American Indian and the Problem of History*, edited by Calvin Martin, pp. 91-97. Oxford University Press, New York.
- Wetzel, Michael G. (1995). *Decolonizing Ktaqmkuk Mi'kmaw History*. Masters of Laws Thesis, Dalhousie University, Halifax, Nova Scotia.
- Wickwire, Wendy C. (). Ethnography and Archaeology as Ideology: The Case of the Stein River Valley. *BC Studies* 91-92: 51-78.
- Wiget, Andrew O. (1982). Truth and the Hopi: An Historiographic Study of Documented Oral Tradition Concerning the Coming of the Spanish. *Ethnohistory* 29(3): 181-199.
- Williams, Nancy M., and Daymbalipu Mununggurr (1989). Understanding Yolngu Signs of the Past. In *Who Needs the Past? Indigenous Values and Archaeology*, edited by Robert Layton, pp. 70-83. Unwin Hyman, London.
- Wilson, Angela C. (1997). Power of the Spoken Word: Native Oral Traditions in American Indian History. In *Rethinking American Indian History*, edited by Donald L. Fixico, pp. 101-116. University of New Mexico Press, Albuquerque.
- Wilson, Dora (Yagalahl) (1992). It Will Always Be The Truth. In *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, edited by F. Cassidy, pp.199- 205. Oolichan and Institute for Research

on Public Policy, Lantzville, B.C. and Montreal, P.Q.

Wilson-Kenni, Dora Time of Trial: The Gitksan and Wet'suwet'en in Court.

BC Studies 95: 7-11.

Part 5: Anthropological and Other Forms of Evidence

With the power to demand consultation and the repatriation of human remains and specific objects, Native Americans have been able to revolutionize the practice of archaeology.

— Adam Fish, 2006

Author(s): Adam Fish

Source: *Wicazo Sa Review* (Spring, 2006), Vol. 21 No. 1, pp. 77-95.

Published by: University of Minnesota Press

Link to Journal: <https://www.upress.umn.edu/journal-division/journals/wicazo-sa-review>.

Stable URL: <https://www-jstor-org.uml.idm.oclc.org/stable/4140300>

© Copyright 2006 by the Association for American Indian Research

Indigenous Bodies in Colonial Courts: Anthropological Science and the (Physical) Laws of the Remaining Human

Adam Fish

INTRODUCTION

American archaeology on the Columbia Plateau is a science of the past. The data is material remains: arrowheads, rocks broken by hand, human and animal bones, faint storage and house pits, the rare pictograph. For over a century, the field methods of this science of the past have been to excavate and analyze these traces. According to their calculations and hypothesis tests, the cultured past gradually evolved in reaction to climatic and ecological changes. In any positivists' endeavor, much deemed subjective, or "soft knowledge," is excluded. Such elements as oral traditions, historical linguistics, local knowledge, and reflexive and subjective experience are barred. The most egregious exclusion is the contemporary public (which includes the tribes), whom science swore to inform. Scientists do not pursue cognitive, social, embodied, and phenomenological information, only information that can correlate behavior to ecology, represent the past as rational to Anglo-American sensibilities, and render the chaos of the past manageable for federal land agencies. The best of the science's knowledge of the shape of projectile points, the presence of pithouses, and the shape of Indian bones were legally and strategically deployed to keep the Ancient One at the Burke Museum in Seattle, Washington.

An absence of creativity, ignorance of twenty years of qualitative archaeological theory and practice, a lack of responsibility to inform the public, and a disengagement with the politics of archaeological praxis are but a few valid critiques of most late-twentieth-century Columbia Plateau archaeologists. Their most infamous omission is the avoidance of presently living Native Americans and a callous appropriation and possession of their material cultural history. On the Columbia Plateau, archaeologists have produced little in the way of socially relevant or publicly interesting knowledge. The results of the first sixty years of modern research produced

not one popular text or archaeological synthesis that was useful to more than one hundred people, including graduate students. During this period, living Columbia Plateau peoples continued to live on isolated reservations with second-rate health care, education, housing, and infrastructure. Where the judges in *Bonnichsen v. U.S.* marginalized oral traditions, this article is an attempt to deconstruct the core of their argument, which is based on anthropological science. I describe how archaeologists' field and representation practices perpetuate a false sense of scientific accuracy resulting in profound consequences for Native Americans.

THE ANCIENT ONE BECOMES THE “KENNEWICK MAN”

As a response to centuries of looting of Native American graves and outrage that the Smithsonian Institution had the remains of more than 18,500 individuals, Native Americans and their supporters rallied for a law that would become the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). The act enables Native Americans, both American Indians and Native Hawaiians, to reclaim and repatriate human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony in museums and federal agencies. The law requires that the appropriate Native American tribe be promptly notified when any human remains or cultural objects are accidentally found on federal or tribal lands. NAGPRA provides a process for museums and federal agencies to return certain Native American cultural items to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations.¹

On July 28, 1996, speedboaters found the Ancient One, a nearly complete human skeleton, in the Columbia River. On September 2, control of the Ancient One was transferred to the U.S. Army Corps of Engineers (COE). On September 9, the Confederated Tribes of the Colville

Reservation, Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, and Wanapum Band claimed the Ancient One under NAGPRA. After accepting the claim, the COE followed the law by publishing an intent to repatriate on September 17. *Bonnichsen v. U.S.* was born the following month when eight scientists, arguing that the Ancient One was so old that the remains could not be affiliated with contemporary tribes, filed suit against the COE to stop it from repatriating the Ancient One and for the right to study the remains. On September 25, 2000, the Department of the Interior (DOI) ruled that the Ancient One belonged to the five tribes. On August 30, Judge Jelders ruled against repatriation and in favor of scientists studying the Ancient One.² On February 4, 2004, the Ninth Circuit Court of Appeals affirmed that decision.³ On September 23, 2004, Colorado Senator Ben Nighthorse Campbell (R) introduced to the Senate S. 2843, or the Native American Technical Corrections Act of 2004. The proposed amendment to NAGPRA was designed to effectively overturn the Court of Appeals' decision by redefining NAGPRA to clearly state that the law pertained to any remains of, or relating to, a tribe, people, or culture that is *or was* indigenous to the United States. The measure died, however, before it became law.

The Ancient One is the remains of a person significant to Native Americans, American anthropologists, and peoples worldwide. The Ancient One or Techaminsh Oytpamanatityt (Yakima for "from the land, the first native") is considered by all Columbia Plateau tribes to be an early, and therefore a significant and important, ancestor. The Ancient One has received an immense amount of publicity. On September 30, 1996, Timothy Egan wrote an article in the *New York Times* documenting the Ancient One soon after he was discovered. All major national and international television networks and newspapers have presented lengthy programs and articles on

the Ancient One. Books on the Ancient One have been published by national presses.⁴ The Ancient One is the most significant person in popular culture associated with American archaeology. The importance of the Ancient One will likely increase as the ramifications of the court proceedings are known.

Human remains and artifacts from the Ancient One site exhibit rare examples in Columbia Plateau prehistory of burial/funerary practices and lifeways, based on analysis of cultural affiliation, context, lithic technology, and osteological remains. This individual yields new information on prehistoric lifeways through osteological examination,⁵ lithic analysis,⁶ C-14 dating,⁷ and DNA analysis. The studies suggest that the Ancient One predates the Cascade Phase (8,000-4,500 BP).⁸ Relatively complete skeletons from the Cascade Phase, especially those with a Cascade dart stuck in their ilium, are extraordinary. The Ancient One may extend the Cascade Phase back 1,300 years. Future research on the Ancient One site will likely yield additional information concerning the lifeways, language, traditional history, and human biological conditions of Columbia Plateau peoples around 9,300 years ago.

Traditional knowledge recognizes two mytho-temporal periods. In the first period, all animals were “people.” The First People occupied the Columbia Plateau, prepared the world for the arrival of the Native Americans, and were “shape shifters, shimmering between humans, species, space and time.”⁹ The second period is characterized by a radical transformation. A transformer, usually Coyote, made changes in preparation for the human people.

According to the Palus peoples, whose ancestors currently reside on the reservations of all appellant tribes, they and their ancestors have always been in and around the Kennewick area. The Palus made this claim as part of court testimony. Traditional places and people are inexplicably linked. The landscape is linked to the people via oral traditions. On the plateau,

stories are observable in the landscape. The Palus histories are “written in the rocks and earth. This knowledge comes from thousands of years of occupation within the same territory. All stories and legends contain history, resource utilization and religious lessons.”¹⁰ In the distant past, the present landscapes were under a period of transformation; glaciers and rivers cut through the region, buffalo existed on the plateau, and the First People were preparing the way for the Palus.¹¹ For the Palus, oral traditions are literal histories. Through recitation and visitation, the current life is linked to the mythic life. There is a story that tells of the creation of the Standing Rock, from which the Palus get their name. The story involves the First People in a phase of transformation, creating the world for the Palus. Events in *How Beaver Made the Palouse Falls* “can be related to the glacial and post-glacial period, 10,000-16,000 years” ago.¹²

ON THE TENACITY OF ARCHAEOLOGICAL “FACT”

That archaeological evidence can be trusted to supply fact is questionable. Most archaeologists will, without mincing their words, confess that the data pool with which they randomly sample is exceptionally limited and subject to internal chaos of unpredictable origin. Out of the field, like all cultural productions, their work is subject to the limitations of representation, text, and audience. These factors, and many others, place burdensome constraints on what archaeologists can possibly approximate from the past. Columbia Plateau archaeologists neither question the legitimacy or the rationality of their conclusions. To the ignorance of Columbia Plateau archaeologists, the notion that science produces ultimate facts has received debilitating appraisals.¹³ Two decades of postmodernism has gnawed at the foundation of absolutes, universals, facticity, and predictability to reveal the political, historical, and social contexts of truth and law. I will describe how the

various elements of the archaeological project make objectivity and hypothesis verification impossible. In describing the contingencies and situations of archaeological fieldwork and its social products, I will exhibit the potencies and potentials of historical writing guided by material culture and landscape fieldwork.

The conclusions of scientific archaeologists are tenuous for five primary reasons. One problem exists in the irreversible effects of soil and time on material culture; material culture deteriorates at an unpredictable rate. A second is the subjective foundation of any phenomenological experience, including scientific experimentation. A third is that all scientific practices are situated within particular histories and are influenced by contemporary political contexts. These processes influence “objectivity.” The fourth and fifth problems relate to the interpretive and reflexive nature of communication (language) and documentation (text). I hope this critique results in an impression that archaeology is more a technique to recover data for the writing of history than a technology for discovering laws governing humankind. Archaeology is a method of research and writing history that could improve its usefulness. Archaeology could learn something from indigenous phenomenologies of the past and thereby avoid costly court cases such as *Bonnichsen v. U.S.*, a product of the “colonialist refusal to reflexively interrogate the political qualities of scientific claims on Indian dead.”¹⁴

MATERIAL CULTURE

In science-based archaeology, environments changed, causing adaptations, which produced new cultural forms. Like all products of archaeological discourse, archaeological theory is a product of temporal and political situation. Empirical science was viewed as contributing to the Allied success

in World War II and archaeology's "proposal to uncover human 'systems' linking technology, environment, and Cultural Progress" was a continuation of the rationale that led to this success.¹⁵ To this end, an emphasis on system theory meant an emphatic focus shifted to "equilibrium, stability, homeostasis, social control, self-regulation, efficiency, operations management, and cost-benefit analysis."¹⁶ Federal agencies, responsible for complying with the recently passed National Historic Preservation Act (1966) and the National Environmental Policy Act (1969), required archaeologists to "adopt the language and framework of logical positivism" and the "'natural' ideology of bureaucratic planners and centralizers."¹⁷ Archaeologists concur that material culture requires some interpretive intervention by living people. In archaeology, there is decay and a salvation. Archaeologists conclude that the accumulation of artifacts, discovered in similar situations in proximal localities, with analogous assemblages and dates, creates a corollary.

The archaeologist arrives too late to abort decay. What remains are almost always stone artifacts that are subjected to thousands of years of bioturbation, redeposition, erosion, wear, and tear. The unpredictable nature of sediments, erosion, animal burrows, and chemical transformations leave ancient material culture in a state unlike the way it was when it was used by the host culture. The human skeleton is pliable both during life and after death. The archaeologist is always left with fragments, signifiers in a broken chain of meaning. No biographies, archives, or texts exist to support the uses of these objects. Archaeologists must find human remains and other remnants from the past in context, in situ; they must personally be there to unleash the bones (and their meaning) from the soil. From a scientific perspective, an artifact without a context, regardless of the importance of the find, is meaningless. The Ancient One was uncovered not by archaeologists but by intoxicated speedboaters. Thus, the primary evidence

for the Ancient One's origination was found in osteological studies, an archaeological strategy less informative than context and association. This flawed methodology and reliance on osteology influenced the holding in *Bonnichsen v. U.S.* To further limit the available data from which to base a hypothesis, archaeologists, in the hopes of becoming true scientists, neglect an important stream of data, personal experience, which is the core of indigenous epistemologies.

SUBJECTIVITY

The scientist is a human being with passions and a past who is influenced by popular culture. In all acts of science, from hypothesis forming through field-testing, to text making, the scientist's mind, body, and emotions are involved. This is exceptionally true in a field science such as archaeology. Archaeologists get data along sandy riverbanks, in dense forests, and in desert caves where there are numerous ecological and personal elements that influence perception, reception, and documentation of the scattered traces of the past. Archaeologists, like all people, use their senses, which react in highly subjective and variable ways to similar times and places. In the nineteenth century, archaeologists recorded their findings in journals and diaries that told of the experience in the field, the mosquitoes and river crossings, the irritating burro and underfunded expedition, as well as the recovered materials. By the mid-twentieth century, archaeologists opined that such a literary practice polluted the science with subjective bias. Attempting to exclude themselves, archaeologists were limited to describing discoveries and not the process of discovery, to description and not interpretation, to filling out standardized forms rather than accounting for subtle details. This is a disembodied praxis.

Imagine this scenario: You are looking up and down at a vertical wall

of dirt several meters high. Within this wall of dirt is a dark brown stain surrounded by a special pattern of stones. This may be evidence for a storage pit or a fire hearth. Other artifacts exist. Moving from the bottom of the wall to the top you are told that the artifacts — below the brown stain are one style of points, thrusting spears, and above are another, small arrowheads — were designed to hunt different animals that lived in different climates. Between each point style are one to two meters of dirt, a few stones deposited by the flooding creek, a hundred footprints walking every which way, and ten thousand rains. From a distance, the archaeologist dutifully reports the position and angle of each artifact. From this profile of soil the archaeologist writes cultural history.

In the past fifty years of digging up the Columbia Plateau, no more than two or three archaeologists had the experience just described. Rarely, and only in the most spectacular of archaeological sites, are such artifact sequences observable.¹⁸ Once excavated, corroborated with other incomplete artifactual sequences, and rendered to graphic representations and expert recuperation, those typological evolutions are then destroyed. Such graphs, models, and analogies stretched to fit all past and incoming archaeological data were embraced by the *Bonnichsen v. U.S.* court — not as *cinéma vérité* — but as reality.

Field archaeology does not exist in a political vacuum or sanitary laboratory. Field archaeologists cannot reproduce their findings in laboratories because they destroy their data through excavation. Any subsequent hypothesis testing is conducted in a different location with vastly different natural and experiential constraints (e.g. different crew members, weather, budgets, moods, excavation methods, and so on). This produces, at best, analogies, but repeatable facts are rarely if ever observed.

SCIENTIFIC METHOD

The convictions that scientific method is the most appropriate and sophisticated vehicle for the recovery of meaning from the past, that science is bias-free, and that the results of scientific inquiry are universally valuable across the planet have been fiercely debated and contested. As stated above, archaeologists are forced to deduce their hypotheses from the most obscure and subtle traces of past human behavior. In addition, there are so many variables to calculate in forming meaningful approximations of past behavior that archaeologists' conclusions are often far from meaningful, scientific models made on paper, of limited use even to archaeologists themselves let alone the contemporary public. The results often conflict with sincere traditional beliefs of Native peoples. Divorced from competition with other epistemologies in the public arena, archaeology at best becomes an academic sport, not to improve humans' conditions but to increase archaeologists' prestige and funding.

Archaeological science uses its data capriciously to affirm pre-existing theories of cultural evolution. These theories depend on slow, continuous, almost static evolution. Within archaeological models there is no room to situate or explain anomalous discoveries. By all scientific opinions, the Ancient One is an anomaly. When Columbia Plateau archaeologists, professionally, politically, and personally invested in their models of gradual evolution, are asked to judge where an anomaly like the Ancient One fits into their evolutionary chronology they state the Ancient One's skeletal form is outside of their chronologies, and therefore is not affiliated with any indigenous people. Evolutionary chronologies are not made to affirm cultural affiliation, they are broad, general schemes used to situate typical discoveries in an organizational model useful for answering managerial problems. The chronologies used on the Columbia Plateau have

existed with little mutation for fifty years. But these dated models gained new authority after being authenticated by law in the Gould court in 2002.

Judge John Gould agrees that the Ancient One poses problems to consensual chronologies. He cites “Dr. Ames’s conclusions about the impossibility of establishing cultural continuity”¹⁹ as evidence of no “cultural relationship.” The Gould court puts an impossible burden on archaeological science that cannot prove the ethnicity of the Ancient One. In situations where the expectations of science are beyond what science can prove, deference should be given to those who presently most identify with the remaining human. The court concluded that NAGPRA does not give Native Americans the right to control remains without proving a “special and significant genetic or cultural relationship.”²⁰ Archaeological science is incapable of accurately defining what Native Americans are and what they are not. Science does not have the skill to decipher identity, and, contrary to the court’s opinion, the tribes do have a “cultural relationship” with the Ancient One. The testimonies, years of struggle, and millions of dollars spent by the economically poor peoples to litigate for the Ancient One’s reburial are a paramount example of kinship with the Ancient One. Judges Gould and Jelderks interpret the gaps in the archaeological record as evidence of a lack of cultural affiliation, and yet most Columbia Plateau archaeologists know that the gaps in the record are a result of a selective and skewed sampling, a limited and inflexible chronological model, and the selective fragments with which archaeologists work.

I suggest that a measurement outside of science be used to judge cultural relationship. The culture that most identifies with the remains is the descendent. The material remains of the past should be given to those whose experiences of themselves and community will be positively affected by being in contact with the material remains. Those whose independence hinges upon the preservation or control of the remains should be primary

shareholders of those remains.

LANGUAGE

Every modern war is waged in combat semiotics. The first major task of colonialism is the imposition of linguistic/semantic order. Since the Sapir-Whorf hypothesis²¹ of 1929, anthropologists have accepted that different languages produce different cultures. Hypothesis formulation, data acquisition, “ground truthing,” theory building, and theory testing all exist in a lingua-cognitive environment. All thought, rational or irrational, is individualistic. An epistemology that claims either absolute or even relative truth is biased and subjective. Science claims that truth can be held in common. In this view, all must agree on a particular history drafted by Anglo-American scientists. The only specification is that only these scientists are the authors of this narrative. The rest of us are conditioned to believe — with thousands of university freshmen — the authorities. Archaeologists are often forced to create names for cultures they “discover” whose original names are forgotten. Archaeologists make up monikers for vast artifact patterns that were taken by the courts as actual cultural patterns. These invented “cultures” are relative only to the Anglo-American culture who wrote them. They are virtually meaningless and often the butt of jokes on Indian reservations. However, the Gould court decided that the names for the time periods used by archaeologists were verifiable, discreet, and extant.

The courts ruled that the DOI acted arbitrarily and capriciously in finding the Ancient One affiliated with the tribal coalition. This ruling was based on an interpretation of “is” in semantic relationship to “indigenous,” and other nuanced interpretations of the intent of NAGPRA. This does not change the fact that the DOI, based on the findings of national experts, determined the remains to be Native American and culturally affiliated to

the claimant Tribes. Regardless of the ruling by untrained nonprofessionals and non-Native Americans, Native Americans recognize the Ancient One as an ancestor.

Apparently “Native American,” as used in NAGPRA, is not a social category capable of withstanding phonemic or genetic analysis. Native Americans know who they are, their identity and social authority is shored up in place names and language, is resistant and adaptive. Colonists resettled the West and did so while renaming places already named by Native Americans. Just as botanists make careers by naming new floral species, archaeologists further their profession lives by recognizing and naming new temporal phases. In *Bonnichsen v. U.S.*, the scientists used the ambiguity and powers inherent in a name game to restructure the politics around Native American identity. Now, Native Americans are Native Americans only with scientific approval. This taxonomy of people returns anthropology to the days when tribal people were seen as a deviation of nature, destined for extinction (or genocide), and whose artifacts were exhibited in natural history museums alongside stuffed wildebeests and geological dioramas.

More excavations do not increase the representation of cultural plurality in the archaeological reports, because “pigeonholing of project data into established cultural sequences has become the norm.”²² Researchers have contributed to synthetic generalities by simply “imposing new phase names,” but this is merely cosmetic diversification, as major renaming projects, for the most part, only recapitulated previous culture history syntheses.

In the end, the collaboration of cultural resource management (CRM) corporations and federal agencies in standardizing archaeological reports, and the forty-year legacy of the broad horizontal cultural area and general vertical cultural history, have “frozen many of the goals of archaeological research to the descriptive character of culture-historical research of the

1950s-1970s.”²³ Much contemporary archaeological work is conceived as salvage archaeology with extinct peoples. Out of step with current social theory and social consciousness, Columbia Plateau archaeology has languished behind CRM reports written for federal land managers. With no impetus from agencies to write general publications interpreting cultural resources for the public, archaeological reporting has not been challenged to experiment with writing and presentation strategies that appeal to the public, do not offend tribal peoples, and more aptly present the data.

TEXTS

Like language, texts are media for communication. Language, spoken, recorded and heard, or intuited and thought, is translated and interpreted, obeyed or ignored, by the listening or reading audience. There are several weak points in the relationship between speaker and audience where trustworthy communication breaks down. Communication in the audible sentence is a fluid practice contingent upon context, the interlocutor, and the interiorities of speaker and audience, writer and reader. Scientific archaeology texts assume an objective voice and thereby hopelessly strive to ameliorate the weak points in communication. This is an impossible goal. The texts, without subjective experiences, are inaccurate descriptions of the archaeological project. This practice leaves the reader with little information with which to reconstruct the life of the ancient culture or of the archaeological project. In addition, some archaeologists question whether texts, encoded in alphabets and shared either in words or print, are the most sophisticated mode for communicating information about the past.²⁴

The beginning of a Columbia Plateau scientific archaeological text consist of a basic contextual and narrative history of the project area, recycled untold times from previous reports. Often the cited reports are more

than forty years old. Project supervisors praise the writers of these texts if the report is “technical.” With this “readerly” part about the “culture” complete, the remainder of the report consists of graphs, lists, photographs, and tables. So much of this writing depends on the seduction of mathematics, filler to justify paid hours and pay checks. Working against the aims of technical writing, both text and table serve as metaphoric models, a woeful poetics of the past and an uneventful archaeological experience. But unlike metaphors, which exploit anomalies and employ ironies within analogy, the technical model strives toward a Never-Never Land of objectivity.

The material culture of the print-based text creates chronological histories resulting in a linear experience for readers, something that is undermined by postprocessual archaeologists,²⁵ New Western historians,²⁶ and indigenous archaeologies.²⁷ Tribal historiography is “grounded in two interrelated systems of communication that predate the written word: drawing and speaking.”²⁸ Gerald Vizenor agrees, “tribal narratives are heard and remembered in *pictofictions* and *pictomyths* without closure.”²⁹ Traditional modes of communication were never textual. They were performative and oratory. Symbolic and iconographic drawing, painting, and etching were authoritative means of communication.

The Ancient One is embroiled in a battle over identity. Tribal identity, like all social being, is in flux, making it a phenomenon difficult to quantify with static archaeological chronologies ill adapted to rationalize either mind or agency. Vizenor explains, “tribal consciousness would be a minimal existence without active choices, the choices that are heard in stories and mediated in names; otherwise, tribal identities might be read as mere simulations of remembrance.”³⁰ Between orations and communities, tribal identity adapts to the present. Stories form the vehicle for the embodiment and historiography of tribal identity, as it is and as it changes.

Fieldwork, the dynamics of language/cognition, and textuality all pollute the scientific archaeological report with subjectivity, bias, and politics. Indigenous forms of history are not used or even considered legitimate. Thus, the court misses the tribal identity of the Ancient One. I will now explore how archaeological science is written from a study in the colonial library.

COLONIAL LIBRARY / LABORATORY

The ascension of indigenous archaeologies, which place importance on the concerns of living indigenous people, and the popularity of qualitative anthropology in the academic and publishing worlds, signal a decline in the preconception that quantitative archaeological science produces absolute knowledge.

For five decades, archaeological projects on the Columbia Plateau have been conducted with little input from tribes and little output to society. Historic, tribal, and archaeological preservation is a concern of both Anglo and Native Americans. The public has recognized that responsibility for the control of cultural resources is great and requires a savvy balance between the concerns of numerous shareholders. History is a construction, fabricated from residual material and immaterial traces, with a legacy of less-than-objective deployments, and it is situated in a contemporary political environment. With the pliability of history at play and the potency of history at stake, the public opined that one type of archaeological property, Native American burials and associated funerary items, was excluded from the exploitative dialectic of cultural resource commodification. NAGPRA was written to ensure that human remains and sacred objects were not used in the free play of scientific/political meaning making.

Science claims to produce valueless and objective truths, which it

models with texts. The court's decision proves that science is not without judgment and is put to use to support certain socially sanctioned practices, such as the dissection of human remains. Those favoring the reinterment of the Ancient One threaten the foundation of the codependent relationship between American law and science. For this reason, indigenous belief systems, threatening the established order, need not be considered. In law and order, as ever, there is an Indian scalp bounty. The Ancient One is but another body in a chain of uncontrollable and dangerous signs scheduled for classification, imposition, appropriation, and eventual impotency.

Tribal sovereignty poses one of the only socially valid and publicly sanctioned resistances to American capital-corporate empires. The host of Native American religious rights protection acts exhibit that policymakers, whether they are aware of it or not, are encouraging a form of diversity that threatens the status quo. One of the foundational stories of U.S. development is the respect and space afforded to the individual. NAGPRA, like the First Amendment of the U.S. Constitution, was written to ensure that the "other" was embraced into the nation's heritage. The court should recognize NAGPRA as a civil law, falsified as absolute law in the critical glare of science, but immediately necessary for religious and cultural diversity.

Social policies can be informed by the epistemologies of science. But deploying science to test and validate a civil service is problematic. If NAGPRA is put to a test, indigenous people should criticize it. Scientific information can only obfuscate problems that are inherently social. In *Bonnichsen v. U.S.*, NAGPRA did not stand up to the alien categories of science because NAGPRA was generated to protect the religious rights of citizens, a tradition encoded in the U.S. Constitution, *another* document probably incapable of defense against scientific dissection.

The Ancient One has become an object in a power play between scientists and indigenous people in which history is used as a canvas on

which to inscribe dominating ideologies. Scientific victory apparently affirms the universal value of the present late-capitalistic way of being. It could be argued that archaeology and anthropology are explicitly linked to a process of incorporating the “other” into a frame of reference visible to mass audiences. A social history of twentieth-century archaeological research on the Columbia Plateau exposes the politically situated knowledge produced by social scientists in pursuit of rational, predictive, and pragmatic models of social behavior.

Not until the late 1980s did archaeologists reflect on their post-colonial legacy,³¹ but these theories have had no effect on U.S. federal land management, a minimal effect on U.S. academies, and little to no effect on archaeologists of the Columbia Plateau. With the ascension of Tribal Historic Preservation Officers (THPOs), the World Archaeology Congress, international indigenous rights law, and the recognition of the politics of heritage management coming out of the transitional Third World countries and indigenous rights movements, it is now apparent to self-aware archaeologists throughout the world that archaeological projects have the potential to not only affect the tourist economy and social memory but also the validity and stability of nation-states and indigenous nations. NAGPRA forces archaeologists to confront this past and process, and NAGPRA’s potency was weakened as a result of *Bonnichsen v. U.S.* Some Plateau archaeologists fought having to reflect upon their actions and become informed by contemporary postcolonial theory... and won.

POST-ANCIENT ONE FUTURE

The Ancient One localizes historical trends that significantly contribute to the public discourse on the religious rights of Native Americans, the peopling of Native America, the viability of NAGPRA and repatriation, the

ethics of anthropological science, and the politics of the past. The legal rights to the Ancient One have been hotly litigated since its discovery in 1996, making the Ancient One site the most litigated archaeological site in the history of American archaeology.

Two recent and interwoven historical trends changed with the discovery and legal proceedings of the Ancient One. One trend involves the legacy of Native American human rights, the second deals with the history of anthropological science. Before NAGPRA, Native Americans and archaeologists often clashed over the control of human remains and artifacts. Throughout the nineteenth and twentieth centuries, amateur pot hunters violated tribal property and religion by excavating burial sites and collecting grave goods. On the Columbia Plateau, from 1933 to 1975, scientists excavated burial grounds before the waters produced by the damming of major rivers flooded the sites, usually with little to no consultation with descendent communities.

In 1990, with the establishment of NAGPRA, a professional protocol between Native Americans and archaeologists was initiated to correct the earlier human rights errors and provide a vehicle for repatriation of remains collected in archaeological excavations and inadvertent discoveries. Since the discovery of the Ancient One site in 1996, and the subsequent court cases up until late 2004, NAGPRA protocol has been scrutinized and appears to have changed to favor the fundamentalist scientists who desire to retain skeletal material for study. The discovery of the Ancient One initiated an erosion of the historical trend of Native Americans legally claiming “prehistoric” human remains in North America while increasing the power of archaeological science to dominate the discourse and material culture of the past. These new trends, instigated by the court’s recent decision on the Ancient One, are in sharp contrast to anthropological labor through the 1990s and into the twenty-first century as best observed in applied

anthropology,³² indigenous archaeology, the Code of Ethics of the American Anthropological Association, the Vermillion Accord,³³ and the United Nations Draft Declaration on the Rights of Indigenous Peoples.³⁴

The Ancient One is essential in mapping trends in the relationship between Native American values and dominant forms of science in late-twentieth-century Native American and American history. Fundaments of Columbia Plateau archaeological research for a century, such as building cultural chronologies and tracking cultural affiliation through time and space, are forced into self-reflexive critique by the legal proceedings on the repatriation of the Ancient One. Trends in the history of American epistemology, science, and Native American human rights coalesce around the Ancient One, as courts, Native Americans, the public, and scientists scrutinize the ethics of anthropological science and its questionable relationship to Native American culture. The discovery of the Ancient One forced into the praxis of anthropology a new future. Archaeologists and THPOs now speak of a “Post-Ancient One world.”³⁵

Some of the tribes and appellants are not against scientific investigation (the appealing Confederated Tribes of the Colville Reservation for example). What the tribes require is a compromise with science. The court was unwilling to recognize that a compromise could have been reached by returning the Ancient One to the tribes after preliminary research had been conducted. To allow for this compromise would have strengthened the belief that there can be mutually autonomous, though complementary, historiographies. But this compromise would have weakened the monolithic belief that science is the *only* epistemology situated in reality and applicable in America. Science, claiming to be backed by democratic principles, high-technological innovations, and Protestant pragmatism, stands as the foremost opponent to the peaceful collaboration of diverse and marginal epistemologies.

The Ninth District court affirmed that the scientific method is the best epistemology with which to discern affiliation and recover meaning from the Ancient One. This comes as no surprise to the tribes who have participated in numerous court cases seeking protection of sacred sites and religious rights. When the courts have weighed the structural components of the Western worldview (granted, it is a huge hegemony, containing as it does nationalism, democracy, capitalism, essentialism, rule of law, monotheism, positivism, rationality, and the military-industrial complex) versus Native American religion rights, the tribes have been defeated in every instance. The Ancient One is now the property of scientists, who, by claiming the authority and right to make universal meaning from the phenomenological world, will construct a history from the Ancient One that will implicitly support the structure of the Western worldview.

Proponents of universal applications of scientific epistemologies claim that the Ancient One is the cultural property/progeny of all humans. While this is a fine ideal, contemporary local concerns surrounding the survival, sovereignty, and health of small-scale cultures is presently more essential than the creation of a world bank of osteological information for comparison, query, and graduate student research. The Ancient One's return would affirm tribal autonomy and the power of pan-tribal confederations, and further legitimize the powers of tribal self-governance in cultural resources management in the eyes of the public, to funding federal agencies, and to governing tribal councils. The "recovery" of the Ancient One back from science would have been a symbol of indigenous perseverance, strengthening Native American culture, and the continuation of tribal religious traditions. The return of the Ancient One would have validated traditional ways of being to young Native people. Oral traditions are made ever more tenuous as legal documents, especially when contrasted to the approximations, models, and theories of science. This will further

marginalize the teachings of elders and the transmission of traditional wisdom through song, dance, and story. The oral traditions submitted by the Columbia Plateau tribes are profound evidences of cultural continuity dating from before the time of the Ancient One. The oral traditions help elders to remember when the earth was in a period of transformation, a time when geological events occurred, over 14,000 years ago. These traditions are alive today and will forever be vibrant inspirations for tribal peoples. These stories are the vehicles and containers for culture, far more representative of culture, a lingua-cognitive phenomena, than the bald evidence presented by the archaeologists. NAGPRA was not written as a battle-ground for the bout between science and indigenous tradition, nor was it written to test the definition of what it is to be a Native American.

Seen as an object not yet coded with a dominant paradigmatic sign, the Ancient One is that threatening or fueling substance. He exists in that virgin frontier of anomalies waiting to be transformed into meaning by archaeologists. He is one of the multitudes that threaten with resistance or constitute a passive fuel for progress. After the scientists fully exhaust all scientific studies and embrace the Ancient One with their incorporating technologies, the dominant paradigm will unfold within the Ancient One. Eventually, the Ancient One will be no more, replaced by a representation in archaeology texts, a postcard, a graph, a billboard, an anecdote, a cyborg.

The structure of the Western worldview once proliferated by sword, Bible, and plough is now perpetuated by a self-replicating informational virus spread by the global culture industry in the form of advertising and American brand democracy. It seemed a perfectly sad joke when Dr. Jim Chatters reconstructed the Ancient One in such a manner as to look like *Star Trek's* Captain Picard, as if he had become a spokesman for a line of sneakers or a discount airline, or maybe a superhero of amazing scientific power: *K-MAN*! It is now true, the Ancient One is another thing objectified

by a special light to become a supermodel for a Western-styled paradigm.

**“THE ANCIENT ONE”: THE RESULT OF SIXTY YEARS OF
ARCHAEOLOGICAL SCIENCES ON THE COLUMBIA PLATEAU**

For over a century, Anglo-American anthropologists, archaeologists, and historians have mediated Columbia Plateau Native American cultural content with direct funding from the U.S. federal government. This work, usually salvage archaeology and salvage ethnography, done to the standards of the day, has profound political implications today, as witnessed by the power of the Indians Claims Commission, by setting restrictive trends in methodology, content, form, temporal depth, and geospatial breadth. Traditional people are offended by the publicizing of incorrect, sacred, and private content in these technical reports, interpretive ethnographies, and romanticized films.

Bureaucratic, militaristic, legal, and scientific historiography informed Native American archaeology throughout the nineteenth and twentieth centuries. On the Columbia Plateau in the twentieth century, “science” excavated villages and burial grounds before the floods of reservoirs from electricity-producing dams seriously disturbed tribal subsistence and identity.

Every one of these archaeological reports defined Native American culture as static, incremental, evolutionary, and ecologically determined, and, to the *exclusion* of all things, functional — usually only with rocks. In 2005, on the Columbia Plateau, a thousand archaeological reports will be written confirming that the Native Americans had little agency, and, while redundant for more than 6,000 years, were not affiliated with prehistoric peoples of such antiquity.

But in the wake of NAGPRA and traditional cultural properties policies, tribes are becoming important shareholders in the past. Materials

and individuals excavated along the Columbia River and stored at Washington State University have been cataloged, prepared for repatriation, or repatriated.³⁶ With the power to demand consultation and the repatriation of human remains and specific objects, Native Americans have been able to revolutionize the practice of archaeology.

The conclusion of the case evinces the results of sixty years of archaeological research divorced from Native American complements. The case eventually boiled down to a judge with no archaeological training opining from arguments about such esoteric elements as radio-carbon dates, the absence of pithouses, the shape of projectile points, and the presence of a chemical in the bones to refer to anadromous fish consumption. Once the scientists had steered the legal discourse away from the language of ethics and to the language of the archaeologist, it was clear the archaeologists were going to win the court case. The elements that constitute culture — language, oral traditions, living narrative, memory identities, participant epistemologies, kinship, religion, and social agents — supported the tribes' claims for repatriation. Hard archaeological evidence, eternally inconclusive, is the reason the Ancient One is destined to decay on a plastic shelf instead of in the Mother Earth.

I have written this to encourage THPOs to assert their federal rights. The majority of the texts in the 1970s and 1980s, from which the data in *Bonnichsen v. U.S.* were drawn, were CRM experiments conducted on public land and funded by tax dollars. THPOs have the legal right to critically review all such reports for wrongful data inclusions, omissions, and interpretations. Today, tribes have a say in the conclusions made in archaeology texts whose writers are funded by tax dollars. Archaeological conclusions affect real living people. The present task for THPOs is to develop historiographical content and forms that best represent *their* histories.

Notes

1. U.S. Department of the Interior, National Park Service, National NAGPRA: Frequently Asked Questions, http://www.cr.nps.gov/nagpra/FAQ/INDEX.HTM#What_is_NAGPRA? (2004).
2. John Jelderks, *Opinion and Order for Robson Bonnichsen et al. v. United States of America et al.* (2002).
3. John Gould, *Opinion and Order for Robson Bonnichsen et al. v. United States of America et al.* (2004).
4. David Hurst Thomas, *Skull Wars: Ancient One, Archaeology, and the Battle for Native American Identity* (New York: Basic Books, 2001).
5. Joseph F. Powell and Jerome C. Rose, "Report on the Osteological Assessment of the 'Ancient One' Skeleton (CENWW.97. Kennewick)," in *The Administrative Record for the Robson Bonnichsen, et al., v. United States of America*, Civil No. 96-1481-JE, (2000).
6. John L. Fagan, "Analysis of Sediments Associated with Human Remains Found at Columbia Park, Kennewick, WA," in *The Administrative Record for the Robson Bonnichsen, et al., v. United States of America*, Civil No. 96-1481-JE, (2000).
7. Francis P. McManamon, "The Initial Scientific Examination, Description, and Analysis of the Ancient One Human Remains," in *The Administrative Record for the Robson Bonnichsen, et al., v. United States of America*, Civil No. 96-1481-JE, (2000).
8. Frank Leonhardy and David Rice, "A Proposed Cultural Typology for the Lower Snake River Region, Southeastern Washington," *Northwest Anthropological Research Notes* 4, no. 1 (1971): 1-29.
9. Guy Moura, "Colville Tribal Statement of Traditional Belief Supporting

Affiliation with the Ancient One,” in *45BN495 National Register Nomination Form: Attachment 1* (2000).

10. Ibid., 1.

11. David Boxberger, *Cultural Affiliation Study of the Kennewick Human Remains: Review of Traditional Historical and Ethnographic Information* (Washington, D.C.: National Park Service, Department of the Interior, 2000), <http://www.cr.nps.gov/aad/kennewick/INDEX.HTM>.

12. Moura, “Colville,” 1.

13. See Richard Rorty, *Philosophy and the Mirror of Nature* (Oxford: Blackwell, 1980).

14. Clayton W. Dumont Jr., “The Politics of Scientific Objections to Repatriation,” *Wicazo Sa Review* 18, no. 1 (Spring 2003): 109, as referencing Brenda Norrell, “Return of Ishi’s Brain. Delayed,” *Indian Country Today*, April 12-19, 1999, and Jane Hubert, “The Disposition of the Dead,” *World Archaeology Bulletin* 2 (1998).

15. Alice Kehoe, *The Land of Prehistory: A Critical History of North American Archaeology* (New York: Routledge, 1998).

16. Thomas Patterson, *Toward a Social History of Archaeology in the United States*, Case Studies in Archaeology Series (New York: Harcourt Brace College Publishers, 1995).

17. Quoted in *ibid.*, 106.

18. Brent Hicks, ed., *Marmes Rockshelter: A Final Report on 11,000 Years of Cultural Use* (Pullman: Washington State University Press, 2004).

19. Gould, *Opinion*, 1603, 1606.

20. Ibid., 1603.

21. The Sapir-Whorf hypothesis states that there is a systematic

relationship between the language a person speaks and how that person both understands the world and behaves in it.

22. E. S. Lohse and Roderick Sprague, "History of Research," in *Handbook of North American Indians* (Washington, D.C.: Smithsonian Institution, 1998), 23.

23. Ibid.

24. Rosemary Joyce, *Languages of Archaeology* (Oxford: Blackwell Press, 2003).

25. Christopher Tilley, *Places, Paths, and Monuments: A Phenomenology of Landscape* (Oxford: Berg Publishers, 1994).

26. Richard White, "*It's Your Misfortune and None of My Own*": *A New History of the American West* (Norman: University of Oklahoma Press, 1991).

27. George P. Nicholas, "A Necessary Tension: Integrating Processual, Postprocessual, and Other Approaches to the Past," in *Indigenous Peoples and Archaeology* (Calgary: University of Calgary Archaeological Association, 2004), 114-29.

28. Craig Howe, "Keep Your Thoughts above the Trees: Ideas on Developing and Presenting Tribal Histories," in *Clearing a Path: Theorizing the Past in Native American Studies* (London: Routledge Press, 2003), 162.

29. Gerald Vizenor, *Manifest Manners: Narrative on Postindian Survivance* (Lincoln: University of Nebraska Press, 1994), 100.

30. Ibid., 56.

31. Michael Shanks and Chris Tilley, *Social Theory and Archaeology* (Cambridge: Polity Press, 1987).

32. Society for Applied Anthropology, *Mission, Visions, Values, Goals* (2004), <http://www.sfaa.net/sfaagoal.html>.
33. World Archaeology Congress, *Vermillion Accord* (1989).
34. United Nations, "Draft Declaration on the Rights of Indigenous Peoples," in UN Doc. E/CN.4/ Sub.2/1994/2/Add.1. (1994: III, Article 12).
35. Adam Fish, "Integrating Tribal Concerns into Cultural Overviews," paper presented at the symposium Thirty Years of Cultural Resources Management with the Confederated Colville Tribes (Honoring the Heritage of the Plateau Peoples: Past, Present, and Future), Washington State University, Pullman, Wash. September 29-30, 2004.
36. Mary B. Collins, and William Andrefsky Jr., *Archaeological Collections Inventory and Assessment of Marmes Rockshelter (45FR50) and Palus Sites (45FR36A, B, C)*, Center for Northwest Anthropology, Report No. 28, Department of Anthropology, Washington State University, Pullman, 1995.

Author(s): Cathay Y. N. Smith

Source: *The Yale Law Journal Forum*, Nov 3rd 2016 (126 Yale L.J. F. 216)

Stable URL: <https://www.yalelawjournal.org/forum/oral-tradition-and-the-kennewick-man>

Oral Tradition and The Kennewick Man

Cathay Y. N. Smith

In April 2016, the U.S. Army Corps of Engineers confirmed that the ancient human body discovered in 1996 near Kennewick, Washington, often referred to as the “Kennewick Man” or “The Ancient One,” is genetically related to modern-day Native Americans.¹ This confirmation ended a twenty-year-long struggle between scientists at the Smithsonian, the U.S. Department of the Interior, and Native American tribes of the Columbia Plateau, and will now jumpstart the process for repatriation of the Kennewick Man to the Native American tribes for reburial in accordance with the Native American Graves Protection and Repatriation Act of 1990

(NAGPRA).²

The Kennewick Man has been beset by scientific, anthropological, ethical, and legal controversy from the day his remains were unearthed in 1996. In July 1996, two college students discovered a human body on federal land close to the town of Kennewick, Washington. The body belonged to a forty-five- to fifty-year-old man who had a stone point embedded in his pelvis. Initially, local anthropologists believed the man was an early European settler or trapper.³ However, the stone point in his pelvis and radiocarbon dating of a bone from his hand indicated that the body was likely between 8,340 and 9,200 years old.⁴ Five Native American tribes sought repatriation of the Kennewick Man for proper burial pursuant to NAGPRA.⁵ Enacted in 1990, NAGPRA requires the repatriation to tribes of Native American human remains and affiliated cultural items discovered or excavated from federal or tribal lands.⁶ A number of scientists, including anthropologists and archaeologists at the Smithsonian Institution, however, argued that the remains should not be repatriated for burial but rather retained for scientific study because there was no evidence linking the Kennewick Man to current-day Native Americans. When the U.S. Army Corps of Engineers demonstrated its intent to repatriate the remains and refused to release the remains to the scientists for study, the scientists initiated litigation against the U.S. Army Corps of Engineers, the U.S. Department of the Interior, the National Park Service, and others involved.⁷

An eight-year-long legal battle over ownership of the Kennewick Man ensued, culminating in the Ninth Circuit Court of Appeals' controversial *Bonnichsen v. United States* decision in 2004.⁸ In that opinion, the court affirmed the trial court's finding that the Kennewick Man was not Native American because there was no evidence he was related to a "presently existing tribe, people, or culture."⁹ In making its decision, the court relied on then-available scientific evidence, but refused to consider the oral-

tradition evidence introduced by the U.S. Department of the Interior and the Native American claimants' expert in the lower court. According to the court, "the value of such [oral-tradition] accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record . . . does not show where historical fact ends and mythic tale beings."¹⁰ It was not until 2015 that an international team of scientists compared DNA removed from the hand bone of the Kennewick Man with DNA from modern-day Native Americans and other humans around the world, concluding that the Kennewick Man's DNA was, in fact, most similar to that of Native Americans.¹¹ Unfortunately, it took modern science twenty years to prove what the Native American claimants had been saying all along—that their oral tradition confirmed that "the Ancient One was one of us."¹²

On the eve of the upcoming repatriation of the Kennewick Man, this Essay focuses on the Ninth Circuit Court of Appeals' summary rejection of the oral-tradition¹³ evidence introduced by Native American claimants in *Bonnichsen v. United States* which, as we now know, was ultimately more reliable than the then-available written historical and scientific records upon which the court relied. Courts disadvantage Native American claimants when they summarily reject oral-tradition evidence and prohibit "a major source of their knowledge, transmitted orally, across time, and in a distinctive style, [from being] meaningfully . . . entered as evidence, with the same consideration as written historical evidence."¹⁴ Furthermore, courts' inconsistent treatment of oral tradition also results in uncertainty and deprives Native American claimants of clear guidelines on what evidence they should or should not submit to prove their claims. This Essay suggests four factors for courts to consider on a case-by-case basis in the future to evaluate the probative value of oral-tradition evidence. It then proceeds to examine the inconsistent treatment of oral tradition evidence by U.S. courts, and urges courts to employ a balanced approach and adopt the factors

offered in this Essay when evaluating Native American oral tradition in legal cases involving Native Americans claimants.

I. ORAL TRADITION AND ITS CHALLENGES AS EVIDENCE

Oral tradition is a “coherent, open-ended system for constructing and transmitting knowledge”—“probably the oldest form of history.”¹⁵ It is “the means by which knowledge is reproduced, preserved and conveyed from generation to generation . . . connecting speaker and listener in communal experience and uniting past and present in memory.”¹⁶ Oral traditions are often expressed in parables and include mythological components in addition to genuine historical and factual elements that are usable in understanding the past.¹⁷ For several thousand years, oral tradition has been the primary vehicle for Native Americans in North America to record facts and events.

It is undeniable that oral tradition poses certain challenges when introduced as evidence in a modern U.S. court proceeding. One of the major obstacles to a court’s acceptance of oral tradition as evidence is the deeply ingrained Eurocentric bias of valuing the written record over oral evidence. Peter Whiteley describes this phenomenon as “the Western cult of the written word,” characterized by “engrained—though largely unexamined—ideas about the supposed instability and unreliability of oral narratives.”¹⁸ This prejudice is evident not only in the court system, but also in past anthropological and archaeological studies. These ingrained ideas are usually concerned with uncertainty about whether oral tradition may have been altered over time, whether its conveyance through hundreds of intermediaries over thousands of years may have created errors within the narrative, whether language changes may have altered the meaning of the oral tradition, and whether the narratives have been influenced by biases or

politics.¹⁹ These ideas explain why anthropologists, archaeologists, and historians in the past largely ignored Native American oral tradition but were wholly willing to take literally colonial records that were written in missionaries' or government officials' diaries or journals—even though such diaries, journals, and reports were equally “interpretively problematic,”²⁰ were likely to be influenced by biases or politics, and often included “self-serving documents, . . . edited and doctored diaries, and memoranda written ‘for the record’” with a deliberate eye toward posterity.²¹ Recognizing the inherent biases against oral tradition, the current Chief Justice McLachlin of the Canadian Supreme Court cautioned in *Mitchell v. Minister of National Revenue* that claims involving Native Americans²²

give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, “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” In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions.²³

Another challenge to admitting Native American oral tradition in courts is the hearsay rule of evidence.²⁴ This rule prevents the introduction of testimony from a person who heard another person assert something outside of court, in order to prove the truth of the matter asserted.²⁵ Oral tradition — which by its very nature is passed down orally through generations — could be excluded as hearsay if used as evidence of the events it describes. Recognizing this issue, Native American claimants typically introduce oral tradition through expert testimony and reports, which courts have found not to be subject to the hearsay rule.²⁶ Similarly, one U.S. court found that oral-tradition evidence about family history fell

under an exception to the hearsay rule that applies when the declarant is unavailable.²⁷ Even though U.S. courts have rarely addressed this issue, the Canadian Supreme Court has declared that “the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.”²⁸ In *Delgamuukw v. British Columbia*, Native American claimants introduced their oral traditions in three forms: the tribes’ sacred official history (in the *adaawk* and the *kungax* oral traditions), personal recollections of tribal members, and affidavits filed by tribal elders.²⁹ The Canadian Supreme Court found that the trial court had erred when it refused to admit the tribal elders’ affidavits or give any weight to the tribes’ sacred official history, and ordered a new trial.³⁰ Specifically, Chief Justice Lamer recognized that, for many Native American tribes, oral traditions “are the only record of their past.”³¹ Requiring Native American claimants to conform to strict evidentiary rules would “impose an impossible burden of proof” on Native American claimants, and “render nugatory” any rights that they have.”³²

A third challenge that plagues Native American oral tradition in courts relates to oral tradition’s incorporation of parables and myth with “genuinely historical components.”³³ Native American oral tradition is often told in parables, and traditionally contains accounts of factual events mixed with legend or myth. For instance, in Whiteley’s account of the oral tradition of the First Mesa’s Water clan chief, historical facts — such as detailed attention to specific, named village sites and clans — were interwoven with myth — such as an oral tradition describing the Water Serpent deity clothing elders in turkey skin to fly over water.³⁴ Similarly, in the oral traditions that Boxberger examined, evidence that bison were present in the Columbia Plateau in the past came in the form of parables about coyotes.³⁵ The use of parables often not only reinforces the Eurocentric ingrained prejudice

against Native American oral tradition; it also presents courts with the task of having to separate myth from fact when evaluating oral-tradition evidence. However, modern-day scientists and geologists have time and time again proven the accuracy of oral tradition in recalling environmental changes (such as the presence of bison, great floods, rivers changing course),³⁶ catastrophes (earthquakes, tsunamis, volcanic eruptions, and lava flows),³⁷ and other prehistoric and historic occurrences. For instance, in the 1990s, the Mohegan Nation of Connecticut employed archaeologists to document the location of a 300-year-old historic cabin site.³⁸ When asked, tribal elders were able to pinpoint the exact location of the buried cabin's foundation, even though there was no evidence of the cabin on the surface of the land.³⁹ Elders were also able to recollect the names of those who occupied the cabin 300 years ago.⁴⁰

Recognizing the issues described above, NAGPRA requires a museum, a federal agency, or the judiciary to examine "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion" in order to determine cultural affiliation of artifacts (including human remains) for repatriation to Native American claimants.⁴¹ In other words, once the artifacts and human remains are considered Native American, NAGPRA explicitly directs the decision maker to consider oral tradition when determining which tribe is entitled to repatriation. There have been more than 300 instances where museums and federal agencies have relied on oral traditions to determine the cultural affiliation of items to be repatriated.⁴² In fact, one of those instances involved human remains dating back to 1000 B.C.E., whose cultural affiliation was determined through "oral traditions that place[d] . . . ancestors in the region 'since the beginning.'"⁴³ By listing oral-tradition evidence next to biological and historical evidence in NAGPRA, and by not assigning priorities or weight between those types of

evidence, Congress effectively acknowledged that oral tradition is valuable evidence. Oral-tradition evidence should not be explicitly sought for one purpose, but have its probative value totally denied in others. Courts should be encouraged to consider oral-tradition evidence to determine whether artifacts and human remains are considered “Native American” under NAGPRA in the first place. Courts should also consider oral-tradition evidence in claims involving Native American issues outside of NAGPRA, such as treaty rights, compensation claims, and traditional religious claims, where Native American claimants are often required to prove their ancestors’ interpretation of treaties, to demonstrate continuity between current practices and pre-contact practices, to establish historic and prehistoric uses of land or water, or to show their ancestors’ usual and customary practices, customs, and traditions.

Similarly, the U.S. Supreme Court has dictated that when evaluating treaties made between Native Americans and the United States, such treaties must be interpreted “as the Indians would have understood them.”⁴⁴ This canon of construction was first introduced by Chief Justice Marshall in *Worcester v. Georgia*, in which the Court interpreted the Treaty of Hopewell as the Cherokees would have interpreted it and accordingly recognized the tribe’s right to exercise control over the agreed-upon land for use and occupancy (rather than merely reserving the tribe’s right to hunt on it).⁴⁵ In order to comply with this canon of construction, it is crucial that Native American claimants be able to introduce evidence of their ancestors’ interpretation of treaties, which would primarily be in the form of oral tradition rather than written record. Indeed, it would be unjust if Native American claimants had to rely on written documentation by outsiders, such as missionaries or government officials, to prove their own ancestors’ interpretation of a treaty—when such information may have been directly passed down from their ancestors in the form of oral tradition.⁴⁶ Recognizing

this potential injustice, the Ninth Circuit in *Cree v. Flores* acknowledged that oral-tradition testimony by tribal elders testifying on their ancestors' understanding of treaties "has been sanctioned for over twenty years" and that the court was "entitled to accord [such] testimony preference over that of other experts."⁴⁷

II. FACTORS FOR ASSESSING CREDIBILITY OF ORAL TRADITION EVIDENCE

This Essay does not advocate that courts must regard every aspect of Native American oral tradition as evidentiary fact, or that all oral tradition is of equal probative value. On the contrary, U.S. courts should implement a reasonable, balanced, and consistent approach to evaluate and consider the probative value of oral-tradition evidence in cases involving Native American claimants. As a starting point, courts and litigants can consider applying the four factors of *individual consistency*, *conformity*, *context*, and *corroborating evidence* to evaluate the credibility and persuasiveness of factual accounts in oral traditions. These four factors, described in more detail below, are adopted from past successful incorporations of oral-tradition evidence in legal proceedings and anthropological studies. They may be applied to evaluate and weigh the probity of oral-tradition evidence introduced through expert testimony and reports by tribal elders or experts, or through direct testimony by tribal elders and members.

First, when a court is faced with evidence in the form of oral tradition, it should analyze the *individual consistency*⁴⁸ of historical facts in oral tradition; specifically, how consistently an individual "will tell the same story about the same events on a number of different occasions."⁴⁹ This factor looks at whether an individual narrator's accounts of an event are consistent with each other and are, somehow, replicated.⁵⁰ In a legal proceeding, it could mean comparing oral tradition obtained at a deposition

with the testimony of the same narrator in a previous deposition, proceeding, or affidavit, where available.⁵¹ For instance, in *Zuni Tribe of New Mexico v. United States*, Andrew Wiget, a folklore analyst and expert witness for the Zuni Tribe, reviewed a total of thirty-three depositions (consisting of thousands of pages) of Zuni members.⁵² Using the commonalities he found within the oral tradition discussed in those deposition testimonies, Wiget pieced together relevant historical facts relating to Zuni occupation of the land at issue.⁵³ He then compared those deposition testimonies with the available testimonies from the same persons in a previous litigation, which showed the *individual consistency* of the oral-tradition evidence.⁵⁴

Second, courts should analyze the *conformity*⁵⁵ of historical facts in oral tradition. Conformity shows “the degree to which the form or content of one [individual’s] testimony conforms with other[s’] testimonies” — in other words, the conformity between the oral traditions of multiple people or tribes.⁵⁶ For instance, oral tradition recorded and expressed by multiple individuals, whose accounts conform to the same pattern in both structure and content, should be considered more reliable as historical facts.⁵⁷ On the other hand, accounts in oral tradition that are only endorsed by single individuals may be rejected as failing to conform to “indigenous canons of the truly historical.”⁵⁸ In the *Zuni Tribe of New Mexico* case mentioned above, in addition to showing individual consistency, Wiget compared the oral-tradition testimonies of all of the deponents with each other, and found *conformity* between the testimonies of most, if not all, of the deponents.⁵⁹

Additionally, courts should consider the *context* of the oral tradition. Narratives that occur in ritual contexts may be more credible as historical facts because in Native American tradition, violations of truth in ritual contexts may subject the individual narrator to the possibility of supernatural sanctions.⁶⁰ Furthermore, oral traditions that are subjected to authentication may also be more credible. For instance, the *adaawk* and

kungax oral traditions of the Gitksan and Wet'suwet'en nations in Canada, as recounted in *Delgamuukw*, are the "sacred official litany, or history, or recital of the most important laws, history, traditions and traditional territory" of a tribe.⁶¹ Those oral traditions are "repeated, performed and authenticated at important feasts" where dissenters may object if they disagree with the narratives, thereby ensuring their authenticity.⁶² The *context* of the *adaawk* and *kungax* — that they are sacred, the most important laws of the tribes, and regularly authenticated by the tribes — weighs in favor of finding the historical facts in those oral traditions credible.

Finally, courts should analyze the availability of *corroborating evidence* in the oral tradition, looking at whether the historical facts in the oral tradition conform to events "recorded in other primary source material such as documents, photographs, diaries and letters."⁶³ The availability of corroborating evidence — from anthropological, scientific, or historic sources — will help to confirm credibility and persuasiveness and to discern "whether the story is consistent with what is known about how the world works."⁶⁴ This factor does not necessarily seek external evidence corroborating the specific facts asserted in the oral-tradition evidence. Rather, it seeks evidence corroborating other aspects within the Native American claimants' oral tradition in order to support the credibility of the oral tradition as a whole. For instance, in 2001, three tribes — Navajo, Southern Ute, and Ute/Paiute — filed competing claims under NAGPRA for repatriation of the Pectol shields.⁶⁵ The Pectol shields were three large painted bison hide shields that were unearthed by Ephraim Portman Pectol and his wife in central Utah (near what is now Capital Reef National Park) in 1926.⁶⁶ In order to determine which tribe had the closest cultural affiliation with the shields, the park archaeologist relied on oral-tradition evidence from the tribes, and found the oral tradition of the Navajo to be most persuasive.⁶⁷ The Navajo oral tradition presented a narrative of two

men, entrusted to care for the shields, hiding them “in the area we call the Mountain With No Name [Henry Mountains] and Mountain With White Face [Boulder Mountain]” when the Navajos were being rounded up by war parties.⁶⁸ The oral-tradition accounts of Navajos being rounded up and having “transitory presence” in the area where the Pectol shields were found was corroborated by historic record.⁶⁹ The recorded historic evidence corroborating certain aspects of the oral tradition made it more likely that other aspects of the oral tradition — including the Navajo ownership of the shields — would be credible. Similarly, in *Zuni Tribe of New Mexico*, during Wiget’s process of reviewing testimonies of members of the Zuni Tribe, he deliberately avoided reviewing parallel scientific expert reports in order not to influence his findings from the oral tradition. It was not until after he had pieced together a historical report based on the oral tradition accounts that Wiget reviewed other evidence to corroborate his report—thereby showing the availability of corroborating evidence.⁷⁰ After evaluating the oral-tradition evidence under the individual consistency, conformity, and corroborating-evidence factors, the U.S. Claims Court in *Zuni Tribe of New Mexico* was convinced of the evidentiary value of Zuni oral tradition when proffered to prove that the Zuni had occupied an area “from time immemorial.”⁷¹

III. IMPROPER REJECTION OF ORAL-TRADITION EVIDENCE IN U.S. COURTS

Courts in the U.S. have been inconsistent in their consideration and treatment of oral-tradition evidence. In two cases discussed above, *Cree v. Flores* and *Zuni Tribe of New Mexico*, the courts considered and recognized the evidentiary value of oral-tradition evidence, and applied that evidence effectively to establish Native American ancestors’ interpretation of treaties and Native American historical occupation of land. However, in many more

cases, including *Bonnichsen*, courts either rejected or discounted oral-tradition evidence on the sole basis that the evidence was in the form of, or was derived from, Native American oral traditions.

In *Bonnichsen v. United States*, the U.S. Department of the Interior and Native American claimants submitted the expert report of Dr. Daniel Boxberger, a professor of anthropology at Western Washington University, in support of their claim for repatriation.⁷² Boxberger reviewed a number of the Native American claimants' oral traditions,⁷³ explaining that

For the Native people of the [Columbia] Plateau oral traditions are true histories The oral traditions speak of a way of life not unlike that described in the ethnographies of the Plateau. From this perspective we might see the oral traditions as a form of historical documentation that can be used to supplement the descriptive ethnographic accounts.⁷⁴

Boxberger's report concluded that "[t]he oral traditions . . . relate to geological events that occurred in the distant past. These events cannot be dated with precision but they are highly suggestive of long-term establishment of the present-day tribes."⁷⁵ In other words, Boxberger's report supported the Native American claimants' position that their ancestors had long lived in the region in which the Kennewick Man was found and that the Kennewick Man was therefore one of their ancestors and Native American under NAGPRA.

In spite of Boxberger's report, the lower court found "no[] evidence that will support the conclusion that the remains are" Native American within the meaning of NAGPRA and, therefore, held that the Kennewick Man was not subject to NAGPRA's repatriation guidelines.⁷⁶ The Ninth Circuit affirmed, stating that "because Kennewick Man's remains are so old and the information about his era is so limited, the record does not permit the Secretary [of the Interior] to conclude reasonably that Kennewick Man" was Native American.⁷⁷ In its opinion, the Ninth Circuit expressed extreme skepticism towards the probative value of oral-tradition evidence. In the

court's words, oral-tradition accounts were

just not specific enough or reliable enough or relevant enough . . . [b]ecause oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins . . .⁷⁸

With these statements, the Ninth Circuit summarily rejected the evidentiary value of all Native American oral tradition and essentially relegated Native American oral tradition to the same evidentiary value as myth. Instead of examining the district court's record to determine whether it had engaged in a balanced and reasonable examination of the credibility of the specific oral-tradition evidence proffered by the Native American claimants, the Ninth Circuit dismissed the probative value of *all* evidence in the form of oral tradition. The Ninth Circuit's decision permitted scientists to study the Kennewick Man, and his body has since been stored in the Burke Museum in Seattle, Washington.

Similarly, in *Sokaogon Chippewa Community v. Exxon Corp.*, the Sokaogon brought suit seeking a declaration that the tribe had the right to occupy a tract of 144 square miles in northeastern Wisconsin where the tribe had resided since 1842.⁷⁹ In response to Exxon's summary-judgment motion, the Native American claimants submitted evidence that, according to Sokaogon oral tradition, beginning in 1854, the tribe was repeatedly promised its own reservation by Commissioner Manypenny and his successors.⁸⁰ In order to defeat Exxon's summary-judgment motion, the Native American claimants merely needed to show that there was a genuine dispute of material fact. In spite of this low burden, the Seventh Circuit affirmed the lower court's decision to grant Exxon's motion, stating that there was "no *documentation*" of the oral tradition, "which is at best embroidered (too many ransoms, shipwrecks, lost and stolen maps, and

deathbed revelations to be plausible) and at worst fictitious,”⁸¹ and finding that “[t]he oral tradition of a promised reservation is not *evidence*, that is, evidence admissible in a court of law, which is what Fed.R.Civ.P. 56 explicitly requires in order to create a triable issue.”⁸² The court placed the blame on the Sokaogon’s counsel who made “no effort . . . to cast [the oral tradition] into a form in which it would be admissible in a court of law.”⁸³

Had the lower court or the Ninth Circuit in *Bonnichsen* applied the four factors of individual consistency, conformity, context, and corroborating evidence to weigh the probative value of the oral tradition evidence, they might have given more thought to the evidence proffered by the Native American claimants. For instance, there was *conformity* of the historical facts in the oral-tradition evidence in *Bonnichsen*. To prepare his expert report in *Bonnichsen*, Boxberger relied on oral traditions from six separate Columbia Plateau tribes: Nez Perce, Yakama, Umatilla, Cayuse, Wanapum, and the Confederated Tribes of the Colville. His expert report was based on the common historical and factual themes found in the oral traditions of these tribes.⁸⁴ The fact that there were common historical and factual themes in the oral traditions of six separate tribes that had resided in the same area for centuries showed the conformity of the oral tradition.

The factor of *corroborating evidence* also weighed in favor of the credibility of the oral-tradition evidence in *Bonnichsen*. In Boxberger’s expert report, he opined that the Native American claimants’ “oral traditions speak of a way of life not unlike that described in the ethnographies of the [Columbia] Plateau.”⁸⁵ He further showed that the oral traditions he examined described geological events that occurred in the distant past, such as the change in the flow of the Columbia River and the past presence of bison on the Columbia Plateau.⁸⁶ Geologists and archaeologists confirmed many of the phenomena described in the Native American claimants’ oral tradition. For example, all of the Native American claimants’ oral traditions

included a story outlining the reason for the absence of bison on the Columbia Plateau.⁸⁷ A number of the oral traditions suggested that bison had been present on the Columbia Plateau in earlier times — a phenomenon that archaeological evidence dates to over 2000 years ago.⁸⁸ Additionally, Boxberger examined oral traditions that described the change in the flow of the Columbia River from the Grand Coulee to the present channel. Current-day geologists have confirmed this phenomenon, and dated it to over 10,000 years ago.⁸⁹ These historical events described in the oral traditions and confirmed by geologists and archaeologists show the availability of corroborating evidence.

CONCLUSION

Oral tradition is a valuable historical and evidentiary source of information that should not be overlooked by attorneys or judges. Attorneys representing Native American claimants should endeavor to demonstrate that oral-tradition evidence satisfies the criteria of individual consistency, conformity, context, and corroborating evidence, whether such evidence is presented through expert testimony or witness testimony by tribal elders. More importantly, courts should not reject or discount evidence solely because it is in the form of oral tradition, but should evaluate the probity of oral-tradition evidence using the four factors discussed above. Courts do a disservice to Native American claimants when they summarily dismiss oral tradition without first considering its value or credibility as evidence. This effectively silences the voices of Native American claimants, and imposes an almost impossible burden of proof on Native American claimants, “for whom large spans of their history and large areas of their domain lack written documentation and whose conceptions of history do not always conform to Western notions.”⁹⁰ The Kennewick Man may finally be going home, but had the courts given more thought to the oral-tradition evidence

introduced by the Native American claimants in *Bonnichsen*, it might not have taken twenty years to repatriate his body to his tribal descendants and to fulfill the purpose of NAGPRA.

Cathay Y. N. Smith is an Assistant Professor of Law at the University of Montana Blewett School of Law. She thanks Jesse Dodson, Maylinn Smith, Monte Mills, Kathryn Ore, Alexandra Perloff-Giles, and Jeremy Aron-Dine.

Preferred Citation: Cathay Y.N. Smith, *Oral Tradition and the Kennewick Man*, 126 Yale L.J. F. 216 (2016), www.yalelawjournal.com/forum/oral-tradition-and-the-kennewick-man.

Notes

1. See Laura Frazier, *Army Corps Finds that Kennewick Man is Native American, Subject to Federal Burial Act*, OREGONIAN (Apr. 27, 2016, 11:25 AM), http://www.oregonlive.com/pacific-northwestnews/index.ssf/2016/04/army_confirms_that_kennewick_m.html#incart_river_home [<http://perma.cc/sVJH-3VSJ>]; Tasneem Raja, *A Long, Complicated Battle Over 9,000-Year-Old Bones Is Finally Over*, NPR (May 5, 2016, 11:47 AM), <http://www.npr.org/sections/codeswitch/2016/05/05/476631934/a-long-complicated-battle-over-9-000-year-old-bones-is-finally-over> [<http://perma.cc/9HDW-YYJA>]. In order to be consistent with case law and reporting, this Essay uses "Kennewick Man" instead of "The Ancient One" to refer to the ancient human body discovered near the town of Kennewick, Washington.

2. 25 U.S.C. §§ 3001-3013 (2012).

3. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1120 (D. Or. 2002).

4. *Id.*

5. *Id.* at 1121. The five tribes were the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Colville Reservation, and the Wanapam Band. *Id.* at 1121 n.8.

6. 25 U.S.C. § 3002(a) (2012).

7. *See Bonnichsen*, 217 F. Supp. 2d at 1119-20, 1122.

8. 367 F.3d 864 (9th Cir. 2004). Some criticized the Ninth Circuit's decision as being “fundamentally flawed,” Allison M. Dussias, *Kennewick Man, Kinship and the “Dying Race”: The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 Neb. L. Rev. 55, 60 (2005), while others heralded the decision as being “the way forward,” *Science Wins Ancient Bones Battle*, BBC News (Feb. 5, 2004, 2:44 AM), <http://news.bbc.co.uk/2/hi/americas/3460773.stm> [<http://perma.cc/6B9Q-PXE6>], and having “effectuate[d] Congress's actual intent in enacting NAGPRA,” Robert Van Horn, *The Native American Graves Protection and Repatriation Act at the Margin: Does NAGPRA Govern the Disposition of Ancient, Culturally Unidentifiable Human Remains?*, 15 Wash. & Lee J.C.R. & SOC. JUST. 227, 243 (2008).

9. *Bonnichsen*, 367 F.3d at 878, 880.

10. *Id.* at 882.

11. Morten Rasumussen et al., *The Ancestry and Affiliations of Kennewick Man*, 523 Nature 455, 455 (2015); *see also* Associated Press, *Kennewick Man Related to Native Americans, DNA Study Says*, OREGONIAN (June 18, 2015), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/06/kennewick_man_related_to_nativ.html [<http://perma.cc/ASF5-A3MU>].

12. Associated Press, *supra* note 11 (quoting Jim Boyd, chairman of the council that governs the Confederated Tribes of the Colville Reservation).
13. In order to be consistent with the language of NAGPRA and the *Bonnichsen* case, this Essay uses the term “oral tradition,” although it is presumed to encompass oral tradition, oral narrative, oral history, legend, folklore, and story.
14. Bruce Granville Miller, *Oral History on Trial* 2-3 (2011) (citation and internal quotation marks omitted).
15. Miller, *supra* note 14, at 12 (quoting Julie Cruikshank, *Oral Tradition and Oral History: Reviewing Some Issues*, 75 Can. Hist. Rev. 403, 408 (1994)).
16. Renée Hulan & Renate Eigenbrod, *Introduction: A Layering of Voices: Aboriginal Oral Traditions*, in *Aboriginal Oral Traditions* 7,7 (Renée Hulan & Renate Eigenbrod eds., 2008).
17. Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 Am. Antiquity 405, 412-13 (2002).
18. Whiteley, *supra* note 17, at 407, quoted in Dussias, *supra* note 8, at 146.
19. See, e.g., John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 Environs Envtl. L. & Pol'y J. 349, 396 (2004).
20. Whiteley, *supra* note 17, at 406-08.
21. Alice M. Hoffman, *Reliability and Validity in Oral History*, 22 *Today's Speech* 23, 27(1974).
22. To be consistent, I continue to use the term “Native American” even though Canadian courts generally use the term “aboriginal.”
23. [2001] S.C.C. 33, para. 27, 34 (Can.) (quoting R. v. Vanderpeet, [1996]

2 S.C.R. 507, para. 68 (Can.)).

24. *See, e.g.*, Fed. R. Evid. 802.

25. *Fed. R. Evid.* 801(c).

26. *See, e.g.*, Cree v. Flores, 157 F.3 d 762, 773 (9th Cir. 1998) (ruling that the trial court could admit oral-tradition evidence given by a tribal elder testifying as an expert witness, who therefore was not subject to the hearsay rule).

27. *See* Makila Land Co. v. Kapu, where the Hawai'i Court of Appeals found that "family oral history can reasonably be viewed as an exception to the hearsay rule under [Hawai'i Rules of Evidence 804 (Hearsay exceptions; declarant unavailable)]." 156 P.3 d 482, 499 (Haw. Ct. App. 2006) (citing Haw. Rev. Stat. § 626-1, Rule 804).

28. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1ot1, para. 87 (Can.).

29. *Id.* at para. 92.

30. *Id.* at para. 107-08.

31. *Id.* at para. 84.

32. *Id.* at para. 87 (quoting *Simon v. The Queen*, [1985] 2 S.C.R. 387, 408 (Can.)).

33. *Whiteley*, *supra* note 17, at 412-13; *see also Delgamuukw*, [1997] 3 S.C.R. 1010 at para. 97 (recounting trial court's decision to discount oral tradition evidence because "it was impossible to make an easy distinction between the mythological and 'real' aspects of these oral histories ... because they... confounded 'what is fact and what is belief,' [and] 'included some material which might be classified as mythology'").

34. *Whiteley*, *supra* note 17, at 408-09.

35. Daniel L. Boxberger, *Review of Traditional Historical and*

Ethnographic Information, Nat'l Park Serv. (Feb. 15, 2000), <http://www.nps.gov/archeology/kennewick/boxberger.htm> [<http://perma.cc/3JA9-3KZ4>].

36. See Dussias, *supra* note 8, at 103 (finding that place names in the Sahaptin language include cultural memory of the Bretz floods from 13,000 to 18,000 years ago); Boxberger, *supra* note 35 (finding oral traditions that include stories of bison present on the Columbia Plateau and of the Columbia River changing course).

37. See, e.g., Ruth S. Ludwin et al., *Dating the 1700 Cascadia Earthquake: Great Coastal Earthquakes in Native Stories*, 76 *Seismological Res. Letters* 140 (2005); D. Wayne Moodie et al., *Northern Athapaskan Oral Traditions and the White River Volcano*, 39 *Ethnohistory* 148 (1992) (providing examples of oral tradition supported by scientific evidence); Dorothy B. Vitaliano, *Geomythology: Geological Origins of Myths and Legends*, in *Myth and Geology* 1 (L. Piccardi & W.B. Masse eds., Geological Soc'y Special Pub. 273, 2007); *Native American Oral Traditions Tell of Tsunami's Destruction Hundreds of Years Ago*, Or. Dep't of Geology & Mineral Indus. (2009), <http://www.oregongeology.org/sub/earthquakes/oraltraditions.htm> [<http://perma.cc/Z78N-YNRQ>].

38. David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* 244-45 (2000); see also *id.* at 247-51 (providing additional examples of oral traditions locating historic and prehistoric sites).

39. *Id.* at 244-45.

40. *Id.*

41. 25 U.S.C. § 3005(a) (4) (2012).

42. Steven J. Gunn, *The Native American Graves Protection and*

Repatriation Act at Twenty: Reaching the Limits of Our National Consensus, 36 Wm. Mitchell L. Rev. 503, 528 (2010) (“At least 266 notices of inventory completion and 42 notices of intent to repatriate have relied, in whole or in part, on oral histories and oral traditions in determining the cultural affiliation of Indian cultural items.”)

43. Notice of Inventory Completion: Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA, 68 Fed. Reg. 62,321, 62,321 (Nov. 3, 2003).

44. *See Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970)) (explaining the canons of Indian treaty interpretation).

45. 31 U.S. (6 Pet.) 515 (1832); *see Note, Indian Canon Originalism*, 126 Harv. L. Rev. 1100, 1102-03 (2013) (describing *Worcester v. Georgia*).

46. Having to rely on outsiders’ written documentation of ancestors’ interpretation not only prejudices Native American claimants because of the potential bias and political propensities in such written documents, but also because of language misinterpretation. For instance, in *Washington v. Wash. State Commercial Passenger Fishing Vessel Assn*, the U.S. Supreme Court acknowledged that there “is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty” because “the interpreter used a ‘Chinook jargon’ to explain treaty terms, and that jargon not only was imperfectly (and often not) understood by many of the Indians but also was composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms.” 443 U.S. 658, 666-67 & n.10 (1979).

47. *Cree*, 157 F.3d at 773-74.

48. The *individual consistency* factor is adopted from Hoffman’s and

Wiget's "reliability" criterion, described in Hoffman, *supra* note 21, at 25, and Andrew Wiget, *Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case*, in *Zuni and the Courts* 173, 178-79 (E. Richard Hart ed., 1995).

49. Hoffman, *supra* note 21, at 25.

50. *Id.*; Wiget, *supra* note 48, at 178.

51. *See* Wiget, *supra* note 48, at 178. In order to determine individual consistency of deponents' oral tradition in *Zuni*, Wiget compared their testimonies to their deposition testimonies from a Native American title case five years prior to the *Zuni* case. With the exception of small changes, most of the deponents' testimonies were consistent. *Id.*

52. *See* Wiget, *supra* note 48, at 173-74.

53. *Id.*

54. *Id.* at 178.

55. The *conformity* factor is adopted from Wiget's "consistency" criterion. *Id.* at 179-80.

56. *Id.* at 179.

57. *See* Whiteley, *supra* note 17, at 412.

58. *Id.*

59. Wiget, *supra* note 48, at 179.

60. Whiteley, *supra* note 17, at 412. A similar concept is Western courts' reliance on oral testimony given under oath in depositions and trial.

61. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 93 (Can.) (quoting *Delgamuukw v. British Columbia*, [1993] 3 W.W.R. 97, 164 (Can.)).

62. *Id.*

63. Wiget, *supra* note 48, at 177 (quoting Hoffman, *supra* note 21, at 25).

64. Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 *J. Land, Resources & Envtl. L.* 91, 113 (2009).

65. *Id.* at 98-99.

66. *Id.* at 91.

67. *See id.* at 99, 110.

68. *Id.* at 110-13 (alterations in original).

69. *Id.* at 114-15.

70. Wiget, *supra* note 48, at 174.

71. *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607, 607 (Ct. Cl. 1987).

72. *See Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1151 (D. Or. 2002).

73. *Id.* at 1151-55.

74. Boxberger, *supra* note 35.

75. *Id.*

76. *Bonnichsen*, 217 F. Supp. 2d at 1138.

77. *Bonnichsen v. United States*, 367 F.3d 864, 882 (9th Cir. 2004) (emphasis in original).

78. *Id.* at 881-82.

79. 2 F.3d 219, 220 (7th Cir. 1993).

80. *Id.* at 222 (emphasis added).

81. *Id.*

82. *Id.* at 224-25 (emphasis in original). The Seventh Circuit ultimately held that the Native American tribal claimant had no right to occupy nonreservation land.

83. *Id.* at 225.

84. Boxberger, *supra* note 35.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Bonnichsen v. United States*, 217 F. Supp. 2d 116, 1153-54 (D. Or. 2002).

90. Wiget, *supra* note 48, at 173.

Part 6: Biblical, African, and Homeric Oral History and Tradition

Out of a mass of ethnographic materials from around the world anthropologists and historians of religion have gradually clarified the extent to which, in primitive societies, only mythic rather than historical time is “real,” the time of primeval beginnings and paradigmatic first acts, the dream-time when the world was new, suffering unknown, and men consorted with the gods.

— Yosef Hayim Yerushalmi, 1982

Author(s): John Miles Foley

Source: *College Literature*, Vol. 34, No. 2, Reading Homer in the 21st Century (Spring, 2007), pp. 1-28

Published by: The Johns Hopkins University Press

Stable URL: <https://www.jstor.org/stable/25115419>

Foley, John Miles. "'Reading' Homer through Oral Tradition." *College Literature* 34:2 (2007), 1-28. © 2007 Johns Hopkins University Press and West Chester University. Reprinted with permission of Johns Hopkins University Press.

“Reading” Homer through Oral Tradition*

John Miles Foley

For beyond all mortal men the singers have a share
of honor and reverence, since the Muse has taught them
the pathways, for she loves the singers' tribe. (*Odyssey* 8.479-81)

* John Miles Foley is WH. Byler Endowed Chair in the Humanities and Curators' Professor of Classical Studies and English at the University of Missouri-Columbia, where he also directs the Center for Studies in Oral Tradition. Among his major books are *Homer's Traditional Art* and *How to Read an Oral Poem*.

Reading Homer today, nearly three millennia after the fact, presents us with some fresh and exciting opportunities alongside some persistent challenges. Not least among the newer developments is the relatively recent discovery that behind our surviving manuscripts lurks a longstanding, textless oral tradition. In other words, before the *Iliad* or *Odyssey* assumed any kind of written form — never mind our convenient modern editions and translations — there existed an ancient Greek oral storytelling tradition, an unwritten vehicle for the tales that surround the Trojan War and its aftermath. Words were, as Homer himself often characterizes them, “wingèd” rather than inscribed, and non-literate bards (*aoidoi*) performed songs (*aoidai*) from their repertoires before audiences of listeners. In the beginning, then, the epics we cherish as books took shape not as silent texts but rather as audible story-performances.

If the modern (re-)discovery of oral tradition was chiefly the accomplishment of the previous century, then its consequences provide a formidable critical agenda for the twenty-first century. In short, we have come to recognize that Homer’s epics circulated in oral tradition for a substantial period before they were recorded, and so now we have before us the exciting and demanding prospect of applying that new understanding to our present-day reading. That the *Iliad* and *Odyssey* stemmed from an oral tradition is beyond doubt, but how does that complex reality affect our grasp of the poems? Do we read Homer’s epics differently because of their unwritten heritage? If so, how? As it turns out, these contemporary concerns represent variations on an ancient theme.

The Homeric Question: Yesterday and Today

The Homeric Question — The puzzle of “Who was Homer?” — has been prominent in one form or another from the ancient world onward.¹

Within a few centuries of the time that many have supposed he lived and practiced his trade, the seventh or eighth century BCE, four or five different city-states were already claiming Homer as a native son. Wide disagreement over the identity of his father and mother, his specific era, and even the poems that he composed (in addition to the *Iliad* and *Odyssey*, the only two to survive whole) further muddled the waters. Notwithstanding heroic efforts over subsequent periods to construct a believable biography, today much remains lost in the past, the result of fragmentary evidence and contradictory “lives of Homer.”²

The nineteenth and early twentieth centuries sought to answer the Question by formulating a binary theory of authorship. The so-called Analysts argued for composite, layered epics that were pieced together by redactors; by ascribing the *Iliad* and *Odyssey* to multiple individuals, they accounted for perceived inconsistencies that otherwise seemed to defy explanation. At the opposite end of the spectrum lay the Unitarians, who believed in a single master-poet solely responsible for creating both massive poems. During this period, then, scholars and students had first to select between two irreconcilable theories — one or many Homers — and then to interpret the epics from that chosen perspective.

About two decades into the twentieth century another solution arose that effectively reframed the Homeric Question, highlighting neither a single person nor multiple contributors but focusing instead on a continuous, ongoing *oral tradition* behind the poems. Instead of construing the *Iliad* and *Odyssey* as either conventionally authored works or pieced-together editions, Milman Parry portrayed them as products of a generations-long process of composition in performance. Think of the Homeric oral tradition as a living inheritance, passed down from one epoch to another and refashioned by each performer, and you have the general idea of what he was advocating.

Parry's explanation proceeded in three basic steps — textual analysis, comparative anthropology, and fieldwork.³ Texts came first, as he demonstrated the *traditional* nature of the epics by showing how the famous noun-epithet names (“wily Odysseus,” “grey-eyed Athena,” “swift-footed Achilles,” and the rest) were part of an elaborate, flexible system for constructing hexameter lines.⁴ The poets, he claimed and painstakingly illustrated, used a specialized language for making Homeric verses, a language that provided ready-made solutions to all possible compositional challenges. Parry reasoned that such formulaic phrases or “atoms” of diction amounted to a symptom of a poetry made and re-made over centuries within a coherent tradition.

Next, and as a result of his exposure to comparative accounts of living oral poetries, especially through the agency of Matija Murko, a Slavicist who attended his thesis defense,⁵ Parry soon made the leap to recognizing that this kind of traditional composition must also originally have been *oral*. In two famous articles published in 1930 and 1932, he made the case for Homeric diction as the product of composition in performance, of a long tradition of oral bards who must have sung (not written) ancient Greek epics. According to this hypothesis, our surviving manuscripts stand at the end of centuries of oral performances, in some way serving as fixed epitomes of that ongoing process.

Parry's third step consisted of on-site fieldwork: testing his hypothesis about Homeric oral tradition in the living laboratory of the Former Yugoslavia, chiefly in what we today call Bosnia.⁶ In 1933-35, and in the company of Albert Lord and their native translator and colleague, Nikola Vujnović, he journeyed to six geographical regions in order to experience and record hundreds of oral epic performances by preliterate bards, or *guslari*. The result of that expedition was first and foremost what Lord described as a “half-ton of epic”: scores of acoustically recorded and

dictated performances deposited in the Milman Parry Collection of Oral Literature at Harvard University.⁷ Just as crucially, after Parry's untimely death in 1935 Lord used their collected material to complete the analytical experiment they had traveled to the Balkans to conduct.⁸ It soon became apparent that the very same kinds of structures and patterns that Parry had found in the texts of Homer were also highly prominent and functional in the South Slavic oral epic songs. The preliterate performers of *epske pjesme*, it turned out, employed a similarly specialized language (noun-epithet formulas, stereotyped scenes, and so forth); in other words, these *guslari* composed their epic poetry Homerically. The hypothesis of an ancient Greek oral tradition appeared to be proven by analogy.

In subsequent years the so-called "Oral Theory" has expanded enormously from the initial comparison of Homer and the South Slavic epics to include more than 150 different oral traditions from six of the seven continents and from ancient times through the modern day.⁹ Among the areas that have been examined from this perspective are dozens of African, Arabic, and central Asian traditions, as well as Native American, African American, Chinese, Japanese, Spanish, Portuguese, and many Germanic tongues. In the past thirty to fifty years we have learned more and more about unwritten forms of verbal art that collectively dwarf all of written literature in both size and variety. Most importantly for our present purposes, the Homeric epics belong to that international and ages-old inventory of originally textless story.

Naturally, much discussion has ensued since Parry and Lord made their initial claims, and many have called for rethinking of their hypotheses along various lines. One early and crucial intervention was the dissolution of the so-called Great Divide, the notion that oral tradition and literacy were two mutually exclusive categories that never mixed in the same person or even the same culture. Subsequent fieldwork from various parts of the world has

shown us that this simply isn't the case, and we have begun to learn about the fascinating ways in which the worlds of orality and literacy combine and interact not only within societies but also within the very same individual.¹⁰ Another matter needing attention was the relationship between oral performance and the versions of the *Iliad* and *Odyssey* that have survived in textual form. Since we can never recover the exact situation in which the poems were recorded, it has proven wiser to allow for multiple possibilities in recording and transmission, as well as for editorial and other kinds of textual evolution over the one and one-half millennia between their possible fixation in the sixth century BCE and the first whole *Iliad* that has reached us, which stems from the tenth century CE.¹¹

Regardless of that lost history, however, the epics as we have them remain at least *oral-derived* and *traditional*, and as we shall see they cannot be fully appreciated without taking this heritage into account. It's simply a matter of what we aim to do with any form of verbal art: to read or interpret the work on its own terms. In the twenty-first century Homeric scholarship has begun to assess the deep implications of oral traditional origins for the *Iliad* and *Odyssey*, with fascinating results, and that process will continue. Reading Homer in our time — as problematic as it may seem in so many ways — offers us this new and exciting challenge.

Homer: Author or Legend?

Before exploring what impact the ancient Greek oral epic tradition has on how we read the *Iliad* and *Odyssey* in the twenty-first century, let's spend a moment considering what that heritage tells us about the figure we call Homer. As noted above, uncertainty and contradiction about his identity began in the ancient world, and modern theories about his era, repertoire, and even the meaning of his name abound.¹² But if comparative studies in

oral epic tradition reveal anything, it must be that individual authorship — in the sense that we have come to apply that notion in post-medieval literary traditions — is the wrong concept to be pursuing.

An example drawn from South Slavic epic tradition will illustrate the categorical disparity. Early in the twentieth century the scholar-fieldworker Alois Schmaus was conducting *in situ* investigations of the *epske pjesme* in roughly the same region of Bosnia as Parry and Lord worked a couple of decades later. He was told numerous times by many *guslari* about an epic singer who outstripped them all in ability, and who was the source of all of their best songs (whatever poems they happened to rank as such). So Schmaus did what any responsible fieldworker would do: he spared no effort in attempting to locate this paragon, named Ćor Huso Husović (literally, Ćor means “one-eyed”), so that he could interview and record him. But try as he might, the fieldworker could neither locate the actual person nor assemble any internally consistent biography. One can hear the frustration in Schmaus’s own account of trying to establish an authoritative version of the great singer’s repertoire: “Even with all conceivable effort, it was impossible for me to learn anything more detailed about the actual songs that Ćor Huso typically sang. Everything remembered on that score was generalities” (1938, 134; my translation).

Later on, a *guslar* named Salih Ugljanin would describe Ćor Huso in similarly grand but decidedly indistinct and sometimes contradictory terms for Parry, Lord, and Vujnović. If we combine what the two fieldwork teams were able to gather about this most celebrated of epic bards, we arrive at something like the following:

Born in the Kolašin region sometime in the first half of the nineteenth century, Ćor Huso Husović was later to become the most famous *guslar* in all of Montenegro and Serbia. Notwithstanding the obscurity of his early years and the severity of his handicap, he was eventually to enjoy an enormous reputation as an itinerant *guslar* who surpassed all others and was the source of their best songs. In addition to his wanderings throughout

Montenegro and Serbia, he spent 19 years in various parts of Bosnia, where he reportedly traveled in the never-realized hope that his vision would be restored. The sources agree that Ćor Huso journeyed everywhere on horseback, fully armed and accompanied by a young guide. His appearance would have been arresting: he wore a red silk coat with sleeves embroidered in the Croatian style, green trousers, black leather boots, a fez, and a great turban, not to mention a long knife hanging from his belt along with two sterling silver pistols. Very tall and stocky, at minimum 120 kg. (more than 260 lb.), with “brimming handfuls” of mustaches, Ćor Huso was literally larger than life, a challenging burden for even the strongest mount, we are told. Curiously, this vivid representation — strictly speaking, more heroic than bardic — conspicuously lacked his own *gusle*; he simply used whatever instrument was available, and prospective audiences were only too ready to provide whatever was needed to induce him to perform. (Foley 1998,162)

Several aspects of this account are unusual or unprecedented in a real-life context. First, *guslari* were conventionally local rather than itinerant performers, learning to compose epic from a male relative or neighbor and remaining most of their lives in their natal villages. Even if they did travel, their talents would not easily be recognized across diverse ethnic regions. Furthermore, there was no reason for singers of tales to dress heroically, armed to the teeth with the very weapons worn by the larger-than-life heroes in the songs they performed, and certainly no evidence that they ever did. In fact, most *guslari* were poor farmers or woodcutters or butchers with minimal possessions. When one adds anecdotes about Ćor Huso performing for Emperor Franz Jozef and being rewarded with 100 gold napoleons and 100 sheep, as well as singing for five or six hours straight (a physical impossibility given the strain that epic performance places on the vocal cords¹³), we can start to understand that this “best of all *guslari*” was more legend than fact.

Parry, Lord, and Vujnović heard a great deal about this master-singer, who was sometimes and in some regions called Isak or Hasan Ćoso rather than Ćor Huso. Depending on the individual singer’s story, this Balkan Homer was 120 or more years old, could jump 12 paces at the age of 101,

sang so well that males and females were permitted to mix at a Moslem wedding, and was the certain victor in whatever contest of epic singing he entered. But although he boasted a repertoire of songs many times larger than any ever observed during fieldwork, and although he was credited as the source of all the finest ones, none of the *guslari* who sang his praises ever actually met him. Again depending on the informant, the explanation given was that he lived in another village, or was always traveling, or plied his trade a generation or two earlier (“he was not even my father’s father,” said Stolac singer Ibro Bašić¹⁴). Indeed, none of the Parry-Lord *guslari* had ever encountered him face-to-face.

If we aggregate all of his often unverifiable, “tall-tale” bio-data, we gain a composite portrait of the master-singer or *Guslar* not as a historical person but as a legend. Moreover, it is a portrait that, like all legends, morphs to fit the local circumstances: real-life singers used the *Guslar* to establish their own bardic lineage and prominence, as well as to stamp certain of their songs as the best. The fact that they describe — and even name — the *Guslar* in mutually inconsistent ways is simply a function of the role such a figure plays for them. In other words, this paragon and forefather amounts most essentially to an anthropomorphization of the poetic tradition itself, a story-based way to talk about the inheritance of oral epic. Call him Ćor Huso, Isak, or Hasan Ćoso — he stands for the body of story that each of his real-life descendants is performing.¹⁵ By tracing their practice to the foundational legend of the *Guslar*, they are in effect providing themselves with the best possible *curriculum vitae* to establish their own credentials as epic singers.¹⁶

If we look at the multiple disparities among the ancient sources that parochially represent his proposed biography, Homer emerges as a cognate kind of legendary figure.¹⁷ For one thing, his parentage varies wildly: Telemachos is cited as one possible father, with Apollo and Orpheus mentioned as earlier ancestors, while the roll of mothers includes Nestor’s

daughter Epikaste. While Smyrna appears to be one of the most popular choices for Homer's birthplace, we also hear of Chios, Cyme, Ios, Argos, and Athens. In regard to actual chronology, which is always construed as relative dating, various Lives of Homer place him before Hesiod or as a contemporary of Midas, for example. While the name "Homer" is consistently interpreted as "blind" or "captive" (the common noun *homêros*), the first of these attributions probably has more to do with a parallel to Phemios, the blind bard of the *Odyssey*, than with the sightlessness of any real-life figure.¹⁸ And as for repertoire, the sources inconsistently add to the canonical *Iliad* and *Odyssey* one or more of the following lost or fragmentary poems from the Epic Cycle or elsewhere: the *Thebais*, the *Epigoni*, the *Cypria*, the *Little Iliad*, the *Aethiopis*, the *Nostoi*, and the *Homeric Hymns*. In summary, if we are willing to set aside our default notions about individual authorship that are after all inapposite in oral tradition, Homer looks much more like a legend — a way to anthropomorphize the ancient Greek epic tradition — than a historical figure. If scholars have been unable to establish a standard biography and trace the *Iliad* and *Odyssey* to a flesh-and-blood individual, it is, we can conclude, because he simply never existed as such. "Homer" names the epic tradition as an ongoing whole.¹⁹

With this conception of Homer in mind, let us now turn to the implications of oral tradition for the structure and artistic achievement of "his" poems. We will start with a short overview of the unique linguistics of oral poetry.

Words Versus "Words"

As primarily people of the book and page (at least for the present cultural moment in the Western world), we approach the act of reading with

a number of built-in and usually unexamined assumptions.²⁰ Arguably the most fundamental of these hidden agendas is the matter of *what constitutes a word*. This may seem only too obvious a concern: after all, we couldn't get very far in understanding any text — such as the one you're reading now — without subscribing to the signal of white space between letter-sequences as a dependable indicator of word-boundaries. Should any doubt arise, we can always consult a dictionary or lexicon, an agreed-upon Bible of words, to back up our visual discriminations. But what if this visual, lexical definition just didn't get to the bottom of what we were trying to read and understand? What if in certain cases the indivisible atom of communication didn't consist of printed letters circumscribed by white space or enshrined as an entry in a dictionary? Our gold-standard currency for what we mean by reading — the typographical word — might prove less negotiable than we customarily assume. Homer hints at just such a possibility when he uses the singular forms of the ancient Greek terms *epos* and *muthos*, both conventionally translated as “word,” to describe a whole speech or a story.²¹ Or consider the similar terminology employed by the poet of *Beowulf*, an oral-derived, traditional poem from early medieval England.²² Mongolian oral epic singers call the same speech- and thought-increment a “mouth-word.”²³

We can observe the same phenomenon — only this time in a living oral tradition — by listening to the South Slavic *guslari*. Not only do these poets conceive of a “word” (*reč*) as a larger unit of utterance within their epic performances;²⁴ they also describe its identity as a composite unit or sound-byte during informal conversations with Parry and Lord's native assistant Nikola Vujnović.²⁵ Here is an excerpt from the interview with Mujo Kukuruzovic, recorded in 1935 in the region of Stolac, which focuses on the non-textual definition of a *reč*.

Nikola Vujnović: This *reč* in a song, what is it?

Mujo Kukuruzović: Well, here, it's this — "miserable captive" (sužanj nevoljniče), as they say, or this — "Ograšćić Alija" [a hero's proper name], or, as they say, "He was lamenting in the ice-cold prison" (Pocmilijo u lednu zindanu).

NV: Is this a *reč*?

MK: This is a *reč*....

NV: Let's consider this: "Mustajbey of the Lika was drinking wine" (Vino pije lički Mustajbeže). Is this a single *reč*?

MK: Yes.

NV: But how? It can't be *one*: "Mustajbey-of-the-Lika-was-drinking-wine."

MK: It can't be one in writing. But here, let's say we're at my house and I pick up the *gusle* [the accompanying instrument] — "Mustajbey of the Lika was drinking wine." That's a single *reč* on the *gusle* for me.

NV: And the second *reč*?

MK: And the second *reč* — "At Ribnik in a drinking tavern" (Na Ribniku u pjanjoj mehani) — there.

NV: And the third *reč*?

MK: Eh, here it is — "Around him thirty chieftains, / All the comrades beamed at one another" (Okolo njega trideset agalara, / Sve je sije jaran do jarana).

NV: Aha, good!

For Kukuruzović, and for other *guslari* as well, a "word" had no relation to our typographically defined item; it was a larger, composite unit consisting of not a single but rather multiple written words. In the conversation above we learn that in South Slavic oral epic tradition a "word" can be a phrase, a poetic line, or even multiple poetic lines. In other such exchanges it becomes apparent that the term *reč* can also designate a speech, a scene, a narrative increment, and even an entire story-performance. Although this taxonomy may at first seem strange, once we consider things from the bards' point of view it makes perfect sense: a *reč* is a unit of utterance, a thought-byte, a logical constitutive unit. Anything smaller than a "word" — one of our typographical words, for example — just doesn't register as a cognitive chunk. As we shall see below, this structural reality has crucially important implications for how we are to understand a work composed in "words" as opposed to words.

Homer's "Words"

What significance does the *guslar*'s lesson in the linguistics of oral epic performance have for reading the *Iliad* and *Odyssey*? What can the South Slavic singer's *reč* tell us about Homer's characteristic use of *epos* and *muthos*?²⁶ The short answer is clear: scholarship has shown that Homer (and his tradition) employed a similar array of large "words," or thought-bytes, to compose the ancient Greek epics. In what follows below we will consider the structure and then the idiomatic meaning of these units of expression at three levels: the phrase, the scene, and the story-pattern.

Consider first the smallest level of Homer's traditional "word"-vocabulary: the single hexameter line.²⁷ We have long been struck by the noun-epithet names, like "swift-footed Achilles," if only because of their frequent occurrence. We may even have wondered why they are repeated so often; indeed, some translators have seen fit to vary the English rendering to avoid what they hear merely as droning repetition. But when we add to their sheer frequency the fact that these and many other phrases constitute significant metrical portions of the Homeric hexameter line, their identity and utility as building blocks within a system come into focus. Such ready-made "words" combine seamlessly with other ready-made "words" to yield whole lines of verse that collectively serve a wide variety of purposes.

For example, one of Odysseus's standard names — "long-suffering divine Odysseus"— combines with numerous different predicates to portray many different actions throughout the *Iliad* and *Odyssey*. Here are four actual combinations:

Multiple actions

But pondered (1 occurrence)
But went through the house
(1 occurrence)

Single noun-epithet name

+long-suffering divine Odysseus
+long-suffering divine Odysseus

Again spoke (8 occurrences)
Then sat there (1 occurrence)

+long-suffering divine Odysseus
+long-suffering divine Odysseus

Moreover, substitution can work both ways, as it were, with numerous different figures metrically eligible to be paired with a single action. Here are six examples of how this process works with a cast of characters and a unique predicate:

Single action

And then spoke to him/her

And then spoke to him/her
And then spoke to him/her
And then spoke to him/her
And then spoke to him/her
And then spoke to him/her

Multiple noun-epithet names

+long-suffering divine Odysseus
(3)

+swift-footed Achilles (2)
+ox-eyed mistress Hera (4)
+Gereian horseman Nestor (8)
+goddess grey-eyed Athena (7)
+Diomedes of the great war-cry
(1)

If we “do the math” on the possibilities generated by such substitution systems, we can begin to understand the power and productivity of this oral traditional method of composition. At the level of the line, Homer uses a network of “words,” which scholars have called *formulas*, to support the making and re-making of the *Iliad* and *Odyssey*.²⁸

But his specialized language includes other kinds of “words” as well, namely stereotyped scenes and story-patterns. The Feast provides a familiar example of the so-called *typical scene*, a unit of expression that recurs with some consistency but which also allows room for variation according to its individual placement in the overall story and in different stories.²⁹ In that way the flexible yet stereotyped scene can serve as a malleable traditional pattern to portray a wide variety of feasts, all of them unique to their role in the developing plot(s) but still all instances of the same generic “word.” The key features of the Feast include a host and guest(s), the seating of the guest(s), several core actions associated with feasting, the satisfaction of the

guest(s), and some kind of consequent mediation of a pre-existing problem. The most stable and recognizable form of the core actions is the following five-line increment, which appears verbatim six times in the *Odyssey*:³⁰

A maidservant brought water for them and poured it from a splendid
and golden pitcher, holding it above a silver basin
for them to wash, and she pulled a polished table before them.
A grave housekeeper brought in the bread and served it to them,
adding many good things to it, generous with her provisions.

Most of the other key elements are more flexible, with the exception of the “satisfaction” feature, which almost always takes a standard form:

[The guests] put their hands to the good things that lay ready before
them,
But when they had cast off their desire for eating and drinking, ...

This five-part sequence of actions constitutes the overall paradigm — or “word”— that Homer shapes to fit the individual feast, primarily in the *Odyssey*, whether it be Telemachos suffering the suitors’ abuse in Book 1, Circe entertaining the captive Odysseus in Book 10, or even Polyphemos perversely practicing cannibalism in Book 9. As we shall see below, it also plays a part in the reuniting of Penelope and Odysseus in Book 23.

Another example of the typical scene in Homer, this one exclusively in the *Iliad*, is the Lament, in which a woman somehow related or close to a fallen hero mourns his demise.³¹ A series of three actions constitutes this “word”: an address to the slain hero indicating “you have fallen”; a narrative of their shared personal history and the future consequences for the mourner and others; and a readdress of the hero that includes a final intimacy. Unlike the Feast, the Lament pattern is not tied to particular lines, but remains flexible enough to accommodate a broad variety of mourners and perspectives. Its four principal occurrences are the mourning-songs for Patroklos as intoned by Briseis (Book 19.287-300), and for Hektor as sung by his wife Andromache (24.725-45), his mother Hekabe (24.748-59), and

his sister-in-law (and central figure in the Trojan War saga) Helen (24.762-75). It is also the vehicle for Andromache's highly traditional and yet highly unusual "lament" for the living Hektor in *Iliad* 6, as we shall see later on.

Of the four principal instances, Andromache's mourning-song in the final book of the *Iliad* is the longest and most complex, although it too follows the three-part sequence. After acknowledging Hektor's fall, the signal that cues the onset of the typical scene, she continues with the long and sad litany of what will become of her, their little son Astyanax, and the rest of the Trojans now that their guardian is gone. Among its most poignant features is Andromache's rendering of the second element in the pattern, as she describes the young boy's fate: he will either become a Greek slave or be cast from a tower to his death by some vengeful Greek whose kin Hektor slew in battle. The contrast between these outcomes and his earlier expectations as Hektor's son — the name Astyanax means "city-prince" — is couched in and informed by the familiar narrative frame of the Lament scene. The scene closes with the wife bemoaning the fact that her husband's death out on the battlefield precluded any final intimacy between them, a reflex of the third element in the pattern. Overall, we can see that Homer conveys Andromache's sorrow by traditional convention, not simply in well-chosen words but via a highly idiomatic "word."

The largest species of "word" in Homer's specialized epic language is the traditional tale-type of Return that underlies the *Odyssey*, a story-pattern we can deduce from three sources.³² First, the comparative evidence: the generic story realized in Odysseus's voyage back to Ithaca and reclaiming of his identity and family is one of the oldest and most common stories we have. It exists in numerous branches of the Indo-European language family and persists into modern times, when it has been collected in dozens of different traditions in many hundreds of versions.³³ Most basically, the pattern presents the saga of a hero called off to war who is absent and held

captive for an extended period of time, and who then overcomes numerous difficulties on his way back home, where — always in impenetrable disguise and cleverly testing his relatives' and allies' loyalty — he eventually conquers the suitors pursuing his wife or fiancée by initially defeating them in athletic contests and then (if necessary) slaughtering them. The story may, however, follow an alternate route that we might understand as the Agamemnon-Clytaemnestra option: according to this second option the wife or fiancée proves unfaithful, having taken a substitute mate, and the tale tracks off in another direction. Worldwide, the Hollywood ending and the Agamemnon-Clytaemnestra option are about equally common.

Our second piece of evidence for the Return “word” comes from Agamemnon himself, or rather from his ghost, after he listens to Amphimedon's account of the slaying of the suitors by his comrade Odysseus and a small company of confederates:

“O fortunate son of Laertes, Odysseus of many devices,
surely you won yourself a wife endowed with great virtue.
How good was proved the heart that is in blameless Penelope,
Ikarios' daughter, and how well she remembered Odysseus,
her wedded husband. Thereby the fame of her virtue shall never
die away, but the immortals will make for the people
of earth a pleasing song for prudent Penelope.
Not so did the daughter of Tyndareos (Clytaemnestra) fashion her evil
deeds, when she killed her wedded lord, and a song of loathing
will be hers among men, to make evil the reputation
of womankind, even for one whose acts are virtuous.” (*Odyssey* 24. 192-
202)

Within the very fabric of the poem, a major hero is providing us an overview of the Return story-pattern, acknowledging that the *pleasing song* about Penelope (the Hollywood ending) stands at odds with the *song of loathing* about Tyndareos' daughter Clytaemnestra (the negative option). Agamemnon's own explanation of the plus-minus structure of the Return Song squares precisely with what we observe about the occurrences of this international tale-type of Indo-European lineage: with the long-lost hero's

homecoming the path forks and can lead in either direction. When we add the third piece of evidence — an epic called the *Nostoi* (Returns) that was part of the now-lost Epic Cycle about the Trojan War and its aftermath³⁴ — we can understand that the overall pattern behind the *Odyssey* is another kind of “word” in Homer’s epic vocabulary.

The Idiomatic Value of Homer’s “Words”

Up to this point we’ve learned that Homeric “words” are structurally different from typographical words, and different as well from those textually discrete items that populate dictionaries and are defined by linguists as root morphemes. “Words” in the *Iliad* and *Odyssey* are most fundamentally units of utterance, logical chunks of expression, and they run the gamut from metrically defined parts of lines and whole lines (“formulas”) through “typical scenes” and “story-patterns.” These then are the thought-bytes that constitute Homer’s traditional language, and if we are to read the ancient Greek epics fluently we must be willing to read them on their own terms — by resetting our default cognitive unit from word to “word.”

So far, so good; we’ve located a structural signature in poetry that derives from oral tradition and adduced some examples of how it plays out in the *Iliad* and *Odyssey* at each level. But now comes the crucial question: just what difference does that structural signature make to reading Homer in the twenty-first century? To put the same question another way, what is the idiomatic value of these oral traditional “words”? In what follows, I will re-examine the units identified above — formulaic lines and line-parts, typical scenes, and a story-pattern — in order to demonstrate the traditional connotations of each level of “word.” In all cases the idiomatic meanings have been derived in the same way as lexicographers derive definitions for

their dictionary entries: by examining all available instances of each “word” in context and then comparing them to determine what special meaning each bears across its actual field of usage. For this purpose I considered every instance of two noun-epithet formulas (“swift-footed Achilles” and “green fear”), including those in which the epithets (here “swift-footed” and “green”) didn’t seem to fit the story situation, as well as each occurrence of the Feast and Lament scenes. Since the story-pattern of Return survives in only a single instance in Homeric epic, I have enlisted the aid of cognate Return epics in other Indo-European languages³⁵; these “sister” epics help, along with Agamemnon’s ghost and the Epic Cycle shards, to establish the lost morphology of the Return Song. This was the method used to define Homer’s “words” — a kind of oral traditional lexicography.

At the simplest level, then, we encounter *formulas* such as the famous noun-epithet combinations, which have troubled generations of readers with their unrelenting repetitiveness and occasional awkwardness. Such sound-bytes may be useful, many scholars have observed, but they behave more like lock-step fillers than elevated poetic expression. Just how many times can Homer say “swift-footed Achilles” or “green fear” before these combinations descend into clichés? Milman Parry’s research showed that the ancient Greek oral tradition usually had only a single solution for each metrical challenge,³⁶ so Homer’s palette of characterization and description would seem extremely limited; in its commitment to tectonics, the tradition appears to have restricted rather than promoted the poet’s creativity. When we add the problem of the frequent inapplicability of the epithet or adjective to the situation at hand — Achilles is called “swift-footed” when running, standing, or lying down, for example — we can begin to glimpse the problem. “Words” at the level of the line certainly promoted composition, providing ready-made language for all conceivable narrative situations, but Homer and his epic tradition must have paid a heavy price — the sacrifice

of originality to mechanism. Or so goes the argument, at any rate.

To understand how such formulas work and why they serve as more than simply fillers, we need to recall their structure as whole “words” and inquire into their meaning as composite phrases, that is, as functionally indivisible units of expression. When Homer employs expressions such as “swift footed Achilles” or “grey-eyed Athena” or “Argos-slaying Hermes,” he is naming a character by citing a single memorable quality, a tell-tale detail, that refers primarily not to that character’s immediate situational identity at any particular point in the story but to his or her larger identity across the epic tradition. The formula serves as an agreed-upon idiomatic cue for the character’s mythic history, somewhat like a trademark musical theme associated with a character in a modern film or a costume that identifies a re-entering actor in a drama even before he or she speaks or is spoken to. Moreover, since the “word” is the entire phrase, and not (as we readers of texts customarily assume) a two-part designation consisting of a noun plus an epithet, the adjectives “swift-footed,” “grey-eyed,” and “Argos-slaying” simply aren’t semantically active by themselves. What matters is not the adjective alone but the noun-adjective combination, and we dismember that unit at our peril. Consider the following parallel. We wouldn’t divide one of our words into its component parts — *swim* to *s* + *w* + *i* + *m*, for example — and expect each of those parts to make sense, would we? Accordingly, the noun-epithet combinations for people and gods should be understood for what they are: whole-“word” code for summoning the named characters to center-stage in the epic proceedings. That’s why it makes no difference whether Achilles happens to be running, standing, or lying down when he’s called “swift-footed.” What may seem to be a redundant and occasionally awkward filler is in reality an idiomatic signal that cues (and re-cues) the character’s entrance and identity.³⁷

Just so with the formula “green fear,” or *chlôron deos*, which occurs

ten times in the Homeric epics and hymns.³⁸ In the *Odyssey*, for example, green fear paralyzes the hero as he watches the shades gather to drink sheep's blood in the underworld (11.43), and his comrades experience the same emotion as they confront the looming whirlpool Charybdis (12.243). Translators have often struggled with how to turn this phrase into English, sometimes rendering "green" as "pallid" or "raw" in an attempt to harmonize the color value and the emotion within English usage. But if we interpret Homer's language on its own terms rather than impose our own, we will understand "green fear" as a single "word" and inquire what the ten instances taken together can tell us about its idiomatic meaning. And when we collate the occurrences and make that evaluation, we find that the phrase traditionally connotes *supernaturally induced fear*. Although no lexicon provides any clue to this corporate sense in the literal meaning of either of the parts (*chlôron* = green and *deos* = fear), the "word" as a whole implicitly conveys the involvement of a deity. Once again, then, the force of the adjective is muted by its role as a "syllable" in the larger "word." "Green" remains inactive by itself because it lies below the threshold of the overall expressive unit, which cues a type of fear with a particular genesis and set of implications. Homeric audiences, fluent in the traditional language of ancient Greek epic, understood the idiomatic sense of the phrase and enriched their reception of the story accordingly. Twenty-first century readers would profit by doing the same.³⁹

Similarly, "words" at the level of *typical scenes* offer Homer and his tradition not merely a structural blueprint for constructing epic narrative, but an opportunity to situate individualized events and moments within a traditionally reverberative frame. An audience familiar with the three-part Lament structure, for example, will already have a roadmap in place to guide them through any instance of the pattern, no matter how singular or unusual.⁴⁰ Because a "word" is most fundamentally a unit of language and

expression, it will idiomatically convey its traditional meaning, glossing the specific by adducing the generic, explaining the time-bound by evoking the timeless. Thus, when Briseis begins her mourning-song, the fluent listener must have expected the entire framework: some reflection on the consequences of Patroklos' death for her as well as some form of final intimacy. The same would have been true of the laments for Hektor, whether by his wife Andromache, his mother Hekabe, or his sister-in-law Helen, whose widely divergent viewpoints are well accommodated and focused by the typical scene. Exactly how the pattern played out in each case — how potential became reality — depended of course on the local, specific needs of the story. Indeed, in well-collected traditions like the South Slavic we can observe variation even among instances of the very same plot event from one performance to another. But the important point for our present concerns is that the Lament "word" presented an opportunity for Homer to mesh traditional and situation-specific meanings, to blend idiom with present usage.

Nowhere is this more apparent than in the brilliant application of the Lament pattern to the strained encounter between Andromache and (the living) Hektor in Book 6 of the *Iliad*. The moment is a memorable one. Hektor has briefly returned from the battlefield, still armed and stained with gore, and he and his wife engage in a conversation that epitomizes one of the central contradictions of the poem: his *kleos*-winning (striving after glory in battle) clashes diametrically with Andromache's responsibilities for the *oikos* (home and hearth, including the family unit). Because Hektor defends Troy, it survives, at least for a while. But because he will go down in the fight against Achilles, he will by those very same actions leave his wife and child defenseless before the Greek conquerors. During their conversation in Book 6 these mutually exclusive and yet intertwined concerns emerge with special clarity, as neither figure — notwithstanding

their history together and their shared commitment to Troy — is able to hear what the other is saying; they communicate at cross purposes. Andromache pleads with her husband to stay with her, safe within the walls of Troy, for her and their son's sake, while Hektor explains his duty to battle heroically for the community's sake.

To frame this intense exchange Homer utilizes the highly idiomatic frame of the Lament scene. The opening element, "You have fallen" at lines VI.407-10, predicts rather than chronicles his demise, underlining the certainty of his death even more emphatically by enlisting the connotations resident in the typical scene. The second element (VI.410-28), which by convention traces the implications of the hero's death for his loved ones, recounts what will transpire for Andromache: as she observes, "for me it would be far better / to sink into the earth when I have lost you" (VI.410-11). It would be difficult to gainsay her opinion on this point, since, as she explains, she has no father or mother or brothers to support her after Hektor is gone. And the reason for her lack of family? Achilles, the enemy Greek hero who will kill Hektor, was directly implicated in all of their deaths. Poignantly fulfilling the third part of the pattern, the final intimacy, Andromache then emphasizes her past and future losses by addressing her husband as her substitute father, mother, and brother, stressing his vital importance to her in an unforgettable fashion that recalls what has transpired and resonates with what is to come. As Hektor stands before her alive, she is already effectively mourning him — following the traditional framework that transforms an already moving episode into an absorbing and compelling preview of the fate that inevitably awaits them. It is the Lament "word," here intoned long before Hektor's actual demise, that provides this powerful glimpse into a future they cannot escape.

Homer's use of the typical scene of the Feast also has predictive value well beyond its structural usefulness and general contextualization.⁴¹ If we

follow the methodology described above of collating instances and drawing comparative conclusions about the idiomatic meaning of “words,” we discover that this scene “betokens a ritualistic event leading from an obvious and pre-existing problem to an effort at mediation of that problem” (Foley 1999, 174). That is to say, in addition to serving simply as a convention that supports narrative composition, this “word” contextualizes the existing problematic situation — whatever it may be — and points toward a possible amelioration — whatever that may be. Along with its recognizable generic contribution as a variable framework, then, the Feast also hints at what lies in the future, the next chapter in the story.

That is a significant dimension of its traditional meaning. Two examples of this predictive function must suffice. In Book 1 the feast at Odysseus’ home includes all of the features listed above: a host and guest(s), the seating of the guest(s), several core actions associated with feasting, and the satisfaction of the guest(s), as well as both the five-line core involving the maidservant’s provision of water for washing together with the housekeeper’s distribution of bread and the two-line coda marking the satisfaction of the guests. The pre-existing problem consists, of course, of the arrogant and destructive behavior of the suitors, who have for years abused the absent Odysseus’s hospitality by consuming the Ithacan household as part of their quest to wed Penelope. Telemachos is himself helpless to put a stop to their presumptuous behavior, but after the feast concludes Athena, in disguise as his father’s guest friend Mentos, instills courage into the young man, just as she had promised to do during the prior council of the gods in Book 1. Her advice triggers Telemachos’s voyage of discovery, and her encouragement helps prompt his transformation from the boy whom Odysseus left behind to the man who will one day assist his father in taking revenge on the suitors. On a much more modest level, the final feast in the *Odyssey*, wherein Odysseus and his father Laertes share a

humble meal (24.385ff.), signals the climactic mediation that eventually arrives in the form of the Peace of Athena. In fact, Homer uses two of his traditional “words” in conjunction to tell the story of how the uprising by the slain suitors’ families was quelled: at the level of the typical scene the Feast cues a mediation to follow, while at the level of the formula Athena causes “green fear” to seize Eupheithes, father of the head suitor Antinous, and the larger company. Both the Telemachos-Athena feast in Book 1 and the Odysseus-Laertes feast in Book 24 can be read literally by reference to our default notion of words, but like Andromache’s first lament they reveal their full resonance only after we re-read them from an oral traditional perspective, in terms of their constitutive and reverberative “words.”

Finally, by reading the *Odyssey* with attention to the largest traditional “word,” the *story-pattern* of Return that underlies the entire epic, we can hear more of that oral traditional resonance. Most globally, the background knowledge that an audience familiar with this story would bring to the *Odyssey* must have informed their general understanding of this particular return tale. They would actively expect the hero to leave Kalypso’s island, succeed in winning his way back home to Ithaca notwithstanding serious challenges, test his family’s and allies’ loyalty while remaining in disguise, defeat the suitors in athletic contests and if necessary in mortal combat, and discover his wife’s faithfulness or treachery while revealing his identity through a secret shared only by the two of them. A fluent audience would be able to follow the generic outlines of the roadmap. But exactly how that familiar sequence manifests itself in this particular tale and this particular performance could not be foreseen; details remain the province of the singular realization, as the pattern takes shape via the individual poet’s negotiation with the traditional inheritance and (in the original situation) with an audience that is part of the process. The Return “word” generates an outline for the plot, with suspense deriving not from an unimaginable

surprise or a starkly divergent development but from how each of the expectable stages of the story will turn out on this occasion.

That idiomatic context, in which a fluent listener or reader weighs the present, emergent tale against an awareness of the traditional implications of the Return “word,” also helps to solve three of the most stubborn dilemmas in Homeric studies. In closing this essay on reading Homer in the twenty-first century, let me explain how interpreting the *Odyssey* as an oral-derived traditional poem in its originative and still active context can productively address each of these quandaries.

First on our agenda is the question of plot sequence. Scholars have long subscribed to the theory that the *Odyssey* and other epics conventionally start *in medias res*, “in the middle of things,” rather than from the chronological beginning.⁴² Thus we meet Odysseus not as he is called away to the Trojan War or during battle, but rather imprisoned on Kalypso’s island and yearning for his homeland. To account for prior events, so goes the “middle” theory, the poem contains a flashback: Books 9-12 fill in the particulars of how he came to the situation with which the epic opens. But by reading the *Odyssey* as the Indo-European return story that it is, we can understand that it starts not in the middle but at the logical beginning. This tale-type, whether in South Slavic, Russian, Albanian, or other traditions, conventionally assumes a well-defined back-story: a hero is summoned away from his wife or fiancée to a joint martial expedition that leads to a decades-long absence and captivity. Idiomatically, the *Odyssey* starts precisely where it should, with the hero in captivity and dependent upon a powerful female for his release. Were it to start anywhere else — at the chronological beginning, for instance — it would be unidiomatic. Moreover, within the Return “word” a flashback isn’t compensation for lost narrative, but rather a built-in part of the story-pattern. A fluent audience or reader will thus expect the non-chronological shape of the story as a whole and, in

particular, the starting-point (with its assumed back-story) and the flashback. That much is implicit in the Return “word” as a traditional thought-byte.

Second is the matter of Penelope’s actions, especially her attitude toward the disguised stranger. When does she really recognize him? Along with Telemachos, don’t we wonder why doesn’t she overtly acknowledge her husband earlier? Critics have argued over this problem for centuries, each of them trying to probe her psychology and pinpoint a specific moment of veiled recognition, but no consensus has emerged. If, however, we adduce the evidence of how the wife/fiancée *conventionally* behaves in the Return Song, these disagreements fall away. To put it most basically, Penelope behaves as she does because indeterminacy — the ability to actively and persistently avoid resolving ambiguities — is at the very heart of the Return heroine’s character. As we look across the comparative spectrum, we notice again and again the ultimate centrality of this figure: as the fulcrum in the plot, it is she (and not her mate) who determines how the end-game plays out. Only if she is able to persevere, to refuse closure and keep her options open, is she in a position to participate in the final test of identity and faithfulness that we view in Penelope’s posing the riddle of the olive-tree bed, in turn made possible by her strategy of weaving and covertly unweaving Laertes’s shroud all those years in order to keep the suitors at bay. Hers is a heroism of intelligently delaying decisions, and like her Return Song sisters she maintains that ambivalence to the end, against all odds. Instead of joining Telemachos in criticizing his mother for her refusal to accept the certainty of Odysseus’s return, then, we should be applauding her particular brand of heroic achievement, without which there would be no Ithacan homeland awaiting the long-suffering Odysseus. Reading via the Return “word” helps us to recognize and appreciate her major role in the overall saga.⁴³

Third, there is the question of where the *Odyssey* actually ends. Does the curtain simply drop with the last line of Book 24, or does the poem effectively culminate with what the ancient critics designated as its *telos* or “goal” at Book 23, lines 295-96 when Penelope and Odysseus go to their olive-tree bed? Again the broader context of the Indo-European Return Song helps to provide an idiomatic perspective. Briefly stated, both opinions have merit and can be meshed to create a coherent response to the question. By convention this story-pattern reaches its *telos* as a result of the test that proves the wife’s or fiancée’s fidelity — for good or ill. That is, the traditional roadmap leads unerringly, no matter what particular tale it is informing, to revelation of the woman’s heroism (or its lack) via the shared secret, whether that test involves an olive-tree bed, the playing of a musical instrument, or some other knowledge or trademark talent. But while the path of the Return trek effectively ends at that juncture, these epics always include a “post-*telos*” section whose role it is to resolve the loose ends of the particular tale. Telegraphically, we can say that the main generic action of the Return Song ends with the long-separated couple reunited in the bed fashioned from Athena’s tree, while the *Odyssey* as a return epic closes only with the Peace of Athena.⁴⁴ This most expansive of “words” thus provides both a generic pathway for the multiform, traditional plot and a more specific postlude section that concludes the singular Return story of Penelope and Odysseus.

Coda

Reading Homer in the twenty-first century presents a real challenge to modern students and scholars, separated as we are by almost three millennia from the time when the versions of the *Iliad* and *Odyssey* that have survived

to us were probably put down in writing in ancient Greece. But notwithstanding that enormous displacement in time and cultural space, the newly developed tools associated with studies in comparative oral traditions can open up dimensions of the Homeric epics that have effectively been lost or silenced for many centuries — by helping us to construe the poems on their own terms. During this essay we have briefly surveyed the history of the Homeric Question, the legendary status of Homer, and, perhaps most importantly, the nature of the very “words” that he and his poetic tradition employ to express themselves. Those “words,” like the *reči* used by the South Slavic *guslari*, are not at all the same as our words: the thought-bytes of ancient Greek epic are larger, composite units of utterance and meaning that take the form of recurrent phrases, scenes, and story-patterns. And we have further seen that structural usefulness is but one function of these “words”; their idiomatic implications — the special meaning they bear as traditional language — are a crucial feature of Homeric art. As efforts at recovering the richness of that art continue, it is well to remain mindful of the roots of the *Iliad* and *Odyssey* in their original medium of oral tradition.⁴⁵

Notes

1. For a history of the Homeric Question, see Turner (1997) and Fowler (2004b). For introductions to the Homeric poems and to ancient epic in general, see, respectively, Fowler (2004a) and Foley (2005).
2. As Barbara Graziosi observes of the ancient *Lives of Homer*. “Unlike the biographies of other poets and famous personalities, they emphasise the lack of a coherent, unified, and self-consistent version of Homer’s life. Rather than presenting us with a continuous narrative, they tend to focus on relatively few specific aspects of the life of Homer, and list a series of contradictory opinions about them, opinions which typically span several centuries” (2002, 9).
3. For the early history and application of this approach in both Homeric studies and elsewhere, see Foley (1988).
4. On the first stage of textual analysis, see espec. Parry (1928).
5. On Murko’s influence, see Murko (1990) and Foley (1988, 15-18).
6. On the history of the expedition, see Parry (1933-35), Lord (1954), Foley (1988, 31-35), and Mitchell and Nagy (2000).
7. For an online overview of the Parry Collection, visit www.chs.harvard.edu/mpc, whose official publication series is *SCHS*. See further the performance of *The Wedding of Mustajbey’s Son Bećirbey* by the *guslar* Halil Bajgorić, available in Foley (2004) and in electronic, hypertext format at www.oraltradition.org/zbm.
8. His landmark book, *The Singer of Tales* (2000) illustrates the method by comparing the living South Slavic oral epic tradition to Homer, the Anglo-Saxon *Beowulf*, the Old French *Chanson de Roland*, and Byzantine Greek epic. See further Lord (1991, 1995).

9. Through the mid-1980s more than 2000 books and articles document the broad reach of the so-called Oral-Formulaic Theory; for references, see Foley (1985), with an electronic version including updates through 1992 at www.oraltradition.org. From the early 1990s onward, with the advent of new perspectives as well as more awareness of adjacent methods, it is more accurate to speak more broadly of studies in oral tradition than strictly the Parry-Lord approach; see further Foley (1995,1999, 2002).

10. South African praise poetry, composed in performance by literate as well as preliterate poets, offers one illustration of this kind of bridging; see further Kaschula (1995, 2000) and Opland (1983, 1998). Other examples include the oral roots of the Old and New Testaments (see Niditch [1996] and Kelber [1997], respectively) and of many African novels (see Obiechina [1992] and Balogun [1995, 1997]). For description of an ecosystem of various oral genres within a single society, some of them practiced by literate individuals, see the array of oral poetic species from a Serbian village as described and exemplified in Foley (2002,188-218).

11. Throughout this essay I advocate an agnostic position on the precise details of the relationship between our texts of the Homeric epics and the oral tradition that informs them. Since we cannot know exactly how the poems reached written form, it seems illogical and unhelpful to cling to any particular theory about that process. By the same token, we cannot ignore the oral-derived, traditional nature of the Homeric language any more than we can afford to ignore the most fundamental medium of any work of art. For views on the nearly universal means by which oral epics are collected and preserved in writing and then print (namely, by the intervention of an outsider to the culture and tradition),

see Honko (2000).

12. In my opinion Gregory Nagy (1996, 90) has offered the most attractive explanation of the etymology of Homer's name, as "he who joins together (*homo* plus *ar-*)," a gloss that speaks to the tectonic nature of the oral poet's craft.

13. As imaged in a verb commonly used to describe epic performance — *turati*, "to drive out, impel" — the activity of singing was so strenuous that *guslari* usually paused every 30-40 minutes to rest. Cf. the Anglo-Saxon verb *wrecan*, with approximately the same meaning, which also designates the act of oral performance in that tradition (e.g., *Seafarer*, line 1: "Mæg ic be me sylfum soðgied *wrecan*" ("I can *drive out* a true tale about myself," quoted from Gordon [1966, 33]).

14. Parry-Lord no. 6598 (unpublished); see Kay (1995, 221).

15. This is not to say that actual *guslari* named Ćor Huso, Isak, or Hasan Ćoso didn't ever exist; there may well have been one or more real-life individuals at the basis of this legend. But the larger-than-life details, as well as the contradictory nature of the different accounts, show that what may once have been based in fact had (very productively) morphed into legend.

16. For a Mongolian parallel to the *Guslar*, see Foley (1998, 173-75). We may also adduce the Anglo-Saxon legendary singer Widsith, whose name etymologically means "wide journey" and who would have had to live multiple centuries in order to visit the courts he is said to have entertained.

17. For summaries of the ancient sources, see Lamberton (1997); also Davison (1963), Turner (1997). For a comparison of the various texts, see Allen (1969, 11-41, espec. the chart between 32 and 33).

18. See note 12 above.

19. This is not to deny the possibility that there was a historical figure named Homer whose actual life was mythologized to serve this legendary purpose, much as a historical Arthur lies at the root of the King Arthur legend and stories. Cp. Nagy's model of "retrojection" (1990, 79, e. g.), and see further note 2 above.

20. On the various activities understood as reading worldwide, see espec. Boyarin (1993) and Foley (2002, 65-77).

21. For *epos*, see espec. the formulaic line "O my child, what *word* has escaped the barrier of your teeth?" which occurs four times in the *Odyssey* (said by Zeus to Athena at 1.64 and 5.22, by Eurykleia to the disguised Odysseus at 19.492, and by Eurykleia to Penelope at 23.70); it carries the idiomatic sense of "You should have known better" and frames each instance as chiding by a senior figure. For *muthos*, see the formulaic line "He/she stood above his/her head and spoke a *word* to him/her," which functions as a speech introduction and occurs four times in the *Odyssey* (4.803, 6.21, 20.32, and 23.4).

22. Cf. the Anglo-Saxon formulaic phrase "and speaks that *word*" at *Beowulf* 2046b, which acts as a speech introduction; it recurs in slightly altered form (with tense adjustment, e.g.) throughout the Anglo-Saxon oral-derived poetic corpus.

23. As explained by Dr. Chao Gejin of the Chinese Academy of Social Sciences during conversation.

24. For example, the great singer Avdo Medjedović begins his 1935 performance of *The Wedding of Smailagić Meho* with the following line: "The first *word*: "God, help us!" (*SCHS*, vol. 4, 55, translation mine).

25. For a full discussion of what Vujnović and other singers say about the *reč*, see Foley (2002, 11-21).
26. On Homeric *epos* as “tale, story” and *muthos* as a performance by a speaker, see Martin (1989, espec. 1-42).
27. Without indulging in undue complexities, we can observe that the hexameter line is composed of regular metrical parts defined by regular word-divisions that also turn out to be “word”-divisions. A single line, then, consists of rule-governed sections, and recurrent phrases exist within the poetic tradition to fit those sections. For more detail on the metrical substructure of the Homeric line, see Foley (1990, 52-84).
28. For further background on formulaic language in Homer, see Edwards (1986, 1988, 1997), Foley (1990, 121-57), Russo (1997), and Clark (2004).
29. On the traditional variation among instances of the Homeric feasting scene, see Foley (1999, 171-87) and Reece (1993). On typical scenes in Homer, see Edwards (1992).
30. Books 1.136-40, 4.52-56, 7.172-76, 10.368-72, 15.135-39, and 17.91-95. See further Foley (1999, 305, n. 8).
31. For thorough studies of the Lament as a typical scene, see Foley (1991, 168-74; 1999, 187-99); also Dué (2002). Related studies include Alexiou (1974) and Fishman (2006).
32. For a full discussion of the Return story-pattern in the *Odyssey* and comparative oral epic, see Foley (1999, 115-67).
33. For example, the ancient Greek, South Slavic, Russian, Bulgarian, Albanian, Anglo-Saxon, Middle English, Turkic (central Asian), and Balochi traditions. The South Slavic epic tradition alone accounts for hundreds of collected instances, only a small percentage of which have

yet seen formal publication; see espec. *SCHS* and Kay (1995, 83 e.g., the song-titles beginning with *Ropstvo*, or “Captivity,” dependably identify a Return epic).

34. On the Epic Cycle, see espec. Burgess (2004) and Davies (1989).

35. I make no assumption about whether the relationship among various comparative instances is the result of historical diffusion or Indo-European genetics, although given the geographical and temporal distances both dynamics must have been operative. The international story-type is of course one of many that have been documented in multiple cultures and eras, but perhaps no others so broadly as the *Odyssey*-story. For another deployment of the Return story-pattern in a different genre from ancient Greece, see the analysis of the *Homeric Hymn to Demeter* in Foley (1995, 136-80).

36. In discussing systems of formulaic phrases, Parry observed that “the thrift of a system lies in the degree to which it is free of phrases which, having the same metrical value and expressing the same idea, could replace one another” (1971, 276). It should be noted that thrift is a characteristic of some Homeric formulaic language (chiefly the noun-epithet names) but not of the majority of the epic diction. Likewise, it proves not to be a feature of either South Slavic oral epic or Anglo-Saxon oral-derived poetry (Foley 1990, 163-64 and 354, respectively).

37. The epithet “Argos-slaying” (*Argeiphontês*) provides a classic case of this phenomenon. It is used in the *Homeric Hymn to Hermes* (line 84) to characterize the infant Hermes long before he accomplishes the deed it celebrates, leading some critics to see the application of the noun-epithet phrase as clumsily non-chronological. But the formula names Hermes traditionally as a mythic character; it is the whole “word” — and not its composite “syllables” — that matters.

38. For a full account and discussion of this phrase, see Foley (1999, 216-18).

39. Of course, no matter how assiduously we use the tools available to us (searchable digitized versions of Homer, etc.), we can never aspire to the fluency of the ancient audience. But by practicing the kind of traditional lexicography advocated here — effectively by trying to read Homer’s “words” on their own terms — we can certainly do better than default to text-centered dilution of his (and his tradition’s) artistry. A partial victory in learning the traditional language is far preferable to outright surrender. For numerous additional examples of reading Homer’s “words,” see Foley (1999).

40. On the implications of the Lament scenes in the *Odyssey*, see Foley (1999, 187-98).

41. On the Feast scene in the *Odyssey*, see Foley (1999, 171-87).

42. The phrase *in medias res* is taken from Horace’s *Ars Poetica*, with reference to Aristotle’s comments on plot sequence in his *Poetics*. See further Preminger and Brogan (1993, 580-81).

43. This view from the perspective of oral tradition and specifically the Indo-European Return Song harmonizes with feminist work on the central role of Penelope in the *Odyssey*, see especially Katz (1991) and Felson-Rubin (1994).

44. Note that the reunion of Penelope and Odysseus is the mediation forecasted by the Feast scene at 23.153ff. (see Foley [1999, 185-86]), while the Peace of Athena, as mentioned above, is the mediation cued by the shared meal between Odysseus and Laertes.

45. For a modern hypertext tool that may be useful for application to Homeric studies, see the eEdition of a South Slavic oral epic at

References

- Alexiou, Margaret. 1974. *The Ritual Lament in Greek Tradition*.
Cambridge: Cambridge University Press.
- Allen, Thomas W 1969. *Homer: The Origins and the Transmission*. 1924.
Reprint. Oxford: Clarendon Press.
- Balogun, F. Odun. 1995. "Matigari: An African Novel as Oral
Performance." *Oral Tradition* 10: 129-64.
- .1997. *Ngugi and African Post-Colonial Narrative: The Novel as
Oral Narrative in Multi-Genre Performance*. Quebec: World Heritage
Press.
- Boyarin, Jonathan. 1993. *The Ethnography of Reading*. Berkeley:
University of California Press.
- Burgess, Jonathan S. 2004. *The Tradition of the Trojan War in Homer and
the Epic Cycle*. Baltimore: The Johns Hopkins University Press.
- Clark, Matthew. 1997. "Formulas, Metre, and Type-scenes." In *The
Cambridge Companion to Homer*, ed. Robert Fowler. Cambridge:
Cambridge University Press.
- Davies, Malcolm. 1989. *The Greek Epic Cycle*. London: Duckworth.
- Davison, J. A. 1963. "The Homeric Question." In *A Companion to Homer*,
ed. Alan J. B. Wace and Frank H. Stubbings. New York: Macmillan.
- Du  , Casey. 2002. *Homeric Variations on a Lament by Briseis*. Lanham,
Maryland: Rowman and Littlefield.
- Edwards, Mark W 1986. "Homer and Oral Tradition: The Formula. Part I."
Oral Tradition 1: 171-230.
- .1988. "Homer and Oral Tradition: The Formula. Part II." *Oral
Tradition* 3: 11-60.

- .1992. "Homer and Oral Tradition: The Type Scene." *Oral Tradition* 7: 284-330.
- .1997. "Homeric Style and Oral Poetics." In *A New Companion to Homer*, ed. Ian Morris and Barry Powell. Leiden: Brill.
- Felson-Rubin, Nancy. 1994. *Regarding Penelope: From Character to Poetics*. Princeton: Princeton University Press.
- Fishman, Andrea. 2006. "Thrénōi to Moirólógia: Female Voices of Solitude, Resistance, Solidarity." *Oral Tradition* 21.2: forthcoming.
- Foley, John Miles. 1992a. *Oral-Formulaic Theory and Research: An Introduction and Annotated Bibliography*. 1985, 1988. Reprint. New York: Garland, www.oraltradition.org.
- .1992b. *The Theory of Oral Composition: History and Methodology*. 1988. Reprint Bloomington: Indiana University Press.
- .1993. *Traditional Oral Epic: The Odyssey, Beowulf, and the Serbo-Croatian Return Song*. 1990. Reprint. Berkeley: University of California Press.
- .1995. *The Singer of Tales in Performance*. Bloomington: Indiana University Press.
- .1998. "Individual Poet and Epic Tradition: Homer as Legendary Singer." *Arethusa* 31:149-78.
- .1999. *Homer's Traditional Art*. University Park: Pennsylvania State University Press.
- .2002. *How to Read an Oral Poem*. Urbana: University of Illinois Press. With eCompanion at www.oraltradition.org/hrop.
- , ed. and trans. 2004. *The Wedding of Mustajbey's Son Bećirbey as Performed by Halil Bajgorić*. Folklore Fellows Communications, vol. 283. Helsinki: Academia Scientiarum Fennica. eEdition at www.oraltradition.org/zbm.
- , ed. 2005. *A Companion to Ancient Epic*. Oxford: Blackwell.

- Fowler, Robert, ed. 2004a. *The Cambridge Companion to Homer*. Cambridge: Cambridge University Press.
- . 2004b. “The Homeric Question.” In *The Cambridge Companion to Homer*, ed. Robert Fowler. Cambridge: Cambridge University Press.
- Gordon, I. L., ed. 1966. *The Seafarer*. New York: Appleton Century Crofts.
- Graziosi, Barbara. 2002. *Inventing Homer: The Early Reception of Epic*. Cambridge: Cambridge University Press.
- Honko, Lauri, ed. 2000. *Textualization of Oral Epics*. Berlin: Mouton de Gruyter.
- Kaschula, Russell H. 1995. “Mandela Comes Home: The Poets’ Perspective.” *Oral Tradition* 10:91-110.
- . 2000. *The Bones of the Ancestors Are Shaking: Xhosa Oral Poetry in Context*. Cape Town: Juta Press.
- Katz, Marilyn A. 1991. *Penelope’s Renown: Meaning and Indeterminacy in the Odyssey*. Princeton: Princeton University Press.
- Kay, Matthew W. 1995. *The Index of the Milman Parry Collection 1933-1935: Heroic Songs, Conversations, and Stories*. New York: Garland.
- Kelber, Werner H. 1997. *The Oral and the Written Gospel: The Hermeneutics of Speaking and Writing in the Synoptic Tradition, Mark Paul, and Q*. 2nd ed. Bloomington: Indiana University Press.
- Lamberton, Robert. 1997. “Homer’s Antiquity.” In *A New Companion to Homer*, ed. Ian Morris and Barry Powell. Leiden: Brill.
- Lord, Albert B. 1954. “General Introduction.” In *Serbo-Croatian Heroic Songs (Srpskohrvatske junacke pjesme)*, ed. Milman Parry, Albert B. Lord, and David E. Bynum. Vol. 4. Cambridge and Belgrade: Harvard University Press and the Serbian Academy of Sciences.
- . 1991. *Epic Singers and Oral Tradition*. Ithaca: Cornell University Press.
- . 1995. *The Singer Resumes the Tale*. Ed. Mary Louise Lord. Ithaca:

- Cornell University Press.
- .2000. *The Singer of Tales*. 2nd ed. 1960. Reprint. Cambridge: Harvard University Press.
- Martin, Richard P. 1989. *The Language of Heroes: Speech and Performance in the Iliad*. Ithaca: Cornell University Press.
- Mitchell, Stephen, and Gregory Nagy. 2000. "Introduction to the Second Edition." In *The Singer of Tales*, by Albert B. Lord. Cambridge: Harvard University Press.
- Murko, Matija. 1990. "The Singers and Their Epic Songs." 1929. Translation. *Oral Tradition* 5:107-30.
- Nagy, Gregory. 1990. *Pindar's Homer: The Lyric Possession of an Epic Past*. Baltimore: Johns Hopkins University Press.
- .1996. *Homeric Questions*. Austin: University of Texas Press.
- Niditch, Susan. 1996. *Oral World and Written Word*. Louisville: Westminster John Knox Press.
- Obiechina, Emmanuel. 1992. "Narrative Proverbs in the African Novel." *Oral Tradition* 1:197-230.
- Opland, Jeff. 1983. *Xhosa Oral Poetry: Aspects of a Black South African Tradition*. Cambridge: Cambridge University Press.
- .1998. *Xhosa Oral Poets and Poetry*. Cape Town: David Philip.
- Parry, Adam, ed. 1971. *The Making of Homeric Verse: The Collected Papers of Milman Parry*. Oxford: Clarendon Press.
- Parry, Milman. 1971. "Ćor Huso: A Study of Southslavic Song." In *The Making of Homeric Verse: The Collected Papers of Milman Parry*, ed. Adam Parry. Oxford: Clarendon Press.
- .1971. "The Traditional Epithet in Homer [1928]." Trans. Adam Parry. In *The Making of Homeric Verse: The Collected Papers of Milman Parry*, ed. Adam Parry. Oxford: Clarendon Press.
- .1971. "Studies in the Epic Technique of Oral Verse-Making. I.

- Homer and Homeric Style.” In *The Making of Homeric Verse: The Collected Papers of Milman Parry*, ed. Adam Parry. Oxford: Clarendon Press.
- .1971. “Studies in the Epic Technique of Oral Verse-Making. II: The Homeric Language as the Language of an Oral Poetry.” In *The Making of Homeric Verse: The Collected Papers of Milman Parry*, ed. Adam Parry. Oxford: Clarendon Press.
- Parry, Milman, Albert B. Lord, and David E. Bynum, eds. *Serbo-Croatian Heroic Songs (Srpskohrvatske junačke pjesme)*. Vols. 1-4, 6, 14. Cambridge and Belgrade: Harvard University Press and the Serbian Academy of Sciences.
- Preminger, Alex, and TV. F. Brogan, eds. 1993. *The New Princeton Encyclopedia of Poetry and Poetics*. Princeton: Princeton University Press.
- Reece, Steve. 1993. *The Stranger’s Welcome: Oral Theory and the Aesthetics of the Homeric Hospitality Scene*. Ann Arbor: University of Michigan Press.
- Russo, Joseph. 1997. “The Formula.” In *A New Companion to Homer*, ed. Ian Morris and Barry Powell. Leiden: Brill
- Schmaus, Alois. 1938. “Ćor Huso Husović.” *Prilozi proucavanju narodne poezije V*: 131-36.
- Turner, Frank. 1997. “The Homeric Question.” In *A New Companion to Homer*, ed. Ian Morris and Barry Powell. Leiden: Brill.

Author(s): Yosef Hayim Yerushalmi

Source: *Zakhor: Jewish History and Jewish Memory*, ch 1, Biblical and Rabbinic Foundations: Meaning in History, Memory, and the Writing of History.

Published by: University of Washington Press, 1982

Stable URL: N/A

Biblical and Rabbinic Foundations: Meaning in History, Memory and the Writing of History

Yosef Hayim Yerushalmi

For ask now of the days past, which were before thee, since the day that God created man upon the earth, and from the one end of heaven unto the other, whether there hath been any such thing as this great thing is, or hath been heard like it?

—Deuteronomy 4:32

R. Eleazar ben Azariah said: Behold, I am about seventy years old, and I have never been worthy to find a reason why the Exodus from Egypt should be mentioned at night-time, until Ben Zoma expounded it thus: It is stated—*That thou mayest remember the day when thou earnest forth out of the land of Egypt all the days of thy life* (Deut. 16:3). Had the text said “the days of thy life” it would have meant only the days; but “all the days of thy life” includes the nights

as well. The sages, however, say: "The days of thy life" refers to this world; "all the days of thy life" is to include the days of the Messiah.

—Mishnah *Berakhot* 1:5

The Hebrew *Zakhor* — "Remember" — announces my elusive theme. Memory is always problematic, usually deceptive, sometimes treacherous. Proust knew this, and the English reader is deprived of the full force of his title which conveys, not the blandly reassuring "Remembrance of Things Past" of the Moncrieff translation, but an initially darker and more anxious search for a time that has been lost. In the ensorcelled film of Alain Resnais the heroine quickly discovers that she cannot even be certain of what transpired "last year at Marienbad." We ourselves are periodically aware that memory is among the most fragile and capricious of our faculties.

Yet the Hebrew Bible seems to have no hesitations in commanding memory. Its injunctions to remember are unconditional, and even when not commanded, remembrance is always pivotal. Altogether the verb *zakhar* appears in its various declensions in the Bible no less than one hundred and sixty-nine times, usually with either Israel or God as the subject, for memory is incumbent upon both.¹ The verb is complemented by its obverse — forgetting. As Israel is enjoined to remember, so is it adjured not to forget. Both imperatives have resounded with enduring effect among the Jews since biblical times. Indeed, in trying to understand the survival of a people that has spent most of its life in global dispersion, I would submit that the history of its memory, largely neglected and yet to be written, may prove of some consequence.

But what were the Jews to remember, and by what means? What have been the functional dynamics of Jewish memory, and how, if at all, is the command to remember related to the writing of history? For historiography, an actual recording of historical events, is by no means the principal medium through which the collective memory of the Jewish people has been

addressed or aroused. The apparent irony is not limited to the Jews alone. It is our common experience that what is remembered is not always recorded and, alas for the historian, that much of what has been recorded is not necessarily remembered.

In the space of these lectures I shall not venture to treat the relations between Jewish memory and the writing of Jewish history in all their tangled configurations. Nor do I propose to attempt a history of Jewish historiography. For it is not historical writing *per se* that will concern us here, but the relation of Jews to their own past, and the place of the historian within that relationship. What I have to say is ultimately quite personal. It flows out of lingering preoccupations with the nature of my craft, but I do not presume to speak for the guild. I trust that, by the time I have done, the personal will not seem merely arbitrary. I would add only that although, as an historian of the Jews, I am concerned primarily with the Jewish past, I do not think that the issues to be raised are necessarily confined to Jewish history. Still, it may be that this history can sometimes set them into sharper relief than would otherwise be possible. And with that we may begin.

* * *

For those reared and educated in the modern West it is often hard to grasp the fact that a concern with history, let alone the writing of history, is not an innate endowment of human civilization. Many cultures past and present have found no particular virtue in the historical, temporal dimension, of human existence. Out of a mass of ethnographic materials from around the world anthropologists and historians of religion have gradually clarified the extent to which, in primitive societies, only mythic rather than historical time is “real,” the time of primeval beginnings and paradigmatic first acts, the dream-time when the world was new, suffering unknown, and men

consorted with the gods. Indeed, in such cultures the present historical moment possesses little independent value. It achieves meaning and reality only by subverting itself, when, through the repetition of a ritual or the recitation or re-enactment of a myth, historical time is periodically shattered and one can experience again, if only briefly, the true time of the origins and archetypes.² Nor are these vital functions of myth and ritual confined to the so-called primitives. Along with the mentality they reflect they are also shared by the great pagan religions of antiquity and beyond. In the metaphysics and epistemology of some of the most sophisticated of Far Eastern civilizations, both time and history are deprecated as illusory, and to be liberated from such illusions is a condition for true knowledge and ultimate salvation. These and similar matters are well documented in an abundant literature and need not be belabored here. Lest our discussion remain too abstract, however, let me cite one striking example in the case of India, of which a noted modern Indian scholar writes:

...the fact remains that except Kalhana's *Rajatarangini*, which is merely a local history of Kashmir, there is no other historical text in the whole range of Sanskrit literature which even makes a near approach to it, or may be regarded as history in the proper sense of the term. This is a very strange phenomenon, for there is hardly a branch of human knowledge or any topic of human interest which is not adequately represented in Sanskrit literature. The absence of real historical literature is therefore naturally regarded as so very unusual that even many distinguished Indians cannot bring themselves to recognize the obvious fact, and seriously entertain the belief that there were many such historical texts, but that they have all perished.³

Herodotus, we are told, was the "father of history" (a phrase that needs to be qualified, but I shall not pause to do so here), and until fairly recently every educated person knew that the Greeks had produced a line of great historians who could still be read with pleasure and empathy. Yet neither the Greek historians nor the civilization that nurtured them saw any ultimate or transcendent meaning to history as a whole; indeed, they never quite arrived at a concept of universal history, of history "as a whole." Herodotus

wrote with the very human aspiration of — in his own words — “preserving from decay the remembrance of what men have done, and of preventing the great and wonderful actions of the Greeks and the barbarians from losing their due meed of glory.” For Herodotus the writing of history was first and foremost a bulwark against the inexorable erosion of memory engendered by the passage of time. In general, the historiography of the Greeks was an expression of that splendid Hellenic curiosity to know and to explore which can still draw us close to them, or else it sought from the past moral examples or political insights. Beyond that, history had no truths to offer, and thus it had no place in Greek religion or philosophy. If Herodotus was the father of history, the fathers of meaning in history were the Jews.⁴

It was ancient Israel that first assigned a decisive significance to history and thus forged a new world-view whose essential premises were eventually appropriated by Christianity and Islam as well. “The heavens,” in the words of the psalmist, might still “declare the glory of the Lord,” but it was human history that revealed his will and purpose. This novel perception was not the result of philosophical speculation, but of the peculiar nature of Israelite faith. It emerged out of an intuitive and revolutionary understanding of God, and was refined through profoundly felt historical experiences. However it came about, in retrospect the consequences are manifest. Suddenly, as it were, the crucial encounter between man and the divine shifted away from the realm of nature and the cosmos to the plane of history, conceived now in terms of divine challenge and human response. The pagan conflict of the gods with the forces of chaos, or with one another, was replaced by a drama of a different and more poignant order: the paradoxical struggle between the divine will of an omnipotent Creator and the free will of his creature, man, in the course of history; a tense dialectic of obedience and rebellion. The primeval dream-time world of the archetypes, represented in the Bible only by the Paradise story in Genesis, was abandoned irrevocably.⁵ With the

departure of Adam and Eve from Eden, history begins, historical time becomes real, and the way back is closed forever. East of Eden hangs “the fiery ever-turning sword” to bar re-entry. Thrust reluctantly into history, man in Hebrew thought comes to affirm his historical existence despite the suffering it entails, and gradually, ploddingly, he discovers that God reveals himself in the course of it. Rituals and festivals in ancient Israel are themselves no longer primarily repetitions of mythic archetypes meant to annihilate historical time. Where they evoke the past, it is not the primeval but the historical past, in which the great and critical moments of Israel’s history were fulfilled. Far from attempting a flight from history, biblical religion allows itself to be saturated by it and is inconceivable apart from it.

No more dramatic evidence is needed for the dominant place of history in ancient Israel than the overriding fact that even God is known only insofar as he reveals himself “historically.” Sent to bring the tidings of deliverance to the Hebrew slaves, Moses does not come in the name of the Creator of Heaven and Earth, but of the “God of the fathers,” that is to say, of the God of history: “Go and assemble the elders of Israel and say to them: The Lord the God of your fathers, the God of Abraham, Isaac and Jacob has appeared to me and said: I have surely remembered you . . .” (Exod. 3:16). When God introduces himself directly to the entire people at Sinai, nothing is heard of his essence or attributes, but only: “I the Lord am your God who brought you out of the Land of Egypt, the house of bondage” (Exod. 20:2). That is sufficient. For here as elsewhere, ancient Israel knows what God is from what he has done in history.⁶ And if that is so, then memory has become crucial to its faith and, ultimately, to its very existence.

Only in Israel and nowhere else is the injunction to remember felt as a religious imperative to an entire people. Its reverberations are everywhere, but they reach a crescendo in the Deuteronomic history and in the prophets. “Remember the days of old, consider the years of ages past” (Deut. 32:7).

“Remember these things, O Jacob, for you, O Israel, are My servant; I have fashioned you, you are My servant; O Israel, never forget Me” (Is. 44:21). “Remember what Amalek did to you” (Deut. 25:17). “O My people, remember now what Balak king of Moab plotted against you” (Micah 6:5). And, with a hammering insistence: “Remember that you were a slave in Egypt...”

If the command to remember is absolute, there is, nonetheless, an almost desperate pathos about the biblical concern with memory, and a shrewd wisdom that knows how short and fickle human memory can be. Not history, as is commonly supposed, but only mythic time repeats itself. If history is real, then the Red Sea can be crossed only once, and Israel cannot stand twice at Sinai, a Hebrew counterpart, if you wish, to the wisdom of Heraclitus.⁷ Yet the covenant is to endure forever. “I make this covenant, with its sanctions, not with you alone, but both with those who are standing here with us this day before the Lord our God, and also with those who are not with us here this day” (Deut. 29:13-14). It is an outrageous claim. Surely there comes a day “when your children will ask you in time to come, saying: What mean you by these stones? Then you shall say to them: Because the waters of the Jordan were cut off before the ark of the covenant of the Lord when it passed through the Jordan” (Josh. 4:6-7). Not the stone, but the memory transmitted by the fathers, is decisive if the memory embedded in the stone is to be conjured out of it to live again for subsequent generations. If there can be no return to Sinai, then what took place at Sinai must be borne along the conduits of memory to those who were not there that day.

The biblical appeal to remember thus has little to do with curiosity about the past. Israel is told only that it must be a kingdom of priests and a holy people; nowhere is it suggested that it become a nation of historians. Memory is, by its nature, selective, and the demand that Israel remember is no exception. Burckhardt’s dictum that all ages are equally close to God

may please us, but such a notion remains alien to biblical thought. There the fact that history has meaning does not mean that everything that happened in history is meaningful or worthy of recollection. Of Manasseh of Judah, a powerful king who reigned for fifty-five years in Jerusalem, we hear only that “he did what was evil in the sight of the Lord” (II Kings 21:2), and only the details of that evil are conveyed to us. Not only is Israel under no obligation whatever to remember the entire past, but its principle of selection is unique unto itself. It is above all God’s acts of intervention in history, and man’s responses to them, be they positive or negative, that must be recalled. Nor is the invocation of memory actuated by the normal and praiseworthy desire to preserve heroic national deeds from oblivion. Ironically, many of the biblical narratives seem almost calculated to deflate the national pride. For the real danger is not so much that what happened in the past will be forgotten, as the more crucial aspect of *how* it happened. “And it shall be, when the Lord your God shall bring you into the land which he swore unto your fathers, to Abraham, to Isaac, and to Jacob, to give you great and goodly cities, which you did not build, and houses full of all good things, which you did not fill, and cisterns hewn out, which you did not hew, vineyards and olive-trees which you did not plant, and you shall eat and be satisfied — *then beware lest you forget the Lord who brought you forth out of the land of Egypt, out of the house of bondage*” (Deut. 6:10-12; cf. 8:11-18).

Memory flowed, above all, through two channels: ritual and recital. Even while fully preserving their organic links to the natural cycles of the agricultural year (spring and first fruits), the great pilgrimage festivals of Passover and Tabernacles were transformed into commemorations of the Exodus from Egypt and the sojourn in the wilderness. (Similarly, the biblical Feast of Weeks would become, sometime in the period of the Second Temple, a commemoration of the giving of the Law at Sinai.) Oral poetry

preceded and sometimes accompanied the prose of the chroniclers. For the Hebrew reader even now such survivals as the Song of the Sea (Exod. 15:1-18) or the Song of Deborah (Judges 5) seem possessed of a curious power to evoke, through the sheer force of their archaic rhythms and images, distant but strangely moving intimations of an experience of primal events whose factual details are perhaps irrevocably lost.

A superlative example of the interplay of ritual and recital in the service of memory is the ceremony of the first fruits ordained in Deuteronomy 26, where the celebrant, an ordinary Israelite bringing his fruits to the sanctuary, must make the following declaration:

A wandering Aramean was my father, and he went down into Egypt, and sojourned there, few in number; and he became there a nation, great, mighty, and populous. And the Egyptians dealt ill with us, and afflicted us, and laid upon us hard bondage. And we cried unto the Lord, the God of our fathers, and the Lord heard our voice, and saw our affliction, and our toil, and our oppression. And the Lord brought us forth out of Egypt with a mighty hand, and with an outstretched arm, and with great terribleness, and with signs, and with wonders. And He has brought us into this place, and has given us this land, a land flowing with milk and honey ... (Deut. 25:5-9).⁸

This is capsule history at its best. The essentials to be remembered are all here, in a ritualized formula. Compressed within it are what we might paraphrase as the patriarchal origins in Mesopotamia, the emergence of the Hebrew nation in the midst of history rather than in mythic pre-history, slavery in Egypt and liberation therefrom, the climactic acquisition of the Land of Israel, and throughout — the acknowledgment of God as lord of history.

Yet although the continuity of memory could be sustained by such means, and while fundamental biblical conceptions of history were forged, not by historians, but by priests and prophets, the need to remember overflowed inevitably into actual historical narrative as well. In the process, and within that varied Hebrew literature spanning a millennium which we

laconically call “the Bible,” a succession of anonymous authors created the most distinguished corpus of historical writing in the ancient Near East.

It was an astonishing achievement by any standard applicable to ancient historiography, all the more so when we bear in mind some of its own presuppositions. With God as the true hero of history one wonders at the very human scale of the historical narratives themselves. Long familiarity should not make us indifferent to such qualities. There was no compelling *a priori* reason why the biblical historians should not have been content to produce an episodic account of divine miracles and little else. Yet if biblical history has, at its core, a recital of the acts of God, its accounts are filled predominantly with the actions of men and women and the deeds of Israel and the nations. Granted that historical writing in ancient Israel had its roots in the belief that history was a theophany and that events were ultimately to be interpreted in light of this faith. The result was, not theology, but history on an un-precedented scale.

Another surprising feature in most of biblical historiography is its concreteness. Where we might have expected a re-telling of Israel’s past that would continually sacrifice fact to legend and specific detail to preconceived patterns, we find instead a firm anchorage in historical realities. The events and characteristics of one age are seldom blurred with those of another. Discrepancies between the hopes of an early generation and the situation encountered by a later one are not erased. (Compare, for example, the promised boundaries of the Land of Israel with those of the territories actually conquered in Canaan.)⁹ Historical figures emerge not merely as types, but as full-fledged individuals. Chronology, by and large, is respected. There is a genuine sense of the flow of historical time and of the changes that occur within it. Abraham is not represented as observing the laws of Moses. The editors who periodically redacted the sources at their disposal did not level them out completely. Two essentially conflicting

accounts of the origins of Israelite monarchy lie side by side to this day in the Book of Samuel.

That biblical historiography is not “factual” in the modern sense is too self-evident to require extensive comment. By the same token, however, its poetic or legendary elements are not “fictions” in the modern sense either. For a people in ancient times these were legitimate and sometimes inevitable modes of historical perception and interpretation.¹⁰ But biblical historiography is hardly uniform in these respects. The historical narratives that span the ages from the beginnings of mankind to the conquest of Canaan are necessarily more legendary, the accounts of the monarchy much less so, and even within each segment there are marked variations of degree. This is only to be expected. The historical texts of the Bible, written by different authors at different times, were often also the end products of a long process of transmission of earlier documents and traditions.

I cannot pause here to discuss the stages by which either biblical interpretations of history or the actual writing of history evolved. In terms of our larger concerns, such an atomistic discussion might even prove misleading. By the second century B.C.E. the corpus of biblical writings was already complete, and its subsequent impact upon Jewry was in its totality. Post-biblical Judaism did not inherit a series of separate historical sources and documents, but what it regarded as a sacred and organic whole. Read through from Genesis through Chronicles it offered not only a repository of law, wisdom, and faith, but a coherent narrative that claimed to embrace the whole of history from the creation of the world to the fifth century B.C.E., and, in the prophetic books, a profound interpretation of that history as well. With the Book of Daniel, the last of the biblical books in point of actual composition, an apocalyptic exposition of world history was incorporated as well, which would exercise its own particular fascination in ages to come.

Obviously much more could still be said about the place and function of history in ancient Israel that I have chosen to ignore. But if we really seek to understand what happened later, then we may already have touched on something that can prove of considerable help, and should therefore be reformulated explicitly. We have learned, in effect, that meaning in history, memory of the past, and the writing of history are by no means to be equated. In the Bible, to be sure, the three elements are linked, they overlap at critical points, and, in general, they are held together in a web of delicate and reciprocal relationships. In post-biblical Judaism, as we shall see, they pull asunder. Even in the Bible, however, historiography is but one expression of the awareness that history is meaningful and of the need to remember, and neither meaning nor memory ultimately depends upon it. The meaning of history is explored more directly and more deeply in the prophets than in the actual historical narratives;¹¹ the collective memory is transmitted more actively through ritual than through chronicle. Conversely, in Israel as in Greece, historiography could be propelled by other needs and considerations. There were other, more mundane, genres of historical writing, apparently quite unrelated to the quest for transcendent meanings.¹² Of the same Manasseh who did evil in the sight of the Lord we read, as we do of other monarchs, that the rest of his acts are written “in the books of the chronicles of the kings of Judah.” Significantly perhaps, those royal chronicles are long lost to us.

If Joshua, Samuel, Kings, and the other historical books of the Bible were destined to survive, that is because something quite extraordinary happened to them. They had become part of an authoritative anthology of sacred writings whose final canonization took place at Yabneh in Palestine around the year 100 C.E., some thirty years after the destruction of the Second Temple by the Romans. With the sealing of the biblical canon by the rabbis at Yabneh, the biblical historical books and narratives were

endowed with an immortality to which no subsequent historian could ever aspire and that was denied to certain historical works that already existed. The Jewish historiography of the Hellenistic period, even such works as the first three books of Maccabees, fell by the wayside, some of it to be preserved by the Christian church, but unavailable to the Jews themselves until modern times.¹³

That which was included in the biblical canon had, so to speak, a constantly renewable lease on life, and we must try to savor some of what this has meant. For the first time the history of a people became part of its sacred scripture. The Pentateuchal narratives, which brought the historical record up to the eve of the conquest of Canaan, together with the weekly lesson from the prophets, were read aloud in the synagogue from beginning to end. The public reading was completed triennially in Palestine, annually in Babylonia (as is the custom today), and immediately the reading would begin again.¹⁴ Every generation of scribes would copy and transmit the historical texts with the reverent care that only the sacred can command. An unbroken chain of scholars would arise later to explicate what had been recorded long ago in a constantly receding past. With the gradual democratization of Jewish learning, both the recitals of ancient chroniclers and the interpretations of prophets long dead would become the patrimony, not of a minority, but of the people at large.

To many, therefore, it has seemed all the more remarkable that after the close of the biblical canon the Jews virtually stopped writing history. Josephus Flavius marks the watershed. Writing in a not-uncomfortable Roman exile after the destruction of the Second Temple, sometime between 75 and 79 C.E. Josephus published his account of the *Jewish War* against Rome and then went on to an elaborate summation of the history of his people in the *Jewish Antiquities*. The latter work was published in 93/94, that is, less than a decade before the rabbis held their council at Yabneh. By

coincidence the two events were almost contemporaneous. Yet in retrospect we know that within Jewry the future belonged to the rabbis, not to Josephus. Not only did his works not survive among the Jews, it would be almost fifteen centuries before another Jew would actually call himself an historian.¹⁵ It is as though, abruptly, the impulse to historiography had ceased.

Certainly, when we turn from the Bible to classical rabbinic literature, be it Talmud or Midrash, we seem to find ourselves on different and unfamiliar terrain as far as history is concerned. Where the Bible, with austere restraint, had said little or nothing of God prior to the creation of the world we know, here we encounter the periodic creation and destruction of worlds before our own.¹⁶ Ancient Near Eastern mythological motifs of divine victories over primeval monsters, of which only faint and vestigial traces are preserved in the Bible, suddenly reassert themselves more vividly and elaborately than before.¹⁷ To be sure, all the historical events and personalities of the Bible are present in rabbinic aggadah; indeed, much more is told about them by the rabbis than in the Bible itself. Guided often by an uncanny eye for gaps, problems, and nuances, the rabbis amplified the biblical narratives with remarkable sensitivity. The wide range of biblically based rabbinic aggadah has enchanted poets and intrigued anthropologists and folklorists, theologians and philosophers. Even a modern critical scholar of the Bible will often find that behind a particular midrash there lies a genuine issue in the biblical text, whether linguistic or substantive, of which he was himself previously unaware. But the fascination and importance of rabbinic literature are not at issue here. It is the historian within all of us that balks, and we recognize some of the reasons for our frustration. Unlike the biblical writers the rabbis seem to play with Time as though with an accordion, expanding and collapsing it at will. Where historical specificity is a hallmark of the biblical narratives, here that acute biblical sense of time

and place often gives way to rampant and seemingly unselfconscious anachronism. In the world of aggadah Adam can instruct his son Seth in the Torah, Shem and Eber establish a house of study, the patriarchs institute the three daily prayer-services of the normative Jewish liturgy, Og King of Bashan is present at Isaac's circumcision, and Noah prophesies the translation of the Bible into Greek.

Of course there is something rather compelling about that large portion of the rabbinic universe in which ordinary barriers of time can be ignored and all the ages placed in an ever-fluid dialogue with one another. Clearly, however, something else that we would consider vital has also been lost in the course of this metamorphosis, and we need not look far to know what it is. The history of the biblical period is present in the Bible itself. Admittedly, the reconstruction of that history through modern critical scholarship, buttressed by archaeology and the recovery of ancient Near Eastern languages and literatures, now offers a more contextual understanding than was ever possible before, and can sometimes diverge sharply from the accounts and interpretations of the biblical writers themselves. But at least the biblical record is sufficiently historical to serve the modern scholar as a constant point of departure and reference for his researches. By contrast, no such reconstruction would be possible if it had to depend, not on the Bible, but on the rabbinic sources that "retell" biblical history. This would be so even if everything the rabbis told were linked together and arranged into one continuous narrative parallel to the biblical sequence, as in Ginzberg's prodigious *Legends of the Jews*.¹⁸

More sobering and important is the fact that the history of the Talmudic period itself cannot be elicited from its own vast literature. Historical events of the first order are either not recorded at all, or else they are mentioned in so legendary or fragmentary a way as often to preclude even an elementary retrieval of what occurred.¹⁹

All this raises two distinct issues. One concerns what the rabbis actually accomplished, the other, what they did not undertake to do.

It is both unfair and misleading to burden the transmigrations of biblical personalities and events in rabbinic aggadah with a demand for historicity irrelevant to their nature and purpose. Classical rabbinic literature was never intended as historiography, even in the biblical, let alone the modern, sense, and it cannot be understood through canons of criticism appropriate to history alone. Anachronism, for example, may be a serious flaw in historical writing; it is a legitimate feature of other, non-historical genres. There is no more point in asking of rabbinic aggadah that it hew closely to the biblical historical record than to try to divest the biblical figures in Renaissance paintings of their Florentine costumes, or to carp at MacLeish for presenting Job as “J. B.” to a twentieth-century audience. The rabbis did not set out to write a history of the biblical period; they already possessed that. Instead, they were engrossed in an ongoing exploration of the meaning of the history bequeathed to them, striving to interpret it in living terms for their own and later generations.²⁰ Just as, in their exposition of biblical law, they explained the *lex talionis* as a principle of monetary compensation rather than a more “historical” eye-for-an-eye, so they were not content with merely historical patriarchs and kings endowed with the obsolete traits of a dead past. This does not mean necessarily that they were bereft of all sense of historical perspective. They were certainly not naive. Without having a term for it they occasionally showed themselves quite capable of recognizing an anachronism for what it was,²¹ but they were also able somehow to sustain and reconcile historical contradictions that we, for that very reason, would find intolerable. I know of no more telling instance of the fusion of both tendencies than what is revealed in this remarkable Talmudic aggadah:

Rabbi Judah said in the name of Rab: When Moses ascended on high [to receive the Torah] he found the Holy One, blessed be He, engaged in affixing *taggin*

[crown-like flourishes] to the letters. Moses said: "Lord of the Universe, who stays Thy hand?" [i.e., is there anything lacking in the Torah so that these ornaments are necessary?] He replied: "There will arise a man at the end of many generations, Akiba ben Joseph by name, who will expound, upon each tittle, heaps and heaps of laws." "Lord of the Universe," said Moses, "permit me to see him." He replied: "Turn thee round."

Moses went [into the academy of Rabbi Akiba] and sat down behind eight rows [of Akiba's disciples]. *Not being able to follow their arguments he was ill at ease*, but when they came to a certain subject and the disciples said to the master "Whence do you know it?" and the latter replied, "*It is a law given to Moses at Sinai*" he was comforted.²²

That the whole of the Law, not only the written (*torah she-biketab*), but also the "oral" (*torah she-be'al peh*), had already been revealed to Moses at Sinai, was an axiom of rabbinic belief;²³ nevertheless, were Moses transported to a second-century classroom, he would hardly understand the legal discussions. In the world of aggadah both propositions can coexist in a meaningful equilibrium without appearing anomalous or illogical. Similarly, elements of biblical history can be telescoped into legendary dimensions with no intimation that either the past or the Bible has been compromised thereby. The historical record remains intact within an inviolate biblical text to which, in a perpetual oscillation, the aggadic imagination must always return before its next flight. Meanwhile, however, any event can be retold and reinterpreted, sometimes simultaneously, in several different ways. Patently, by that very token the assumptions and hermeneutics of the rabbis were often antithetical to those of the historian, and generally remote from ours even when we are not historians.²⁴ But they were appropriate to their particular quest, which was equally far removed from our own.

A problem of a very different sort is posed by the meager attention accorded in rabbinic literature to post-biblical events. While we can accept the aggadic transfigurations of biblical history as forms of commentary and interpretation, we may still ask, tentatively at least, why the rabbis did not

see fit to take up where biblical history broke off.

For the fact is that the rabbis neither wrote post-biblical history nor made any special effort to preserve what they may have known of the course of historical events in the ages immediately preceding them or in their own time. The two solitary works frequently trotted out to demonstrate the contrary need not detain us long. *Megillat Ta'anit*, the so-called "Scroll of Fasting," is not an attempt at historiography but a terse calendar of thirty-five half-holidays originating in the Hasmonean period and commemorating various historical events, most of them connected with the Maccabean wars.²⁵ Such a calendar was preserved purely for its practical ritual consequences, since on the days it enumerates one was not to declare a public fast (hence the curious title) nor mourn the dead. Significantly, it notes the day of the month on which the events occurred, but not the year. At best only the other work, the *Seder 'Olam* ("Order of the World")²⁶ attributed to the second-century Palestinian rabbi Jose ben Halafta, may qualify as a rudimentary sort of historical recording, but even then it remains the exception that confirms the rule. It is, in essence, a dry chronology of persons and events from Adam until Alexander the Great that hardly pauses for breath while relentlessly listing its succession of names and years. Apart from this, the attempts by some modern scholars to find traces of historiography in the Talmudic period merely reflect a misplaced projection of their own concerns upon a reluctant past.²⁷

Does this signify, as is so often alleged, that the rabbis were no longer interested in history? Surely not. Prophecy had ceased, but the rabbis regarded themselves as heirs to the prophets, and this was proper, for they had thoroughly assimilated the prophetic world-view and made it their own.²⁸ For them history was no less meaningful, their God no less the ultimate arbiter of historical destinies, their messianic hope no less fervent and absolute. But where the prophets themselves had been attuned to the

interpretation of contemporary historical events, the rabbis are relatively silent about the events of their own time. In Talmudic and midrashic literature there are many interpretations of the meaning of history, but little desire to record current events. It is this characteristic concern for the larger configurations of history, coupled with indifference to its concrete particulars, that deserves some explanation.

We will state it as simply as possible. If the rabbis, wise men who had inherited a powerful historical tradition, were no longer interested in mundane history, this indicates nothing more than that they felt no need to cultivate it. Perhaps they already knew of history what they needed to know. Perhaps they were even wary of it.

For the rabbis the Bible was not only a repository of past history, but a revealed pattern of the whole of history, and they had learned their scriptures well. They knew that history has a purpose, the establishment of the kingdom of God on earth, and that the Jewish people has a central role to play in the process. They were convinced that the covenant between God and Israel was eternal, though the Jews had often rebelled and suffered the consequences. Above all, they had learned from the Bible that the true pulse of history often beat beneath its manifest surfaces, an invisible history that was more real than what the world, deceived by the more strident outward rhythms of power, could recognize. Assyria had been the instrument of divine wrath against Israel, even though Assyria had not realized it at the time. Jerusalem had fallen to Nebuchadnezzar, not because of Babylonian might, but because of Jerusalem's transgressions, and because God had allowed it to fall. Over against the triumphalism which was the conventional historical wisdom of the nations there loomed, as though in silent rebuke, the figure of the Suffering Servant of Isaiah 53.

Ironically, the very absence of historical writing among the rabbis may itself have been due in good measure to their total and unqualified

absorption of the biblical interpretation of history. In its ensemble the biblical record seemed capable of illuminating every further historical contingency. No fundamentally new conception of history had to be forged in order to accommodate Rome, nor, for that matter, any of the other world empires that would arise subsequently. The catastrophe of the year 70 C.E. was due, like that of 586 B.C.E., to sin, although the rabbis were well aware that the nature of the sin had changed and was no longer one of idolatry.²⁹ The Roman triumph, like that of the earlier empires, would not endure forever:

Rabbi Nahman opened his discourse with the text, *Therefore fear thou not, O Jacob My servant* (Jer. 30:10). This speaks of Jacob himself, of whom it is written, *And he dreamed, and behold, a ladder set up on the earth . . . and behold the angels of God ascending and descending on it* (Gen. 28:12). These angels, explained Rabbi Samuel ben Nahman, were the guardian Princes of the nations of the world. For Rabbi Samuel ben Nahman said: This verse teaches us that the Holy One, blessed be He, showed our father Jacob the Prince of Babylon ascending seventy rungs of the ladder, the Prince of Media fifty-two rungs, the Prince of Greece one hundred and eighty, while the Prince of Edom [i.e., Rome] ascended till Jacob did not know how many rungs. Thereupon our father Jacob was afraid. He thought: Is it possible that this one will never be brought down? Said the Holy One, blessed be He, to him: "*Fear thou not, O Jacob My servant*. Even if he ascend and sit down by Me, I will bring him down from there." Hence it is written, *Though thou make thy nest as high as the eagle, and though thou set it among the stars, I will bring thee down from thence* (Obad. 1:4).³⁰

Destruction and redemption were dialectically linked. We are told: "On the day the Temple was destroyed the Messiah was born." Should you then, want to know where he is, here is one version:

Rabbi Joshua ben Levi met Elijah standing by the entrance to the cave of Rabbi Simon bar Yohai ... He asked him: "When will the Messiah come?" — He replied: "Go and ask him." — "And where is he sitting?" — "At the entrance to the city of Rome." — "And by what sign may he be recognized?" — "He is sitting among the poor lepers. But whereas they untie their bandages all at once and tie them back together, he unties and ties each separately, thinking: 'Perhaps I will be summoned. Let me not be delayed.'"

Rabbi Joshua went to the Messiah and said to him: "Peace upon you, my master and teacher." — "Peace upon you, son of Levi," he replied. — He asked:

“When will you come, master?” — He answered: “Today!”

Rabbi Joshua returned to Elijah. The latter asked him: “What did he say to you?” . . . He replied: “He lied to me, for he said that he would come today, yet he has not come.” — Elijah answered: “This is what he said to you — *Today, if ye would but hearken to His voice* (Ps. 95:7).”³¹

If, in these potent images, the history of the world empires is a Jacob’s Ladder and the messiah sits unnoticed at the gates of Rome ready, sooner or later, to bring about her downfall, then the affairs of Rome may well appear inconsequential and ordinary historical knowledge superfluous. Whether, as R. Joshua found, the messianic advent is contingent upon Jewish repentance and obedience to God, or even if, as others claimed, it will take place independently, at the inscrutable initiative of the divine will, the question of what to do in the interim remained. Here the rabbis were unanimous. In the interval between destruction and redemption the primary Jewish task was to respond finally and fully to the biblical challenge of becoming a holy people. And for them that meant the study and fulfillment of the written and oral law, the establishment of a Jewish society based fully on its precepts and ideals, and, where the future was concerned, trust, patience, and prayer.

Compared to these firm foundations contemporary history must have seemed a realm of shifting sands. The biblical past was known, the messianic future assured; the in-between-time was obscure. Then as now, history did not validate itself and reveal its meaning imminently. In the biblical period the meaning of specific historical events had been laid bare by the inner eye of prophecy, but that was no longer possible. If the rabbis were successors to the prophets they did not themselves lay claim to prophecy. The comings and goings of Roman procurators, the dynastic affairs of Roman emperors, the wars and conquests of Parthians and Sassanians, seemed to yield no new or useful insights beyond what was already known. Even the convolutions of the Hasmonean dynasty or the intrigues of Herodians — Jewish history after all — revealed nothing

relevant and were largely ignored.³²

Only messianic activism still had the capacity to revive and rivet attention on current historical events and even lead to direct action on the historical plane, but attempts to “hasten the end” became discredited out of bitter experience. Three tremendous uprisings against Rome, all with eschatological overtones, had ended in disaster and disillusion. In the second century, no less an authority than Rabbi Akiba could hail Bar Kochba, the military leader of the revolt of 132, as the Messiah. Thereafter the tendency to discourage and combat messianic activism in any form, already evident earlier, became a dominant characteristic of responsible rabbinic leadership for ages to come.³³ The faith of rabbinic Judaism in the coming of the Messiah remained unshaken; the time of his coming was left to heaven alone. R. Samuel bar Nahmani declared: “Blasted be those who calculate the end, for they say that since the time has arrived and he has not come, he will never come. Rather — wait for him, as it is written: Though he tarry, wait for him...”³⁴ The scrutiny of outward historical events for signs that the end of time was approaching remained largely the province of apocalyptic visionaries who continued to surface periodically throughout the centuries.

As for the sages themselves — they salvaged what they felt to be relevant to them, and that meant, in effect, what was relevant to the ongoing religious and communal (hence also the “national”) life of the Jewish people. They did not preserve the political history of the Hasmoneans, but took note of the conflict between the Pharisees and Alexander Jannaeus.³⁵ They did not incorporate a consecutive history of the period of the Second Temple or its destruction, but they carefully wrote down the details of the Temple service, convinced of its eventual restoration.³⁶ They betrayed scant interest in the history of Rome, but they would not forget the persecution under the emperor Hadrian and the martyrdom of the scholars.³⁷ True, they also ignored the battles of the Maccabees in favor of the cruse of oil that

burned for eight days, but their recognition of this particular miracle should not be passed over lightly. Hanukkah alone, be it noted, was a post-biblical Jewish holiday, and the miracle, unlike others, did not have behind it the weight of biblical authority. The very acceptance of such a miracle was therefore a reaffirmation of faith in the continuing intervention of God in history. Indeed, we may well ponder the audacity with which the rabbis fixed the formal Hanukkah benediction as: “Blessed be Thou O Lord our God ... *who has commanded us* to kindle the Hanukkah light.”³⁸

I suspect, of course, that many moderns would rather have the Maccabees than the miracle. If so, that is assuredly a modern problem, and not that of the rabbis. They obviously felt they had all the history they required, and it will help us neither to applaud nor to deplore this. To continue to ask why they did not write post-biblical history or, as we shall yet see, why medieval Jews wrote so little, is somewhat reminiscent of those “educated” Indians who, westernized under the benevolent auspices of the British Raj, are embarrassed by the absence of historiography in their own tradition and cannot reconcile themselves to it.

We, I think, can afford to be less troubled. We can acknowledge serenely that in rabbinic Judaism, which was to permeate Jewish life the world over, historiography came to a long halt even while belief in the meaning of history remained. We can freely concede, moreover, that much in the rabbinic (and even the biblical) heritage inculcated patterns and habits of thought in later generations that were, from a modern point of view, if not anti-historical, then at least ahistorical. Yet these factors did not inhibit the transmission of a vital Jewish past from one generation to the next, and Judaism neither lost its link to history nor its fundamentally historical orientation. The difficulty in grasping this apparent incongruity lies in a poverty of language that forces us, *faute de mieux*, to apply the term “history” both to the sort of past with which we are concerned, and to that

of Jewish tradition.

Some of the differences have already surfaced, others will become clearer as we go along, for what we have discussed thus far is only preparatory to what remains to be unraveled of our larger theme. The next lecture will focus on specific instances of how Jewish memory functioned in the Middle Ages. We will go on from there to examine the brief but significant renaissance of Jewish historical writing in the sixteenth century. Finally, we will marshal our accumulated resources to probe a phenomenon that is still very much with us — the unprecedented explosion of Jewish historiography in modern times.

Notes

1. The meaning and functions of this verb are amply discussed in the complementary studies of B. S. Childs, *Memory and Tradition in Israel* (London, 1962), and W. Schottroff, *'Gedenken' im alten Orient und im Alten Testament: Die Wurzel zākar im Semitischen Sprachkreis* (Neukirchen-Vluyn, 1964). Cf. also P. A. H. de Boer, *Gedenken und Gedächtnis in der Welt des Alten Testaments* (Stuttgart, 1962). The covenant relationship in the Bible demands that not only Israel must “remember,” but God as well. Indeed, He can be challenged and even upbraided for having “forgotten”; for a particularly vivid example of this, see Psalm 44. Needless to say, these lectures attempt to deal only with the human side of the equation.

2. See especially M. Eliade, *The Myth of the Eternal Return* (New York, 1954), pp. 34-48 and *passim*. The periodic abolition of historical time through myth and ritual is a consistent and major theme throughout Eliade's works, e.g.: *The Sacred and the Profane* (New York, 1959), ch.2; *Myths, Dreams and Mysteries* (New York, 1960), ch. 3; *Myth and Reality* (New

York, 1968), chs. 5-6; *Yoga: Immortality and Freedom* (New York, 1958), pp. 39-40. Eliade's phenomenological analysis, based on an impressive array of comparative materials, persuades. However, his far-reaching historical and philosophical conclusions, in which the mythic abolition of history is extolled as salvation from the "terror of history," leap well beyond the evidence. See the brief but cogent remarks of R. J. Zwi Werblowsky in his review of the first of the aforementioned works in *Journal of Jewish Studies*, 6 (1955) :172-75.

3. R. C. Majumdar, "Ideas of History in Sanskrit Literature," in *Historians of India, Pakistan and Ceylon*, ed. C. H. Philips (London, 1961), p. 25. Cf. K. Quecke, "Der indische Geist und die Geschichte," *Saeculum*, 1 (1950) :362-79, who opens with the sweeping assertion that "kein anderes Kulturvolk der Menschheit hat eine solch unvorstellbare Gleichgültigkeit gegenüber der Wahrheit historischer Tatsachen bewiesen wie die Inder." The great Far-Eastern contrast to India in this respect is, of course, China, whose prodigious historiographical achievement is only gradually being recognized by Western scholars. A significant effort to bridge the gap is the collaborative volume on *Historians of China and Japan*, ed. W. G. Beasley and E. G. Pulleyblank (London, 1961). On Chinese attitudes, not merely to historical writing but to time and history generally, see Joseph Needham's splendid essay on "Time and Knowledge in China and the West," in *The Voices of Time*, ed. J. T. Fraser (New York, 1966), pp. 92-135.

4. I use "meaning in history" here solely in the sense of a transcendent meaning, and do not suggest thereby that without it, as in Greece (or China), history is necessarily meaningless. Nor is it my intent to endorse any of the rigid distinctions that are often posited between Hebrew and Greek ways of thinking, in particular their alleged radically contrasting modes of perceiving time. For examples of the latter position, see O.

Cullman, *Christ and Time* (London, 1951); J. Marsh, *The Fullness of Time* (London, 1952); T. Bowman, *Hebrew Thought Compared with Greek* (London, 1960); and the sharp critiques of J. Barr, *Biblical Words for Time* (2nd rev. ed.; London, 1969), arguing that biblical thought and attitudes cannot be elicited from its lexical stock or linguistic structures, and A. Momigliano, "Time in Ancient Historiography," *History and Theory*, Beiheft 6 (1966): 1-23 (reprinted in his *Essays in Ancient and Modern Historiography* [Middletown Conn., 1977], pp. 179-204). Nevertheless, perceptions of time and views of history constitute two separate issues. Whatever the case with regard to the actual experience of time, conceptions of history in ancient Israel and Greece were, on other grounds, demonstrably different. On the specific question of linear vs. cyclical time, see below, note 7.

5. This does not mean that archetypal *thinking* disappeared, only that the archetypal events were now located within history rather than in a primeval mythic time. The exodus from Egypt is the outstanding example of such an historical archetype, serving as a pattern for the narrative of the crossing of the Jordan, visions of the messianic redemption, and much besides. Exodus typology has been widely discussed in biblical scholarship. For its possible legal and social analogues, see D. Daube, *The Exodus Pattern in the Bible* (All Souls Studies, vol. 2, London, 1963). The tendency to assimilate new events to central events of the past was greatly intensified in rabbinic thinking, and remained characteristic thereafter. For its effects on Jewish perceptions of history in the Middle Ages, see lecture 2.

6. For a concise and lucid discussion of biblical "theology" as historical recital, see G. E. Wright, *God Who Acts* (London, 1952). The essential point was grasped already in the twelfth century by Judah Halevi. See the speech of the Rabbi, contrasted with that of the Philosopher, in Halevi's *Kuzari*,

trans. H. Hirschfeld (New York, 1946), p. 41.

7. I have phrased the matter thus, fully aware of various attempts to discern cyclical notions of one kind or another in biblical historiography. See most recently G. W. Trompf, *The Idea of Recurrence in Western Thought: From Antiquity to the Renaissance* (Berkeley, 1979); on the Hebrew scriptures, see pp. 116-20, 134-39, 156-64. Such efforts may be regarded as reactions to prevalent oversimplistic views concerning the “linear” character of Hebrew thinking about history as opposed to the “cyclical” thinking of the Greeks. Certainly both generalizations are in need of correction. To focus only on the former, if the Hebrew conception of history is “linear,” the line is surely not an unbroken one, nor is it a never-ascending curve of progress. Still, I find it hard to grasp how Trompf’s broadening of the notion of cycle to include such paradigms as “alternation,” “re-enactment,” “renovation, restoration and Renaissance,” advances our understanding, or whether the term “recurrence” (used instead of “cycle” to avoid the implication of a literal repetition of events) can embrace these and other disparate phenomena without ultimately misleading. Another paradigm, which Trompf styles “the reciprocal view,” also serves him as a prime example of biblical recurrence. He defines it as “the view that common types of events are followed by consequences in such a way as to exemplify a general pattern in history.” When to these criteria are added “belief in the uniformity of human nature,” “preoccupation with parallelism,” and, “connected with almost all the above . . . the view that the past teaches lessons for present and future action,” one wonders if there has ever been any kind of historiography prior to modern times from which, by such definitions, one could not extract an idea of “recurrence.” If so, however, the term has been stretched to the bursting point and is no longer valuable.

Significantly, Trompf is himself somewhat uneasy about abandoning

the “linear” model altogether. He readily concedes that once eschatology took hold in Israel there was no room for real doctrines of recurrence. But even apart from this “the ancient Hebrews and early Christians were clearly opposed to the belief in an eternal return. Admittedly, the Israelites participated in yearly festivals, and they could speak of the ‘return,’ the ‘coming around,’ or the ‘circuit’ of seasons and natural events. But it is remarkable how they still managed to think historically when, for their immediate neighbors at any rate, human life was under the flux of ‘unhistorical, cyclically oriented nature mythologies and the magical ordinances of fate’ [quoting V. Hamp] . . . To this extent at least, then, the Judeo-Christian-linear/Greek-cyclical contrast still has worth” (Trompf 1979: 118ff.).

8. This “Credo . . . bears all the marks of great antiquity” (G. Von Rad, *Old Testament Theology* (New York, 1961) 1:121. Of. also the somewhat more elaborate declaration in Josh. 24:2-14.

9. Yehezkel Kaufmann, *Toledot ha-‘emunah ha-Yisraelit* [History of Israelite religion] (2nd ed.; Jerusalem-Tel Aviv, 1954), 1 (Book 1): 190-94; 2 (Book 1): 378ff.; and, in greater detail, *The Biblical Account of the Conquest of Palestine*, trans. M. Dagut (Jerusalem, 1954), especially pp. 46-56.

10. Von Rad has effectively stated the essential point: “Historical poetry was the form in which Israel, like other peoples, made sure of historical facts. That is, of their location and their significance. In those times poetry was, as a rule, the one possible form for expressing basic insights. It was not just there along with prose as something one might elect to use — a more elevated form of discourse as it were — but poetry alone enabled a people to express experiences met with in the course of their history in such a way as to make the past become absolutely present. In the case of legend we now

know that we must reckon with this coefficient of interpretation. But in thinking of the literary stories, which extend from the Hexateuch to II Kings, and which we must also regard to begin with as poetry, we have to learn to grasp this coefficient more clearly in its special features in any given story... The understanding of lists and annals is independent of the presuppositions of faith. But these poetic stories appeal for assent; they address those who are prepared to ask questions and receive answers along like lines. . .” (*Old Testament Theology*, 1:109).

11. The relationship between the two remains problematic. Reflecting a widespread assumption, Momigliano writes: “The Hebrew historian never claimed to be a prophet. He never said ‘the spirit of the Lord is upon me.’ But the pages of the historical books of the Bible are full of prophets who interpret the events because they know what was, is and will be. The historian by implication subordinates himself to the prophet; he derives his values from him” (*Essays in Ancient and Modern Historiography*, p. 195). It is striking, however, that with the sole exception of Isaiah, none of the classical prophets is even mentioned by the biblical historians. More significantly, throughout the historical literature from Deuteronomy through II Kings, national catastrophe is always related to religious and cultic sins and not, as was the primary message of classical prophecy from Amos on, to social and moral evils. See Kaufmann, *Toledot*, 1 (1): 25-31. Kaufmann’s view that Hebrew historiography and prophecy represent independent developments out of a common ground in Israelite monotheism impresses me as essentially correct.

12. E.g., such lost works as the “Book of the Acts of Solomon” (I Kings 11:41) and the books of the “Chronicles” of the Kings of Judah and of Israel (I Kings 1:18 and 14:19, respectively, and often thereafter).

13. On Hellenistic Jewish historical writings of which, with the exception

of Maccabees I-III, only quoted fragments survive, see E. Schürer, *Geschichte des jüdischen Volkes im Zeitalter Jesu Christi* (Leipzig, 1901-11), 3:468-97; R. H. Pfeiffer, *History of New Testament Times, with an Introduction to the Apocrypha* (New York, 1949), pp. 200-6; Y. Gutman, *Ha-sifrut ha-Yehudit ha-Hellenistit* [Jewish-Hellenistic Literature], 1 (Jerusalem, 1958): 132-39, and 2 (Jerusalem, 1963): 73-143.

14. It should be recognized that this fixed and perpetual public reading of the Scriptures had, simultaneously, dual consequences. The ritualized repetition of the readings, whether annual or triennial, endowed even the historical narratives with a certain cyclical quality. I return to this point in lecture 2.

15. I refer to Joseph ben Joshua Ha-Kohen of Avignon, on whom see lecture 3.

16. See *Bereshit Rabbah* 3:5 and 9:2 (ed. J. Theodor and Ch. Albeck [reprint Jerusalem, 1965], 1:23, 68, and the parallel passages cited there).

17. In the Bible see, for example Is. 27:1, 51:9; Ps. 74:13-14, 89:11; Job 9:13, 26:12-13. Contrast, in rabbinic literature, TB *Baba Batbra* 74b; *Shemot Rabbah* 15:22; *Bamidbar Rabbah* 18:22, 21:18; *Tanhuma Hukat* 1. Cf. also TB *Hagigah* I2a.

18. Louis Ginzberg, *The Legends of the Jews*, 7 vols. (Philadelphia, 1909-38).

19. The problem had already begun to be recognized in the late nineteenth century. Thus, for example, Israel Lévi could write: “Que de mal se sont donné les savants, depuis Krochmal jusqu’à notre regretté maître Joseph Derenbourg, pour découvrir dans les sources talmudiques des renseignements sur l’histoire juive avant l’ère chrétienne, et que resterait-il un jour de ce labeur prodigieux! Quand on reprend froidement tous ces

textes sur lesquels on a cru pouvoir edifier des constructions historiques, on est tout surpris d'en reconnaître la fragilité: ce sont tres souvent de simples *aggadot*, des anecdotes imaginées de toutes pièces en vue de l'edification ou même de l'amusement des lecteurs..." ("Les sources talmudiques de l'histoire juive," REJ, 35 (1897): 213. For a broader view of the issues, see J. Neusner, "The Religious Uses of History: Judaism in First Century A.D. Palestine and Third Century Babylonia," *History and Theory*, 5 (1966): 154. Structured specifically around the rabbinic responses to the destruction of the Second Temple and to the rise of the Sassanians, Neusner's essay formulates and elucidates some central problems in the rabbinic attitude toward history generally.

20. The most valuable attempt to analyze the rabbinic understanding of history on its own terms, rather than to judge it by alien standards, is still N. N. Glatzer's *Untersuchungen zur Geschichtslehre der Tannaiten* (Berlin, 1933).

21. E.g., *Bereshit Rabbah* 46:4: "R. Huna declared in the name of Bar Kappara: Abraham sat and deduced a *gezerah shavah* [i.e., an analogy between two laws based on a verbal congruence; one of the logical modes of rabbinic hermeneutics]...R. Hanina bar Pazi said to him: 'And were *gezerot shavot*, then, already given to Abraham?!'" See also *ibid.* 63:7 [after it has been implied, on the basis of Gen. 25:22, that Rebekah went to houses of study]: "And were there, then, synagogues and houses of study in those days?"

22. TB *Menahot* 29b (my italics).

23. The formulation in TP *Pe'ah* 17:1 is particularly apposite here: "All that a mature disciple will yet expound before his master has already been told to Moses at Sinai."

24. Significant attempts to uncover the latent structures of rabbinic thought will be found in M. Kadushin's *Organic Thinking* (New York, 1938), and *The Rabbinic Mind* (New York, 1952). For the processes of aggadic interpretation in particular, the most valuable and comprehensive work is that of Y. Heinemann, *Darkey ha-'aggadah* [The methods of the Aggadah] (Jerusalem, 1940; 2nd ed., 1954). The striking similarities between certain hermeneutical rules of the rabbis in interpreting the Bible, and those of the Alexandrian grammarians in interpreting Homer and Hesiod, were brought into sharp relief by S. Lieberman in his *Hellenism in Jewish Palestine* (New York 1950); see pp. 47-82, "Rabbinic Interpretation of Scripture."

25. The original Aramaic text, along with the much later Hebrew scholia, has been edited several times. See A. Neubauer, *MJC*, 2:3-25; S. Zeitlin, *Megillat Taanit as a Source for Jewish Chronology and History in the Hellenistic and Roman Periods* (Philadelphia, 1922); H. Lichtenstein, "Die Fastenrolle: Untersuchung zur Jüdisch-Hellenistischen Geschichte," *HUCA*, 8-9 (1931-32): 257-351 (the fundamental study); and, most recently, B. Z. Lurie, *Megillat Ta'anit*, with Hebrew introduction and commentary (Jerusalem, 1964). Not surprisingly, although it is Lurie's goal to examine the work as an historical *source* for the Hasmonean period, he characterizes it as "unique in its form in our *ancient historical literature*" (p. 9, my italics).

26. Conventionally designated as *Seder 'Olam Rabba* [The Greater Order of the World] merely to distinguish it from the so-called *Seder 'Olam Zuta*, or "Minor Order," which is a later Geonic work. The text has been edited by Neubauer, *MJC*, 2:26-67, and by B. Ratner (Vilna 1897). An edition with German translation published by A. Marx (Berlin, 1903) covers only the first ten chapters and was never completed.

27. An extreme and relatively recent instance of this may be found in B.

Dinur, "Ha-fragmentim ha-histori'im be-sifrut ha-Talmud u-ba'ayot ha-heker bahem" [Historiographical fragments in Talmudic literature and the problems of their investigation] in *Proceedings of the Fifth World Congress of Jewish Studies* (1969) (Jerusalem, 1972), vol. 2 [Hebrew section], pp. 137-46, with English abstract [English section], pp. 251-52.

28. "Since the deaths of Haggai, Zachariah and Makchi, the Holy Spirit has ceased in Israel" (Tosefta *Sotah* 13; TB *Sotah* 48b, *Yoma* 9b, *Sanhedrin* 11a. Cf. *Seder 'Olam Rabbah* ch. 30 (ed. Neubauer, p. 65): "And the rough he-goat is the King of Greece [Dan. 7:21] — that is, Alexander of Macedon. Up to this point the prophets were prophesying through the Holy Spirit; from this point on, incline thine ear and hearken unto the words of the sages." Such, at least, was the accepted scheme. In reality another type of "prophecy," crystallized in the apocalyptic literature, continued unabated.

29. The *locus classicus* is TB *Yoma* 9b: "Why was the First Temple destroyed? Because of three things which prevailed there: idolatry, immorality, bloodshed . . . But why was the Second Temple destroyed, seeing that in its time they were occupying themselves with Torah, precepts, and the practice of charity? Because therein prevailed hatred without cause."

30. *Vayyikra Rabbah* 29:2. The number of rungs signifies years of domination over Israel. The eagle is interpreted, appropriately, as a symbol of Rome.

31. TB *Sanhedrin* 98a. For further variations on this theme, see A. Berger, "Captive at the Gate of Rome: The Story of a Messianic Motif," *PAAJR*, 44 (1977): 1-17.

32. That there was no rabbinic conspiracy to obliterate the memory of the Hasmonean dynasty was argued vigorously by G. Alon, "Ha-hishkiah ha'umah va-hakhameha 'et ha-Hashmona'im?" [Did the nation and its sages

cause the Hasmoneans to be forgotten?], reprinted in his *Mehqarim be-toledot Yisrael* [Studies in Jewish history] (Jerusalem, 1967), 1:15-25. Be that as it may, even if the rabbis did not deliberately suppress the history of the Hasmoneans, it remains a fact that they made no special effort to preserve or record it.

33. See A. H. Silver's schematic survey in *A History of Messianic Speculation in Israel* (reprint, Boston, 1959), Part II ("Opposition to Messianic Speculation"), pp. 195-239, and especially G. Scholem, "Toward an Understanding of the Messianic Idea," in *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (New York, 1971), pp. 1-36.

34. TB *Sanhedrin* 97b.

35. It need hardly be added that much of what is related of Alexander Jannaeus in rabbinic literature is unhistorical. For a review of the rabbinic sources, see B. Lurie, *Yannai ha-melekh* (Jerusalem, 1960), and his *Mi-Yannai 'ad Hurdus* (Jerusalem, 1974), especially chs. 14-18.

36. See L. Ginzberg, "The Mishnah *Tamid*" *Journal of Jewish Lore and Philosophy*, 1 (1919): 33-44, 197-209, 265-95.

37. It is characteristic, again, that although the martyrdom of Jewish scholars at the hands of the Romans is certainly historical, the traditions are problematic and the details full of aggadic embellishments. See L. Finkelstein, "The Ten Martyrs," *Essays and Studies in Memory of Linda R. Miller* (New York, 1938), pp. 29-55; and cf. S. Lieberman, "The Martyrs of Caesaria," *Annuaire de l'Institut de Philologie et d'Histoire Orientales et Slaves*, 7 (1939-44), especially pp. 416 ff.

38. A lingering uneasiness at the source of authority for the blessing is still perceptible in TB *Shabbat* 23a: "What benediction is uttered? This: 'Who sanctified us by His commandments and commanded us to kindle the light

of Hanukkah.’ And where did He command us? Rabbi Awiya said: [It follows from] *thou shalt not turn aside [from the sentence which he shall show thee]* (Deut. 17:11). Rabbi Nahman quoted: *Ask they father and he shall show thee; thine elders, and they will tell thee* (Deut. 32:7). Cf. also *Midrash Tehillim* 22:10: “R. Benjamin bar Japheth taught in the name of R. Eleazar: ‘As the dawn ends the night, so all the miracles ended with Esther.’ But what of Hanukkah? We speak, however, only of the miracles which are recorded in Scripture.”

Author(s): Sandra E. Greene

Source: *Africa Today* (Fall/Winter 2003), Vol. 50 No. 2, pp. 41-53.

Published by: Indiana University Press

Stable URL: <https://doi.org/10.1353/at.2004.0011>

Copyright © 2003, Indiana University Press, Reprinted with permission of Indiana University Press.

Whispers and Silences: Explorations in African Oral History

Sandra E. Greene

Western-trained historians have long employed a variety of methodological and theoretical approaches when analyzing African oral narratives. In almost all cases, they have emphasized recording and analyzing texts produced for official or public consumption. But what of things not said, the stories, the statements made only in whispers behind closed doors, away from the eyes and ears of officials and family? What are we to make of statements that, by being offered in secret, defy the social consensus on what is appropriate, proper, and safe to discuss with insiders, outsiders, or both?

This paper argues that an analysis of what is whispered and what is not said is as important as analyzing what is said. It illustrates this point by exploring oral discourses that have swirled around the topics of slavery and traditional religious belief among the Anlo-Ewe of Ghana since the late 19th century. It demonstrates that analyses of whispers and silences reveals much about the stresses, strains, and opportunities associated with modernity that have had an impact on oral discourses about the past.

Introduction

Western-trained historians of Africa have long employed a variety of methodological and theoretical approaches when analyzing African oral narratives. In most cases, they have emphasized recording and analyzing texts produced individually and collectively for public consumption. Scholars have documented both official histories and counternarratives. They have analyzed personal histories and even narratives definable as gossip, all in a remarkably successful effort to use locally produced texts to reconstruct the African past.¹ But what of those things not said, the stories, the unremembered histories, the statements made only in whispers, to be hidden from officialdom and the public?² What are we to make of such phenomena, especially when in times past, such histories and statements were tendered readily and willingly in public spaces? How do we account for the shift from an official discourse to one conveyed only in secret, from the openly stated to the guardedly whispered, or even forgotten, where change has occurred not only in the venue of certain speech acts, but also in the content of the discourse once publicly performed?

Such changes in African oral discourses about the past, though difficult to document, have been the subject of numerous scholarly studies. Perhaps most relevant here are those that have examined African memories of the Atlantic and Indian Ocean slave trades.³ Emphasized by the authors of all these studies is the virtual silence on the slave trade, even though that trade had a profound impact on every aspect of life in the communities studied. In his study of narratives in Cameroon, Ralph Austen notes that Duala accounts “make [only] vague references to [the slave trade]” (2000:229–244). Edward Ball (1998) has made similar observations in his study, *Slaves in the Family*. Those he interviewed in Sierra Leone about the slave trade stated: “the slave business...should not be spoken about” (1998: 439). For Pier Larson, who conducted research among the Merina of Madagascar, “the

relevant question [became] not so much how the slave trade [was] explicitly remembered, but how it was and continues to be forgotten” (1999: 339). In all these instances, silence has become the norm. Why? According to these authors and others, forgetting has been convenient. To speak of the Atlantic and Indian Ocean slave trades is thought by many to connect the teller of such accounts with unwanted baggage from the past. For others, the historical reality of the trade has been of little relevance for their own contemporary identities (Singleton 1999). Accordingly, nothing is said. Silence prevails. Memories fade.

Such silences have also often been influenced by political considerations. References to slave-trading activity in Merina national narratives in Madagascar have been consciously omitted in favor of accounts that emphasize the importance of unity around a revered political leader (Larson 1999). In southern Ghana, most traditional political leaders have accepted the legitimacy of and enforced customary laws that prohibit the discussion of slave origins. Equally significant, however, is that the wider public has embraced these political efforts. Thus, we cannot attribute the widespread silences about the slave trade to political repression or self-censorship alone: rather, silence on this controversial topic is the result of social censorship, on which a conscious decision has been collectively made and supported, to avoid open discussion of this topic (Sheriff 2000). Does silence mean complete acceptance of the dominant official discourse? Not necessarily. Where the dominant narrative has been embraced and supported, silence often occurs — as evident in the silence around the slave trade — because it is understood by the larger public to be one way to protect one’s self, one’s family, and one’s community from the pain and the divisiveness that can follow in the wake of disclosure. Where silence is imposed and embraced only because it is perceived to be the only way to avoid political or social ostracism, what emerges is a vibrant culture of

whispering, what James C. Scott has called “hidden transcripts[,...]discourse that takes place ‘offstage’, beyond direct observation by powerholders” (1990: 4). In such cases, the silence that accompanies an official discourse about the past is the public face of a set of “hidden transcripts,” alternative narratives that refuse to be forgotten.

In this article, I analyze the whispers and silences that surround official discourses about the past among the Anlo-Ewe of Ghana. I focus on two themes of seeming sensitivity: traditional religious belief and slavery. I suggest during the colonial and postcolonial periods, specific social, political, economic, and religious changes brought alterations in the way the Anlo talked about these topics. Certain speech acts, former official “truths,” were rendered marginal, removed from public discourse, silenced, and relegated to locations where they exist only as whisperings, hidden from the eyes and ears of a political and social elite in some instances, and from fellow family members in other instances. An analysis of these whispers and silences can reveal a history of societal tensions as yet unresolved, the study of which is critical for understanding the history of official discourse about the African past.

Past and Present Oral Narratives on Religion and Politics

Recordings of an openly stated Anlo discourse about the nature of Anlo religious and political systems date to the late 19th and early 20th centuries, when German missionaries, affiliated with the Norddeutsche Missionsgesellschaft, and British colonial officers began operating in Ghana. Both groups sought to better understand the area in which they were operating, and did so by conducting interviews with a variety of individuals: political leaders and peasant women, priests of local religious orders, and wealthy merchants. Their purpose was to use the knowledge recorded to convert the Anlo to Christianity and to bring the Anlo area under colonial control, but

the recordings they made also provide a unique window on how the Anlo were then talking about their society. Particularly useful are the messages conveyed by the *awoamefia*, the political leader of the Anlo polity, through his ritual activity. According to 19th-century European travelers' and missionaries' accounts, the *awoamefia*'s actions spoke clearly of his religious and political authority. In photos of the late 19th-century *awoamefia*, Amedor Kpegla chose to wear a hat that was exclusively associated with the local priesthood. Until about 1900, he remained secluded from view to limit the potentially harmful effects his sacred aura might have on the unprotected. As the embodiment of the Anlo state and the individual principally responsible for its spiritual and physical health, he was prohibited from viewing the dead or attending funerals (ADM 11/1/1661: 22, 96).⁴ In seclusion, his role was to advise and counsel, to pray for peace and prosperity, while the very symbol of the Anlo political leader's office, the *awoame* stool, constituted, in part, the ritual paraphernalia used to obtain rain.

By 1912, however, the clear and intimate association that Anlo leaders had once made through word and action between the office of *awoamefia* and the polity's religious culture had undergone a change. In that year, a group of male elders testified before the British colonial government's Crowther Commission (a body that held hearings to establish the organization and character of the Anlo political system) that the institution most characteristic of the Anlo political system was not the office of the *awoamefia*, but the military. They explained in great detail the history of the military alliances that had held Anlo together as a political entity. They discussed the outcome of military battles. They identified allies and enemies. They barely mentioned the office of the *awoamefia*. One elder commented that the *awoamefia*'s stool had ritual significance, but nothing else was noted, not the *awoamefia*'s role as religious leader, nor the

sacredness of his body. Clearly, official discourse about the *awoamefia* had begun to change.⁵

By 1978, sixty-six years after the 1912 testimony, even guarded acknowledgement of the religious character of Anlo's political leader no longer occurred. Official discourse had been altered altogether. In that year, T. S. A. Togobo, spokesman for the then current *awoamefia*, Togbui Adeladza II, stated that the Anlo political leader had once been surrounded by priests and had indeed engaged in religious rituals, but only in his role as the ex-officio priest of Nyigbla, the national war deity. The *awoame* stool of office was a secular symbol; the *awoamefia*, a religious leader in name only. To reinforce this characterization, Togobo narrated the story of a conflict that he indicated explained how the Anlo political leader came to be called *awoamefia*. The story goes something like this:

The first Anlo *awoamefia*, Sri, was installed in Notsie [at present in southern Togo], but was forced to flee the town with his followers because of the cruelty shown them by the Notsie king, Agokoli. In their haste to leave town, however, Sri forgot to bring along the *awoame* stool. Only after arriving in Anlo, did they discover the loss. Sri then sent a delegation back to Notsie to retrieve the stool. The delegation accomplished its task, but only after lying to Agokoli that the severed head the Notsie chief had demanded in exchange for the stool, was that of Sri's. Their success, however, did not allay their fears that Agokoli might still find out that Sri was alive. In fact, Agokoli — it is said — did indeed send a delegation to confirm Sri's death. It was at this point that Sri then moved from the Alagbati section of Anloga to the Nyaxoenu District. According to Togobo, the move was prompted in part by the delegation's presence but also by the fact that a dispute had erupted between Sri and his relative Gli (priest of the god Tomi) just at the moment the Notsie delegation arrived. The dispute between Sri and Gli is said to have been caused by a disagreement over who controlled the town, where control was defined in terms of prestige and the extent to which one's services as arbitrator were solicited when disputes arose between individuals in the town. The cases would be taken to the most prominent person to be adjudicated. Fear that the ill-feelings between the two might lead Gli to inform the Notsie delegation of Sri's whereabouts prompted the Anlos to move Sri from Alagbati to Setsifeme [a shrine house known as *awoame*, the sacred place] in Nyaxoenu. Sri remained in this house for the three years the Notsie delegation was in Anlo. Thereafter Fia Sri became known as *awoamefia*, the *fia* or chief in a sacred place. (Greene 1978)

This account of the conflict between the *awoamefia* and his relative is significant because it couches the dispute in purely secular terms. The fact that Gli is a priest is rendered largely irrelevant. The notion that Sri's symbol of office, the *awoame* stool, had religious significance as indicated in the 1912 testimony goes unmentioned. Instead, the conflict and eventual elevation of Sri to the office of Anlo political leader is described as a simple clash over power that resulted in Sri's being given refuge in a religious shrine because that was the only way to shield him from the Notsie delegation. In this version of Anlo history — a version that is narrated openly and freely to anyone interested, a version that is known and repeated at festival reenactments and in undergraduate theses and published scholarly accounts — the office of *awoamefia* has been secularized, distanced from any intimate connection with the religious. Why?

In an earlier article, I noted that the expansion of Christianity had a marked impact on the willingness of many Anlo to associate their polity, as represented by the *awoamefia*, with traditional religious beliefs (Greene 1985:80–82). Those who embraced Christianity were urged to view their new religion as a marker of enlightened civilization. Traditional religious practices were defined as the work of the devil (Meyer 1999). Over time, and certainly by the late 1970s, traditional religion had become a quite limited factor in the public lives of many Anlo. British colonial rule had undermined the religious character of the office of the *awoamefia*: by 1907, instead of remaining secluded from view as an individual with great spiritual power, the *awoamefia* began to operate less as a religious leader and more as a purely political figure within the British colonial system. Other developments also contributed to the secularization of the office. After their incorporation into the British-controlled Gold Coast Colony, the Anlo faced a colonial and then a postcolonial administrative apparatus, that was largely interested in projecting the cultures of the more numerous matrilineal and

more hierarchically organized Akan states as typical of all cultures in the southern Gold Coast. Much attention was given to the nature of Akan customary law, political institutions, and kinship structures. All other peoples were relegated to the margins when the British and later the postcolonial governments of Ghana constructed their notions of the cultural political systems in the region. Anlo response to this was decidedly mixed. Most were unwilling to deny the fact that certain institutions — for example, the Anlo military structure — had been borrowed from the Akan. Thus, by 1938, the desire to reinforce the value of their own culture prompted several individuals to propose to the Anlo Traditional Council that the military terms borrowed from the Akan in the eighteenth century be replaced with Ewe ones. The Ewe term *gave* or *dome* was offered as a replacement for the Akan term *adortri*; *awkplorlawo* was to replace *asafohenewo*, and *megbewakor* was proposed as a substitute for the Akan term *tsrydom* (Anlo State 1934-1938:259–267). After World War II, however, as the Gold Coast began moving toward independence, interest quickly shifted. Efforts to conform to the Akan pattern gained momentum. By the late 1940s, the protocols associated with greeting the *awoamefia* were altered to be more consistent with Akan norms; the effort to replace Akan military terms with Ewe ones was dropped (Greene 1996). This, in turn, led inexorably to the Anlo deliberately secularizing the office of *awoamefia*. All references to the Anlo leader's association with traditional religious practices were eliminated from the officially sanctioned public discourses about the office. The newer discourse stressed the nonreligious character of the position.

More significant for this study is the fact that there continues to exist a hidden discourse about the religious nature of the *awoamefia* office. It is a discourse found largely among traditional religious believers and those whose voices have been marginalized in official discussions of Anlo political history. Most often, it is a discourse whispered behind closed doors,

offered only in privately scheduled or at clandestine meetings. In 1978, for example, after I had spent months interviewing Boko Seke Axovi, a well-known diviner and traditional healer, I decided to shift away from the clan histories I had been collecting and to return to a topic I had explored only cursorily: the origins of the *awoamefia* position. After asking what I thought was a fairly innocuous question, I was surprised to see Axovi raise himself from his reclining chair and gesture to me to move closer so that he could whisper to me his answer. The story he recited was actually the very same account I had heard months before from my more Western-educated and cosmopolitan informant, T.S.A. Togobo, but the accounts differed in interpretation. Axovi described the history of the *awoamefia* office as one deeply and intimately steeped in the religious. The *awoamefia* was not simply associated with powerful priests; he was a priest himself. The conflict that developed between the Anlo's first *fia*, Sri I, and his relative Gli was not simply a political conflict, but a religious one, a contest over spiritual authority. This emphasis, different from the one offered by Togobo, meant little to me at the time, but became more significant after I was summoned to a clandestine meeting by an older woman, who informed me that everything I had been told was incorrect, that the *awoamefia* was really a "fetish priest." Why were such accounts, ones that mirrored oral testimonies delivered publicly without fanfare in the 19th century, now offered in the late 20th century in whispers at clandestine meetings behind closed doors? What was so important about these whispered narratives that they had to be delivered in secret?

Preliminary answers to these questions can be found in yet another brief look at Anlo history. Christianity was first introduced into the Anlo area in the mid-19th century. Over time, it gained increasing numbers of followers, a gain that brought to traditional religious believers a steady assault on their beliefs and practices. The missionaries who operated in the area regularly

and roundly condemned these practices, and the colonial government outlawed many of them. In time, opportunities for political authority and economic prosperity shifted away from the traditional religious orders and became increasingly associated with belief in Christianity and Western education. The number of traditional believers, as a result, steadily declined. By the 1980s, traditional believers were finding themselves mocked by ever more belligerent evangelical Christians in the one location — the Anlo capital of Anloga — that had once been the most important place on the Anlo littoral, the place where traditional beliefs and practices had been shown the most respect. In the early part of 2001, relations had deteriorated to the point that both Christians and traditional believers had begun to attack each other's places of worship: churches were burned, shrines defiled, and Christian ministers forced out of town (Greene 1997b and 2002: 109-131).

All this was prompted by the gradual but steady marginalization of Anlo's traditional religions, the refusal by ever-increasing numbers of local Christians to respect the few practices still maintained by traditional believers, and the fact that while some educated Anlos wished to embrace and celebrate an Anlo culture, they were prepared to do so only when the culture would be reconfigured to incorporate more-evangelical Christian and secular aspects of Akan culture. Yet the older discourse remains. It is an alternative discourse, which, in defying obliteration, is a window not only on the past, but also on the tensions that pervade Anlo society. These tensions suggest that some in Anlo continue to critique the decisions taken by the Anlo leadership on how best to adapt to the modern world. Yet it is a critique that exists in clandestine form only. Why?

Certainly one answer has to do with the fact that the chief supporters of a secularized and Akanized Anlo political culture have been the educated political elite. To defy the move toward modernity involved pitting oneself against a local powerful elite, who had received the backing of the colonial

and later the first nationalist government. During the colonial period, vocal opposition had resulted in political marginalization; in the postcolonial period, opposition could be met with public ostracism or rebuke by political leaders and neighbors who supported the trajectory promoted by the Anlos' political leadership. Thus, individuals aware of and interested in keeping alive alternative versions of local history found they could do so comfortably only by remaining silent at public, official occasions, while taking the opportunity to share clandestinely the narratives that were no longer in favor by the political elite and the general public. Whispers, along with public silence, had to suffice.

Past and Present Oral Narratives on Slavery

A similar history of tensions and shifts in public discourse is evident in Anlo discussions of slavery. Oral accounts discussing the existence of slavery in Anlo date to the late 19th century, when German missionaries began documenting the systems of unfree labor that prevailed in the polity (Seeger 1892; Spieth 1906:123; Westermann 1935:284-285). British colonial local courts, organized by the late 19th century, contain testimonies by slaves and masters alike describing the system. In all these accounts, Anlo citizens describe slavery as an unquestioned facet of community life. Individuals acknowledge their status as slaves; masters define and defend their rights. By the 1920s, however, such public references to slave origins no longer appear in court cases.⁶ An edict had been issued by the traditional political authorities in Anlo declaring illegal all discussion of slave origins. In the 1970s, when I began conducting oral interviews among the Anlo, the ban remained in place. As I was told in no uncertain terms:

If someone refers to your slave as such, they threaten the prosperity of the family who owns the slave and the clan of that family. It is a serious matter. No court will allow it. No elder will bring [a] case [that allows such information to be used]. If you don't know and you try it, you will be revealing

the secrets of the families in town and they will form a gang and you will disappear immediately. They will kill you spiritually, instantly. It is not done. (Greene 1987)

Significantly, these kinds of injunctions did not stop individuals from discussing privately, in explicit terms, the slave origins of various individuals and families. In one interview I conducted in 1996, an elderly woman complained without any prompting that her grandfather had bequeathed all his wealth to the slave side of the family because that particular branch had had no maternal relations from whom they could obtain land. As a consequence, she commented bitterly, her side — the free side of the family — had been left destitute. In an interview with several members of another extended family, I raised the question of slave ownership. The male elders present indicated in this group interview that their ancestors owned no slaves; yet this seeming family unanimity was belied when an older female family member indicated through the almost imperceptible movement of her eyes that the relative she was sitting next to was in fact of slave origins. In still another set of private conversations with me, without the slightest hesitation, Anlo chiefs and traditional religious leaders discussed the slave origins of specific families.⁷

Most families in Anlo do have slave branches and follow specific policies on how they handle this fact. The elders of one family I interviewed readily acknowledged that the founding elder of their family was responsible for making them one of the largest and most wealthy kin-groups in Anlo because he had so many slave wives and dependents. These same elders were quite clear in noting that they made no distinction between those of slave and free origin. Many male slaves had been made chiefs, placed in office on family stools despite their origins, because they had served their founding elder well and were capable leaders. The family trees constructed by these elders did not include a list of those of slave descent, even though

as these elders admitted it would be easy enough to make such a list, based on their records. But making such a list was of no interest; according to them, it served no purpose. Other families were quite strict in insisting that those of slave origins within their families be distinguished from the others. Any time a family office needed filling, they deliberately and carefully investigated the backgrounds of all those deemed eligible for the position; those found with slave origin were immediately excluded from the list of eligible candidates. Still other families maintained a record of origins because it was important for them to distinguish, perhaps for purposes of intrafamily social hierarchy, those of slave origins from the others. According to the elder of one prominent Anlo family:

[Our founding elder] had a ranch... After the abolition of slavery, he sent all his slaves there to work on the farm. They worked, gave the lion share of the fruits to the master, keeping some for themselves. They would marry amongst themselves, have children and stay on to work. They could never claim the land for themselves; they were slaves, laborers and just worked for their master. Their descendants are still on the land tilling it and by right I should receive some payment, but... but now they claim to be part of the... family with all rights. So I can't sack them.⁸

After these comments, he invited me to visit the town and see “those” people. More important, however, is that while this particular elder was prepared to share this information with me, he and none of the others who I interviewed were prepared to discuss these family details openly. What once was a matter of public record, had been rendered silent, consigned to the private sphere of family politics.

The reasons for this silencing, this “cultural censorship,” are not difficult to determine. As indicated, the Anlo believe — as do most others in southern Ghana — that to discuss openly the slave origins of another can too easily lead to intra-and/or interkinship disputes. Family integrity could be destroyed. Hostile relations between individual families and family members could erupt and tear a community apart. This is the reason often

given by elders throughout Ghana for maintaining public silence about the slave origins of individuals and families. Perhaps it is also why most studies on slavery have been written by Americans and Europeans, rather than Ghanaian scholars. What good reason is there to investigate such matters? What can be gained that would outweigh the potential social upheavals that might result? To date, there is no evidence that slave origins alone have prevented a whole class of people from prospering on the local, regional, or national level. Access to school — made available to slave and free alike — rendered slave origins largely irrelevant during the colonial and postcolonial periods. Migrations for economic reasons to other areas made questions of one's distant origins, at home and abroad, far less relevant for measuring social status than the rewards one could accrue from such experiences. As a result, perhaps public discourse yielded to silence. Concerns about the slave backgrounds of individuals and families were relegated to the private discourse, yet there continues to exist a culture of exuberant whispering. Why? It would seem that accusations of slave origins continue to serve certain ends. For some, they provide a ready explanation for personal economic difficulties and an accessible outlet for jealousies. As one woman noted, "If our grandfather had not given all his most valuable assets to the slaves in the family, we would not be poor right now. Those slaves are getting rich because they are using our inheritance." Continuous allusions to the slave ancestry of *non-kin* competitors (who are most often accused of making illegal claims of control over land or chieftainships) provide accusers a reason for indignation and an impetus for righting a perceived wrong.

Conclusion

Whispered references to the slave origins of another, like clandestine commentaries about the religious identity of the *awoamefia*, reveal the

existence of unresolved tensions about how one should identity oneself and others, and what rights and responsibilities should prevail in etiquette and law, as a result of the social, political, economic, and religious changes wrought by colonial and postcolonial developments. These tensions rarely boil to the surface. When they do, whether in the form of riotous destruction of property (as has happened in Anlo in the last twenty years), or in whispered campaigns (which have the potential to contaminate social relations), the result can be individually and collectively devastating. Analyses of the official silences and private whisperings are critical for understanding the debates and tensions within African societies. As “hidden transcripts” and a form of “cultural censorship,” they illustrate the complexities that underpin African oral discourses about the past.

Notes

1. A vast multidisciplinary literature exists on African oral narratives, but the concern here is on those analyzed by historians. These include oral traditions and oral histories. For an excellent discussion on the history of historical analyses of oral traditions, see Miller 1980. See also the journal *History in Africa*. For an example of recent discussion on the changing character of oral productions, see Hofmeyr 1994. On the historical analysis for rumor for history, see White 2000. For an example of the use of oral histories of individuals to explore the larger history of an area, see Bozzoli 1991.
2. Here, I am not referring to the “secret” knowledge held by adults or knowledgeable community leaders, knowledge that is conveyed to others (for example, children, outsiders, or the recently initiated) at the discretion of the knowledge holder. Instead, I refer to accounts related in ways that let the listener know that this is knowledge not to be conveyed to anyone,

knowledge that has been forced from public discussion.

3. Other studies have focused on the changes wrought by nationalist efforts to shape a history of use to the nationalist project. See, for example, Gayibor 1989 and Sunseri 2000.

4. In 1971, Anlo elders located in a rural area in already rural Anlo acknowledged that “the office of chief was originally held by fetish priests... This was the case for a long time at Anloga [capital of the Anlo polity]... These rulers... cannot be regarded as chiefs, having been rather *awoamefia*... (round-hut-inside-chiefs, i.e., fetish priests) whose persons were so sacred that they were hardly seen in public” (Aduamah n.d.:16). This testimony stands in sharp contrast to efforts in central Anlo today (efforts evident to some extent even in the 1912 Crowther Commission hearings) to distance the *awoamefia* from association with local religious beliefs and practices. For more on the sacred aura surrounding the *awoamefia*, see Greene 2002:88-89.

5. This shift in discourse reflected a change in how the office of *awoamefia* was being handled by the then Anlo political leader, Sri II. Unlike his predecessor (Amedor Kpegla), Sri II was educated by the Bremen Mission, and upon becoming *awoamefia* in 1907 embarked on a campaign to modernize and secularize the office. This shift in how the office was being handled, however, does not totally explain the decisions to deemphasize the religious in discussions about the history of the office.

6. The most recent court testimony I have found where individuals are defined openly as slaves dates to 1919 (see District Court Grade II Library, Judicial Council Minute Book, 1919:6). By 1921, explicit references were no longer evident in court recordings (see Judicial Court Record Book 1921:273-336). For a discussion of how individuals and families in Anlo used this edict to effect a change in their identities, see Greene 1997:23-41.

7. To maintain the anonymity of the individuals and families discussed here, I have opted not to include citations of the interviews that form the basis of the examples cited here.

8. See endnote 7.

References

- ADM. 11/1/1661: 22, 96. National Archives of Ghana, Accra, Ghana.
- Aduamah, E. K. n.d. *Ewe Traditions*, sections 1-19. Legon: Institute of African Studies, University of Ghana.
- Anlo State. 1934-1938. Council Minute Book. Anlo State Council Library, Anloga, Ghana.
- Austen, Ralph. 2001. The Slave Trade as History and Memory: Confrontations of Slaving Voyage Documents and Communal Traditions. *William and Mary Quarterly*, 3rd series, 58(1):229-244.
- Ball, Edward. 1998. *Slaves in the Family*. New York: Farrar, Straus and Giroux.
- Bozzoli, Belinda, with Mmantho Nkotsoe. 1991. *Women of Phokeng: Consciousness, Life Strategy and Migrancy in South Africa, 1900-1983*. Portsmouth: Heinemann.
- Gayibor, N.L. 1989. Le Remodelage des Traditions Historiques: La Légende d'Agokoli, roi de Notse. In *Sources orales de l'histoire de l'Afrique*, edited by Claude Hélène Perrot. Paris: CNRS.
- Greene, Sandra E. 1978. Field Note 11: Interview with T.S.A. Togobo, 7 August.
- . 1985. The Past and Present of an Anlo-Ewe Oral Tradition. *History in Africa* 12:73-87.
- . 1987. Field Note 54: Interview with Tse Gbeku, Anloga, 16 December.

- . 1996. Field Note 243: Interview with Colonel Courage Togobo, Accra, 15 October.
- . 1997a. Crossing Boundaries / Changing Identities: The Descendants of Female Slaves and Male Strangers in Nineteenth and Twentieth Century Anlo. In *Gendered Encounters: Challenging Cultural Boundaries and Social Hierarchies in Africa*, edited by Maria Grosz-Ngate and Omari H. Kokole. London: Routledge.
- . 1997b. Sacred Terrain: Religion, Politics and Place in the History of Anloga (Ghana). *International Journal of African Historical Studies* 30(1):1-22.
- . 2002. *Sacred Sites and the Colonial Encounter*. Bloomington: Indiana University Press.
- Hofmeyr, Isabel. 1994. *We Spend Our Years As a Tale that Is Told: Oral Historical Narrative in a South African Chieftdom*. Portsmouth, N.H.: Heinemann.
- Judicial Council Record Book, 1919. District Court Grade II Library, Anloga, Ghana.
- Judicial Council Record Book, 1921. District Court Grade II Library, Anloga, Ghana.
- Larson, Pier. 1999. Reconsidering Trauma, Identity and the African Diaspora: Enslavement and Historical Memory in Nineteenth Century Highland Madagascar. *William and Mary Quarterly*, 3d series, 56(2):335-362.
- Meyer, Birgit. 1999. *Translating the Devil: Religion and Modernity among the Ewe of Ghana*. Edinburgh: Edinburgh University Press.
- Miller, Joseph C., ed. 1980. *The African Past Speaks: Essays on Oral Traditions and History*. Kent, England: Folkestone.
- Scott, James. C. 1990. *Domination and the Arts of Resistance: Hidden Transcripts*. New Haven: Yale University Press.

- Seeger, M. 1892. Die Sklaverei in Togolande und der englischen Goldküsten Kolonie. *Deutsche Kolonialzeitung*, Berlin 5:54-56.
- Shaw, Rosalind. 2002. *Memories of the Slave Trade: Ritual and Historical Imagination in Sierra Leone*. Chicago: University of Chicago Press.
- Sheriff, Robin E. 2000. Exposing Silence as Cultural Censorship: A Brazilian Case. *American Anthropologist* 102(1):114-132.
- Singleton, Theresa A. 1999. The Slave Trade Remembered on the Former Gold and Slave Coasts. *Slavery and Abolition* 20(1):150-169.
- Spieth, Jakob. 1906. *Die Ewe-Stämme*. Berlin: Dietrich Reimer.
- Sunseri, Thaddeus. 2000. Statist Narratives and Maji and Maji Ellipses. *International Journal of African Historical Studies* 33(3):567-584.
- Westermann, Diedrich. 1935. *Die Glidy-Ewe*. Berlin: Mitteilungen des Seminars für Orientalische Sprachen.
- White, Luise. 2000. *Speaking with Vampires: Rumor and History in Colonial Africa*. Berkeley: University of California Press.

Author(s): Pieter JJ Botha

Published by: *Scriptura* 117 (2018:1), pp. 1-18.

Stable URL: <http://dx.doi.org/10.7833/117-1-1331>

The Spelling Eye and the Listening Ear: Oral Poetics and New Testament Writings

Pieter JJ Botha

Abstract

Concepts such as orality, media criticism, manuscript culture, oral reading and performance have been introduced to New Testament scholarship since the 1980s, but their impact on and contribution to mainstream research are still in question. A resurgent interest in these socio-cultural notions is raising fundamental questions about approaches to and conclusions about early Christian texts. Some of the implications and possibilities of these developments are reviewed and briefly illustrated. Rather than emphasising another method or 'criticism' that could be 'added' to the repertoire of biblical scholarship, it is proposed that a multifaceted conceptualising of 'speaking-hearing-remembering', an 'oral poetics', inform NT scholarship.

Introduction

For the past three decades some New Testament scholars have been arguing for a reorientation in our discipline, calling for a more comprehensive approach to the NT texts; an approach informed by orality studies as practised by human and social sciences (e.g., Boomershine 1987a; 1987b; Kelber, 1994; 2014; Maxey, 2009a) which is in dialogue with cognition studies and memory research (e.g. Czachesz, 2007; DeConick, 2008). In this endeavour, some researchers point to the results of folklore studies and to the investigations in historical sociology and the anthropology of social and religious movements in pre-industrial cultures (such as Yaghjian, 1996; Hearon, 2004; Draper, 1999; 2003). Others emphasise the insights gained by scholars working in disciplines with similar historical interests who have adopted theories and methods from performance studies, the ethnography of communication and oral historians (Rhoads, 2010; Botha, 2012; Daniels, 2013; Byrskog, 2000 — among others). As in all research trajectories, these developments were anticipated, specifically in various challenges to form criticism: Willi Marxsen¹ in the late 1950s, Erhardt Güttgemanns in 1970² and Werner Kelber in 1983 all objected to the trivialisation of the uniqueness of oral and scribal communication.

A call to be critical and more informed about the oral aspects of early Christian traditions clearly ties these assessments together, but it is the forceful claims about the *why* and the *how* of oral tradition which provides particular relevance to this selection of work. It is not the case that New Testament scholars deny the presence of oral tradition in early Christianity; rather that there is a detectable resistance not only to participate in the extensive body of knowledge with regard to orality and informal communication when they do source and tradition criticism, but also an avoidance of engaging with the *implications* of the actualities of oral tradition and orality. Orality/oral tradition is not merely an optional feature

of early Christian history (like paint on a wall), and does not refer to terms to be invoked merely to cover up difficulties with purely documentary solutions to exegetical questions. Oral tradition, oral aspects and orality are basic interpretive categories, requiring formal examination.

On the one hand, the extent of interest in orality and New Testament has reached a point at which studies reviewing a remarkable progress have become available. Particularly deserving mention in this regard is Rafael Rodríguez's *Oral tradition and the New Testament: a guide for the perplexed* (2014). In this 'state of question' Rodríguez succinctly summarises and critically analyses the what, the who, the how and the why of oral tradition scholarship with reference to New Testament studies. The work of Eric Eve, who reviews the origins of the gospel traditions as a research trajectory covering oral tradition, composition and memory (Eve, 2014; 2016), also deserves to be mentioned.

On the other hand, Kelber's analysis of contemporary biblical scholarship and why objections to cross-cultural and/or trans-historical analytical models persist, is still very relevant:

As an academic discipline, biblical scholarship is laden with centuries of received manners and mannerisms. Not infrequently it has operated in a state of culturally conditioned and/or institutionally enforced isolation. More to the point, many of its historical methods and assumptions about the functioning of biblical texts originated in perennial working relations with print versions — typographic constructs of modernity. Plainly, New Testament (and biblical) studies stand in need of a rethinking of the communications environment in which the early Jesus tradition participated (Kelber, 2009:181).

Kelber's examination remains apt because far too many scholarly studies still either ignore these critical issues or dismiss them rather briefly. Partly motivating such avoidance could be an evasion of some of the implications of orality/performance research (such as loss of a fixed 'original' text, for instance). It could also relate to the challenges of construing context and memorising texts. Whatever the case may be, investigations into orality/the

performance aspects of biblical texts — and consequently the body of multi- and interdisciplinary research surrounding them — are bypassed at our peril. If history and historical understanding are important, if indeed we want to ‘participate’ in meaningful communication with our forebears and their historical writings, dealing with the issues pertaining to orality and oral tradition in the first-century world and early Christianity is unavoidable.

A Change in Perspective

The bottom line of the challenges proposed by this development is that the viability of a number of assumptions in conventional NT scholarship and its treatment of texts, pertaining to the transmission of tradition and the oral aspects of ancient communication, have become problematic. Since the 1920s the work of Milman Parry, and then from the mid-twentieth century Albert Lord, Eric Havelock, Walter Ong, Dell Hymes, Ruth Finnegan and Jack Goody, and more recently Richard Bauman, John M Foley, David Olson and Jan and Aleida Assmann have fundamentally changed how to think (or more correctly, how *not* to think) about the compositional and performative aspects of oral traditions and the texts dependent on, or interacting with, them.³ It is time to deal with research on orality and related fields in a much more comprehensive way and to do that we need a profound shift in perspective; what Dunn calls a reset in default setting (cf. Dunn, 2003).

In order to illustrate more precisely what these challenges entail and to gain a better understanding of the reasons for the shift in perspective a discussion of the exploratory work of Loubser (2007) is useful.

‘Studies on the Media Texture of the New Testament’

In a way, Bobby Loubser’s *Oral and manuscript culture in the Bible: Studies on the media texture of the New Testament* (2007), is a signpost to a

crossroad in New Testament scholarship. It provides a useful summary of some of the research that has been done with regard to oral traditions in various disciplines, and it suggests a number of interesting and useful alternative research problems. Loubser himself notes that in the light of the developments at the time of his writing, the stage is set for a ‘third generation’ of New Testament orality studies (Loubser, 2007:87).

He uses the term ‘media criticism’ to characterise the paradigm change he pleads for: “an understanding of the media culture of a society provides an indispensable window into the social and psychological dynamics in that society” (Loubser, 2007:3). An understanding of media is not only important for the interpretation of ancient texts, but also vital for understanding a culture in general as well as for cross-cultural communication. Loubser’s first two chapters summarise studies dealing with media and biblical traditions, and he connects these with some discussions of communication theory. He puts heavy emphasis on ‘medium’; medium is a critical aspect of a message, for it is the configuration of physical elements (including orality and auality), determined by the technology of communication, that *mediates* the coherent exchange of information. The medium is the configuration of vectors, inclusive of such things as script, voice, memory, social contexts, and format (e.g., scrolls, codices), that are operative in the storage, retrieval, and utilisation of information.

The second chapter constitutes the heart of Loubser’s book, as it situates discussion of media approaches within scholarship, as well as evaluates methodology in biblical research. In order to navigate one’s way among the proliferation of methods in biblical scholarship, but also in order to be able to reflect on one’s preferences, some ‘general theory’ is necessary (Loubser, 2007:23-25). To this end, Loubser delves into systems theory (or, as he prefers to call it, a ‘systems approach’; 2007:24). A system is a set of

elements related to one another in such a way that it maintains or supports regulated processes (Loubser, 2007:26), therefore communication (or rather, communication *events*) should be analysed as a systems process involving senders and receivers. The purpose of the system is transmission of information, with various feedback loops that permit the adjustment of the message to the audience. “Communication systems are part of social systems in which live people participate” (Loubser, 2007:31). One implication of a systems approach is that several methods for biblical interpretation, including social-scientific study, textual criticism, reception studies, rhetorical analysis and even, according to Loubser, dogmatic hermeneutics (Loubser, 2007:51-53), are to be incorporated.

The written text that biblical scholarship tends to take as its exclusive focus is “just one aspect” of more encompassing communication systems. Texts (the material objects) ought not to be identified with the total event of communication; rather, they are active components within a system of communication, which in turn is part of a larger social system, forming the physical and visible substratum of the actual message. In addition to its purely conceptual elements, which have tended to be central to scholarly analysis, a message makes implicit and explicit reference to numerous linguistic and cultural codes (or social conventions) such as genre and canon (Loubser, 2007:33-34). Medium is another critical aspect of the message, for it is the configuration of physical elements (including orality and aurality), determined by the technology of communication, that *mediates* the coherent exchange of information. The ‘oral-aural medium’ is basic to human communication, but invariably ‘augmented’ by other media (Loubser, 2007:35). Media carry various properties that regulate the production, format, distribution and reception of messages. Just think of how media regulate distancing (e.g., writing in contrast to conversation — Loubser, 2007:41). “Knowledge of the general media culture... provide

us with important clues as to the stylistic forms, conceptual textures and themes communicated, it can inform us about the senders and receivers, why they used certain strategies, and the world they lived in” (Loubser, 2007:47).

In the rest of his book Loubser suggests some ways for studying the ‘media texture’ of NT texts (mainly Pauline material and the Gospel of John). His first instance is a convincing exercise in an acoustic mapping of Luke 9:51-56 (Loubser, 2007:75-83). He shows that here Luke retains an oral substratum (effaced in translations that approach the text in wholly literary terms) that requires oral activation from its base in the written Gospel medium.

Likewise, the cognitive centrality of verbal (oral/aural) memory determines the doctrine of the Spirit’s presence in the Johannine literature as the expression of the oral focus upon the immediate presence of the word (Loubser, 2007:121-132). Loubser also attempts to find contemporary analogies for oral theologies in the innovative Christologies of presence prominent in some African indigenous churches (2007:145-151).

While the cultural contexts for biblical texts have long moved away from the almost exclusive orality of traditional societies, writing in antiquity retained purposes of oral enactment as well as being an external prop for memory. Conventional scholarship, Loubser points out again and again, is notoriously deficient in media awareness, and tends to project modern understandings of media dynamics — especially notions of individual, solitary authors and readers — upon the ancient messages embodied in the biblical texts.⁴ In Greco-Roman times, the boundaries of the written text were indistinct, opening out to the wider oral-traditional register. Loubser (2007:72) questions whether we can rightly assume the existence of a “self-conscious literate identity” behind each of the texts of the New Testament. New Testament writings do not reflect homogeneous compositions, but the vocabularies and styles of a number of individuals.

In other words, suggests Loubser, ancient texts should be seen as team products. This ‘team’ creating the text also includes the delivery and presentation of the text. Hence, modern depictions of ‘reading’ the New Testament texts must be inadequate; a more appropriate visualisation of what ancient reading entails would be ‘performance’ (Loubser, 2007:138). In many ways this is a refinement of a longstanding interpretation of an aspect of Paul’s letters (Botha, 1993; Dahl, 1977:79; Doty, 1973:75-76; Hester, 1986:387-389; Funk, 1966; Lategan, 1988:416; Malherbe, 1986:68; Roller, 1933:16-23; White, 1986:19; see the excellent review by Oestreich, 2016:7-40).

Following from this, Loubser notes that the ‘author’ of a New Testament text is present with the audience when the text is ‘read’. In Paul’s letters reference to ‘seeing’ Jesus Christ (Gal. 3.1) should be understood more literally than is usual: the gestures of the reader make visible parts of the meaning/message. It is not a Pauline gospel, but a Pauline *Christology* being contextualised (Loubser, 2007:99). Loubser goes on to argue that Paul’s internalising, his “in Christ/Christ in us” theology, is the expression of an oral mentality, more precisely, of the cognitive centrality of oral memory that was a key component of ancient communication.

A number of main points raised by Loubser’s work can be summarised as follows:

- In antiquity, oral contextualisation was key to the emergence *and* transmission of a written composition.
- The search for an ‘original text’ of any New Testament writing becomes improbable (Loubser, 2007:71).
- The search for the historical Jesus requires a methodological rethink — in Loubser’s (2007:7) words, the search has acquired ‘surrealistic proportions’ — as the ‘oral origins’ of the gospel traditions give different answers to the questions driving the search.

- The identification of ‘layers’ in the letters of Paul is futile. Rather than (somewhat inept) editing, the inconsistencies, gaps and verbal conflicts characterising these writings are due to the ‘oral origins’ of such writings (Loubser, 2007:97). The irregularities and breaks in Pauline and Gospel texts can “to a considerable extent at least” be ascribed to the medium of communication (Loubser, 2007:111).

Loubser’s book is an important study and a useful contribution to initiate reconceptualising (and redescribing) in our discipline: media criticism (or knowledge of media textures) “provides a viable strategy for a fuller understanding of texts as they function within communication systems” (Loubser, 2007:165).

Problematic Aspects

There are two interrelated shortcomings that limit Loubser’s work. Firstly, it falls short when it comes to detailed (socio-cultural) historical investigations of ancient orality and literacy — an ethnography of ancient communication, in a manner of speaking. Despite the overall persuasiveness of Loubser’s studies, his presentation of ancient media dynamics lacks historical detail and contextual grounding.

Secondly, and precisely in order to clarify Greco-Roman literacy, a more sophisticated understanding of the complexity of communication is necessary. For his theorising and methodological claims Loubser relies very much on the synthesis developed by Ong (1982) — which was intended as an *introduction*, a summary of Ong’s view on how writing “shaped and powered the intellectual activity of *modern man*” and never as a methodological guideline.⁵ It is this specific reliance that undermines Loubser’s very aim of developing a ‘systems approach’. Loubser does not make use of the anthropological critiques of Ong’s synthesis (or incorporate

the many extensions/refinements available in such studies: Briggs 2013; Clark, 1999; Kirshenblatt-Gimblett, 1998:309-321; Porcello, et al. 2010; Swearingen, 1986), nor does he take cognisance of the response by communication theorists (Kennedy, 1991; Payne, 1991; Olson, 1994; Bloch, 1998; Langlois, 2006; Durant, 1997). Consequently Loubser remains stuck with positing an oral mentality in the strong, epistemologically determinative sense, from which he then derives various theological and conceptual features of early Christianity. The idea of a determinative form of an oral mentality has been shown to be problematic (e.g., Finnegan, 1988; Worthington, 1996; Cole & Cole, 2006). Starting off with an overstated adversarial preconception of orality and literacy, Loubser operates with an unhistorical *dualism*, contrary to his own intentions.

The implicit divide and opposition between orality and literacy is simply not realistic in view of the extensive ethnographic reports from around the world (Finnegan, 2001; Theall, 1992), and research about literacy practices (Finnegan, 1988; Snyder, 1990; Reder & Davila, 2005), which stresses the interaction of orality and literacy. This interactive scenario holds true for both ancient and medieval traditions.

Speech *and* writing are present and influential in ‘traditional’ cultures, as significant oral modes of communication that persist powerfully in communities acquiring and practising literacy. After all, “literacy was *formed, shaped, and conditioned* by the oral world that it penetrated” (Graff, 1987:5; Killingsworth, 1993:27). Deborah Tannen’s cross-cultural research places in doubt at least one of the supposed analytical mainstays of the orality/literacy opposition, namely the ‘de-contextualisation hypothesis,’ the idea that writing is less context-dependent than speech — lending weight to the point about not generalising Ong’s categories. De-contextualisation does not apply to speech and writing per se, but rather to *informal conversational speech* as opposed to *formal academic writing* (Tannen,

1982a; 1982b; Chafe & Tannen, 1987; Hunter, 1996).

Orality is an almost magical wand in Loubser's studies, revealing true consciousness and generating something unlike anything we (literates) are familiar with. This is belied by Loubser's own description of Greco-Roman antiquity as a *mixed*-media culture with the manuscript medium itself integrally comprising the co-existent operations of writing, orality and memory. Clearly, investigating and then integrating more of ancient communication is required, but also a better theoretical framework. Orality versus literacy was a useful first step, a 'strong thesis' to provoke reflection, but now we need more articulate models that square with historical realities and generate appropriate appreciation of verbal art.

'Poetics' rather than 'Criticism'

Because it is a useful contribution — Loubser's book is not about just another 'approach' to the New Testament, but about fundamental problems with the media assumptions that supply the cognitive frameworks within which biblical scholarship operates — it is important to respond to the challenges raised by him. In order to contribute to curing our 'media blindness' (Loubser, 2007:v, 3, 52, 133), I recommend that we learn oral poetics.

As important as 'media criticism' (Loubser's preferred 'model' for interpretation) is as a tool to interpret ancient documents, 'oral poetics', as an open-ended interpretive and performative hermeneutical process allows us to avoid the simplification of 'adding' one more criticism to the exegetical toolbox. The discussion thus far makes one aware that more than just another method or procedure is called for — rather, we are required to think of a *poetics*, an *oral poetics*. Traditionally poetics deals with the system of conscious and unconscious aesthetic and technical principles that govern the production and interpretation of verbal art. Yet it is an inherently pragmatic and pluriform activity, which, with the identifier 'oral'

emphasises voice, participation, performance, translation, contextualisation and impact (cf. Tedlock, 1977; Amodio, 1995:58-59).

Towards an Oral Poetics (for early Christian Traditions)

The Spelling eye and the Listening Ear

‘Listening ear’ and ‘spelling eye’ are concepts that I discovered in the context of reviewing the practices of teachers of literature, who are dealing with a bias toward (or overemphasis on) the printed word.⁶ The contrast expressed by the two designations is, on the one hand, studying a text with ‘an eye toward’ precision of textual and word features, as different, on the other hand, from paying intent attention to the communicative event, ‘listening’ thoughtfully to what is being conveyed. The underlying idea is that it would be a very poor comprehension that prefers to examine a text (and correct the spelling, so to speak) rather than attend to the possible realisation of the text. The spelling eye ‘fixes’ the text, whilst the listening ear is aware of the multifaceted processes when a body speaks to others.

One of the insights that media criticism brings to the interpretation of ancient texts is the need to recover the possible *aural* aspects of these texts. Any attempt to bring voice to a text means assuming and construing *an* audience. The spelling eye strives to bring to *the* text *one* audience (which, in practice, basically are the dictionary and the grammar rulebook). The listening ear knows that there are always various voices with many audiences; it does not look for the context of a text because it gives precedence to contextualisation. It imaginatively perks up the ears to hear the voice, and to sense the body projecting that voice, striving for sense and understanding.

The listening ear is a way of dissolving the opposition ‘seen’ by the spelling eye between the denotative and connotative meaning of a text. Listening is to be aware of the continuum of meanings, to shift beyond the

denotative *versus* the connotative towards a *balance* of denotation and connotation. ‘Denotative’ refers to the strictly textual, a sort of ‘dictionary’ level of meaning of words in a given context, whereas ‘connotative’ meaning refers to the traditional associations that memory attaches to words in a given context (Foley, 1991:xiv-xv, 8-9; 1995:50). ‘Connotation’ includes certain commonly held values, attitudes, and feelings, what Foley describes as ‘traditional referentiality’.⁷ An easy example could be the unexpected and strange call by a centurion that, as Jesus breathes his last, “this man was a son of God” (Mk. 15.39). Here υἱὸς θεοῦ ἦν opens an untextual (yet very contextualised) range of connotative meanings eclipsing its denotative value: a dying man symbolising divinity, politics, social relations and critiques of power. One might also think of the possibilities presented by σωτήρ in the Pauline literature, given the strong presence of divine healing in urban settings where Asklepieai were not only in clear view, but where Asklepios was successfully displayed and invoked as the saviour.⁸ The deep interest of early Christianity in healing shaped their Christology.

The *listening ear* model that I am proposing is founded upon a conception of social life as discursively constituted, produced and reproduced in situated acts of speaking and other signifying practices that are simultaneously anchored in their situational contexts of use and transcendent of them, linked by inter-discursive ties to other situations, other acts, other utterances. The socio-historical continuity and coherence manifested in these inter-discursive relationships rests upon cultural repertoires of concepts and practices that serve as sets of ‘frames’ for the production, reception, and circulation of discourse (cf. Bauman, 2004; 2013 and Nagler, 1976).

This is a contextual approach, which seeks to understand not so much the forms of the New Testament’s oral-derived texts (though such

investigations are part of it), but how these forms generate meaning(s) in their various contexts of use.

To explicate this contextual approach a bit more, the social poetics of oral literature as developed by John Niles (1993; 1999; 2013) is useful. Particularly with regard to verbal art (so-called oral literature) Niles develops a poetics that brings the social praxis (the social functions) of traditional storytelling to the fore. In addition to asking what, or how, traditional stories mean (in the sense of textual features), Niles insists that we also ask practical questions: “What work does a narrative of this kind do?” “What are the cultural questions to which a narrative of this kind represents an answer?” (Niles, 1999:120).

Building on the research done by Niles, six *linked* social functions of traditional storytelling can be identified: (1) the ludic: the effectiveness of all other functions of a presentation basically resides in the capacity of stories to compel attention, to entertain; it is the fact that such art is a form of collective play that enables a tradition “to bear effortlessly a heavy cargo of meaning” (Niles, 1999:70); (2) the sapiential: a traditional narrative has pedagogical significance; it trains auditors to know the parts and understand the principles of the world they inhabit; (3) the normative: stories establish priorities of moral value and enculturate the auditor to an ethical system by inspiring emulation or avoidance; (4) the constitutive: stories create a ‘heterocosm,’ an imaginative world that transcends ordinary reality but also refashions that reality into a system of symbolic categories: “inside and outside, now and then, here and there, us and them, male and female, young and old, free and unfree, safe and risky, the rulers and the ruled, the public and the private, the holy and the unholy, the clean and the unclean, the just and the unjust, and so on” (Niles, 1999:78); (5) the socially cohesive: traditional narratives manipulate an audience's understanding of itself as a group, often through the construction of ethnic identities and various other

solidarities and affiliations; and (6) the adaptive: traditional stories are an arena of cultural conflict and change, part of a dynamic continuum of telling and retelling whereby received ideas and values are constantly challenged, reaffirmed, or changed.

These are not genres, but functions of performed genres; in a way they are all present in verbal art — though of course one or more of these functions may dominate. Emphasising the functions to which the ‘listening ear’ is attuned, is also to affirm the importance of Rodríguez’s argument that a multiplicity of factors should be carefully investigated when it comes to oral tradition, so that more than just the underlying conceptual source-field for a given text be uncovered. It is about describing “the multisensory, multilayered, totalising social context that enabled the early Christians to interpret and respond to their written texts” (Rodríguez, 2014:79).

Oral-aural Dynamics

When we look at Greek and Roman παιδεία for aspects of literacy teaching, and link this to discussions of interpretation by Greek and Roman authors, it is fairly evident that Greco-Roman authors produced their works with an auditory impact in mind. Presentation was a distinct element of reading and publication. They analysed works after the fact to evaluate (and improve) the *sounded* quality of their compositions.⁹ Their understanding of interpreting a text dealt with γραμματική, λέξις and σύνθεσις the fundamental categories for literary analysis. ‘Grammar’ (γραμματική) was about εὐφωρία, pleasing sound; λέξις (speech) dealt with ἀρετὴ λέξεως, good diction. Composition (σύνθεσις) was about presenting harmony (ἡ ἁρμονία). A well-spoken composition contained harmonised sounds that were sweet to the ear (μελιχρὸν ἐν ταῖς ἀκοαῖς, Dionysius Halicarnassus *De compositione verborum* 1).

Various early church authors are often invoked to affirm the origins of

the Gospels, but actual attention to the testimonies of Justin Martyr, Papias, and Clement Alexandria and their use of gospel traditions is illuminating:

It is as if each written text represents a particular performance of ‘the gospel’, the good news about Jesus, and, however much it is valued and respected, it retains its ‘provisional’ character as a performance, as one possible instantiation of *the* gospel. Contrary to what we might expect, it is the underlying story that has solidity, while the particular performance in which it is embodied... has a more ephemeral quality (Alexander, 2006:23).

Of course, the difficulties of making such ‘instantiations’ visible (acknowledging that ‘audible’ is at best a to-be-hoped-for ambition) are considerable. Yet, significant success is possible. Martin Jaffee’s essay, “Honi the Circler in manuscript and memory: an experiment in ‘re-oralising’ the Talmudic text” (2009), building on the work of Foley (1995), attempts to balance the recovery of an orally mediated tradition with a detailed analysis of the handwritten texts. It is precisely this kind of balance that the *listening ear* is about. It is also precisely this balance which eludes much of biblical media-critical scholarship; we seem to either forget the scriptural, ‘hand’-based nature of all our data or to underestimate the significance of the oral setting contextualising the ancient written texts.

Jaffee offers two presentations of the Honi tradition¹⁰ from the Munich manuscript of the Babylonian Talmud. The first illustrate the visual appearance of that tradition in the Munich Manuscript, “attempting to represent in English what a reader of the manuscript finds in the published facsimile edition: line after undifferentiated line of text without any of the normal cues of punctuation that would signal to a reader how to vocalise the text” (Jaffee, 2009:91). The second presentation employs different typefaces (italics, plain text, boldfaced type, capital letters, etc.) in an attempt

to represent visually the various oral-performative sources of textual tradition that are manifest in the editorial shaping of the material but concealed by the scribal format of the manuscript. My goal is to permit the reader to grasp the fundamental ways in which the linear, scribal version of the Talmud neutralises the oral-performative traces of the transmitted text even as it

becomes the very condition of the recovery of the text's oral life (Jaffee, 2009:91).

Jaffee does not — indeed cannot — provide any methodologically rigorous criteria to prove that the ‘oral-performative’ interpretation of the Honi pericope actually happened. He acknowledges this problem (Jaffee, 2009:96-97), but does not abandon the *attempt* to recover oral-performative dynamics that we know contextualised the written textual artifacts. Simply because we cannot know whether, or how well, we have recovered those dynamics does not preclude exploration.¹¹ “An ‘oralist’ reading of rabbinic texts... reminds the reader that the written manuscript is not the text itself, but the storage space for that part of the text that can be represented in fixed, visual form” (Jaffee, 2009:110).

We cannot know with any certainty the extent to which Jaffee’s ‘re-oralisation’ of the Honi pericope restages how that pericope would have been heard by its audiences in any given historical setting, but we can appreciate how the presentation of the text in discrete breath-units with highlighting of the multiple voices comprising the Talmudic text adds depth and texture to the words on a page.

There are many implications that follow from attention to sound patterns, rhythm, mnemonic constructions and auditory aspects: not only how texts are structured but also how they are experienced and received (Hearon, 2006). What an oral poetics invokes is clearly far more complex and involved than merely the reading out loud of a text.¹² It is to acknowledge that more than just the voice of the composer/poet (in the past pictured as *the* central figure) is involved, that there are various other participants who help to form the work and mediate its meaning and the dynamics through which this occurs (Finnegan, 1992:51).

The point is not so much about the correct presentation, but about better presentations: more and better and deeper contextualised readings, based on

persuasive, detailed historical work evoking plausibility. It is to move beyond the conventional disembodied, solitary, silent and intellectual interpretation to an embodied, involved, exposed, vulnerable and actualising processual understanding.

Christians and Bible readers are fond of referring to the living word — but as Wendland¹³ so eloquently shows, exegetical and translation studies of the Bible fail woefully when it comes to providing “an ‘ear’ for their audiences to actually hear more of the Bible’s beauty and power, including its captivating vocal qualities” (Wendland, 2008:146).

Oral Poetics: Performance Criticism

The basic aspects of performance studies — as an academic discipline — are not new, namely to consider traditions and texts as scripts only fully realised in performance, and performance as a mode of speaking. Performance studies relates to anthropology, culture studies, theatre studies, literary criticism and the study of oral traditions (Foley, 1992; Joubert, 2004:3-181; Schechner, 2013; Turner, 1986). Significant performance critical investigations of New Testament texts have already been done (e.g., Botha, 1992; Davis, 1999; Harvey, 1998; Oestreich, 2016; Shiell, 2011; Wendland, 2012).

Among biblical scholars different accents are placed by different researchers. So Maxey prefers to emphasise performance criticism as a contribution, analysing “a biblical text through the translation, preparation, and performance of a text for group discussion of the performance event” (Maxey, 2009b:42). The purpose is to foster appreciation of performance for the appropriation of the Bible in the modern world.

Others note the encompassing presence of performance in ancient communication, being as it was embedded in an oral-aural, high-context, face-to-face, socially-oriented, participatory and relational culture.

Speaking, listening, gesturing, observing and memorising were the typical, even primary means of everyday communication, properly characterised by an oral ‘register’ of discourse consisting of associated traditions, memories, experiences, images, and the like (Hearon, 2006:6-15; 2014; Kelber, 2007; Rhoads, 2006a; 2006b).

As an interdisciplinary hermeneutical strategy, performance criticism interacts with ethno-poetics, social-scientific criticism, rhetoric studies, rhetorical criticism, reader-response criticism and cultural hermeneutics and its constitutive role in oral poetics is evident.

In a technical sense, performance criticism of ancient (written) texts searches out traces of orality; interrogating attributes of written literature for residing or embedded oral, vocal, performative features. Such indirect signs — ‘voice prints’ or ‘sound maps’ — of oral thought and articulation identifiable within the text would include features like the following: the occurrence of dynamic, distinctly interactive discourse; indicators of personal involvement (such as emotions, facial expressions and gestures); aural signals, such as formulas opening or closing a discourse segment; patterns of lexical repetition; recurring themes and motifs; phonological reiteration (e.g., alliteration); apparent ungrammaticalities (such as paratactic, event-laden sentences, ambiguous references, and inconsistent deixis, cf. Oesterreicher, 1997:200); verbal recursion of various types (such as repetitive and definitional patterns not only structure the text, but make it more ‘presentable’ and aurally memorable), and then image-based techniques to evoke visualisation of the textual content.

The Gospel of Mark’s preference for sequences of vivid actions, and its plot-governed, descriptive narrative, have drawn a number of performance critical investigations (Boomershine, 2015; Maxey, 2010; Shiner, 2004). Hortatory prophetic and epistolary literature also lend themselves to performance, such as the Letter of James, with its graphic,

symbolical, and controversial images (see Wendland, 2008:57-142).

The performance is not merely a subdued event for a subservient audience, but an opportunity for co-creation of meaning with the reader/teller/performer by means of metonymic references. The performance, in other words, is not only an aesthetic event, but a *rhetorical* event, as the performer, in a manner of speaking, persuades the listening audience to participate in and agree with his/her way of directing the communal experience (Quick, 2011:598).

One of the neglected issues in scholarly reflection on the functions and contexts of the New Testament documents is investigation of what actually happened when the text arrived at its (supposed) destination.

In conventional perspective, an implicit assumption is clearly that the text was presented under perfect conditions to a perfectly docile and understanding audience. Other typical assumptions deal with what happened immediately after the text had been delivered. Yes, what did happen then? Surely the text was *not* xeroxed and exact copies distributed throughout the congregation? Surely it was *not* reprinted and filed in the libraries of various private households? Surely it was *not* made into a poster stuck up on the congregation's public notice board with all issues addressed and finalised?

An oral poetics interrogates precisely the various possible performance possibilities of the text. It was 'reproduced' in conversations, meetings and private discussions, provoking a range of presentations and responses (and in that way it became 'tradition'). It was probably copied by some scribes with varying accuracy for various reasons — at a fee for a passer-by, or for a patron, and then those copies were presented at a variety of situations each with smaller or greater deviations from other presentations.

To actualise such questions in NT scholarship demands that we adapt our understanding of the meaning and rhetoric of early Christian writings

by means of performance criticism. We need to approach manuscripts as performance events, considering the intertwining (συμπλοκή) of author, performer, audience, material settings/aspects, social circumstances (keeping in mind the tentative, exploratory and open-endedness of such results).

Early Christian manuscripts should be approached as verbal art, fused into verbal behaviour. Methodologically one starts from the text, but on an interpretative level the approach is through performance, and that means that the living world itself becomes the point of reference. Within an oral poetics questions about the historical at the core of the stories change; they become attempts to understand the relationship of the characters and themes with the repertoire of stories and motifs that shaped, influenced and generated the story under review, rigorously analysing the textual features as elements of performance events.

Concluding Remarks

By way of conclusion the idea of an oral poetics as the ‘listening ear’ can be summarised as follows.

- The oral-traditional context of New Testament and early Christian writings can no longer be ignored. Media criticism (to borrow from Loubser) is here to stay, and is to become an unavoidable part of exegesis. Much greater attention should be given to the performance dimension of the ancient world and to the experience/role of performances by ancient Christian authors, narrators, teachers and audiences.
- In antiquity, publication meant oral performance, reading meant memorising for storage and recall. Consequently, we need to deal with how spoken literature builds structure that is received and comprehended in time, not space, outlining the functions of

repetition, sound's primary structuring device.

- The results of philological and exegetical work, and especially translations should be judged not on the basis of their acceptability as silent written literature, but on the basis of how it 'performs' when read aloud, how it strikes ears that have been re-educated to the subtlety and richness of the spoken word (Tedlock, 1977:516).
- The interrelationship between spoken words and written words in the rhetorical world of antiquity can be actualised by means of a multi-modal, social historical and social semiotic study, emphasising the oral-aural features of the texts. Such an oral poetics elucidates, in terms of form-function-meaning interrelationships, how genre and performance may be keyed and rekeyed, contextualised and re-contextualised, and turned to the fulfilment of social ends (Bauman, 2004:12).
- We cannot settle for the comfortable sinecure of the strictly literary criticism of the 'spelling eye' any longer. With 'listening ears' we need to strike out with bold new hypotheses based on the data of recent discoveries about oral and traditional verbal art, explicated by sound, detailed historical work. Such hypotheses are bound to be closer approximations of what ancient texts can convey than those based on post-oral, non-traditional literature (cf. Foley, 1981:122).

Notes

1. Marxsen very perceptively argued for a reconsideration of the conventional *linear* model of the synoptic tradition; "the traditional material scatters into every direction" (Marxsen, 1959:17). Although his focus was on the theological integrity of the Markan text, Marxsen noted that the synoptic tradition was more diffuse than evolutionary, and that the text could not simply have arisen from oral customs.

2. Willem Vorster developed insights of Güttgemanns in his *Wat is 'n evangelie?* (1981; cf. Vorster, 1982; 1983). Neither scholar was explicitly concerned with oral tradition, but focused on the problematic assumptions at play in form and tradition history.
3. Of course, issues can be raised about the individual contributions of each of these scholars. The point is the *accumulated* contribution in historical linguistics, anthropology, social history, communication studies, classics, cultural studies and literary criticism: Bauman, 2013; McCarthy, 2007; Niles, 2013; Olson, 2009; Olson & Cole, 2006.
4. The challenge of anachronistic and ethnocentric depictions of ancient communication can hardly be overemphasised: Botha, 2009; 2012:62-132; Loubser, 2007:168-178.
5. See Ong 1982:82 (his italics). In the recent updated edition (Ong & Hartley, 2012) it is emphasised that study of the contrast between orality and literacy “is largely unfinished business” and that it is best to see these perspectives and insights as ‘theorems’: “more or less hypothetical statements” describing and explaining orality and the orality-literacy shift (Ong & Hartley 2012:153).
6. Such as Bomer, 2006; Evans & Saint-Aubin, 2010. The particular terms seem to have been introduced by Helene Magaret. Magaret wrote that that “at best the written word is only a symbol of that which is spoken and that the study of literature can never be divorced from the study of speech” (Magaret, 1951:32). It should be noted that her concern was primarily the improvement of spelling (literacy among American youth).
7. ‘Traditional referentiality’ is Foley’s concept to indicate that the structure of an oral work of art summons certain meanings by virtue of its traditionality. The concept includes various extra-textual dimensions, which

comprise the personal, but more significantly the extra-personal, collective knowledge that the members of a community share — a complex of unpronounced norms, beliefs, expectations, conventions, and the like which are vitalised by oral works (Foley, 1991:59ff.).

8. The title ‘saviour’ was used in various ways in the ancient world, often for gods (Otto, 1910; Nock, 1951; Dibelius & Conzelmann, 1972:100-103). Generally speaking σωτήρ indicates the helper in time of need, bringer of deliverance and ‘salvation’, often with a sense of ‘conservator’ or ‘preserver’ as the ‘saving’ relating to the title was considered in a material way (hence the frequent combination of ‘saviour and benefactor’). However, it was mostly the god Asklepios who was seen as ‘saviour of all’ (e.g. Aelius Aristides *Orationes* 6.37.2). See further Coffman, 1993.

9. Lee & Scott, 2009:91-134. There is a wealth of information to be mined from studies on ancient literary criticism, even though few explicitly analyse aural-auditory aspects of ancient literary theory; see De Jonge, 2008; Grafton 1998; McNelis, 2002; 2007; Nünlist, 2009; Yunis, 2003.

10. Honi the Circler, “the most famous of a number of Second Temple holy men whose feats are recounted in the rabbinic literature” (Jaffee, 2009:91).

11. And, to remind ourselves, the impossibility of actual recovery *does not* mean conventional tradition criticism/source criticism must therefore be correct.

12. Of course, we do not know how ancient Greek sounded (but cf. Caragounis, 1995), and accentuation is uncertain (Davies, 1996), but however the sounds were pronounced, they were pronounced consistently (Allen, 1993:8). The difficulties should not distract from the main issue: “In the study of a ‘dead’ language there is inevitably a main emphasis on the written word. But it is well to remember that writing is secondary to speech,

and, however much it may deviate from it, has speech as its ultimate basis” (Allen, 1993:8).

13. Ernst Wendland has made a massive contribution to the study of orality and performance with regard to Scripture (cf. Wendland, 2008; 2012; 2013 from among his many studies). It must be pointed out that Wendland prefers to limit oral hermeneutics to the stylistic elements of Scripture.

References

- Alexander, L 2006. What is a Gospel? *In The Cambridge Companion to the Gospels*, ed. SC Barton, 13-33. Cambridge: Cambridge University Press.
- Allen, WS 1993. *Vox Graeca: A Guide to the Pronunciation of Classical Greek*. 3rd ed. Cambridge: Cambridge University Press.
- Amodio, MC 1995. Affective Criticism, Oral Poetics, and Beowulf’s Fight with the Dragon. *Oral Tradition* 10(1):54-90.
- Bauman, R 2004. *A World of Others’ Words: Cross-cultural Perspectives on Intertextuality*. Oxford: Blackwell.
- 2013. Discovery and Dialogue in Ethno-poetics. *Journal of Folklore Research* 50(1):175-90.
- Bloch, MEF 1998. *How we Think they Think: Anthropological Approaches to Cognition, Memory and Literacy*. Boulder: Westview Press.
- Bomer, R 2006. Reading with the Mind’s Ear: Listening to Text as a Mental Action. *Journal of Adolescent and Adult Literacy* 49(6):524-35.
- Boomershine, TE 1987a. Biblical Megatrends: Towards a Paradigm for the Interpretation of the Bible in Electronic Media. *Society of Biblical Literature Seminar Papers*:144-57.
- 1987b. Peter’s Denial as Polemic or Confession: The Implications of Media Criticism for Biblical Hermeneutics. *Semeia* 39:47-68.

- 2015. *The Messiah of Peace: A Performance-criticism Commentary on Mark's Passion-resurrection Narrative*. Eugene, OR: Cascade Books.
- Botha, PJJ 1992. Letter writing and Oral Communication in Antiquity: Suggested Implications for Paul's Letter to the Galatians. *Scriptura* 42:17-34.
- 1993. The Verbal Art of the Pauline Letters: Rhetoric, Performance and Presence. In *Rhetoric and the New Testament: Essays from the 1992 Heidelberg Conference*, eds. SE Porter and TH Olbricht, 409-28. Sheffield: Sheffield Academic Press.
- 2009. The Greco-Roman Book: Contextualising early Christian Documents. *Acta Patristica et Byzantina* 20:2-27.
- 2012. *Orality and Literacy in Early Christianity*. Eugene, OR: Cascade Books.
- Briggs, CL 2013. Contested Mobilities: On the Politics and Ethno-poetics of Circulation. *Journal of Folklore Research* 50:285-99.
- Byrskog, S 2000. *Story as History — History as Story: The Gospel Tradition in the Context of Ancient Oral History*. Tübingen: Mohr Siebeck.
- Caragounis, CC 1995. The Error of Erasmus and Un-Greek Pronunciations of Greek. *Filología Neotestamentaria* 8:151-85.
- Chafe, W & D Tannen 1987. The Relation between Written and Spoken Language. *Annual Review of Anthropology* 16:383-407.
- Clark, T 1999. Technology Inside: Enlightenment and Romantic Assumptions of the Orality/Literacy School. *Oxford Literary Review* 21:57-72.
- Coffman, RJ 1993. Historical Jesus the Healer: Cultural Interpretations of the Healing Cults of the Greco-Roman World as the Basis for Jesus Movements. *SBL 1993 Seminar Papers*: 412-43.
- Cole, M & J Cole 2006. Rethinking the Goody Myth. In *Technology*,

- Literacy, and the Evolution of Society: Implications of the Work of Jack Goody*, ed. DR Olson & M Cole, 305-24. Mahwah, NJ: Lawrence Erlbaum Associates.
- Czachesz, I 2007. The Transmission of Early Christian Thought: Toward a Cognitive Psychological Model. *Studies in Religion* 36:65-83.
- Dahl, NA 1977. *Studies in Paul*. Minneapolis: Augsburg.
- Daniels, JW 2013. *Gossiping Jesus: The Oral Processing of Jesus in John's Gospel*. Eugene, OR: Pickwick Publications.
- Davies, AM 1996. Pronunciation, Greek. In *Oxford Classical Dictionary*. 3rd ed., ed. S Hornblower & A Spawforth. Oxford: Oxford University Press.
- Davis, CW 1999. *Oral Biblical Criticism: The Influence of the Principles of Orality on the Literary Structure of Paul's Epistle to the Philippians*. JSNTSS 172. Sheffield: Sheffield Academic Press.
- De Jonge, CC 2008. *Between Grammar and Rhetoric: Dionysius of Halicarnassus on Language, Linguistics and Literature*. Leiden: Brill.
- DeConick, AD 2008. Human Memory and the Sayings of Jesus: Contemporary Experimental Exercises in the Transmission of Jesus Traditions. In *Jesus, the Voice, and the Text: Beyond the Oral and the Written Gospel*, ed. T Thatcher, 135-80. Waco: Baylor University Press.
- Dibelius, M & H Conzelmann. 1972. *The Pastoral Epistles*. Hermeneia. Philadelphia: Fortress.
- Doty, WG 1973. *Letters in Primitive Christianity*. Philadelphia: Fortress Press.
- Draper, JA 1999. Recovering Oral Performance from Written Text in Q. In *Whoever hears You hears Me: Prophets, Performance and Tradition in Q*, RA Horsley, 175-94. Harrisburg: Trinity Press International.

- 2003. The closed Text and the Heavenly Telephone: The Role of the Bricoleur in Oral Mediation of Sacred Text in the case of George Khambule and the Gospel of John. In *Orality, Literacy and Colonialism in Southern Africa*, ed. J Draper. Semeia Studies, Vol. 46, 57-90. Pietermaritzburg: Cluster Publications.
- Dunn, JDG 2003. Altering the Default Setting: Re-envisaging the Early Transmission of the Jesus Tradition. *New Testament Studies* 49:139-75.
- Durant, A 1997. Orality. In *Dictionary of Cultural and Critical Theory*, ed. M Payne, 390-92. Oxford: Blackwell Publishers.
- Evans, MA & J Saint-Aubin. 2010. An Eye for Print: Child and Adult Attention to Print during shared Book Reading. In *Literacy Development and Enhancement Across Orthographies and Cultures*, ed. D Aram & O Korat, 43-54. New York: Springer.
- Eve, E 2014. *Behind the Gospels: Understanding the Oral Traditions*. Grand Rapids: Eerdmans.
- 2016. *Writing the Gospels: Composition and Memory*. London: SPCK.
- Finnegan, R 1988. *Literacy and Orality: Studies in the Technology of Communication*. Oxford: Blackwell.
- 1992. *Oral Traditions and the Verbal Arts: A Guide to Research Practices*. London: Routledge.
- 2001. Oral and Literate Culture. In *International Encyclopedia of the Social & Behavioral Sciences*, Vol. 16, 10887-91. Amsterdam: Elsevier.
- Foley, JM 1981. Oral Texts, Traditional Texts: Poetics and Critical Methods. *Canadian-American Slavic Studies* 15:122-48.
- 1991. *Immanent Art: From Structure to Meaning in Traditional Oral Epic*. Bloomington: Indiana University Press.
- 1992. Word-power, Performance and Tradition. *Journal of American*

- Folklore* 105(417):275-301.
- 1995. *The Singer of Tales in Performance*. Bloomington: Indiana University Press.
- Funk, RW 1966. Saying and Seeing: Phenomenology of Language and the New Testament. *Journal of Bible and Religion* 34:197-213.
- Graff, HJ 1987. *The Labyrinths of Literacy: Reflections on Literacy Past and Present*. London: Falmer.
- Grafton, A 1998. Correctores Corruptores? Notes on the Social History of Editing. In *Editing texts — Texte edieren*, ed. GW Most, 22-53. Göttingen: Vandenhoeck.
- Güttgemanns, E 1979. *Candid Questions Concerning Gospel Form Criticism: A Methodological Sketch of the Fundamental Problematics of Form and Redaction Criticism*. Pittsburgh: Pickwick.
- Harvey, JD 1998. *Listening to the Text: Oral Patterning of Paul's Letters*. Grand Rapids: Eerdmans.
- Hearon, HE 2004. The Implications of “Orality” for Studies of the Biblical Text. *Oral Tradition* 19(1):96-107.
- 2006. The Implications of Orality for Studies of the Biblical Text. In *Performing the Gospel: Orality, Memory, and Mark*, ed. RA Horsley, JA Draper & JM Foley, 3-20. Minneapolis: Fortress Press.
- 2014. A Social Semiotic Multi-modal Approach to Communication Practices in early Christianity: Orality and Literacy in early Christianity. *Journal of Early Christian History* 4(1):44-67.
- Hester, JD 1986. The Use and Influence of Rhetoric in Galatians 2:1-14. *ThZ* 42:386-408.
- Hunter, L 1996. Transformation in African Verbal Art: Voice, Speech, Language. *Journal of American Folklore* 109(432):178-92.
- Jaffee, MS 2009. Honi the Circler in Manuscript and Memory: An Experiment in “re-oralizing” the Talmudic Text. In *Jesus in Memory:*

- Traditions in Oral and Scribal Perspectives*, ed. WH Kelber & Byrskog, 87-111. Waco: Baylor University Press.
- Joubert, A 2004. *The Power of Performance: Linking Past and Present in Hananwa and Lobedu Oral Literature*. Trends in Linguistics 160. Berlin: Mouton de Gruyter.
- Kelber, WH 1983. *The Oral and the Written Gospel: The Hermeneutics of Speaking and Writing in the Synoptic Tradition, Mark, Paul & Q* Philadelphia: Fortress.
- 1994. Modalities of Communication, Cognition, and Physiology of Perception: Orality, Rhetoric, Scribality. *Semeia* 65:193-216.
- 2007. Orality and Biblical Studies: A Review Essay. *Review of Biblical Literature* 12.
[Http://www.bookreviews.org/pdf/2107_6748.pdf](http://www.bookreviews.org/pdf/2107_6748.pdf) <retrieved on 3/12/2007>.
- 2009. The Work of Birger Gerhardsson in Perspective. In *Jesus in memory: Traditions in Oral and Scribal Perspectives*, ed. WH Kelber & S Byrskog, 173-206. Waco: Baylor University Press.
- 2014. Orality and Literacy in Early Christianity. *Biblical Theology Bulletin* 44(3):1-12.
- Kennedy, WJ 1991. Voice as Frame: Longinus, Kant, Ong, and Deconstruction in Literary studies. In *Media, Consciousness, and Culture: Explorations of Walter Ong's Thought*, ed. BE Gronbeck, TJ Farrell & PA Soukup, 77-89. Newbury Park: Sage Publications.
- Killingsworth, MJ 1993. Product and Process, Literacy and Orality: An Essay on Composition and Culture. *College Composition and Communication* 44:26-39.
- Kirshenblatt-Gimblett, B 1998. Folklore's Crisis. *Journal of American Folklore* 111(441): 281-327.
- Langlois, R 2006. An Introduction to Jack Goody's Historical

- Anthropology. In *Technology, Literacy, and the Evolution of Society: Implications of the Work of Jack Goody*, ed. DR Olson & M Cole, 3-28. Mahwah, NJ: Lawrence Erlbaum Associates.
- Lategan, BC 1988. Is Paul defending his Apostleship in Galatians? The Function of Galatians 1. 11-12 and 2. 19-20 in the Development of Paul's Argument. *NTS* 34(3):411-30.
- Lee, ME & BB Scott. 2009. *Sound Mapping the New Testament*. Salem: Polebridge Press.
- Loubser, JA 2007. *Oral and Manuscript Culture in the Bible: Studies on the Media Texture of the New Testament*. Stellenbosch: Sun Press.
- Margaret, H 1951. The Eye, the Ear, and the Misspelled Word. *College English* 13:29-32.
- Malherbe, AJ 1986. *Moral Exhortation: A Greco-Roman Sourcebook*. Philadelphia: Fortress Press.
- Marxsen, W 1969. *Mark the Evangelist: Studies on the Redaction History of the Gospel*. Nashville: Abingdon.
- Maxey, JA 2009a. *From Orality to Orality: A New Paradigm for Contextual Translation of the Bible*. Biblical Performance Criticism Series 2. Eugene, OR: Cascade Books.
- 2009b. Performance Criticism and its Implications for Bible Translation. Part I: Oral Performance and New Testament Studies. *Bible Translator* 60(1):37-49.
- 2010. The Power of Words in Mark: Their Potential and their Limits. *Currents in Theology and Mission* 37(4):296-303.
- McCarthy, WB 2007. Recent Scholarship in Oral Theory and Ethnopoetics. *Journal of American Folklore* 120(3):360-64.
- McNelis, C 2002. Greek Grammarians and Roman Society during the Early Emperor: Statius' Father and his Contemporaries. *Classical*

- Antiquity* 21(1):67-94.
- 2007. Grammarians and Rhetoricians. In *A Companion to Roman Rhetoric*, Vol. 21, ed. W Dominik & J Hall, 285-96. Malden: Blackwell Publishing.
- Nagler, M 1976. How does an Oral Poem Mean? *Arion* 3(3):365-77.
- Niles, JD 1993. Understanding Beowulf: Oral Poetry Acts. *Journal of American Folklore* 106(420):131-55.
- 1999. *Homo Narrans: The Poetics and Anthropology of Oral Literature*. Philadelphia: University of Pennsylvania Press.
- 2013. Orality. In *The Cambridge Companion to Textual Scholarship*, ed. N Fraistat and J Flanders, 205-23. Cambridge: Cambridge University Press.
- Nock, AD 1972. Soter and Euergetes. In *Essays on Religion and the Ancient World*, Vol 2, comp & ed Z Stewart, 720-35. Oxford: Clarendon.
- Nünlist, R 2009. *The Ancient Critic at Work: Terms and Concepts of Literary Criticism in Greek Scholia*. Cambridge: Cambridge University Press.
- Oesterreicher, W 1997. Types of Orality in Text. In *Written Voices, Spoken Signs: Tradition, Performance and the Epic Text*, ed. E Bakker & A Kahane, 190-214. Cambridge, MA: Harvard University Press.
- Oestreich, B 2016. *Performance Criticism of the Pauline Letters*. Trans. L Elias & B Blum. Eugene: Cascade Books.
- Olson, DR 1994. *The World on Paper: The Conceptual and Cognitive Implications of Writing and Reading*. Cambridge: Cambridge University Press.
- 2009. Why Literacy Matters, Then and Now. In *Ancient Literacies: The Culture of Reading in Greece and Rome*, ed. WA Johnson & HN Parker, 385-404. Oxford: Oxford University Press.
- Olson, DR & M Cole, eds. 2006. *Technology, Literacy, and the Evolution*

- of Society: Implications of the Work of Jack Goody*. Mahwah, NJ: Lawrence Erlbaum.
- Ong, WJ 1982. *Orality and Literacy: The Technologizing of the Word*. London: Methuen.
- Ong, WJ & J Hartley 2012. *Orality and Literacy: The Technologizing of the Word*. 30th anniversary ed. London: Routledge.
- Otto, W 1910. Augustus Soter. *Hermes* 45(3):448-60.
- Payne, D 1991. Characterology, Media and Rhetoric. In *Media, Consciousness, and Culture: Explorations of Walter Ong's Thought*, ed. BE Gronbeck, TJ Farrell & PA Soukup, 223-36. Newbury Park: Sage Publications.
- Porcello, TL Meintjes, AM Ochoa & DW Samuels 2010. The Reorganization of the Sensory World. *Annual Review of Anthropology* 39:51-66.
- Quick, C 2011. The Metonym: Rhetoric and oral Tradition at the Crossroads. *Oral Tradition* 26(2): 597-600.
- Reder, S & E Davila 2005. Context and Literacy Practices. *Annual Review of Applied Linguistics* 25:170-87.
- Rhoads, D 2006a. Performance Criticism: An emerging Methodology in Second Testament Studies — Part I. *Biblical Theology Bulletin* 36:118-33.
- 2006b. Performance Criticism: An emerging Methodology in Second Testament Studies — Part II. *Biblical Theology Bulletin* 36(4):164-84.
- 2010. Biblical Performance Criticism: Performance as Research. *Oral Tradition* 25(1): 157-98.
- Rodríguez, R 2014. *Oral Tradition and the New Testament: A Guide for the Perplexed*. London: Bloomsbury.
- Roller, O 1933. *Das Formular der paulinischen Briefe: ein Beitrag zur Lehre vom antiken Briefe*. BWANT 58. Stuttgart: Kohlhammer Verlag.

- Schechner, R 2013. *Performance Studies: An Introduction*. 3rd ed. London: Routledge.
- Shiell, WD 2011. *Delivering from Memory: The Effect of Performance on the early Christian Audience*. Eugene, OR: Pickwick Publications.
- Shiner, W 2004. Applause and Applause Lines in the Gospel of Mark. In *Rhetorics and Hermeneutics: Wilhelm Wuellner and his Influence*, ed. JD Hester & JD Hester, 129-44. New York: T&T Clark International.
- Snyder, HR 1990. A Case Study in defining Literacy: David Olson's Journey from the Great Divide to the Great Beyond. *Interchange* 21(3):1-12.
- Swearingen, CJ 1986. Oral Hermeneutics during the Transition to Literacy: The Contemporary Debate. *Cultural Anthropology* 1(2):138-56.
- Tannen, D 1982a. The Myth of Orality and Literacy. In *Linguistics and Literacy*, ed. W Frawley, 37-50. New York: Plenum Press.
- 1982b. The Oral/Literate Continuum in Discourse. In *Spoken and Written Language: Exploring Orality and Literacy*, ed. D Tannen, 1-16. Norwood: Ablex.
- Tedlock, D 1977. Toward an Oral Poetics. *New Literary History* 8:507-19.
- Theall, DF 1992. Beyond the Orality/Literacy Dichotomy. *Postmodern Culture* 2(3):1-34.
- Turner, V 1986. *The Anthropology of Performance*. New York: PAJ Publications.
- Vorster, WS 1981. *Wat is 'n evangelie? — die plek van die tekssoort evangelie in die literatuurgeskiedenis*. Pretoria: NG Kerkboekhandel.
- 1982. Redaction, Contextualization and the Sayings of Jesus. In *Logia. Les paroles de Jesus — The Sayings of Jesus*, ed. J Delobel, 491-500. Leuven: University Press.
- 1983. Kerygma/History and the Gospel Genre. *New Testament Studies* 29:87-95.

- Wendland, ER 2008. *Finding and Translating the Oral-aural Elements in Written Language: The Case of the New Testament Epistles*. Lewiston, NY: Edwin Mellen Press.
- 2012. Comparative Rhetorical Poetics, Orality, and Bible Translation: The Case of Jude. In *Translating Scripture for Sound and Performance: New Directions in Biblical studies*, ed. JA Maxey & ER Wendland. Biblical Performance Criticism Series 6, 139-78. Eugene, OR: Cascade Books.
- 2013. *Orality and the Scriptures: Composition, Translation, and Transmission*. Dallas: SIL International.
- White, JL 1986. *Light from Ancient Letters*. Philadelphia: Fortress.
- Worthington, I 1996. Greek Oratory and the Oral/Literate Division. In *Voice into Text: Orality and Literacy in Ancient Greece*, ed. I Worthington, 165-77. Leiden: Brill.
- Yaghjian, LB 1996. Ancient Reading. In *The Social Sciences and New Testament Interpretation*, ed. RL Rohrbaugh, 206-30. Peabody: Hendrickson.
- Yunis, H 2003. Writing for Reading: Thucydides, Plato, and the Emergence of the Critical Reader. In *Written Texts and the Rise of Literate Culture in Ancient Greece*, ed. H Yunis, 189-212. Cambridge: Cambridge University Press.

Part 7: Modern Inquiries and Initiatives

... the Truth and Reconciliation Commission (the “Commission”) was established as part of a response to the residential schools legacy to contribute to truth, healing and reconciliation ...

– The National Centre for Truth and Reconciliation Act
(CCSM c N20)

Author(s): Gerard J. Kennedy

Source: *Manitoba Law Journal*, Vol. 41 No.1 pp. 317-342.

Stable URL: <https://www.jstor.org/stable/4288379?origin=JSTOR-pdf>

Public Inquiries' Terms of Reference: Lessons from the Past – And for the Future

*Gerard J. Kennedy**

* Ph.D. Candidate, Osgoode Hall Law School; Visiting Doctoral Researcher, NYU School of Law. The author thanks the Pierre Elliott Trudeau Foundation, the Social Sciences and Humanities Research Council, and the estate of the late Willard Z. Estey for supporting his doctoral research. This paper originated in the Public Inquiries class at Osgoode Professional Development that the author took in fulfillment of his course work requirements for his doctorate. He thanks Professor Ronda Bessner, the extremely helpful staff of the *Manitoba Law Journal*, and an anonymous peer-reviewer for their feedback on earlier drafts of this paper. All views are the author's, as are any mistakes.

ABSTRACT

Terms of reference define public inquiries' power, yet there has been little analysis of them. In this article, the author analyzes the terms of reference of six different public inquiries — three widely considered successful (the Walkerton Inquiry, Goudge Inquiry, and Kaufman Commission), three widely considered unsuccessful (the Somalia Inquiry, Cornwall Inquiry, and Missing and Murdered Indigenous Women Inquiry) — to investigate how terms of reference contribute to the success of public inquiries. Throughout all analyzed inquiries, there is an inevitable tension between wanting to have clear terms of reference that provide guidance to the inquiries, without being so restrictive so as to impede the commissioners from fulfilling their work. He ultimately concludes that specificity is the side on which governments should err when crafting the investigative portions of terms of reference. However, he suggests that it is completely acceptable — and likely desirable — to place little if any restrictions on the policy-recommending functions of public inquiries, or the procedural/operational aspects of their terms of reference. He also suggests that fewer commissioners lead to more effective investigative inquiries.

I. INTRODUCTION

Since being called, the National Inquiry into Missing and Murdered Indigenous Women and Girls (“MMIWG Inquiry”) has been criticized for a plethora of reasons, from disorganization, to an ineffectual Interim Report, to neglecting victims.¹ There is little consensus on the alleged reasons for this, but considerable criticism has been levelled at the Commissioners themselves.² In this paper, I suggest another narrow, and likely non-exclusive, reason for the MMIWG’s Inquiry’s difficulties: its terms of reference.

This issue is not confined to the MMIWG Inquiry. All public inquiries take their powers from their terms of reference, promulgated by either the Governor-in-Council, or the Lieutenant-Governor-in-Council.³ Acting outside those terms of reference leads to the inquiry acting without jurisdiction, with such actions being illegal.⁴ It is hard, therefore, to overstate the importance of terms of reference.⁵ So how can terms of reference be crafted to lead to a successful public inquiry? It is this underexplored question — with implications far beyond the MMIWG

Inquiry — that I investigate in this paper.

In Part II, I analyze how to define a “successful” public inquiry. In Part III, I explain my choice to investigate the terms of reference of six different public inquiries, with three widely being praised for their effectiveness and three widely being criticized for their ineffectiveness. I also recognize the limits of this methodology. In Part IV, I review the terms of reference of the six inquiries, and how they led to the inquiries having positive or negative results. Finally, in Part V, I posit what future (Lieutenant-)Governors-in-Council can learn from past experiences, and how this should inform future cabinets in crafting public inquiries.

It is a trite observation that terms of reference should be specific enough to provide clear guidance to commissioners while also being flexible enough to not foreclose the ability to fulfill the purpose of a public inquiry. I nonetheless conclude that, with respect to defining the subject matter that an inquiry is to investigate, specificity is the side on which governments should err. At the same time, effective inquiries appear to have broad policy mandates and few procedural or operational restrictions. Governments will undoubtedly continue to struggle to strike the right balance between specificity and generality in terms of reference for future public inquiries — there is probably no “one right way” to do so. Though every public inquiry is unique, generality and specificity should almost invariably be present — just in different aspects of terms of reference.

II. WHAT IS AN “EFFECTIVE” PUBLIC INQUIRY?

“Effectiveness” is a difficult concept to define with precision, and its characteristics are more likely to be qualitative rather than quantitative. With respect to the effectiveness of public inquiries, I am content to begin with criteria from Justice Freya Kristjanson, who notes fairness, thoroughness, cost-effectiveness, and providing a “comprehensive and timely report that

analyzes the key issues and provides concrete and realistic recommendations”⁶ as the main characteristics of a successful public inquiry.

These factors might not be exhaustive, and another criterion – that of implementation — also seems relevant. A Commission may be successful even if many of its recommendations are not implemented quickly or even at all.⁷ Moreover, sometimes its recommendations may not be acted upon for years if not decades, as occurred in the case of the recommendation of the Royal Commission on Aboriginal Peoples (“RCAP”) to divide the work of the Department of Indian Affairs.⁸ In any event, implementation is the prerogative of the government, not the commissioner(s), and if a commissioner is a sitting judge, any attempt to be involved in implementation would be particularly inappropriate.⁹ Even so, Peter Carver, while accepting the limitations of using implementation to measure an inquiry’s success, admits that it is not irrelevant,¹⁰ and it would therefore appear to be an appropriate consideration in addition to those noted by Justice Kristjanson.

Lorne Sossin has posited that media coverage and generating “public confidence” are also relevant.¹¹ While the latter is hard to quantify, it would appear to be relevant to the public nature of public inquiries — indeed, public inquiries that are not conducted mostly in public can have difficulty in fulfilling their purposes.¹² Summarizing work in this area, Ronda Bessner emphasizes the role of public inquiries in educating the public.¹³ This is a difficult task,¹⁴ and goes beyond media coverage, also including keeping in touch with the public through the internet, and giving the public the option to listen to and/or attend hearings.¹⁵

Bessner also persuasively argues that healing and apologies are relevant to the effectiveness of public inquiries.¹⁶ While these are unlikely to be the primary purposes of public inquiries, as criminal and civil liability

do not apply, apologies are more likely in the public inquiry context, which can in turn lead to healing.¹⁷ (Admittedly, these apologies are also facilitated by legislation such as Ontario's *Apology Act*, which restricts the ability to use apologies in future proceedings, with such legislation therefore incentivizing apologies.¹⁸) Ultimately, therefore, I will look at the following eight factors as indicators of an inquiry's effectiveness: i) fairness; ii) thoroughness; iii) cost-effectiveness; iv) quality of report; v) media coverage/public education; vi) any apologies given; vii) facilitation of healing; and viii) implemented recommendations.

III. CHOICES OF INQUIRIES

Before proceeding further, I acknowledge that public inquiries may be considered effective or ineffective for reasons that have little if anything to do with their terms of reference. For instance, a commissioner may behave in a biased manner, as seen in the "Gomery Inquiry" into sponsorship contracts in Quebec,¹⁹ or otherwise violate fundamental principles of procedural fairness,²⁰ such as not giving an affected party adequate notice.²¹ The flip side of this coin is that an inquiry may be particularly successful due to characteristics of a particular commissioner. Indeed, though I use the "Walkerton Inquiry" as one of my examples of a successful inquiry, much of its success has been attributed to the leadership of Justice Dennis O'Connor of the Court of Appeal for Ontario (as he then was), particularly his decisions to hold the inquiry in Walkerton and balance fairness with efficiency.²² However, using multiple case studies to determine the link between an inquiry's success and its terms of reference mitigates the likelihood that idiosyncratic characteristics of particular inquiries will affect my overall analysis.

With this in mind, the following three instances can be used as cases-in-point of "successful" inquiries. The first is the "Walkerton Inquiry", led

by Justice O'Connor and concerning the tragedy of contaminated drinking water in Walkerton, Ontario. Though not without journalistic detractors,²³ the Walkerton Inquiry is frequently cited by judges and academics as the “model” of successful inquiries in terms of acceptance and effectiveness.²⁴ Stan Koebel’s apology, that “words cannot describe” how sorry he was for his role in doctoring environmental documents, was moving.²⁵ The Inquiry possessed all the hallmarks of effectiveness, was completed in a timely capacity without a single application for judicial review (an indicator of fairness),²⁶ and led to a thorough report that changed drinking water policy in Ontario.²⁷

Second, I will turn to the “Goudge Inquiry”, led by Justice Stephen Goudge of the Court of Appeal for Ontario, into Pediatric Forensic Pathology in Ontario. The focus of the Inquiry was primarily on the medical malpractice of Dr. Charles Smith, which led to numerous wrongful convictions. Despite seeking and being granted a short extension,²⁸ the Inquiry was widely considered to be fair.²⁹ The report has been cited by any Canadian academic articles³⁰ and court cases.³¹ After Dr. Smith’s apology to him, William Mullins-Johnson forgave Dr. Smith “for [his] own healing”.³² Commissioner Goudge also noted the effectiveness of the counselling offered during the inquiry process.³³ More importantly, his recommendations were adopted by the provincial government and, as such, forensic pathology services in Ontario are now delivered in a fundamentally different way.³⁴

Third, I will look at the “Kaufman Commission”, officially the Commission on Proceedings Involving Guy Paul Morin, where Justice Fred Kaufman of the Quebec Court of Appeal analyzed the wrongful conviction of Guy Paul Morin. Though the Commission did require a nine month extension,³⁵ its practical recommendations could be implemented³⁶ and the final report has been cited dozens of times by courts (including at least four

citations by the Supreme Court of Canada alone³⁷) and academics.³⁸ The report has been particularly cited with respect to the use of evidence that has the potential to be misused.³⁹

The following three cases will be used as examples of “unsuccessful” public inquiries. The first is the “Somalia Inquiry”, officially the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.⁴⁰ No less than five applications for judicial review⁴¹ resulted from this inquiry, in addition to the Inquiry needing to seek, and be granted, intervenor status in another case.⁴² The cabinet and the Inquiry also descended into a(n in)famous dispute, which the Federal Court of Appeal had to resolve,⁴³ after the government forced the Inquiry to wrap up its work. Moreover, the government declined to adopt some of its recommendations.⁴⁴

The second ineffective public inquiry I will analyze is the “Cornwall Inquiry”, officially the Commission of Inquiry into the Events Surrounding Allegations of Abuse of Young People in Cornwall. The Inquiry was extensively delayed,⁴⁵ partially because of five judicial reviews.⁴⁶ Failing to find an alleged pedophile ring and making tepid findings regarding institutions’ alleged failures to respond to allegations of child abuse, it appears as though the Inquiry had little if any public policy impact, though it may have helped some sexual abuse survivors in their healing processes.⁴⁷

Third, I will look at the MMIWG Inquiry, which, despite not yet having completed its work (meaning I need to rely largely on media sources instead of academic articles), has been subject to a plethora of criticism. The dysfunction of the Inquiry is best symbolized by the resignation of numerous staff members, including a commissioner.⁴⁸ The criticism and negative media coverage of the Inquiry’s lack of substantive work has ranged from a poorly received interim report (lack of effectiveness of report and likely lack of implementation)⁴⁹ to the uncertainty of its own mandate (lack of

thoroughness).⁵⁰ Moreover, affected individuals and groups have felt hampered in their ability to participate (lack of fairness and likely lack of healing),⁵¹ and the Inquiry has needed to seek more time to complete its work (lack of timeliness).⁵²

I acknowledge that I need to caveat my conclusions regarding the MMIWG Inquiry. The fact is that the Inquiry is not complete, which means that I need to rely largely on media instead of academic articles. Moreover, it is not unprecedented for an Inquiry that has procedural difficulties to nonetheless produce a valuable report — the Goudge Inquiry needed to request an extension and the Krever Inquiry into the tainted blood tragedy, despite ultimately changing numerous aspects of blood donation policy,⁵³ had an interlocutory judicial review application that reached the Supreme Court of Canada.⁵⁴ The Inquiry could also be like RCAP, with its findings proving valuable years into the future. Further, if the MMIWG Inquiry does ultimately fail, it could have little to do with the terms of reference, instead reflecting a clash between Indigenous culture, knowledge-gathering, and resolution, and Western equivalents, whether adversarial or inquisitorial.⁵⁵ Given its topicality and the issues it has encountered, however, I would be remiss to exclude an analysis of the Inquiry. Even if the Inquiry ultimately proves valuable, its difficult journey, and the potential role of the terms of reference in making that journey difficult, is worth analyzing in and of itself.

Whenever an analysis seeks to extrapolate from examples, criticism can be made of one's choices. However, I trust the above discussion indicates why I believe these are all good examples of successful and unsuccessful public inquiries. While all come from the federal and Ontario realms, these are the two largest governments in Canada, meaning they have the largest number of inquiries from which to draw.

I do recognize that these inquiries are all, at some level, legal-investigative inquiries, and not purely policy advisory inquiries that do not

seek to build policy recommendations from a legal investigation. The latter type of inquiries may not necessarily produce the same results.⁵⁶ But in the interests of not muddying the waters, I am content to proceed with an analysis of legal-investigative inquiries, recognizing that my conclusions may need to be modified (or even not be applicable at all) in cases of purely policy inquiries.

V.CHARACTERISTICS OF SUCCESSFUL AND UNSUCCESSFUL PUBLIC INQUIRIES' TERMS OF REFERENCE

A. Walkerton Inquiry

The terms of references of the Walkerton Inquiry are only nine paragraphs long. Eight of these are fairly standard, appointing Justice O'Connor commissioner,⁵⁷ forbidding any finding of civil or criminal liability,⁵⁸ prescribing how the report is to be delivered,⁵⁹ allowing the Inquiry to make recommendations regarding funding,⁶⁰ noting the Inquiry's broad evidentiary powers,⁶¹ and explaining the Inquiry's resources.⁶² The heart of the Inquiry's mandate is found in paragraph two:

The commission shall inquire into the following matters:

- (a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as *Esherichia coli* bacteria were found to be present in the town's water supply;
- (b) the cause of these events including the effect, if any, of government policies, procedures and practices; and
- (c) any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water,

in order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario.⁶³

Commissioner O'Connor described his mandate as "very wide"⁶⁴ and

indeed it was – apart from the legally necessary⁶⁵ prohibition on making findings tantamount to civil or criminal liability, no restrictions were imposed on his ability to investigate the causes of the Walkerton tragedy, or make recommendations to prevent future tragedies related to Ontario’s drinking water. Moreover, virtually no restrictions were placed upon the Inquiry in terms of the procedure through which it was to be conducted, or how it was to structure itself. However, the fact remains that the mandate was clearly fundamentally confined to the analysis of a single event — the Walkerton tragedy of Spring 2000, and the policy recommendations which should result from that. Though the term “any other relevant matters that the commission considers necessary to ensure the safety of Ontario’s drinking water” could be interpreted very broadly, and did grant Commissioner O’Connor a broad mandate from a policy recommendation perspective, the circumstances (and the geography) in which this provision appear are still obvious. Though Commissioner O’Connor could investigate clearly related matters, the mandate was confined in terms of subject matter, time period, and geography. Within that, Commissioner O’Connor was given flexibility. Though the four corners of his mandate were not defined with scientific precision, they were still readily discernible. As noted above, different considerations may be required in non-investigative contexts.

B. Goudge Inquiry

The Goudge Inquiry’s terms of reference consist of sixteen paragraphs, three of which address the establishment of the Inquiry and six of which address resources. The three establishing the Inquiry are all clear and pointed, appointing the Commissioner,⁶⁶ prescribing the date for delivery of a report,⁶⁷ and appointing a scientific expert.⁶⁸ The provisions regarding resources give the Inquiry discretion to fulfil its mandate within an approved budget.⁶⁹ While the creation of a website is mandated,⁷⁰ the other provisions give the Inquiry discretion on matters such as determining the practicality

of following government expense policies,⁷¹ asking the government for resources,⁷² and, like the Cornwall Inquiry,⁷³ deciding whether and in what circumstances to offer counselling services.⁷⁴

Seven sections of the terms of reference address its mandate, with section 4 at the heart of the matter:

4. The Commission shall conduct a systemic review and assessment and report on:

1. the policies, procedures, practices, accountability and oversight mechanisms, quality control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings;
2. the legislative and regulatory provisions in existence that related to, or had implications for, the practice of pediatric forensic pathology in Ontario between 1981 to 2001; and
3. any changes to the items referenced in the above two paragraphs, subsequent to 2001

in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.⁷⁵

Though hardly a small undertaking, this is nonetheless clearly defined in terms of geography and time period, with subject matter being related to substantive interactions with the criminal justice system. Though the mandate was not confined only to Dr. Smith's wrongdoing — which seems appropriate, as institutions around him enabled his actions — the type of actions in the Inquiry's mandate clearly relate to the persons and organizations that empowered him. Sections 5 and 6 state, as per usual, that no pronouncements on criminal or civil liability can be made.⁷⁶ It adds that no findings on professional responsibility liability could be made, presumably to protect the medical profession's ability to decide what discipline should have come to Dr. Smith.⁷⁷ Sections 7 and 8 guide the Inquiry in terms of evidence it is to rely upon, but they are not exhaustive, as section 10 clarifies.⁷⁸

Ultimately, the Goudge Inquiry's terms of reference gave it significant flexibility on its own management, practice, and procedure. However, what was to be investigated, though broad on its face, was clearly defined geographically, temporally, and in terms of subject matter.

C. Kaufman Commission

The Terms of Reference for the Kaufman Commission were just eight paragraphs long. The first paragraph appoints Justice Kaufman commissioner, terms six through eight address resources, term three forbids making findings of civil or criminal liability, term four prescribes how the report is to be delivered, and term five permits (but does not mandate) the reliance on particular documents.⁷⁹ The heart of the Commission's mandate is in term two:

The Commission shall inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province.⁸⁰

Much like the Walkerton Inquiry, the Kaufman Commission's terms of reference clearly confine its subject matter and investigative powers to particular events and/or matters relating to the prosecution of Morin and his exoneration. But from a policy perspective, much like the Walkerton Inquiry, there was little restriction on what the Commission could recommend to improve "the administration of criminal justice" in Ontario. Moreover, virtually no restrictions were placed on the Commission's operational or procedural powers.

D. Somalia Inquiry

The Somalia Inquiry's terms of reference vis-à-vis subject matter were detailed. The Inquiry was directed to investigate nineteen different aspects of the Canadian Armed Forces' deployment in Somalia in the early 1990s, with each aspect being matched to a particular time period.⁸¹ The other provisions, much like the MMIWG Inquiry's terms of reference, largely relate to the appointment of commissioners, their ability to adopt their own procedures, the manner in which to protect confidentiality and national security, and the submission of the report.⁸² The terms were amended three times when the Inquiry was unable to deliver the report on time.⁸³ Justice Gilles Lévesque of the Federal Court of Appeal, Chief Commissioner, indicated that the timeline was unrealistic⁸⁴ — this could be a cautionary tale to future commissioners who believe timelines are unrealistic. The largest difference between the Somalia Inquiry's terms of reference and the three aforementioned inquiries is their vastness in terms of investigative and policy mandates. General states of affairs within the armed forces, rather than specific incidents, were to be investigated, such as “the extent, if any, to which cultural differences affected the conduct of operations”⁸⁵ and “the adequacy of selection and screening of officers and non-commissioned members for the Somalia deployment”.⁸⁶

E. Cornwall Inquiry

Most of the Cornwall Inquiry's Terms of Reference bear striking similarity to those of the Goudge Inquiry. Sections 1 and 10-13 of the Cornwall Inquiry's Terms of Reference establish Justice Norman Glauze of the Ontario Court of Justice as Commissioner before dealing with the issue of resources in a manner that is not uncommon.⁸⁷ Sections 4-9 provide directions on evidence, delivery of the report, and the need to not express an

opinion on civil or criminal liability.⁸⁸

The core of the Inquiry's mandate is found in Sections 2 and 3:

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:

(a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and

(b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.⁸⁹

Unlike the Goudge Inquiry, there is no clear temporal restriction on the Inquiry's mandate — “historical” is a vague term, the meaning of which had to be litigated.⁹⁰ Similarly, “young people”, “abuse”, and “other public and community sectors” are not defined. Though the Inquiry was clearly called in response to allegations of a pedophile ring and the failure of institutions to respond to allegations of abuse,⁹¹ there is no hint of that in the terms of reference. The phrase “allegation of historical abuse of young people in Cornwall” appears too broad to get at the primary evils that the Inquiry was to investigate.⁹²

F. MMIWG Inquiry

The MMIWG Inquiry has twenty-five primary parts of its Terms of Reference. The first two are the most important, mandating that the Inquiry:

a. [...] inquire into and to report on the following:

i. systemic causes of all forms of violence — including sexual violence — against Indigenous women and girls in Canada, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of Indigenous

women and girls in Canada, and

ii. institutional policies and practices implemented in response to violence experienced by Indigenous women and girls in Canada, including the identification and examination of practices that have been effective in reducing violence and increasing safety

b. [...] make recommendations on the following:

i. concrete and effective action that can be taken to remove systemic causes of violence and to increase the safety of Indigenous women and girls in Canada, and

ii. ways to honour and commemorate the missing and murdered Indigenous women and girls in Canada[.]⁹³

It should be noted that section “a” contains no geographic or temporal restrictions on the Inquiry’s mandate (apart from “in Canada”). The number of cases that the Inquiry is to investigate is also very large. Over 1,300 witnesses had been heard from by June 2018.⁹⁴ Comparative data would be necessary to be sure that this is not too large and, admittedly, the Inquiry’s mandate has been considered too narrow by some critics, who have condemned the government for not giving it the power to order that particular police investigations be reopened.⁹⁵ However, sections “r” and “s” explicitly authorize the Inquiry to refer instances of particular wrongdoing to the competent authorities.⁹⁶ This still recognizes that public inquiries can typically “only report and recommend [and] cannot [...] determine rights”,⁹⁷ with a possible power to order police to take particular steps being potentially problematic.

Term “c” gives the Inquiry its name, and the last six provisions in the terms of reference (“t”-“y”) relate to protection of privacy and the need to ensure that the official languages of Canada are respected.⁹⁸

Terms “d” through “q” mostly relate to the Inquiry’s operations.⁹⁹ Many of these – such as the authorization to rent space and retain experts — are unremarkable. Some details are worth noting, however: the terms of reference explicitly authorize the Inquiry to establish regional and issue-

specific advisory bodies (term “g”),¹⁰⁰ take particular culturally-and subject matter-sensitive approaches to its work (“e”)¹⁰¹, consider particular past reports (“h”),¹⁰² and review the government’s pre-Inquiry engagement process (“i”).¹⁰³ Moreover, the Inquiry is authorized to provide an opportunity to participate to “any person” affected (“f”).¹⁰⁴ Each of these may be a good idea, but they are more procedurally specific than can be seen in the other terms of reference. The MMIWG Inquiry was granted a shorter-than-requested extension of time to complete its work.¹⁰⁵

V. GOING FORWARD

A. Conclusion on Above Analysis

The above analysis of six public inquiries’ terms of reference leads to several conclusions. First, governments should err on the side of specificity when crafting the subject matter and investigative mandate portions of terms of reference. However, this need not be the case with respect to the policy mandate sections of terms of reference. Second, there appears to be no need to give specific procedural or operational guidance in terms of reference. A final point, somewhat unrelated, would be that fewer commissioners appear to create more effective inquiries than more commissioners, at least with respect to investigative inquiries. I will now expand on each of these points.

B. Defined Investigative Mandates, Open-Ended Policy Mandates

Two criteria seem to unite the terms of reference of the successful public inquiries. The first is that they had clear mandates to investigate particular events. These events can be summarized as follows:

- (a) What went wrong in Walkerton that resulted in the outbreak of *e.coli* in Spring 2000?
- (b) How was Dr. Charles Smith able to give evidence that led to so

many wrongful convictions?

(c) What went wrong in the criminal justice system that led to the wrongful conviction of Guy Paul Morin?

Needless detail was not added on how the commissioners should investigate these events (indeed, the terms of reference were quite concise). However, the geography, time period, and subject matter to be investigated were clear. These narrow mandates allowed the commissioners to “hone in” on either particular tragedies caused by multiple systemic factors (such as insufficient monitoring of water safety in the case of Walkerton¹⁰⁶ or reliance on jailhouse informants in Morin¹⁰⁷) or how a single individual’s actions led to multiple tragedies (in the case of Smith). Perhaps because of this, healing of affected individuals and apologies by wrongdoers occurred in these inquiries.

This in turn leads to the second notable aspect, which is the nature of the subject matter of the successful inquiries’ terms of reference. Though the inquiries’ investigative mandates of particular events were clear, sufficient flexibility was given to allow the commissioners to look at the systemic, policy issues that caused the particular tragedies. For example, the Goudge Inquiry’s terms of reference gave a broad mandate to “make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario”.¹⁰⁸ Similarly, paragraph 2(c) of the Walkerton Inquiry’s terms of reference allowed Commissioner O’Connor to look at anything that affected the safety of Ontario’s drinking water.¹⁰⁹ Language like this responds to concerns that narrow terms of reference will constrain inquiries’ effectiveness.¹¹⁰ It is not surprising that similar language to paragraph 2(c) has been used in other public inquiries, such as the Long-Term Care Homes Inquiry, chaired by Justice Eileen Gillese of the Court of Appeal for Ontario.¹¹¹ Though such language can be interpreted very

broadly, this does not appear to be a problem in practice, as specific investigative mandates seem to ensure that inquiries will not veer too far off-course. In any event, a government can decline to adopt unreasonable policy recommendations. That being said, if an inquiry cannot make clear investigative findings due to an excessively broad mandate, it may never compile a valuable factual record.

This balance between narrow investigative and broad policy mandates was not present in the Cornwall and MMIWG Inquiries' terms of reference. Rather than starting with narrow investigative mandates and then going broad from a policy perspective, these inquiries started with very broad investigative mandates that left the inquiries unable to build a strong factual footing. Jonathan Kay has written about the MMIWG Inquiry's lack of certainty about whether it is an investigative inquiry or a mechanism to facilitate healing, and the difficulty inherent in attempting to do both.¹¹² Strangely, the Somalia Inquiry's terms of reference managed to be too specific and too far-reaching at the same time. On the one hand, the commissioners were told exactly what specific issues they were to investigate, rather than looking at a specific event and asking the commissioners to unpack the issues raised. Moreover, there were so many specific issues to be investigated that, to cite Professor Ed Ratushny, "[t]he massive terms of reference were incapable of completion during the short time frame available, even with extensions."¹¹³

Ultimately, therefore, it appears helpful to clearly define inquiries' investigative purposes.¹¹⁴ At the same time, it is important to not confine (subject to constitutional constraints regarding determining criminal and civil liability) what inquiries can recommend from a policy perspective. This is a practical way to balance the competing dangers, recognized by Professor Ratushny that "the government will overreact and include too much in the terms of reference or try to curtail the inquiry's scope to a degree that could

inhibit its effectiveness.”¹¹⁵

C. Terms of Reference – Procedure and Operations

Despite the need for significant specificity in terms of subject matter mandate, such clarity does not appear necessary — and can in fact be counterproductive — when it comes to procedure and operations. None of the Goudge, Walkerton, or Kaufman Inquiries had any substantive restrictions on how they were to conduct their operations or construct their procedures. On the contrary, all terms of reference seemed to clarify just how broad these powers could be, so long as they were related to the subject matter of the inquiries. To be fair, this is also mostly true for the Cornwall and Somalia Inquiries. However, the MMIWG Inquiry gave numerous directions to the commissioners on how to construct itself (including with issue-specific and region-specific advisory groups), how it should receive evidence, and what past reports and government actions it should consider. To some extent, this is understandable given the broad nature of the Inquiry and the government’s desire to ensure no one feels excluded. It was also partially necessary given that many issues within the Inquiry’s mandate were within provincial jurisdiction,¹¹⁶ but it still seems to have been unhelpful.

D. Number of Commissioners

I would be remiss if I failed to note one other observation in passing. Each of the three successful inquiries I analyzed had a single commissioner, while two of the three unsuccessful inquiries had multiple commissioners. It is a longstanding hypothesis that multiple commissioners increase the likelihood of division on an inquiry, thereby decreasing its likelihood of success.¹¹⁷ There are other virtues that may accompany the risks of multiple

commissioners, such as subject matter expertise that a judge (a common choice for a sole commissioner) would be unlikely to possess.¹¹⁸ Even so, my brief analysis does suggest that having multiple commissioners may come with the risks hypothesized in the past. It would appear that the risk coming from multiple commissioners would be amplified in cases of investigative inquiries — where diverging views on investigative functions can have serious ramifications — as opposed to policy inquiries — where the virtues of having persons with diverse backgrounds are likely more valuable in any event.

VI. CONCLUSION

Terms of reference define a public inquiry. In this paper, I have explored six public inquiries — three widely considered successful, three widely considered unsuccessful — to analyze how their terms of reference affected their (lack of) success. Though the terms of reference cannot be considered the only reasons for the inquiries' success, it nonetheless appears that several conclusions can be drawn — some specific, others more general. On the specific front, clear terms of reference with respect to an inquiry's investigative subject matter are likely to help commissioners build a successful inquiry. This appears to result in an inquiry being able to build a proper factual record. However, when it comes to making policy recommendations, terms of reference should not be constraining. Indeed, broad powers on this front can be very helpful. Further, when it comes to the procedure an inquiry is to use, or its operations, there appears little if any reason for prescriptions in the terms of reference. I have mostly invested legal-investigative inquiries in this paper, that lend themselves to public inquiries, and different conclusions may be appropriate for purely policy-based inquiries. Nonetheless, these guidelines for terms of reference still appear helpful, as demonstrated by the experience of the three unsuccessful

legal-investigative inquiries analyzed in this paper.

The decision to call a public inquiry is to a significant extent a political decision. But governments should be hesitant to cave into political pressure to call inquiries or, at the very least, should not cave into political pressure to call inquiries with broad mandates. The Walkerton Inquiry, Goudge Inquiry, and Kaufman Commission were all called in response to particular tragedies caused by multiple factors (in the Walkerton and Kaufman cases) or multiple tragedies caused by the same individual (the Goudge Inquiry). As a result, the inquiries could handle their mandates and deliver concrete results. But one cannot help but wonder if political pressure to call the Somalia Inquiry, Cornwall Inquiry, and MMIWG Inquiry may have resulted in mandates that were too broad, perhaps because governments wished to avoid political blowback if anyone felt excluded. This motivation may be coming from a good place (wanting to respond to a terrible tragedy and be seen as doing something), but at times the result has been unwieldy mandates and ineffective inquiries.

Regardless of the government's motivations for calling a public inquiry, an unsuccessful public inquiry is in no one's best interests. To return to where I began, the MMIWG Inquiry is currently proving to be unsatisfactory to the government and all affected parties. Governments have very little control over public inquiries after setting the terms of reference;¹¹⁹ as such, governments must take the utmost care in their drafting. The risk of an excessively narrow mandate is a very real one, but so is an excessively broad mandate. At times, individuals with a grievance to air — maybe even a legitimate grievance — may not be captured by an inquiry's mandate. Nonetheless, that would appear to be an acceptable price to pay for a successful public inquiry.

Notes

1. See e.g. Nancy Macdonald & Meagan Campbell, “Lost and Broken” *Maclean’s* (13 September 2017), online: <http://www.macleans.ca/lost-and-broken/>.
2. *Ibid.*
3. Ed Ratushny, *The Conduct of Public Inquiries* (Toronto: Irwin Law, 2009) at 261-262.
4. *Ibid.* at 24. Seen in, e.g. *Ontario Provincial Police v Commissioner of the Cornwall Public Inquiry*, 2008 ONCA 33, 232 OAC 251 [Moldaver *Cornwall* Decision].
5. Barbara McIsaac, QC, “Review of Professor Ed Ratushny *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009)” 4 JPPL 121 at 122, summarizing Ratushny, *supra* note 3.
6. Madam Justice Freya Kristjanson, “Procedural Fairness and Public Inquiries” in Ronda Bessner & Susan Lightstone, *Public Inquiries in Canada: Law and Practice* (Toronto: Thomson Reuters, 2017) at 98.
7. Professor David Cameron expresses this view in CBC News, “Canada and Public Inquiries” (13 November 2007), online: <http://www.cbc.ca/news2/background/cdngovernment/inquiries.html>, as does Professor Peter Carver in “Getting the Story Out: Accountability and the Law of Public Inquiries” in Colleen M Flood & Lorne Sossin, eds *Administrative Law in Context*, (Toronto: Emond Montgomery Press, 2013) at 547.
8. Aaron Wherry, “Another doctor is in: Philpott joins Bennett in pursuit of reconciliation” *CBC News* (28 August 2017), online: <http://www.cbc.ca/news/politics/jane-philpott-indigenous-services-analysis-wherry-1.4265166>.

9. The Hon Associate Chief Justice Dennis R O'Connor & Freya Kristjanson, "Some Observations on Public Inquiries" (delivered at the Annual Conference of the Canadian Institute for the Administration of Justice, Halifax, October 13, 2007), online: Court of Appeal for Ontario <<http://www.ontariocourts.ca/coa/en/ps/speeches/publicinquiries.htm>>; Gregory J Inwood & Carolyn M Johns, "Commissions of inquiry and policy change: Comparative analysis and future research frontiers" 59:3 *Canadian Public Administration* 382 at 399.
10. Carver, *supra* note 7 at 547.
11. Lorne Sossin, "The Goudge Inquiry: Anatomy of Success for an Inquiry to Change Policy?" in Gregory J Inwood & Carolyn M Johns, eds, *Commissions of Inquiry and Policy Change: A Comparative Analysis* (Toronto: University of Toronto Press, 2014) at 248.
12. Jasminka Kalajdzic, "Outsiders: The Sources and Impact of Secrecy at the Iacobucci Inquiry" (2010) 36 Queen's LJ 161 is an analysis of one such instance.
13. Ronda Bessner, "Assessing the Effectiveness of the Public Inquiry" in Bessner & Lightstone, *supra* note 6 at 412ff.
14. See e.g. Peter H Russell, "The Royal Commission on Aboriginal Peoples: An Exercise in Policy Education" in Inwood & Johns, *supra* note 9.
15. *Supra* note 13.
16. *Ibid* at 414ff.
17. The juxtaposition between Indigenous-based healing processes and the traditional criminal justice system has been extensively reviewed since *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679. See e.g. Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility"

(2016) 67 UNB LJ 313 at 317-319.

18. *Apology Act*, 2009, SO 2009, c3.

19. Officially known as the Commission of Inquiry into the Sponsorship Program and Advertising Activities, discussed in *Chrétien v Gomery*, 2008 FC 802, 333 FTR 157, aff'd 2010 FCA 283, 10 Admin LR (5th) 295.

20. See Kristjanson, *supra* note 6 at 98. Admittedly, significant deference is given to Commissioners in determining what procedure was appropriate: see, e.g. *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440, 151 DLR (4th) 1 [Krever].

21. See e.g. *Stevens v Canada (Attorney General)*, 2004 FC 1746, [2005] 2 FCR 629.

22. Justice John H Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51:4 McGill LJ 783 at 793; Ronda Bessner, “The Role of the Commissioner of a Public Inquiry” in Bessner & Lightstone, *supra* note 6 at 38-39.

23. Editorial Board, “It Doesn’t Hold Water” *National Post* (22 January 2002).

24. See e.g. Gomery, *supra* note 22 at 793.

25. Associated Press, “Canadian town wary of water after outbreak” *Deseret News* (20 December 2000), online: <<https://www.deseretnews.com/article/799556/Canadian-town-wary-of-water-after-outbreak.html>>; Bessner, *supra* note 13 at 418.

26. See quote of William Trudell in Susan Lightstone, “The Roles and Experiences of Counsel for Parties at Public Inquiries” in Bessner & Lightstone, *supra* note 6 at 307-308.

27. See, e.g., Ida Ngueng Feze et al., “The Regulation of Novel Water

Assessment Biotechnologies: Is Canada Ready to Ride the Next Wave?” (2014) 26 J Env'tl L & Prac 201 at 218-219, noting that examples of the changes in drinking water policy resulting from the Inquiry include “source protection, stricter assessment of laboratory monitoring processes, and a system for the approval of testing methods aimed at assessing drinking water quality”.

28. Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario, Report* (Toronto: Ontario Ministry of the Attorney General, 2008) vol 4, The Honourable Mr. Justice Stephen Goudge, Appendix 2 at 682, online: <https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v4_en_pdf/Vol_4_Eng_App01-09.pdf> [Goudge Inquiry Terms of Reference].

29. Sossin, *supra* note 11 at 258.

30. See, e.g., David Paciocco, “Taking a ‘Goudge’ Out of Bluster and Blarney: An ‘Evidence-Based Approach’ to Expert Testimony” (2009) 13 Can Crim L Rev 135, and Sossin, *ibid.* This is just skimming the surface. Based on a July 12, 2018 Westlaw search for “Goudge Inquiry”, I found 45 citations.

31. Merely at the appellate level, one can find, e.g., *R v McLennan*, 2016 ONCA 732, 343 CCC (3d) 39; *R v Orr*, 2015 BCCA 88, 368 BCAC 157; *R v T(M)*, 2013 ONCA 476, 308 OAC 143; *Abbott and Haliburton Co v White Burgess Langille Inman*, 2013 NSCA 66, 330 NSR (2d) 301, rev'd on other grounds, 2015 SCC 33, [2015] 2 SCR 182 [“White Burgess SCC”]; *Carmen Alfano Family Trust v Piersanti*, 2012 ONCA 297, 291 OAC 62; *R v Simmons*, 2012 ONCA 94, 289 OAC 39; *R v Marquardt*, 2011 ONCA 281, [2011] OJ No 1619; *R v Kumar*, 2011 ONCA 120, 273 OAC 130; *R v F(C)*, 2010 ONCA 691, [2010] OJ No 4471; *R v M(C)*, 2010 ONCA 690, [2010] OJ No 4472; *Adams v Cook*, 2010 ONCA 293, 100 OR(3d) 1; *R v Dooley*, 2009 ONCA 910, 257 OAC 150; *R v Sherret-Robinson*, 2009 ONCA 886,

[2009] OJ No 5312.

32. Bessner, *supra* note 13 at 419.

33. *Ibid* at 415.

34. See Sossin, *supra* note 11 at 246-248; Ministry of Community Safety and Correctional Services, News Release, “Ontario Acts on Goudge Recommendations” (23 October 2008), online: <<https://news.ontario.ca/archive/en/2008/10/23/Ontario-Acts-On-Goudge-Recommendations.html>>.

35. Ontario, *The Commission on Proceedings Involving Guy Paul Morin: report* (Toronto: Ontario Ministry of the Attorney General, 1998) vol 2, The Honourable Fred Kaufman at 1249 [Kaufman Report].

36. Discussed by, e.g. Lisa Dufraimont, “Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?” (2008) 33 Queen’s LJ 261.

37. *White Burgess* SCC, *supra* note 31 at para 12; *R v White*, 2011 SCC 13, [2011] 1 SCR 433 at paras 45-46 (per Rothstein J), 107 (per Charron J, concurring), and 141 and 182-183 (per Binnie J, dissenting); *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 at para 36; *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 at para 99.

38. See, e.g. Dufraimont, *supra* note 36.

39. *Supra* notes 36-37.

40. Described in Ratushny, *supra* note 3 at 21.

41. *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 1 FC 911, 126 FTR 241 (TD), rev’d [1997] 2 FC527(AD); *Dixon v Canada*

(*Somalia Inquiry Commission*), [1997] 3 FC 169, 1997 CarswellNat 1133(AD) rev'g [1997] 3 FC 169 (TD) [*Dixon*]; *Boyle v Canada (Somalia Inquiry Commission)* (1997), 131 FTR 135, [1997] FCJ No 942 (TD); *Morneault v Canada (Attorney General)* (1998), 150 FTR 28, [1998] FCJ No 501 (TD) rev'd, (2000), 184 FTR 15 (AD); *Labbé v Canada (Somalia Inquiry Commission)* (1997), 128 FTR 291, 1997 CarswellNat 325 (TD).

42. *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 116 FTR 131, 1996 CarswellNat 946 (TD).

43. *Dixon*, *supra* note 41.

44. Martin L Friedland, "Military Justice and the Somalia Affair" (1998) 40 Crim LQ 360 at 398.

45. Robert Benzie & Rob Ferguson, "Huge inquiry fails to find pedophile ring in Cornwall", Toronto Star (16 December 2009), online: <https://www.thestar.com/news/ontario/2009/12/16/huge_inquiry_fails_to_find_pedophile_ring_in_cornwall.html>.

46. *Commissioner of the Cornwall Public Inquiry v Dunlop*, [2007] OJ No 4768, 231 OAC 189 (Div Ct), with further reasons at (2008), 90 OR (3d) 524 and (2008), 241 OAC 193; *Ontario Provincial Police v Commissioner of the Cornwall Public Inquiry*, 229 OAC 238, 2007 CarswellOnt 5828 (Div Ct), rev'd, *Moldaver Cornwall Decision*, *supra* note 4, with a stay pending appeal granted at 2007 ONCA 673, 2007 CarswellOnt 6267; *Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v Commissioner of the Cornwall Public Inquiry* (2007), 223 OAC 66 (Div Ct); *MacDonald v Commissioner of the Cornwall Public Inquiry*, 214 OAC 293, [2006] OJ No 3546 (Div Ct); *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry*, 2007 ONCA 20, 219 OAC 129, aff'g (2006), 219 OAC 58 (Div Ct).

47. Benzie & Ferguson, *supra* note 45.

48. Gloria Galloway & Tu Thanh Ha, “Indigenous women’s group pulls support from missing and murdered inquiry as commissioner resigns”, *The Globe and Mail* (11 July 2017), online: <<https://www.theglobeandmail.com/news/politics/mmiw-commissioner-marilyn-poitras-resigns-in-another-blow-to-inquiry/article35653097/>>.

49. See e.g. Gary Mason, “Without a focus, MMIW inquiry will slide toward irrelevancy”, *The Globe and Mail* (29 November 2017), online: <<https://www.theglobeandmail.com/opinion/a-good-project-gone-awry/article37114389/>>.

50. Jonathan Kay, “Current MMIW Inquiry a terrible mash-up of two models”, *National Post* (29 November 2017), online: <<http://nationalpost.com/opinion/jonathan-kay-current-mmiw-inquiry-a-terrible-mash-up-of-two-models>>.

51. Leonard Monkman, “After shaky start, MMIW inquiry wraps first 3 days of hearings in Winnipeg”, *CBC News* (24 August 2017), online: <<http://www.cbc.ca/news/indigenous/mmiw-inquiry-expert-hearings-1.4261471>>.

52. Renata D’Aliesio, “Missing, murdered Indigenous women inquiry to ask for more time”, *The Globe and Mail* (4 September 2017), online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/national/missing-murdered-indigenous-women-inquiry-to-ask-for-more-time/article36163093/>>.

53. André Smith, Ralph Matthews & Jay Fiddler, “Blood Donation and Community: Exploring the Influence of Social Capital” (2011) 4:1 *International J of Social Inquiry* 45 at 48ff.

54. *Krever*, *supra* note 20.

55. See, e.g., Brenda L Gunn, “Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System” (2007) 6:1 *Indigenous LJ* 31 at 33-34.
56. See, e.g., Ed Ratushny, “The Commission of Inquiry: A Residual Institution of Government” (2010) 4 *JPPL* 275 at 277-278.
57. Ontario, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (Toronto: The Queen’s Printer for Ontario, 2002), The Honourable Dennis R. O’Connor, Appendix A at para 1, online: <http://www.archives.gov.on.ca/en/e_records/walkerton/report1/pdf/Appendix_A.pdf> [Walkerton Inquiry Terms of Reference].
58. *Ibid* at para 3.
59. *Ibid* at para 4.
60. *Ibid* at para 5.
61. *Ibid* at para 6.
62. *Ibid* at paras 7-9.
63. *Ibid* at para 2.
64. Ontario, The Walkerton Inquiry, “The Inquiry and Its Mandate” (Toronto: June 2000), online: <http://www.archives.gov.on.ca/en/e_records/walkerton/cmandate/index.html>.
65. *Re Nelles et al and Grange et al*, 46 OR (2d) 210, 1984 CanLII 1861 (ONCA).
66. Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 678.
67. *Ibid*.
68. *Ibid*.

69. *Ibid* at 680.

70. *Ibid*.

71. *Ibid*.

72. *Ibid* at 681.

73. See e.g. Ontario, *Report of the Cornwall Inquiry* (Cornwall, ON: Ministry of the Attorney General, 2009) vol 4, The Honourable G Norman Glaude at 2, online: <<https://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/report/index.html>> [Cornwall Inquiry].

74. Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 681.

75. *Ibid* at 678-679.

76. *Ibid* at 679.

77. See e.g. Hilary Young, “Why Withdrawing Life-Sustaining Treatment Should Not Require ‘*Rasouli* Consent’” (2012) 6:2 McGill J L& Health 54 at 98, explaining the self-governing nature of the medical profession in terms of professional discipline.

78. Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 679-680.

79. Kaufman Report, *supra* note 35, Appendix A-1 at 1245-1248.

80. *Ibid* at 1247.

81. Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997) vol 5, The Honourable Gilles Létourneau, Appendix 1 at 1503-1507 [Somalia Inquiry Terms of

Reference].

82. *Ibid* at 1505-1507.

83. *Ibid* at 1509-1512.

84. Tamar Witelson, “Interview with Mr. Justice Gilles Létourneau: Somalia Commission Chair” in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2015) at 361-363. Also summarized in Bessner, *supra* note 22 at 30-31.

85. Somalia Inquiry Terms of Reference, *supra* note 81 at 1504.

86. *Ibid* at 1503.

87. Cornwall Inquiry, *supra* note 73, vol 1, Appendix A1, OIC558/2005, April 14, 2005 at 1, 4-5.

88. *Ibid* at 3-4.

89. *Ibid* at 2.

90. Moldaver *Cornwall* Decision, *supra* note 4, explaining that “historical” could, viewed in isolation, mean any event that occurred in the past but such an interpretation would manifestly be too broad given the purposes of the Inquiry.

91. Benzie & Ferguson, *supra* note 45.

92. Cornwall Inquiry, *supra* note 73, vol 1, Appendix A1, OIC558/2005, April 14, 2005 at 1, 4-5.

93. Indigenous and Northern Affairs Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, “Terms of Reference” (12 December 2016), online: <<http://www.mmiwg-ffada.ca/files/terms-of-reference.pdf>> [MMIWG Terms of Reference].

94. Maura Forrest, “Ottawa grants six-month extension to missing and

murdered Indigenous women inquiry”, *National Post* (5 June 2018), online: <<https://nationalpost.com/news/politics/ottawa-grants-six-month-extension-to-missing-and-murdered-indigenous-women-inquiry>>.

95. Kathryn Blaze Baum & Gloria Galloway, “Missing, murdered inquiry will lack power to compel police action”, *The Globe and Mail* (20 July 2016), online: <<https://www.theglobeandmail.com/news/national/missing-murdered-indigenous-women-inquiry-unlikely-to-have-mandate-to-review-police-conduct/article31020957/>>.

96. MMIWG Terms of Reference, *supra* note 93, ss r-s.

97. Ratushny, *supra* note 3 at 11.

98. MMIWG Terms of Reference, *supra* note 93, ss c, t-y.

99. *Ibid*, ss d-q.

100. *Ibid*, s g.

101. *Ibid*, s e.

102. *Ibid*, s h.

103. *Ibid*, s i.

104. *Ibid*, s f.

105. Gloria Galloway, “Head of inquiry into missing, murdered Indigenous women says scope will narrow after extension limited to six months”, *The Globe and Mail* (5 June 2018); online: <<https://www.theglobeandmail.com/politics/article-ottawa-allows-extension-for-inquiry-into-missing-murdered-indigenous/>>.

106. Fezeet al., *supra* note 27 at 218-219.

107. Kaufman Report, *supra* note 35, Chapter III at 403-602.

108. Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 679.

109. Walkerton Inquiry Terms of Reference, *supra* note 57.

110. See e.g. M Anne Stalker, “The Protection of Individual Rights and the Public Inquiry” (1994) 43 UNB LJ 427 at 433.

111. Order-in-Council 1547/2017, Legal Framework, Long-Term Care Homes Public Inquiry, online: <http://longtermcareinquiry.ca/wp-content/uploads/LTCH_OIC.pdf>, s 2(c).

112. Kay, *supra* note 50.

113. Ratushny, *supra* note 56 at 281.

114. Stalker, *supra* note 110 at 433 posited that this might be the case, and also that it may help protect individual rights.

115. McIsaac, *supra* note 5 at 122, summarizing Ratushny, *supra* note 3 at 133.

116. The Canadian Press, “Provinces commit to help inquiry into missing, murdered Indigenous women” *Macleans* (1 May 2016), online: <<http://www.macleans.ca/news/canada/provinces-commit-to-help-inquiry-into-missing-murdered-indigenous-women/>>.

117. See e.g. Inwood & Johns, *supra* note 9 at 398.

118. For instance, an accountant, Renaud Lachance, FCA, was a commissioner on the Charbonneau Inquiry into public construction contracts in Québec. Québec, Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction, “Notes biographiques” (16 June 2015), online: <<https://www.ceic.gouv.qc.ca/la-commission/notes-biographiques.html>>.

119. Robert Centa & Patrick Macklem, “Securing Accountability Through Commissions of Inquiry: A Role for the Law Commission of Canada” (2001) 39:1 Osgoode Hall LJ 117 at 130.

C.C.S.M. c. M198

Source: CanLii

Stable URL: <https://canlii.ca/t/52z3g>

The Missing and Murdered Indigenous Women and Girls Honouring and Awareness Day Act

CCSM c M198

(Assented to June 2, 2017)

WHEREAS more than 1,200 Indigenous women and girls in Canada have gone missing or been murdered since 1980, according to police reports;

AND WHEREAS for decades their families have called for greater recognition of the crisis of violence against Indigenous women and girls;

AND WHEREAS the tragic issue of missing and murdered Indigenous women and girls in Canada has garnered attention and support throughout Manitoba, Canada and the international community;

AND WHEREAS advocacy by their families, with the support of Indigenous women's organizations, led to the creation of the National Inquiry into Missing and Murdered Indigenous Women and Girls;

AND WHEREAS vigils honouring missing and murdered Indigenous women and girls are held across Canada on October 4 each year, raising public awareness and building a movement of social change in respect of violence against Indigenous women and girls;

AND WHEREAS families of Manitoba's missing and murdered Indigenous women and girls have called for an official day of awareness to honour their daughters, mothers, sisters, grandmothers, partners and friends;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Missing and Murdered Indigenous Women and Girls Honouring and Awareness Day

1 In each year, October 4 is to be known throughout Manitoba as Missing and Murdered Indigenous Women and Girls Honouring and Awareness Day.

C.C.S.M. reference

2 This Act may be referred to as chapter M198 of the *Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

3 This Act comes into force on the day it receives royal assent.

C.C.S.M. c. N20

Source: CanLii

Stable URL: <https://canlii.ca/t/52gvq>

The National Centre for Truth and Reconciliation Act

CCSM c N20

(Assented to June 30, 2015)

WHEREAS all Manitobans are beneficiaries of the treaties with Aboriginal nations and share responsibility for promoting respect for those treaties and for Aboriginal nations, culture, languages, communities and families;

AND WHEREAS Aboriginal people within Canada have been subject to a wide variety of human rights abuses since European contact, including the abuses of the Indian Residential Schools system;

AND WHEREAS one of the primary objectives of the residential schools system was to remove and isolate Aboriginal children from the influence of their homes, families, traditions and culture and to assimilate them into the

dominant culture, based on the assumption that Aboriginal culture and spiritual beliefs were inferior and unequal;

AND WHEREAS this policy of assimilation was wrong and caused great harm;

AND WHEREAS the Truth and Reconciliation Commission (the “Commission”) was established as part of a response to the residential schools legacy to contribute to truth, healing and reconciliation;

AND WHEREAS the Commission’s mandate includes the collection of statements and documents from former students, their families and communities, and other interested participants;

AND WHEREAS the Commission is required to archive all such documents and transcripts or recordings of the statements received in a manner that will ensure their preservation and accessibility to the public, in accordance with access and privacy legislation and any other applicable legislation;

AND WHEREAS the Commission has entered into a Trust Deed with The University of Manitoba to establish a national centre through which the University will receive, hold and archive the Commission's records, including survivor statements and artifacts;

AND WHEREAS the Trust Deed requires the University to use and preserve the Commission's records exclusively for the following purposes:

- (a) to ensure preservation of the Commission’s archives and other materials relating to residential schools;
- (b) to make the records accessible to former students, their families and communities, the general public, researchers and educators, in accordance with access and privacy legislation, and any other applicable legislation;
- (c) to promote engagement of the public regarding residential schools and other Aboriginal issues, including through the

fostering of understanding and reconciliation;

AND WHEREAS, through the Centre, The University of Manitoba will continue to collect statements and other materials relating to residential schools and other Aboriginal issues;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

DEFINITIONS

Definitions

1 The following definitions apply in this Act.

“Centre” means the national centre established as part of The University of Manitoba in accordance with the terms of a Trust Deed and an Administrative Agreement entered into by the Commission and The University of Manitoba. (« Centre »)

“Centre records” means the records in the custody or under the control of the Centre, but does not include records relating solely to the administration and operation of the Centre. (« documents du Centre » ou « documents détenus par le Centre »)

“Commission” means the Truth and Reconciliation Commission of Canada established in accordance with the Indian Residential Schools Settlement Agreement dated May 8, 2006. (« Commission »)

“director” means the director of the Centre. (« directeur »)

“information” includes personal information and personal health information. (« renseignements »)

“personal health information” means personal health information as defined in *The Personal Health Information Act*. (« renseignements médicaux personnels »)

“personal information” means personal information as defined in *The Freedom of Information and Protection of Privacy Act*. (« renseignements personnels »)

“record” means a record as defined in *The Freedom of Information and Protection of Privacy Act*. (« document »)

PURPOSE AND MANDATE

Purpose of this Act

2 The purpose of this Act is to set out the access and privacy laws that apply to Centre records.

Mandate of the Centre

- 3 For the purpose of this Act, the mandate of the Centre is
- (a) to preserve the Commission's archives and other materials relating to residential schools;
 - (b) to acquire and preserve additional records that document the relationship between indigenous and non-indigenous peoples in Canada and the barriers to, and efforts made to achieve, meaningful reconciliation;
 - (c) to make the Centre records accessible to former students, their families and communities, the general public, researchers and educators, in accordance with access and privacy legislation and any other applicable legislation; and
 - (d) to promote the engagement of the public regarding residential schools and other Aboriginal issues, including through fostering understanding and reconciliation.

ACCESS AND PRIVACY LAWS APPLY TO CENTRE RECORDS

FIPPA and PHIA apply to Centre records

4(1) *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* apply to all Centre records, except as otherwise provided in this Act.

Centre records not excluded from FIPPA

4(2) For certainty, Centre records are not exempt from *The Freedom of Information and Protection of Privacy Act* under clause 4(j) (archival records) of that Act.

AUTHORITY TO COLLECT AND USE RECORDS AND INFORMATION

General authority to collect and use records and information

- 5 For the purposes of fulfilling its mandate, the Centre is authorized
- (a) to collect records and information from any source and in any manner; and
 - (b) to use Centre records.

Agreements re further collection of records

6(1) In addition to the archives of the Commission received by the Centre, the director may enter into written agreements with other persons, governments and entities, including the Government of Canada and its departments and agencies, respecting the collection of records and information from them.

Commitment not to disclose

6(2) An agreement may include a commitment to restrict the disclosure of records or information contained in the records.

Limit re records from parties to the Settlement Agreement

6(3) However, an agreement may not include a commitment to restrict the disclosure of records or information that the Centre receives from the Commission or from a party to the Indian Residential Schools Settlement Agreement that is relevant to the experience of residential schools, or the impacts or consequences of residential schools.

Records from Government of Canada

6(4) In the absence of an agreement under subsection (1), the Centre may receive records from the Government of Canada and its departments and agencies that are relevant to the mandate of the Centre.

PROACTIVE DISCLOSURE OF CENTRE RECORDS

Proactive disclosure of records

7(1) To fulfill the mandate of the Centre as it relates to ensuring availability of the Centre records, the director is authorized to make Centre records available and to disclose any personal information, including personal health information, contained in the records, to the extent that the director considers it necessary to fulfill the mandate.

Interaction with FIPPA and PHIA

7(2) For certainty, subsection (1) authorizes the disclosure of personal information under clause 44(1)(e) of *The Freedom of Information and Protection of Privacy Act* and personal health information under clause 22(2)(o) of *The Personal Health Information Act*.

Disclosure only if consistent with restrictions

7(3) The disclosure of a record or information under this section must be consistent with any commitment made in an agreement under subsection 6(2) and the restrictions referred to in section 8.

Restrictions on proactive disclosure

8(1) The director must restrict the disclosure of records and information under subsection 7(1) if

- (a) the disclosure would be an unreasonable invasion of an individual's privacy; or
- (b) a court order prohibits disclosure.

Director to consider circumstances

8(2) In determining whether a disclosure would be an unreasonable invasion of an individual's privacy under clause (1)(a), the director must consider all of the relevant circumstances, including whether the public interest in the disclosure clearly outweighs any invasion of privacy that could result from the disclosure.

Classification of documents

8(3) The director may establish classes of Centre records and the information contained in them and, for the purposes of this section, specify restrictions that apply to each class.

Types of restrictions on proactive disclosure

8(4) A restriction under this section may do all or any of the following:

- (a) restrict or prohibit disclosure for some or all purposes;
- (b) restrict or prohibit disclosure for a certain period of time;
- (c) restrict who may have access to a Centre record.

Severing information

9 When disclosure of information in a Centre record is restricted under subsection 6(2) or section 8, but the restricted information can reasonably be severed from the record, the director may sever the restricted

information and disclose the remainder of the record.

Complaints re proactive disclosure

10 The Centre must establish a procedure for receiving and dealing with complaints about the disclosure of Centre records under sections 7 and 8.

RIGHT OF ACCESS BY INDIVIDUAL WHO PROVIDED INFORMATION

Purpose of this section — additional right of access

11(1) The purpose of this section is to allow an individual who has provided a record to the Commission or the Centre access to the record without having to make a formal access request under Part 2 of *The Freedom of Information and Protection of Privacy Act* or Part 2 of *The Personal Health Information Act*.

Access right of individual who provided information

11(2) An individual has the right, on request and without charge, to examine and receive a copy of a Centre record or information contained in a record if

- (a) he or she provided the record or information to the Commission or the Centre; or
- (b) the record or information is a transcript or recording of a statement or other information provided by the individual to the Commission or the Centre.

Person authorized to act for individual

11(3) The individual may authorize any person to exercise the right under subsection (1) on his or her behalf.

Right of access of relative

11(4) A family member of the individual has the right, on request and without charge, to examine and receive a copy of a record or information referred to in clause (2)(a) or (b) if

- (a) the individual consents; or
- (b) the individual is deceased and the director believes that disclosing the record or information to the family member would not unreasonably invade the privacy of the deceased individual or another individual referred to in the record.

Duty to provide information

11(5) The director must comply promptly with a request under this section.

Director must take precautions

11(6) The director must not permit records to be examined or copied under this section without being satisfied as to the identity of the person making the request and, if applicable, the authorization or consent of the individual who provided the record or information.

Restrictions do not apply

11(7) A restriction imposed under section 8 does not affect a request under this section.

ACCESS REQUEST UNDER FIPPA**Access request under FIPPA**

12(1) When a request for access to a Centre record is made under Part 2 of *The Freedom of Information and Protection of Privacy Act*,

- (a) the exceptions set out in sections 17, 18, 24, 25 and subsection 27(1) of that Act apply;
- (b) the exceptions set out in sections 19 to 23, subsection 27(2) and sections 28 to 31 do not apply; and
- (c) the director must not disclose the record or information contained in the record if
 - i. a commitment has been made not to disclose it in an agreement under subsection 6(2), or
 - ii. a court order prohibits disclosure.

Extended privacy protection for deceased individuals

12(2) In applying clause 17(4)(h) of *The Freedom of Information and Protection of Privacy Act* to a request for access to a Centre record, the clause must be read as referring to an individual who has been dead for more than 20 years rather than 10 years.

Restrictions on proactive disclosure do not apply

12(3) For certainty, a restriction imposed under section 8 does not affect a right of access under Part 2 of *The Freedom of Information and Protection of Privacy Act* or Part 2 of *The Personal Health Information Act*.

DISCLOSURE FOR RESEARCH PURPOSES

FIPPA governs research requests

13 Section 47 (disclosure for research purposes) of *The Freedom of Information and Protection of Privacy Act* applies to all Centre records. Sections 24 and 24.1 (disclosure for health research) of *The Personal Health Information Act* do not apply.

GENERAL PROVISIONS

No limit on powers of Ombudsman or Adjudicator

14 Nothing in this Act limits the powers and duties of the Ombudsman or the Information and Privacy Adjudicator under *The Freedom of Information and Protection of Privacy Act* or *The Personal Health Information Act*.

C.C.S.M. reference

15 This Act may be referred to as chapter N20 of *The Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

16 This Act comes into force on a day to be fixed by proclamation.

NOTE: S.M. 2015, c. 2 came into force by proclamation on July 13, 2015.

Part 8: Human Nature in Translation

Law has a special meaning to Aboriginal people. The “law,” to Aboriginal people, means rules that they must live by and it reflects their traditional culture and values.

— Report of the Aboriginal Justice Inquiry of Manitoba

Source: Report of the Aboriginal Justice Inquiry of Manitoba, volume 1, chapter 2.

Published by: Aboriginal Justice Implementation Commission (1999)

Stable URL: <http://www.ajic.mb.ca/volume.html>

Excerpts from the Report of the Aboriginal Justice Inquiry of Manitoba

Aboriginal Justice Implementation Commission

VOL. 1, CH. 2 – THE JUSTICE SYSTEM AND ABORIGINAL PEOPLE: ABORIGINAL CONCEPTS OF JUSTICE

Cultural Imperatives and Systemic Discrimination

Until we realize that [Aboriginal people] are not simply “primitive versions of us” but a people with a highly developed, formal, complex and wholly foreign set of cultural imperatives, we will continue to misinterpret their acts, misperceive their problems, and then impose mistaken and potentially harmful “remedies.”³³ [Emphasis in original]

It is exactly this misunderstanding that is at the heart of systemic discrimination. The justice system assumes much about the people who appear before it. The system assumes all persons will use the same reasoning when protecting their interests, when choosing their pleas, when conducting their defences, when confronting their accusers, when responding to detailed questions, and when showing respect and remorse to the court. It also assumes that punishment will affect all persons in the same manner.

When the justice system of the dominant society is applied to Aboriginal individuals and communities, many of its principles are at odds with the life philosophies which govern the behaviour of Aboriginal people. The value systems of most Aboriginal societies hold in high esteem the interrelated principles of individual autonomy and freedom, consistent with the preservation of relationships and community harmony, respect for other human (and non-human) beings, reluctance to criticize or interfere with others, and avoidance of confrontation and adversarial positions.

Methods and processes for solving disputes in Aboriginal societies have developed, of course, out of the basic value systems of the people. Belief in the inherent decency and wisdom of each individual person implies that any person will have useful opinions in any given situation, and should be listened to respectfully. Aboriginal methods of dispute resolution, therefore, allow for any interested party to volunteer an opinion or make a comment. The "truth" of an incident is arrived at through hearing many descriptions of the event and of related, perhaps extenuating, circumstances.

Impossible though it is to arrive at "the whole truth" in any circumstance, as Aboriginal people are aware, they believe that more of the truth can be determined when everyone is free to contribute information, as opposed to

a system where only a chosen number are called to testify on subjects carefully chosen by adversarial counsel, where certain topics or information are inadmissible, and where questions can be asked in ways that dictate the answers.

Because the purpose of law in Aboriginal society is to restore harmony within the community, not only the accused has to be considered. Other people who have been or might be affected by the offence, particularly the victim, have to be considered in the matter of “sentencing” and disposition.

In the Ojibway concept of order, when a person is wronged it is understood that the wrongdoer must repair the order and harmony of the community by undoing the wrong. In most cases, the responsibility is placed on the wrongdoer to compensate the wronged persons. This concept of order makes the individual responsible for the maintenance of harmony within the society. Restitution to the victim or victims is, therefore, a primary consideration.

The person wronged, bereaved or impoverished is entitled to some form of restitution. In the eyes of the community, sentencing the offender to incarceration or, worse still, placing him or her on probation, is tantamount to relieving the offender completely of any responsibility for a just restitution of the wrong. It is viewed by Aboriginal people as a total vindication of the wrongdoer and an abdication of duty by the justice system.

The accused also may have dependants who are involved in some way. Aboriginal people believe care has to be taken so that actions to control the offender do not bring hardship to others. The administration of justice in

Aboriginal societies is relationship-centred and attempts to take into account the consequences of dispositions on individuals and the community, as well as on the offender.

The differences between Aboriginal processes and the processes of the Canadian justice system are profound. The Canadian justice system, like other justice systems in the European tradition, is adversarial. When an accusation has been made against an individual, legal advisers representing plaintiff and defendant confront one another before an impartial judge or jury. Witnesses are called to testify for or against the accused; that is, to criticize or explain the actions of another. Guilt or innocence are decided on the basis of the argument that takes place between legal representatives. Retribution is demanded if the person accused is considered guilty.

The concepts of adversarialism, accusation, confrontation, guilt, argument, criticism and retribution are alien to the Aboriginal value system, although perhaps not totally unknown to Aboriginal peoples. In the context of Aboriginal value systems, adversarialism and confrontation are antagonistic to the high value placed on harmony and the peaceful coexistence of all living beings, both human and non-human, with one another and with nature. Criticism of others is at odds with the principles of non-interference and individual autonomy and freedom. The idea that guilt and innocence can be decided on the basis of argument is incompatible with a firmly rooted belief in honesty and integrity that does not permit lying. Retribution as an end in itself, and as an aim of society, becomes a meaningless notion in a value system which requires the reconciliation of an offender with the community and restitution for victims.

The same contradictions between Aboriginal values and the dominant

justice system result in a heavy burden being placed on Aboriginal accused, plaintiffs and witnesses who enter into the “white” justice system. Accusation and criticism (giving adverse testimony), while required in the Canadian justice system, are precluded in an Aboriginal value system which makes every effort to avoid criticism and confrontation. “Refusal or reluctance to testify, or when testifying, to give anything but the barest and most emotionless recital of events” appears to be the result of deeply rooted cultural behaviour in which “giving testimony face to face with the accused is simply wrong ... [and] where in fact every effort seems to have been made to avoid such direct confrontation.”³⁴ In Aboriginal societies, it may be ethically wrong to say hostile, critical, implicitly angry things about someone in his or her presence, precisely what our adversarial trial rules require.

Plea-making is another area where the mechanics of the Canadian justice system are in conflict with Aboriginal cultural values. Aboriginal individuals who, in fact, have committed the deeds with which they are charged are often reluctant or unable to plead not guilty because that plea is, to them, a denial of the truth and contrary to a basic tenet of their culture.

Some people have pointed out to our Inquiry that many Aboriginal people have trouble comprehending the “white” concept of guilt or innocence before a court, in terms of their own culture. There is no such concept in Aboriginal culture and so there are no words in their vocabulary for “guilty” or “not guilty.” This example comes from the Royal Commission on the Donald Marshall, Jr., Prosecution in Nova Scotia.

Q I was starting to ask you if you could explain to us the...meaning of the word “guilty” in Micmac.

Francis: There really is no such word as “guilty” in the Micmac language.

There is a word for “blame”. So an Indian person who’s not as knowledgeable let’s say in the English language if he were asked if he were guilty or not, he would take that to mean, “Are you being blamed or not?” and that’s one of the reasons I found that Native people were pleading guilty is because they suspect that the question was, “Is it true that you’re being blamed?” and the Native person would of course say, “Yes.” In other words, but the real question being, “Are you guilty or not guilty?” and the answer of course would be “Yes, I plead guilty,” thinking that’s blame. What they neglected to say was, “Yes, I’m guilty that I’m being blamed but I didn’t do it.”³⁵

Similar problems with language exist between Aboriginal people and the justice system in Manitoba. We had this exchange with Art Wambidee, a court worker from the Sioux Valley First Nation:

Q You mentioned as well problems in interpreting some of the words that are used in court. That issue was raised with us before by people in the north talking about the Cree language, that there is no concept for “guilty” or “innocent”. It doesn’t translate into one word. Is that the same thing with your language?

Art Wambidee: It’s the same thing, yes.

Q How would you, if you had to interpret “guilty” or “not guilty” for someone in your language? How would you interpret that? What would you make them try to understand?

A Well, I guess that I’d sort of interpret it, “Did you do that, or didn’t you?”

A final example is the implicit expectation on the part of lawyers, judges and juries that people standing accused before them should show remorse and a desire for rehabilitation. However, Aboriginal cultural imperatives demand that they accept, without emotion, what comes to them. Aboriginal people, therefore, might react contrary to the expectations of people involved in the justice system. In the Aboriginal person’s powerlessness, he or she simply may wait passively, with head respectfully bowed, to receive the judgment of the court. This attitude has been carried over into Aboriginal behaviour within the justice system.

In his effort to honour those pleading his case, he makes every attempt to agree to their requests, (to) give answers that please, and not to argue or appear adversarial.³⁶

Judges and juries can hardly be impartial when they misinterpret the words, demeanour and body language of individuals. Witnesses who refuse to testify, and people accused of crimes who refuse to plead and who show no emotion, are judged differently from those who react in ways expected by the system. Their culturally induced responses are misunderstood, sometimes as contempt, and may result in an unfair or inappropriate hearing and in inappropriate sentencing. To require people to act in ways contrary to their most basic beliefs and their ingrained rules of behaviour not only is an infringement of their rights — it is a deeply discriminatory act.

Language Issues

Lawyers, court communicators, family court workers, juvenile workers, Aboriginal community members and other concerned people stressed to our Inquiry the pervasiveness of language problems for Aboriginal people at every stage of Manitoba's system of justice.

These issues are not merely of language; they go to the heart of our society's obligation to ensure that people understand their legal rights and obligations, the nature of any charges against them and any legal proceedings affecting their rights. The right of all people to the use of a familiar language, preferably their first language, is not always met. Canadian courts do not automatically provide interpreters for Aboriginal people, nor do enforcement and corrections agencies. An even more fundamental question, beyond this immediate and pressing omission, is whether Aboriginal people understand the concepts behind the language used in the legal system, even when interpreters and translators are used.

Understanding Words

On a mechanical level, there are obvious problems when the police, lawyers

and the courts conduct business in a language that is not the mother language, nor even perhaps the second language, of the people involved. Translation and interpreter services often are not available. When offered, they may be inadequate or even prejudicial.

On the philosophical level, there is the serious question of whether the legal terms of the dominant society can be translated into Aboriginal languages. Even if that can be done, does the translation actually convey the same concept to Aboriginal people in their mother tongue as it does to European-language speakers?

Mechanical language problems have been identified at every step of the legal process. When individuals are approached by police under what police officers consider suspicious circumstances, they often cannot explain what may be, in fact, innocent situations. They may not understand the reasons for their arrests or the explanations of their rights. Remarks and explanations made in inadequate or broken English or French during arrest, transportation and booking have been misunderstood by arresting officers and used to incriminate some Aboriginal people. As northern paralegal Sylvia Grier told us, "Police reports were not accurate because of an inability of Aboriginal speakers to explain the circumstances to the police."

Aboriginal people who do not speak a dominant language cannot ask to use a telephone or request a public defender, or even ask for help to do so, if there are no translation services provided while they are booked. Translation is not readily available during consultations between the people accused and their lawyers. In the courtroom, according to Chief Philip Michel of Brochet, "by-standers are often sworn in to act as interpreters...[with] no guarantee of proper communication or unbiased translation."

It is obvious that defendants who do not speak English or French, or who do not speak the relevant language well, will be at a disadvantage during courtroom proceedings. It is not so obvious that many Aboriginal people who do speak a dominant language may have a command of that language which enables them to function in most areas of life, but which is not adequate for dealing with formal courtroom language. This problem is not restricted to Aboriginal peoples. Many lifelong, fluent and highly articulate anglophones and francophones cannot deal with “legalese.”

It is also apparent to observers that many people do not realize that they are missing or misunderstanding parts of the proceedings. As we learned from our hearings, many are reluctant to admit a language deficiency in public.

A fundamental right of all Canadians in the justice system ought to be the right to use a known language, preferably their mother tongue. Obvious as this may seem, and in spite of the fact that the *Charter of Rights and Freedoms* enshrines a person’s right to an interpreter, there is no program to ensure that Aboriginal people have access to an interpreter in court, nor are they told they have a right to one. Although there are a number of court communicators working in our courts, their mandate is “to assist Native Peoples in the development of a better understanding of their rights, interests, privileges, and responsibilities in relation to the criminal justice system. It is the role of the Court Communicator to assist Native Peoples through the process and attempt to bridge any gaps which may exist.”³⁷ In other words, their job is to interpret cultures, not languages, and their training prepares them mainly to interpret the customs of the dominant society to Aboriginal peoples — not the other way around.

Court communicators in the Manitoba program may provide interpreting services, but only unofficially, “due to a lack of other available resources.”³⁸ Interpreting is not part of their role. Local people are frequently hired as court interpreters, but many people see their services as inadequate because they are untrained, not properly qualified, and can give no guarantee of impartiality or neutrality.

Apparently, the only interpreter/translator training program in use in Canada is the one in the Northwest Territories. The program consists of a course and materials prepared for freelance and government interpreters. It is designed to help them understand existing court procedures, language and protocol.

However, translation problems are described within the context of English. The material does not deal with the differing concepts of Aboriginal and dominant society approaches to law and justice. Many of the inadequacies of the Legal Interpreter’s Handbook, the manual prepared for court communicators in the Northwest Territories, are the result of ethnocentricity and cultural misunderstanding by the authors.

The Manitoba *Native Court Interpreter’s Manual* has been judged by some Cree scholars and linguists to be an adequate beginning to the process of translating legal language into Aboriginal languages. However,

...problems encountered with the Court Manual and with the process of translating and verifying the words requested were all the result of the difficulty of creating a vocabulary for which there is no cultural concept in the language. The vocabulary has to be developed and agreed upon, then taught to the people it will impinge upon.³⁹

Understanding Legal Concepts

There are really two types of misunderstandings that arise from the translation of terms from one language into another. The first is easier to

understand: some words simply do not translate directly into an Aboriginal language. Much more difficult and, therefore, more prone to misunderstandings, is the attempt to convey the concepts implied by technical legal words.

Take the word “truth,” for example. “Truth” is a key concept in the Canadian legal system and, as such, is considered definite and definable. One swears “to tell the truth, the whole truth and nothing but the truth.” There are well-defined sanctions for people whom the court determines are not telling the “truth” or are committing perjury.

On the other hand, the Ojibway understanding of “truth” incorporates the concept that “absolute truth” is unknowable.

When an Ojibway says “niwii-debwe”, that means he is going to tell “what is right as he knows it”. A standard expression is “I don’t know if what I tell you is the truth. I can only tell you what I know.”⁴⁰

It is as a philosophical proposition that in saying a speaker casts his words and his voice as far as his perception and his vocabulary will enable him or her, that it is a denial that there is such a thing as absolute truth; the best and most the speaker can achieve and a listener expect is the highest degree of accuracy. Somehow that one expression, “w’dab-ahae”, sets the limits to a single statement as well as setting limits to truth and the scope and exercise of speech.⁴¹

Truth and knowledge, to an Ojibway, are always relative. Individuals can say only what they have observed or experienced, and are prepared to doubt whether they have done so accurately and correctly. Culturally ingrained habits of respect for others and for other people’s opinions, of doubt concerning one’s own rightness and righteousness, of willingness to be corrected, and of unwillingness to set oneself up as an authority or expert, account for the readiness with which Aboriginal witnesses appear to change their testimony.

An Aboriginal person challenged by someone perceived to be wiser, more powerful or more knowledgeable may agree readily that perhaps the other person is right. The Aboriginal person, in certain circumstances, is open to suggestions that he or she may have misunderstood, misperceived or misheard the events that are under examination.

The proceedings of the Royal Commission on the Donald Marshall, Jr., Prosecution contain an example of the Aboriginal understanding of the relativity of truth.

Q What about the questioning process, the questioning of a witness in the Courtroom, of a Micmac witness?

Francis: That was another area in which I found to be just devastating towards Native people who attempted to defend themselves in that — in almost all cases a Native person who was not that familiar with the English language would work so hard to try to satisfy the person who was asking the questions. If for instance, either a lawyer or a prosecuting lawyer was asking the questions to a native person on the witness stand and was not satisfied with the answer that he or she received, would continue to ask the question by checking a word here or there and asking the same question and the native person would change the answer from, let's say a "no" to a "yes" or a "yes" to a "no"...simply because he felt that whatever he was doing, he wasn't doing it right and he would attempt to satisfy the person asking the questions.

Q Regardless of the truth?

Francis: Regardless of the truth.⁴²

The exchange, odd though it sounds to anglophone ears, illustrates the point that the lawyer or prosecuting lawyer was searching for "absolute truth," a concept the witness' culture does not accept.

From the time of his or her arrest until sentencing, the "truth," as revealed by the Aboriginal individual, will be relative to his or her perceptions of the situation. This could very well mean many different versions of the "truth":

one during police interrogation, one in conversation with lawyer or lawyers, the one known widely in the Aboriginal community and, finally, the one given under cross-examination in court. In the Indian view, at no point would he or she be accused of lying. All the versions would be deemed reasonable in view of what might have happened, and no one would deem it necessary to judge one version more right than the others.

Other concepts embedded in Aboriginal culture and expressed through Aboriginal languages would be interpreted somewhat differently in English. Concepts of time and space, for example, are much less precise in Aboriginal languages, while they are exactly measured and divided into uniform units in English. More specifically, words describing time or distance in Aboriginal languages would tend to be vague, such as “near,” “too heavy” or “after sundown,” as compared to “three feet,” “110 pounds” and “a quarter after 11” in English.

The inability to name an exact time, or estimate a distance or a weight with precision, is due in large part to the irrelevance of these concepts to Aboriginal life. In a courtroom, the persistence of a lawyer in trying to elicit a precise response results in the witness becoming convinced that the lawyer is asking for verification of his or her own point of view.

The Aboriginal witness, when confronted by a question whether the distance was 10, 20 or one foot, is stumped. The information is of no interest to the witness but appears to be of considerable importance to the lawyer. The lawyer is in a position of authority and, therefore, is to be honoured by concurrence with his or her point of view, whatever it might be. So the Aboriginal witness will try to reassure the lawyer that the information is correct.⁴³

Many Aboriginal people are just as vague when it comes to such things as house numbers. An individual knows where home is in terms of how to get there, but may not bother to remember the house number. This very circumstance has resulted in many people being recorded mistakenly by the police as having “no fixed address,” thus affecting their prospects for bail or consideration during sentencing.

New Concepts — Old Words

Some words can be translated directly from an Aboriginal language into the English language, but they may not convey the same concept. Some concepts are totally foreign to Aboriginal thought and so new words or phrases have to be invented to approximate the meaning. Former court interpreter Barbara Whitford gave this example:

Q What about other phrases that you may have some difficulty or that an interpreter or a person who speaks, say, only Ojibway, would have difficulty understanding an English legal concept. Probation is an example....

Barbara Whitford: Actually, you have posed a very difficult question, as it just happened for me this afternoon and I was unable to be able to say to that woman, in my language, the question that you just asked.

Q The question about probation?

A I could come back and tell you. I need to think about that. I need to seek an older person, perhaps my mother, who might have that language. Are you understanding what I am saying?

Q Yes. So, you don't have a way of explaining it. You couldn't explain probation....

A Not right off the bat. As I'm sitting here, no, I cannot answer that, no.

Because most concepts of the dominant justice system differ from those of Aboriginal societies, words used to describe the concepts in an Aboriginal language have had to be newly coined or invented, or explained with words

that actually have different meanings. The way that Art Wambidee translates “probation” for an offender is, “it will mean that he’s dragging a rope behind him.” Barbara Whitford gave us other examples:

Q It has often been said that in Aboriginal languages, Ojibway and Cree and others, that there is no single word that captures what a lawyer is.

Barbara Whitford: Right.

Q If you were asked to interpret a lawyer, the word lawyer, how would you explain that?

A Well, I have a word for that, for lawyer.

Q What is that word?

A (Indian name for lawyer).

Q And what does that translate back in English meaning?

A Someone who defends you.

Q How about judge; do you have a word for judge?

A I was sitting there this afternoon contemplating that. No, not right offhand, I don’t. But it is along the same lines as what I just said, the person who makes the decision regarding.

Many words used in Aboriginal languages to describe the concepts of the Canadian legal system carry connotations which they may or may not have in English. The Cree term for “arrested” (literally, he or she was “caught”) implies a presumption of guilt, as does the Cree word for “accused.”

Even if legal proceedings were carried out entirely in Aboriginal languages, there would be problems describing concepts which are wholly Western. In European languages, for instance, “to appeal” is to act in a particular way, but in Ojibway the relevant word is an abstraction which means the “science of appealing,” or the “art of appealing.” It cannot be used to describe an act. For the word in Ojibway to be given the added meaning of action would be

to violate Ojibway grammatical structures and the manner of thought which underlies them.⁴⁴

Other words have been translated literally from English into Aboriginal languages. The English word “bail,” for instance, has been translated into Ojibway and means bail as in “bailing a boat.” The Ojibway word itself is unclear until it is put into context. To use the single Ojibway word for “bail,” as we use the English word in a courtroom context, would require widespread consultation and acceptance about the word or phrase among Ojibway speakers. Unlike English, Ojibway does not have a body of words with double meanings (homonyms) whose individual meanings are dependent on context.⁴⁵ The imposed introduction of a homonymic element would be another violation of Ojibway grammar and the worldview it expresses.

Many Ojibway words are imprecise, or perhaps it would be better to say that many words do not describe in detail. For instance, there is no way to distinguish between a defence lawyer and a Crown attorney in a short phrase. To explain the difference between these two kinds of lawyers would require a detailed explanation of the workings of the court in order for an Ojibway-only speaker to understand the concepts.

Finally, the English language and lifestyle are not threatened in North America, nor is change feared. Aboriginal people, on the other hand, are justifiably concerned about the erosion of their cultures and languages, and are understandably less open to incorporating “foreign” concepts and elements into their languages.

A basic problem in using Aboriginal languages in the legal system is that

until recently they did not exist in print. Some Aboriginal languages still have not been put into written form. This makes the standardization of words and their meanings difficult, if not impossible, in some cases. The same word in the same language can imply different meanings from community to community and from regional dialect to regional dialect.

If it is determined that Aboriginal languages are going to be used in the courts, then language development activities have to proceed to build a corpus of Aboriginal language terms which are universally understood and accepted with that language group.⁴⁶

Conclusion

Law has a special meaning to Aboriginal people. The “law,” to Aboriginal people, means rules that they must live by and it reflects their traditional culture and values. For instance, the Ojibway worldview is expressed through their language and through the Law of the Orders, which instructs people about the right way to live. The standards of conduct which arise from the Law of the Orders are not codified, but are understood and passed on from generation to generation. Correct conduct is concerned with “appropriate behaviour, what is forbidden, and the responsibility ensuing from each.”⁴⁷ The laws include relationships among human beings as well as the correct relationship with other orders: plants, animals and the physical world. The laws are taught through “legends” and other oral traditions.

Broadly speaking, Aboriginal people share many values with other peoples around the world. Yet, despite these similarities, Aboriginal cultures are vastly different from other cultures in Canada and throughout the world. They are unique and have no other place of origin. Despite this distinctiveness, Aboriginal cultures and ways of life have been assumed by

the dominant society to be without value or purpose. Past policies deemed it best that these cultures be stamped out altogether. Failing that, it was decided that Aboriginal cultures would have to melt into the mainstream in the hope they would assimilate and disappear.

Aboriginal cultures and the values they represent have not disappeared. Instead, they have adapted to new times and new situations. They remain vibrant and dynamic today. The rules of behaviour and the cultural imperatives of Aboriginal society continue to determine how an Aboriginal person views the surrounding world, and they influence that person's actions and reactions with other individuals and with society as a whole.

So do the laws, customs and traditions that have been defined by that culture. They define the concepts of justice in Aboriginal cultures. These laws respect the cultural imperatives that restrict interference and encourage restraint. Their primary purpose is to discourage disruption and to restore harmony when it occurs. They developed in other times and for other circumstances, but they remain powerful and relevant in Aboriginal society today.

We cannot continue to ignore the cultures of Aboriginal people and the laws, customs and values they generate. We cannot keep denying their very existence. To do so would be to compound past mistakes that have precipitated horrific consequences for Aboriginal people. If the justice system in Manitoba is to earn the respect of Aboriginal people, it must first recognize and respect their cultures, their values and their laws.

Notes

33. Ross, "Dancing with a Ghost," p. 16.

34. *Ibid.*, p. 5.

35. Francis, 2 November 1987, presentation quoted in Ahenakew, King and Littlejohn, "Indigenous Languages," p. 30.

36. Ahenakew, King and Littlejohn, "Indigenous Languages," p. 25.

37. *Native Court Interpreter's Manual* (Winnipeg: Department of the Attorney General, 1987), p. i.

38. *Ibid.*

39. Ahenakew, King and Littlejohn, "Indigenous Languages," p. 4.

40. *Ibid.*, p. 25.

41. Basil Johnston, Ojibway writer, in correspondence with Cecil King, 10 January 1990, quoted in Ahenakew, King and Littlejohn, "Indigenous Languages," p. 25.

42. Francis, 2 November 1987 presentation quoted in Ahenakew, King and Littlejohn, "Indigenous Languages," p. 26.

43. Ahenakew, King and Littlejohn, "Indigenous Languages," p. 29.

44. *Ibid.*, p. 81.

45. *Ibid.*

46. *Ibid.*, p. 83.

47. *Ibid.*, p. 23.

Author: Basel Al-Sheikh Hussein

Source: *Theory and Practice in Language Studies* (2012), Vol. 2, No. 3, pp. 642-646.

Published by: Academy Publisher

Stable URL:

<https://www.academypublication.com/issues/past/tpls/vol02/03/30.pdf>

The Sapir-Whorf Hypothesis Today

*Basel Al-Sheikh Hussein**

Abstract — The Sapir-Whorf's Linguistic Relativity Hypothesis provokes intellectual discussion about the strong impact language has on our perception of

* **Basel Al-Sheikh Hussein** was born in Burqa/Jordan 1947. He received his MA in Linguistics from Goethe University / W. Germany (1980), whereas PhD degree in Linguistics was received from Goethe University / W. Germany (1985). Over the past 20 years he was teaching linguistics to Arab Students in University of Basrah, Takreet University (Iraq) and in Al-Zaytoonah University, Al-Zarqa University and Al-Isra University (Jordan). Since then, he has been doing research in the field of linguistics, sociolinguistics and applied linguistics. Dr. Basel Al-Sheikh Hussein is currently an Assistant Prof. of English Linguistics, Al-Zaytoonah University of Jordan / College of Arts / Dept. of English.

the world around us. This paper intends to enliven the still open questions raised by this hypothesis. This is done by considering some of Sapir's, Whorf's, and other scholar's works.

I. INTRODUCTION

Needless to say that the "Linguistic Relativity Hypothesis", well-known as the Sapir-Whorf Hypothesis, has been the subject of controversy ever since it was first formulated. Its originator was the American anthropologist and linguist E. Sapir. He clearly expresses the principle of this hypothesis in his essay "The Status of Linguistics as a science" (cf. Sapir, selected Essays, 1961). B.L. Whorf reformulated the hypothesis in his 1940 published essay "Science and Linguistics" (cf. Whorf, Selected Writings, 1956).

The Sapir-Whorf hypothesis proclaimed the influence of language on thought and perception. This, in turn, implies that the speakers of different languages think and perceive reality in different ways and that each language has its own world view. The issues this hypothesis raised not only pertain to the field of linguistics but also had a bearing on Psychology, Ethnology, Anthropology, Sociology, Philosophy, as well as on the natural sciences. For, if reality is perceived and structured by the language we speak, the existence of an objective world becomes questionable, and the scientific knowledge we may obtain is bound to be subjective. Such a principle of relativity then becomes a principle of determinism. Whether the language we speak totally determines our attitude towards reality or whether we are merely influenced by its inherent world view remains a topic of heated discussion.

In this paper, the author only intends to enliven the already started discussion of the still unanswered questions raised by this hypothesis. However, a short general background as to the real initiators of the Linguistic Relativity Hypothesis is inevitable.

II. GERMANS AS THE INITIATORS OF THE LINGUISTIC RELATIVITY HYPOTHESIS

Sapir and Whorf were by no means the initiators of the notion of linguistic relativity. The idea that the language system shapes the thinking of its speakers was first formulated by the German philosophers J.G. Herder (1744-1803) and W.V. Humboldt (1767-1835). However, it was Humboldt's philosophy of language that influenced linguistics. He felt that the subject matter of linguistics should reveal the role of language in forming ideas. That is to say, if language forms ideas, it also plays a role in shaping the attitudes of individuals. Hence, individuals speaking different languages must have different world views.

III. SAPIR'S AND WHORF'S VIEWS ON LANGUAGE

A. Sapir

For Sapir, language does not reflect reality but actually shapes it to a large extent. Thus, he recognizes the objective nature of reality; but since the perception of reality is influenced by our linguistic habits, it follows that language plays an active role in the process of cognition. Sapir's linguistic relativity hypothesis can be stated as follows:

- a) The language we speak and think in shapes the way we perceive the world.
- b) The existence of the various language systems implies that the people who think in these different languages must perceive the world differently.

The idea that a given language shapes reality resembles Humboldt's idea of the world view inherent in every language. Sapir was acquainted with Humboldt's views, but his ideas on the role of language in the process

of cognition were not genetically linked with Humboldt's opinions. Sapir reflections on language were based on empirically verifiable data resulting from his own work on American Indian languages.

Sapir realized that there is a close relationship between language and culture so that the one cannot be understood and appreciated without knowledge of the other. Sapir's views on the relationship between language and culture are clearly expressed in the following passage taken from his book "Language",

"Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society. It is quite an illusion to imagine that one adjusts to reality essentially without the use of language and that language is merely an incidental means of solving specific problems of communication or reflection. The fact of the matter is that the 'real world' is to a large extent unconsciously built up on the language habits of the group...We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation." (Sapir, 1929b, P.207).

B. Whorf

The formulation of the linguistic relativity, for which Whorf is famous, was the result of his prolonged study of the Hopi language (an American Indian language). His first attempts at interpreting the Hopi grammar according to the usual Indo-European categories were abandoned when they produced unexplainable irregularities. The linguistic structures that he found were very different from those of his mother tongue, English. Whorf argues that this implies a different way of thinking. Since thought is expressed through language, it follows that a differently structured language must pattern thought along its lines, thus influencing perception. Consequently, a Hopi speaker who perceives the world through the medium of his language must see reality accordingly.

Whorf's formulation of the linguistic relativity hypothesis is more

radical than Sapir's but it is the one that is referred to as the Sapir-Whorf hypothesis. This hypothesis is not homogeneous as its name would indicate.

Sapir did not doubt the existence of an objective world. He said that human beings do not live in the objective world alone, but that the real world is, to a large extent, unconsciously built up on the language habits of the group.

Whorf stated that the world is presented in a kaleidoscopic flux of impressions which has to be organized by the linguistic system in our minds. This would seem to make the objective world into something totally subjective for Whorf.

Whorf extended his master's (Sapir's) ideas, and went much further than saying that there was a 'predisposition'; in Whorf's view, the relationship between language and culture was a deterministic one.

The strongest Whorf statement concerning his ideas is the following:

"The background linguistic system (in other words, the grammar) of each language is not merely a reproducing instrument for voicing ideas but rather is itself the shaper of ideas, the program and guide for the individual's mental activity, for his analysis of impressions, for his synthesis of his mental stock in trade. Formulation of ideas is not an independent process, strictly rational in the old sense, but is part of a particular grammar, and differs, from slightly to greatly, between different grammars. We dissect nature along lines laid down by our native languages. The categories and types that we isolate from the world of phenomena we do not find there because they stare every observer in the face; on the contrary, the world is presented in a kaleidoscopic flux of impressions which has to be organized by our minds — and this means largely by the linguistic systems in our minds. We cut nature up, organize it into concepts, and ascribe significances as we do, largely because we are parties to an agreement to organize it in this way — an agreement that holds throughout our speech community and is codified in the patterns of our language. The agreement is, of course, an implicit and unstated one, but its terms are absolutely obligatory; we cannot talk at all except by subscribing to the organization and classification of data which the agreement decrees." (Carroll, 1956, pp. 212-14).

Even though Whorf's view in the above quotation is a deterministic one, he does not claim that a language completely determines the world-

view of its speakers; he states that “this fact [the close relationship between language and its speakers, world-view] is very significant for modern science, for it means that no individual is free to describe nature with absolute impartiality but is constrained to certain modes of interpretation even while he thinks himself most free. The person most nearly free in such respects would be a linguist familiar with very many widely different linguistic systems. As yet no linguist is in such position. We are thus introduced to a new principle of relativity, which holds that all observers are not led by the same physical evidence to the same picture of the universe, unless their linguistic backgrounds are similar, or can in some way be calibrated” (Carroll, 1956, p. 214).

Different speakers, then, view the world differently, and even sophisticated linguists aware of structural differences between languages cannot see the world as it is without the screen of language. Fishman (1960 and 1975 c) considered the kinds of claims the Sapir-Whorf hypothesis makes. Among these claims is that, if speakers of one language have certain words to describe things and speakers of another language lack similar words, then speakers of the first language will find it easier to talk about those things. This is the case if we consider the technical terms used in different sciences; for instance, physicians talk easily about medical phenomena, more than anyone else. A stronger claim is that, if one language makes distinctions that another does not make, then those who use the first language will more readily perceive the differences in their environment which such linguistic distinctions draw attention to. If you must classify ‘camels’, differently from someone who is not asked to make these distinctions.

The application of Whorf’s views to the area of grammar makes his claims stronger, since classification systems that belong to sex, number, time, are both more subtle and more pervasive. The effect of such

grammatical systems is stronger on language users than vocabulary differences alone. The strongest claim of all is that the grammatical categories available in a particular language not only help the users of that language to perceive the world in a certain way but also at the same time limit such perception. You perceive only what your language allows you, or predispose you, to perceive. Your language controls your world-view. Speakers of different languages will, therefore, have different world-views.

Whorf acquired his views about the relationship between language and the world through his work as a fire prevention engineer, and through his work, as Sapir's student, on American Indian languages, especially on the Hopi language of New Mexico. Whorf found through his work as a fire prevention engineer that English speakers used the words 'full' and 'empty' in describing gasoline drums in relation to their liquid content alone; so, they smoked beside 'empty' gasoline drums, which weren't actually 'empty' but 'full' of gas vapor. Whorf was led by this and other examples to the conclusion that "the cue to a certain line of behavior is often given by the analogies of the linguistic formula in which the situation is spoken of, and by which to some degree it is analyzed, classified, and allotted its place in that world which is to a large extent unconsciously built up on the language habits of the group" (Carroll, 1956, P. 137).

The real work that led Whorf to make his strongest claims was his involvement in American Languages, in particular his contrastive studies on the Hopi Indian Language. He contrasted the Hopi linguistic structure with that of English, French, and German. Whorf found that these languages share many structural features that he named 'Standard Average European' (SAE). Whorf, then, came to the conclusion that Hopi and SAE differ widely in their structural characteristics. For example, Hopi grammatical categories provide a 'process' orientation toward the world, whereas the categories in SAE give SAE speakers a fixed orientation toward time and space so that

they not only ‘objectify’ reality in certain ways but even distinguish between things that must be counted, e.g., trees, hills, and sparks, and those that need not be counted, e.g., water, fire, and courage. In SAE ‘events occur’, ‘have occurred’, or ‘will occur’, in a definite time; i.e., present, past, or future; to speakers of Hopi, what is important is whether an event can be warranted to have occurred, or to be occurring, or to be expected to occur.

Whorf believed that these differences lead speakers of Hopi and SAE to view the world differently. The Hopi see the world as essentially an ongoing set of processes; objects and events are not discrete and countable; and time is not apportioned into fixed segments so that certain things recur, e.g., minutes, mornings, and days. In contrast, speakers of SAE regard nearly everything in their world as discrete, measurable, countable, and recurrent; time and space do not flow into each other; sparks and flames are things like pens and pencils; mornings recur in twenty-four hour cycles, and past, present, and future are every bit as real as sex differences. The different languages have different obligatory grammatical categories so that every time a speaker of Hopi or SAE says something, he or she must make certain observation about how the world is structured because of the structure of the language each speaks.

In this view, then, language provides a screen or filter to reality; it determines how speakers perceive and organize the world around them, both the natural world and the social world. Consequently, the language you speak helps to form your world-view. It defines your experience for you; you do not use it simply to report that experience. It is neutral but gets in the way, imposing habits of both looking and thinking.

Those who find the Whorfian hypothesis attractive argue that the language a person speaks affects that person’s relationship to the external world in one or more ways. If language A has a word for a particular concept, then that word makes it easier for speakers of language A to refer

to that concept than speakers of language B, who lack such a word and are forced to use a circumlocution. Moreover, it is actually easier for speakers of language A to perceive instances of the concept. If a language requires certain distinctions to be made because of its grammatical system, then the speakers of that language become conscious of the kinds of distinctions that must be referred to; for example, sex, time, number, and animacy. These kinds of distinctions may also have an effect on how speakers learn to deal with the world, i.e., they can have consequences for both cognitive and cultural development.

Boas (1911) long ago pointed out that there was no necessary connection between language and culture or between language and race. People with very different cultures speak languages with many of the same structural characteristics, e.g., Hungarians, Finns, and the Samoyeds of northern Siberia; and people who speak languages with very different structures often share much the same culture, e.g., Germans and Hungarians, or many people in southern India, or the widespread Islamic culture. Moreover, we can also dismiss any claim that certain types of languages can be associated with ‘advanced’ cultures and that others are indicative of cultures that are less advanced. As Sapir himself observed on this last point (1921, p.219) “when it comes to linguistic form, Plato walks with the Macedonian swineherd, Confucius with the head-hunting Savage of Assam”.

It might be useful to take a quick look at some of Whorf’s essential works and at the way he develops his grammatical method since this has contributed to the understanding of the Hopi language and since the study of the Hopi language lays the groundwork for his formulation of the hypothesis.

C. Whorf's Essential Works

In his essays: “A Linguistic Consideration of Thinking in Primitive Communities” (1936, see selected writings. Ed: J.B. Carroll. MIT, New York...1956) and “Grammatical Categories” (1937, above source), Whorf draws the attention to the fact that traditional grammar only describes the external formal structure of a language and overlooks the linguistic relations that are not accounted for by sounds. These unmarked internal relations are what Whorf terms “covert categories”. As an example, he cited the case of the English gender. Except for the pronouns, HE, SHE, IT, there is no real classification of gender in English, which does not stop this category from being operative. Names are unmarked for gender, but the native speaker knows whether they refer to a man or a woman, and picks out the appropriate pronoun.

The “overt categories” are those that are marked by a sound and detected by a written sign.

The Navaho (an American Indian language) classification for objects is a covert one. It classifies different sorts of objects according to attributes like long, round, etc. Whorf refers to them as CRYPTOTYPES, as opposed to the PHENOTYPES with a clear meaning and formal mark. Since CRYPTOTYPES are not marked, the speaker is not aware of them.

The presence of CRYPTOTYPES and the fact that we are unaware of their functioning, led Whorf later (Science and Linguistics, 1940) to conclude that thought is patterned by speech and therefore both thinking and speaking are influenced by the grammatical structure of our mother tongue.

In general, Whorf's views on language touch upon the problem of reality and perception, logic and cognition. In his “Language and Logic” (1941), Whorf attempts to demonstrate that common logic is not universal but dependent on the language of the speaker. The average person does not realize the influential nature of linguistic structure on his cognitive

processes.

Whorf translated different languages into one another and obtained completely different structures and meanings. Some languages like Nootka (an American Indian language) do not divide their sentences into individual words. Whorf blames the Greeks for building up a contrast system and making it a law of reason, such as: Verb/Subject; Action/Actor, and Subject/Predicate. He says the European languages are built up on this contrast and consequently tend to objectivist phenomena. This “bipartition ideology of nature” common to European languages has influenced modern science in the way they “see actions and forces where it sometimes might be better to see states” (p.244). Therefore, Whorf cautions us not to accept the biased world view of a single language. He insists upon the necessity of analyzing many different language structures in order to correct the provisional analysis of reality and world view that western culture has imposed on modern science. That is to say, to avoid the despotism of language, Whorf proposes that we learn many differently structured languages.

IV. EVALUATION OF THE ISSUES RAISED BY THE SAPIR-WHORF HYPOTHESIS

Apart from Whorf, the study of the Hopi language has been the continuing occupation of the American Team of Linguists, C.C. Voegelin and F.M. Vangelis. Their first concern was the systematization of the Hopi Vocabulary. This was intended to facilitate the classification of the Hopi grammatical categories. That is to say, their approach is a linguistic one; its aim is not primarily to verify Whorf’s data in order to prove or disprove the Sapir-Whorf hypothesis. This was done by the German linguists, H. Gipper and E. Malotki. Malotki says that “a different kind of linguistic emphasis leads to a certain kind of linguistic thinking” (1979:301). Gipper is just as

conscient. He states that our language does influence our conscience, we grow up and learn its structures unconsciously and we articulate our thoughts according to its grammar. There can be no doubt that our mother tongue influences our thinking process, but since we are capable of initiating changes in our language and in our thinking habits, the question of relativity cannot be posed in terms of absoluteness or determinism, but in terms of degree (cf. 1972).

By restating the problem in terms of degree, it is possible to unite the mirror theory with the creation theory, which asserts the creation of reality by the medium of language. Doing this would allow the following combination: in the first case, we perceive the existence of an objective reality, but in the second case, as adults, we perceive it out of habit through the medium of our language which structures our impressions and accentuates or disregards certain phenomena. The question is: to what degree does language influence us?

Language also affects our perception: the remembering of color cards by recalling their names; remembering figures according to the label we gave them during perception, etc. Carroll has demonstrated in a test given to Navaho and English speaking children that Navaho children classified objects according to their shapes, thus illustrating how perception can influence cognition. Cognition is also influenced by our linguistic structures.

V. CONCLUSION

Whorf may not have been right on all counts, but he was not wrong either. The fact that language plays a role in shaping our thoughts, in modifying our perception and in creating reality is irrefutable. Gipper phrased the question properly when he asked: to what extent does language influence us? In view of the positive (favorable to the hypothesis), or neutral

results which the different tests have yielded, it would seem that the question of linguistic relativity is still a subject of controversy today. Although the search for linguistic universals has been intensified, it will be impossible to determine what is universal, if we don't know what is particular. Linguistic forms and grammatical categories need not appear so different, if their functions are similar.

References

- Boas, F. (1911). *Handbook of American Indian languages*. Introduction, Washington; Government Printing House, Part I, pp. 5-83.
- Bright, J.O. and Bright, W. (1965). Semantic Structures in Northwestern California and the Sapir-Whorf Hypothesis, *American Anthropologist* 67, No. k, part 2, pp. 249-258.
- Brown, R.L. (1967). *Wilhelm von Humboldt's conception of Linguistic Relativity*. The Hague/Paris: Mouton.
- Buehler, k. (1978). *Sprachtheorie. Die Darstellungsfunktion der sprache*. Frankfurt/Berlin/Wien: Ullstein.
- Carroll, J.B. (ed.) (1956). *Language, Thought, and Reality: Selected writings of Benjamin Lee Whorf*. Cambridge, Mass.: MIT Press.
- Carroll, J.B. (1964). *Language and Thought*. Englewood Cliffs (N.Y.): prentice Hall.
- Carroll, J.B. (1963). Linguistic Relativity, Contrastive linguistics, and Language Learning. *International Review of Applied linguistics in Language Teaching* I. pp. 1-20.
- Chafe, W.L. (ed., 1976). *American Indian Languages and American linguistics*. Lisse: The Peter de Ridder Press.
- Davies, I. (1998). "A Study of Colour Grouping in Three Languages: A Test of Linguistic Relativity Hypothesis." *British Journal of Psychology* 89 (3):433-453.

- Davies, I., P. Sowden and D. Jerrett. (1998). "A Cross-cultural Study of English and Setswana Speakers on a Colour Triads Task: A Test of the Sapir-Whorf Hypothesis. *British Journal of Psychology* 89:1-15.
- Fearing, F. (1954). An Examination of the conception of Benjamin Whorf in the Light of the Theories of perception and Cognition. In: *Language in Culture*, ed.: h. Hoijer. Chicago: University Press. Pp. 47-78.
- Fishman, J.A. (1960). A Systematization of the Whorfian Hypothesis. *Behavioral Science*, 5:323-39.
- Fishman, J.A. (1972 c). *The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society*. Rowle, Mass.: Newbury House.
- Gipper, h. (1972). *Gibt es ein Sprachliches Relativitätsprinzip? Untersuchungen zur Sapir-Whorf Hypothesen*. Frankfurt/Main; S. Fischer.
- Hackett, Ch. F. (1954). Chinese versus English. An Exploration of the Whorfian Thesis. *Language in Culture*, ed.; h. Hoijer, Chicago; University Press. pp. 106-123.
- Humboldt, W. von (1607). Ueber die Verschiedenheit des menschlichen Sprachbaues. *Gesammelte Schriften*, Vol.6, part I. Berlin: B. Bohr's Verlag. pp. 111-303.
- James, H.L. (1956). *The Hopi Indians: Their History and Their Culture*. Caldwell (Idaho): The caxton Printers.
- Lee, P. (1997). "Language in Thinking and Learning: Pedagogy and the New Whorfian Framework." *Harvard Education Review* 67:430-471.
- Lenneberg, E.H. (1953). Cognition in Ethnolinguistics. *Language* 29. pp.463-471.
- Lucy, J. (1997). "Linguistic Relativity." *Annual Review of Anthropology* 26:291-313.
- Malotki, E.(1979). *Hopi-Raum. Eine sprachwissenschaftliche Analyse der*

- Raumvorstellungen in der hopi Sprache*. Tuebingen; Gunter Nau Verlag.
- Miller, R.L. (1968). The Linguistic Relativity Principle and Humboldtian Ethnolinguistics. *A History and Appraisal*. The Hague/Paris: Mouton.
- Pinnow, H.J. (1974). *Studie zur Verbstammvariation im Navaho*. Indiana, Beiheft 2. Berlin; Gebr. Mann, (XIII).
- Ross, P.E. (1992). "New Whoof in Whorf: An Old Language Theory Regains its Authority." *Scientific American* 266 (2):24-26.
- Sapir, E. (1961). *Culture, Language and Personality*. Selected Essays. Ed.: David G. Mandelbaum, Berkeley and Los Angeles: University of California Press.
- Sapir, E. (1949). *Language: An introduction to the Study of Speech*, 8th ed., New York; Harcourt, Brace & Co.
- Sapir, E. (1921). *Language: An Introduction to the Study of Speech*. New York: Harcourt, Brace.
- Sapir, E. (1929 a). Male and Female Forms of speech in Yana. In S.W.J. Teeuwen (ed.), *Donum Natalicum Schrijnen*. Nijmegen: Dekker & Van de Vegt.
- Sapir, E. (1929b). The Status of Linguistics as a science, *Language*, 5:207-19.
- Schaff, A. (1973). *Language and Cognition*. New York: McGraw-Hill 1.
- Steinfatt, T. (1989). "Linguistic Reality: Toward a Broader View." *Language, Communication and Culture: Current Directions*. Newbury Park, CA: Sage.
- Voegelin, Ch. F. and Voegelin, F.M. (1957). Hopi Domains: A Lexical Approach to the Problem of Selection. *Supplement to International Journal of American Linguistics* 23.
- Whorf, B.L. (1946). The Hopi Language, Toreva Dialect. *Linguistic Structures of Native America*, ed.: H. Hoewe. New York; Viking Fund

Publications in Anthropology. pp. 158-183.

Whorf, B.L. (1956). *Language, Thought and Reality*. Selected Writings.

Ed.: J.B. Carroll. MIT, New York: J. Wilky/London: Chapinaon & Hall.

Appendix: Sample Course Syllabus
and List of Additional Reading
Material

SYLLABUS & TIMETABLE

LAW 3980: Oral History, Indigenous Peoples, and the Law

Dr. Bryan P. Schwartz

Oral history can present greater opportunities for understanding historical events than the recitation of bare facts. It can reveal the intellectual, social, spiritual and emotional cognition of the event for the group in question — John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39:1 Osgoode Hall LJ 1.

Companion Text: Bruce Granville Miller, *Oral History on Trial* (Vancouver: UBC Press, 2011), online.

Class Number & Date	Class Topics and Required Readings
Lecture #1: <i>Introduction to Oral Histories in Practice:</i> <i>Cross Cultural Training & First Nations Ancestry</i>	<p>After a brief introduction to the learning objectives of the course, a few concepts of oral history and law are provided by Dr. Bryan P. Schwartz. Indigenous oral history, tradition, and cross-cultural implications are discussed by Joan Jack.</p> <p><u>Guest Speaker: Joan Jack</u> – An Anishinaabe Ikwe from the Berens River First Nation, Mrs. Jack is an accomplished lawyer and policy adviser.</p>

	<p><u>Required Readings:</u></p> <ul style="list-style-type: none"> • Paul Thompson, “The Voice of the Past: Oral History” in Robert Perks & Alistair Thomson, eds, <i>The Oral History Reader</i> at 25-31. • Joan Lovisek, “Transmission Difficulties: The Use and Abuse of Oral History” (2002) in H.C. Wolfart, ed, <i>Papers of the 33rd Algonquian Conference</i>, online: <https://ojs.library.carleton.ca/index.php/ALGQP/article/view/1125/1007>. - <i>Buffalo v Canada</i>, 2005 FC 1622, paras 38-45 (summarizing the cases of Van der Peet, Delgamuukw, and Mitchell). • <i>Tsilhqot’in Nation v British Columbia</i>, 2014 SCC 44, [2014] 2 SCR 257 (headnote). • Adam Benforado, <i>Unfair: The New Science of Criminal Injustice</i> (Broadway Books, 2016), ch 6 at 108-132 (“The Corruption of Memory: The Eyewitness”).
<p>Lecture #2: <i>Eyewitness Testimony in Modern-Day Trials</i></p>	<p>This class touches on particular legal, practical, and psychological implications of eyewitness testimony in the context of modern-day trials.</p>

	<p><u>Guest Speaker: Dr. David Ireland</u> – Dr. Ireland is a Professor at the Faculty of Law at the University of Manitoba where he teaches criminal law and procedure, evidence law and advocacy. His research program centres on improving the delivery of criminal justice in Canada.</p> <p><u>Required Readings:</u></p> <ul style="list-style-type: none"> • Elizabeth Loftus, “Our changeable memories: Legal and practical implications” (2003) 4 Nature Reviews Neuroscience at 231-234. • Lee Stuesser, “Experts on Eyewitness Identification: I Just Don't See It” (2006) 31 Man LJ 543. • Bruce MacFarlane, “Interview: Janet Reno on Wrongful Conviction” (2006) 31 Man LJ 565. • Rupert Ross, Dancing with a ghost: Exploring Aboriginal Reality, 1st ed, (Toronto, Ontario: Penguin Random House Canada, 2006) ch 1 (“Seeing Through Rules”) at 2-6, ch 2 (“Signals of Difference”) at 7-12.
<p>Lecture #3: <i>Traditional</i></p>	<p>Flora Zaharia will introduce the class to Indigenous storytelling. Unique and potent</p>

<p><i>Storytelling</i></p>	<p>aspects of this form of orality will be discussed.</p> <p><u>Guest Speaker: Flora Zaharia</u> - A storyteller, born on Kainaiissksahkoyi in Southern Alberta; she, her parents, and siblings are residential school survivors.</p> <p><u>Required Readings:</u></p> <ul style="list-style-type: none"> • Alessandro Portelli, “The peculiarities of oral history” (1981) 12:1 History Workshop J at 96-107. • Aman Sium & Eric Ritskes, “Speaking truth to power: Indigenous storytelling as an act of living resistance” (2013) 2:1 Decolonization: Indigeneity, Ed & Soc’y 1. • Chimamanda Ngozi Adichie, “The Danger of a Single Story” TEDGlobal (2009), online: <ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/>.
<p><i>Lecture #4: The National Centre for Truth and Reconciliation & Oral History</i></p>	<p>Raymond Frogner will lead the class in an introduction to archival science and oral history, and his role with the National Centre for Truth and Reconciliation. Mr. Frogner will also discuss the role his organization plays, as an archival repository, in truth and reconciliation.</p>

Guest Speaker: Raymond Frogner – Mr.

Frogner is the Head of Archives at the National Centre for Truth and Reconciliation at the University of Manitoba.

Required Readings:

- Brett Loughheed, Ry Moran & Camille Callison, “Reconciliation through Description: Using Metadata to Realize the Vision of the National Research Centre for Truth and Reconciliation” (2015) 53 Cataloging & Classification Quarterly at 596-614.
- Raymond Frogner, “”Lord, Save Us from the Et Cetera of the Notary”: Archival Appraisal, Local Custom, and Colonial Law” (2015) 79 Archivaria at 121-158.
- NCTR, “Let Our Truth Be Heard” (October 26, 2011), video online:

<<https://collections.irshdc.ubc.ca/index.php/Detail/objects/1685>>.

- NCTR, “Hear Our Voices” (October 26, 2011), video online:

<<https://collections.irshdc.ubc.ca/in>

	<p>dex.php/Detail/objects/1630>.</p> <ul style="list-style-type: none"> • The National Research Centre for Truth and Reconciliation Act, SM 2015, c 2, CCSM c N20, online: <https://web2.gov.mb.ca/bills/40-4/b006e.php>.
Oral History Workshops	<p>Class attendance for the Oral History Workshops is mandatory; Kimberly Moore, of the University of Winnipeg Oral History Centre, will lead the class.</p> <p><u>Host: Kimberly Moore</u> – As instructor from the Oral History Centre.</p> <p><u>Required Reading:</u></p> <ul style="list-style-type: none"> • Union of British Columbia Indian Chiefs, “Broken Promises, Stolen Lands” at ch 6 (“Oral History”), online: <www.ubcic.bc.ca/stolenlands_brokenpromises>.
Additional Module: <i>Anthropological & Other Types of Historical Evidence</i>	<p>This module covers disparate and unique forms of historical evidence, historicity as a topic, as well as anthropological and other angles of viewing history.</p> <p>During Kim’s 3 weeks of lectures, you have the option of reading this material to write a reflection on.</p>

	<p><u>Readings:</u></p> <ul style="list-style-type: none"> • Eموke J Szathmary, “The Changing History of the First Discovery of America” in Cristian Réka, Kökény Andrea, & Szönyi György, eds, <i>Confluences: Essay Mapping the Manitoba-Szeged Partnership</i> (Szeged: JATEPress. 2017) at 29-50. • Cathay YN Smith, “Oral Tradition and the Kennewick Man” (2016) 126 Yale LJ F 216, online: <http://scholarship.law.umt.edu/faculty_lawreviews/135>. • Alexander Von Gernet, “What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation” in Owen Lippert, ed, <i>Beyond the Nass Valley</i> (Vancouver, BC: Fraser Institute, 2000) at 103-127.
<p>Lecture #5: <i>African Oral History</i></p>	<p>This class focuses on African oral history and tradition. Among other topics, Dr. Sibanda will discuss African oral history and tradition.</p> <p><u>Guest Speakers: Dr. Eliakim Sibanda</u> – Dr.Sibanda is a Professor in the Department of History at the University of Winnipeg. His teaching areas include: African</p>

	<p>Liberation Movements; History of Agrarian Policies (focus on communal land tenure and Peasant agriculture); Biographical History; Oral History; Migration and Migrant Labour History of Southern Africa; Ethnicity, Race, Gender and Class in 20th Southern Africa.</p> <p><u>Required Readings:</u></p> <ul style="list-style-type: none"> • Lynn Abrams, Oral History Theory (New York: Routledge, 2010), ch 2 (“The Peculiarities of Oral History”). • David Henige, “Oral Tradition as a Means of Reconstructing the Past” in John Edward Philips, ed, Writing African History at 169. • Caroline Gerdes, “How Historically Accurate Is ‘Roots’? The Book It's Based On Has Generated Controversy” Bustle (May 30, 2016), online: bustle.com/articles/163170-how-historically-accurate-is-roots-the-book-itsbasedon-has-generated-controversy>. • Eleanor Bley Griffiths, “Is Roots a true story? Why this tale of slavery and family history is so controversial” RadioTimes (March
--	--

	<p>1, 2017), online: radiotimes.com/news/2017-03-01/is-roots-a-true-story-why-this-tale-of-slavery-and-family-history-is-so-controversial/.</p>
<p>Lecture #6: <i>Jewish and Biblical Oral History</i></p>	<p>This class covers Jewish and Biblical oral history and tradition.</p> <p><u>Guest Speaker: Dr. Justin Jaron Lewis</u> – Dr. Lewis is a Professor in the Department of Religion at the University of Manitoba. Dr. Lewis’ research has centred on early Yiddish literature and on Hasidic Judaism, especially its storytelling tradition.</p> <p><u>Require Readings:</u></p> <ul style="list-style-type: none"> • Yosef Hayim Yerushalmi, <i>Zakhor: Jewish History and Jewish Memory</i> (Seattle, WA: University of Washington Press, 1982), ch 1 (“Biblical and Rabbinic Foundations: Meaning in History, Memory, and the Writing of History”).
<p>Lecture #7: <i>Courts of Law & Oral Traditions</i></p>	<p>This class explores the current position of oral history and tradition in Canadian courtrooms, while looking also to the past and future. Dr. Borrows will discuss oral history and tradition in Canada.</p>

	<p><u>Guest Speaker: Dr. John Borrows</u> – Dr. Borrows is a Professor of Constitutional and Aboriginal law at the University of Victoria, and the Canada Research Chair in Indigenous Law.</p> <p><u>Required Readings:</u></p> <ul style="list-style-type: none"> • John Borrows, “Listening for a change: The Courts and Oral Tradition” (2001) 39:1 Osgoode Hall LJ 1. • Aimée Craft, “Reading Beyond the Lines: Oral Understandings and Aboriginal Litigation” (Paper presented to the Canadian Institute for the Administration of Justice Conference, October 11, 2013, revised December 2013). • Kirsten Manley-Casimir, “Creating Space for Indigenous Storytelling in Courts” (2013) 27:2 CJL & Soc’y at 231-247.
<p>Lecture #8: <i>First Nations’ Ancestry, Residential School Survivors, and MMIWG</i></p>	<p>This class handles important topics of First Nations ancestry, residential school survivors, MMIWG, and the current state and role of oral histories.</p> <p><u>Guest Speaker: Jennifer Wood</u> Jennifer is a proud Ojibway from Neyaashiinigmiing First Nation (Bruce</p>

	<p>Peninsula) Ontario, now residing in Manitoba, Canada. She has worked as the senior political staff person for Grand Chief Sheila North Wilson of Manitoba Keewatinowi Okimakanak (MKO), a governance organization representing 31 First Nations in northern Manitoba. Earlier in her career, Jennifer had also worked for nearly a decade for the Assembly of Manitoba Chiefs as both the Coordinator of the Residential Schools Settlement Agreement and head of Intergovernmental Affairs.</p> <p><u>Required Readings:</u></p> <ul style="list-style-type: none"> • Sean Field, “Disappointed Remains: Trauma, Testimony, and Reconciliation in Post-Apartheid South Africa” (2010) in Donald A Ritchie, ed, The Oxford Handbook of Oral History, 1st ed, ch 9 at 142-158. • Tricia Logan, “Questions of Privacy and Confidentiality after Atrocity: Collecting and Retaining Records of the Residential School System in Canada” (2018) 12:1 Genocide Studies Int’l at 92-102. • The National Inquiry into Missing and Murdered Indigenous Women
--	---

	<p>and Girls, “Our Women and Girls are Sacred” (2017) Interim Report, online: <mmiwgffada.ca/wp-content/uploads/2018/03/nimmiwg-interim-report.pdf> [MMIWG].</p> <ul style="list-style-type: none"> • MMIWG, “Legal Path: Rules of Respectful Practice for the National Inquiry into Missing and Murdered Indigenous Women and Girls” (2018), online: <https://www.mmiwgffada.ca/wp-content/uploads/2018/01/Legal_Path_Rules_of_Respectful_Practice_2018-1109_ENG-3.pdf>. <p><u>Additional Readings:</u></p> <ul style="list-style-type: none"> • Cristin Schmitz, “Updated: IAP records to be destroyed after 15 years unless claimants consent to archiving: Supreme Court” The Lawyer’s Daily (October 6, 2017), online: <https://www.thelawyersdaily.ca/articles/4829>. • Murray Sinclair, speaking at the University of Winnipeg about MMIWG, online: <www.youtube.com/watch?v=0rpkXrXtoYw&t=0s&list=PL_2Kjr9FL>.
--	---

	ZXMmxAK0iHTg9CaHFPc_DA-5&index=4>.
--	------------------------------------

Course Description:

The primary purpose of this course is to explore the nature of Indigenous oral history and tradition, which serve increasingly vital roles in the Canadian legal and political systems. Oral history is used in the courts, comprehensive and specific land claims processes, treaty interpretations, land use and occupancy studies, and as an educational tool. Individual, family, and community histories and traditions bring complicated issues of the past and present to life. They also supplement and function to support archival and archaeological evidence, particularly concerning issues with minimal documentary records.

The framework for doing the above is to look at three kinds of oral evidence: 1) testimony in ordinary cases in our legal system; 2) oral history in the sense of a person's recollection of the events they witness in their own lifetime, and; 3) oral tradition, including the body of norms, passed down from generation to generation.

In each case or reading we will ask: How is the testimony generated and preserved? What is the reliability of the testimony? How is testimony served, limited or distorted by various features of witness's perception, memory, and communication? To what extent are these features biologically hardwired into the typical human being or how much are they the product of an individual's variation in make-up, experience and reflection? What is the impact of the culture in which the person belongs? How much is the individual affected by the general understanding and interpretation of events within that individual's community? What means can be used to confirm or question a witness's oral testimony? In a trial, for example, an account might be compared with another oral testimony; it might be subjected to cross-examination; it might be compared and contrasted with written records and with physical evidence such as testimony about blood types, DNA or fingerprints. One oral tradition might be compared with other oral traditions, historical documents, archeological evidence, and the DNA testing of groups.

In this course, students will explore the roots of these ancient and dynamic phenomena. Guest lecturers will explain the concepts and practices of oral history, including Biblical and African oral traditions, as well as the disparate and unique methodologies and media for recording and remembering the past. These are also compared and contrasted, and students will likewise consider the public perceptions of oral history, modes of memory recall, and orality transmission. Students will study the effects of trauma, reliability of eyewitness testimony, and specific Indigenous rituals of memory recall and encoding. Primary legal materials, such as jurisprudence and legislation, are considered along with their limitations. Modern psychological and sociological insights are discussed, as well.

This course features guest speakers, workshops, self-learning, and class discussion. Students will develop skills in oral history interviewing, cultural awareness, and research ethics through cross-cultural and oral history training, allowing students to do research approved by the Joint-Faculty Research Ethics Board.

Teaching Methodology:

Students will study legal materials, such as judicial opinions and legislation, but also insights from the social sciences, such as psychology and sociology; in this way, Indigenous oral history in North America is studied comparatively with the oral history of other times, places, and cultures to determine commonalities and differences.

Evaluation Schemes:

Option A – Research and Writing

- **One major research paper**, approximately 20-25 pages in length, will be worth 60% of a student's final grade in the course. This paper is due at 5:00 PM on the final day of the semester.
- **Oral History Centre certification**, worth 20%, will be awarded upon a student's successful completion of a series of oral history workshops near the end of the course.
- **Completion of the TCPS: CORE 2** research ethics course is valued at 10% of a student's grade.

- **Class attendance and engagement** is weighed at 10% of a student's grade.

Option B – Weekly Mini-Essays

- **7 weekly reflection papers**, approximately 1000 words in length each, will be worth 60% of a student's final grade in the course. Each paper, handling the weekly readings. All students have the option of choosing which evaluation scheme to select.
- **Oral History Centre certification**, worth 20%, will be awarded upon a student's successful completion of a series of oral history workshops near the end of the course.
- **Completion of the TCPS: CORE 2** research ethics course is valued at 10% of a student's grade.
- **Class attendance and engagement** is weighed at 10% of a student's grade.

ADDITIONAL READING MATERIALS

Oral History, Indigenous Peoples, and the Law

Dr. Bryan Schwartz

Additional Resources:

- **Canadian Oral History Association Website:**
 - o <https://canoha.ca/links/>
- **International Oral History Association:**
 - o <http://iohanet.org>
- **Métis Nation of Ontario's Oral History Project Site:**
 - o <http://epe.lac-bac.gc.ca/100/205/301/ic/cdc/mohm/Homepage.htm>
- **Memoirs of Holocaust Survivors in Canada:**
 - o <http://www.concordia.ca/research/migs/projects/holocaust-memoirs.html>
- **Omushkego Oral History Project (in collaboration with University of Winnipeg):**
 - o <http://www.ourvoices.ca/index/ourvoices-browse-action>
- **Manitoba Treaties Oral History Project Treaty Elders' Teachings Series:**
 - o <http://www.trcm.ca/research/completed-research-projects/manitoba-treaties-oral-history-project-treaty-elders-teachings-series/>

Introducing Oral History

This section seeks to define and explore oral history both as a concept and in practice. The readings will focus on how people perceive, remember, and relate their oral histories, whether a traumatic experience, a family history, or an account of everyday life. The readings then explore how oral history can be compared with other ways of remembering the past, such as other people's accounts of history, or by way of documentary or forensic evidence.

What does the literature say about how people perceive, remember, and relate their life stories?

- Paul Thompson, *The Voice of the Past: Oral History*, 3rd ed (New York, USA: Oxford University Press, 2000), ch 1 (“History and the Community”) at 1-24.
- Alessandro Portelli, “The Peculiarities of Oral History” (Oxford, UK: Oxford University Press, 1981) in 12:1 *History Workshop* J 96.
- Alessandro Portelli, A. (2016). *The Order has been Carried Out: History, memory, and meaning of a Nazi massacre in Rome*. Springer.
- Alessandro Portelli, A. (2010). *Death of Luigi Trastulli and Other Stories, The Form and Meaning in Oral History*. Suny Press.
- Alessandro Portelli, “Case Study: Rome’s House of Memory and History: The Politics of Memory and Public Institutions” in Donald A Ritchie, ed, *The Oxford Handbook of Oral History* (New York, USA: Oxford University Press, 2011).
- Anna Green, “Can Memory be Collective” in Donald A Ritchie, ed, *The Oxford Handbook of Oral History* (New York, USA: Oxford University Press, 2011) at 96-111.
- Lorenz, F. (2011). How does one win a lost war? Oral history and political memories in Donald A Ritchie, *ibid* at 124.
- Wiederhorn, J. Case Study: “Above all, we need the witness”: The Oral History of Holocaust Survivors in Donald A Ritchie, *The Oxford Handbook of Oral History*.
- Kenny, M G, “A Place for Memory: The Interface between Individual and Collective History” (1999) in 41:3 *Comparative Studies in Soc’y and History* 420.

How do we compare and contrast oral history with other sources?

- Thompson, P. (2000). *The voice of the past: Oral history*. Oxford university press. See Chapter 4, “Evidence.”
- Moshenska, G. (2007). Oral history in historical archaeology: excavating sites of memory. *Oral History*, 35(1), 91.
- Roseman, M. (1999). Surviving Memory: Truth and inaccuracy in

Holocaust testimony. *The Journal of Holocaust Education*, 8(1), 1-20.

- Avery, L. (2004). A Return to Life: The Right to Identity and the Right to Identify Argentina's Living Disappeared. *Harv. Women's LJ*, 27, 235.

Indigenous Oral History & Storytelling:

- Anderson, K. (2004). Speaking from the heart: Everyday storytelling and adult learning. *Canadian Journal of Native Education*, 28(1/2), 123.
- Whiteduck, M. (2013). "But it's our story. Read it.": Stories my grandfather told me and writing for continuance. *Decolonization: Indigeneity, Education & Society*, 2(1).
- Sium, A., & Ritskes, E. "Speaking Truth to Power: Indigenous Storytelling as an Act of Living Resistance" (2013) 2:1 *Decolonization: Indigeneity, Education & Soc'y*.
- Rosemary Gerogeson & Jessica Jallenbeck, "We Have Stories: Five Generations of Indigenous Women in Water" (2018) 7:1 *Decolonization: Indigeneity, Education & Soc'y*.
- Calliou, B., "Methodology for Recording Oral Histories in the Aboriginal Community" (2004) 15:1 *Native Studies Rev* at 73-105.
- Loughheed, B., Moran, R., & Callison, C. "Reconciliation through description: using metadata to realize the vision of the National Research Centre for Truth and Reconciliation" (2015) 53:5-6 *Cataloging & Classification Q* 596.

Oral Tradition

This section focuses on oral tradition, while also focusing on the difficult relationships between oral tradition as evidence in the court system and Indigenous rights claims in Canada. Through the work and critiques of Vansina, readings on whether oral tradition (e.g. legends and myths) can make for the *true* history of a culture (e.g. regarding African tribes). The readings will also explore the debates on notable works of oral tradition, like the Bible and works of Homer, such as *Odyssey* and the *Iliad*. Relationships between oral tradition, and written or physical sources of evidence, including archaeology, genetics, and linguistics, will also be discussed, namely, in the context of Indigenous peoples. The ethical relationship between these two types of evidence (e.g. the case of the Kennewick man) will be touched on, as

well.

Caselaw on Oral History in Indigenous Rights Cases:

- *Delgamuukw* (1997) SCC; *Delgamuukw* (1991) BCSC (lower court decision)
- *Marshall* (1999) SCC
- *Mitchell* (2001) SCC
- *Van der Peet* (1991) SCC
- *Squamish Indian Band* 2001 FCT 480
- *Samson* FCT (2005)
- *Ironeagle* (2000) SKQB
- *Badger* (1996) SCC
- *Benoit* (2002) FCT; *Benoit* (2003) FCA

Indigenous Oral Traditions and the Canadian Legal System:

- Borrows, J. (2010). *Canada's indigenous constitution*. University of Toronto Press.
- Gover, B. J., & Macaulay, M. L. (1996). Snow Houses Leave No Ruins: Unique Evidence Issues in Aboriginal and Treaty Rights Cases. *Sask. L. Rev.*, 60, 47.
- Lysyk (2006), Evidentiary Issues: Oral Tradition Evidence.
- Milward, D. (2010). Doubting what the elders have to say: A critical examination of Canadian judicial treatment of Aboriginal oral history evidence. *The International Journal of Evidence & Proof*, 14(4), 287-325.
- Pylypchuk, M. A. (1991). The value of aboriginal records as legal evidence in Canada: an examination of sources. *Archivaria*, 32.
- Hanna, D. (2000). Oral Traditions: Practical Considerations for Communities in light of the Delgamuukw Decision. *The Delgamuukw/Gisday'wa national process: A background*.
- Hulan, & Eigenbrod (2008), *Aboriginal Oral Traditions: Theory, Practice, and Ethics*, See pp. 79-97, "A Bad Connection: First Nations Oral Histories in the Canadian Courts" (Drew Mildon).
- Campo (2008), "Oral History Does Make a Difference: William v British

Columbia et al.”

- Ridington, R. (2014). Dane-zaa Oral History: Why It's Not Hearsay. *BC Studies*, (183), 37.
- Jurss, L. K. (2017). Telling Stories In Council And Court: Developing A Reflective Tribal Governance.
- Bracken, C. (2013). The Judges and the Pharmakon: Oral Tradition and Aboriginal Rights. *Native Studies Review*, 22.
- Miller, B. G. (2011). *Oral history on trial: Recognizing Aboriginal narratives in the courts*. UBC Press.
- Manley-Casimir, K. (2012). Creating space for indigenous storytelling in courts. *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société*, 27(2), 231-247.

Changes to the Federal Court of Canada *re* Elder Testimony Post-Samson:

- *Samson* (2005) FCT
- Federal Court – Aboriginal Law Bar Liaison Committee (April, 2016): Practice Guidelines for Aboriginal Law Proceedings.
- Hutchins, P. W., *A Modest Proposal in Two Parts — Part II: The Role of Elders and Oral History Evidence in the Courts* (Aboriginal Law Forum presented by Insight Information delivered at St. Andrew’s Club and Conference Centre, Toronto, Ontario, 19-20 November, 2007).

Specific Claims Tribunal and Oral History:

- Specific Claims Tribunal of Canada: Rules of Practice and Procedure, SOR/2011-119.
- Specific Claims Tribunal Act, S.C. 2008, c. 22.
- Specific Claims Tribunal website: <http://sclaimswp.bryan-schwartz.com>
 - Advisory Committee Meeting of October 5, 2010 (Specific Claims Tribunal Canada).
 - Frequently Asked Questions (about the Specific Claims Tribunal).
 - The Facts: What is Oral History?
 - Ermineskin Indian Band and Nation v Canada FC 1623 (2005).

- Canada's Comments on Draft Rules of Practice and Procedure of the Specific Claims Tribunal of Canada (July 23, 2010).
- Morrison, J. "Archives and Native Claims."
- Indian Claims Commission (1997), "Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation.'"
- Atikawmew D'Opitciwan First Nation v Canada SCT 2004
- *Snake v R*, 2001 FCT 858
- Indian Claims Commission (2005), "Information Guide: Fairness in Claims Negotiations."
- *Squamish Indian Band* 2001 FCT 480.

Literalists: Von Gernet and Indigenous Rights Claims in Canada:

- Von Gernet, A. D. (1996). *Oral narratives and Aboriginal pasts: An interdisciplinary review of the literature on oral traditions and oral histories*. Indian and Northern Affairs Canada.
- Von Gernet (2007), *Reconstructing Tsimshian Culture and History Using Oral Traditions: A Brief Assessment of Two Expert Opinions* (Link: http://faculty.arts.ubc.ca/menzies/von_gernet.pdf).
- Cruikshank, J. (1992). Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. BC*. *BC Studies: The British Columbian Quarterly*, (95), 25-42.

Vansina, African folklore, and Alex Haley:

- Chimamanda Ngozi Adichie (2009), "The danger of a single story." TED Talk Subtitles and Transcript.
- Vansina, J. (1972). *Oral tradition: A study in historical methodology*. Transaction Publishers. See Chapter 1, "Oral Tradition and Historical Methodology" (pp. 1-18). Chapter 2, "Tradition as a Chain of Testimonies" (pp. 19-47).
- Vansina, J. (1971). Once upon a time: Oral traditions as history in Africa. *Daedalus*, 442-468.
- Willis, R. (1980). The Literalist Fallacy and the Problem of Oral Tradition. *Social Analysis: The International Journal of Social and Cultural Practice*, (4), 28-37.

- Haley, A. (1973). Black history, oral history, and genealogy. *The Oral History Review*, 1, 1- 25.
- Wright, D. R. (2011). The Effect of Alex Haley's Roots on How Gambians Remember the Atlantic Slave Trade. *History in Africa*, 38, 295-318.
- Gerber, D. A. (1977). Haley's Roots And Our Own: An Inquiry Into The Nature Of A Popular Phenomenon. *The Journal of Ethnic Studies*, 5(3), 87.
- Gerber, D. A. (1979). Local and Community History: Some Cautionary Remarks on an Idea Whose Time Has Returned. *The History Teacher*, 13(1), 7-30.
- Mills, G. B., & Mills, E. S. (1981). "Roots" and the New" Faction": A Legitimate Tool for Clio?. *The Virginia Magazine of History and Biography*, 89(1), 3-26.
- Nobile, P. (1993). Was Roots One of the Great Literary Hoaxes?. *The Toronto Star*, 8.
- Taylor, H. (1995). 'The Griot from Tennessee': The Saga of Alex Haley's Roots. *Critical Quarterly*, 37(2), 46-62.
- Ki-Zerbo, J. (1969). The oral tradition as a source of African history. *Diogenes*, 17(67), 110- 124.
- Spear, T. (1981). Oral traditions: whose history. *History in Africa*, 8, 165-181.
- Finnegan, R. (1970). A note on oral tradition and historical evidence. *History and Theory*, 9(2), 195-201.
- Showren, T. (2014). Oral Traditions: Method to Adoption of Construction of the History of Non-Literate Tribes. *International Journal of Social Science and Humanity*, 4(6), 478.
- Chamberlin, J. E. (2006). *Living Language and Dead Reckoning: Navigating Oral and Written Traditions: the 2005 Garnett Sedgewick Memorial Lecture*. Ronsdale.

Oral Tradition and the Bible:

- Botha, P. J. (1991). Mark's story as oral traditional literature: Rethinking the transmission of some traditions about Jesus. *HTS Teologiese*

Studies/Theological Studies, 47(2), 304-331.

- Ehrman, B. D. Textual Criticism of the New Testament. *Hearing the New Testament: Strategies for Interpretation*, 127-45.
- Ehrman, B. D. (1996). *The orthodox corruption of scripture: The effect of early Christological controversies on the text of the New Testament*. Oxford University Press. See Chapter 1, "The Text of Scripture in an Age of Dissent: Early Christian Struggles for Orthodoxy."
- Ehrman, B. D. (2009). *Misquoting Jesus*. HarperCollins. *Introduction*.
- I.H. Marshall, "Historical Criticism," I. Howard Marshall, ed., *New Testament Interpretation: Essays on Principles and Methods*, 1977. Carlisle: The Paternoster Press, revised 197, pp.126-138.
- Dewey, Joanna. "The Gospel of Mark as an Oral-Aural Event: Implications for Interpretation." *The New Literary Criticism and the New Testament*, ed. Malbon and McKnight, Sheffield Academic Press, 1994, pp. 145-63.

Oral Tradition and Homer:

- Kirk, G. S. (1976). *Homer and the oral tradition*. Cambridge University Press.
- West, M. (2011). The Homeric Question Today. *Proceedings of the American Philosophical Society*, 155(4), 383-393.

Oral Traditions and the Kennewick Man (Ethical Debates):

- *Bonnichsen v United States* (Kennewick man case)
- Young, J. O., & Brunk, C. G. (Eds.). (2012). *The ethics of cultural appropriation*. John Wiley & Sons. See Chapter 2, "Archaeological Finds: Legacies of Appropriation, Modes of Response", and Chapter 3, "The Appropriation of Human Remains: A First Nations Legal and Ethical Perspective."
- Bruning, S. B. (2006). Complex legal legacies: the Native American graves protection and repatriation act, scientific study, and Kennewick Man. *American Antiquity*, 71(3), 501-521.
- Nicholas, G., Bannister, K., Brown, M., Hamilakis, Y., Ouzman, S.,

- Vitelli, K., ... & Bannister, K. (2004). Copyrighting the past? Emerging intellectual property rights issues in archaeology. *Current Anthropology*, 45(3), 327-350.
- Cybulski, J. S., Ossenberr, N. S., & Wade, W. D. (1979). Statement on the excavation, treatment, analysis and disposition of human skeletal remains from archaeological sites in Canada. *Canadian Review of Physical Anthropology*, 1(1), 32-36.
 - Buikstra, J. E. (2006). Repatriation and bioarchaeology: Challenges and opportunities. *Bioarchaeology: the contextual analysis of human remains*, 389-415.
 - Walker, P. L. (2000). Bioarchaeological ethics: a historical perspective on the value of human remains. *Biological anthropology of the human skeleton*, 3, 40.

Verifying Oral Histories:

- Szathmary, E. J. (1981). Genetic markers in Siberian and northern North American populations. *American Journal of Physical Anthropology*, 24(S2), 37-73.
- Szathmary, E. J. (1979). Eskimo and Indian contact: examination of craniometric, anthropometric and genetic evidence. *Arctic Anthropology*, 23-48.
- Szathmary, E. J. (2017). The Changing History of the First Discovery of America. *Confluences: Essays Mapping the Manitoba-Szeged Partnership, Papers in English & American Studies XXIV*, p 29-50
- Mulligan, C., & Szathmary, E. J. (2017). The peopling of the Americas and the origin of the Beringian occupation model. *American Journal of Physical Anthropology*, 162, 403-408.
- Vansina, J. (1972). *Oral tradition: A study in historical methodology*. Transaction Publishers. See Chapter 6, "Historical Knowledge" (pp. 164-182).
- Greenberg, J. H., & Ruhlen, M. (1992). Linguistic origins of native Americans. *Scientific American-American Edition*, 267, 60-60.
- Greenberg, J. H., Turner, C. G., Zegura, S. L., Campbell, L., Fox, J. A.,

- Laughlin, W. S., ... & Woolford, E. (1986). The settlement of the Americas: a comparison of the linguistic, dental, and genetic evidence [and comments and reply]. *Current Anthropology*, 27(5), 477-497.
- Wells, S. (2006). *Deep ancestry: Inside the genographic project*. National Geographic Books. See Chapter 6, “Julius’s Story: The Cradle” (pp. 133-161).
 - Lowie, R. H. (1917). Oral tradition and history. *The Journal of American Folklore*, 30(116), 161-167.
 - Kate Wong, (June 8, 2017), Scientific American, “Ancient Fossils from Morocco Mess Up Modern Human Origins.”
 - Allen, B. (1979). The personal point of view in orally communicated history. *Western Folklore*, 38(2), 110-118.
 - Cruikshank, J. (1981). Legend and landscape: Convergence of oral and scientific traditions in the Yukon Territory. *Arctic Anthropology*, 67-93.
 - Leclair, J. (2005). Of grizzlies and landslides: the use of archaeological and anthropological evidence in Canadian aboriginal rights cases. *Public Archaeology*, 4(2-3), 109-119.
 - Cruikshank, J. (1994). Oral tradition and oral history: Reviewing some issues. *The Canadian Historical Review*, 75(3), 403-418.
 - Mason, R. J. (2000). Archaeology and native North American oral traditions. *American Antiquity*, 65(2), 239-266.
 - Preston, C. (2005). A Past of Tragic Stories: The (Non-) Treatment of Native Peoples’ Oral Histories in Canada. *Undercurrent*, 2(1).
 - Whiteley, P. M. (2002). Archaeology and oral tradition: the scientific importance of dialogue. *American Antiquity*, 67(3), 405-415.
 - Pendergast, D. M., & Meighan, C. W. (1959). Folk traditions as historical fact: A Paiute example. *The Journal of American Folklore*, 72(284), 128-133.
 - Wiley, C. J. (2008). Collective memory of the Prehistoric past and the archaeological landscape.
 - Echo-Hawk, R. C. (2000). Ancient history in the New World: integrating oral traditions and the archaeological record in deep time. *American Antiquity*, 65(2), 267-290.

- Martindale, A. (2006). Methodological issues in the use of Tsimshian oral Traditions (Adawx) in Archaeology. *Canadian Journal of Archaeology/Journal Canadien d'Archéologie*, 158-192.
- Woolf, D. R. (1988). The "Common Voice": History, Folklore and Oral Tradition in Early Modern England. *Past & Present*, (120), 26-52.
- Bird, L. (2005). Telling our stories: Omushkego legends and histories from Hudson Bay. University of Toronto Press. See Chapter 2, "Now, the Question of Creation."
- Untuwe Pi Kin He – Who We Are: Treaty Elders' Teachings Volume I. See Chapter 1, "Creation."
- Borrows, J. (2016). *Freedom and Indigenous Constitutionalism*. University of Toronto Press.
- Meltzer, D. J. (2009). *First peoples in a new world: colonizing ice age America*. University of California Press. See Chapter 5 (pp. 137-181), "Non-archaeological answers to archaeological questions," and Chapter 6 (pp. 183-207), "American Origins: The Search for Consensus."
- Warrick, G. (2012). Buried Stories: Archaeology and Aboriginal Peoples of the Grand River, Ontario. *Journal of Canadian Studies/Revue d'études canadiennes*, 46(2), 153-177.
- Wheeler, W. (2010). Cree intellectual traditions in history. *The West and beyond: New perspectives on an imagined region*, 47-61.
- Ulrich, L., & Gill, D. (2016). The Tricksters Speak: Klooscap and Wesakechak, Indigenous Law, and the New Brunswick Land Use Negotiation. *McGill Law Journal/Revue de droit de McGill*, 61(4), 979-1014.
- Thomas, D. H. (2000). Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity. See Chapter 23, "Speaking of Oral Tradition."
- Cariou, W. (2016). Life-Telling: Indigenous Oral Autobiography and the Performance of Relation. *Biography*, 39(3), 314-327.
- Bardill, J. (2018). Ancestors and Identities: DNA, Genealogy, and Stories. In *The Palgrave Handbook of Biology and Society* (pp. 831-849). Palgrave Macmillan, London.

Witness Testimony in Trials:

This section contains materials relevant to modern-day trials, discussing the reliability and frailty of ear- and eyewitness testimony. These materials will also touch on how people perceive and remember events, focusing on distortions in observation, memory, and in telling. A brief exploration of the relationship between oral testimony and competing forms of evidence, like forensic science (e.g. DNA, fingerprinting), will be contrasted with modes of conveying oral testimony, and how juries perceive and remember such. Wrongful convictions, and finally, a few readings on the integration of oral histories in the Canadian legal system, through e.g. *Gladue* factors at sentencing hearings, will be provided.

Caselaw Concerning the Unreliability of Ear- and Eyewitness Testimony:

- *R v Arseneault*, 2016 NBCA 47.
- *R v Hay*, 2013 SCC 61.
- *R v Henderson*, 2009 MBQB 101.

Juries and the Frailty of Ear- and Eyewitness Testimony:

- *R v Arseneault*, 2016 NBCA 47.
- *R v Hay*, 2013 SCC 61.

Distortions in Initial Observation:

- Lindsay, R. C. L., Mansour, J. K., Bertrand, M. I., Kalmel, N., & Melsom, E. I., “Face Recognition in Eyewitness Memory (2011) in *The Oxford Handbook*, 307-328.
- Marsh, M. N., “Hey! What’s that Gorilla doing over there? On the illusory-hallucinatory nature of everyday living” (2015) 23:4 *Euro Rev* 455-472.

Distortions from Memory:

- Howe, M. L., & Knott, L. M. (2015). The fallibility of memory in judicial processes: Lessons from the past and their modern consequences. *Memory*, 23(5), 633-656.
- Benforado, A. (2016). *Unfair: The New Science of Criminal Injustice*. *Broadway Books*. See Chapter 6 (The Corruption of Memory: The

Eyewitness).

- Davis, D., & Loftus, E. F. (2007). Internal and external sources of misinformation in adult witness memory. In M. P. Toglia, J. D. Read, D. F. Ross, & R. C. L. Lindsay (Eds.), *The handbook of eyewitness psychology, Vol. 1. Memory for events* (pp. 195-237). Mahwah, NJ: Lawrence Erlbaum Associates.
- Duke, S. B., Lee, A. S. E., & Pager, C. K. (2007). A picture's worth a thousand words: Conversational versus eyewitness testimony in criminal convictions. *Am. Crim. L. Rev.*, 44, 1. o Wright, D. B., Memon, A., Skagerberg, E. M., & Gabbert, F. (2009). When eyewitnesses talk. *Current Directions in Psychological Science*, 18(3), 174-178.
- Lacy, J. W., & Stark, C. E. (2013). The neuroscience of memory: Implications for the courtroom. *Nature Reviews Neuroscience*, 14(9), 649-658.
- Loftus, E. F. (2005). Planting misinformation in the human mind: A 30-year investigation of the malleability of memory. *Learning & Memory*, 12(4), 361-366.

Distortions in Telling and Cultural Influences, e.g. The Ethic of Noninterference (Rupert Ross):

- Ross, R. (2006). *Dancing with a ghost: Exploring Aboriginal reality*. Penguin Books Canada. – See Chapter 1, “Seeing Through Rules” (pp. 2-6), Chapter 2, “Signals of Difference” (pp. 7- 12), and Chapter 3, “The Rules of Traditional Times” (pp. 13-47).
- Cooke, M. (1995). Interpreting in a cross-cultural cross-examination: An Aboriginal case study. *International Journal of the Sociology of Language*, 113(1), 99-112.
- Kennedy, R. (2008). Subversive witnessing: mediating indigenous testimony in Australian cultural and legal institutions. *WSQ: Women's Studies Quarterly*, 36(1), 58-75.

Psychology and Evidence about how Juries Perceive and Remember:

- Benforado, A. (2016). *Unfair: The New Science of Criminal Injustice*. Broadway Books. See Chapter 5 (In the Eye of the Beholder: The Jury).

- Bornstein, B. H., & Greene, E. (2011). Jury decision making: Implications for and from psychology. *Current Directions in Psychological Science*, 20(1), 63-67.

What are competing sources to oral testimony at a trial, such as forensic evidence, e.g. fingerprints, DNA, blood, or ballistics?

- Sonenshein, D. A., & Nilon, R. (2010). Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance. *Or. L. Rev.*, 89, 263.
- Read, J. D. (2005). Features of eyewitness testimony evidence implicated in wrongful convictions. *Man. LJ*, 31, 523.
- Mnookin, J. L. (2001). Fingerprint evidence in an age of DNA profiling. *Brook. L. Rev.*, 67, 13.
- Jobling, M. A., & Gill, P. (2004). Encoded evidence: DNA in forensic analysis. *Nature Reviews Genetics*, 5(10), 739-751.
- Frederiksen, S. (2011). The national academy of sciences, Canadian DNA jurisprudence and changing forensic practice. *Man. LJ*, 35, 111.
- Kayser, M., & De Knijff, P. (2011). Improving human forensics through advances in genetics, genomics and molecular biology. *Nature Reviews Genetics*, 12(3), 179-192.
- McDonald, T. R. (1998). Genetic justice: DNA evidence and the criminal law in Canada. *Man. LJ*, 26, 1.
- Thompson, W. C. (1996). DNA evidence in the OJ Simpson trial. *U. Colo. L. Rev.*, 67, 827.
- MacFarlane, B. (2005). Janet Reno on Wrongful Conviction. *Man. LJ*, 31(3), 565.

Sentencing:

- Cultural influences (Gladue factors)
 - *R v Gladue*, [1999] 1 SCR 688.
 - Turpel-Lafond, M. E. (1999). Sentencing within a restorative justice paradigm: Procedural implications of R. v. Gladue. *Crim. LQ*, 43, 34.

Oral History and Modern Inquiries

This section includes extra readings on oral history and modern inquiries. The readings focus on projects, such as the Inquiry into Missing and Murdered Indigenous Women and Children in Canada, the Truth and Reconciliation Commission in South Africa (Apartheid), as well as the Truth and Reconciliation Commission in Canada (Indian Residential Schools).

Truth and Reconciliation Commissions and Other National Inquiries:

- Field, S (2011), “Disappointed Remains: Trauma, Testimony, and Reconciliation in Post- Apartheid South Africa.” See Chapter 9 (pp. 142-158) in *Oxford Handbook of Oral History*.
- Logan, T. (2018). Questions of Privacy and Confidentiality after Atrocity: Collecting and Retaining Records of the Residential School System in Canada. *Genocide Studies International*, 12(1), 92-102.
- Cristin Schmitz (October 6, 2017) The Lawyer’s Daily. “Updated: IAP records to be destroyed after 15 years unless claimants consent to archiving: Supreme Court.”
- Colby Cosh (National Post). (October 6, 2017). “The Supreme Court ordering official records destroyed?! Actually, good call.”
- Bringing them home: National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families (1997).
- Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015).
- van Rijswijk, H. (2013). Stolen Generations: Online Testimonies as Sources of Social Justice: Towards an Ethics of Encounter.
- Hughes, J. (2012). Instructive Past: Lessons from the Royal Commission on Aboriginal Peoples for the Canadian Truth and Reconciliation Commission on Indian Residential Schools. *Canadian journal of law and society*, 27(01), 101-127.
- Luker, T. (2005). “‘Postcolonising’ Amnesia in the Discourse of Reconciliation: The Void in the Law’s Response to the Stolen Generations”. *Australian Feminist Law Journal*, 22(1), 67- 88.
- Napoleon, V., & Friedland, H. (2016). An Inside Job: Engaging with

Indigenous Legal Traditions through Stories. *McGill Law Journal/Revue de droit de McGill*, 61(4), 725-754.

- Friedland, H., & Napoleon, V. (2015). Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions. *Lakehead Law Journal*, 1(1), 16-44.
- Stanton, K. (2011). Canada's Truth and Reconciliation Commission: Settling the Past?. *The International Indigenous Policy Journal*, 2(3), 2.
- Nagy, R. (2012). Truth, reconciliation and settler denial: specifying the Canada–South Africa analogy. *Human Rights Review*, 13(3), 349-367.
- James, M. (2012). A carnival of truth? Knowledge, ignorance and the Canadian Truth and Reconciliation Commission. *International Journal of Transitional Justice*, 6(2), 182-204.
- Des Rosiers, N. (2016). Public Inquiries and Law Reform Institutions: “Truth Finding” and “Truth Producing”. *Canadian Journal of Women and the Law*, 28(2), 374-392.

Inquiry into Missing and Murdered Aboriginal Women and Girls (MMIWG):

- Legal Path: Rules of Respectful Practice for the National Inquiry into Murdered and Missing Indigenous Women and Girls.

Testimony from the dispute resolution of residential school records case:

- *Fontaine v AG* 2016 ONCA 241
- Gloria Galloway (The Globe and Mail), Ottawa seeks to preserve residential-school testimonies.
- The Canadian Press, Top court to hear federal government's appeal on residential school records.
- Jason Warick (CBC News), “Residential school survivors should decide fate of documents: FSIN.”
- McMahon, T. (2018). Creating the National Centre for Truth and Reconciliation and Proactive Disclosure Under the National Centre for Truth and Reconciliation Act.
- McMahon, T. (2018). ‘I Lost My Talk’: Indian Residential Schools, Copyright, Archives and Commissions of Inquiry.

- McMahon, T. (2018). The Supreme Court's Indian Residential Schools Cases: The Beatings Continue.
- Rask, H. (2018). A Call to Remember: Local negotiations over the memory of Indian Residential Schools in Canada.

Difficulties re Translation and Oral History

This section explores the use of translation practices in conducting oral history research, focusing on whether people's life stories are translatable across different cultures and languages. This part also includes readings on whether language influences how people perceive the world.

- Deutscher, G. (2010). Does your language shape how you think?. *The New York Times*, 29.
- Davis, E. (2015). Does the world look different in different languages?. *Artif. Intell.*, 229, 202-209.
- Boroditsky, L. (2011). How language shapes thought. *Scientific American*, 304(2), 62-65.
- Mykhailiuk, O. Y., & Pohlod, H. Y. (2015). The languages we speak affect our perceptions of the world. *Journal of Vasyl Stefanyk Precarpathian National University*, 2(2-3), 36-41.
- Temple, B. (2013). Casting a wider net: reflecting on translation in oral history. *Oral History*, 100- 109.
- Burton, S. K. (2003). Issues in cross-cultural interviewing: Japanese women in England. *Oral History*, 38-46.
- Jones, R. (2004). Blended voices: crafting a narrative from oral history interviews. *The Oral History Review*, 23-42.
- Wong, J. P. H., & Poon, M. K. L. (2010). Bringing translation out of the shadows: Translation as an issue of methodological significance in cross-cultural qualitative research. *Journal of Transcultural Nursing*, 21(2), 151-158.
- Müller, M. (2007). What's in a word? Problematizing translation between languages. *Area*, 39(2), 206-213.
- Wheeler, N. (2008). Cross-lingual oral history interviewing in China:

confronting the methodological challenges. *Oral History*, 56-68.

- Temple, B. (1997). Watch your tongue: issues in translation and cross-cultural research. *Sociology*, 31(3), 607-618.

The Human “Nature” Debate

This portion of additional readings involves the question of whether traditions are specific to specific cultures, or, whether traditions are universal; e.g. where the same traditions (such as the story of the trickster) manifest in different cultures in various, but comparable, forms. This area draws on the underlying issue of human nature, and the nature versus nurture debates, which engage many scholars worldwide.

- Olrik, A, *Principles for oral narrative research*. (Indiana University Press, 1992). See Chapter 3, “The Structure of the Narrative: The Epic Laws,” and Chapter 5, “The Original Form and Development of the Narrative.”
- Lévi-Strauss, C. (1955). The structural study of myth. *The journal of American folklore*, 68(270), 428-444.
- Steven Pinker, “The Blank Slate, the Noble Savage, and the Ghost in the Machine” (2000) 21 Tanner Lectures on Human Values at 179-210.
- Steven Pinker, “Why Nature & Nurture Won’t Go Away” (2004) 133:4 *Daedalus* 5-17.
- Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (Penguin Books, 2003).
- T.O. Beidelman, “The Moral Imagination of the Kaguru: Some Thoughts on Tricksters, Translation and Comparative Analysis” (1980) 7:1 *American Ethnologist* 27-42.
- Karl Popper, *Unended Quest: An Intellectual Autobiography* (New York, NY: Routledge, 2002).
- John McWhorter, *The Language Hoax: Why the World Looks the Same in Every Language* (Oxford University Press, 2014).

The Ethics of Collecting or Studying Oral Histories and Traditions

This chapter focuses on the ethical and legal considerations associated with conducting oral history projects in general, and the particular juridical and ethical sensitivities that need to be addressed in connection with oral history projects

involving humans with particular attention to Indigenous Communities and their individual members.

- The First Nations Principles of OCAP®: <https://fnigc.ca/ocap-training/>
- Assembly of First Nations - First Nations Ethics Guide on Research and Aboriginal Traditional Knowledge:
https://www.afn.ca/uploads/files/fn_ethics_guide_on_research_and_atk.pdf
- Tri-Council Policy Statement Ethical Conduct for Research Involving Humans: <https://ethics.gc.ca/eng/documents/tcps2-2018-en-interactive-final.pdf>
- Eigenbrod, R., & Hulan, R. (Eds.). (2008). *Aboriginal oral traditions: Theory, practice, ethics*. Brunswick Books. See pp. 13-43, “The Assault on Aboriginal Oral Traditions: Past and Present (Andrea Bear Nicholas).
- Rossi, L. (2009). Oral historian—neither moralizer nor informer. *Oral History: The challenges of dialogue*, 10, 15.
- Alfred (2009), Sharing oral history with wider public: Experiences of the Refugee Communities History Project. In *Oral History: The challenges of dialogue*.
- Beck, J. J., & Van Cleve, L. (2011). Speaking of Music and the Counterpoint of Copyright: Addressing Legal Concerns in Making Oral History Available to the Public. *Duke L. & Tech. Rev.*, 103.
- Callison, C. (1995). Appropriation of aboriginal oral traditions. *UBCL Rev.*, 165.
- Janovicek, N. (2006). Oral history and ethical practice: Towards effective policies and procedures. *Journal of Academic Ethics*, 4(1-4), 157-174.
- Jarvis-Tinus, J. (1992). Legal Issues Regarding Oral Histories. In *Oral History Forum d’histoire orale* (Vol. 12).
- Jessee, E. (2011). The limits of oral history: Ethics and methodology amid highly politicized research settings. *Oral History Review*, ohr098.
- Neuenschwander, J. A. (1983). Oral History and Copyright: An Uncertain Relationship. *JC & UL*, 10, 147.
- Neuenschwander, J. A. (2011). The legal ramifications of oral history. In

The Oxford handbook of oral history (p. 351). Oxford University Press.

- Halbmayr, B. (2009). The ethics of oral history: Expectations, responsibilities, and dissociations. *Marta Kurkowska-Budzan, Krzysztof Zamorski (Hg.) (2009): Oral History. The challenges of dialogue. Studies in narrative*, 10, 195-203.
- Dougherty, J., & Simpson, C. (2012). Who owns oral history? A creative commons solution.
- Larson, M. (2013). Steering clear of the rocks: a look at the current state of oral history ethics in the digital age. *The Oral History Review*, 40(1), 36-49.
- Larson, M. (2013). Steering clear of the rocks: a look at the current state of oral history ethics in the digital age. *The Oral History Review*, 40(1), 36-49.
- United Nations (2008), “United Nations Declaration on the Rights of Indigenous Peoples.”
- Aboriginal and Torres Strait Islander Library and Information Resources Network Protocol.
- Callison, C., Roy, Lorie, LeCheminant, Gretchen Alice, & Walter de Gruyter & Co. (2016). *Indigenous notions of ownership and libraries, archives and museums* (IFLA publications ; 166). See Chapter 3, “Anishinaabe ji-dibenjigaadeg (ownership) and ganawenindiwin (protection),” Chapter 8, “Ko Aotearoa Tenei: Indigenous Cultural and Intellectual Property Rights in Aotearoa New Zealand,” and Chapter 21, “Indigenous Digital Oral History.”
- Halbmayr, B. (2009). The ethics of oral history: Expectations, responsibilities, and dissociations. *Oral History. The challenges of dialogue. Studies in narrative*, 10, 195-203.