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Listening for a Change: The Courts and Oral Tradition

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# Listening for a Change: The Courts and Oral Tradition

## **Abstract**

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.

## **Keywords**

Indigenous peoples; Canada--History; Admissible evidence; Canada

# LISTENING FOR A CHANGE: THE COURTS AND ORAL TRADITION<sup>©</sup>

BY 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.

Le récit oral aborigène est une source valable qui peut fournir de l'information au sujet de l'histoire d'un peuple. Il peut constituer une preuve importante des événements passés et peut également éclairer le sens que peuvent donner divers groupes à leur histoire. Malgré sa valeur, la tradition orale pose un défi particulier quant à son admissibilité et son interprétation en raison de la nature unique de sa source et de sa transmission. Cet article énumère et discute ces défis et suggère maintes approches qui peuvent aider à mieux comprendre les sagacités qui se retrouvent dans l'histoire aborigène.

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## I. 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.<sup>1</sup> The framework she provided helped me make sense of the fragmentary archival material that I had been sorting through

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<sup>1</sup> 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.

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 Kegeponce Jones, my great-great-grandfather, had signed two treaties in 1854<sup>2</sup> and 1857<sup>3</sup> 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,<sup>4</sup> the provision of education, the building of infrastructure (such as roads, public buildings, and docks), large

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<sup>2</sup> For the text of Treaty 72, see Canada, *Indian Treaties and Surrenders* (Toronto: Coles Publishing Company, 1971) at 195-96.

<sup>3</sup> For text, see *ibid.* at 213.

<sup>4</sup> 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 in 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.

reserves,<sup>5</sup> housing,<sup>6</sup> and for the provision of hunting, fishing, and timber rights.<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup> This

<sup>5</sup> *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.

<sup>6</sup> 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.

<sup>7</sup> 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 ...

<sup>8</sup> 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: Colles, 1974) at 51.

<sup>9</sup> 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

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.<sup>10</sup> As the Royal Commission on Aboriginal Peoples noted, “oral history is enmeshed with the stories of a lifetime.”<sup>11</sup> 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.<sup>12</sup> 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

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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 Kegeedonce 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.

<sup>10</sup> 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*].

<sup>11</sup> 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.

<sup>12</sup> 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.

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."<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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."<sup>16</sup> Lowie had

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<sup>13</sup> 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.

<sup>14</sup> 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).

<sup>15</sup> 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.

<sup>16</sup> 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

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.”<sup>17</sup> 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.”<sup>18</sup> 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.”<sup>19</sup> 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,

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as very significant and thus did not select this event as worth recording in their traditions.

<sup>17</sup> R. H. Lowie, “Oral Tradition and History” (1917) 30 *J. of Am. Folklore* 161 at 163.

<sup>18</sup> H. Trevor-Roper, *The Rise of Christian Europe* (New York: Harcourt, Brace & World, 1965) at 9.

<sup>19</sup> *Ibid.*

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.<sup>20</sup> 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

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<sup>20</sup> This list is taken from J. Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at 13-27.

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."<sup>21</sup> 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.<sup>22</sup> Professor von Gernet's

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<sup>21</sup> 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 <[http://www.aicn-inac.gc.ca/pr/pub/orl/index\\_e.html](http://www.aicn-inac.gc.ca/pr/pub/orl/index_e.html)> (date accessed: 24 September 2001).

<sup>22</sup> 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

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

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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.

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."<sup>23</sup> 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."<sup>24</sup>

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

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<sup>23</sup> *Death of Luigi*, *supra* note 10 at 51.

<sup>24</sup> *Ibid.* at 50.

to Africa led by a man named Buba.<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> The genetic signature is also common among Ashkenazi and Serphardic priests, but is rare or absent in non-Jewish

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<sup>25</sup> T. Parfitt, *Journey to the Vanished City: The Search for the Lost Tribe of Israel* (New York: Vintage Books, 2000).

<sup>26</sup> N. Wade, “DNA Backs a Tribe’s Tradition of Early Descent From Jews” *The New York Times* (9 May 1999) 1.

<sup>27</sup> See G. Buijs, “Black Jews in the Northern Province: A Study of Ethnic Diversity in South Africa” (1998) 21 *Ethnic and Racial Stud.* 661.

<sup>28</sup> D. Christy, “A Load of Old Ballistics” *The [London] Guardian* (16 March 1999) 19.

<sup>29</sup> 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.

<sup>30</sup> 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.*

populations.<sup>31</sup> 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.<sup>32</sup> 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

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<sup>31</sup> *Ibid.* Dr. Goldstein has found that 45 per cent of Ashkenazi priests and 56 per cent of Sephardic priests have the cohen gene signature, while in Jewish populations in general, the frequency is 3-5 per cent.

<sup>32</sup> 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. Wolfpoff in E. Trinkaus, ed., *The Emergence of Modern Humans: Bicultural Adaptations in the Later Pleistocene* (Cambridge: Cambridge University Press, 1989); 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, *Genes, Guns and Steel: The Fates of Human Societies* (New York: W.W. Norton, 1997).

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.<sup>33</sup> 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.<sup>34</sup>

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<sup>33</sup> *Looking Forward*, *supra* note 11.

<sup>34</sup> *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

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.<sup>35</sup> The similarities between oral and written history are legion. A significant portion of the documentary record started its life as oral

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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.

<sup>35</sup> 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 in 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'kaptx 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. Tenkin, *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, 1988) [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 Arkirangi* (Honolulu: University of Hawaii Press, 1997); M. Kwäioloa & B. Burt, *Living Tradition: A Changung 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).

history.<sup>36</sup> This means that each format can encounter similar challenges in verification and authentication, though this may occur in different ways.<sup>37</sup> Each format may also be subject to substantial revision, permutation, and change.<sup>38</sup> Just as there are different written versions of how and why Canadian confederation occurred,<sup>39</sup> so there are different oral accounts of how the Ojibway came to live on their traditional territories in southern Ontario.<sup>40</sup> 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

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<sup>36</sup> 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.

<sup>37</sup> Vansina, *supra* note 20 at 186–201.

<sup>38</sup> 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.

<sup>39</sup> 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.

<sup>40</sup> 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).

different interests in its reproduction.<sup>41</sup> 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.<sup>42</sup> We are all socialized and acculturated in different ways. These various patterns of individual and cultural choice shape how we view the world.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

Given the pervasiveness of western culture in understanding oral tradition, in the end it may be that people are generally more suspect about

<sup>41</sup> Collingwood makes this point throughout his book in his discussion of various historians, *supra* note 38.

<sup>42</sup> 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. E.H. Carr also makes this point in his book, *What is History*, 2d ed. (Toronto: Penguin Books, 1990) at 16–20.

<sup>43</sup> 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 pre-understanding. It shapes our judgements without our being aware of it." *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) at 148–149.

<sup>44</sup> R. Gordon & W. Nelson, "An Exchange on Critical Legal Studies" (1988) 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.

<sup>45</sup> 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.

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 pictographs, 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?<sup>46</sup> 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.”<sup>47</sup>

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

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<sup>46</sup> 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.

<sup>47</sup> *Death of Luigi*, *supra* note 10 at 50.

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.<sup>48</sup>

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

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<sup>48</sup> *Genealogy of Law*, *supra* note 1.

complicit in the structure of their narratives.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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

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<sup>49</sup> "Remembering in an interview is a mutual process, which requires understanding on both sides," Thompson, *supra* note 12 at 157.

<sup>50</sup> Valle Giulia, *supra* note 35 at 11-12.

<sup>51</sup> Past Meets Present, *supra* note 35 at 12.

<sup>52</sup> E. Tonkin, *supra* note 35 at 1-4.

<sup>53</sup> *Ibid.* at 67-69.

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.<sup>54</sup> Through the years, Aboriginal oral history has led judges to label Indigenous peoples as, among other things, "ignorant,"<sup>55</sup> "primitive,"<sup>56</sup> "untutored,"<sup>57</sup> "savage,"<sup>58</sup> "crude...simple, uniformed and

<sup>54</sup> 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 1968. 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 halfblood, 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. 1888, c.41, s.11, as rep. by S.B.C. 1968, 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 trials, see D. Opekokew, "A Review of Ethnocentric Bias Facing Indian Witnesses" in R. Gosse, J. Y. Henderson & R. Carter, eds., *Continuing Foundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) 192.

<sup>55</sup> *Beecher v. Wetherby*, 95 U.S. 517-440, 441 (1887).

<sup>56</sup> *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.

<sup>57</sup> *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. Simen*, [1985] 2 S.C.R. 357 at 399.

<sup>58</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543; *Ex Parte Crow Dog*, 109 U.S. 556.

inferior people,”<sup>59</sup> who led lives that were “nasty, brutish and short.”<sup>60</sup> 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.”<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

This traditional approach may be changing in light of the ground breaking case of *Delgamuukw v. British Columbia*,<sup>65</sup> 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

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<sup>59</sup> *United States v. Sandoval*, 34 S.Ct. 1 (U.S.S.C.).

<sup>60</sup> *Delgamuukw v. A.G.B.C.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) at 268.

<sup>61</sup> *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw* (S.C.C.)].

<sup>62</sup> Some notable cases considering Aboriginal oral evidence are *Milirrpum 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.

<sup>63</sup> 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.

<sup>64</sup> 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 Gr. 392 (U.C.Ch.) at 404–06.

<sup>65</sup> *Delgamuukw* (S.C.C.), *supra* note 61.

evidentiary standards” that would be applied in private law cases.<sup>65</sup> The differential treatment of Aboriginal evidence was justified by the *sui generis* categorization of Aboriginal rights, which recognizes their unique source and nature.<sup>67</sup> 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.”<sup>68</sup> 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.<sup>69</sup> 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.”<sup>70</sup> The Court noted that these modifications

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<sup>66</sup> *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.

<sup>67</sup> *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.

<sup>68</sup> *Delgamuukw* (S.C.C.), *ibid.*

<sup>69</sup> *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 1065.

<sup>70</sup> *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

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.”<sup>71</sup>

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.<sup>72</sup> 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.”<sup>73</sup> 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

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treatment of evidence in commercial law sounds like Lamer’s treatment of Aboriginal evidence in *Delgamuukw*.

<sup>71</sup> *Ibid.*, quoting from *R. v. Simon*, [1985] 2 S.C.R. 387 at 408.

<sup>72</sup> *Delgamuukw* (S.C.C.), *supra* note 61 at 1066.

<sup>73</sup> *Ibid.*

legal and constitutional structure.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> These traditions include memories<sup>77</sup> of the government's deception,<sup>78</sup> lies,<sup>79</sup> theft,<sup>80</sup> broken promises,<sup>81</sup> unequal and inhumane treatment,<sup>82</sup> suppression of language,<sup>83</sup>

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<sup>74</sup> 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 *Delgamuëw v. The Queen*" (1999) 37 Osgoode Hall L. J. 537.

<sup>75</sup> *Ibid.*

<sup>76</sup> 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.

<sup>77</sup> The footnotes that follow in this sentence record Aboriginal historical experiences that can also be verified through written sources.

<sup>78</sup> 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).

<sup>79</sup> H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 27-50.

<sup>80</sup> Many Aboriginal people remember the theft of their masks, totem poles, bison 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).

<sup>81</sup> 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. Silyea*, [1964] S.C.R. 642.

<sup>82</sup> 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, 1986). The Supreme Court of Canada has

repression of religious freedoms,<sup>84</sup> restraint of trade and economic sanctions,<sup>85</sup> denial of legal rights,<sup>86</sup> suppression of political rights,<sup>87</sup> forced physical relocation,<sup>88</sup> and plunder and despoliation of traditional territories.<sup>89</sup> 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

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commented on the current "crisis" this treatment has spawned in *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>83</sup> 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.

<sup>84</sup> See K. Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

<sup>85</sup> 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).

<sup>86</sup> 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.

<sup>87</sup> 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).

<sup>88</sup> 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 forceably 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.

<sup>89</sup> 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).

on it in *Delgamuukw*.<sup>90</sup> In many places Aboriginal law continues to exist as an important source of legal authority,<sup>91</sup> even if it has been weakened in some cases through the unjust imposition of alien structures.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> The Court did not strongly acknowledge the binary nature of this testimony, which comprised both a

<sup>90</sup> *Delgamuukw* (S.C.C.), *supra* note 61.

<sup>91</sup> 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-e-quis-a-La* (1839), 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.); *Kitchovahl: v. Tucktoo* (1972), 28 D.L.R. (3d) 293 (N.W.T.C.A.), (*sub nom. Re Deborah*); *Michell v. Dennis*, [1934] 2 C.N.L.R. 91 (B.C.S.C.); *Caswell 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.

<sup>92</sup> 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.

<sup>93</sup> 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, B.C.: 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.

<sup>94</sup> 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.

<sup>95</sup> 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"].

<sup>96</sup> A. Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: University of British Columbia Press, 1994).

“subjective and evaluative” aspect and a “scientific and objective aspect.”<sup>97</sup> 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

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<sup>97</sup> 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.

observed that “all messages are a part of a culture.”<sup>98</sup> 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.”<sup>99</sup> 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.<sup>100</sup> The people who decide the “fact” are inexorably defined from within the matrix of relationships they share with others.<sup>101</sup>

There are enormous risks for non-apprehension and misinterpretation when Aboriginal peoples submit their “facts” to the judiciary for interpretation.<sup>102</sup> This problem is especially poignant in litigation as factual determinations are presented in an adversarial environment,<sup>103</sup> and interpretations made by judges with a different language, cultural orientation, and experiential background than aboriginal people.<sup>104</sup> The potential for misunderstanding exists because each culture has somewhat different perceptions of space, time, historical truth, and causality.<sup>105</sup> The cultural specificity of what constitutes a fact in one culture

<sup>98</sup> Vansina, *supra* note 20 at 124.

<sup>99</sup> *Ibid.* See also J. Cruikshank, “Oral Tradition and Oral History: Reviewing Some Issues” (1994) 75 *Can. Hist. Rev.* 403.

<sup>100</sup> 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.

<sup>101</sup> M. Heidegger, *Being and Time*, trans. J. Macquarrie and E. Rebinson (New York: Harper & Row, 1962) at 157.

<sup>102</sup> R. Rorty, “On Ethnocentrism: A Reply to Clifford Geertz” (1986) 25 *Mich. Q. Rev.* 115; A.A. An-Na’im, “Problems of Universal Cultural Legitimacy for Human Rights” in A.A. An-Na’im & F. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington: Brookings Institution, 1990) 331.

<sup>103</sup> 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.

<sup>104</sup> R. Devlin, “Judging and Diversity: Justice or Just Us?” (1986) 20:3 *Prov. Ct. Judges J.* 4.

<sup>105</sup> 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,

may make it difficult for a person from a different culture to accept the same information as a fact.<sup>106</sup> Since variations between groups help to encode "facts" with different meanings within each culture,<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> This

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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.

<sup>106</sup> Vansina has written that "[h]istorical truth is also a notion that is culture specific," *ibid.* at 129.

<sup>107</sup> 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.

<sup>108</sup> 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.

<sup>109</sup> Vansina, *supra* note 20 at 124.

<sup>110</sup> *Ibid.* at 137.

<sup>111</sup> 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.

evaluation will be especially fraught with danger if the interpreter does not recognize the cultural foundation of knowledge, and acknowledge personal bias.<sup>112</sup> 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.”<sup>113</sup>

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.<sup>114</sup> Unless this happens, Aboriginal oral history runs the risk of being “undervalued”<sup>115</sup> because the “Aboriginal perspective on their practices, customs and traditions and on their relationship with the land” may not be given “due weight.”<sup>116</sup> 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.<sup>117</sup> Unless

<sup>112</sup> 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.

<sup>113</sup> *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.

<sup>114</sup> “With or Without You,” *supra* note 95.

<sup>115</sup> *Delgamuukw* (S.C.C.), *supra* note 61 at 1065, quoted from *Van der Peet*, *supra* note 62 at 559.

<sup>116</sup> *Delgamuukw*, *ibid.* at 1067, per Justice Lamer.

<sup>117</sup> P. Petrone, *Native Literature in Canada: From the Oral Tradition to the Present* (Toronto: Oxford University Press, 1990) at 9–10.

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,<sup>118</sup> as the legal interpretation of their traditions and history is centralized and administered by non-Aboriginal people.<sup>119</sup> 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,<sup>120</sup> 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

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<sup>118</sup> 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.

<sup>119</sup> 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.

<sup>120</sup> 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.

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.<sup>121</sup> 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."<sup>122</sup> In deciding to review

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<sup>121</sup> "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.

<sup>122</sup> *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

the treatment of Aboriginal oral tradition on new grounds the Supreme Court may have created a larger task that 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 transubstantiative 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.<sup>123</sup> Most readers of documentary evidence do not interpret written history in a homogeneous and undifferentiated manner. For example, people are generally used to

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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.

<sup>123</sup> The author would like to thank an anonymous reviewer for bringing this point to his attention.

reading the Illiad,<sup>124</sup> Bible,<sup>125</sup> Ramayana,<sup>126</sup> Norse Sagas,<sup>127</sup> and Mayan Codexes,<sup>128</sup> 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.<sup>129</sup> 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

<sup>124</sup> D. Page, *History and the Homeric Illiad* (Berkeley: University of California Press, 1972).

<sup>125</sup> 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).

<sup>126</sup> J. Keay, *India: A History* (London: HarperCollins, 2000) at 44-47.

<sup>127</sup> 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).

<sup>128</sup> D. Drew, *The Lost Chronicles of the Maya Kings* (London: Weidenfeld & Nicolson, 1999) at 290-335.

<sup>129</sup> For a discussion of the "poly-functionality" of the Icelandic sagas, see M.E. Kalnke, *The Book of Reykjaholar: The Last of the Great Medieval Legendaries* (Toronto: University of Toronto Press, 1996) at 8-9.

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.”<sup>130</sup>

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.<sup>131</sup> 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.”<sup>132</sup> 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.<sup>133</sup> 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

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<sup>130</sup> *S.(R.D.)*, *supra* note 113 at 507, per Justices L’Heureux-Dubé and McLachlin.

<sup>131</sup> 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.

<sup>132</sup> *S.(R.D.)*, *supra* note 113 at 507, per Justices L’Heureux-Dubé and McLachlin.

<sup>133</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 at 488.

of historical evidence that courts are familiar with."<sup>134</sup> 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."<sup>135</sup> 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."<sup>136</sup> The conscious comparison of different factual perspective at issue in a trial, including the judges' critical examination of their own perspective,<sup>137</sup> is crucial to the fair disposition of cases involving Aboriginal oral history.<sup>138</sup> 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."<sup>139</sup>

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

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<sup>134</sup> *Delgamuukw* (S.C.C.), *supra* note 62 at 1069.

<sup>135</sup> *Ibid.* at 1067.

<sup>136</sup> *S. (R.D.)*, *supra* note 113 at 507.

<sup>137</sup> *Ibid.* at 506, per Justices L'Heureux-Dubé and McLachlin, 533-534, per Justice Cory.

<sup>138</sup> *Delgamuukw* (S.C.C.), *supra* note 61 at 1066, per Justice Lamer.

<sup>139</sup> *S. (R.D.)*, *supra* note 113 at 107, per Justices L'Heureux-Dubé and McLachlin for the majority, citing Professor Jennifer Nedelsky.

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.